

ClientAlert

Financial Markets Developments

Bank Advisory
Financial Restructuring and Insolvency
October 2010

Dodd-Frank Wall Street Reform and Consumer Protection Act: FDIC Quickly Proposes Rules Regarding Aspects of Orderly Liquidation Authority

In an effort to provide clarity for the markets on how its newly gained resolution authority would work, the Federal Deposit Insurance Corporation (the "FDIC") has "quickly" proposed rules with respect to certain portions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Specifically, on October 4, 2010, the FDIC Board of Directors approved the Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Proposed Rules"). The Proposed Rules are designed to deal with one of the primary concerns and an area of criticism with respect to Title II—the statutory authority of the FDIC to prefer certain creditors over other similarly situated creditors with respect to payment of claims. In particular, industry experts have expressed concern that this authority would lead to more bailouts of the kind previously seen and which the Dodd-Frank Act was designed to prevent. To this end, the Proposed Rules make clear there is an absolute bar to additional payments to holders of long-term senior debt, holders of subordinated debt and shareholders.

The Proposed Rules can be generally divided into a three-part structure. The first part ("Part I") is a preamble which is designed to provide an overview of the resolution process under the Dodd-Frank Act for companies not familiar with FDIC receivership procedures. The second part ("Part II") is the proposed regulation itself and the FDIC's commentary, which is divided into the following broad areas: (i) the priority of payments to creditors by defining categories of claimants who cannot receive additional payments;¹ (ii) the authority to continue operations by paying for services provided by employees and others; (iii) the treatment of creditors by clarifying the measure of damages for contingent claims; (iv) the application of proceeds from the liquidation of subsidiaries of insurance companies by reiterating the current treatment under corporate and insolvency law that remaining shareholder value is paid to the shareholders of any subsidiary; and (v) the limitations on the FDIC's ability to take liens on assets of covered financial companies that are insurance companies. Included are certain directly relevant questions posed by the FDIC relating to the regulations set forth in the Proposed Rules. The Proposed Rules will be open for public comment for 30 days. The third part of the Proposed Rules ("Part III") focuses on broader questions related to the new authority, such as how the FDIC's contract repudiation authority might work, identification of additional orderly liquidation areas for rulemaking, details on the working of bridge companies and other related matters. Part III allows 90 days for comment and the feedback will be used to craft a separate and more expansive proposal on the FDIC's orderly liquidation authority early in 2011.



If you have questions or comments regarding this Alert, please contact one of the lawyers listed below:

Linda Leali
Associate, Miami
+ 1 305 995 5285
lleali@whitecase.com

Gerard Uzzi
Partner, New York
+ 1 212 819 8479
guzzi@whitecase.com

Duane Wall
Partner of Counsel, New York
+ 1 212 819 8453
dwall@whitecase.com

Miami

White & Case LLP
Wachovia Financial Center
200 South Biscayne Boulevard, Suite 4900
Miami, Florida 33131
United States
+ 1 305 371 2700

New York

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

¹ Dodd-Frank Act § 210(b)(4), (d)(4), and (h)(5)(E).

Part I. Overview of Title II of the Dodd-Frank Act

The preamble of the Proposed Rules contains a general overview of the mechanics of the resolution process set forth in Title II. As discussed at the September 27, 2010 FDIC board meeting, the goal of the FDIC in providing this overview is to offer information to the marketplace and provide greater understanding for those not familiar with the law or with the FDIC practice for bank liquidations. **Below are certain highlights of the FDIC's overview as set forth in the Proposed Rules.** For a detailed discussion of Title II, see the White & Case Client Alert titled [Orderly Liquidation Authority](#), dated July 2010.

