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The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique — Part II

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This is the second part of a two-part article discussing the Orderly Liquidation Authority established by Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In Part I the author discussed the background and legislative history of the Orderly Liquidation Authority. In Part II the author discusses the general terms and structure of the Orderly Liquidation Authority and recent rulemaking implementing the authority.

Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") creates a new statutory regime, the Orderly Liquidation Authority, which is intended to permit the orderly liquidation of a financial company whose failure could adversely affect the financial stability of the United States.[1] If invoked, the Orderly Liquidation Authority under Title II would be used in lieu of the Bankruptcy Code to resolve the troubled financial company. The Orderly Liquidation Authority is modeled upon the receivership provisions of the Federal Deposit Insurance Act (the "FDIA") applicable to insured depository institutions. It provides for the appointment of the Federal Deposit Insurance Corporation

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(the "FDIC") as the receiver for the troubled financial company. It further provides for the FDIC as receiver to wind-down the troubled institution in an orderly manner using many of the special powers and procedures that historically have applied to the liquidation of insured depository institutions under the FDIA.

The enactment of the Orderly Liquidation Authority was prompted by the experience in the fall of 2008 as a number of major U.S. financial institutions faced failure or the imminent prospect of failure. One of the lessons drawn from that experience by the Treasury Department and the senior federal regulators was that the existing statutory framework did not provide them with sufficient tools to address the risks presented by the failure of a major financial institution, particularly during a pandemic financial crisis.[2] As the Treasury Department noted in its financial reform report issued in June 2009, the federal statutory framework has specialized procedures for dealing with the failure of a banking institution, but not for a bank holding company or a nonbank financial institution.[3] When a bank holding company or other nonbank financial company encounters severe distress, there are two options: (i) obtain outside capital or (ii) file for bankruptcy. As the Treasury Department further noted in its report, during most economic climates these are suitable options that do not impact larger financial stability.[4] At a time of pandemic financial instability as in the fall of 2008, however, these two options are recast in a fundamentally different way. The options then become: (i) obtain emergency funding from the federal government as in the case of AIG; or (ii) file for a "disorderly" bankruptcy as in the case of Lehman Brothers.[5] Each of these two options was in the words of the treasury report "untenable." But to avoid a disorderly failure with systemic implications, the treasury was nonetheless forced to resort to government funding in the case of Bear Stearns and AIG.[6] The treasury thus proposed the Orderly Liquidation Authority as an alternative to the untenable options that the government decision-makers confronted at the depth of the financial crisis.

ORDERLY LIQUIDATION AUTHORITY AS AN OPTION

The Orderly Liquidation Authority is designed to permit an orderly liquidation or wind-down of a systemically important financial institution in a way that mitigates the collateral consequences to the financial system of the liquidation while avoiding the need for a taxpayer assisted rescue or bailout. It should be emphasized that the Orderly Liquidation Authority is available to the treasury and the other relevant authorities as an option that can be invoked if in their judgment the use of the Bankruptcy Code to resolve a particular financial institution would present systemic risks.

In a recent report on the Lehman Brothers bankruptcy, the FDIC identified the advantages that it sees in the use of the Orderly Liquidation Authority over the use of a Bankruptcy Code case for a systemically important financial institution.[7] The FDIC cited three overarching advantages. The first advantage is the availability of a fast and efficient mechanism, in the form of a bridge financial company, to preserve the going-concern value of the firm's assets and business lines. Modelled on the bridge bank authority in the FDIA, Title II authorizes the creation of a new federally chartered entity, a bridge financial company, to which assets and liabilities of the covered financial company may be transferred.[8] This bridge financial company can be used to continue key operations that are important to the market or other operations that have a going concern value that can best be preserved and maximized by their immediate transfer.

Related to this first advantage are two other advantages subsumed in the provisions of Title II. Similar to the receivership provisions in the FDIA, Title II provides the FDIC as receiver for a nonbank financial company with broad power to transfer assets and liabilities without any court approval or any other party's consent.[9] This power can be used to provide for an immediate transfer of assets and liabilities to a bridge financial company or other third party. Also similar to the provisions in the FDIA, Title II provides that a counterparty on a qualified financial contract ("QFC") is stayed for one business day in exercising any termination or netting rights arising solely from the appointment of the FDIC as receiver for a company or otherwise based on the financial condition of the company.[10] This one-business day delay would facilitate the transfer of a QFC book of business over a "resolution weekend" to a bridge financial company or theoretically even to a third party if such a party could be found.

A second significant advantage to Title II is the availability of government funding to preserve the continuity of systemically important operations. The availability of government funding (as discussed in more detail below) is an important distinction from the Bankruptcy Code route. This government funding is available immediately upon the initiation of the Orderly Liquidation Authority process.[11] In the case of the failure of a major financial company, the FDIC as receiver will have to take the immediate steps as part of an orderly liquidation plan to preserve the value of the assets of the failed company and to minimize the cascading consequences of the failure on the financial system. The assurance of funding from a secure source will be critical to the immediate execution of any such plan. The funding may be needed in the receivership proceeding itself, for any bridge financial company created by the FDIC, or for any third party that is prepared to assume parts of the operations of the failed financial company. A related advantage of government funding is that it can also be used by the FDIC as receiver to pay "advance dividends" to the creditors of the failed financial company.[12] As the FDIC has done as a receiver under the FDIA, the FDIC as a receiver under Title II can make advance dividends in partial satisfaction of unsecured creditor claims without waiting until all claims are valued or all assets are liquidated. The payment of advance dividends may mitigate to some extent the liquidity problems presented for creditors of the failed institution. The government funding can also allow the FDIC more time to liquidate assets. It thus avoids the systemic consequences of a fire sale of assets of the failed institution with the attendant "knock-on" effects for the general marketplace. It also permits a more orderly liquidation process promoting greater maximization of value for the creditors of the failed company itself.

Another significant advantage of the Orderly Liquidation Authority regime is that it lends itself more readily to advance planning than a bankruptcy process and in fact provides the "cover" for such a planning exercise. In the Lehman case, the lack of advance planning is thought to have contributed significantly to the diminution in value of the bankruptcy estate.[13] Title I of the Dodd-Frank Act requires advance resolution planning under the Bankruptcy Code by all systemically important financial institutions.[14] Advance planning under Title I will presumably now be conducted without the specific market consequences that would otherwise attach to a company engaging in bankruptcy planning.[15] Title I provides the cover for systemically important financial companies and the relevant regulators to engage in detailed analyses of recovery and resolution plans for individual institutions as part of the regular supervisory process. This advance planning exercise will presumably be beneficial in either ultimate scenario, a bankruptcy filing or an orderly liquidation under Title II.

EXCLUSIVITY OF ORDERLY LIQUIDITY AUTHORITY

Invocation of the Orderly Liquidation Authority is not mandatory and the Treasury Department and the relevant federal regulators will have the broad authority to determine whether and when to invoke the special liquidation regime. Resolution under the Bankruptcy Code should continue as the "dominant tool" for handling the failure of financial institutions, even large financial institutions.[16] The Orderly Liquidation Authority thus does not displace the Bankruptcy Code in general as the tool for handling the resolution of financial institutions. However, if the Orderly Liquidation Authority is invoked with respect to a particular financial company (referred to in Title II as a "covered financial company"), it does displace the Bankruptcy Code with respect to that covered financial company.

The provisions of Title II relating to the Orderly Liquidation Authority will exclusively apply to and govern all matters relating to the liquidation of the covered financial company for which the FDIC has been appointed a receiver.[17] No case or proceeding under the Bankruptcy Code may be commenced with respect to the covered financial company at any time that an orderly liquidation is pending.[18] If a case or proceeding under the Bankruptcy Code with respect to the covered financial company has been commenced prior to the appointment of the FDIC as receiver under Title II, the case or proceeding will be dismissed upon notice to the Bankruptcy Court.[19]

FINANCIAL COMPANIES SUBJECT TO TITLE II

The Orderly Liquidation Authority established by Title II can be invoked with respect to any "financial company" if the secretary of the treasury (the "secretary") and the appropriate federal regulatory authorities make the required systemic risk determination with respect to that company (as discussed further below). The scope of potential application of the Orderly Liquidation Authority is thus established in the first instance by the definition of the term "financial company." The term "financial company" is defined in Section 201(a)(11) of Title II to mean any company that is incorporated or organized under any provision of federal law or the laws of any state and that is:

(i) a bank holding company as defined in Section 2(a) of the Bank Holding Company Act of 1956 (the "BHCA");

(ii) a nonbank financial company supervised by the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") pursuant to Title I;

(iii) any company that is predominantly engaged in activities that the Federal Reserve Board has determined are financial in nature or incidental thereto for purposes of Section 4(k) of the BHCA ("financial activities"); or

(iv) any subsidiary of any company described in clauses (i) through (iii) that is predominantly engaged in financial activities other than a subsidiary that is an insured depository institution or an insurance company.[20]

The defined term is broad in its scope. As one would expect, it explicitly covers any nonbank financial company designated for supervision by the Federal Reserve Board under Title I.[21] A nonbank company engaged in financial activities that has not been designated for supervision by the Federal Reserve Board under Title I is also potentially subject to the Orderly Liquidation Authority under clause (iii) of the definition if the company is predominantly engaged in financial activities and if the necessary systemic risk findings under Title II are made with respect to the company. For purposes of Title II a company will not be deemed to be "predominantly engaged" in financial activities if the consolidated revenues of the company from financial activities constitute less than 85 percent of the total consolidated revenues of the company.[22] Clause (iii) of the definition provides the flexibility to subject a company predominantly engaged in financial activities to the Orderly Liquidation Authority even if the company had not previously been designated for supervision as a systemically significant financial institution under Title I.[23]

Clause (i) of the definition makes any bank holding company eligible for the Orderly Liquidation Authority if the necessary systemic risk determination is made. Chairman Sheila Bair of the FDIC testified early in the legislative process that it would be desirable for the FDIC to have resolution authority over non-systemically important depository holding companies as well as over systemically important depository holding companies.[24] She observed that many of the essential services for a bank's operation reside in other portions of a holding company that are beyond the reach of the FDIC's resolution authority under the FDIA. The loss of such services may make it difficult to preserve the value of a failed bank's assets or otherwise to resolve the bank on the least cost basis to the FDIC insurance fund.[25] Chairman Bair argued that extending the FDIC resolution authority to the holding companies generally would facilitate the resolution process at the insured depository institution level. Notwithstanding this expressed desire by Chairman Bair, the Orderly Liquidation Authority will only apply to a depository holding company if a systemic risk determination is made. It should also be noted that while the definition of "financial company" in Title II does not encompass a savings and loan holding company as such, the definition would encompass a savings and loan holding company that has been designated under Title I as a nonbank financial company requiring supervision by the Federal Reserve Board and potentially any other savings and loan holding company that is predominantly engaged in financial activities.

