the referendum herein ordered have been submitted to and approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0178. It has been estimated that it will take an average of 20 minutes for each of the approximately 267 Washington potato growers to cast a ballot. Participation is voluntary. Ballots postmarked after June 24, 2011, will not be included in the vote tabulation.

Teresa Hutchinson and Gary D. Olson of the Northwest Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, are hereby designated as the referendum agents of the Secretary of Agriculture to conduct this referendum. The procedure applicable to the referendum shall be the "Procedure for the Conduct of Referenda in Connection With Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended" (7 CFR 900.400–900.407).

Ballots will be mailed to all growers of record and may also be obtained from the referendum agents or from their appointees.

List of Subjects in 7 CFR Part 946

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 601–674.

Dated: March 16, 2011.

David R. Shipman,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2011–6829 Filed 3–22–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1218

[Doc. No. AMS–FV–10–0095]

Blueberry Promotion, Research, and Information Order; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible producers and importers of highbush blueberries to determine whether they favor continuance of the Blueberry Promotion, Research, and Information Order (Order).

DATES: This referendum will be conducted by mail ballot from July 5, 2011, through July 26, 2011. To be eligible to vote in this referendum, blueberry producers and importers must have produced or imported 2,000 pounds or more of highbush blueberries annually during the representative period of January 1, 2010, through December 31, 2010. Ballots must be received by the referendum agents no later than the close of business on July 26, 2011, to be counted.

ADDRESSES: Copies of the Order may be obtained from: Referendum Agent, Research and Promotion Branch (RPB), Fruit and Vegetable Programs (FVP), AMS, USDA, Stop 0244, Room 0632–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244, *telephone:* 888–720–9917 (toll free), *fax:* 202–205–2800, *e-mail: Veronica.Douglass@ams.usda.gov;* or at *http://www.ams.usda.gov/fvpromotion.*

SUPPLEMENTARY INFORMATION: Pursuant to the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425) (Act), it is hereby directed that a referendum be conducted to ascertain whether continuance of the Order is favored by eligible producers and importers of highbush blueberries. The Order is authorized under the Act.

The representative period for establishing voter eligibility for the referendum shall be the period from January 1, 2010, through December 31, 2010. Persons who produced or imported 2,000 pounds or more of highbush blueberries during the representative period are eligible to vote in the referendum. Persons who received an exemption from assessments for the entire representative period are ineligible to vote. The referendum shall be conducted by mail ballot from July 5, 2011, through July 26, 2011.

Section 518 of the Act authorizes continuance referenda. Under section 1218.71(b) of the Order, the Department of Agriculture (Department) shall conduct a referendum every five years or when 10 percent or more of the eligible voters petition the Secretary of Agriculture to hold a referendum to determine whether persons subject to assessment favor continuance of the Order. The Department would continue the Order if continuance of the Order is approved by a majority of the producers and importers voting in the referendum, who also represent a majority of the volume of blueberries produced or imported during the representative period determined by the Secretary.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the referendum ballot has been approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0093. It has been estimated that there are approximately 2,000 producers and 50 importers who will be eligible to vote in the referendum. It will take an average of 15 minutes for each voter to read the voting instructions and complete the referendum ballot.

Referendum Order

Veronica Douglass, RPB, FVP, AMS, USDA, Stop 0244, Room 0632–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244, is designated as the referendum agent to conduct this referendum. The referendum procedures 7 CFR 1218.100 through 1218.107, which were issued pursuant to the Act, shall be used to conduct the referendum.

The referendum agents will mail the ballots to be cast in the referendum and voting instructions to all known highbush blueberry producers and importers of 2,000 pounds or more prior to the first day of the voting period. Persons who are producers and importers during the representative period are eligible to vote. Persons who received an exemption from assessments during the entire representative period are ineligible to vote. Any eligible producer or importer who does not receive a ballot should contact the referendum agent no later than one week before the end of the voting period. Ballots must be received by the referendum agent by 5 p.m. Eastern Daylight Savings Time, July 26, 2011, in order to be counted.

List of Subjects in 7 CFR Part 1218

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Blueberry promotion, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

Dated: March 16, 2011.

David R. Shipman,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2011–6827 Filed 3–22–11; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064–AD73

Orderly Liquidation Authority

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing and requests comments on a rule that would implement certain provisions of its authority to resolve covered financial companies under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act"). This proposed rule ("Proposed Rule") builds on the interim final rule published by the FDIC on January 25, 2011 ("Interim Final Rule") to address additional provisions of Title II. The Proposed Rule addresses the following issues: the definition of a "financial company" subject to resolution under Title II by establishing criteria for determining whether a company is "predominantly engaged in activities that are financial in nature or incidental thereto;" recoupment of compensation from senior executives and directors, in limited circumstances, as provided in section 210(s) of the Dodd-Frank Act; application of the power to avoid fraudulent or preferential transfers; the priorities of expenses and unsecured claims; and the administrative process for initial determination of claims and the process for judicial determination of claims disallowed by the receiver.

DATES: Written comments must be received by the FDIC not later than May 23, 2011.

ADDRESSES: You may submit comments by any of the following methods:

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include "RIN 3064–AD73" in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EDT).
- *Federal eRulemaking Portal: http://www.regulations.gov/.* Follow the instructions for submitting comments.
- *Public Inspection:* All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at (703) 562–2200 or 1–877–275–3342.

FOR FURTHER INFORMATION CONTACT: Marc Steckel, Associate Director, Division of Insurance and Research, 202–898–3618; or R. Penfield Starke, Senior Counsel, Legal Division, (703) 562–2422. For questions to the Legal Division concerning the following parts of the Proposed Rule contact:

Definition of predominantly engaged in financial activities: Ryan K. Clougherty, Senior Attorney (202) 898–3843.

Avoidable transfer provisions: Phillip E. Sloan, Counsel (703) 562–6137.

Compensation recoupment: Patricia G. Butler, Counsel (703) 516–5798.

Subpart A—Priorities of Claims: Elizabeth Falloon, Counsel (703) 562–6148.

Subpart B—Receivership Administrative Claims Procedures: Thomas Bolt, Supervisory Counsel (703) 562–2046.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act was enacted on July 21, 2010. Title II of the Dodd-Frank Act provides for the appointment of the FDIC as receiver of a covered financial company following the prescribed recommendation, determination and judicial review process set forth in the Act. Title II outlines the process for the orderly liquidation of such a covered financial company following the FDIC's appointment as receiver and provides for additional implementation of the orderly liquidation authority by rulemaking. The Proposed Rule is intended to provide clarity and certainty with respect to how key components of the orderly liquidation authority will be implemented and to ensure that the liquidation process under Title II reflects the Dodd-Frank Act's mandate of transparency in the liquidation of covered financial companies. Among the significant issues addressed in the Proposed Rule are the priority for the payment of claims and the process for the determination of claims by the receiver and for seeking a judicial adjudication of any claims disallowed in whole or in part. While it is not expected that the FDIC will be appointed as receiver for a covered financial company in the near future, it is important for the FDIC to have rules in place in a timely manner in order to allow stakeholders to plan transactions going forward.

The Proposed Rule is promulgated under section 209 of the Act which authorizes the FDIC, in consultation with the Financial Stability Oversight Council, to prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement Title II. Section 209 of the Act also provides that, to the extent possible, the FDIC shall seek to harmonize such rules and regulations with the insolvency laws that otherwise would apply to a covered financial company.

This is the second rulemaking for the FDIC under section 209. On October 19, 2010, the FDIC published in the **Federal Register** a notice of proposed rulemaking to implement certain orderly liquidation provisions of Title II. That rulemaking culminated in the Interim Final Rule published on January 25, 2011, to be codified at 12 CFR 380.1–380.6, that addressed discrete topics that were critical for initial guidance for the financial industry, including the payment of similarly situated creditors, the honoring of personal services contracts, the recognition of contingent claims, the treatment of any remaining shareholder value in the case of a covered financial company that is a subsidiary of an insurance company, and limitations on liens that the FDIC may take on the assets of a covered financial company that is an insurance company or covered subsidiary.

The October 19, 2010 notice of proposed rulemaking solicited comments not only on the first proposed rule but also on more general aspects of the orderly liquidation authority of Title II. This comment period ended on January 18, 2011. These comments have been considered with respect to the determination of the scope and contents of the Proposed Rule.

The Proposed Rule continues to develop the framework begun with the Interim Final Rule. While the Interim Final Rule addressed only certain discrete issues under Title II, the Proposed Rule enhances the initial framework by addressing broader issues that define the rights of creditors in Title II receiverships. For example, while the Interim Final Rule specified the treatment of "similarly situated creditors" in § 380.2, it did not address the treatment of creditors generally within the overall structure provided by Title II for the payment of creditors. The Proposed Rule takes the next step by defining the priorities of payment for creditors in a single rule clarifying the meaning of "administrative expenses" and "amounts owed to the United States," detailing the priority of setoff claims, specifying how post-insolvency interest will be paid, and clarifying the payment of claims for contracts and agreements expressly assumed by a bridge financial company. While the Proposed Rule does not alter the rules adopted by the Interim Final Rule, certain subsections of that latter rule likely will be incorporated into Subpart A on priorities when the Proposed Rule is finalized in order to provide greater

thematic coherence. New Subpart B addresses another key element of creditor rights by specifying the process for initial determination of claims and the steps necessary to seek a judicial decision on any disallowed claims. As a result, the Proposed Rule will provide a "roadmap" for creditors to better understand their substantive and procedural rights under Title II by defining key elements determining how their claims will be determined and in what priority they will be paid. The discrete issues addressed in the IFR should be viewed as components that fit within this broader framework.

Other provisions of the Proposed Rule address other foundational elements of Title II. Section 380.8 of the Proposed Rule helps define which companies may be subject to resolution under Title II, by clarifying the meaning of "financial company" in Section 201 of the Dodd-Frank Act. Section 380.7 and the amendments to section 380.1 help define how compensation may be clawed back from senior executives and directors responsible for the failure of the covered financial company under section 210(s) of the Dodd-Frank Act. Section 380.9 of the Proposed Rule will clarify the application of the receiver's powers to avoid fraudulent and preferential transfers to ensure they conform to the similar powers under the Bankruptcy Code.

Some comments revealed unfamiliarity with the FDIC's resolution process by stakeholders outside the banking industry. By elaborating on the details of the orderly liquidation process, the Proposed Rule seeks to explain the role of the FDIC as receiver for a covered financial company. While the orderly liquidation process under the Dodd-Frank Act resembles the process the FDIC undertakes in the resolution of insured depository institutions in many respects, and reflects the experience developed by the FDIC in resolving those institutions, these regulations implement newly enacted provisions of the Dodd-Frank Act and do not necessarily inform or interpret the provisions of the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.* ("FDI Act"), and the law governing the resolution of failed insured depository institutions. Thus, some provisions implementing the Dodd-Frank Act may expand the rights and duties of parties with an interest in the resolution, or otherwise provide rights and duties that differ from those under the FDI Act.

A common thread among many comments was the nature of the relationship between the orderly liquidation process under the Dodd-Frank Act and the Bankruptcy Code. Congress mandated that, to the extent possible, the FDIC will harmonize the rules adopted under section 209 of the Act with the Bankruptcy Code or otherwise applicable insolvency laws. While acknowledging certain express differences between the Title II orderly liquidation process and other insolvency regimes, this Proposed Rule was prepared with this statutory mandate in mind.

Finally, many comments emphasized the importance of allowing sufficient time in the rulemaking process to fully consider the complex issues raised under the Dodd-Frank Act. This Proposed Rule is a second incremental step in the rulemaking process and will invite input from stakeholders through additional questions posed as part of the Notice of Proposed Rulemaking. Additional rulemaking will follow, including certain rules required by the Act, such as rules governing receivership termination, receivership purchaser eligibility requirements, records retention requirements, as well as the orderly resolution of broker-dealers, including the priority scheme and claims process applicable to broker-dealers.

II. The Proposed Rule

Companies Predominantly Engaged in Financial Activities

Section 380.8 of the Proposed Rule establishes standards for determining if a company is predominantly engaged in financial activities. If a company is determined to be predominantly engaged in such activities for purposes of the definition of "financial company" under Title II of the Act, it may be subject to the orderly liquidation provisions of Title II.

Section 201(a)(11) of the Dodd-Frank Act defines "financial company," for purposes of Title II of the Act, as any company incorporated or organized under any provision of Federal law or the laws of any State that is: (i) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 ("BHC Act"); (ii) a nonbank financial company supervised by the Board of Governors of the Federal Reserve System ("Board of Governors"); (iii) any company that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the BHC Act,[1] or (iv) any subsidiary of such companies that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the BHC Act, other than a subsidiary that is an insured depository institution or insurance company.[2]

Section 201(b) of the Dodd-Frank Act provides that, for the purposes of defining the term "financial company" under section 201(a)(11), "[n]o company shall be deemed to be predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the [BHC Act], if the consolidated revenues of such company from such activities constitute less than 85 percent of the total consolidated revenues of such company, as the Corporation, in consultation with the Secretary [of Treasury], shall establish by regulation. In determining whether a company is a financial company under [Title II], the consolidated revenues derived from the ownership or control of a depository institution shall be included."

Accordingly, the FDIC is issuing a regulation that defines the term "predominantly engaged" and creates a new definition of "financial activity" to encompass the activities the Dodd-Frank Act includes in the 85 percent calculation. The FDIC consulted with the Board of Governors during the development of this section of the Proposed Rule. The Board of Governors has issued a notice of proposed rulemaking entitled "Definitions of 'Predominantly Engaged in Financial Activities' and 'Significant' Nonbank Financial Company and Bank Holding Company" (Board of Governors' NPR).[3] The Board of Governors' NPR addresses the definition of "predominantly engaged in financial activities" for purposes of determining if an entity is a nonbank financial company under Title I of the Dodd-Frank Act.

Definition of Predominantly Engaged

The Proposed Rule defines a company as being predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of

[1] 12 U.S.C. 1843(k).

[2] Section 201(a)(11) also provides that "financial company" does not include Farm Credit System institutions chartered under and subject to the provisions of the Farm Credit Act of 1971, as amended (12 U.S.C. 2001 *et seq.*), or governmental or regulated entities as defined under section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4502(20)). Consistent with section 201(b) of the Dodd-Frank Act, the criteria in the Proposed Rule for determining if a company is predominantly engaged in financial activities would not apply to such entities.

