



March 4, 2014

**TO:** Board of Directors

**FROM:** Bret D. Edwards   
Director  
Division of Resolutions and Receiverships

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Director  
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**SUBJECT:** Final Rule Regarding Restrictions on Sales of Assets of a Covered Financial Company by the Federal Deposit Insurance Corporation

#### **EXECUTIVE SUMMARY**

The FDIC is required to prescribe a rule under Section 210(r) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 210(r)” of the “Dodd-Frank Act”), 12 U.S.C. § 5390(r), to prohibit sales of covered financial company assets to individuals or entities who engaged in wrongdoing at the expense of a covered financial company or seriously mismanaged a covered financial company. On October 30, 2013, the Board adopted a notice of proposed rulemaking entitled “Restrictions on Sales of Assets of a Covered Financial Company by the Federal Deposit Insurance Corporation” (the “Proposed Rule”) that would implement Section 210(r) and establish a self-certification process for prospective purchasers of assets. The Proposed Rule was published in the Federal Register on November 6, 2013 with request for comments by January 6, 2014. Staff has reviewed the public comments and prepared a draft final rule (the “Final Rule”) that is substantially similar to the Proposed Rule. Staff recommends that the Board adopt the Final Rule.

## **DISCUSSION**

Section 210(r) requires the FDIC to promulgate regulations which, at a minimum, prohibit the sale of an asset of a covered financial company by the FDIC to: (1) any person who has defaulted, or was a member of a partnership or an officer or director of a corporation that has defaulted, on one or more obligations exceeding \$1,000,000 to such covered financial company, has been found to have engaged in fraudulent activity in connection with such obligation, and proposes to purchase any such asset in whole or in part through the use of financing from the FDIC; (2) any person who participated, as an officer or director of such covered financial company or of any affiliate of such company, in a material way in any transaction that resulted in a substantial loss to such covered financial company; or (3) any person who has demonstrated a pattern or practice of defalcation regarding obligations to such covered financial company.

The Proposed Rule clarified the scope and applicability of the statutory prohibition, defined important terms, and established a mechanism for compliance with the statutory prohibition through a self-certification requirement. A statutory provision similar to Section 210(r) is found in section 11(p) of the Federal Deposit Insurance Act (“Section 11(p)” of the “FDI Act”), 12 U.S.C. § 1821(p), and the FDIC had promulgated a rule implementing Section 11(p) in 2000, which can be found at 12 CFR Part 340 (“Part 340”). In general, the Proposed Rule was modeled upon Part 340 with some differences due largely to the nature of a covered financial company’s assets and to the potential strategies being developed by the FDIC for resolution of a covered financial company, which may involve a transfer of assets to a bridge financial company.

One distinction between Part 340 and the Proposed Rule is the express discussion of applicability to sales of assets by a bridge financial company in the Proposed Rule. Because

Section 210(r) applies only to the sale of assets of a covered financial company “by the FDIC,” it does not place restrictions on sales of assets by a bridge financial company or a bridge financial company’s subsidiaries. However, because it is likely that a bridge financial company will be a significant tool in the resolution of a covered financial company, it was appropriate to discuss the applicability of the Proposed Rule to sales of assets by a bridge financial company. The Proposed Rule provided that the restrictions apply only to sales of bridge financial company assets that require the FDIC’s approval. Other sales of assets from the bridge financial company in the course of its business would not be sales “by the FDIC” and the restrictions would not apply. No comments were received with respect to this provision in the Proposed Rule, and no changes are made in the Final Rule.

Like Part 340, the Proposed Rule expanded upon the statutory restrictions in Section 210(r) by restricting the sale of assets of *any* covered financial company to a prohibited purchaser, including prospective purchasers who are also prohibited from purchasing assets of a failed insured depository institution under Section 11(p) and Part 340, even though the statute would only prohibit the sale of assets of a *specific* covered financial company to an individual who has caused a substantial loss to that *specific* covered financial company. The broader prohibition promotes accountability and is consistent with the position taken in Part 340 that a prohibited purchaser of assets from *any* FDIC receivership is prohibited from purchasing assets from *any other* FDIC receivership. A commenter agreed that it was appropriate to prohibit individuals or entities that profited or engaged in wrongdoing at the expense of an insured depository institution or seriously mismanaged an insured depository institution from buying assets of a covered financial company from the FDIC.