Appointment of Receiver

The Proposed Rules highlight the process for appointing a receiver for a failing financial company which starts with certain designated Federal regulatory agencies recommending to the Secretary of the Treasury (the "Secretary") that the Secretary should determine, after consultation with the US President, that grounds exist to appoint the FDIC as a receiver. With respect thereto, the Secretary is required to make specific findings in support of his or her determination, including, among other things, that the company is in default or in danger of default; that the failure of the company and its resolution under otherwise applicable federal or state law would have serious adverse effects on financial stability in the United States, and that no viable private sector alternative is available.² If the Secretary makes the recommended determination and the board of directors (or similar governing body) of the company acquiesces or consents to the appointment, then the FDIC's appointment as receiver is effective immediately. If the company's governing body does not acquiesce or consent, the Dodd-Frank Act provides for immediate judicial review by the US District Court for the District of Columbia to determine whether the Secretary's specific findings in respect of the company are arbitrary and capricious.³ If the court upholds the Secretary's determinations, it will issue an order authorizing the Secretary to appoint the FDIC as receiver.⁴ If the court fails to act within 24 hours of receiving the petition, then the appointment of the receiver takes effect by operation of law.⁵

2 Dodd-Frank Act § 203(a)(2).

3 Dodd-Frank Act § 202(a)(1)(A)(i) and (iii).

4 Dodd-Frank Act § 202(a)(1)(A)(iv)(I).

5 Dodd-Frank Act § 202(a)(1)(A)(v).

No Bailout

By prohibiting the FDIC from taking an equity interest in or becoming a shareholder of a covered financial company or any covered subsidiary, the Proposed Rule makes clear the FDIC's intention that losses associated with the liquidation of a covered financial company are imposed on its creditors and shareholders and not taxpayers.⁶

Responsible Parties Must Be Removed

The Dodd-Frank Act requires the removal of the management, directors and third parties who are deemed responsible for a covered financial company's failing financial condition.⁷

Claims Priority

Title II incorporates procedural and other protections for creditors to ensure that they are treated fairly. Specifically, the creditors bear the losses of the company's failure under a specific claims priority that guarantees creditors that they will receive no less than the amount that they would have received had the covered financial company been liquidated under Chapter 7 of the Bankruptcy Code.⁸ Creditors dissatisfied with the FDIC's treatment of their claim can file a case in the district court or territorial court of the United States for the district within which the principal place of business of the covered financial company is located and no deference will be given to the FDIC's decision.⁹ Further, the FDIC has authority to make interim payments to creditors once claims are proven.

Bridge Financial Companies

Chartering of Bridge Companies. The FDIC's authority to charter bridge companies under the Dodd-Frank Act provides it the ability to continue key operations, services and transactions. The bridge financial company is a completely new entity that will not be saddled with the shareholders, debt, senior executives, or bad assets and operations that contributed to the failure of the covered financial company or that would impede an orderly liquidation.

6 See Dodd-Frank Act § 204(a), 210(a)(9)(E).

7 Dodd-Frank Act § 206(4) and (5).

8 Dodd-Frank Act § 210(a)(7)(B) and (d)(2)(B).

9 Dodd-Frank Act § 210(a)(2)-(4).

Counterparties Restricted from Terminating Contracts. The FDIC views one of the Dodd-Frank Act's strengths as being that a party to a contract cannot terminate such contract simply because the contract was assigned to the bridge financial company as well as the fact that the FDIC has the authority to compel the contracting parties to continue to perform if the contracts are needed to continue operations transferred to the bridge company.¹⁰ Additionally, under the Dodd-Frank Act, in contrast to the Bankruptcy Code, the FDIC can compel parties to financial market contracts to continue to perform so long as statutory notice of the transfer is provided within one business day after the FDIC is appointed as receiver.¹¹ This allows the FDIC the ability to maximize the value of the failed company's assets and operations and avoid market destabilization. The FDIC views this last right as significantly important, as the lack of such a right under the Bankruptcy Code is believed to have resulted in a loss of billions of dollars in market value to the bankruptcy estate in the Lehman Brothers insolvency.

Broad Authority. The receiver has broad authority over a bridge company via its ability to provide strategic direction to the contractors employed by the FDIC to oversee its operations. Further, the FDIC also has broad authority to liquidate the business, sell the assets and resolve the liabilities of a covered financial company immediately after the FDIC is appointed as receiver or when appropriate.¹² The FDIC expects such authority to be crucial in resolving non-bank financial companies under the Dodd-Frank Act as the FDIC will be able to move quickly in making the necessary decisions to maintain the highest value of the companies.