[3] 76 FR 7731 (February 11, 2011).

section 4(k) of the BHC Act if: (1) At least 85 percent of the total consolidated revenues of the company for *either* of its two most recent fiscal years were derived, directly or indirectly, from financial activities or (2) based upon all the relevant facts and circumstances, the Corporation determines that the consolidated revenues of the company from financial activities constitute 85 percent or more of the total consolidated revenues of the company. As required under section 201(b) of the Act, the FDIC consulted with the Secretary of the Treasury during the development of this portion of the Proposed Rule.[4]

The case-by-case determination provided for in (2) above is designed to provide the FDIC the flexibility, in appropriate circumstances, to consider whether a company meets the 85 percent consolidated revenue test based on the full range of information that may be available concerning the company's activities (including information obtained from other Federal or state financial supervisors or agencies) at any time. For example, a company's revenues, as well as the risks the company may pose to the U.S. financial system, may change significantly and quickly as a result of various types of transactions or actions, such as a merger, consolidation, acquisition, establishment of a new business line, or the initiation of a new activity. Moreover, these transactions and actions may occur at any time during a company's fiscal year and, accordingly, the effects of the transactions or actions may not be reflected in the year-end consolidated financial statements of the company for several months. The Proposed Rule allows the FDIC to promptly consider the effect of changes in the nature or mix of a company's activities as a result of such a transaction or action where such changes may affect whether the company should be a financial company for purposes of Title II. A determination based on the facts and circumstances would be made by the FDIC Board of Directors, unless delegated. The FDIC expects to conduct such a case-by-case review only when justified by the circumstances.

While section 201(b) of the Dodd-Frank Act provides that a company's consolidated revenues are to be used in determining whether the company is predominantly engaged in financial activities, it does not specify the time period over which such consolidated revenues should be considered in making such a determination. The FDIC is proposing that either of the last two fiscal years is the appropriate time period for determining whether a company meets the 85 percent revenue test (the "two-year test"). The FDIC believes that the two-year test provides appropriate flexibility in determining whether a company is predominantly engaged in financial activities. The two-year test would capture, for example, a company whose revenues have traditionally met or exceeded the 85 percent consolidated revenue test but that experienced a temporary decline in such revenues during its last fiscal year. Additionally, the two-year test is similar to a proposal recently promulgated by the Board of Governors that addresses whether a company is predominantly engaged in financial activities for the purposes of determining if such a company is a nonbank financial company under Title I.[5]

Under the Proposed Rule, a company would *not* be considered to be predominantly engaged in financial activities under the two-year test, and thus would not be a financial company, if the level of such company's financial revenues were below the 85 percent consolidated revenue threshold in both of its two most recent fiscal years. The Proposed Rule defines "total consolidated revenues" as the total gross revenues of a company and all entities subject to consolidation by the company for a fiscal year, as determined in accordance with applicable accounting standards. "Applicable accounting standards" is defined under the Proposed Rule as the accounting standards a company uses in the ordinary course of business in preparing its consolidated financial statements, provided those standards are: (i) U.S. generally accepted accounting principles; (ii) International Financial Reporting Standards; or (iii) such other accounting standards that the FDIC determines to be appropriate.

The FDIC believes the Proposed Rule's approach to calculating consolidated revenue is appropriate for several reasons. First, the approach reduces the potential for companies to arbitrage the 85% consolidated revenue test by changing the accounting standards used for purposes of this Proposed Rule. Specifically, the Proposed Rule provides that the accounting standards used for calculating total consolidated revenues must be the same standards that the company uses in the ordinary course of its business in preparing its consolidated financial statements. Second, by calculating consolidated revenues using the accounting standards that a company uses in the ordinary course of its business, the Proposed Rule also reduces the potential regulatory burden on companies. Finally, the FDIC believes the methodology for calculating consolidated revenues under the Proposed Rule is likely to provide an accurate basis for determining whether companies are financial companies for the purposes of Title II.

Definition of Financial Activity

The Proposed Rule defines "financial activity" to include: (i) Any activity, wherever conducted, described in section 225.86 of the Board of Governors' Regulation Y or any successor regulation;[6] (ii) ownership or control of one or more depository institution[s]; and (iii) any other activity, wherever conducted, determined by the Board of Governors in consultation with the Secretary of the Treasury, under section 4(k)(1)(A) of the BHC Act,[7] to be financial in nature or incidental to a financial activity.

Section 225.86 of the Board of Governors' Regulation Y references the activities that have been determined to be financial in nature or incidental thereto under section 4(k) of the BHC Act. Section 4(k) of the BHC Act authorizes the Board of Governors, in consultation with the Secretary of the Treasury, to determine in the future that additional activities are "financial in nature or incidental thereto."[8] The Proposed Rule recognizes that the Board of Governors may determine that additional activities, beyond those already identified in § 225.86 of the Board of Governors' Regulation Y, are financial or incidental activities for the purposes of section 4(k) of the BHC Act. Upon such a determination with respect to an activity, the Proposed Rule includes any revenues derived from such activity as revenues derived from financial or incidental activities.[9]

[4] The FDIC also contacted the Board of Governors and other voting members of the Financial Stability Oversight Council (FSOC) in the development of this section. The FDIC notes that Title I includes a separate definition of "nonbank financial company" that is used for purposes of that Title's provisions related to enhanced supervision by the Board of Governors following a systemic determination by the FSOC. The Board of Governors has responsibility for issuing regulations that define the term "predominantly engaged in financial activities" for purposes of Title I. The Title I definition of nonbank financial company does not take into account "incidental" activities, but does include an asset test in addition to a revenue test. *See,* 12 U.S.C. 5523 *et seq.;* and 12 U.S.C. 5531.

[5] *See,* 76 FR 7731 (February 11, 2001).

[6] *See,* 12 CFR 225.86.

[7] *See,* 12 U.S.C. 1843(k)(1)(A).

[8] 12 U.S.C. 1843(k)(1) and (2).

[9] Besides authorizing financial holding companies to engage in activities that have been determined to be "financial in nature or incidental

Continued

Neither section 201(a)(11) nor section 201(b) of the Dodd-Frank Act impose any additional conditions beyond those that may apply under section 4(k) of the BHC Act or the Board of Governors' Regulation Y for an activity to be considered a financial or incidental activity for purposes of determining whether a company is a financial company under Title II. Accordingly, the Proposed Rule broadly defines "financial activities" to include all financial or incidental activities, regardless of: (i) Where the activity is conducted by a company; (ii) whether a bank holding company or a foreign banking organization could conduct the activity under some legal authority other than section 4(k) of the BHC Act; and (iii) whether any Federal or state law other than section 4(k) of the BHC Act may prohibit or restrict the conduct of the activity by a bank holding company.

For example, all investment activities that are permissible for a financial holding company under the merchant banking authority in section 4(k)(4)(H) of the BHC Act and the Board of Governors' implementing regulations [10] are considered financial activities under the Proposed Rule even if some portion of those activities could be conducted by a financial holding company under another or more limited investment authority (such as the authority in section 4(c)(6) of the BHC Act,[11] which allows bank holding companies to make passive, non-controlling investments in any company if the bank holding company's aggregate investment represents less than five percent of any class of voting securities and less than 25 percent of the total equity of the company). Likewise, all securities underwriting and dealing activities are considered financial activities for purposes of the Proposed Rule even if a bank holding company or other company affiliated with a depository institution may be limited in the amount of such activity it may conduct or may be prohibited from broadly engaging in the activity under the "Volcker Rule." [12]

Rules of Construction

To further facilitate determinations under the Proposed Rule and to reduce burden, the Proposed Rule includes two rules of construction governing the application of the two-year test to revenues derived from a company's minority, non-controlling equity investments in *unconsolidated* entities.

Under the first rule of construction, the revenues derived from a company's equity investment in another company (investee company), the financial statements of which are *not* consolidated with those of the company under applicable accounting standards, would be considered as revenues derived from a financial activity if the investee company itself is predominantly engaged in financial activities under the revenue test set forth in the Proposed Rule (non-consolidated investment rule). Treating all of the revenues derived from such an investment as derived from a financial activity based on the aggregate mix of the investee company's revenues is consistent with the statutory definition of financial company generally, which treats an entire company as a financial company if 85 percent of its consolidated revenues are derived from financial activities. This approach also avoids requiring a company to determine the precise percentage of an investee company's activities that are financial in order to determine the portion of the company's revenues derived from the investment that should be treated as derived from such activities. Lastly, the non-consolidated investment rule is similar to the approach proposed by the Board of Governors for determining whether a nonbank company is predominantly engaged in financial activities under Title I.[13]

The second rule of construction would permit (but not require) a company to treat revenues it derives from certain *de minimis* equity investments in investee companies as *not* derived from financial activities without having to separately determine whether the investee company is itself predominantly engaged in financial activities ("*de minimis* rule"). The *de minimis* rule would be subject to several conditions designed to limit the potential for these *de minimis* investments to substantially alter the character of the activities of the company.

Specifically, the *de minimis* rule provides that a company may treat revenues derived from an equity investment in an investee company as revenues *not* derived from financial activities (regardless of the type of activities conducted by the investee company), if: (i) The company owns less than five percent of any class of outstanding voting shares, and less than 25 percent of the total equity, of the investee company; (ii) the financial statements of the investee company are not consolidated with those of the company under applicable accounting standards; (iii) the company's investment in the investee company is *not* held in connection with the conduct of any financial activity (such as, for example, investment advisory activities or merchant banking investment activities) by the company or any of its subsidiaries; (iv) the investee company is not a bank, bank holding company, broker-dealer, insurance company, or other regulated financial institution; and (v) the aggregate amount of revenues treated as nonfinancial under the rule of construction in any year does not exceed five percent of the company's total consolidated financial revenues.

The FDIC consulted with the Board of Governors during the development of this section of the Proposed Rule. The Board of Governors has issued a notice of proposed rulemaking entitled "Definitions of 'Predominantly Engaged in Financial Activities' and 'Significant' Nonbank Financial Company and Bank Holding Company" ("Board of Governors' NPR").[14] The Board of Governors' NPR addresses the definition of "predominantly engaged in financial activities" for purposes of determining if an entity is a nonbank financial company under Title I of the Dodd-Frank Act.

Recoupment of Compensation

Section 380.7 of the Proposed Rule establishes criteria for the circumstances under which the FDIC as receiver will seek to recoup compensation from persons who are substantially responsible for the failed condition of a covered financial company.

Background

When appointed receiver for a failed covered financial company, the FDIC is required to exercise its Title II authority to liquidate failing financial companies in a manner that furthers the statutory purposes of Title II as set forth in section 204(a) of the Act: mitigation of

thereto" section 4(k)(1) of the BHC Act also permits a financial holding company to engage in activities the Board of Governors has determined to be "complementary to financial activities and do not pose a substantial risk to the safety and soundness of depository institutions or the financial system generally." *See,* 12 U.S.C. 1843(k)(1)(B). Because section 201(a)(11) refers only to activities that have been determined by the Board of Governors to be financial in nature or incidental thereto under section 4(k), activities that have been (or are) determined to be "complementary" to financial activities under section 4(k) are not considered financial or incidental activities for purposes of determining whether a company is predominantly engaged in activities that are financial in nature or incidental thereto under section 201(a)(11) of the Dodd-Frank Act.

[10] *See,* 12 CFR 225.170 *et seq.*

[11] 12 U.S.C. 1843(c)(6).

[12] 12 U.S.C. 1851 *et seq.*

[13] *See,* 76 FR 7731 (February 11, 2011).

[14] 76 FR 7731 (February 11, 2011).

significant risk to the financial stability of the United States and minimization of moral hazard. In fulfilling these goals, the FDIC must "* * * take all steps necessary and appropriate to assure that all parties, including management, directors, and third parties, having responsibility for the condition of the financial company bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility." [15] In order to carry out this mandate, the FDIC as receiver may recover from senior executives and directors who were substantially responsible for the failed condition of a covered financial company any compensation that they received during the two-year period preceding the date on which the FDIC was appointed as receiver of the covered financial company, or during an unlimited time period in the case of fraud. Section 210(s)(3) of the Act directs the FDIC to promulgate regulations to implement the compensation recoupment requirements of section 210(s) of the Act. The purpose of this section is to provide guidance on how the FDIC will implement its authority by identifying the circumstances in which the FDIC as receiver will seek to recoup compensation from persons who are substantially responsible for the failed condition of a covered financial company.

Substantially Responsible

In assessing whether a senior executive or director is substantially responsible for the failed condition of the covered financial company, the FDIC as receiver will investigate: (1) How the senior executive or director performed his or her duties and responsibilities, and (2) the results of that performance. Senior executives and directors who perform their responsibilities with the requisite degree of skill and care will not be required to forfeit their compensation. The health of the financial industry depends on these persons remaining committed to the industry. If a senior executive or director fails to meet the requisite degree of skill and care, however, the FDIC as receiver will determine what results that failure had on the covered financial company, by considering any loss to the covered financial company caused individually or collectively by the senior executive or director. Furthermore, to be held responsible, the loss to the financial condition must have materially contributed to the failure of the covered financial company. The FDIC is considering the use of additional qualitative and quantitative benchmarks to establish that the loss materially contributed to the failure of the covered financial company. Financial indicators under consideration as possible benchmarks are assets, net worth and capital, and the percentage or magnitude of loss associated with these benchmarks that would establish a material loss and trigger substantial responsibility. The FDIC solicits comments on these and other potential benchmarks that may be used to effectively evaluate loss.

Presumptions

In the event that the FDIC is appointed as receiver for a covered financial company, certain persons will be presumed substantially responsible for the financial condition of the company. Substantial responsibility shall be presumed when the senior executive or director is the chairman of the board of directors, chief executive officer, president, chief financial officer, or acts in any other similar role regardless of his or her title if in this role he or she had responsibility for the strategic, policymaking, or company-wide operational decisions of the covered financial company. The FDIC as receiver also will presume the substantial responsibility of a senior executive or director who has been adjudged by a court or tribunal to have breached his or her duty of loyalty to the covered financial company. Finally, in order to ensure consistency this presumption also extends to a senior executive or director who has been removed from his or her position with a covered financial company under section 206(4) or section 206(5) of the Act.

