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The FDIC's Final Rule Implementing Certain Provisions of Orderly Liquidation Authority—Summary and Analysis

On July 6, 2011, the Federal Deposit Insurance Corporation ("FDIC") released the Final Rule Amending 12 C.F.R. Part 380 under Title II ("Orderly Liquidation Authority" or "OLA") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "statute") (the "Final Rule"). The Final Rule adopts with certain changes the provisions of two sets of rulemakings, one initially proposed in October 2010 and then adopted as an interim final rule in January 2011 (the "IFR") and the other initially proposed in March 2011 (the "NPR").

This memorandum begins by highlighting certain aspects of the Final Rule of particular importance to creditors. It then summarizes and analyzes the provisions of the Final Rule. It concludes by discussing a number of provisions that are notably absent from the Final Rule.

Key Issues

The Final Rule covers certain areas, such as the claims process and the priority of claims, in great depth, while others, such as the "minimum recovery" right, remain entirely unaddressed. The FDIC has indicated that they see OLA rulemaking as an ongoing process. However, given other substantive areas for which the FDIC is responsible, it is unclear when further rulemaking can be expected.

The Final Rule helpfully makes clear that its provisions generally do not apply to qualified financial contracts ("QFCs"). For example, the provisions regarding the FDIC's transfer of assets free from rights of setoff and requiring the FDIC's consent prior to foreclosing on collateral both have carve-outs for QFCs. While not as broad as some commenters had suggested, they appear adequate to clarify that the statutory safe harbors for QFCs prevail notwithstanding anything to the contrary in the Final Rules.[1]

The Final Rule includes provisions (some of which were absent in prior rulemakings) intended to harmonize the treatment of secured creditors under OLA with that under the Bankruptcy Code (the "Code"), including by defining "adequate protection" that must be given to creditors whose rights with respect to collateral are stayed under OLA. However, rules regarding when and how creditors would be able to challenge the FDIC's determinations of whether adequate protection has been provided, or other matters relating to collateral, remain absent. Implicitly, but not explicitly, an aggrieved creditor would be required to pursue its claim in an administrative process before having access to a court. Moreover, until the FDIC issues a

[1] Indeed, the FDIC does not have the authority by rule to derogate from the statutory protections for QFCs.

policy statement granting advance consent to the foreclosure under certain circumstances by secured creditors on collateral (which the FDIC indicates it plans to do), secured creditors remain indefinitely stayed from exercising remedies with respect to collateral.

With respect to setoff rights, the Final Rule and OLA appear to be at odds, with the Final Rule permitting the FDIC to transfer assets of the covered financial company ("CFC") free and clear of any setoff rights. By contrast, the statute would appear to protect contractual rights of setoff under certain circumstances.

Also notable is the absence of any rules regarding "minimum recovery" (the statutory floor on recoveries by creditors, requiring creditors to receive at least what they would have in a liquidation under a hypothetical Chapter 7 proceeding). Similarly absent are rules providing for the collective determination and dispute of claims. To the contrary, the Final Rule generally does not allow for claims to be filed on behalf of others, meaning that an agent bank for a syndicate of lenders, for instance, would not be able to file claims on behalf of the syndicate.

Provisions of the Final Rule

The provisions of the Final Rule cover a broad range of issues, which the FDIC has organized into three subparts:

- Subpart A – General and Miscellaneous Provisions, which includes definitions and addresses the treatment of insurance company subsidiaries, the recoupment of compensation from senior executives and directors, and provisions clarifying the treatment of fraudulent and preferential transfers.

- Subpart B – Priorities, which addresses the priority of expenses and unsecured claims, claims in respect of impaired rights of setoff, obligations of bridge financial companies, and the payment of "additional amounts" to certain similarly situated creditors.

- Subpart C – Receivership Administrative Claims Process, which addresses the receivership claims process, the treatment of contingent claims, and the treatment of secured claims.

Rather than address the Final Rule on a section-by-section basis, this memorandum discusses the rules topically in an order that approximates their order in the Final Rule.