Bridge Financial Company Financing. The Dodd-Frank Act provides the bridge financial company the ability to access funding which will be vital in the ability of the receiver to effectuate a prompt sale at a better value or continue the company's essential operations until the company can be liquidated in an orderly manner.

Resolution Planning

The FDIC views pre-planning as critical to its ability to use its powers set forth in Title II, including the FDIC's back-up examination authority and the requirement that the largest companies submit "living wills" or resolution plans that will facilitate a rapid and orderly resolution of the company under the Bankruptcy Code.¹³ In the Proposed Rules, the FDIC noted

that the required resolution plans should describe how the liquidation process can be accomplished without posing systemic risk to the public and financial system. Those plans that are determined not to be credible can lead to increasingly stringent requirements imposed jointly by the FDIC and the Federal Reserve and ultimately to the requirement that assets or operations be divested to facilitate an orderly resolution.

Advanced Planning With International Regulators

To ensure that the Dodd-Frank Act's orderly liquidation authority works as efficiently as possible, the FDIC is coordinating with regulators in various key non-US jurisdictions to adopt key legal and policy reforms so that in the event of an appointment of FDIC as receiver under Title II, the cross-border operations of the covered financial company can be liquidated consistently, cooperatively and in a manner that maximizes its value and minimizes the costs and negative effects on the financial system. In that regard, the FDIC is working to have the authority to control the company's assets and operations in the non-US jurisdiction, subject to appropriate assurances that the FDIC will meet ongoing commitments to continue the covered financial company's operations to facilitate an orderly wind-up of the company.

Part II. The Proposed Rules

As mentioned above, pursuant to Section 209 of the Dodd-Frank Act,¹⁴ the FDIC is required, in consultation with the Financial Stability Oversight Counsel, to prescribe rules and regulations to implement Title II. Further, to the extent possible, the FDIC must harmonize such rules and regulations with insolvency laws that would otherwise apply to a covered financial company.¹⁵ The FDIC's intent in issuing the Proposed Rules is to "provide greater clarity and certainty about how key components [of the Title II] authority will be implemented and to ensure that the liquidation process under Title II reflects the Dodd-Frank Act's mandate of transparency in the liquidation of failing systemic financial companies." Below is an analysis of each of the Proposed Rules.

Treatment of Similarly Situated Creditors

As drafted, the Dodd-Frank Act provides the FDIC with broad authority to pay certain claimants more than other similarly situated claimants under certain "necessary circumstances."¹⁶ Included among the "necessary circumstances" under which

¹⁰ Dodd-Frank Act § 210(c)(10).

¹¹ Dodd-Frank Act § 210(c)(10)(B).

¹² Dodd-Frank Act § 210(a)(1)(D).

¹³ Dodd-Frank Act § 165(d).

¹⁴ Dodd-Frank Act § 209.

¹⁵ *Id.*

¹⁶ Dodd-Frank Act § 210(b)(4), (d)(4), and (h)(5)(E).

the FDIC may make an “additional payment” to a claimant are circumstances in which the payment is made to: (i) maximize the value of the assets of the covered financial company; (ii) initiate and continue operations essential to the receivership and any bridge financial company; (iii) maximize the present value return from the sale or other disposition of the assets; or (iv) minimize the amount of any loss on the sale or other disposition of the assets.¹⁷ This authority is designed to allow the FDIC to maintain essential operations, such as utilities, IT support and building maintenance, while minimizing losses and maximizing recoveries in liquidation.

The FDIC recommends Proposed Rule 380.2(b) to alleviate concern that this authority may be used by the FDIC to conduct additional governmental bailouts. Proposed Rule 380.2(b) establishes the **four categories of claimants** discussed below who can **never** satisfy the requirements under the Dodd-Frank Act to receive “additional payments.”¹⁸ By prohibiting additional payments to the enumerated claimants in Proposed Rule 380.2(b), the FDIC intends to cement liquidation risks to bondholders, shareholders, and unsecured creditors rather than allowing such risks to shift to taxpayers.