Clause (iv) of the definition makes any subsidiary of any company described in clauses (i) through (iii) that is predominantly engaged in financial activities (other than a subsidiary that is an insured depository institution or an insurance company) a "financial company." This clause has the effect of potentially subjecting, for example, a broker-dealer subsidiary of a holding company as well as the holding company to the Orderly Liquidation Authority. The exclusion of an insured depository institution and an insurance company from the reach of clause (iv) is explained by the fact that alternative federal or state resolution schemes are applicable to such subsidiaries.[26] An insured depository subsidiary of a holding company will remain subject to the standard resolution and liquidation provisions of the FDIA. An insurance company subsidiary will likewise remain subject to the state insolvency laws but with one possible intersection with the provisions of Title II discussed further below. The holding company for an insured depository institution or for an insurance company would, however, remain potentially subject to resolution under the Orderly Liquidation Authority. In addition, in any case in which the FDIC is appointed as a receiver for a financial company under Title II, the FDIC may thereafter appoint itself as the receiver for any subsidiary of that company other than an insured depository institution subsidiary, insurance company subsidiary, or Securities Investor Protection Corporation ("SIPC")-member broker-dealer subsidiary if the FDIC and the secretary make the determination that the subsidiary is in default or danger of default, that the action would mitigate serious adverse effects on financial stability, and that the action would facilitate the orderly liquidation of the covered financial company.[27]

SYSTEMIC RISK DETERMINATION PROCESS

A financial company will become subject to the Orderly Liquidation Authority (and thus a covered financial company) only if the secretary and the specified federal regulatory agencies invoke the authority by making a "systemic risk" determination as provided in Section 203 of Title II.[28] The process for making a systemic risk determination is a critical element in the operation of the Orderly Liquidation Authority regime. The legislative history indicates that the process for making the systemic risk determination includes "several steps intended to make the use of the authority very rare."[29] Thus there should be "a strong presumption that the Bankruptcy Code will continue to apply to most failing financial institutions (other than insured depository institutions and insurance companies which have their own separate resolution processes), including large financial institutions."[30]

The process for making a systemic risk determination in Section 203 is modeled on the systemic risk provision in Section 13(c)(4)(G) of the FDIA.[31] Under Section 203 the systemic risk determination process is initiated by the FDIC and the Federal Reserve Board, either on their own initiative or at the request of the secretary, making a written recommendation to the secretary that the secretary appoint the FDIC as receiver for a financial company. This recommendation must be supported by a vote of not fewer than two-thirds of the directors of the FDIC and two-thirds of the members of the Federal Reserve Board. The process is slightly modified if a broker-dealer or insurance company is involved. In the case of a broker-dealer or a holding company in which the largest U.S. subsidiary is a broker-dealer, the Securities and Exchange Commission (rather than the FDIC) and the Federal Reserve Board would make the recommendation, on a two-thirds vote in the case of each agency, in consultation with the FDIC. In the case of an insurance company or a holding company in which the largest U.S. subsidiary is an insurance company, the director of the Federal Insurance Office (a new office in the treasury established pursuant to Title V of the Dodd-Frank Act) and the Federal Reserve Board would make the recommendation on the vote of two-thirds of the members of the Federal Reserve Board, in consultation with the FDIC.[32]

The written recommendation to the secretary from the specified federal agencies must contain the following:

- an evaluation of whether the financial company is in default or in danger of default;
- a description of the effect that the default of the financial company would have on financial stability in the United States;
- a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities;
- a recommendation regarding the nature and the extent of actions to be taken under Title II regarding the financial company;
- an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company;
- an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company;
- an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and
- an evaluation of whether the company satisfies the definition of a financial company under Section 201 of Title II.[33]

Upon receipt of such a written recommendation, the secretary in consultation with the president must in turn make the determination that:

- the financial company is in default or in danger of default;
- the failure of the financial company and its resolution under otherwise applicable federal or state law would have serious adverse effects on financial stability in the United States;
- no viable private sector alternative is available to prevent the default of the financial company;
- any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under Title II is appropriate, given the impact that any action taken under Title II would have on financial stability in the United States;
- any action under Section 204 (which includes authority to provide federal funding to the receivership) would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company;
- a federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and
- the company satisfies the definition of a financial company under Section 201.[34]

NOTICE TO COMPANY AND JUDICIAL REVIEW

Upon making a determination under Section 203, the secretary must notify the covered financial company.[35] This notification to the covered financial company theoretically triggers a binary process. If the board of directors of the company acquiesces to the appointment of the FDIC as receiver, the secretary will thereupon appoint the FDIC as receiver.[36] Title II expressly exculpates the members of a board of directors from liability to shareholders or creditors for acquiescing in good faith to the appointment of the FDIC as a receiver.[37] This provision parallels a provision in the FDIA that protects directors of an insured depository institution from liability for acquiescing to the appointment of the FDIC as conservator or receiver for the institution.[38] This provision is intended to promote acquiescence by the board of directors to the appointment of the FDIC as receiver, thus avoiding the need for a court review discussed below.

If the board of directors of the company does not acquiesce, the secretary must petition the United States District Court for the District of Columbia (the "District Court") for an order authorizing the secretary to appoint the FDIC as receiver.[39] This petition is filed under seal and the ensuing judicial process is to be conducted on a strictly confidential basis.[40] The District Court will provide notice and an opportunity for a hearing to the covered financial company, but with significant constraints on both the timing and scope of the judicial review process. The District Court review of the petition is limited to two issues: the secretary's determination that the company is "in default or in danger of default" and the secretary's determination that the company satisfies the definition of "financial company."[41] Thus, the District Court review does not extend to the fundamental determination that the failure and resolution of the covered financial company under the Bankruptcy Code would have serious adverse effects on financial stability in the U.S. Moreover, even as to the two determinations that are subject to judicial review, the standard of review is an arbitrary and capricious standard.[42] If the District Court upholds the secretary's determination on these two issues, the District Court will issue an order immediately authorizing the secretary to appoint the FDIC as receiver. Under the provisions of Title II, the District Court has 24 hours from the time of receipt of the petition to act upon the petition.[43] If the District Court does not act on the petition within 24 hours, the petition is deemed granted by operation of law and the liquidation under Title II begins automatically without further notice or action.[44] Title II provides for a limited right to appeal from the decision of the District Court. The secretary of the treasury or the covered financial company may appeal the decision of the District Court to the Court of Appeals for the District of Columbia (the "Court of Appeals") not later than 30 days after the decision of the District Court has been rendered (or deemed rendered).[45] The Court of Appeals is to consider the appeal on an expedited basis. The scope of review is limited to the two determinations reviewed by the District Court under an arbitrary and capricious standard.[46] Moreover, there can be no stay of the District Court decision pending any appeal.[47] Because the FDIC as receiver will almost certainly take immediate action under the Orderly Liquidation Authority, including the transfer of assets and liabilities to a bridge financial company or possibly to other third parties, the absence of a stay may mean that there would be no effective remedy even if the Court of Appeals were theoretically to overturn the decision of the District Court approving a petition to appoint the FDIC as receiver. Title II also provides for the possibility of discretionary review by the Supreme Court under a writ of certiorari. The scope of the Supreme Court's discretionary review is subject to the same limitations as the review by the Court of Appeals.[48]

CONGRESSIONAL OVERSIGHT

Title II also provides significant elements of congressional oversight over the use and operation of the Orderly Liquidation Authority. Section 203(c) requires the secretary of the treasury within 24 hours after appointing the FDIC as a receiver for a covered financial company to provide a report to the majority leader and the minority leader of the Senate and the speaker and the minority leader of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.[49] This report is to provide a summary of the basis for the determination and to cover certain other matters such as an estimate on the potential effect of the resolution of the covered financial company under otherwise applicable insolvency law on financial stability in the U.S., the potential effect of the appointment of the FDIC as receiver on the financial system, financial markets and other financial companies, and whether the resolution of the covered financial company under otherwise applicable insolvency law would cause banks and other financial companies to experience severe liquidity stress.[50]

Not later than 60 days after its appointment as receiver for a covered financial company, the FDIC must file a detailed operational report with the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.[51] This report must cover such matters as the FDIC's plan to wind down the company, the reasons for providing any funding to the receivership, the expected costs of the orderly liquidation, and the identity of any claimant that is treated in a manner different than other similarly situated claimants (a special authority provided to the FDIC as receiver under Title II which is discussed in further detail below).[52] The FDIC must update this report not less frequently than quarterly. The FDIC and the primary financial regulatory agency for the covered financial company must appear before Congress if requested not later than 30 days after the FDIC has filed its first report.[53] Title II also provides that the comptroller general of the United States shall review and report to Congress on any determination made by the secretary to appoint the FDIC as a receiver.[54] This review by the comptroller general generally mirrors a similar requirement under the systemic risk provision in Section 13(c)(4)(G)(iv) of the FDIA.[55]

Title II provides at least one other element of congressional oversight on the ongoing operation of a Title II receivership. Section 202 provides that an appointment of the FDIC as a receiver under Title II will terminate three years after the date of appointment.[56] The FDIC may extend the life of the receivership for two additional one-year periods if the FDIC certifies in writing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House that the extension is necessary (i) to maximize the value of assets of the covered financial company or minimize losses relating to the covered financial company and (ii) to protect the stability of the financial system. As part of this extension, the FDIC must submit a report describing the need for the extension and providing a specific plan to conclude the receivership before the end of the second extension.[57] The combination of these various reporting and review requirements suggests that there will likely be active congressional oversight of the treasury and the FDIC if the Orderly Liquidation Authority is ever invoked.

SPECIAL PROVISIONS FOR CERTAIN COMPANIES

As noted above, the scope of the defined term "financial company" is broad. Given the broad scope of the defined term, Title II makes special provision for the potential treatment of certain types of financial companies. An insured depository institution as a subsidiary of a company is excluded from application of Title II by virtue of an express carve-out in Section 201(a)(11)(B)(iv). As noted above, this carve-out is premised on the fact that an insured depository institution subsidiary of a financial company is directly subject to the resolution and receivership provisions of the FDIA. The language of clause (iii) in the defined term could theoretically present an interpretive issue for an insured depository institution that is not a subsidiary of another company. Because the FDIA applies to such an institution, it would be neither necessary nor appropriate to construe clause (iii) as reaching such an institution.[58]

An insurance company as a subsidiary of a company is also excluded from the direct application of Title II by virtue of the express carve-out in Section 201(a)(11)(B)(iv).[59] Nonetheless, an insurance company on its own may fall within the ambit of Section 201(a)(11)(B)(iii) as a company predominantly engaged in financial activities. Because of this possibility, Section 203(e) makes special provision for insurance companies. Section 203(e)(1) provides that if an insurance company is itself a covered financial company (*i.e.*, a systemic risk determination is made as to the insurance company under Section 203(b) presumably based on the application of Section 201(a)(11)(B)(iii)), or if the insurance company is a subsidiary or affiliate of a covered financial company, the liquidation or rehabilitation of the insurance company will be conducted as provided under applicable state law.[60] Section 203(e)(2) provides that the special provision made for insurance companies in Section 203(e)(1) does not apply with respect to any subsidiary or affiliate of an insurance company that is itself not an insurance company. Such subsidiaries or affiliates could be placed into a Title II orderly liquidation proceeding. Moreover, Section 203(e)(3) provides limited back-up authority to the FDIC in a case where an insurance company itself is a covered financial company, *i.e.*, where a systemic risk determination has been made as to it by the secretary of treasury in accordance with the provisions of Section 203(a)(1)(C). Section 203(e)(3) provides that if, within 60 days after the systemic risk determination has been made with respect to the insurance company, the appropriate regulatory agency has not filed the appropriate judicial action in the appropriate state court to place the insurance company into orderly liquidation under the laws of the state, the FDIC will have the authority "to stand in the place" of the appropriate regulatory agency and file the appropriate judicial action in the appropriate state court to place the insurance company into orderly liquidation "under the laws and requirements of the State."[61] This is an unusual provision and poses several interpretive questions. The state insurance laws typically include specific provisions that govern the rehabilitation or liquidation of insurance companies incorporated by the state.[62] These laws typically provide that only the state insurance commissioner may petition a specified court of the state to initiate a rehabilitation or liquidation proceeding.[63] The state court order to rehabilitate or liquidate the business of an insurer must appoint the state insurance commissioner as the rehabilitator or liquidator.[64]

One interpretative issue arises from the difference between the language in Section 203(e)(1), which provides that the liquidation *or* rehabilitation of the insurance company would be conducted under state law, and the language in Section 203(e)(3), which provides that if the state authority has not filed a state court action to place the insurance company into orderly *liquidation* within 60 days, the FDIC may file an appropriate judicial action to place the insurance company into orderly liquidation under state law. If the state insurance authority initiates a rehabilitation proceeding under state law within 60 days of the systemic risk determination, does that action satisfy the condition in Section 203(e)(3) or may the FDIC require a liquidation rather than a rehabilitation of an insurance company under state law if a systemic risk determination has been made with respect to the insurance company? Another interpretive issue arises from the interaction between the language of Section 203(e)(3) and the provisions of state insurance law. How will a state court construe the authority of the FDIC to stand in the place of the appropriate state regulatory agency to file an action to commence an orderly liquidation under state law when state law provides that only a state insurance commissioner may initiate the state court proceeding either for rehabilitation or liquidation? Can Section 203(e)(3) be read as a matter of federal law to require a state court to act upon a filing made by the FDIC "in the place" of the appropriate state regulatory agency? These interpretive issues may be resolved as a practical matter by advance consultation between the federal authorities and the state authorities.