The requirement that a prospective purchaser self-certify compliance as a condition precedent to purchase of an asset from the FDIC has been in place since the adoption of Part 340 in 2000. The use of the “Purchaser Eligibility Certification” (“PEC”) has proved to be an effective and efficient mechanism to ensure that eligible purchasers are not precluded from purchasing assets under the FDI Act and Part 340. It has also been used to identify prospective purchasers who are otherwise ineligible pursuant to other FDIC policies (for example, compliance with the Division of Resolutions and Receiverships’ Collection Policy, set forth in DRR Directive System Circular 7220.2). The Proposed Rule took the same approach as was taken under Part 340 by requiring a prospective purchaser to certify compliance prior to purchasing assets of a covered financial company from the FDIC. The PEC form was not published in the Federal Register with the Proposed Rule but a model was included in the Board case recommending adoption of the Proposed Rule and was published on the FDIC’s website. The PEC form is being reviewed by the Office of Management and Budget. One technical correction to the signature line has been made to the PEC form since the time it was published on the FDIC’s website to specify that the certification is made under penalty of perjury as stated in the Proposed Rule and the Final Rule.<sup>1</sup>

The two comment letters received by the FDIC during the 60-day comment period both generally were supportive of the Proposed Rule. The commenters agreed that the restrictions on sales of assets of a covered financial company by the FDIC should apply to individuals or entities who engaged in wrongdoing with respect to any covered financial company and not just the covered financial company with which those individuals or entities were involved. A commenter submitted four suggestions for change to the Proposed Rule.

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<sup>1</sup> See Attachment B for model Purchaser Eligibility Certification form.

The first suggestion was that the Proposed Rule provide that no proxies or indirect purchasers may be used with the objective of ultimately providing ownership, management or control to an individual or entity that would otherwise be prohibited from purchasing assets of a covered financial company. The FDIC recognizes the risk that a straw buyer may be used. The PEC developed in connection with the original purchaser eligibility regulation under the FDIA included a statement by which a prospective purchaser certifies that “neither the identity nor form of the prospective purchaser, nor any aspect of the contemplated transaction, has been created or altered with the intent, in whole or in part, to allow an individual or entity who otherwise would be ineligible to purchase assets from the FDIC to benefit directly or indirectly from the sale.” That language was also included in the PEC formulated for use with the Proposed Rule. FDIC staff agrees that the Proposed Rule would be strengthened by adding this requirement explicitly to the text of the Final Rule in addition to the PEC itself and has incorporated that change in the Final Rule.

The second suggestion was that purchases made in connection with a settlement of claims should be subject to the requirement that the settlement be submitted to, and approved by, a court. FDIC staff does not recommend that such a condition be imposed. The FDIC has authority to settle claims involving receivership assets. Where settlements are not in the course of litigation, there is no avenue for judicial approval of the settlement, nor is such a requirement specified in the statute. Further, Part 340 does not contain a requirement for judicial approval of settlements. Thus, FDIC staff does not believe it is appropriate to require judicial review and approval of settlements involving matters that are not in litigation and has not made this suggested change in the Final Rule.

The third suggestion was that the FDIC establish standards and procedures under which it makes findings that a person, entity, or financial group has engaged in mismanagement or contributed to significant losses of a covered financial company so that it can be readily determined that such person, entity or financial group is ineligible to purchase or acquire assets of covered financial companies. Under the Proposed Rule, the basis for these determinations was set forth with specificity and varied based upon the cause for ineligibility. For instance, a person has participated in a “material way in a transaction that caused a substantial loss to a covered financial company” if found by a court or alleged by a regulatory agency to have violated law or breached an agreement or fiduciary duty in connection with the loss. In addition, the definitions of “default,” “substantial loss,” and “pattern or practice of defalcation” clarify the Final Rule’s scope of coverage. This approach has been used under Part 340 since that rule was promulgated in 2000 and has been found to be clear and effective based on practical experience. Therefore, FDIC staff does not believe the suggested change should be made in the Final Rule.

The fourth suggestion was that a sale be voidable if it is later found to have been in violation of Section 210(r) and the Proposed Rule. FDIC staff has considered this suggestion and believes that such a condition could pose significant practical issues with respect to conveyance of title to assets purchased from the FDIC. A sale that is potentially voidable could create uncertainty as to whether an acquirer or subsequent purchaser of an asset holds marketable title. Such a cloud on title could adversely affect the value of all assets sold by the FDIC if the market were to apply a discount for the risk that a sale could be voided on this basis. Additionally, the Proposed Rule stated that the purchaser’s certification is made under penalty of perjury and this is retained in the Final Rule as well.

Aside from the single change noted above, the regulatory text of the Final Rule is the same as in the Proposed Rule. As did the Proposed Rule, the Final Rule expands on Section 210(r) by clarifying the scope and applicability of the statutory prohibition, defining important terms, and establishing a mechanism for compliance with the statutory prohibition through a self-certification requirement.