I. Recoupment of Compensation from Senior Executives and Directors

Section 204(a) of Dodd-Frank requires the FDIC to ensure that parties responsible for the failure of a CFC "bear losses consistent with their responsibility". The statute lists "recoupment of compensation" as one of the FDIC's options for satisfying this mandate. Section 210(s)(3) of Dodd-Frank requires the FDIC to promulgate regulations implementing such claw back of compensation.

Under the Final Rule, the FDIC may file an action to recover the compensation of any senior executive or director who it determines is substantially responsible for the failed condition of the CFC, which means that such person failed to act with the care that an ordinarily prudent person would have given the circumstances (unlike the NPR, which had defined "substantially responsible" in reference to the individual's position within the CFC). The FDIC may file suit against individuals who are found substantially responsible and whose performance is determined to have resulted in financial losses to the CFC that materially contributed to the CFC's to recover compensation earned during the two-year period prior to the appointment of the FDIC as receiver for the CFC.

Certain senior executives and directors, including the chairman of the board, CEO, president, CFO and anyone responsible for the strategic or policymaking decisions of the CFC, will be presumed to be substantially responsible under the Final Rule. This presumption can be rebutted by such individuals with proof that they performed their duties with the care that an ordinarily prudent person would have given the circumstances.

Exempted from this presumption of substantial responsibility are senior executive and directors who joined a CFC no more than two years prior to the appointment of the FDIC as receiver for the purpose of turning it around during a time of crisis. Individuals exempt from the presumption can still be subject to an action to have their compensation clawed back if the FDIC determines that their actions demonstrate that they were substantially responsible for the failed condition of the CFC.

II. The Treatment of Fraudulent and Preferential Transfers

Rule § 380.9 fixes a technical drafting error in the statute with respect to whether the FDIC can avoid a transfer as fraudulent or preferential, in a manner helpful to transferees and consistent with the Code. The Final Rule's approach is consistent with the letter published on December 29, 2010 by the FDIC's then-Acting General Counsel in response to letters from the American Securitization Forum ("ASF") and the Securities Industry and Financial Markets Association ("SIFMA").

The FDIC has a statutory mandate to promulgate rules that harmonize the treatment of creditors under OLA and the Code, if possible. Rule § 380.9 appropriately corrects what was likely a drafting oversight in the statute, which was meant to provide for the same treatment of preferential and fraudulent transfers as found under the Code.

III. Priority of Expenses and Unsecured Claims

Rule § 380.21(a) integrates each provision in OLA with respect to the priority of expenses and claims into a comprehensive waterfall of payments. Rules § 380.22 through § 380.27 further define and clarify certain priorities in the waterfall. Under the Final Rule, payments of unsecured claims are paid out of the receivership in the following order:

1. Repayment of debt incurred or credit obtained by the FDIC as receiver for the CFC, provided that the FDIC has determined that, at the time such debt was incurred, it was otherwise unable to obtain unsecured credit for the CFC from commercial sources;

2. Administrative expenses of the receiver, including;

    - Pre-insolvency extensions of credit enforced and drawn upon by the FDIC.
    - Unsecured credit extended to the receivership, unless included in category 1 above.

3. Any amounts owed to the United States;

    - Only amounts which were advanced for the purpose of orderly liquidation, advanced to avoid or mitigate systemic risk or owed to the Department of Treasury for unpaid taxes qualify.
    - Included in this category are, among others, amounts advanced by the Department of Treasury to capitalize the Orderly Liquidation Fund, debt owed to a Federal Reserve Bank and payments to satisfy FDIC guarantees of debt under its Temporary Liquidity Guarantee Program.
    - Excluded from this category are, among others, obligations to government sponsored entities such as Fannie Mae, Freddie Mac and the Federal Home Loan Banks incurred in the ordinary course of business prior to the appointment of the FDIC as receiver.