An individual presumed to be substantially responsible for the failed condition of a covered financial company based on his or her position or role in the covered financial company may rebut the presumption of substantial responsibility for the condition of the covered financial company by proving that he or she performed his or her duties with the requisite degree of skill and care required by the position. This determination will be made on a case-by-case basis. A senior executive or director presumed to be substantially responsible for the failed condition of a covered financial company based on his or her removal from his or her position under sections 206(4) or 206(5) of the Act, or based on an adjudication that he or she breached his or her duty of loyalty to the covered financial company may rebut the presumption by proving that he or she did not did not cause, either individually or in conjunction with others, a loss to the covered financial company that materially contributed to the failure of the covered financial company.

Exceptions to Presumptions

Senior executives or directors who join a covered financial company specifically for the purpose of improving its financial condition are exempted from this presumption if they were employed by the covered financial company for this purpose within the two years preceding the appointment of the FDIC as receiver. However, although they are not subject to the presumption, the FDIC as receiver may still seek recoupment of their compensation if their actions nevertheless establish that they are substantially responsible for the failed condition of the covered financial company.

The use of a rebuttable presumption of substantial responsibility under certain circumstances is consistent with its use in other regulatory and common law areas. The Office of the Comptroller of the Currency uses rebuttable presumptions to determine when an individual's acquisition of bank stock will result in the acquisition by that individual of the power to direct the bank's management or policies. 12 CFR 5.50. The Social Security Administration uses presumptions to establish total disability. 20 CFR part 410. At common law, the existence of certain facts, such as exclusive control in negligence cases or disparate impact in discrimination cases, is viewed as sufficient to require some form of rebuttal evidence.

The authority of the FDIC as receiver to recoup compensation from senior executives and directors is separate from the authority granted to the FDIC as receiver in other sections of Title II to pursue recovery from senior executives and directors for losses suffered by a failed covered financial company. The FDIC as receiver is not precluded from pursuing recovery based on other grants of authority in Title II of the Act because it recoups compensation from senior executives and directors under Section 210(s).

Section 380.1 of the Proposed Rule amends the existing § 380.1 promulgated pursuant to the January 25, 2011 Interim Final Rule to add definitions of the terms "compensation" and "director," and to apply the definition of "senior executive" included in § 380.3 of the Interim Final

[15] Section 204(a)(3) of the Act.

Rule wherever the phrase "senior executive" is used in the Proposed Rule and throughout part 380. The definition of the term "compensation" incorporates the definition mandated in section 210(s)(3) of the Act. The Proposed Rule's definition for the term "director" includes those persons who are in a position to affect the activities of the covered financial company and who have a material effect on the financial condition of the covered financial company.

Treatment of Fraudulent and Preferential Transfers

Section 380.9 of the Proposed Rule addresses the powers granted to the FDIC as receiver in section 210(a)(11) of the Act to avoid certain fraudulent and preferential transfers and seeks to harmonize the application of these powers with the analogous provisions of the Bankruptcy Code so that the transferees of assets will have the same treatment in a liquidation under the Dodd-Frank Act as they would in a bankruptcy proceeding.

There are two areas in which there is a potential for inconsistent treatment of transferees under a Title II orderly liquidation as compared to a Chapter 7 bankruptcy liquidation. The first issue relates to the standard used in determining whether the FDIC as receiver can avoid a transfer as fraudulent or preferential under Title II. For purposes of this determination, section 210(a)(11)(H)(i)(II) of the Act provides that a transfer is made when the transfer is so perfected that a *bona fide* purchaser cannot acquire a superior interest, or if the transfer has not been so perfected before the FDIC is appointed as receiver, immediately before the date of appointment. This section could be read to apply the *bona fide* purchaser construct to all fraudulent transfers and to all preferential transfers pursuant to section 210(a)(11)(B) of the Dodd-Frank Act. By contrast, the Bankruptcy Code uses the *bona fide* purchaser construct only for fraudulent transfers and for preferential transfers of real property other than fixtures. Section 547(e)(1)(B) of the Bankruptcy Code provides that in the case of preferential transfers of personal property and fixtures, a transfer occurs at the time the transferee's interest in the transferred property is so perfected that a creditor on a simple contract cannot acquire a judicial lien [16] that is superior to the interest of the transferee. This section of the Proposed Rule makes clear that under section 210(a)(11)(H) of the Dodd-Frank Act, the FDIC could not, in a proceeding under Title II, avoid as preferential the grant of a security interest perfected by the filing of a financing statement in accordance with the provisions of the Uniform Commercial Code or other non-bankruptcy law where a security interest so perfected could not be avoided in a case under the Bankruptcy Code.

The second issue relates to the 30-day grace period, provided in section 547(e)(2) of the Bankruptcy Code, in which a security interest in transferred property may be perfected after such transfer has taken effect between the parties. Section 547(e)(2) of the Bankruptcy Code generally states that a transfer of property is made (i) when the transfer takes effect between the transferor and the transferee, if the transfer is perfected at or within 30 days after that time (or within 30 days of the transferor receiving possession of the property, in the case of certain purchase money security interests), (ii) when the transfer is perfected, if the transfer is perfected after the 30-day period, or (iii) if such transfer is not perfected before the later of the commencement of the bankruptcy case or 30 days after the transfer takes effect, immediately before the date when the bankruptcy petition is filed. Section 210(a)(11)(H) of the Dodd-Frank Act does not contain any express grace period. Consistent with the direction provided in section 209 of the Dodd-Frank Act to harmonize the regulations with otherwise applicable insolvency law to the extent possible, and to facilitate implementation of the avoidable transfer provisions of sections 210(a)(11)(A) and (B) of the Dodd-Frank Act, § 380.9 of the Proposed Rule includes provisions that would result in the following:[17]

- The avoidance provisions in section 210(a)(11) would apply the *bona fide* purchaser construct only in the case of fraudulent transfers under subparagraph (A) thereof and preferential transfers of real property (other than fixtures) under subparagraph (B) thereof;
- The avoidance provisions in section 210(a)(11)(B) would apply the "hypothetical lien creditor" construct as applied under section 547(e)(1)(B) of the Bankruptcy Code to any preferential transfers of personal property and fixtures; and
- the avoidance provisions in section 210(a)(11)(B) would apply the 30-day grace period as provided in section 547(e)(2) of the Bankruptcy Code, including any exceptions or qualifications contained therein.

Subpart A—Priorities

The Proposed Rule adds a Subpart A consisting of §§ 380.20–26 relating to the priorities of expenses and unsecured claims in the receivership of a covered financial company. Subpart A integrates all of the various provisions of the Dodd-Frank Act that determine the nature and priority of payments. First, the Subpart integrates the various statutory references to administrative expenses throughout the Act including identification of claims for amounts due to the United States, to ensure consistent application of those provisions. Second, the Subpart confirms the statutory preference for claims arising out of the loss of setoff rights over other general unsecured creditors if the loss of the setoff is due to the receiver's sale or transfer of an asset. Third, the Proposed Rule clarifies the payment of obligations of bridge financial companies and the rights of receivership creditors to remaining value. Finally, the Proposed Rule provides for the payment of post-insolvency interest on claims and for the determination of the index by which the limit applicable to certain claims for wages and benefits will be increased.

Subpart A of the Proposed Rule organizes and clarifies provisions throughout Title II of the Dodd-Frank Act dealing with the relative priorities of various creditors with claims against a failed financial company. These various provisions are based on the fundamental principle that any orderly liquidation should fairly treat similarly situated creditors and should ensure that the ultimate risk of loss for a failure of a systemically important financial company rests with the stockholders of the failed company. Although tools were put into place to ensure that temporary financing would be available to facilitate an *orderly* liquidation of the company to preserve its going concern value and to avoid cost-increasing disruptions of operations, the Dodd-Frank Act's resolution regime makes clear that there will be no more bailouts.

The responses to the request for broad comments in the October 19, 2010 Notice of Proposed Rulemaking raised a number of issues regarding the priorities of expenses and unsecured claims in a covered financial company receivership. Among the suggestions for future

[16] The term "judicial lien" is defined in section 101(36) of the Bankruptcy Code as a lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding. A similar, but abbreviated, formulation is found in section 547(e)(1)(B) of the Bankruptcy Code.

[17] These provisions conform with the letter dated December 29, 2010 from the FDIC's Acting General Counsel to the Securities Industry and Financial Markets Association ("SIFMA") and the American Securitization Forum available on SIFMA's Web site at *http://www.sifma.org/issues/item.aspx?id=22820.*

rulemakings, the topic of priorities of claims appeared often. One specific topic raised by several commenters included section 210(a)(12)(F) of the Dodd-Frank Act regarding the priority for creditors who are deprived of setoff rights. Another was the treatment of post-solvency interest, particularly with respect to oversecured creditors. Other comments requested that the FDIC clarify the relationship between a bridge financial company and creditors of the covered financial company. Subpart A of the Proposed Rule addresses these and other issues with respect to priorities. Other suggestions will be taken up in future rulemakings, and further comments are solicited in response to this Notice of Proposed Rulemaking.

Definitions

Section 380.20 of the Proposed Rule contains a definition of the term "allowed claim" which is used throughout Subpart A to mean a claim in the amount allowed by the FDIC as receiver in accordance with the procedures established in Subpart B of the Proposed Rule, or as determined by the final order of a court of competent jurisdiction. Definitions that apply throughout part 380 are found in § 380.1, including the definitions of "senior executive" (previously included in § 380.3), "compensation," and "director."

Priority of Unsecured Claims

Section 380.21 lists each of the eleven priority classes of claims established under the Dodd-Frank Act in the order of its relative priority. In addition to the specified priorities listed in section 210(b), the Proposed Rule integrates additional levels of priority established under section 210(c)(13)(d) (certain post-receivership debt); section 210(a)(13) (claims for loss of setoff rights); and section 210(a)(7)(D) (post insolvency interest). In order, the eleven classes of priority of claims are as follows:

(1) Claims with respect to post-receivership debt extended to the covered financial company where such credit is not otherwise available,

(2) Other administrative costs and expenses,

(3) Amounts owed to the United States,

(4) Wages, salaries and commissions earned by an individual within 6 months prior to the appointment of the receiver up to the amount of $11,725 (as adjusted for inflation),

(5) Contributions to employee benefit plans due with respect to such employees up to the amount of $11,725 (as adjusted for inflation) times the number of employees,

(6) Claims by creditors who have lost setoff rights by action of the receiver,

(7) Other general unsecured creditor claims,

(8) Subordinated debt obligations,

(9) Wages, salaries and commissions owed to senior executives and directors,

(10) Post-insolvency interest, which shall be distributed in accordance with the priority of the underlying claims, and (1) Distributions on account of equity to shareholders and other equity participants in the covered financial company.

Paragraph (b) of § 380.21 conforms the method of adjusting certain payments for inflation to the similar provisions of the Bankruptcy Code. Paragraph (c) provides that each class will be paid in full before payment of the next priority, and that if funds are insufficient to pay any class of creditors, the funds will be allocated among creditors in that class, *pro rata.*

This Proposed Rule establishes the general rule for the priority of claims of different classes of creditors. The Dodd-Frank Act provides for limited exceptions to this general rule of similar treatment for similarly-situated creditors, and any exception to the priorities established by this section must meet the statutory grounds for such an exception and the related regulations, including § 380.2 of this part.

Administrative Expenses

There are several references throughout the Act to the administrative expenses of the receiver. In section 201(a)(1) of the Dodd-Frank Act, the term is defined as including both "the actual, necessary costs and expenses" incurred by the receiver in liquidating a covered financial company, as well as "any obligations" that the FDIC as receiver determines are "necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company." Section 210(b)(2) of the Dodd-Frank Act provides that the receiver may grant first priority administrative expense status to unsecured debt obtained by the receiver in the event that credit is not otherwise available from commercial sources. Administrative expense priority is given to debt incurred by the FDIC as receiver in enforcing an existing contract to extend credit to the covered financial company under section 210(c)(13)(D). The Act also expressly confers administrative expense status on claims for payment for services performed under a service contract of the covered financial company after appointment of the receiver (§ 210(c)(7)(B)(ii)) and for payment of ongoing contractual rent for leases under which the covered financial company is lessee (§ 210(c)(4)) in harmony with bankruptcy practice as well as current practice under the FDI Act. In addition, pursuant to section 211(d)(4) of the Dodd-Frank Act, the expenses of the Inspector General of the FDIC incurred in connection with the conduct of an investigation of the liquidation of any covered financial company shall be funded as an administrative expense of the receiver of that covered financial company. Section 210(a)(15) of the Dodd-Frank Act expressly provides that damages for breach of a contract "executed or approved" by the FDIC as receiver for a covered financial company shall be paid as an administrative expense. Subparagraph 380.22(a)(3) clarifies that the phrase "executed or approved" includes only (i) contracts that are affirmatively entered into by the FDIC as receiver in writing after the date of its appointment, or (ii) contracts that pre-date the appointment of the FDIC as receiver that have been expressly approved in writing by the receiver. Damages for breach of a pre-receivership contract cannot attain administrative expense priority merely by the inaction of the receiver, such as the absence of a formal repudiation. Similarly, a contract inherited by the FDIC as receiver will not be deemed to have been approved based upon an alleged course of conduct by the receiver. Affirmative action by the receiver by formally approving the contract in writing is the prerequisite for administrative expenses treatment of damages for breach of a contract entered into by the covered financial company prior to appointment of the receiver.

In addition to consolidating all of these statutory references to the administrative expenses of the receiver into a single rule, proposed § 380.22(a) makes clear that expenses of the receiver that are necessary and appropriate to facilitate a smooth and orderly liquidation may be incurred by the FDIC pre-failure as well as after the appointment of the FDIC as receiver, and that all such expenses are administrative expenses of the receiver. The inclusion of both pre-failure and post-failure administrative expenses under the same standard is consistent with the treatment of administrative expenses under the FDI Act. *See* 12 CFR 360.4. In a bankruptcy case, the pre-petition expenses of preparing a petition must be paid prior to filing or await confirmation. All fees, compensation and expenses of liquidation and

administration shall be fixed by the FDIC. Such fees, compensation and expenses include amounts that the Corporation charges the receivership for services rendered by the FDIC.