Long-Term Senior Debt. The first category of claimants who are prohibited from receiving an “additional payment” includes holders of long-term senior debt whose claims are not (i) administrative expenses of the receiver; (ii) amounts owed to the United States; and (iii) (a) wages, salaries, or commissions and (b) employee benefits, each up to US\$11,725 for each individual earned 180 days prior to the receivership.¹⁹ “Long-term senior debt” is defined under the Proposed Rules as senior debt issued by the covered financial company to bondholders or other creditors that has a term exceeding 360 days but excludes (i) partially funded, revolving or other open lines of credit that are necessary to continue operations essential to the receivership or any bridge company and (ii) any contracts to extend credit enforced by the FDIC under its authority pursuant to the Dodd-Frank Act to do so.²⁰

Proposed Rule 380.2(b) focuses on long-term unsecured senior debt in an effort to distinguish bondholders, to which additional payments would not help maximize recoveries or contribute to the orderly liquidation of failed covered financial companies, from commercial lenders or other providers of financing who have made lines of credit available to the covered financial company that are essential for its continued operation. The purpose of this

Proposed Rule is to put bondholders of a covered financial company that hold long-term, unsecured senior debt on notice that they will not receive additional payments compared to other general creditors, such as the providers of essential services discussed above.

Subordinated Debt. The second category of claimants who are prohibited from receiving an “additional payment” includes holders of debt subordinated to general creditors other than (i) wages, salaries or commissions of senior executives and directors; and (ii) obligations to shareholders, members, general partners, limited partners or other persons with interests in the equity of the covered financial company whose claims arise as a result of such status.²¹ As with holders of long-term senior debt, the purpose of Proposed Rule 380.2(b) is to put holders of subordinated debt on notice that they will not receive additional payments compared to other general creditors, such as trade creditors.

Equity Interests. The third category of claimants who are prohibited from receiving an “additional payment” includes shareholders, members, general partners, limited partners or other persons with equity interests whose claims arise because of such status.²²

Other Creditors. The fourth category of claimants who are prohibited from receiving an “additional payment” includes those other holders of general or senior liabilities, which are not (i) administrative expenses of the receiver; (ii) amounts owed to the United States; and (iii) (a) wages, salaries or commissions and (b) employee benefits, each up to US\$11,725 for each individual earned 180 days prior to the receivership, unless the FDIC, through a vote of the members of the Board of Directors then serving and in its sole discretion, specifically determines that additional payments or credits to such holders are necessary and meet all the requirements for additional payments, including to continue the operations of the covered financial company and maximize the value of the assets and minimize the losses.²³ Pursuant to Proposed Rule 380.2(b)(4), the authority of the Board of Directors to make a determination that additional payments should be made under these circumstances cannot be delegated.

Claw-Back Rights. Importantly, even if the Board of Directors approves additional payments,²⁴ the Dodd-Frank Act provides the receiver the authority to “**claw-back**” or **recoup** some or all of the additional payments made to creditors if the proceeds from

17 Proposed Rule § 380.2(b).

18 Proposed Rule § 380.2(a) and (b).

19 Proposed Rule § 380.2(b).

20 Dodd-Frank Act § 210(c)(13)(D).

21 Proposed Rule § 380.2(b)(2).

22 Dodd-Frank Act § 210(b)(4), (d)(4), and (h)(5)(E).

23 *Id.*

24 *Id.*

the sale of the covered financial company are insufficient to pay in full the obligations issued by the FDIC or the Secretary of the Treasury.²⁵ This authority is designed to ensure that if there is any shortfall in proceeds of the sale of the assets of the covered financial company, the company's creditors will be assessed before the industry as a whole and taxpayers will never be exposed to loss.