4. Wages, salaries and other compensation, unless included in category 9 below, subject to a cap and certain conditions;

5. Contributions owed to employee benefit plans, unless included in category 9 below, subject to a cap and certain conditions;

6. Any amounts due to creditors in respect of setoff rights impaired by the receiver's transfer of assets free from rights of setoff;

    - Rule § 380.24(d) clarifies that the QFC provisions of OLA apply notwithstanding the FDIC's right to impair setoff in certain non-QFC contexts.

7. Any other general or senior unsecured liabilities of the CFC;

8. Any obligations subordinated to general creditors;

9. Any wages, salaries or other compensation to senior executives and directors;

10. Post-insolvency interest; and

11. Payments to shareholders, general partners, members or other equity holders.

The Final Rule clarifies that the FDIC will respect agreements among creditors to subordinate certain claims within or between priority classes.[2] The FDIC staff memorandum accompanying the Final Rule also makes clear that secured creditors are not subject to the waterfall, except to the extent their claims are undersecured.

Amounts Owed to the United States

The NPR proposed to define “amounts owed to the United States”, which receive a high priority in the statutory receivership claims and expenses priority waterfall, as any amount owed to a U.S. agency, department or instrumentality. Final Rule § 380.23 narrows that definition, which now includes only amounts owed to the U.S. that were advanced to the CFC for the purpose of its orderly liquidation, were advanced for the purpose of mitigating systemic risk or that are owed to the Treasury for unpaid taxes. The Final Rule also includes non-exclusive lists of amounts that are included in the definition (e.g., amounts owed to the Treasury for unpaid taxes or to the Federal Reserve) and amounts that are excluded from the definition (e.g., amounts incurred in the ordinary course of business prior to the appointment of the receiver to government sponsored entities such as Fannie Mae, Freddie Mac and the Federal Home Loan Banks).

Rule § 380.23 provides that amounts owed to the United States that were advanced to promote the CFC’s orderly liquidation or to reduce systemic risk or were owed to the Treasury on account of tax liabilities shall receive priority payment, whether the amount is classified as debt or equity on the books of the CFC. This is consistent with OLA’s emphasis on ending “bailouts”.[3]

In another divergence from the Code, the Final Rule’s definition of “amounts owed to the United States” creates a priority for all of the CFC’s tax liabilities.[4] By contrast, the Code provides for such priority for only certain taxes.[5]

As noted above, the Final Rule provides that subordination agreements will be respected during the claims process.[6] The Final Rule specifically provides that a U.S. agency or department may agree in writing to subordinate obligations owed to it, provided that such debt receives higher priority than the regulatory capital of the CFC.[7]

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[2] Rule § 380.21(c).

[3] *See*, *e.g.*, 12 U.S.C. § 5386(6).

[4] Rule § 380.23(3).

[5] *See* Code § 507(a)(8).

[6] Rule § 380.21(c).

[7] Rule § 380.23(c).

Furthermore, the super-priority afforded U.S. agencies and departments could impair the FDIC's ability to perform the "minimum recovery" obligation under OLA, which requires that creditors receive at least what they would have in a chapter 7 liquidation under the Code. For example, in cases where assets and only some liabilities are transferred to a bridge, obligations incurred to finance the operation of the bridge and to liquidate the CFC in an orderly fashion could deplete assets to the extent that the FDIC would be unable to satisfy its "minimum recovery" obligation to left-behind creditors. The implementation of "minimum recovery" remains a significant area in which rules are lacking.

Post-Insolvency Interest

Under the Final Rule, creditors are paid post-insolvency interest on allowed claims, at a rate calculated under Rule § 380.25(b). The priority of such interest payments is senior only to equity, subordinated even to the payment of wages and compensation to senior executives and directors.

Setoff

Under the Code, creditors with mutual debts with the debtor counterparty can generally set off such amounts, thereby reducing the amount of the creditors' unsecured claim. Under the Final Rule, creditors whose rights to set off are impaired by the receiver's transfer of assets free of such rights have a priority claim equal to the amount of such impairment. While this priority places such claims above general unsecured creditors, it subordinates them to the payment of administrative expenses, amounts borrowed to finance the liquidation of the CFC and certain other claims. Therefore, unlike under the Code, it is possible that creditors under OLA might not receive the full benefit of their setoff rights.