Amounts Owed to the United States

Section 210(b)(1)(B) of the Dodd-Frank Act establishes a priority class for "amounts owed to the United States" immediately following the priority class for "administrative expenses of the receiver." Section 380.23 of the Proposed Rule establishes a definition for the phrase "amounts owed to the United States" and makes clear that it includes amounts advanced by the Department of Treasury or by any other department, agency or instrumentality of the United States, whether such amounts are advanced before or after the appointment of the receiver. For the sake of clarity, in addition to expressly listing advances by the FDIC for funding the orderly liquidation of the covered financial company pursuant to section 204(d)(4) as amounts owed to the United States, the Proposed Rule also expressly includes other sums advanced by departments, agencies and instrumentalities of the United States such as amounts owed to the FDIC for payments made pursuant to guarantees including payments to satisfy any guarantee of debt under the FDIC's Temporary Liquidity Guarantee Program, 12 CFR part 370, as well as unsecured accrued and unpaid taxes owed to the United States. Unsecured claims for net realized losses by a Federal reserve bank also are included, consistent with the mandate under section 1101 of the Act that requires such advances to have the same priority as amounts due to the United States Department of Treasury. The Dodd-Frank Act does not similarly specifically include government-sponsored entities such as FNMA, FHMLC or Federal Home Loan Banks, and the regulation therefore does not provide that obligations to those entities would be among the class of claims included among amounts owed to the United States under subsection 380.21(a)(3).

Although section 204(d)(4) of the Dodd-Frank Act provides that the FDIC has the power to take liens upon assets of the covered financial company to secure advances and guarantees made under that section, and provides that such advances will be repaid as administrative expenses "as appropriate," the Proposed Rule makes clear that the FDIC will treat all such amounts as amounts owed to the United States payable at the level of priority immediately following administrative expenses. This priority will apply regardless of whether or not such advance is treated as debt or equity on the books of the covered financial company. It will also apply whether or not such advance is secured by a lien under section 204(d)(4) in recognition of the FDIC's authority to impose assessments under section 210(o), which effectively guarantees repayment of such advances whether or not they are secured. Similarly, although the statute permits a distinction between advances for the purpose of funding administrative expenses (which are repayable at the administrative expense priority level) and other advances that are repaid as amounts owed to the United States, there will be little practical difference in the treatment of obligations for amounts advanced under section 204(d) of the Act because the power to impose additional assessments under section 210(o) assures that these amounts always will be repaid, thereby rendering unnecessary the need to track the actual use of such advances. As a practical matter, the only potential difference in the payment of a claim at the administrative expense priority under § 380.21(a)(2) and a claim at the priority class level for amounts owed to the United States under § 380.21(a)(3) would be the timing of the payment, and that potential differential would be addressed by the payment of interest at the post-insolvency rate as described in § 380.25.

Section 380.23(b) acknowledges that the United States may consent to subordination of its right to repayment of any specified debt or obligation provided that *all* unsecured claims of the United States shall, at a minimum, have a higher priority than equity or other liabilities of the covered financial company that count as regulatory capital. This is consistent with the mandatory requirement of section 206 of the Dodd-Frank Act that the shareholders of a covered financial company shall not receive payment until after all other claims are fully met.

Setoff

Section 210(a)(12) of the Dodd-Frank Act permits a creditor to offset certain qualified mutual debts between the covered financial company and the creditor. To allow the FDIC as receiver the flexibility to maximize the return from the disposition of assets of the covered financial company and to transfer assets to a bridge financial company so as to preserve the going concern value of the company, the Dodd-Frank Act specifically empowers the receiver to transfer assets of a covered financial company "free and clear of the setoff rights of any third party." Section 380.24 of the Proposed Rule addresses the claims of creditors who have lost a right of setoff due to the exercise of the receiver's right to sell or transfer assets of the covered financial company free and clear. Normally, a transfer of the assets without the claim will prevent setoff because the transfer destroys the mutuality of obligations that is the prerequisite of any ability to offset a claim directly against an obligation. The Dodd-Frank Act includes section 210(a)(12)(F) to provide a claimant with a preferred recovery as a general creditor and, thereby, achieve comparable protection. In the Proposed Rule, § 380.24 ensures that the claim of a creditor based upon the loss of an otherwise valid right of setoff due to a transfer of assets of the receiver will be paid at the level of priority immediately prior to all other general unsecured creditors.

Under the Dodd-Frank Act, the receiver is expressly authorized to sell assets free and clear of setoff claims, and the resulting claim for loss of those rights is expressly given a priority above other general unsecured creditors—but below administrative claims, amounts owed to the United States and certain employee-related claims. This preferential treatment should normally provide value to setoff claimants equivalent to the value of setoff under the Bankruptcy Code. While in bankruptcy setoff claims are functionally treated similarly to a security interest, the Bankruptcy Code treatment would severely impair the FDIC's ability to transfer assets of the covered financial company for value. The provisions of the Dodd-Frank Act and the implementing provisions in the Proposed Rule do provide adequate protection for the claimant in the context of the necessity for prompt transfer of the underlying asset. The Proposed Rule establishes that the FDIC as receiver will pay claimants for their loss of setoff rights in accordance with the express provisions of the Dodd-Frank Act.

Post-Insolvency Interest

Section 380.25 of the Proposed Rule establishes a post-insolvency interest rate, as required by section 210(a)(7)(D) of the Dodd-Frank Act. That rate is based on the coupon equivalent yield of the average discount rate set on the three-month U.S. Treasury Bill. Post-insolvency interest is computed quarterly and is not compounded. This is the rate that has been used by the FDIC in connection with claims under the FDI Act, and the same rate was chosen for the Dodd-Frank Act for ease of administration. In contrast, the

Bankruptcy Code provides in section 726(a)(5) for post-petition interest at the "legal rate;" however, in interpreting this provision, bankruptcy courts have not established a uniform post-petition interest rate. For the purpose of uniform treatment, the Proposed Rule computes post-insolvency interest in the same manner as provided for under the FDI Act pursuant to 12 CFR 360.7.

The Proposed Rule makes it clear that the post-insolvency interest is applied to the entire claim amount, which may include pre-receivership interest. In addition, if the claim is for damages arising out of repudiation of an obligation, the claim amount may include interest through the date of repudiation as required under section 210(c)(3)(D) of the Act. The Dodd-Frank Act does not contain a provision similar to section 506(b) of the Bankruptcy Code allowing interest at the contract rate and certain fees and expenses to be paid to oversecured creditors to the extent of the value of their collateral. Comment is sought on whether this is an area in which the FDIC should seek to harmonize orderly resolution practice with the Bankruptcy Code.

Transfers to Bridge Financial Companies

Section 380.26 of the Proposed Rule addresses and clarifies the treatment of assets and liabilities that are transferred to a bridge financial company by the FDIC as receiver by providing that any obligation that is expressly purchased or assumed by the bridge financial company will be paid by the bridge financial company in accordance with the terms of such obligation. The Proposed Rule similarly addresses the treatment of contracts or agreements expressly entered into by the bridge financial company. As an operating company, a bridge financial company will make payments on valid and enforceable obligations as they become due and not pursuant to a claims process. In short, valid and enforceable obligations purchased or assumed by the express agreement of the bridge financial company, as well as valid and enforceable obligations under contracts or agreements expressly agreed to by the bridge financial company will be paid in full as part of the normal operations of the bridge financial company.

Certain rights and obligations of the covered financial company will be transferred and assumed by the express agreement of the bridge financial company in the purchase and assumption agreement with the receiver for that covered financial company. The terms and conditions under which those rights and obligations are transferred and assumed will, of course, be governed by the terms of the purchase and assumption agreement. Thus, if an obligation is conditionally transferred to a bridge financial company subject to due diligence, put-back rights or other contingencies, the assumption of the obligation would be subject to these contingencies. Section 380.26 should not be read to eliminate express contingencies to the assumption of obligations nor any right to terminate an obligation or to put it back to the receiver of the covered financial company.

Several comments requested that a rule be promulgated to clarify the relationship between the bridge financial company and the creditors of the covered financial company. A bridge financial company will be a solvent company when it is formed in accordance with the express requirements of section 210(h)(5)(F) of the Act. The Dodd-Frank Act provides, however, that a bridge financial company has a finite existence pursuant to section 210(h)(12), and section 210(n) contemplates several means of disposing of the assets and liabilities of a bridge financial company and terminating its existence. A bridge financial company can be sold via merger, consolidation or a sale of stock, whereupon the bridge financial company's federal charter is terminated and any remaining assets liquidated. A bridge financial company also can be liquidated by a sale of its assets and assumption of its liabilities. If a bridge financial company is not liquidated, dissolved and terminated within two years of the date it is chartered (subject to not more than three one-year extensions), the FDIC shall act as receiver for the bridge financial company and shall wind up the affairs of the bridge financial company in conformity with the liquidation of covered financial companies under Title II of the Act, including the priorities and claims provisions. The Proposed Rule makes clear that the proceeds that remain following sale, liquidation and dissolution of the bridge financial company will be distributed to the FDIC as receiver for the covered financial company and will be made available to the creditors of the covered financial company after all administrative expenses and other creditor claims of the receiver for the bridge financial company have been satisfied.

Subpart B—Receivership Administrative Claims Process

The Proposed Rule also includes Subpart B, consisting of §§ 380.30–39 and §§ 380.50–55, to clarify how creditors can file claims against the receivership estate, how the FDIC as receiver will determine those claims, and how creditors can pursue their claims in Federal court.

Section 210(a)(2)–(5) of the Dodd-Frank Act provides for the resolution of claims against a covered financial company through an administrative process conducted by the FDIC as receiver. Generally, this process calls for creditors to file their claims with the receiver by a claims bar date. The receiver will determine whether to allow or disallow a claim no later than 180 days after the claim is filed (subject to any extension agreed to by the claimant). If the claim is disallowed, the claimant may seek *de novo* judicial review of the claim by filing a lawsuit (or continuing a pending lawsuit) within a prescribed 60-day time period. No court has jurisdiction to hear any claim against either the covered financial company or the receiver unless the claimant has first obtained a determination of the claim from the receiver.

Congress has established an exclusive, separate set of procedures for the presentation and determination of claims against a covered financial company or the FDIC as receiver. The statute is clear that the claimant must exhaust the administrative claims process as a jurisdictional prerequisite before any court can adjudicate the claim. While harmonization with other insolvency laws may be worthwhile and achievable in many other aspects of the orderly liquidation of a covered financial company, the FDIC cannot promulgate rules that materially diverge from or are inconsistent with the claims procedures set forth in the Dodd-Frank Act. Nevertheless, the FDIC believes that it is appropriate to look to the Bankruptcy Code to fill gaps in the Act, for example, where the Title II claims procedures lack specific directives regarding how the receiver should handle property that serves as collateral for a secured claim.

The administrative claims process of Title II is closely modeled after the claims process set forth in the FDI Act for receiverships of insured depository institutions. Like the FDI Act claims process, the Title II administrative process for claims against a covered financial company is designed to maximize efficiency while reducing the delay and additional costs that could be incurred in a different insolvency regime. Creditors' rights are protected by the availability of judicial review if the claim is disallowed, in whole or in part, by the receiver. This is a *de novo* determination of the claim by the court

on its merits and not a review of whether the receiver abused its discretion in disallowing the claim.

Because many parties may be unfamiliar with the resolution process for a failed insured depository institution generally and the administrative claims process in particular, the FDIC has undertaken in the Proposed Rule to explain certain important aspects of the claims process for a covered financial company receivership. While the Proposed Rule reflects all the statutory procedures, it also organizes those procedures in a step-by-step manner in order to promote greater understanding and clarity. In some instances, the Proposed Rule interprets the statutory procedures to address issues that are not addressed in the statute. For example, the statute does not provide notice procedures for claimants who are discovered after the claims bar date; the Proposed Rule fills this gap by providing for a 90-day claims filing period for such claimants. In other instances, the Proposed Rule supplements the statutory procedures in order to facilitate programs that have been instituted by the FDIC for greater efficiency, such as the electronic filing of claims.

The following sections appear under Subpart B of the Proposed Rule:

Receivership Administrative Claims Process

Section 380.30 of the Proposed Rule reflects the express authorization under the Dodd-Frank Act that the FDIC as receiver shall determine all claims in accordance with the statutory procedures and with the regulations promulgated by the FDIC. This section also clarifies that the administrative claims process will not apply to claims transferred to a bridge financial company or to third parties.

Definitions

Section 380.31 of the Proposed Rule defines the term "claim" to have the same meaning as in section 201(a)(4) of the Dodd-Frank Act, specifically, "any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (This definition is generally consistent with the definition of the term in the Bankruptcy Code.) The Proposed Rule uses the definition of "claim" as set forth in section 201(a)(4) of the Act, but adds language to the definition to specify that a claim is a right to payment from either the covered financial company or the FDIC as receiver. The clarification that claims against the receiver are subject to the administrative claims process is necessary because section 210(a)(9)(D) divests a court of jurisdiction over claims against the receiver until the administrative claims process has been exhausted. If claims against the receiver were not first determined pursuant to the administrative claims process, no court would ever have jurisdiction over these claims. The terms "Corporation," "Corporation as receiver," and "receiver" are used interchangeably in the statute, and the Proposed Rule clarifies that such terms refer to the FDIC in its capacity as receiver of a covered financial company.

Claims Bar Date

Section 380.32 of the Proposed Rule reflects the statutory requirement that the FDIC as receiver establish a "claims bar date" by which creditors of the covered financial company are to file their claims with the receiver. The claims bar date must be identified in both the published notices and the mailed notices required by the statutory procedures. The Proposed Rule clarifies that the claims bar date is calculated from the date of the *first* published notice to creditors, not from the date of appointment of the receiver.