Requests for Comments. The FDIC requested written comments on all aspects of the Proposed Rule, including the following questions related to the treatment of similarly situated creditors. Comments must be received by the FDIC no later than 30 days after publication of the Proposed Rules in the Federal Register, i.e., November 18, 2010.²⁶

- Should "long-term senior debt" be defined in reference to a specific term, such as 270 or 360 days or some different term, or should it be defined through a functional definition?
- Is the description of "partially funded, revolving or other open lines of credit" adequately descriptive? Is there a more effective definition that could be used? If so, what and how is it more effective?
- Should there be further limits to additional payments or credit amounts that can be provided to shorter-term general creditors? Are there further limits that should be applied to ensure that any such payments maximize value, minimize losses, or are to initiate and continue operations essential to the implementation of the receivership or any bridge financial company? If so, what limits should be applied consistent with other applicable provisions of law?
- Under the Proposed Rule, the FDIC's Board of Directors must determine to make additional payments or credit amounts available to shorter-term general creditors only if such payments or credits meet the standards specified in 12 U.S.C. 5390(b)(4), (d)(4), and (h)(5)(E). Should additional requirements be imposed on this decision-making process for the Board? Should a super-majority be required?

Treatment of Undersecured Obligations

Proposed Rule 380.2(c) provides that claims secured by a legally valid and enforceable or perfected security interest or security entitlement in any property or assets of the covered financial company are required to be paid in full to the extent of such collateral. To the extent that any portion of a secured creditor's claim is unsecured, such portion will be treated as an unsecured claim and paid in accordance with the statutory priority scheme.²⁷ Secured obligations collateralized by securities of the United States will be valued at par.

The purpose of Proposed Rule 380.2(c) is to incentivize market participants to use highly liquid and easy-to-value collateral such as US government obligations to collateralize short-term debt, rather than illiquid collateral, such as mortgaged-backed securities, to secure short-term debt.

Requests for Comments. The FDIC requested written comments on all aspects of the Proposed Rule, including the following questions related to the treatment of undersecured obligations. Comments must be received by the FDIC no later than 30 days after publication of the Proposed Rules in the Federal Register, i.e., November 18, 2010.

- Under the Dodd-Frank Act, secured creditors will be paid in full up to the extent of the pledged collateral and the proposed rule specifies that direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States shall be valued for such purposes at par value. How should other collateral be valued in determining whether a creditor is fully secured or partially secured?
- During periods of market disruption, the liquidation value of collateral may decline precipitously. Since creditors are normally held to a duty of commercially reasonable disposition of collateral [Uniform Commercial Code], should the FDIC adopt a rule governing valuation of collateral other than US or agency collateral? Would a valuation based on rolling average prices [sic], weighted by the volume of sales during the month preceding the appointment of the receiver, provide more certainty to valuation of other collateral? Would that help reduce the incentives to quickly liquidate collateral in a crisis?

²⁵ Dodd-Frank Act § 210(o)(1)(D).

²⁶ The Proposed Rules were published in the Federal Register on October 19, 2010.

²⁷ Dodd-Frank Act § 210(b)(1).

Treatment of Personal Service Agreements

Proposed Rule 380.3 provides for administrative expense treatment of personal service agreements under specified circumstances. First, the Proposed Rule 380.3 provides the following definitions of “personal service agreement” and “senior executive.”

- *Personal service agreement* means a written agreement between an employee and covered financial company, covered subsidiary or a bridge financial company setting forth the terms of employment. This definition also includes collective bargaining agreements.²⁸
- *Senior Executive* means any person who participates or has authority to participate (other than in the capacity of the director) in major policy functions of the company. This definition includes the chairman of the board, the president, every vice president, the secretary, and the treasurer or chief financial officer, general partner and manager of a company, unless the person is excluded, by liquidation of the board of directors, the bylaws, the operating agreement or the partnership agreement of the company, from participation (other than in the capacity of the director) in major policymaking functions of the company, and the person does not actually participate therein. Furthermore, this definition substantially follows the definition of “executive officer” in Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. 215.2).²⁹

Administrative Expense Treatment of Personal Service Agreements. Proposed Rule 380.3(b) provides that if the FDIC as receiver accepts performance under a personal service agreement, before repudiation or disaffirmance of such agreement, then the terms of such agreement shall apply and any payments for the services accepted by the FDIC, as receiver, shall be treated as administrative expenses which means that such claims are paid before any other unsecured creditors.³⁰ Alternatively, under the Proposed Rule, if a bridge company accepts performance of services under a personal service agreement, then the terms and conditions of such agreement shall apply. Payment for services rendered to a bridge company will not necessarily be treated as an administrative expense but will be treated in accordance with the terms of such personal service agreement.