In any event, Section 203(e) does not affect the potential applicability of the Orderly Liquidation Authority to an insurance holding company or any subsidiary of an insurance company that is not itself an insurance company. Accordingly, a fact pattern can be envisioned in which a holding company of an insurance company and sister companies and subsidiaries of the insurance company are placed into an orderly liquidation process under Title II while the insurance company is liquidated (or perhaps rehabilitated) by the state insurance authority under the applicable state insurance law. The conflicts and complications of such parallel proceedings are easily imagined. Title II provides only in the most general way for coordination in these matters. Section 204(c) directs the FDIC to consult with the primary financial regulatory agencies for any subsidiaries of a covered financial company that are not themselves covered subsidiaries and coordinate with such regulators regarding the treatment of solvent subsidiaries and the separate resolution of insolvent subsidiaries under other governmental authority.[65] The National Association of Insurance Commissioners (the "NAIC") has established a working group to analyze the issues presented by Title II. The working group quickly fell to the task of drafting a new chapter for inclusion in the NAIC Receiver's Handbook for Insurance Company Insolvencies entitled "State Implementation of a Dodd-Frank Receivership."[66] The draft of the chapter identifies the many legal and practical issues that Section 203(e) would present if invoked with respect to an insurance company.

Title II also makes special provision for a broker or dealer that is registered with the SEC and is a member of the SIPC. Section 205 provides that if the FDIC is appointed as a receiver for such a broker or dealer, the FDIC must appoint the SIPC to act as trustee for the liquidation of the broker or dealer under the Securities Investor Protection Act of 1970 ("SIPA").[67] Section 205 and various provisions in Section 210 seek to coordinate the functions of the SIPC as trustee in liquidating the broker or dealer with the functions of the FDIC as receiver under Title II, although various ambiguities arise under the relevant language of Title II as to these potentially overlapping regimes. For example, Section 205 envisions that the FDIC may transfer certain assets and liabilities of a broker or dealer to a bridge financial company consistent with the general powers granted to the FDIC to establish bridge financial companies and transfer assets and liabilities while leaving other assets and liabilities in the receivership of the broker or dealer to be administered by the SIPC. Section 205(a)(2)(B) provides that the determination of claims and the liquidation of assets retained in the receivership of the broker or dealer and not transferred to a bridge financial company will be administered by SIPC under SIPA.[68]

However, Section 205(a)(2)(D) provides that as trustee, SIPC shall determine and satisfy *all* claims against the broker or dealer arising on or before the filing date.[69] Section 205(b)(4) provides that notwithstanding any provision of SIPA, the rights and obligations of any counterparty to a "qualified financial contract" to which the broker or dealer is a party will be governed by the provisions of Title II.[70] But Section 205(d)(1) provides that no action taken by the FDIC as receiver may adversely affect the rights of a customer to customer property or customer name securities, diminish the amount or timely payment of net equity claims of customers or otherwise impair recoveries to a customer under SIPA.[71] Section 205(f)(1) also provides that all obligations of the broker or dealer or any bridge financial company established with respect to the broker or dealer to a customer relating to, or net liquidity claims based on, customer property or customer name securities will be promptly discharged by SIPC, the FDIC or the bridge financial company in a manner and in an amount at least as beneficial to the customer as would have been the case had the actual proceeds from the liquidation of the broker or dealer under Title II been distributed in a proceeding under SIPA.[72] Under Section 205(f)(2) the FDIC is required to satisfy customer claims to the extent that a customer would have received more securities or cash with respect to the allocation of customer property had the broker or dealer been subject to a proceeding under SIPA.[73] Under Section 205(g), the SIPC will allocate customer property and deliver customer name securities in accordance with the applicable provisions of SIPA, but all other claims will be paid in accordance with the priorities set forth in Title II.[74] The ambiguities that arise under Section 205 may ultimately be clarified by the rules that the FDIC and the SEC are required to issue jointly to implement this section.[75] In a recent rulemaking under Title II, the FDIC has stated that it intends in a subsequent joint rulemaking with the SEC to address issues relating to the orderly liquidation of broker-dealers.[76]

GENERAL PURPOSE OF THE ORDERLY LIQUIDATION AUTHORITY

In contrast to the Bankruptcy Code, the Orderly Liquidation Authority is not designed to facilitate a reorganization or a fresh start for a company. Instead, the purpose of the Orderly Liquidation Authority as stated in Section 204(a) is to provide the "necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard."[77] This statement of purpose encapsulates the challenge that underlies the Orderly Liquidation Authority: on the one hand, to liquidate a failing firm in a manner that limits the risk to the financial system; on the other hand, to minimize the moral hazard that comes from protecting the financial system as a whole from the failure of a systemically important financial company. As various commentators have noted, it will require a careful balancing act to handle the tension between these two stated purposes.[78]

Section 204(a) provides further general directions on how the FDIC is to implement the Orderly Liquidation Authority. Section 204(a) states that the authority provided under Title II is to be exercised in a manner that best fulfills the general purpose stated above so that:

(i) creditors and shareholders bear losses;

(ii) management responsible for the condition of the company is not retained; and

(iii) the FDIC and the other appropriate agencies take all steps necessary to assure that all parties, including management and directors, having responsibility for the condition of the company bear losses consistent with their responsibility, including actions for damages, restitution and recoupment of compensation.[79]

Section 206 of Title II contains several similar directives.[80] Section 206 provides first that in taking any action under Title II the FDIC must decide that the particular action is necessary for the purpose of protecting the financial stability of the United States rather than for the purpose of preserving the particular failing company. Second, the FDIC must ensure that unsecured creditors bear losses in accordance with the priority of claims provisions in Title II and that shareholders do not receive any payment until all other claims, including government funding claims, are fully paid. Third, the FDIC must ensure that the management and members of the board responsible for the failed condition of the company are removed. Finally, the FDIC may not take an equity interest in or become a shareholder of the covered financial company or any covered subsidiary.[81] These general directives appear consistent with the purpose of the Orderly Liquidation Authority as stated in Section 204(a). The requirement that the FDIC not take an equity interest is consistent with the notion that the covered financial company is not to be preserved or reorganized. The requirement that the management and directors "responsible" for the failed condition of the company be removed is consistent with the general notion that the management of the company is not to be running the operation of the company as a debtor-in-possession. Some flexibility in the application of these directives may nonetheless be in order. It might be appropriate in certain circumstances for the FDIC as receiver to take an equity interest in a bridge financial company which will be the successor to certain of the assets and liabilities of the failed company. Presumably, the language of Section 206 will be read to allow for such a possibility. Likewise, the FDIC will presumably want to consider how to implement the requirement for removal of "management" to provide flexibility at least in dealing with members who do not constitute senior management.[82]

Additional guidance on the principles that the FDIC must observe in taking action under Title II is provided in Section 210(a)(9). This section states that in exercising any power as receiver, the FDIC shall "to the greatest extent practicable" conduct its operations in a manner that among other things:

(i) maximizes the net present value return from the sale or disposition of assets;

(ii) minimizes the amount of any loss realized in the resolution of cases; and

(iii) mitigates the potential for serious adverse effects to the financial system.[83]

The broad contours of the directives contained in Sections 204, 206, and 210 will require further delineation in the overall rulemaking process that is provided for in Section 209.

The scope of the rulemaking process envisioned by Section 209 is itself an important element of the Orderly Liquidation Authority. Section 209 provides that the FDIC in consultation with the Financial Stability Oversight Council (the "Council") *shall* prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement Title II.[84] These rules may include rules with respect to the rights, interests and priorities of creditors, counterparties and security entitlement holders with respect to the covered financial company or any assets or property of and held by the covered financial company. The rules may also address the potential for conflicts of interest between individual receiverships established under Title II and receiverships established under the FDIA. Section 209 further provides that "to the extent possible" the FDIC shall seek "to harmonize applicable rules and regulations promulgated under [Section 209] with the insolvency laws that would otherwise apply to a covered financial company."[85] The treasury draft legislation and the House-passed version of the resolution authority merely provided that the FDIC "may" issue rules to implement the resolution authority.[86] Section 209 was revised as part of the Senate legislative process to require the FDIC to issue rules to implement Title II. This change was apparently made because the FDIC has historically implemented its receivership authority under the FDIA with only minimal rulemaking, relying instead on statements of policy or case law to define its approach.[87] The requirement for a comprehensive rulemaking process under Title II will likely ensure a more formal approach to the development of the Orderly Liquidation Authority than under the FDIA. The treasury draft legislation and the House-passed version of resolution authority also did not include the additional provision directing the FDIC to harmonize to the extent possible the rules under Title II with the insolvency rules that would otherwise be applicable to the company.[88] In its initial rulemaking under Title II, the FDIC has said that the liquidation rules under Title II are designed "to create parity in the treatment of creditors with the Bankruptcy Code" as reflected in the "direct mandate" of Section 209.[89] As so construed, this "direct mandate" in Section 209 may prove one of the most important provisions in Title II from a creditor rights' perspective.

FUNDING FOR THE ORDERLY LIQUIDATION AUTHORITY

Perhaps the most important element of the Orderly Liquidation Authority and certainly the element that most clearly distinguishes the Orderly Liquidation Authority from the Bankruptcy Code approach is the availability of government funding to facilitate the liquidation and wind-down of the covered financial company. There are several basic provisions in Title II that provide the authority and mechanics for this funding. Section 204(d) provides that upon appointment as a receiver, the FDIC in its discretion may make available to the receivership, subject to certain restrictions discussed below, funds for the orderly liquidation of the covered financial company.[90] Any funds provided by the FDIC will be entitled to a priority for payment in the receivership.[91] The FDIC may use the funds to make loans to the covered financial company or any covered subsidiary, purchase or guarantee assets of the covered financial company or any covered subsidiary, assume or guarantee liabilities of the covered financial company or any covered subsidiary, take a lien on any or all assets of the covered financial company or any covered subsidiary, sell or transfer assets or liabilities of the covered financial company or any covered subsidiary, or to make "additional" payments to certain creditors (as described further below).[92] This broad authority is designed to provide the FDIC with the ability to fund the systemically important functions of a failed institution over an orderly wind-down period, to fund a bridge financial company, to facilitate the transfer of assets or liabilities to a third-party financial company, or to pay out claims in the receivership without the need for a fire-sale of assets in the receivership.

The source of the funds that the FDIC would use to implement this funding authority is provided in Section 210(n)(5).[93] This section authorizes the FDIC upon its appointment as a receiver for a covered financial company to issue obligations to the secretary of the treasury. Under Section 210(n)(6) the ability of the FDIC as receiver to borrow from the treasury is limited, however, to the aggregate of (i) an amount equal to 10 percent of the total consolidated assets of the covered financial company (based on the company's most recent financial statement) during the initial 30-day period following the date of the FDIC's appointment as receiver and (ii) an amount equal to 90 percent of the fair value of the total consolidated assets of the covered financial company "available for repayment" after the initial 30-day period following the date of the FDIC's appointment as receiver.[94]

The statutory language presents a number of questions which will have to be clarified through regulations to be issued by the FDIC and the treasury (as required by Section 210(n)(7)). For example, the 10 percent limit for the initial 30-day borrowing period is based on the most recent financial statement of the failed company, which presumably will be based on historical cost for those assets that are not required under accounting principles to be carried at fair value. The subsequent fair value adjustment (triggered by the receivership event) for assets previously carried on an historical cost accounting basis will likely produce a significantly lower borrowing base for the borrowing period commencing after the initial 30 days. If the initial borrowing base is fully used during the initial 30 days, it will mean that the subsequent borrowing base will actually be less than 90 percent of the fair value because the test is calculated on an aggregate basis.[95]

It is also unclear which consolidated assets should be deemed to be "available for repayment." Assets owned by the covered financial company itself that are subject to existing third-party lien presumably should not be deemed available for purposes of the calculation except to the extent the borrowed funds will be used to discharge the lien. However, are unencumbered assets at a covered subsidiary generally to be deemed "available for repayment" or only to the extent that the funds borrowed by the FDIC are actually made available to the covered subsidiary? In this regard, one must also consider the language in Section 204(d), which allows the FDIC to take a lien on any or all assets of a covered financial company or a covered subsidiary, including a first priority lien on unencumbered assets of the covered financial company or any covered subsidiary. It would appear that the FDIC should be able to obtain a first priority lien on the unencumbered assets of a covered subsidiary only to the extent that the funds borrowed by the FDIC are actually made available to the covered subsidiary.[96] An additional question arises with respect to the treatment of a subsidiary of a covered financial company that is *not* a covered subsidiary.[97] It would appear that the maximum borrowing base under Section 210(n)(6)(B) would not include the assets of such a subsidiary (even if previously consolidated with the covered financial company for financial statement purposes) because the assets of that subsidiary may not be regarded as "available for repayment" of the FDIC borrowing (except to the extent of the net asset value of the subsidiary).