Notice Requirements

Section 380.33 of the Proposed Rule reiterates the statutory procedures for notice to creditors of the covered financial company. As required by the statute, upon its appointment as receiver of a covered financial company, the FDIC as receiver will promptly publish a first notice; subsequently, the receiver will publish a second and third notice one month and two months, respectively, after the first notice is published. The notices must inform creditors to present their claims to the receiver, together with proof, by no later than the claims bar date. The Proposed Rule provides that the notices shall be published in one or more newspapers of general circulation in the market where the covered financial company had its principal place of business. In recognition of the public's growing reliance on communication using the Internet as well as the prevalence of online commerce, the Proposed Rule provides that in addition to the published and mailed notices, the FDIC may post the notice on its public Web site.

In addition to the publication notice required by paragraph (a) of this section, the receiver must mail a notice that is similar to the publication notice to each creditor appearing on the books and records of the covered financial company. The mailed notice will be sent at the same time as the first publication notice to the last address of the creditor appearing on the books or in any claim filed by a claimant. The Proposed Rule provides that after sending the initial mailed notice required under paragraph (b), the FDIC may communicate by electronic media (such as e-mail) with any claimant who agrees to such means of communication.

Paragraph (d) of § 380.33 clarifies the treatment of creditors that are discovered after the initial publication and mailing has taken place. The FDIC as receiver shall mail a notice similar to the publication notice to any claimant not appearing on the books and records of the covered financial company no later than 30 days after the date that the name and address of such claimant is discovered. If the name and address of the claimant is discovered prior to the claims bar date, such claimant will be required to file the claim by the claims bar date. There may be instances when notice to the discovered claimant is sent immediately before the claims bar date, possibly giving the claimant insufficient time to prepare and file a claim before the claims bar date. In such a case, the claimant may invoke the statutory exception for late-filed claims set forth in section 210(a)(3)(C)(ii) and § 380.35(b)(3) of the Proposed Rule in order to overcome the claims bar date filing requirement.

When a claimant is discovered by the receiver after the claims bar date, the receiver must still provide mailed notice that is similar in content to the publication notice required by section 210(a)(2)(C). Such a discovered claimant cannot comply with a claims bar date that has already passed. Therefore, the Proposed Rule adopts a procedure for providing another time frame for filing a claim which parallels the statutory time frame mandated by section 210(a)(2)(B); *i.e.,* no earlier than 90 days from the first publication notice. Thus, although a claimant discovered after the claims bar date will be given 90 days to file its claim, the failure to file a claim by the end of that 90 day period will result in disallowance of the claim.

Procedures for Filing Claims

Section 380.34 of the Proposed Rule provides guidance to potential claimants regarding certain aspects of filing a claim. The FDIC as receiver has determined to provide creditors with instructions as to how to file a claim in several different formats. These will include providing FDIC contact information in the publication notice, providing a proof of claim form and filing instructions with the mailed

notice, and posting a link to the FDIC's on-line non-deposit claims processing Web site. A claim will be deemed filed with the receiver as of the date of postmark if the claim is mailed or as of the date of successful transmission if the claim is submitted by facsimile or electronically.

This section also confirms existing law that each individual claimant must submit its own claim and that no single party may assert a claim on behalf of a class of litigants. On the other hand, a trustee named or appointed in connection with a structured financial transaction or securitization is permitted to file a claim on behalf of the investors as a group because in such a case the trustee legally owns the claim.

The Proposed Rule reiterates the statutory provision that the filing of a claim constitutes the commencement of an action for purposes of any applicable statute of limitations and does not prejudice a claimant's right to continue any legal action filed prior to the date of the receiver's appointment. The Proposed Rule clarifies, however, that the claimant cannot continue its legal action until after the receiver determines the claim.

Determination of Claims

Section 380.35 of the Proposed Rule reflects the receiver's statutory authority to allow and disallow claims. The FDIC as receiver may disallow all or any portion of a claim, including a claim based on security, preference, setoff or priority, which is not proved to the receiver's satisfaction. Pursuant to the statutory directive, the receiver must disallow any claim that is filed after the claims bar date, subject to the statutory exception for late-filed claims. Under this exception, a late-filed claim will not be disallowed if (i) the claimant did not have notice of the appointment of the receiver in time to file by the claims bar date, and (ii) the claim is filed in time to permit payment by the receiver.

The Proposed Rule establishes that claims that do not accrue until after the claims bar date may not be disallowed by the receiver as untimely filed. Claims of this type may include claims based on the post-claims bar date repudiation of a contract, or acts or omissions of the receiver. In this regard, the Proposed Rule adopts the FDIC's interpretation of the application of the late-filed claim exception of the FDI Act to these types of claims. *See Heno* v. *Federal Deposit Insurance Corporation,* 20 F.3d 1204 (1st Cir. 1994). The Proposed Rule confirms that such claims will be deemed to satisfy the statutory late-filed claim exception. In addition, the Proposed Rule provides a definition of the phrase "filed in time to permit payment" to refer to a claim that is filed at any time before the FDIC as receiver makes a final distribution from the receivership of the covered financial company.

Decision Period

Section 380.36 of the Proposed Rule reflects that under the statute the receiver must notify a claimant of its decision to allow or disallow a claim prior to the 180th day after the claim is filed. The Proposed Rule also provides that the claimant and the receiver may extend the claims determination period by mutual agreement in writing. In accordance with the statute, the receiver must notify the claimant regarding its determination of the claim prior to the end of the extended claims determination period.

Notification of Determination

Section 380.37 of the Proposed Rule requires the receiver to notify the claimant of the determination of the claim as required by the statute. The notification may be mailed to the claimant as set forth in section 210(a)(3)(A). The receiver may use electronic media to notify claimants who file their claims electronically. If the receiver disallows the claim, the receiver's notification shall explain each reason for the disallowance and advise the claimant of the procedures required to file or continue an action in court. Consistent with the statute, the Proposed Rule provides that for purposes of triggering the procedures for seeking a judicial determination of the claim, a claim shall be deemed to be disallowed if the receiver does not notify the claimant prior to the end of the 180-day determination period or any extended claims determination period agreed to by the receiver and the claimant.

Procedures for Seeking Judicial Review of Disallowed Claim

Section 380.38 of the Proposed Rule implements the statutory procedures for a claimant to seek a judicial determination of its claim after the claim has been disallowed by the FDIC as receiver. The court's standard of judicial review would be a *de novo* consideration of the merits of the claim, not a judicial review of the receiver's determination of the claim. The statute states that a claimant may (i) file a lawsuit on its disallowed claim in the district court where the covered financial company's principal place of business is located, or (ii) continue a previously pending lawsuit. The Proposed Rule clarifies that if the claimant continues a pending action, the claimant may continue such action in the court in which the action was pending before the appointment of the receiver, resolving any uncertainty whether the action should be "continued" in the district court where the covered financial company's principal place of business is located. (In the case of an action pending in state court, the receiver would have the authority to remove the action to Federal court if it chose to do so.)

As provided by statute, § 308.38(c) of the Proposed Rule provides that the claimant has 60 days to commence or continue an action regarding the disallowed claim. The time period for commencing or continuing a lawsuit would be calculated, as applicable, from the date of the notification of disallowance, the end of the 180-day claims determination date, or the end of the extended determination date, if any. If a claimant fails to file suit on a claim (or continue a pre-receivership suit) before the end of the 60-day period, the claimant will have no further rights or remedies with respect to the claim. This time period is not subject to a tolling agreement between the FDIC and the claimant. The Proposed Rule reiterates the statutory provision that exhaustion of the administrative claims process is a jurisdictional prerequisite for any court to adjudicate a claim against a covered financial company or the receiver.

Secured Claims

Sections 380.50–55 of the Proposed Rule address the treatment of secured claims, which include covered bonds. The Dodd-Frank Act, like the Bankruptcy Code and the receivership provisions of the FDI Act, provides that a claimant holding a security interest in property is entitled to the value of its collateral up to the amount of the claim. Under section 210(a)(3)(D)(ii) of the Act, a claim that is secured by any property of the covered financial company may be treated as an unsecured claim to the extent that the claim exceeds the fair market value of the property, effectively bifurcating the claim into a secured component ("the secured claim") and an unsecured component. The unsecured component is treated like an unsecured claim and paid along with other unsecured claims. The Dodd-Frank Act is less specific about the treatment of the secured claim, however. Section 210(a)(1)(D) provides that subject to all legally enforceable security interests (and security entitlements), the receiver shall take steps to realize upon the assets of the covered financial company, including through the sale of assets. The

Proposed Rule attempts to clarify how the receiver will recognize and treat secured claims during this process.

Section 380.50 of the Proposed Rule reflects the receiver's authority in section 210(a)(3)(D)(ii) of the Dodd-Frank Act to recognize a claim as secured to the extent of the value of the collateral. The Proposed Rule further provides that in reviewing a secured claim, the receiver will determine the amount of the claim, the relative priority of the security interest, whether the claimant's security interest is legally enforceable and perfected, and the fair market value of the property or other asset that is subject to the security interest.

Section 380.51 of the Proposed Rule relates to two provisions of the Dodd-Frank Act that affect secured claimants, subparagraphs 210(c)(13)(C) and (q)(1)(B). Subparagraph 210(c)(13)(C) precludes most secured claimants from exercising rights against the pledged collateral during the 90-day period after the FDIC is appointed receiver of a covered financial company without the consent of the FDIC as receiver. The provision also requires the receiver's consent during this 90-day period before a creditor can exercise any right to terminate, accelerate, or declare a default under any contract to which the covered financial company is a party, or obtain possession of or exercise control over any property of the covered financial company, or affect any contractual rights of the covered financial company. Subparagraph 210(q)(1)(B) affects claimants who are secured by a mortgage or other lien by providing that no property of the FDIC as receiver shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the receiver. Such property includes the property of the covered financial company in receivership. The Proposed Rule establishes that the FDIC may grant consent under subparagraphs 210(c)(13)(C) or (q)(1)(B) to a secured creditor to obtain possession of or exercise control over property of the covered financial company that serves as its collateral, or to foreclose upon or sell such collateral. The Proposed Rule sets forth several important limitations on consents that may be granted by the FDIC including that any consent is solely at the discretion of the FDIC and that such consent does not constitute a waiver, relinquishment or limitation on any rights, powers or remedies granted to the FDIC in any capacity. Furthermore, the consent right is not assignable to a purchaser of property from the FDIC.

Section 380.52 of the Proposed Rule confirms that under section 210(c)(12)(A) of the Dodd-Frank Act, the authority of the FDIC to repudiate a contract of the covered financial company will not have the effect of avoiding any legally enforceable and perfected security interests in the property (except those avoidable as fraudulent or preferential transfers under section 210(a)(11)). The Proposed Rule further provides that after repudiation the security interest will no longer secure the contractual obligation that was repudiated but will instead secure a claim for repudiation damages. Accordingly, the receiver may consent to the claimant's liquidation of the collateral and application of the proceeds to the claim for repudiation damages.

Section 380.53 of the Proposed Rule implements the requirement under section 210(a)(5) of the Dodd-Frank Act that the FDIC establish an expedited claims determination procedure for secured creditors who allege that they will suffer irreparable injury if they are compelled to follow the ordinary claims process. The expedited claims procedure established by the Proposed Rule tracks the statutory procedures and time frames set forth in section 210(a)(5). Under such procedures, the receiver has 90 days to review the secured claim, and the secured creditor has 30 days to file or continue an action for judicial review of the claim at the earlier of the end of the 90-day period or the date the receiver denies all or a portion of the claim.

Section 380.54 of the Proposed Rule addresses how the receiver may treat property that serves as collateral for a secured claim. A number of comments were received on the topic of the receiver's valuation and disposition of collateral, and this section of the Proposed Rule addresses this issue. Section 380.54 of the Proposed Rule provides an alternative to the voluntary surrender of collateral by the receiver set forth in § 380.51 by providing that the receiver may sell the collateral. The receiver will then consent to the security interest's attachment to the proceeds of the sale. The receiver may want to sell the collateral if its value exceeds the amount of the claim it secures. In the event of a sale by the receiver, the secured creditor will be permitted to bid and acquire the collateral by offsetting the amount of its claim against the purchase price of the collateral.

Section 380.55 of the Proposed Rule provides that the FDIC as receiver may redeem the property of the covered financial company from a lien held by a secured creditor by paying the creditor in cash the fair market value of the property up to the value of its lien. The receiver's ability to exercise this power may be important when the use or possession of the property would be necessary to the orderly liquidation of the covered financial company.

III. Solicitation of Comments

The FDIC solicits comments on all aspects of the Proposed Rule. The FDIC also solicits responses to the following questions:

1. The FDIC has proposed a two-year period for applying the 85 percent consolidated revenue test. Is there another more appropriate timeframe that the FDIC should use to determine whether a company meets the 85 percent consolidated revenue test for the purposes of Title II?

2. Is there a more appropriate definition of "applicable accounting standards" than that used in the Proposed Rule?

3. The Proposed Rule includes a rule of construction regarding investments that are not consolidated. Is this rule of construction appropriate?

4. The Proposed Rule includes a rule of construction regarding *de minimis* investments. Is there a more appropriate approach to calculating and accounting for revenues that are derived from such *de minimis* investments?

5. Section 380.7 of the Proposed Rule establishes standards for a determination that a senior executive or director is substantially responsible for the failure of a covered financial company. Under the Proposed Rule, the loss to the financial condition of the covered financial company must have materially contributed to the failure of the covered financial company. The FDIC is considering the use of additional qualitative and quantitative benchmarks to establish that the loss materially contributed to the failure of the covered financial company. Financial indicators under consideration as possible benchmarks are assets, net worth and capital, and the percentage or magnitude of loss associated with these benchmarks that would establish a material loss and trigger substantial responsibility. The FDIC solicits comments on these and other potential benchmarks that may be used to effectively evaluate loss.

6. Section 380.8 of the Proposed Rule generally establishes the criteria for determining whether a company is predominantly engaged in activities that are financial in nature or incidental thereto. Should § 380.8 of the Proposed Rule be limited so that it only encompasses entities that, individually

or on a consolidated basis, are eligible under section 102 of the Dodd-Frank Act for designation as nonbank financial companies supervised by the Board of Governors?

7. Should § 380.8 of the Proposed Rule be limited to companies that, individually or on a consolidated basis, are designated as systemically important under the Dodd-Frank Act?