Senior Executives and Directors Excluded. Proposed Rule 380.3(e) explicitly provides that the above-described treatment of personal service agreements does not apply to personal service contracts with senior executives or directors.³¹ Nor does it limit the FDIC’s ability to recover compensation from any senior executive or director of a failed financial company as permitted under the Dodd-Frank Act.³²

Repudiation Authority Not Affected. Pursuant to Proposed Rule 380.3(d), like other contracts with the covered financial company, notwithstanding the acceptance of services subject to a personal services agreement, such agreement is subject to repudiation by the FDIC if such agreement is determined to be burdensome and its repudiation would promote the orderly liquidation of the company.³³

Continuation of Personal Service Agreement After Sale. Proposed Rule 380.3(c) makes clear that a personal service agreement would not continue to apply to employees in connection with a sale or transfer of a subsidiary or assets of a covered financial company unless the acquiring party expressly assumes the personal service agreement.

Claims Based on Contingent Obligations

Similar to the Bankruptcy Code, the definition of “claim” under the Dodd-Frank Act includes contingent obligations.³⁴ Proposed Rule 380.4 clarifies the provability of such claims. Proposed Rule 380.4, however, applies only to contingent obligations that meet the following criteria:

- The contingent obligation of the covered financial company must be a guarantee, letter of credit, loan commitment or similar credit obligation.
- Such contingent obligation must come due and payable upon the occurrence of a specified future event (other than the mere passage of time) and such future event may not be under the control of either the covered financial company or the party to whom the obligation is owed and cannot have occurred as of the date of the appointment of the FDIC as receiver.

Furthermore, the FDIC holds the view that an obligation in the form of a guarantee or letter of credit is no longer contingent if the principal obligor becomes insolvent or is the subject of insolvency proceedings.

²⁸ Proposed Rule 380.3(a)(1).

²⁹ Proposed Rule 380.3(a)(2). The FDIC expects to conform the definition of “senior executive” in this section to the definition that is adopted in the regulation pursuant to section 213(d) of the Dodd-Frank Act.

³⁰ Dodd-Frank Act § 210(b)(1)(A).

³¹ Proposed Rule 380.3(e).

³² Dodd-Frank Act § 210(s).

³³ Dodd-Frank Act § 210(c)(1).

³⁴ The Dodd-Frank Act defines “claim” to include a right of payment that is contingent and also provides for damages for repudiation of a contingent obligation in the form of a guarantee, letter of credit, loan commitment, or similar credit obligation. Dodd-Frank Act §§ 201(a)(4) and 210(c)(3)(E).

Provability of Contingent Claims. Contingent claims may be provable against the FDIC notwithstanding the obligation not having come due and payable as of the date of the receivership.³⁵ For example, where a guarantee or letter of credit becomes due and payable after the appointment of the receiver, the receiver will not disallow a claim solely because the obligation was contingent as of the date of appointment.

Damages Measurement. Proposed Rule 380.4(c) provides that actual direct compensatory damages for repudiation of a contingent guarantee, letter of credit, loan commitment or similar credit obligation shall be no less than the estimated value of the claim as of the date the FDIC was appointed as receiver of the covered financial company, as such value is measured based upon the likelihood that such contingent claim would become fixed and the probable magnitude of the claim.³⁶

Treatment of Subsidiaries of Insurance Companies

Under the Dodd-Frank Act, where the FDIC acts as receiver for a direct or indirect subsidiary of an insurance company, that is not an insured depository institution or an insurance company itself, the value realized from the liquidation or other resolution of the subsidiary will be distributed according to the priority scheme set forth in the Dodd-Frank Act.³⁷ Proposed Rule 380.5 expressly recognizes the requirement that the FDIC must remit all proceeds from the liquidation, transfer, sale or other disposition of the direct or indirect subsidiaries of an insurance company, that are not themselves insurance companies, in accordance with the priority scheme in the Dodd-Frank Act.³⁸ This results in a clarification that such value will be available to the policyholders of the parent insurance company to the extent required by applicable state laws and regulations.