Notably, the Final Rule appears to conflict with related statutory provisions. OLA provides that, "subject to other provisions of this title", recipients of assets transferred by the FDIC take such assets subject to any claims and rights that would be enforceable against such recipient "under applicable noninsolvency law",[8] which would appear to include contractual rights to set off.[9] Although another provision of OLA, from which the Final Rule is derived, provides that "[e]xcept as otherwise provided in this title, the [FDIC] may sell or transfer any assets free and clear of the setoff rights of any party…",[10] we believe that the more specific provision is controlling, and that the Final Rule is thus inconsistent with the statute.

The statute and the Final Rule clarifies that the provisions of the Final Rule regarding setoff do not apply to QFCs.

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[8] 12 U.S.C. § 5390(a)(1)(G)(iii).

[9] See, e.g., N.Y. U.C.C. § 9-404(a).

[10] 12 U.S.C. § 5390(a)(12)(F).

Treatment of Creditors of the Bridge Financial Company

Rule § 380.26 clarifies that obligations assumed by a bridge financial company (a "bridge") will be paid in accordance with the terms of such obligation, not pursuant to the claims process and priority waterfall. However, in a receivership of a bridge, any claim arising out of a breach of an agreement transferred to a bridge would have administrative expense priority under Rule § 380.26(a). The Final Rules also provide that any credit extended to the bridge or extended to the receiver in respect of the bridge will be treated as an administrative expense upon the receivership of the bridge. Rule § 380.26(c) clarifies that when the bridge is dissolved, any proceeds after the payment of the bridge's administrative expenses will be distributed to the FDIC as receiver for the predecessor CFC.

The provisions with respect to the treatment of creditors of the bridge would, upon the failure and receivership of the bridge under OLA, effectively destroy the priority of different classes of debt transferred to the bridge. In addition, they fail to provide new creditors of a bridge with a higher priority than creditors whose obligations were assumed by the bridge. The FDIC expects that obligations of the bridge will be paid out in full by the bridge in the ordinary course.

Payments of "Additional Amounts" to Similarly Situated Creditors

Rule § 380.27(b) prohibits "additional payments" over what the holder would have received in a liquidation for holders of long-term senior debt and subordinated debt and equity holders. Holders of short-term debt may only receive additional payments if the FDIC's Board of Directors determines by vote that it is necessary. Rule § 380.27(a) defines "long-term senior debt" as senior debt issued by the CFC with a term of more than 360 days, except revolving lines of credit necessary to continue operations essential to the receivership or bridge.

The prohibition on additional payments to holders of long-term debt and equity was also included in the notice of proposed rulemaking published in the Federal Register on October 19, 2010, as well as the IFR.[11] In light of the unknowable nature of future financial crises, it seems imprudent for the FDIC to constrain its statutory authority[12] to make payments or credit amounts to creditors. In addition, it seems unnecessary in light of the FDIC's statutory authority to claw back payments in the event that the Treasury has not been repaid in full as a result of the receivership claims process.[13] Despite several comments to this effect during two different comment periods, and consistent with its emphasis on imposing losses on creditors and eliminating moral hazard, the FDIC has retained Rule § 380.27 largely unchanged from the previous rulemakings.

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[11] 75 Fed. Reg. 64173 (Oct. 19, 2010).

[12] Under 12 U.S.C. § 5390(b)(4), (d)(4) and (h)(5)(E).

[13] 12 U.S.C. § 5390(o)(1)(D)(i).

In conversations with the FDIC, staff expressed the view that this rule relates only to the receiver's power to make payments to creditors under the claims process and not to the receiver's power to transfer liabilities to a bridge or third party (thereby presumably satisfying in full such claim).