8. In what ways can the definition of administrative expenses under the Dodd-Frank Act be further harmonized with bankruptcy law and practice? Section 503(b)(4) of the Bankruptcy Code expressly provides for the payment of attorneys' and accountants' fees and expenses. Is there a need for a comparable provision in these rules, in light of the procedures for administration of the claims process described in the Proposed Rule?

9. Should "amounts due to the United States" be limited to obligations backed by the full faith and credit of the United States? To the extent that amounts due to the United States includes amounts that are not obligations issued by the FDIC to the Secretary of the Department of Treasury under the Dodd-Frank Act, how will the additional assessments authorized by section 210(o) of the Act be applied?

10. How should the value of lost setoff rights be determined?

11. How do the differences in the post insolvency interest rules contained in § 380.25 and those established under bankruptcy law and practice materially affect creditors? How would the provisions of section 506(b) of the Bankruptcy Code allowing certain fees and expenses to be paid to oversecured creditors to the extent of the value of their collateral be implemented in an orderly resolution under the Dodd-Frank Act, if it is applicable? What would be the impact on creditors if a similar rule is adopted under the Dodd-Frank Act? Or if one is not adopted?

12. What, if any, additional provisions should be included in the Proposed Rule regarding the administrative process for the determination of claims?

13. Proposed section 380.33 requires the FDIC to publish a notice to creditors to present their claims and specifies that the notice shall be published in one or more newspapers of general circulation where the covered financial company has its principal place or places of business. If the covered financial company is a multi-national organization, how should the principal place(s) of business be determined? Should a publication notice be published in each country in which the covered financial company does business?

14. In the event that publication notices are published in other countries, what standards should be applied to identify appropriate "newspapers of general circulation" to satisfy this regulatory requirement?

15. Should the consent provisions of subparagraphs 210(c)(13)(C) and (q)(1)(B) of the Act be interpreted as not applying to a secured creditor who has possession of or control over collateral before the appointment of the receiver pursuant to a security arrangement?

16. What, if any, additional provisions should be included in the Proposed Rule governing the treatment of secured claims and property that serves as security? Specifically, are there any additional provisions that are necessary or appropriate regarding obtaining consent from the receiver to exercise rights against the collateral, and the sale or redemption of collateral by the receiver? Should collateral be valued at the time it is surrendered, sold, or redeemed by the receiver, or some other time? Is it necessary to provide that after repudiation a security interest will no longer secure the contractual repayment obligation but will instead secure any claims for repudiation damages?

17. What, if any, provisions should be changed or added to the expedited relief procedures for secured creditors who allege irreparable injury if the ordinary claims process is followed?

IV. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

The Proposed Rule would not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (U.S.C. 601 *et seq.*) requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities. (5 U.S.C. 603(a)). The Regulatory Flexibility Act provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the Proposed Rule will not have a significant economic impact on a substantial number of small entities. The Proposed Rule will clarify rules and procedures for the liquidation of a failed systemically important financial company, which will provide internal guidance to FDIC personnel performing the liquidation of such a company and will address any uncertainty in the financial system as to how the orderly liquidation of such a company would operate. As such, the Proposed Rule will not have a significant economic impact on small entities.

C. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the Proposed Rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471) requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Proposed Rule in a simple and straightforward manner.

List of Subjects in 12 CFR Part 380

Holding companies, Insurance companies.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends title 12 part 380 of the Code of Federal Regulations as follows:

PART 380—ORDERLY LIQUIDATION AUTHORITY

1. The authority citation for part 380 continues to read as follows:

Authority: 12 U.S.C. 5301 *et seq.*

2. Revise 380.1 by to read as follows:

§ 380.1 Definitions.

(a) For purposes of this part, the following terms are defined as follows:

(1) The term "bridge financial company" means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered financial company.

(2) The term "Corporation" means the Federal Deposit Insurance Corporation.

(3) The term "covered financial company" means:

(i) A financial company for which a determination has been made under 12 U.S.C. 5383(b) and

(ii) Does not include an insured depository institution.

(4) The term "covered subsidiary" means a subsidiary of a covered financial company, other than:

(i) An insured depository institution;

(ii) An insurance company; or

(iii) A covered broker or dealer.

(5) The term "insurance company" means any entity that is:

(i) Engaged in the business of insurance;

(ii) Subject to regulation by a State insurance regulator; and

(iii) Covered by a State law that is designed to specifically deal with the rehabilitation, liquidation or insolvency of an insurance company.

(b) The following words shall be defined as follows:

(1) *Compensation.* The word compensation means any direct or indirect financial remuneration received from the covered financial company, including, but not limited to, salary; bonuses; incentives; benefits; severance pay; deferred compensation; golden parachute benefits; benefits derived from an employment contract, or other compensation or benefit arrangement; perquisites; stock option plans; post-employment benefits; profits realized from a sale of securities in the covered financial company; or any cash or non-cash payments or benefits granted to or for the benefit of the senior executive or director.

(2) *Director.* The word director means any director of a covered financial company with authority to vote on matters before the board of directors.

(3) *Senior executive.* The term senior executive has the meaning set forth in 12 CFR 380.3(a)(2).

3. Add §§ 380.7, 380.8, and 380.9 to read as follows:

§ 380.7 Recoupment of compensation from senior executives and directors.

(a) *Substantially Responsible.* The Corporation, as receiver of a covered financial company, may recover from any current or former senior executive or director substantially responsible for the failed condition of the covered financial company any compensation received during the 2-year period preceding the date on which the Corporation was appointed as the receiver of the covered financial company, except that, in the case of fraud, no time limit shall apply. A senior executive or director shall be deemed to be substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act if:

(1) He or she failed to conduct his or her responsibilities with the requisite degree of skill and care required by that position, and

(2) As a result, individually or collectively, caused a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.

(b) *Presumptions.* The following presumptions shall apply for purposes of assessing whether a senior executive or director is substantially responsible for the failed condition of a covered financial company:

(1) It shall be presumed that a senior executive or director is substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act under any of the following circumstances:

(i) The senior executive or director served as the chairman of the board of directors, chief executive officer, president, chief financial officer, or in any other similar role regardless of his or her title if in this role he or she had responsibility for the strategic, policymaking, or company-wide operational decisions of the covered financial company prior to the date that it was placed into receivership under the orderly liquidation authority of the Dodd-Frank Act;

(ii) The senior executive or director is adjudged liable by a court or tribunal of competent jurisdiction for having breached his or her duty of loyalty to the covered financial company;

(iii) The senior executive was removed from the management of the covered financial company under 12 U.S.C. 5386(4); or

(iv) The director was removed from the board of directors of the covered financial company under 12 U.S.C. 5386(5).

(2) The presumption under paragraph (b)(1)(i) of this section may be rebutted by evidence that the senior executive or director performed his or her duties with the requisite degree of skill and care required by that position. The presumptions under paragraphs (b)(1)(ii),)(iii) and (iv) of this section may be rebutted by evidence that the senior executive or director did not cause a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.

(3) The presumptions do not apply to:

(i) A senior executive hired by the covered financial company during the two years prior to the Corporation's appointment as receiver to assist in preventing further deterioration of the financial condition of the covered financial company; or

(ii) A director who joined the board of directors of the covered financial company during the two years prior to the Corporation's appointment as receiver under an agreement or resolution to assist in preventing further deterioration of the financial condition of the covered financial company.

(4) Notwithstanding that the presumption does not apply under paragraphs (b)(3)(i) and (ii) of this section, the Corporation as receiver still may pursue recoupment of compensation from a senior executive or director in paragraphs (b)(3)(i) and (ii) of this section if they are substantially responsible for the failed condition of the covered financial company.

(c) *Actions by the Corporation as receiver for Losses to the Covered Financial Company.* Pursuing recoupment of compensation under this section shall not in any way limit or impair the ability of the Corporation as receiver to pursue any other claims or causes of action it may have against senior executives and directors of the covered financial company for losses they cause to the covered financial company in the same or separate actions.

§ 380.8 Predominantly engaged in activities that are financial or incidental thereto.

(a) For purposes of sections 201(a)(11) and 201(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381(a)(11) and (b)) and this section, a company is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), if:

(1) At least 85 percent of the total consolidated revenues of such company (determined in accordance with applicable accounting standards) for either of its two most recent fiscal years were derived, directly or indirectly, from financial activities, or

(2) Based upon all of the relevant facts and circumstances, the Corporation determines that the consolidated revenues of the company from financial activities constitute 85 percent or more of the total consolidated revenues of the company.

(b) For purposes of paragraph (a) of this section, the following definitions apply:

(1) The term "total consolidated revenues" means the total gross

revenues of the company and all entities subject to consolidation by the company for a fiscal year.

(2) The term "financial activity" means:

(i) Any activity, wherever conducted, described in 12 CFR 225.86 or any successor regulation;

(ii) Ownership or control of one or more depository institutions; or

(iii) Any other activity, wherever conducted, determined by the Board of Governors of the Federal Reserve System, in consultation with the Secretary of the Treasury, under section 4(k)(1)(A) of the Bank Holding Company Act (12 U.S.C. 1843(k)(1)(A)) to be financial in nature or incidental to a financial activity.

(3) The term "applicable accounting standards" means the accounting standards utilized by the company in the ordinary course of business in preparing its consolidated financial statements, provided that those standards are:

(i) U.S. generally accepted accounting principles,

(ii) International Financial Reporting Standards, or

(iii) Such other accounting standards that the FDIC determines to be appropriate.

(c) *Effect of other authority.* Any activity described in paragraph (b)(2) of this section is considered financial in nature or incidental thereto for purposes of this section regardless of whether—

(1) A bank holding company (including a financial holding company or a foreign bank) may be authorized to engage in the activity, or own or control shares of a company engaged in such activity, under any other provisions of the BHC Act or other Federal law including, but not limited to, section 4(a)(2), section 4(c)(5), section 4(c)(6), section 4(c)(7), section 4(c)(9), or section 4(c)(13) of the Bank Holding Company Act (12 U.S.C. 1843(a)(2), (c)(5), (c)(6), (c)(7), (c)(9), or (c)(13)) and the Board's implementing regulations; or

(2) Other provisions of Federal or state law or regulations prohibit, restrict, or otherwise place conditions on the conduct of the activity by a bank holding company (including a financial holding company or foreign bank) or bank holding companies generally.

(d) *Rules of construction.* For purposes of determining whether a company is predominantly engaged in financial activities under this section, the following rules shall apply—

(1) Investments that are not consolidated. Except as provided in paragraph (d)(2) of this section, revenues derived from an equity investment by the company in another company, the financial statements of which are not consolidated with those of the company under applicable accounting standards, shall be treated as revenues derived from financial activities, if the other company is predominantly engaged in financial activities as defined in paragraph (a)(1) of this section.

(2) Treatment of *de minimis* investments. A company may treat revenues derived from an equity investment by the company in another company as revenues not derived from financial activities, regardless of the type of activities conducted by the other company, if

(i) The company's aggregate ownership interest in the other company constitutes less than five percent of any class of outstanding voting shares, and less than 25 percent of the total equity, of the other company;

(ii) The financial statements of the other company are not consolidated with those of the company under applicable accounting standards;

(iii) The company's investment in the other company is not held in connection with the conduct by the company or any of its subsidiaries of an activity that is considered to be financial in nature or incidental thereto for purposes of this section (such as, for example, investment advisory activities or merchant banking activities);

(iv) The other company is not—

(A) A depository institution or a subsidiary of a depository institution;

(B) A bank holding company or savings and loan holding company;

(C) A foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7));

(D) Any of the following entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*)—

(*1*) A broker or dealer;

(*2*) A clearing agency;

(*3*) A nationally recognized statistical rating organization;

(*4*) A transfer agent;

(*5*) An exchange registered as a national securities exchange; or

(*6*) A security-based swap execution facility, security-based swap data repository, or security-based swap dealer;

(E) An investment advisor registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*);

(F) Any of the following entities registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*)—

(*1*) A futures commission merchant;

(*2*) A commodity pool operator;

(*3*) A commodity trading advisor;

(*4*) An introducing broker;

(*5*) A derivatives clearing organization;

(*6*) A retail foreign exchange dealer; or

(*7*) A swap execution facility, swap data repository, or swap dealer.

(G) A board of trade designated as a contract market by the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); or

(H) An insurance company subject to supervision by a state or foreign insurance authority; and

(v) The aggregate dollar amount of revenues treated by the company as not financially related under this paragraph (d)(2) of this section does not exceed five percent of the total consolidated financial revenues of the company in that year.

§ 380.9 Treatment of fraudulent and preferential transfers.

(a) *Coverage.* This section shall apply to all receiverships in which the FDIC is appointed as receiver under 12 U.S.C. 5382(a) or 5390(a)(1)(E) of a covered financial company or a covered subsidiary, respectively, as defined in 12 U.S.C. 5381(a)(8) and (9).

(b) *Avoidance Standard for Transfer of Property.* (1) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of property for purposes of 12 U.S.C. 5390(a)(11)(A), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee.

(2) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of real property, other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected

such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee. For purposes of this section, the term fixture shall be interpreted in accordance with U.S. Federal bankruptcy law.

(3) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of a fixture or property, other than real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee, and the standard of whether the transfer is perfected such that a *bona fide* purchaser cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee of such property shall not apply to any such transfer under this subparagraph (b)(3).

(c) *Grace period for perfection.* In determining when a transfer occurs for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall apply the following standard:

(1) Except as provided in paragraph (c)(2) of this section, a transfer shall be deemed to have been made:

(i) At the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in paragraph (c)(1)(ii) of this section;

(ii) At the time such transfer takes effect between the transferor and the transferee, with respect to a transfer of an interest of the transferor in property that creates a security interest in property acquired by the transferor—

(A) To the extent such security interest secures new value that was:

(*1*) Given at or after the signing of a security agreement that contains a description of such property as collateral;

(*2*) Given by or on behalf of the secured party under such agreement;

(*3*) Given to enable the transferor to acquire such property; and

(*4*) In fact used by the transferor to acquire such property; and

(B) That is perfected on or before 30 days after the transferor receives possession of such property;

(iii) At the time such transfer is perfected, if such transfer is perfected after the 30-day period described in paragraph (c)(1)(i) or (ii) of this section, as applicable; or

(iv) Immediately before the appointment of the Corporation as receiver of a covered financial company or a covered subsidiary which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), if such transfer is not perfected at the later of—

(A) The earlier of the date of the filing, if any, of a petition by or against the transferor under Title 11 of the United States Code and the date of the appointment of the Corporation, as receiver of such covered financial company or such covered subsidiary; or

(B) 30 days after such transfer takes effect between the transferor and the transferee.