Limitations on the FDIC's Ability to Take Liens on Certain Assets of Covered Financial Companies

The Dodd-Frank Act currently permits the FDIC to provide funding for the orderly liquidation of covered financial companies and covered subsidiaries that the FDIC determines, in its discretion, is necessary or appropriate.³⁹ The FDIC can provide funding in several different ways, including making loans, acquiring debt, purchasing assets or guaranteeing the covered financial company

or covered subsidiary against loss, assuming or guaranteeing obligations, making payments or entering into certain transactions.⁴⁰ Specifically, the FDIC is permitted to take liens on any or all assets of the covered financial company or any covered subsidiary, including first-priority liens on unencumbered assets to secure repayment of any transactions conducted under an orderly liquidation.⁴¹

In the event the FDIC provides funding to a covered financial company that is an insurance company or is a covered subsidiary or affiliate of an insurance company or enters into any transaction with respect to such covered entity as described above,⁴² Proposed Rule 380.6 limits the liens the FDIC can place on assets of such entities. In Proposed Rule 380.6, the FDIC proposes that it will exercise its right to take a lien on some or all assets only when the FDIC determines, in its sole discretion, that:

- Taking such lien is necessary to the orderly liquidation of the entity.
- Taking such lien will not either unduly impede or delay the liquidation or rehabilitation of such insurance company, or the recovery by its policyholders.

Proposed Rule 380.6(b) clarifies that no restriction on taking of a lien on assets of a covered financial company or any covered subsidiary or affiliate would limit or restrict the ability of the FDIC to take a lien on any or all of the assets in connection with the sale of such entities or any of their assets on a financed basis to secure any financing being provided in connection with such sale.

Requests for Comments. The FDIC requested written comments on all aspects of the Proposed Rule, including the following questions related to Proposed Rules 380.3 – 380.6. Comments must be received by the FDIC no later than 30 days after publication of the Proposed Rules in the Federal Register, i.e., November 18, 2010.

- Are changes necessary to the provisions of proposed Section 380.3 through 380.6? What other specific issues addressed in these sections should be addressed in the proposed rule or in future proposed rules?

35 Proposed Rule 380.4(b).

36 Proposed Rule 380.4(c).

37 Dodd-Frank Act § 210(b)(1).

38 Proposed Rule 380.5.

39 Dodd-Frank Act § 204(d).

40 Dodd-Frank Act § 204(d)(1)-(6).

41 Dodd-Frank Act § 204(d)(4).

42 Dodd-Frank Act § 204(d).

Part III. FDIC's Request for Comment Related to Title II's Orderly Liquidation Authority

In Part III of the Proposed Rules, the FDIC has requested written comments to broader questions relating to how Title II should work in practice. Comments to these questions must be received by the FDIC no later than 90 days after publication in the Federal Register, i.e., January 17, 2011. Based on such feedback, the FDIC intends to craft a broader, more detailed rule on how it will use its Title II powers which rule is expected in early 2011. Among the general categories of topics for which the FDIC has proposed questions and for which it is soliciting comments are:

- Identification of additional orderly liquidation authority areas that would benefit from the FDIC's rulemaking, including any rulemaking in order to harmonize such rules with otherwise applicable insolvency laws.
- Whether and what process should be used for determining the value of claims, including methods for determining estimated claims for the repudiation of certain contingent obligations.
- Identification and treatment of the key issues relating to the application of the setoff provisions in section 210(a)(12).
- Whether clarification is needed for determining the priority of expenses and claims, including administrative expenses of the FDIC.
- Whether and what regulations should be adopted relating to the FDIC's statutory avoidance powers.
- Identification and mechanics of addressing issues surrounding the chartering, operation and termination of a bridge financial company.
- Whether the Proposed Rules' definition of "long-term senior debt" should be clarified or amended.

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.