The FDIC recently issued a proposed rule to implement the maximum obligation limitation in Section 210(n)(6).[98] The proposed rule attempts to address certain of these interpretive issues. The proposed rule defines the term "fair value" for purposes of Section 210(n)(6) to mean the expected value of an asset or group of assets based on the assumption that the asset or group of assets is sold or otherwise disposed of in "an orderly transaction." The preface to the proposed rule explains that this formulation has been proposed to distinguish it from a valuation based on a "forced liquidation value" or a "distressed sale basis," such as a liquidation under Chapter 7 of the Bankruptcy Code.[99] The discussion in the preface notes that this definition is consistent with the authority under Title II for the FDIC to conduct an orderly liquidation in a manner that maximizes the value of the assets of the covered financial company over a three-to-five year period.[100]

The proposed rule also attempts to address the issue of which consolidated assets should be deemed to be "available for repayment." The proposal takes a latitudinarian view of the concept. In the preface to the proposed rule, the FDIC and treasury indicate that Title II directs the FDIC as receiver to liquidate assets "including assets that may be released from lien encumbrances by payment in the ordinary course of business."[101] This suggests that assets subject to a lien will be regarded as available for repayment to the extent that the FDIC as receiver intends to use the borrowed funds to discharge the lien against the particular assets. But what of assets in a covered subsidiary of a covered financial company? Should these "consolidated assets" be deemed to be available to repay obligations of the FDIC as receiver if the FDIC has not extended additional funds to the particular subsidiary and taken a lien against the unencumbered assets of the subsidiary? The preface to the proposed rule acknowledges that there may be assets of a covered financial company that are not available for repayment.[102] The one example given in the preface is the case of assets of a covered financial company's wholly owned foreign subsidiary that are "ring-fenced" by the subsidiary's foreign regulator.[103] But a similar point might be made with respect to the assets of a domestic subsidiary that under normal creditor rights rules would be available first to satisfy creditors and other claimants of the subsidiary before being used to satisfy claims of the FDIC as receiver for the holding company.

The ability of the FDIC to borrow from the treasury after the initial 30-day borrowing period is subject to another significant limitation. Under Section 210(n)(9) no amount may be borrowed after the initial 30-day borrowing period unless the FDIC and the secretary of the treasury have an agreement in place that provides a specific plan and schedule to repay the borrowing and demonstrates that "income" to the FDIC from the liquidated assets of the covered financial companies and assessments against financial companies (as discussed further below) will be sufficient to amortize the outstanding balance of the borrowing plus interest within 60 months after the date of the borrowing.[104] The FDIC and the secretary of the treasury are required to consult with the Senate Banking Committee and the House Financial Services Committee on the terms of the repayment schedule and to provide a copy of the repayment schedule to the committees before the end of the initial 30-day period.[105]

ASSESSMENT PROCESS

The functions of the FDIC as a receiver under the Orderly Liquidation Authority are separate as a legal and financial matter from the functions of the FDIC as the insuring entity for depository institutions. The existing deposit insurance fund under the FDIA is not available to assist in connection with the liquidation of a covered financial company (although it would be available to support the resolution of an insured depository institution subsidiary of a covered financial company). To ensure that the FDIC's role as receiver for a covered financial company is separate from its insurance and other functions under the FDIA, Title II creates a separate fund in the Treasury Department, the Orderly Liquidation Fund, to support and carry out the responsibilities relating to the Orderly Liquidation Authority.[106] The Orderly Liquidation Fund will cover the costs of the FDIC under Title II, including both FDIC administrative expenses and the repayment of all amounts borrowed by the FDIC from the treasury in connection with an orderly liquidation of a covered financial company. Unlike the deposit insurance fund under the FDIA, which is funded through *ex ante* assessments on insured depository institutions, the Orderly Liquidation Fund will be funded in the first instance by borrowings from the treasury, but ultimately by *ex post* assessments on certain creditors who receive "additional" payments in an orderly liquidation proceeding and on certain other large financial companies. The purpose of the assessment mechanism is to assure that the private sector ultimately pays the costs of resolving any systemically important institution. Thus, all the initial government funding is to be repaid (with interest) from the proceeds of the receivership and from assessments on private sector entities.

The assessment mechanism in Title II proved to be one of the most controversial issues in Title II. As discussed in Part I of this article, the House-passed version of financial reform legislation would have created a $150 billion Systemic Dissolution Fund in the treasury through *ex ante* assessments on financial companies with $50 billion or more in consolidated assets and on financial companies that manage hedge funds with $10 billion or more assets under management. As finally enacted, Title II of the Dodd-Frank Act provides for an *ex post* assessment process. Section 210(o) provides the rules and mechanics for the assessment process. As a general rule, the FDIC is required to impose "risk-based" assessments as necessary to repay in full the obligations issued by the FDIC to the secretary of the treasury within 60 months of the date of issuance of the obligations.[107] The FDIC with approval of the secretary of the treasury may extend the 60-month period if the FDIC determines it is necessary to avoid a serious adverse effect on the U.S. financial system.[108]

The assessment mechanism envisions two basic assessment processes. The first assessment process is on claimants that received additional payments from the FDIC under the special authority contained in subsections (b)(4), (d)(4) or (h)(5)(E) of Section 210 (except for those payments necessary to initiate and continue operation of the receivership or any bridge financial company).[109] If these assessments are insufficient to repay the FDIC funding, then the FDIC must impose assessments on bank holding companies with total consolidated assets of $50 billion or more, nonbank financial companies supervised by the Federal Reserve Board under Title I, and other financial companies with total consolidated assets of $50 billion or more.[110] As an overall matter, the FDIC is directed to impose assessments on a graduated basis with financial companies having greater assets and risk being assessed at a higher rate.

The FDIC in consultation with the secretary of the treasury is required to issue regulations to carry out the assessment provisions of Section 210(o).[111] The Council is required to make a recommendation to the FDIC on a risk matrix to be used in imposing the assessments. In establishing the risk matrix the Council and the FDIC are directed to take into account a series of general and specific factors. One of the general factors to be taken into account is economic conditions generally affecting financial institutions so as to allow assessments to increase during more favorable economic conditions and to decrease during less favorable economic conditions.[112] This countercyclical factor, which makes more sense in an *ex ante* mechanism than an *ex post* mechanism, originated in the House version of the bill. The risk matrix is also to take into account the differences in risk posed to financial stability by financial companies, the differences in liability structures of financial companies, and the different bases for other financial assessments that financial companies may be required to pay, to ensure that assessed financial companies are treated equitably and that assessments reflect those differences.[113] The risk matrix is also to take into account a detailed list of financial characteristics presented by a financial company or category of financial company, such as the activities, liquidity, leverage, stability of funding, concentration of liabilities, and importance as a source of credit or liquidity as well as the risks presented by the financial company during the preceding 10-year period.[114]

Although, as discussed below, the FDIC has issued rules to implement certain provisions in Title II, the FDIC has not as yet begun any rulemaking process relating to the assessment provisions of Title II. The ultimate rulemaking process relating to assessments will be one of particular interest to the financial institutions sector because of the breadth of financial companies potentially subject to any proposed assessment mechanism.

GENERAL AUTHORITY OF THE FDIC AS RECEIVER

Under Section 210 the powers of the FDIC as receiver under Title II generally parallel the powers provided to the FDIC as receiver for an insured depository institution under the FDIA. The FDIC upon its appointment as receiver succeeds to all the rights, titles, powers and privileges of the covered financial company and its shareholders and members. Section 210 provides that the FDIC as receiver may "operate" the company with all of the powers of the members or shareholders, directors and officers of the company, "conduct" all business of the company, and perform all functions of the company in the name of the company.[115] The concept of operating a company, conducting the business of a company, and performing all functions of a company that has been placed into liquidation poses intriguing questions. Can the receivership estate (as distinct from any bridge financial institution created to assume assets and liabilities from the receivership estate) incur new liabilities to customers of the company when the company is insolvent? Can the receivership estate (as distinct from any bridge financial institution) perform functions that require licensing or approvals under federal or state law? FDIC experience in bank receiverships again may provide only limited guidance in applying these provisions in the context of a nonbank financial company.

An important authority provided to the FDIC as receiver under Title II is the authority to organize a bridge financial company to which the FDIC as receiver can transfer selected assets and liabilities of the covered financial company.[116] This is a resolution technique that is not available in a Bankruptcy Code case. This authority in Title II is based on similar authority contained in the FDIA, which permits the FDIC to organize a national bank (under a charter from comptroller of the currency) to operate as a bridge bank.[117] The bridge bank assumes specified assets and liabilities from a failed bank and operates in effect as a successor entity to the extent of the assets and liabilities assumed. Under the FDIA, a bridge bank is chartered as a national banking association and operates under that charter with the powers and attributes of a national banking association.[118] Under Title II, the bridge financial company will be a new form of federally chartered entity with the FDIC as the chartering authority. The FDIC as the chartering entity will establish the terms of the charter and bylaws of the bridge financial company.[119] The FDIC will also appoint the initial board of directors of the bridge financial company. Subject to such regulations as the FDIC may issue, a bridge financial company may elect to follow the corporate governance practices under the general corporation law of Delaware or the state of incorporation of the covered financial company with respect to which it is being established.[120]

The capital structure of a bridge financial company will be determined by the FDIC. Title II expressly provides that the FDIC can establish in its discretion the capital requirements for a bridge financial company.[121] Title II also provides that the FDIC in establishing a bridge financial company will not be required to contribute capital to the bridge financial company or issue any capital stock on behalf of a bridge financial company, but the FDIC may in its discretion cause capital stock or other securities to be issued by a bridge financial company and offered for sale. Title II authorizes the FDIC in lieu of capital to make funding available to the bridge financial company subject to a repayment plan required under subsection (n) discussed above.[122] Title II also provides that the FDIC can authorize the equivalent of debtor-in-possession financing by a bridge financial company with a priority over any or all of the obligations of the bridge financial company. If a bridge financial company is otherwise unable to obtain credit, the FDIC with court approval may authorize the bridge financial company to obtain financing with a security interest that is senior or equal to an existing lien on the property, provided that adequate protection is provided to the holder of the existing lien.[123]

In a recent rulemaking process under Title II (discussed further below), the FDIC has taken steps to clarify several aspects of the operation of a bridge financial company.[124] The singular importance of the bridge financial company authority to the operation of Title II, however, suggests that the FDIC will have to issue additional regulations on the operation of a bridge financial company to offer greater clarity to the marketplace.

THE IMPORTANCE OF RULEMAKING UNDER TITLE II

The range of issues that will require rulemaking under Title II to provide necessary clarity to the marketplace is great. The success of Title II will depend not merely upon the actions that the FDIC ultimately takes in the event that a financial company is resolved under the Orderly Liquidation Authority, but also upon the actions that creditors, counterparties and shareholders take in the course of their current and future interactions with those companies that are potentially subject to resolution under the Orderly Liquidation Authority. The conditioning of these parties in the near term will influence the outcome of any Orderly Liquidation Authority process that may ultimately be invoked in the long term. This conditioning will also affect the overall marketplace in which the largest financial companies operate. Thus, while the ultimate specific actions taken by the FDIC in an orderly liquidation of a particular institution will be considered in evaluating the success of that Orderly Liquidation, the context in which the FDIC ultimately takes those actions and the effects of those actions will be significantly influenced by the earlier actions and perceptions of other parties. The actions taken by the FDIC in an orderly liquidation case will need to be carefully balanced to meet the dual purposes of mitigating systemic risk and minimizing moral hazard. The rules that set the framework for the scope of actions that the FDIC might ultimately take in an orderly liquidation case will likewise need to reflect the same careful balance.