(2) For the purposes of this paragraph (c), a transfer is not made until the covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), has acquired rights in the property transferred.

(d) *Limitations.* The provisions of this section do not act to waive, relinquish, limit or otherwise affect any rights or powers of the Corporation in any capacity, whether pursuant to applicable law or any agreement or contract.

§ 380.10–380.19 [Reserved]

4. Add reserved §§ 380.10 through 380.19;

5. Add subpart A, consisting of §§ 380.20 through 380.29, to read as follows:

Subpart A—Priorities

Sec.

380.20 Definitions.
380.21 Priorities.
380.22 Administrative expenses of the receiver.
380.23 Amounts owed to the United States.
380.24 Priority of claims arising out of loss of setoff rights.
380.25 Post-insolvency interest.
380.26 Effect of transfer of assets and obligations to a bridge financial company.
380.27–380.29 [Reserved]

§ 380.20 Definitions.

Allowed claim. The term *allowed claim* means a claim against the receivership that is allowed by the Corporation as receiver or upon which a final non-appealable judgment has been entered in favor of a claimant against a receivership by a court with jurisdiction to adjudicate the claim.

§ 380.21 Priorities.

(a) Unsecured claims against the covered financial company or the receiver that are proved to the satisfaction of the Corporation as receiver for the covered financial company shall be paid in the following order of priority:

(1) Repayment of debt incurred by or credit obtained by the Corporation as receiver for a covered financial company, provided that the Corporation as receiver has determined that it is otherwise unable to obtain unsecured credit for the covered financial company from commercial sources.

(2) Administrative expenses of the receiver, as defined in § 380.22, other than those described in paragraph (a)(1) of this subsection.

(3) Any amounts owed to the United States, as defined in § 380.23.

(4) Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual (other than an individual described in paragraph (a)(9) of this subsection), but only to the extent of $11,725 for each individual (as adjusted for inflation in accordance with paragraph (b) of this section) earned not later than 180 days before the date of appointment of the receiver.

(5) Contributions owed to employee benefit plans arising from services rendered not later than 180 days before the date of appointment of the receiver, to the extent of the number of employees covered by each such plan multiplied by $11,725 (as adjusted for inflation in accordance with paragraph (b) of this section); less the sum of:

(i) The aggregate amount paid to such employees under paragraph (a)(4) of this section, plus

(ii) The aggregate amount paid by the Corporation as receiver on behalf of such employees to any other employee benefit plan.

(6) Any amounts due to creditors who have an allowed claim for loss of setoff rights as described in § 380.24.

(7) Any other general or senior liability of the covered financial company (which is not a liability described under paragraphs (a)(8), (9) or (11) of this section).

(8) Any obligation subordinated to general creditors (which is not an obligation described under paragraph (a)(9) or (11) of this section).

(9) Any wages, salaries, or commissions, including vacation,

severance, and sick leave pay earned, owed to senior executives and directors of the covered financial company.

(10) Post-insolvency interest in accordance with § 380.25, provided that interest shall be paid on allowed claims in the order of priority of the claims set forth in paragraphs (a)(1) through (9) of this section.

(11) Any amount remaining shall be distributed to shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company arising as a result of their status as shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company, in proportion to their relative equity interests.

(b) All payment under subparagraphs (a)(4) and (5) of this section shall be as adjusted for inflation in the same manner that claims under 11 U.S.C. 507(a)(1)(4) are adjusted for inflation by the Judicial Conference of the United States pursuant to 11 U.S.C. 104.

(c) All unsecured claims of any category or priority described in paragraphs (a)(1) through (10) of this section shall be paid in full or provision made for such payment before any claims of lesser priority are paid. If there are insufficient funds to pay all claims of a particular category or priority of claims in full, then distributions to creditors in such category or priority shall be made *pro rata.*

§ 380.22 Administrative expenses of the receiver.

(a) The term "administrative expenses of the receiver" includes those actual and necessary pre- and post-failure costs and expenses incurred by the Corporation as receiver in liquidating the covered financial company; together with any obligations that the Corporation as receiver for the covered financial company determines to be necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company. Administrative expenses of the Corporation as receiver for a covered financial company include:

(1) Contractual rent pursuant to an existing lease or rental agreement accruing from the date of the appointment of the Corporation as receiver until the later of:

(i) The date a notice of the dissafirmance or repudiation of such lease or rental agreement is mailed, or

(ii) The date such disaffirmance or repudiation becomes effective; provided that the lesser of such lease is not in default or breach of the terms of the lease.

(2) Amounts owed pursuant to the terms of a contract for services performed and accepted by the receiver after the date of appointment of the receiver up to the date the receiver repudiates, terminates, cancels or otherwise discontinues such contract or notifies the counterparty that it no longer accepts performance of such services;

(3) Amounts owed under the terms of a contract or agreement executed in writing and entered into by the Corporation as receiver for the covered financial company after the date of appointment, or any contract or agreement entered into by the covered financial company before the date of appointment of the Corporation as receiver that has been expressly approved in writing by the Corporation as receiver after the date of appointment; and

(4) Expenses of the Inspector General of the Corporation incurred in carrying out its responsibilities under 12 U.S.C. 5391(d).

(b) Obligations to repay any extension of credit obtained by the Corporation as receiver through enforcement of any contract to extend credit to the covered financial company that was in existence prior to appointment of the Corporation as receiver pursuant to 12 U.S.C. 5390(c)(13)(D) shall be treated as administrative expenses of the receiver. Other unsecured credit extended to the receivership shall be treated as administrative expenses except with respect to debt incurred by or credit obtained by the Corporation as receiver for a covered financial company as described in § 380.21(a)(1).

§ 380.23 Amounts owed to the United States.

(a) The term "amounts owed to the United States" as used in § 380.21(a)(3) of this subpart includes all amounts due to the United States or any department, agency or instrumentality of the United States government, without regard for whether such amount is included as debt or capital on the books and records of the covered financial company. Such amounts shall include obligations incurred before and after the appointment of the receiver. Without limitation, "amounts owed to the United States" include all of the following, which all shall have equal priority under § 380.21(a)(3):

(1) Amounts owed to the Corporation for any extension of credit by the Corporation, including any amounts made available under 12 U.S.C. 5384(d), whether such extensions of credit are secured or unsecured;

(2) Unsecured amounts paid or payable by the Corporation pursuant to its guarantee of any debt issued by the covered financial company under the Temporary Liquidity Guaranty Program, 12 CFR part 370, any widely available debt guarantee program authorized under 12 U.S.C. 5612, or any other debt or obligation of any kind or nature that is guaranteed by the Corporation;

(3) Amounts owed to the Department of Treasury on account of unsecured tax liabilities of the covered financial company that directly result from the income or activities of the covered financial company; and

(4) The amount of any unsecured debt owed to a Federal reserve bank.

(b) The United States may, in its sole discretion, consent to subordinate the repayment of any amount due to the United States to any other obligation of the covered financial company provided that such consent shall be in writing by the appropriate Department, agency or instrumentality and shall specify the particular debt, obligation or other amount to be subordinated including the amount thereof and shall reference this section or 12 U.S.C. 5390(b)(1); and provided further that unsecured claims of the United States shall, at a minimum, have a higher priority than liabilities of the covered financial company that count as regulatory capital on the books and records of the covered financial company.

§ 380.24 Priority of claims arising out of loss of setoff rights.

(a) Notwithstanding any right of any creditor to offset a mutual debt owed by such creditor to any covered financial company that arose before the date of appointment the receiver against a claim of such creditor against the covered financial company, the Corporation acting as receiver for the covered financial company may sell or transfer any assets of the covered financial company to a bridge financial company or to a third party free and clear of any such rights of setoff.

(b) If the Corporation as receiver sells or transfers any asset free and clear of the setoff rights of any party, such party shall have a claim against the receiver in the amount of the value of such setoff established as of the date of the sale or transfer of such assets, provided that the setoff rights meet all of the criteria established under 12 U.S.C. 3590(a)(12).

(c) Any allowed claim pursuant to 12 U.S.C. 5390(a)(12) shall be paid prior to any other general or senior liability of the covered financial company described in § 380.21(a)(7) of this

subpart. In the event that the setoff amount is less than the amount of the allowed claim, the balance of the allowed claim shall be paid at the otherwise applicable level of priority for such category of claim under § 380.21.

§ 380.25 Post-insolvency interest.

(a) *Date of accrual.* Post-insolvency interest shall be paid at the post-insolvency interest rate calculated on the principal amount of an allowed claim from the later of:

(1) The date of the appointment of the Corporation as receiver for the covered financial company; or

(2) In the case of a claim arising or becoming fixed and certain after the date of the appointment of the receiver, the date such claim arises or becomes fixed and certain.

(b) *Interest rate.* Post-insolvency interest rate shall equal, for any calendar quarter, the coupon equivalent yield of the average discount rate set on the three-month Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar quarter. Post-insolvency interest shall be computed quarterly and shall be computed using a simple interest method of calculation.

(c) *Principal amount.* The principal amount of an allowed claim shall be the full allowed claim amount, including any interest that may have accrued to the extent such interest is included in the allowed claim.

(d) *Post-insolvency interest distributions.* (1) Post-insolvency interest shall only be distributed following satisfaction of the principal amount of all creditor claims set forth in § 380.21(a)(1) through (9) of this subpart and prior to any distribution pursuant to § 380.21(a)(11).

(2) Post-insolvency interest distributions shall be made at such time as the Corporation as receiver determines that such distributions are appropriate and only to the extent of funds available in the receivership estate. Post-insolvency interest shall be calculated on the outstanding principal amount of an allowed claim, as reduced from time to time by any interim distributions on account of such claim by the Corporation as receiver.

§ 380.26 Effect of transfer of assets and obligations to a bridge financial company.

(a) The purchase of any asset or assumption of any asset or liability of a covered financial company by a bridge financial company, through the express agreement of such bridge financial company, constitutes assumption of the contract or agreement giving rise to such asset or liability. Such contracts or agreements, together with any contract the bridge financial company may through its express agreement enter into with any other party, shall become the obligation of the bridge financial company from and after the effective date of the purchase, assumption or agreement, and the bridge financial company shall have the right and obligation to observe, perform and enforce their terms and provisions. In the event that the Corporation shall act as receiver of the bridge financial company any claim arising out of any breach of such contract or agreement by the bridge financial company shall be paid as an administrative expense of the receiver of the bridge financial company.

(b) In the event that the Corporation as receiver of a bridge financial company shall act to dissolve the bridge financial company, it shall wind up the affairs of the bridge financial company in conformity with the laws, rules and regulations relating to the liquidation of covered financial companies, including the laws, rules and regulations governing priorities of claims, subject however to the authority of the Corporation to authorize the bridge financial company to obtain unsecured credit or issue unsecured debt with priority over any or all of the other unsecured obligations of the bridge financial company, provided that unsecured debt is not otherwise generally available to the bridge financial company.

(c) Upon the final dissolution or termination of the bridge financial company whether following a merger or consolidation, a stock sale, a sale of assets, or dissolution and liquidation at the end of the term of existence of such bridge financial company, any proceeds that remain after payment of all administrative expenses of the bridge financial company and all other claims against such bridge financial company will be distributed to the receiver for the related covered financial company.

§§ 380.27–380.29 [Reserved]

6. Add subpart B, consisting of §§ 380.30 through 380.55, to read as follows:

Subpart B—Receivership Administrative Claims Process

Sec.
380.30 Receivership administrative claims process.
380.31 Definitions.
380.32 Claims bar date.
380.33 Notice requirements.
380.34 Procedures for filing claim.
380.35 Determination of claims.
380.36 Decision period.
380.37 Notification of determination.
380.38 Procedures for seeking judicial review of disallowed claim.
380.39–380.49 [Reserved]
380.50 Determination of secured claims.
380.51 Consent to certain actions.
380.52 Repudiation of secured contract.
380.53 Expedited relief.
380.54 Sale of collateral by receiver.
380.55 Redemption from security interest.

Subpart B—Receivership Administrative Claims Process

§ 380.30 Receivership administrative claims process.

The Corporation as receiver of a covered financial company shall determine claims against the company and the receiver in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2) through (5) and the regulations promulgated by the Corporation. The receivership administrative claims process shall not apply to any claim against a covered financial company that has been transferred to a bridge financial company or other party.

§ 380.31 Definitions.

(a) *Claim* means any right to payment from either the covered financial company or the Corporation as receiver, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(b) *Corporation, Corporation as receiver, and receiver* each means the Federal Deposit Insurance Corporation acting as receiver for a covered financial company.

(c) *Creditor* means a person asserting a claim.

§ 380.32 Claims bar date.

Upon its appointment as receiver for a covered financial company, the Corporation shall establish a claims bar date by which date creditors of the covered financial company shall present their claims, together with proof, to the receiver. The claims bar date shall be not less than 90 days after the date on which the notice to creditors to file claims is first published under § 380.33(a) of this subpart.

§ 380.33 Notice requirements.

(a) *Notice by publication.* Promptly after its appointment as receiver for a covered financial company, the Corporation shall publish a notice to the creditors of the covered financial company to file their claims with the receiver no later than the claims bar date. The Corporation as receiver shall republish such notice 1 month and 2 months, respectively, after the date the notice is first published. The notice to

creditors shall be published in one or more newspapers of general circulation where the covered financial company has its principal place or places of business. In addition to such publication in a newspaper, the Corporation may post the notice on the FDIC's Web site at *http://www.fdic.gov.*

(b) *Notice by mailing.* At the time of the first publication of the notice to creditors, the Corporation as receiver shall mail a notice to present claims no later than the claims bar date to any creditor shown in the books and records of the covered financial company. Such notice shall be sent to the last known address of the creditor appearing in the books and records or appearing in any claim found in the records of the covered financial company.