IV. The Receivership Claims Process

The Final Rule's procedures for filing claims closely mirror the procedure under the Federal Deposit Insurance Act ("FDIA"). Under the Final Rule:

- The claims bar date would be at least 90 days after notice to creditors to file claims is published by the FDIC.
  - The FDIC would provide notice by publication in a newspaper and on its web site.
  - The FDIC would also provide notice by mailing creditors on the CFC's books.
  - If a creditor is discovered after the initial notice, the FDIC would provide notice by mailing.
    - If such notice is given immediately before the claims bar date, the FDIC can allow a late filing.
    - If such notice is after the claims bar date, the affected creditor would receive at least 90 days after receiving its notice to file its claim.
- Claims would be filed by each individual claimant. No single party would be able to assert a claim on behalf of a class.
- The FDIC may disallow a claim or any portion of a claim if it is not satisfactorily proven. A late-filed claim may nonetheless be considered if the claimant did not receive notice in time to file a claim before the claims bar date or if the claim is based on an act or omission of the FDIC that occurred after the claims bar date.
- The FDIC must notify a claimant whether it has allowed or disallowed a claim within 180 days, unless the FDIC and claimant agree in writing to an extension.
- If the FDIC disallows a claim or portion thereof, the claimant can seek judicial review on the merits of it claim, which will be decided *de novo*.
- The FDIC may not disallow a claim solely because it is based on a contingent obligation of the CFC. If the receiver repudiates a contingent obligation based on a guarantee, letter of credit, loan commitment or similar credit obligation, the damages for repudiation shall be no less than the estimated value of the claim as of the date the FDIC was appointed receiver, based upon the likelihood the contingent claim would become fixed and the probable magnitude thereof.

The Receivership Claims Process

The Final Rule provides that the claims bar date shall be no less than 90 days after creditors receive notice to file claims. The FDIC would need to allow or disallow proven claims within 180 days after such bar date, though the deadline with respect to a claim may be extended by agreement between the creditor and the FDIC. This 180-day claims determination period is exceedingly short (as would be the minimum 90-day claims filing period). Such a timeline has been used by the FDIC to resolve small and regional insured banks, whose books are far less complex. However, such an accelerated claims filing and determination process could increase the likelihood that creditors are paid on incomplete and inaccurate information, and could impose a significant burden on creditors and FDIC staff alike.

Rule § 380.34 provides that a claimant must generally file a claim on its own behalf and not on behalf of others. The preamble to the NPR noted that a trustee of a securitization or other structured financial transaction would be permitted to file a claim on behalf of all of the investors in such transaction, because the trustee would legally own the claim. By contrast, it appears that the lead agent bank in a syndicate would not be permitted to file a claim on behalf of all the participants in the syndicate. Further, it is likely that many creditors will be similarly situated and file similar claims. The Final Rule provides no means for such creditors to collectively challenge the determinations of the FDIC, whether the same or different. The collective treatment of claims remains a significant area in which rules are lacking.

Contingent Claims

Dodd-Frank prohibits the FDIC from disallowing a claim merely because such claim is contingent,[14] a welcome departure from the FDIC's practice under the FDIA of attempting to disallow such claims in their entirety. The Final Rule retained language from the IFR that largely repeated the statutory provision with respect to contingent claims. Unlike the IFR, the Final Rule also provides that the receiver must estimate the value of a contingent claim within 180 days after the claim is filed, unless the FDIC and the claimant agree in writing to an extension.

Unlike the IFR, the Final Rule provides that the FDIC's determination of the estimated value of the contingent claim will be the amount of the allowed claim even if the contingent claim becomes fixed after such determination. Similarly, the Final Rule narrowed the exception for a late-filed claim where such claim did not accrue until after the claims bar date, which the staff memorandum accompanying the Final Rule noted could apply to contingent claims. The Final Rule limited the exception instead to instances where the claim is based upon an act or omission by the FDIC that occurs after the claims bar date.

The Final Rule does not define which claims should be treated as contingent. In the preamble to the notice of proposed rulemaking released by the FDIC in October 2010, however, the FDIC stated that it "holds the view" that a guaranty is no longer contingent if the principal obligor becomes insolvent. Commenters suggested that the FDIC codify this view in

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[14] 12 U.S.C. § 5380(a)(4), § 5390(c)(3)(E).

the Final Rule, as well as provide that a claim is no longer contingent once it is drawable for any reason (not only if the primary obligor is insolvent). However, the FDIC did not codify its view in the Final Rule.