Recognizing the importance of the market perception and response to the new Orderly Liquidation Authority, the FDIC has moved quickly to commence rulemaking processes under Title II. In October 2010, the FDIC commenced its first rulemaking process under Title II to address several specific points under Title II and to request comment on a number of general points.[125] The proposed rule addressed four discrete points. The first and most important point was the authority of the FDIC as receiver to make "additional payments" to certain creditors as authorized under Sections 210(b)(4), (d)(4) and (h)(5)(E) of Title II. These provisions in the Dodd-Frank Act permit the FDIC as receiver to pay certain creditors of a covered financial company more than other similarly situated creditors (*i.e.*, creditors otherwise entitled to the same priority under the priority provisions of Section 210(b)) if the FDIC decides such payments are necessary to maximize the value of the assets of the company, to maximize the present value return from the sale of assets of the company, to minimize the amount of any loss on the sale of assets of the company, or to initiate and continue operations essential to the implementation of the receivership or any bridge financial company.[126] The authority to make these "additional payments" to certain creditors in a Title II is one of the distinguishing characteristics between a Title II proceeding and a Bankruptcy Code case. In the proposed rule the FDIC sought to clarify that certain categories of creditors would never be eligible to receive "additional payments."[127] Specifically, the FDIC wanted to put creditors on notice that holders of unsecured debt with a term of more than 360 days would never qualify to receive "additional payments."[128] The other points covered in the proposed rule related to the treatment of contingent claims, personal service contracts of employees (other than senior executives) of a covered financial company, and subsidiaries of an insurance company that is a covered financial company.

After receiving comments on the proposed rule, the FDIC issued an interim final rule in January 2011, adopting certain of the provisions as proposed and modifying others.[129] As to the issue of "additional payments," the FDIC decided to adopt the proposed rule without change. The final interim rule like the proposed rule provided that a holder of debt with a term of more than 360 days will never be eligible to receive an "additional payment" from the FDIC as receiver. In the Supplemental Information section of the *Federal Register* notice, the FDIC stated that there appeared to be a misapprehension among commenters on the proposed rule that the proposed rule made it more likely that short-term debt holders would receive "additional payments."[130] In adopting the interim final rule, the FDIC stated that short-term debt holders (including holders of commercial paper and derivatives) are "highly unlikely to meet the criteria set forth in the statute for permitting payment of additional amounts" and that "additional payments" to any creditor would be "very rare."[131]

The interim final rule like the proposed rule provided that proven claims secured by a legally valid and enforceable security interest or security entitlement will be paid or satisfied in full to the extent of the collateral and that any portion of the claim exceeding the fair market value of the collateral will be treated as an unsecured claim and paid in accordance with the priorities set out in Section 210(b).[132] In adopting the interim final rule, the FDIC removed a provision contained in the proposed rule that would have valued U.S. government or agency securities collateral at par value rather than fair market value for purposes of determining the amount provable on the unsecured portion of the secured claim.

The interim final rule also provided for the provability of contingent claims in a fashion that is somewhat broader than in the proposed rule. In contrast to the practice for bank receiverships under the FDIA, Title II expressly provides that contingent claims may be provable in an orderly liquidation proceeding.[133] In the Supplementary Information section of the interim final rule, the FDIC said that it revised the language of the interim final rule to confirm that the treatment of contingent claims under Title II will parallel the treatment under the Bankruptcy Code.[134] The FDIC said that holders of contingent claims should expect to receive no less than the amount they would have received in a Chapter 7 case.[135]

The interim final rule adopted without change the provisions in the proposed rule relating to the acceptance of, and the payment for, services by the FDIC from employees of the covered financial company during the receivership or during the operation of a bridge financial company. If the FDIC accepts such services, the terms and conditions of any personal service agreement (including collective bargaining agreement) will apply to the performance of the services during that period, subject to the rights of the FDIC as receiver to disaffirm or repudiate any personal service contract.[136] Expressly excluded from the provisions of the interim final rule are personal service agreements for "senior executives" of the covered financial company or covered subsidiary.[137]

Finally, the interim final rule adopted with an additional clarification the provisions of the proposed rule relating to the FDIC taking of liens on assets of a covered financial company that is an insurance company or of a subsidiary of such an insurance company. The clarification was intended to confirm that a lien could be taken on the assets only of a company that received an advance of FDIC funds and only if the FDIC determines that taking such a lien will not impede or delay the liquidation or rehabilitation of the insurance company or the recovery of its policyholders.[138]

The issues addressed in the interim final rule were relatively narrow, with the possible exception of the treatment of "additional payments." Substantial areas of Title II still remain to be clarified. In March 2011 the FDIC took the next step in implementing Title II by commencing a second proposed rulemaking process.[139] The new proposed rule extended the rulemaking process to several broad areas under Title II not covered by the interim final rule. The proposed rule addressed in varying degrees of specificity:

- the definition of "financial company" for purposes of Title II;
- the priorities for expenses and unsecured claims;
- the administrative claims process and the process for judicial determination of claims disallowed by the receiver;
- the treatment of collateral;
- the power to avoid fraudulent and preferential transfers; and
- the special provision for the recoupment of compensation paid to senior executives and directors of a financial company that becomes subject to an orderly liquidation proceeding under Title II.

After receiving comments on the proposed rule, the FDIC issued a final rule in July 2011, adopting certain of the provisions as proposed and modifying others.[140]

The proposed rule provided a definition of the term "predominantly engaged" in activities that are financial in nature or incidental thereto, which in turn determines whether certain nonbank financial companies would be deemed to be a "financial company" for purposes of Title II and thus potentially subject to the Orderly Liquidation Authority under Title II.[141] The most noteworthy element of this aspect of the proposed rule lay not in the text of the proposed definition of "predominantly engaged" in financial activities, but in the question posed by the FDIC in the preamble to the proposed rule, in which the FDIC sought comment on whether the proposed rule should be limited to encompass only entities that are designated as systemically important under the Dodd-Frank Act.[142] As discussed above, if the approach reflected in that question were to be adopted, it would appear that only nonbank financial companies designated for supervision by the Federal Reserve Board under Title I and bank holding companies with $50 billion or more of consolidated assets could be subject to orderly liquidation under Title II. In the final rule as adopted in July, the FDIC decided to postpone consideration of this issue pending further action and coordination with the Federal Reserve Board on its implementation of a similar (but not identical) concept in Title I.[143]

The proposed rule integrated into a single provision the various priority provisions contained in Title II and provided several helpful clarifications of the priority scheme.[144] For example, the proposed rule confirmed that any obligation of a covered financial company expressly assumed by a bridge financial company will be paid by the bridge financial company, subject to the terms and conditions of the assumption document, and would not be subject to the claims process in the receivership of the covered financial company.[145] If the FDIC were subsequently to act as a receiver for the bridge financial company itself, any claim arising out of the breach of such an assumed obligation would be paid as an administrative expense. The proposed rule also clarified that upon the dissolution or termination of a bridge financial company, any proceeds remaining after the payment of administrative expenses and creditor claims would be distributed to the receiver for the related covered financial company.[146] These are helpful clarifications as to the operation of a bridge financial company that various comment letters to the FDIC had represented. The final rule with some additional helpful modifications adopts the clarifications provided in the proposed rule.[147]

The proposed rule also sought to implement the provisions of Title II providing for the resolution of claims against a covered financial company through an administrative process conducted by the FDIC as receiver. As discussed in Part I of this article, like the provisions of the FDIA for bank receiverships and unlike the provisions of the Bankruptcy Code, the Orderly Liquidation Authority will operate essentially as an administrative proceeding with only limited judicial review. The Orderly Liquidation Authority provides for an administrative claims process to be run by the FDIC as receiver. The disallowance of claims by the FDIC as receiver is one of the few decisions under Title II that is expressly made subject to judicial review. The proposed rule provided confirmation and clarification of the claims process and the right of judicial review. The proposed rule confirmed that the provisions of Section 210(a)(9)(D) of Title II divest a court of jurisdiction over claims against the covered financial company or the receiver unless the claimant has first exhausted the administrative claims process.[148] In the preamble to the proposed rule, the FDIC also confirmed that judicial review would consist of a *de novo* determination of the claim by the court on the merits and not a review of whether the receiver abused its discretion in disallowing a claim.[149] The FDIC adopted these provisions of the proposed rule essentially unchanged in the final rule.[150]

The proposed rule provided additional details on the process for handling secured claims. Implementing Sections 210(c)(13)(C) and (q)(1)(B) of Title II, the proposed rule provided that a secured creditor could seek the consent of the FDIC to obtain possession of or control over collateral and consent to the foreclosure or sale of collateral, but such consent would be provided solely at the discretion of the FDIC.[151] The proposed rule did not on its face distinguish between types of collateral or types of claims, such as those relating to qualified financial contracts. This was an unintended element in the drafting of the proposed rule because Title II exempts collateral related to qualified financial contracts from the consent provisions of Sections 210(c)(13)(C) and (q)(1)(B). The proposed rule also provided rules for expedited relief with respect to secured claims, essentially tracking language in Section 210(a)(5) itself.[152] The final rule makes several important changes and clarifications to the proposed rule's treatment of secured claims. First, it provides that the fair market value of collateral will be determined in light of the purpose of the valuation and at the time of this proposed use of disposition of the property. This change is intended to align the rule more closely with Bankruptcy Code practice. Second, it provides that the FDIC will give its consent to a request from a secured creditor to use or dispose of the collateral if the FDIC does not intend to use, sell or lease the property itself. If the FDIC decides that it wishes to use, sell or lease the property, the FDIC must provide adequate protection to the secured creditor. Third, if the FDIC does not notify the secured creditor within 30 days after the request, consent by the FDIC is deemed to be given. Finally, the final rule clarifies that the consent requirements do not apply to qualified financial contracts.[153]

The proposed rule also confirmed that the FDIC will apply the fraudulent and preferential transfer provisions in Title II in a manner that is consistent with the comparable Bankruptcy Code provisions, notwithstanding certain language differences between the two.[154] This outcome is particularly important to the operation of the securitization market and codifies the interpretation of these provisions provided by the FDIC in a December 2010 nonbinding advisory opinion letter.[155] The final rule incorporates these provisions.[156]

Finally, the proposed rule implemented the provisions of Section 210(s) of Title II, which authorizes the FDIC as receiver to recover from any current or former senior executive or director "substantially responsible for the failed condition" of a covered financial company any compensation received during the two-year period preceding the FDIC's appointment as a receiver (except in the case of fraud where no time limit applies). The proposed rule provided that a senior executive or director would be deemed to be "substantially responsible for the failed condition" of a covered financial company if he or she (i) failed to conduct his or her responsibilities with the "requisite degree of skill and care" required by that position and (ii) as a result, individually or collectively, caused a loss to the company that materially contributed to the failure of the company.[157] Going beyond the language of Section 210(s), the proposed rule also created a set of presumptions, including a presumption that any senior executive or director serving as the chairman, chief executive officer, president, chief financial officer, or in any other similar role with strategic, policymaking or company-wide operational responsibilities, is substantially responsible for the failed condition of the covered financial company.[158] Such individual would have to rebut the presumption with evidence that he or she performed his or her duties with the requisite degree of skill and care. This presumption is the reverse of the presumption underlying the business judgment rule with respect to directors and as a practical matter will impose a heavy evidentiary burden on all these individuals. The final rule incorporates the provisions of the proposed rule with only one change. The final rule clarifies that the standard against which a senior executive or director will be judged for purposes of recoupment is the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances.[159]