## **RECOMMENDATION**

It is recommended that the Board of Directors resolve to adopt the Final Rule and approve the publication of the attached Federal Register notice of the Final Rule.<sup>2</sup>

### **Staff Contacts**

**Legal Division:** Elizabeth Falloon, Supervisory Counsel, (703) 562-6148; Shane Kiernan, Counsel, (703) 562-2632.

**Division of Resolutions and Receiverships:** Marc Steckel, Deputy Director, (202) 898-3618; Craig C. Rice, Senior Capital Markets Specialist, (202) 898-3501.

**Office of Complex Financial Institutions:** Charlton R. Templeton, Senior Resolution Planning & Implementation Specialist, (202) 898-6774.

## **ATTACHMENTS**

**A – Resolution**

**B – Model Purchaser Eligibility Certificate form**

**C – Federal Register Notice**

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<sup>2</sup> See Attachment A for model resolution and Attachment C for Federal Register notice.

**Attachment B**

**Covered Financial Company Asset Sales Purchaser Eligibility Certificate**



### PRIVACY ACT STATEMENT

The Federal Deposit Insurance Act (12 U.S.C. §§1819, 1821, and 1823) and Executive Order 9397 authorize the collection of this information. The FDIC will use this information in the marketing of assets, to identify qualified potential purchasers and to solicit bids for assets. Submitting this information to the FDIC is voluntary. Failure to submit all of the information requested could result in your inability to bid on or purchase assets held by the FDIC. The information provided by individuals is protected by the Privacy Act, 5 USC §552a. The information may be furnished to third parties as authorized by law and in accordance with any of the other routine uses described in the FDIC Potential Bidders List (FDIC-30-64-0019) System of Records. A complete copy of this System of Records is available at <http://www.fdic.gov/regulations/laws/rules/2000-4050.html#fdic200030-64--0019>. If you have questions or concerns about the collection or use of the information, you may contact the FDIC's Chief Privacy Officer at [Privacy@fdic.gov](mailto:Privacy@fdic.gov).

### ESTIMATED REPORTING BURDEN

Public reporting burden for this collection is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Paperwork Reduction Act, Legal Division, FDIC, Washington, D.C. 20429; and to the FDIC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Any comments should reference OMB Control No. 3064-NEW. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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Federal Deposit Insurance Corporation  
**COVERED FINANCIAL COMPANY ASSET SALES  
PURCHASER ELIGIBILITY CERTIFICATION**

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Sale Number(s):

The purpose of the Purchaser Eligibility Certification is to identify Prospective Purchasers who are not eligible to purchase assets of a covered financial company from the Federal Deposit Insurance Corporation under the laws and regulations governing such sales. Completion of the Purchaser Eligibility Certification, **without modification**, is a prerequisite to any such purchase.

#### **DEFINITIONS**

**Associated Person.** An Associated Person of a Prospective Purchaser who is an individual is (1) the Prospective Purchaser's spouse or dependent child or any member of the immediate household, (2) a partnership in which the Prospective Purchaser is or was a general or limited partner, (3) a limited liability company of which the Prospective Purchaser is or was a member, or (4) a corporation of which the Prospective Purchaser is or was an officer or director. An Associated Person of a Prospective Purchaser that is an entity is (1) any individual or entity that, acting individually or in concert with one or more individuals or entities, owns or controls 25 percent or more of the Prospective Purchaser, or (2) a manager or general partner of the Prospective Purchaser.

**Covered Financial Company.** The term "covered financial company" means (1) a financial company for which a determination has been made under 12 U.S.C. § 5383(b) and (2) does not include an insured depository institution.

**FDIC.** FDIC means the Federal Deposit Insurance Corporation.

**Prospective Purchaser.** A Prospective Purchaser is any individual or entity that has made or intends to make an offer to purchase assets of a Covered Financial Company from the FDIC. For all purposes of this Certification, an "entity" includes any entity with a legally independent existence, including, without limitation, a trustee; the beneficiary of at least a 25% share of the proceeds of a trust; a partnership; a limited liability company; a corporation; an association; or any other organization or society.

**Substantial Loss.** A Substantial Loss is: (1) any debt or duty to pay money owed to the FDIC or a Covered Financial Company, including any guarantee of any such debt or duty, that is delinquent for ninety (90) or more days and on which there remains an outstanding balance of more than \$50,000; (2) an unpaid final judgment in excess of \$50,000 regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; (3) a deficiency balance following a foreclosure of collateral in excess of \$50,000, regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; or (4) any loss in excess of \$50,000 evidenced by an IRS Form 1099-C (Information Reporting for Cancellation of Debt).