V. The Treatment of Secured Claims

Under Dodd-Frank, a secured creditor is entitled to the value of its collateral to the extent of its claim and has an unsecured claim for the amount of the secured obligation in excess of the value of its collateral.[15] Under the Final Rule:

- The FDIC would determine the amount of the claim, the validity of the creditor's security interest in the collateral and the value of the collateral. Unlike prior rulemakings, the Final Rule provides that collateral securing an obligation of the CFC will be valued at the time of the proposed disposition or use of the collateral. The staff memorandum accompanying the Final Rule notes that this approach is more consistent with the valuation of collateral under the Code. (The IFR and NPR had provided that the collateral would be valued as of the date of the appointment of the receiver.)

- Under Dodd-Frank, secured creditors must obtain the consent of the FDIC before foreclosing on collateral, prior to the expiration of the 90-day stay.[16] Under the Final Rule, the FDIC must provide such consent unless the receiver plans to use, sell or lease the property or repudiates the secured contract.

- The FDIC must provide adequate protection to a secured creditor if the FDIC uses, sells, leases or grants a security interest in the secured creditor's collateral, by making periodic cash payments or granting the claimant an additional or replacement lien to the extent that the FDIC's actions diminish the collateral's value or by otherwise providing relief "that will result in the realization by the claimant of the indubitable equivalent of the claimant's security interest in the property". The rule also includes a presumption of adequate protection if the value of the collateral is not depreciating or if the creditor is significantly overcollateralized.

- The FDIC's repudiation of a contract would not have the effect of avoiding a creditor's valid security interest with respect to such contract, and such interest would secure allowable damages for the FDIC's repudiation.

Section 210(c)(13)(C) of Dodd-Frank provides for a 90-day stay on collateral foreclosure by secured creditors, while Section 210(q)(1)(B) requires consent for such foreclosure even after the expiration of the 90-day stay. Under the mirror provision of the FDIA, on which section 210(q) was modeled, the FDIC issued a policy statement granting advance consent to the exercise of remedies. The FDIC staff memorandum accompanying the Final Rule

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[15] 12 U.S.C. § 5390(a)(3)(D)(ii).

[16] 12 U.S.C. § 5390(c)(13)(C) (providing for the "90-day stay").

states that the FDIC will issue a similar policy statement granting advance consent. Pending that policy statement, secured creditors will be subject to an indefinite stay.

The Final Rule added a provision regarding adequate protection for secured creditors to provide treatment similar to that under the Code. It provides that if the FDIC uses, sells, leases or grants a security interest in a secured claimant's collateral, the FDIC will provide adequate protection to such claimant by making periodic cash payments or granting the claimant an additional or replacement lien to the extent that the FDIC's actions diminish the collateral's value or by otherwise providing relief "that will result in the realization by the claimant of the indubitable equivalent" of the secured creditor's interest. There is no procedure to challenge the FDIC's determinations, and no procedure for an advance hearing (as in the case of "cash collateral" under the Code).

The Final Rule replaced and deleted certain provisions in the rules with respect to secured claims. The provision regarding the expedited claims procedure for secured claimants was deleted because, according to the FDIC staff memorandum accompanying the Final Rule, it repeated the language of the statute nearly verbatim. The sale of collateral by the FDIC is now covered by the added rule on adequate protection for secured claimants discussed above. The provision regarding the FDIC's redemption of collateral was deleted from the Final Rules because it was duplicative of the statute.

In addition, unlike the NPR, the Final Rule clearly provides that secured creditors may exercise remedies with respect to their collateral held in connection with a QFC notwithstanding the 90-day stay (although still subject to the one-day stay).[17]

Areas for Potential Future Rulemakings

There are numerous provisions suggested by commenters that are absent from the Final Rule. They range from what we consider significant deficiencies to absent but helpful clarifications. Whether or when the FDIC intends to address these issues is unclear.