(c) *Notice by electronic media.* After publishing and mailing notice as required by paragraphs (a) and (b) of this section, the Corporation may communicate by electronic media with any claimant who expressly agrees to such form of communication.

(d) *Discovered claimants.* Upon discovery of the name and address of a claimant not appearing in the books and records of the covered financial company, the Corporation as receiver shall, not later than 30 days after the discovery of such name and address, mail a notice to such claimant to file claims no later than the claims bar date. Any claimant not appearing on the books and records that is discovered before the claims bar date shall be required to file a claim before the claims bar date, subject to the exception of § 380.35(b)(2) of this subpart. If a claimant not appearing on the books and records is discovered after the claims bar date, the Corporation shall notify the claimant to file a claim by a date not later than 90 days from the date appearing on the notice that is mailed to such creditor. Any claim filed after such date shall be disallowed, and such disallowance shall be final.

§ 380.34 Procedures for filing claim.

(a) *In general.* The Corporation as receiver shall provide, in a reasonably practicable manner, instructions for filing a claim, including by the following means:

(1) Providing contact information in the publication notice;

(2) Including in the mailed notice a proof of claim form that has filing instructions; and (3) Posting filing instructions on the Corporation's public Web site at *http://www.fdic.gov.*

(b) *When claim is deemed filed.* A claim that is mailed to the receiver in accordance with the instructions established under paragraph (a) of this section shall be deemed to be filed as of the date of postmark. A claim that is sent to the receiver by electronic media or fax in accordance with the instructions established under paragraph (a) of this section shall be deemed to be filed as of the date of transmission by the claimant.

(c) *Class claimants.* If a claimant is a member of a class for purposes of a class action lawsuit, whether or not the class has been certified by a court, each claimant must file its claim with the Corporation as receiver separately.

(d) *Indenture trustee.* A trustee appointed under an indenture or other applicable trust document related to investments or other financial activities may file a claim on behalf of the persons who appointed the trustee.

(e) *Legal effect of filing.* (1) Pursuant to 12 U.S.C. 5390(a)(3)(E)(i), the filing of a claim with the receiver shall constitute a commencement of an action for purposes of any applicable statute of limitations.

(2) *No prejudice to continuation of action.* Pursuant to 12 U.S.C. 5390(a)(3)(E)(ii) and subject to 12 U.S.C. 5390(a)(8), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue, after the receiver's determination of the claim, any action which was filed before the date of appointment of the receiver for the covered financial company.

§ 380.35 Determination of claims.

(a) *In general.* The Corporation as receiver shall allow any claim received by the receiver on or before the claims bar date if such claim is proved to the satisfaction of the Corporation. The Corporation as receiver may disallow any portion of any claim by a creditor or claim of a security, preference, setoff, or priority which is not proved to the satisfaction of the Corporation.

(b) *Disallowance of claims filed after the claims bar date.* (1) Except as otherwise provided in this section, any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i).

(2) *Certain exceptions.* Paragraph (b)(1) of this section shall not apply with respect to any claim filed by a claimant after the claims bar date and such claim shall be considered by the receiver if:

(i) The claimant did not receive notice of the appointment of the receiver in time to file such claim before the claims bar date, or the claim did not accrue until after the claims bar date, and

(ii) The claim is filed in time to permit payment. A claim is "filed in time to permit payment" when it is filed before a final distribution is made by the receiver.

§ 380.36 Decision period.

(a) *In general.* Prior to the 180th day after the date on which a claim against a covered financial company or the Corporation as receiver is filed with the Corporation, the Corporation shall notify the claimant whether it allows or disallows the claim.

(b) *Extension of time.* The 180-day period described in subsection (a) of this section may be extended by a written agreement between the claimant and the Corporation executed not later than 180 days after the date on which the claim against the covered financial company or the Corporation as receiver is filed with the Corporation (the "extended claims determination period"). If an extension is agreed to, the Corporation shall notify the claimant whether it allows or disallows the claim prior to the end of the extended claims determination period.

§ 380.37 Notification of determination.

(a) *In general.* The Corporation as receiver shall notify the claimant by mail of the decision to allow or disallow the claim. Notice shall be mailed to the address of the claimant as it last appears on the books, records, or both of the covered financial company; in the claim filed by the claimant with the Corporation as receiver; or in documents submitted in the proof of the claim. If the claimant has filed the claim electronically, the receiver may notify the claimant of the determination by electronic means.

(b) *Contents of notice of disallowance.* If the Corporation as receiver disallows a claim, the notice to the claimant shall contain a statement of each reason for the disallowance, and the procedures required to file or continue an action in court.

(c) *Failure to notify deemed to be disallowance.* If the Corporation does not notify the claimant before the end of the 180-day claims determination period, or before the end of any extended claims determination period, the claim shall be deemed to be disallowed, and the claimant may file or continue an action in court.

§ 308.38 Procedures for seeking judicial determination of disallowed claim.

(a) *In general.* In order to seek a judicial determination of a claim that has been disallowed, in whole or in part, by the Corporation as receiver, the claimant, pursuant to 12 U.S.C. 5390(a)(4)(A), may either:

(1) File suit on such claim in the district or territorial court of the United

States for the district within which the principal place of business of the covered financial company is located; or

(2) Continue an action commenced before the date of appointment of the receiver, in the court in which the action was pending.

(b) *Timing.* Pursuant to 12 U.S.C. 5390(a)(3)(A), a claimant who seeks a judicial determination of a claim disallowed by the Corporation must file suit on such claim before the end of the 60-day period beginning on the earlier of:

(1) The date of any notice of disallowance of such claim;

(2) The end of the 180-day claims determination period (unless such period has been extended with respect to such claim under § 380.36(b) of this subpart); or

(3) If the claims determination period was extended with respect to such claim under § 380.36(b), the end of such extended claims determination period.

(c) *Statute of limitations.* Pursuant to 12 U.S.C. 5390(a)(4)(C), if any claimant fails to file suit on such claim (or to continue an action on such claim commenced before the date of appointment of the Corporation as receiver) prior to the end of the 60-day period described in 12 U.S.C. 5390(a)(4)(B), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(d) *Jurisdiction.* Pursuant to 12 U.S.C. 5390(a)(9)(D), unless the claimant has first exhausted its administrative remedies by obtaining a determination from the receiver regarding a claim filed with the receiver, no court shall have jurisdiction over:

(1) Any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any covered financial company for which the Corporation has been appointed receiver, including any assets which the Corporation may acquire from itself as such receiver; or

(2) Any claim relating to any act or omission of such covered financial company or the Corporation as receiver.

§§ 380.39–380.49 [Reserved]

§ 380.50 Determination of secured claims.

In the case of a claim against a covered financial company that is secured by any property of the covered financial company, the receiver shall determine the amount of the claim; whether the claimant's security interest is legally enforceable and perfected; the priority of the claimant's security interest; and the fair market value of the property that is subject to the security interest. The receiver shall treat the portion of the claim that exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim.

§ 380.51 Consent to certain actions.

(a) A secured creditor may seek the consent of the Corporation as receiver to obtain possession of or exercise control over any property of the covered financial company that serves as collateral for the secured claim. Such consent may include the liquidation of such property by commercially reasonable methods taking into account existing market conditions, provided no involvement of the receiver is required.

(b) A party may seek the consent of the Corporation as receiver to the foreclosure or sale of any property of the covered financial company that serves as collateral for the secured claim. When the consent of the Corporation is sought hereunder, the secured creditor shall submit to the Corporation by certified mail a written request for the consent of the Corporation to the proposed action by the secured creditor. After the Corporation has gathered and analyzed the necessary information, the Corporation shall notify the secured creditor of its determination whether to grant consent as expeditiously as possible. If the Corporation determines not to grant consent, the Corporation shall include in the notification each reason why consent is not being given.

(c) Consents to be granted under this section are to be provided solely at the discretion of the Corporation. No person shall have any right to bring any action to direct or compel the granting of any consent under this section, or to pursue any claim or cause of action based on the alleged failure of the Corporation or any person acting on its behalf to take any action whatsoever under this section. Any consent granted by the Corporation as receiver under this section shall not act to waive or relinquish any rights granted to the Corporation in any capacity, pursuant to any other applicable law or any agreement or contract, and shall not be construed as waiving, limiting or otherwise affecting the rights or powers of the Corporation to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the Corporation regarding transfers taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law. The right to consent under this section may not be assigned or transferred to any purchaser of property from the Corporation.

§ 380.52 Repudiation of secured contract.

(a) To the extent that a contract to which a covered financial company is a party is secured by property of the company, the repudiation of the contract by the Corporation as receiver shall not be construed as permitting the avoidance of any legally enforceable and perfected security interest in the property, but the security interest shall be deemed to secure any claim for repudiation damages.

(b) The Corporation as receiver may consent to the exercise of any legal or contractual rights against the property, including liquidation, for the purpose of applying the value of the property or its proceeds up to the amount of the allowed claim for damages for repudiation.

§ 380.53 Expedited relief.

(a) *In general.* A secured creditor may seek expedited relief outside the administrative claims process upon alleging:

(1) A legally valid and enforceable or perfected security interest in property of a covered financial company or control of any legally valid and enforceable security entitlement in respect of any asset held by the covered financial company for which the Corporation has been appointed receiver; and

(2) That irreparable injury will occur if the claims procedure established under this subpart is followed.

(b) *Determination period.* No later than the end of the 90-day period beginning on the date on which a request for expedited relief is filed, the Corporation shall determine:

(1) Whether to allow or disallow such claim, or any portion thereof; or

(2) Whether such claim should be determined pursuant to the procedures established pursuant to this subpart.

(c) *Notice to claimant.* The Corporation shall notify the claimant of the determination made under this section and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining a judicial determination.

(d) *Period for filing or renewing suit.* Any claimant who files a request for expedited relief shall be permitted to file suit (or continue a suit filed before the date of appointment of the Corporation as receiver) seeking a determination of the rights of the claimant with respect to such security

interest (or such security entitlement) after the earlier of:

(1) The end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(2) The date on which the Corporation denies the claim or a portion thereof.

(e) *Statute of limitations.* If an action described in paragraph (d) of this section is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with paragraph (d) of this section, the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

§ 380.54 Sale of collateral by receiver.

(a) The Corporation as receiver may sell property of the covered financial company that is subject to a security interest. In such a case, the purchaser of such property shall take free and clear of the security interest, and the security interest shall attach to the proceeds of the sale. Such proceeds, up to the allowed amount of the secured claim, shall be remitted to the claimant within a reasonable time after the sale.

(b) If the receiver sells property subject to a security interest under subsection (a) of this section, a holder of such security interest may purchase the property from the receiver, and may offset its claim against the purchase price of such property.

(c) This section shall not apply with respect to any property that is subject to a security interest described in 12 U.S.C. 5390(a)(3)(D)(iii)(II).

§ 380.55 Redemption from security interest.

The Corporation as receiver may pay the secured creditor the fair market value of the property subject to a security interest up to the amount of the allowed secured claim in full and retain such property free and clear of such security interest.

By order of the Board of Directors.

Dated at Washington, DC, this 15th day of March 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–6705 Filed 3–22–11; 8:45 am]

BILLING CODE P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 700, 701, 702, and 741

RIN 3133–AD87

Net Worth and Equity Ratio

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: On January 4, 2011, President Obama signed Senate Bill 4036 into law, which, among other things, amends the statutory definitions of "net worth" and "equity ratio" in the Federal Credit Union Act. NCUA proposes to make conforming amendments to the definition of "net worth" as it appears in NCUA's Prompt Corrective Action regulation and the definition of "equity ratio" as it appears in NCUA's Requirements for Insurance regulation. NCUA also proposes to make technical changes in other regulations to ensure clarity and consistency in the use of the term "net worth," as it is applied to federally-insured credit unions.

DATES: Comments must be received on or before May 23, 2011.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Notice of Proposed Rulemaking (Net Worth and Equity Ratio)" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

A. Background

On January 4, 2011, President Obama signed Senate Bill 4036 (the Bill) into law. S. 4036, 111th Cong., Public Law 111–382 (2011). The Bill amends the Federal Credit Union Act (the Act) to clarify NCUA's authority to make stabilization fund expenditures without borrowing from the Treasury, amends the definitions of "equity ratio" and "net worth," and requires the Comptroller General of the United States to conduct a study on NCUA's handling of the recent corporate credit union crisis. The Bill is divided into four sections, each of which is discussed briefly below. The amendments in this proposed rule implement the changes made to the Act by sections two and three of the Bill.

1. Section One—Stabilization Fund

This section amends the Temporary Corporate Credit Union Stabilization Fund (TCCUSF) provisions of the Act in 12 U.S.C. 1795e. Specifically, the amendments add a new provision authorizing NCUA to make premium assessments of federally-insured credit unions to pay pending or future TCCUSF expenses directly, in addition to the existing authority to make assessments to repay Treasury advances. Public Law 111–382. Exercise of this direct assessment authority requires the NCUA Board "take into consideration any potential impact on credit union earnings such an assessment may have" and requires the premium be paid not later than 60 days following the assessment. The amendments also make clear that, during the period of time in which the Treasury agrees to extend the life of the TCCUSF, the NCUA can obtain additional advances from the Treasury. *Id.* NCUA does not have regulations on the TCCUSF, so no changes to NCUA regulations are necessary.

2. Section Two—Equity Ratio

Section two of the Bill amends § 202(h)(2) of the Act (12 U.S.C. 1782(h)(2)) by redefining the equity ratio for the National Credit Union Share Insurance Fund (NCUSIF or Fund). Under the amended definition, the equity ratio will be calculated "using the financial statements of the Fund alone, without any consolidation or combination with the financial statements of any other fund or entity." Public Law 111–382. The term "equity ratio" is defined in § 741.4(b) of NCUA's regulations and is used in several places throughout that section. As discussed more fully below, the Board, is proposing to amend the definition of "equity ratio" in NCUA's regulations to mirror the recent statutory change.

Section Three—Net Worth Definition

Section three of the Bill amends section 216(o)(2) of the Act (12 U.S.C. 1790(o)(2)) by redefining the term "net worth" as it applies to federally insured credit unions for purposes of prompt corrective action (PCA). The amended definition retains all of the existing elements of net worth and includes the