#### **ELIGIBILITY CERTIFICATION**

The undersigned hereby certifies that all of the following statements are true, correct and complete when made and will be true at closing of the sale:

- A. Officers or Directors of Financial Companies.** Neither the Prospective Purchaser nor any of its Associated Person(s) has ever participated as an officer or director of a financial company that has become a Covered Financial Company or of an affiliate of such company in a material way in one or more transactions that have caused a Substantial Loss to a Covered Financial Company. A Prospective Purchaser has participated in a “material way in one or more transactions that have caused a Substantial Loss to a Covered Financial Company” if, in connection with such Substantial Loss, the Prospective Purchaser has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by the FDIC or a primary financial regulatory agency or by any component of the government of the United States or of any state (1) to have violated any law, regulation or order issued by a federal or state regulatory agency, or breached or defaulted on a written agreement with a federal or state regulatory agency, or breached a written agreement with a Covered Financial Company; or (2) to have breached a fiduciary duty owed to a Covered Financial Company.
- B. Removal or Prohibition from Participation in the Affairs of a Financial Company.** Neither the Prospective Purchaser nor any of its Associated Person(s) has been removed from, or prohibited from participating in the affairs of, a financial company pursuant to any final enforcement action by the FDIC or any primary financial regulatory agency.
- C. Pattern or Practice of Defalcation.** Neither the Prospective Purchaser nor any of its Associated Person(s) has engaged in more than one transaction with the intent to cause a loss, or with reckless disregard for whether such transactions would cause a loss, to any Financial Company, where the transactions, in the aggregate, caused a Substantial Loss to one or more Covered Financial Companies.
- D. Convicted of Certain Crimes.** Neither the Prospective Purchaser nor any of its Associated Person(s) (1) has been convicted of committing or conspiring to commit any offense under Section 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 of Title 18 of the United States Code affecting any Covered Financial Company; *and* (2) has defaulted on any debt or duty to pay money (including any guarantee) owed to the FDIC or any Covered Financial Company to such an extent that a judgment has been rendered in favor of the FDIC or the property securing the debt has been foreclosed on.
- E. Prohibited from Purchasing Insured Depository Institution Assets.** Neither the Prospective Purchaser nor any of its Associated Person(s) are prohibited from purchasing the assets of a failed insured depository institution from the FDIC under 12 U.S.C. § 1821(p) or 12 C.F.R. Part 340.
- F. If Seller Financing Is Used.** Neither the Prospective Purchaser nor any of its Associated Person(s) (1) has defaulted on any debts or duties to pay money (including any guarantee) to the FDIC or a Covered Financial Company that, in the aggregate, exceed \$1,000,000, to such an extent that a judgment has been rendered in favor of the FDIC or the property securing the debt has been foreclosed on; *and* (2) has made any fraudulent misrepresentations in connection with any of these debts or duties to pay money. *This representation is not required, and has no effect, if the Prospective Purchaser does not finance any portion of the purchase price through financing offered by the FDIC.*
- G. Transactions Structured to Circumvent this Certification.** Neither the identity nor form of the Prospective Purchaser, nor any aspect of the contemplated transaction, has been created or altered with the intent, in whole or in part, to allow an individual or entity who otherwise would be ineligible to purchase assets from the FDIC to benefit directly or indirectly from the proposed transaction.

**PROSPECTIVE PURCHASER INFORMATION**

Name of Prospective Purchaser	Tax ID Number or SSN
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Please Check Applicable Box:

- Individual     Partnership     LLC     Corporation     Trust     Other (*specify*)

Physical Street Address ( <i>for overnight delivery</i> )		City	State or Province
Country	ZIP Code	Contact Person and Title	
Telephone Number	Fax Number	Email Address	

IN WITNESS WHEREOF, the undersigned declares under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and has executed this Certification as of this

\_\_\_\_\_ day of \_\_\_\_\_

PROSPECTIVE PURCHASER

\_\_\_\_\_  
[Print Name of Prospective Purchaser]

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Print Name and Title of Authorized Signatory]

Notice Concerning Legal Action

Any person who knowingly or willfully makes false or fraudulent statements or disclosures in connection with this Certification will be referred to the FDIC's Office of Inspector General and/or the appropriate law enforcement officials for investigation and legal enforcement and may be subject to fines and/or imprisonment (18 U.S.C. §§ 1001, 1007 and 1014).