CONCLUSION

The FDIC is in truth at the beginning of the process of developing an approach or approaches to the use of the Orderly Liquidation Authority. At critical points in the development process there may be an instinct within the FDIC to default to elements of the traditional paradigm used in the resolution of insured banking institutions. Indeed, in its recently published report on how it could have structured an orderly resolution of Lehman Brothers under Title II, the FDIC relies heavily on the resolution methodology and techniques used for failed banks.[160] The report outlines a hypothetical approach to the resolution of Lehman Brothers based on a resolution planning process as envisioned under Section 165(d) of the Dodd-Frank Act and on a bidding and sale process that generally mirrors the practices under the FDIA. It specifically envisions a sale either under a "whole financial company" purchase and assumption agreement with loss-sharing or under a modified purchase and assumption agreement without loss sharing (involving a good bank-bad bank strategy).[161] The report is based on some very robust assumptions on the part of the FDIC. Among the assumptions is that the FDIC "would conduct due diligence, identify potential acquirers and troubled assets, determine a transaction structure and conduct sealed bidding — all before Lehman ever failed and was put into receivership under Title II."[162] A cautious observer may think it wise to stress test the validity of such an assumption, particularly at a time of prevailing systemic disruptions when a number of large financial institutions may be encountering financial distress at the same time. In all events, it would be prudent for the FDIC to consider alternatives to the traditional bank resolution approaches to address the wider range of challenges presented by the Orderly Liquidation Authority. One such approach has been suggested by two leading financial trade associations. The Securities Industry and Financial Market Association and The Clearing House Association have proposed a recapitalization approach for potential consideration in implementing the Orderly Liquidation Authority.[163] The approach involves using the FDIC's new receivership powers to create a bridge financial company, transfer the systemically important and viable parts of the closed institution's business to the bridge entity, recapitalize the business by exchanging debt claims against the closed institution for equity in the bridge entity, and liquidating the closed institution left behind in the receivership. This approach too rests on several robust assumptions, but it offers the prospect of an alternative to the traditional purchase and assumption approach that underlies the approach in the FDIC Lehman report. The FDIC would be well advised to develop multiple potential strategies for the handling of an orderly liquidation. Reflecting the importance that the FDIC attaches to its role under the Orderly Liquidation Authority, the FDIC has established an Office of Complex Financial Institutions with responsibility for implementing the Orderly Liquidation Authority. It will fall to this office to provide the creative thinking necessary to implement Title II.

Recent academic commentary on Title II suggests the challenges that the FDIC will face in implementing Title II. One academic commentator roundly criticizes the approach incorporated in Title II and challenges the supposition that the FDIC-style resolution process will work as well for the largest financial institutions as it does for the typical small- or medium-sized bank entity.[164] Rather, he argues that "the new provisions [in Title II] extend FDIC-style resolution to precisely the kinds of cases where it is least effective."[165] He also speculates that when faced with an unmanageable failure, the FDIC will succumb to the temptation to bail-out wide swaths of creditors to avoid a systemic crisis.[166]

Another academic commentator likewise wonders whether the FDIC has the institutional capacity to deal with the resolution of large, complex financial companies.[167] At the same time that commentator notes that the FDIC might use its funding authority too narrowly, merely to provide liquidity to the resolution, and not to provide a source of funds for creditors when the risk of contagion arises.[168] This particular commenter seems inclined to endorse the use of funds to stem the risk of a systemic failure in appropriate circumstances.[169] But various statements by the FDIC appear to confirm that the FDIC does not intend to use its funding authority to bail out creditors. The general counsel of the FDIC has recently testified that the Orderly Liquidation Authority "operates under fixed rules that bar *unequivocally* any bailout of shareholders and creditors."[170] Former Chairman Bair of the FDIC took every opportunity during the rulemaking process to affirm that there will be no bailouts under the Orderly Liquidation Authority.[171] Questions nonetheless linger. In a recent report Standard & Poor's notes the uncertain perception of Title II in the marketplace and offers the view that in certain circumstances for selected systemically important financial institutions future extraordinary government support may still be possible.[172] Standard & Poor's indicates that it awaits the finalization of rules under Title II before changing its view that the U.S. government remains "supportive" of systemically important financial institutions.[173]

The market too awaits further rulemaking under Title II. The initial rulemaking process undertaken by the FDIC represents an important and very helpful first step. Significant areas, however, still remain to be clarified. As part of the prior rulemaking process commenters have suggested to the FDIC a number of broad areas that should be addressed in future rulemaking, including the operation and management of bridge financial companies, the treatment of SIPC-member broker-dealers, and the possibility of recapitalization of a failed institution through the Orderly Liquidation Authority. Commentators have also requested rulemaking on a range of specific topics, such as the minimum recovery right, the stay and other provisions applicable to secured creditors, the mechanism for the clawback of "additional payments" to certain creditors, the possibility of review rights for decisions by the FDIC as receiver other than the disallowance of a claim, and other mechanisms for ensuring as much similarity of treatment for creditors under Title II as under the Bankruptcy Code. The ultimate resolution of these areas of concern will likely affect the market's judgment of the credibility and viability of the new Orderly Liquidation Authority.

NOTES

[1] Pub. L. No. 111-203, Title II, 124 Stat. 1376, 1442-1520 (2010) (to be codified at 12 U.S.C. §§ 5381-5394).

[2] *See* Press Release, U.S. Dep't of the Treasury, Treasury Proposes Legislation for Resolution Authority (Mar. 25, 2009), *available at* http://www.treasury,gov/press-center/press-releases/Pages/tg70.aspx.

[3] U.S. Dep't of the Treasury, Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation 76 (June 2009) [hereinafter Treasury Financial Regulatory Reform Report].

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] FDIC, *The Orderly Liquidation of Lehman Brothers Holdings under the Dodd-Frank Act,* http://www.fdic.gov/regulations/reform/lehman.html.

[8] Pub. L. No. 111-203, § 210(h), 124 Stat. at 1496 (to be codified at 12 U.S.C. § 5390(h)).

[9] *Id.*, § 210(a)(1)(G)(i)(II), 124 Stat. at 1499 (to be codified at 12 U.S.C. § 5390(a)(1)(G)(i)(II)).

[10] *Id.*, § 210(c)(10)(B), 124 Stat. at 1491 (to be codified at 12 U.S.C. § 5390(c)(10)(B)).

[11] *Id.*, §§ 204(d) & 210(n), 124 Stat. at 1455 & 1506 (to be codified at 12 U.S.C. §§ 5384(d) & 5390(n)).

[12] *Id.*, § 210(a)(7), 124 Stat. at 1468 (to be codified at 12 U.S.C. § 5390(a)(7)).

[13] *See*, *e.g.*, Jeffrey McCracken, *Lehman's Chaotic Bankruptcy Filing Destroyed Billions in Value*, Wall St. J., Dec. 29, 2008, at A10. *See also* Trustee's Preliminary Investigation Report and Recommendations, In re Lehman Brothers Inc., (U.S. Bankr. S.D.N.Y. Aug. 25, 2010) (recommending as a general regulatory matter that broker-dealers be required to maintain up-to-date liquidation plans).

[14] Pub. L. No. 111-203, § 165(d), 124 Stat. at 1426 (to be codified at 12 U.S.C. § 5365(d)). Section 165(d)(1) requires that bank holding companies with consolidated assets of $50 billion or more and nonbank financial companies designated for supervision by the Federal Reserve Board periodically provide plans to the Federal Reserve Board and the FDIC for their rapid and orderly resolution. The Federal Reserve Board and the FDIC are directed by Section 165(d)(8) to adopt regulations specifying the details of these "resolution plans" or "living wills." In September 2011 the FDIC issued a final rule implementing the resolution plan requirement. *See* Press Release, FDIC Adopts Final Rule on Resolution Plans Under Dodd-Frank (Sept. 13, 2011), *available at* http://www.fdic.gov/news/news/press/2011/pr11151.html.

The Federal Reserve Board is expected to issue the same rule in the near future. Section 165(d)(4) requires that the resolution plan provide for an orderly resolution of the company under the Bankruptcy Code. The final rule as adopted by the FDIC provides that the resolution plan must be prepared assuming resolution under the Bankruptcy Code and not under Title II. The FDIC has indicated that it will separately prepare resolution plans of its own under Title II for systemic institutions.

[15] *See*, *e.g.*, *Examining the Causes of the Current Financial and Economic Crisis of the United States and of the Collapse of Lehman Brothers: Hearing Before the Financial Crisis Inquiry Commission*, 12 (Sept. 1, 2010) (statement of Harvey R. Miller, lead bankruptcy counsel for Lehman Brothers):

> The Lehman bankruptcy was unplanned. As a financial institution, Lehman's viability depended to a large extent on the confidence of the financial markets and the public. Accordingly, the disclosure of bankruptcy consideration and planning would have been disastrous to the continued operations of such a financial institution.

[16] *See* Treasury Financial Regulatory Reform Report, *supra* note 3, at 77.

[17] Pub. L. No. 111-203, § 202(c), 124 Stat. at 1447 (to be codified at 12 U.S.C. § 5382(c)).

[18] *Id.*, § 208(a), 124 Stat. at 1459 (to be codified at 12 U.S.C. § 5388(a)).

[19] *Id.*

[20] *Id.*, § 201(a)(11), 124 Stat. at 1443 (to be codified at 12 U.S.C. § 5381(a)(11)).

[21] *Id.*, § 201(a)(15), 124 Stat. at 1444 (to be codified at 12 U.S.C. § 5381(a)(15)). The general implications for the designation of a nonbank financial company as requiring supervision by the Federal Reserve Board are discussed in Part I of this article.

[22] *Id.*, § 201(b), 124 Stat. at 1444 (to be codified at 12 U.S.C. § 5381(b)).

[23] The FDIC issued a notice of proposed rulemaking relating to certain aspects of Title II in March 2011. *See* Orderly Liquidation Authority, 76 Fed. Reg. 16324 (Mar. 22, 2011)(proposed rule). One issue addressed in the proposed rulemaking was the definition of the term "predominantly engaged" in financial activities for purposes of the definition of "financial company." While the text of the proposed rule would have implemented clause (iii) of the definition in a manner that would encompass companies not designated as systemically significant under Title I, the FDIC in the preamble to the proposed rule asked for comment on the question whether the proposed rule should be limited to companies that are designated as systemically important under the Dodd-Frank Act. If the approach reflected in that question were to be adopted by the FDIC, it would appear that nonbank financial companies designated for supervision by the Board of Governors and bank holding companies with $50 billion or more of consolidated assets could be subject to orderly

liquidation under Title II, but other financial companies could not. This approach would result in a symmetry of treatment under Title I and Title II and would theoretically limit the set of financial companies that could ultimately be subject to an orderly liquidation proceeding. It would address the difference in approach under Title I, which requires an *ex ante* determination of systemic significance, and the approach under Title II, which permits in effect an *ex post* determination of systemic significance. In July 2011 the FDIC adopted the proposed rule in final form, but postponed for the time being action on the question how the term "predominantly engaged" would be defined. *See* Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 41626, 41628 (July 15, 2011) (final rule).

[24] *See Regulating and Resolving Institutions Considered "Too Big To Fail": Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 12 (May 6, 2009) 23-25 (testimony of Sheila C. Bair, Chairman, FDIC), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=4deb17aa-b8b8-4bc1-82ef-4c57388acf90.

[25] *Id.*

[26] *See* S. Rep. No. 111-176, at 58 (2010).

[27] Pub. L. No. 111-203, §210(a)(1)(E), 124 Stat. at 1461 (to be codified at 12 U.S.C. § 5390(a)(1)(E)).

[28] *Id.*, § 203, 124 Stat. at 1450 (to be codified at 12. U.S.C. § 5383).

[29] S. Rep. No. 111-176, at 58 (2010).

[30] *Id.*

[31] *See* Treasury Financial Regulatory Reform Report, *supra* note 3, at 77. *See also* 12 U.S.C. § 1823(c)(4)(G).

[32] Pub. L. No. 111-203 § 203(a)(1)(A)-(C), 124 Stat. at 1450 (to be codified at 12 U.S.C. § 5383(a)(1)(A)-(C)).