Minimum recovery provisions

- OLA clearly provides that after the receivership claims procedure is complete, creditors cannot "receive less than the amount such creditor is entitled to receive" under a Chapter 7 liquidation of the CFC.[18] The FDIC staff memorandum accompanying the Final Rule notes that several commenters "repeatedly" emphasized the importance of what it called the "Chapter 7 minimum" payment provisions.

- There are no provisions on determining a creditor's "minimum recovery" in the rules with respect to the receivership claims procedure, nor any provisions regarding how a

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[17] Rule § 380.51(g)(2). The language of the statute is clear that this consent requirement does not apply to collateralized QFCs. *See* 12 U.S.C. § 5390(c)(8)(A)(ii).

[18] 12 U.S.C. § 5390(a)(7)(B).

creditor challenges the minimum recovery amount determined by the FDIC. There is a concern that the FDIC does not consider Chapter 7 liquidation value to be a "floor" for recovery by creditors, despite the seemingly clear statutory language.

- With no guidance on how the FDIC will determine and creditors will challenge the minimum recovery amount, valuations of such amount would presumably be challenged on an ad hoc basis subject to de novo review. The valuation with respect to each creditor is likely to be challenged, which could tie up the FDIC in court for years. In addition, the individual nature of de novo review could lead to inconsistent and unpredictable results for creditors.

Definition of "predominately engaged in" financial activities

- The Final Rule deleted the provisions in the NPR defining "predominately engaged in" financial activities, a term used in defining which companies are eligible for resolution under OLA. The section is being reserved until the FDIC further coordinates with the Federal Reserve Board on the definition of the same term for purposes of determinations under Title I of Dodd-Frank, after which the rule will be finalized through a separate notice.

Definition of "adequate protection" in the context of nullifying affiliate cross-default provisions

- The provision of OLA that allows the FDIC to prevent counterparties to contracts of affiliates guaranteed by the CFC to exercise contractual rights to terminate their agreements based on the insolvency of the CFC is premised on a transfer of the guarantee to a bridge or solvent third party or "adequate protection" otherwise being provided.

- Despite commenters' suggestion in a comment letter to the FDIC that "adequate protection" be clarified, no such clarification is included in the Final Rule.

The rights of creditors upon a default by the FDIC

- The Final Rule does not clarify the treatment of obligations to non-QFC creditors (including secured creditors) upon a default by the FDIC during the 90-day automatic stay,[19] which commenters suggested should be afforded administrative expense claim status.

Treatment of broker-dealers

- The Final Rule does not include clarity on the interplay between SIPA and OLA (or SIPC and the FDIC) in the resolution of a systemically significant broker-dealer. The FDIC staff memorandum accompanying the Final Rule states that rules regarding covered broker-dealers will be addressed in a separate rulemaking prepared jointly with the SEC.

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[19] Under 12 U.S.C. § 5390(c)(13)(C).

- In particular, the FDIC staff memo notes that SIPC's subrogation claim will be treated as an "amount owing to the U.S." for purposes of the priorities of unsecured claims. It is not clear how that priority for unsecured claims relates to SIPC's status as a subrogee to "customer" claims.

Treatment of clearing organizations and futures commission merchants ("FCMs")

- The Final Rule does not clarify whether the rules promulgated under the Bankruptcy Code provisions applicable to the liquidation of clearing organizations and FCMs (e.g., 17 C.F.R Part 190) would apply to the resolution of those entities under OLA.

Fair treatment of non-U.S. creditors

- Commenters urged the FDIC to adopt a rule that it will not exercise powers under OLA in a way that discriminates against non-U.S. creditors, especially when exercising its authority to treat similarly situated creditors differently. The Final Rule does not include such a provision.

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If you have any questions, please feel free to contact Seth Grosshandler (sgrosshandler@cgsh.com | 212-225-2542), Knox McIlwain (kmcilwain@cgsh.com | 212-225-2245), Peter Petraro (ppetraro@cgsh.com | 212-225-2714) or any of your regular contacts at the firm.

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