[33] *Id.*, § 203(a)(2), 124 Stat. at 1451 (to be codified at 12 U.S.C. § 5383(a)(2)).

[34] *Id.*, § 203(b), 124 Stat. at 1451 (to be codified at 12 U.S.C. § 5383(b)). For purposes of Title II, a financial company would be considered to be in default or danger of default if

(i) a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code;

(ii) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;

(iii) the assets of the financial company are, or are likely to be, less than its obligations to creditors and others; or

(iv) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business. § 203(c)(4), 124 Stat. at 1453 (to be codified at 12 U.S.C. § 5383(c)(4)).

[35] *Id.*, § 203(c)(1)(C), 124 Stat. at 1452 (to be codified at 12 U.S.C. § 5383(c)(1)(C)).

[36] *Id.*, § 202(a)(1)(A)(i), 124 Stat. at 1444 (to be codified at 12 U.S.C. § 5382(a)(1)(A)(i)).

[37] *Id.*, § 207, 124 Stat. at 1459 (to be codified at 12 U.S.C. § 5387).

[38] *See* 12 U.S.C. § 1821(c)(12) (2006).

[39] Pub. L. No. 111-203, § 202(a)(1)(A)(i), 124 Stat. at 1444 (to be codified at 12 U.S.C. § 5382(a)(1)(A)(i)).

[40] *Id.*, § 202(a)(1)(A)(ii) & (iii), 124 Stat. at 1445 (to be codified at 12 U.S.C. § 5382(a)(1)(A)(ii) & (iii)). Criminal sanctions apply to any person who recklessly discloses the determination of the secretary, the petition filed by the secretary with the District Court, or the pendency of the court proceedings. *Id.*, § 202(a)(1)(C), 124 Stat. at 1446 (to be codified at 12 U.S.C. § 5382(a)(1)(C)).

[41] *Id.*, § 202(a)(1)(A)(iii), 124 Stat. at 1445 (to be codified at 12 U.S.C. § 5382(a)(1)(A)(iii)).

[42] The "arbitrary and capricious" standard is the least demanding form of judicial review of an administrative action. *See*, *e.g.*, *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F. 3d 1435, 1438 (7th Cir. 1996). *See also National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

[43] Pub. L. No. 111-203, § 202(a)(1)(A)(v), 124 Stat. at 1445 (to be codified at 12 U.S.C. § 5382(a)(1)(A)(v)).

[44] Section 202(b) of the Dodd-Frank Act directs the District Court to establish rules and procedures to govern the review process, including rules and procedures to ensure that the 24-hour deadline is met. *Id.*, § 202(b), 124 Stat. at 1447 (to be codified at 12 U.S.C. § 5382(b)). The District Court on January 19, 2011 adopted Local Civil Rule 85 to implement the provisions of Section 202 of the Dodd-Frank Act. Local Civil Rule 85 provides several additions to the provisions of Section 202. For example, Local Civil Rule 85 provides that at least 48 hours prior to filing a petition, the secretary of the treasury shall provide written notice under seal to the court that a petition will likely be filed with the court. Local Civil Rule 85 also requires that the petition be accompanied by a certificate of counsel or other proof satisfactory to the court, stating that (i) actual notice of the filing of the petition and copies of all papers to be presented to the court have been furnished to the financial company or (ii) the efforts made by the secretary to give such notice and furnish such copies. D.D.C.R. L.R. 85 (2011). In a recent report the U.S. Government Accountability Office indicates that the FDIC and treasury had expressed concern to the District Court that the 48-hour requirement in the rule would be impossible to meet. *See* U.S.

Gov't Accountability Office, GAO-11-707, Bankruptcy: Complex Financial Institutions and International Coordination Pose Challenges 18 (2011). The District Court subsequently revised Local Civil Rule 85 to provide that "to the extent feasible" notice would be provided at least 48 hours prior to the filing.

45 Pub. L. No. 111-203, § 202(a)(2)(A)(i), 124 Stat. at 1446 (to be codified at 12 U.S.C. § 5382(a)(2)(A)(i)).

46 *Id.*, § 202(a)(2)(A)(iv), 124 Stat. at 1446 (to be codified at 12 U.S.C. § 5832(a)(2)(A)(iv)).

47 *Id.*, § 202(a)(1)(B), 124 Stat. at 1445 (to be codified at 12 U.S.C. § 5382(a)(1)(B)).

48 *Id.*, § 202(a)(2)(B)(iv), 124 Stat. at 1446 (to be codified at 12 U.S.C. § 5382(a)(2)(b)(iv)).

49 *Id.*, § 203(c)(2), 124 Stat. at 1452 (to be codified at 12 U.S.C. § 5383(c)(2)).

50 *Id.*

51 *Id.*, § 203(c)(3)(A), 124 Stat. at 1452 (to be codified at 12 U.S.C. § 5383(c)(3)(A)).

52 *Id.*

53 *Id.*, § 203(c)(3)(C), 124 Stat. at 1453 (to be codified at 12 U.S.C. § 5383(c)(3)(C)).

54 *Id.*, § 203(c)(5), 124 Stat. at 1453 (to be codified at 12 U.S.C. § 5383(c)(3)(G)). The inspector generals of the FDIC and the treasury are also required to conduct audits of each orderly liquidation proceeding conducted under Title II on a six month basis. *Id.*, § 211(d) & (e), 124 Stat. at 1514 (to be codified at 12 U.S.C. § 5391 (d) & (e)).

55 *See* 12 U.S.C. § 1823(c)(4)(G)(iv).

56 Pub. L. No. 111-203, § 202(d)(1), 124 Stat. at 1447 (to be codified at 12 U.S.C. § 5382(d)(1)).

57 *Id.*, § 202(d)(2)&(3), 124 Stat. at 1447-48 (to be codified at 12 U.S.C. § 5382(d)(2)&(3)).

58 The House-passed version of H.R. 4173 made this point more clearly by providing a general exclusion from the definition of the term "financial company" for an insured depository institution. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 1473, 111th Cong., § 1602(9)(E) (2009).

59 For purposes of Title II, 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. Pub. L. 111-203, §201(a)(13), 124 Stat. at 1444 (to be codified at 12 U.S.C. §5381(a)(13)).

60 *Id.*, § 203(e)(1), 124 Stat. at 1454 (to be codified at 12 U.S.C. § 5383(e)(1)).

[61] *Id.*, § 203(e)(3), 124 Stat. at 1454 (to be codified at 12 U.S.C. § 5883(e)(3)).
[62] *See e.g.*, National Association of Insurance Commissioners, Insurer Receivership Model Act NAIC 555-1.
[63] *Id.* §§ 202 (commencement of formal delinquency proceeding) & 207 (grounds for conservation, rehabilitation or liquidation).
[64] *Id.* §§ 401 (rehabilitation order) & 501 (liquidation order).
[65] Pub. L. No. 111-203, § 204(c)(3), 124 Stat. at 1447-48 (to be codified at 12 U.S.C. § 5384(c)(3)).
[66] *See* National Association of Insurance Commissioners, Dodd-Frank Receivership Implementation (E) Working Group, http://www.naic.org/committees_e_receivership_dodd_frank.htm.
[67] Pub. L. No. 111-203, § 205(a)(1), 124 Stat. at 1456 (to be codified at 12 U.S.C. § 5385(a)(1)).
[68] *Id.*, § 205(a)(2)(B), 124 Stat. at 1456 (to be codified at 12 U.S.C. § 5385(a)(2)(B)).
[69] *Id.*, § 205(a)(2)(D), 124 Stat. at 1456 (to be codified at 12 U.S.C. § 5385(a)(2)(D)).
[70] *Id.*, § 205(b)(4), 124 Stat. at 1457 (to be codified at 12 U.S.C. § 5385(b)(4)).
[71] *Id.*, § 205(d)(1), 124 Stat. at 1457 (to be codified at 12 U.S.C. § 5385(d)(1)).
[72] *Id.*, § 205(f)(1), 124 Stat. at 1458 (to be codified at 12 U.S.C. § 5385(f)(1)).
[73] *Id.*, § 205(f)(2), 124 Stat. at 1458 (to be codified at 12 U.S.C. § 5385(f)(2)).
[74] *Id.*, § 205(g), 124 Stat. at 1458 (to be codified at 12 U.S.C. § 5385(g)).
[75] *Id.*, § 205(h), 124 Stat. at 1458 (to be codified at 12 U.S.C. § 5385(h)).
[76] *See* Orderly Liquidation Authority, 76 Fed. Reg. 16324, 16326 (March 23, 2011).
[77] Pub. L. No. 111-203, § 204(a), 124 Stat. at 1454 (to be codified at 12 U.S.C. § 5384(a)).
[78] *See, e.g.*, Viral V. Acharya et al., *Resolution Authority*, *in* Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance 218 (Viral V. Acharya et al. eds., 2011).
[79] Pub. L. No. 111-203, § 204(a), 124 Stat. at 1454 (to be codified at 12 U.S.C. § 5384(a)).
[80] *Id.*, § 206, 124 Stat. at 1459 (to be codified at 12 U.S.C. § 5386).
[81] *Id.* The directives in § 204(a) and § 206 are further buttressed by the provisions of § 214(a), which reiterates that "[a]ll financial companies put into receivership under [Title II] shall be liquidated" and "[n]o taxpayer funds shall be used to prevent the liquidation of any financial company under [Title II]." *Id.*, § 214(a), 124 Stat. at 1518 (to be codified at 12 U.S.C. § 5394(a)).
[82] The term "management" is one that the FDIC will presumably decide to define for purposes of this provision in Title II. *See* 76 Fed. Reg. 4207, 4215 (Jan. 25,

2011) (FDIC interim final rule providing that the FDIC as receiver will treat as an administrative expense payments to employees of the covered financial company whose services are requested by the FDIC, but excluding any "senior executive" of the company from this provision).

[83] Pub. L. No. 111-203, § 210(a)(9)(E), 124 Stat. at 1469-1470 (to be codified at 12 U.S.C. § 5390(a)(9)(E)).

[84] *Id.*, § 209, 124 Stat. at 1460 (to be codified at 12 U.S.C. § 5389).

[85] *Id.*

[86] *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 1473, 111th Cong. § 1608 (2009).

[87] The minimal rules adopted by the FDIC with respect to receiverships under the FDIA are codified at 12 C.F.R. Part 360.

[88] *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 1473, 111th Cong. (as passed by House, Dec. 21, 2009) § 1608.

[89] 76 Fed. Reg. 4207, 4209 (Jan. 25, 2011).

[90] Pub. L. No. 111-203, § 204(d), 124 Stat. at 1455-1456 (to be codified at 12 U.S.C. § 5384(d)).

[91] *Id***.**

[92] *Id.*

[93] *Id.*, § 210(n)(5), 124 Stat. at 1506-1507 (to be codified at 12 U.S.C. § 5890(n)(5)).

[94] *Id.*, § 210(n)(6), 124 Stat. at 1507 (to be codified at 12 U.S.C. § 5390(n)(6)).

[95] Commentators and critics have characterized the initial 10 percent borrowing base itself as "massive". *See* David Skeel, The New Financial Deal: Understanding The Dodd-Frank Act and Its (Unintended) Consequences 144-145 (2011). *See also* Statement of Republican Policy on H.R. 4173, the "Dodd-Frank Wall Street Reform and Consumer Protective Act" (June 30, 2010).

[96] *Cf.* Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 41626, 41640 (July 15, 2011) (discussing provisions in § 380.6 authorizing to the FDIC to take a lien on assets of a covered subsidiary of an insurance company "receiving [FDIC] funds").

[97] Section 201(a)(9) of Title II defines the term "covered subsidiary" to mean a subsidiary of a covered financial company other than (i) an insured depository institution, (ii) an insurance company, or (iii) a SIPC-member broker or dealer.

[98] Memorandum from Steven O. App, deputy to the chairman and chief financial officer, FDIC, to FDIC board of directors, *Notice of Proposed Rulemaking Regarding Calculating the Maximum Obligation the FDIC May Incur in Liquidating a Covered Financial Company* (June 8, 2011), *available at* http://www.fdic.gov/news/

board/06july2011no6.pdf.

[99] *Id.* at 15.

[100] *Id.* at 16.

[101] *Id.* at 17.

[102] *Id.*

[103] *Id.* at 17-18.

[104] Pub. L. No. 111-203, § 210(n)(9)(B)(i), 124 Stat. at 1508 (to be codified at 12 U.S.C. § 5390(n)(9)(B)(i)). The FDIC with the approval of the secretary of the treasury may extend the 60-month period if the FDIC determines that the extension is necessary to avoid a serious adverse effect on the U.S. financial system. *Id.*

[105] *Id.*, § 210(n)(9)(B)(ii), 124 Stat. at 1508-1509 (to be codified at 12 U.S.C. § 5390(n)(9)(B)(ii)).

[106] *Id.*, § 210(n)(1), 124 Stat. at 1506 (to be codified at 12 U.S.C. § 5390(n)(1)).

[107] *Id.*, § 210(o)(1)(B), 124 Stat. at 1509 (to be codified at 12 U.S.C. § 5390(o)(1)(B)).

[108] *Id.*, § 210(o)(1)(C), 124 Stat. at 1509 (to be codified at 12 U.S.C. § 5390(o)(1)(C)).

[109] *Id.*, § 210(o)(1)(D)(i), 124 Stat. at 1509 (to be codified at 12 U.S.C. § 5390(o)(1)(D)(i)). Subsections (b)(4), (d)(4) and (h)(5)(E) of § 210 permit the FDIC as receiver to make an "additional payment" to a claimant, meaning a payment in excess of the amount that would otherwise be payable to the claimant as a member of its priority class, if the FDIC determines the action is necessary to maximize the value of the assets of the covered financial company or minimize the loss realized on the sale or other disposition of assets, or if necessary to initiate or continue operations essential to the receivership or bridge company. An "additional payment" may be made to a claimant or claimants only if all other similarly situated claimants receive not less than the amount that they would have received in a liquidation under Chapter 7 of the Bankruptcy Code.

[110] *Id.*, § 210(o)(1)(D)(ii), 124 Stat. at 1510 (to be codified at 12 U.S.C. § 5390(o)(1)(D)(ii)).

[111] *Id.*, § 210(o)(6)(A), 124 Stat. at 1512 (to be codified at 12 U.S.C. § 5390(o)(6)(A)).

[112] *Id.*, § 210(o)(4)(A), 124 Stat. at 1510 (to be codified at 12 U.S.C. § 5390(o)(4)(A)).

[113] *Id.*, § 210(o)(4)(B), 124 Stat. at 1510 (to be codified at 12 U.S.C. § 5390(o)(6)(B)). The assessments to be taken into account are those paid by insured depository institutions under the FDIA, SIPC member broker-dealers under SIPA, insured credit unions under the Federal Credit Union Act, and insurance companies pursuant to applicable state law to cover the costs of rehabilitation, liquidation or other state

insolvency proceedings. *Id.*

[114] *Id.*, § 210(o)(4)(C), 124 Stat. at 1511 (to be codified at 12 U.S.C. § 5390(o)(4)(C)).

[115] *Id.*, § 210(a)(1)(B)(i)-(iii), 124 Stat. at 1460 (to be codified at 12 U.S.C. § 5390(a)(1)(B)(i)-(iii)).

[116] *Id.*, § 210(h), 124 Stat. at 1496 (to be codified at 12 U.S.C. § 5390(h)).

[117] Federal Deposit Insurance Act, 12 U.S.C. § 1821(n) (2006).

[118] *Id.* § 1821(n)(1)&(2).

[119] Pub. L. No. 111-203, § 210(h)(2)(D), 124 Stat. at 1496 (to be codified at 12 U.S.C. § 5390(h)(2)(D)).

[120] This approach is similar to that taken with respect to the choice of corporate governance rules for a national bank. *See* 12 C.F.R. § 7.2000 (2011) (corporate governance procedures for national banks).

[121] § 210(h)(2)(G)(i), 124 Stat. at 1497 (to be codified at 12 U.S.C. § 5390(h)(2)(G)(i)).

[122] § 210(h)(2)(G)(iv), 124 Stat. at 1497 (to be codified at 12 U.S.C. § 5390(h)(2)(G)(iv)).

[123] § 210(h)(16)(C)(i), 124 Stat. at 1504 (to be codified at 12 U.S.C. § 5390(h)(16)(C)(i)).

[124] *See* Orderly Liquidation Authority, 76 Fed. Reg. 16324 (Mar. 23, 2011) (proposed rule); Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 41626 (July 15, 2011) (final rule).

[125] *See* Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 64173 (Oct. 19, 2010).

[126] Pub. L. No. 111-203, § 210(b)(4), (d)(4) & (h)(5)(E), 124 Stat. at 1476, 1494 & 1499 (to be codified at 12 U.S.C. § 5390(b)(4), (d)(4) & (h)(5)(E)).

[127] 75 Fed. Reg. at 64177.

[128] *Id.*

[129] *See* Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 4207 (Jan. 25, 2011) (to be codified at 12 C.F.R. pt. 380).

[130] *Id.* at 4212.

[131] *Id.* The FDIC provided several examples of short-term creditors that might qualify for additional payments. The examples included creditors that provide utility and other services to the covered financial company, such as payment processing services, and creditors with contract claims that are tied to performance bonds or other credit support needed for the covered financial company to qualify to continue

other contracts. *Id.* at 4211-4212.

[132] *Id.* at 4215 (to be codified at 12 C.F.R. § 380.2(c)).

[133] Pub. L. No. 111-203, § 201(a)(4), 124 Stat. at 1443 (to be codified at 12 U.S.C. § 5381(a)(4)) (defining the term "claim" to include any right to payment whether fixed or contingent).

[134] 76 Fed. Reg. at 4213.

[135] *Id.*

[136] *Id.* at 4215 (to be codified at 12 C.F.R. 380.3).

[137] *Id.* The term "senior executive" is defined in the interim final rule to mean the chairman of the board, the president, every vice president, the secretary, the treasurer or chief financial officer and general partner and manager of the company unless the person is excluded by resolution of the board of directors or other applicable documentation from participation in major policymaking functions of the company. *Id.* (to be codified at 12 C.F.R. § 380.1).

[138] *Id.* at 4216 (to be codified at 12 C.F.R. § 380.6).

[139] Orderly Liquidation Authority, 76 Fed. Reg. 16324 (Mar. 23, 2011) (proposed rule).

[140] Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protect Act, 76 Fed. Reg. 41626 (July 15, 2011) (final rule).

[141] 76 Fed. Reg. at 16338 (proposed § 380.8).

[142] 76 Fed. Reg. at 16337.

[143] 76 Fed. Reg. at 41628.

[144] 76 Fed. Reg. at 16340-41 (proposed § 380.21).

[145] *Id.* at 16342 (proposed §§ 380.26(a) & 380.30).

[146] *Id.* (proposed § 380.26(c)).

[147] 76 Fed. Reg. at 41644 (to be codified at 12 C.F.R. §§ 380.26 & 380.31)

[148] 76 Fed. Reg. at 16343 (proposed § 380.38).

[149] *Id.* at 16333.

[150] 76 Fed. Reg. at 41645 (to be codified at 12 C.F.R. § 380.38).

[151] 76 Fed. Reg. at 16344 (proposed § 380.51).

[152] *Id.* (proposed § 380.53).

[153] 76 Fed. Reg. at 41646-41647 (to be codified at 12 C.F.R. §§ 380.50, 380.51 & 380.52).

[154] 76 Fed. Reg. at 16339 (proposed § 380.9).

[155] *See* Letter from Michael H. Krimminger, acting general counsel, Federal Deposit Insurance Corporation, to Kenneth E. Bentsen, Jr., executive vice president, Securities Industry and Financial Markets Association, and Tom Deutsch, executive director, American Securitization Forum, Dec. 29, 2010, *available at* http://www.sifma.org/

WorkArea/DownloadAsset.aspx?id=22820.
[156] 76 Fed. Reg. at 41641 (to be codified at 12 C.F.R. § 380.9).
[157] 76 Fed. Reg. at 16338 (proposed § 380.7(a)).
[158] *Id.* (proposed § 380.7(b)).
[159] 76 Fed. Reg. at 41640 (to be codified at 12 C.F.R. § 380.7(a)).
[160] *See* FDIC, *The Orderly Liquidation of Lehman Brothers Holdings under the Dodd-Frank Act*, FDIC Quarterly, vol. 5, No. 2 (Apr. 2011), *available at* http://www.fdic.gov/bank/analytical/quarterly/2011_vol5_2/lehman.pdf.
[161] *Id.* at 14.
[162] *See* FDIC, *The Orderly Liquidation of Lehman Brothers Holdings under the Dodd-Frank Act,* http://www.fdic.gov/regulations/reform/lehman.html.
[163] *See* Letter from the Securities Industry and Financial Markets Association and The Clearing House, to the Federal Deposit Insurance Corporation, May 23, 2011, *available at* http://www.fdic.gov/regulations/laws/federal/2011/11c16Ad73.PDF.
[164] David Skeel, The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences 129-152 (2011).
[165] *Id.* at 126.
[166] *Id.* at 144-145.
[167] Viral v. Acharya et al., *supra* note 78, at 224-225.
[168] *Id.* at 227.
[169] *Id.*
[170] "*Does the Dodd-Frank Act End 'Too Big to Fail'?": Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 112th Cong. 11 (June 14, 2011) (testimony of Michael H. Krimminger, general counsel, FDIC), *available at* http://financialservices.house.gov/UploadedFiles/061411krimminger.pdf.
[171] *State of the FDIC: Deposit Insurance, Consumer Protection, and Financial Stability: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 112th Cong. (June 30, 2011) (testimony of Sheila C. Bair, chairman, FDIC), *available at* http://www.fdic.gov/news/news/speeches/chairman/spjun3011.html; Sheila C. Bair, chairman, FDIC, Remarks to the National Press Club (June 24, 2011), *available at* http://www.fdic.gov/news/news/speeches/chairman/spjun2411.html; *The Changing Role of the FDIC: Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs, H. Comm. on Oversight and Gov't Reform*, 112th Cong. (June 22, 2011) (testimony of Sheila C. Bair, chairman, FDIC), *available at* http://www.fdic.gov/news/news/speeches/chairman/spjun2211.html; *Financial Regulatory Reform: The International Context: Hearing Before the H. Comm. on Financial Services*, 112th Cong. (June 16, 2011) (testimony of Sheila C. Bair, chairman, FDIC), *available at* http://www.fdic.gov/news/news/speeches/chairman/spjun1611.html.

[172] Standard & Poor's, Financial Institutions Research, The U.S. Government Says Support For Banks Will Be Different "Next Time" — But Will It? (July 12, 2011), *available at* http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245314573699.

[173] *Id.* at 10. Moody's took a slightly different approach in downgrading certain debt securities of Bank of America Corp. and Bank of America N.A. in September 2011. As part of its rationale for the downgrades, Moody's explained:

> The downgrades result from a decrease in the probability that the US government would support the bank, if needed. Moody's believes that the government is likely to continue to provide some level of support to systemically important financial institutions. However, it is also more likely now than during the financial crisis to allow a large bank to fail should it become financially troubled, as the risks of contagion become less acute.

But Moody's also explained that because there is no global process yet in place to resolve a global financial institution, it would be "very difficult" for the government to use the orderly liquidation authority to resolve a systemically important bank without a disruption of the marketplace and the broader economy. Moody's Investors Service, Rating Action: Moody's downgrades Bank of America Corp. to Baa1/P-2; Bank of America N.A. to A2, P-1 affirmed (Sept. 21, 2011), *available at* http://www.moodys.com/research/Moodys-downgrades-Bank-of-America-Corp-to-Baa1P-2-Bank--PR_226511.

See also Moody's Investors Service, Rating Action: Moody's downgrades Citicorp Inc. to P-2; Citibank Prime-1 affirmed; all long-term senior ratings confirmed (Sept. 21, 2011), *available at* http://www.moodys.com/research/Moodys-downgrades-Citigroup-Inc-to-P-2-Citibank-Prime-1--PR_226520.