

Federal Deposit Insurance Corporation

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PART 380—ORDERLY LIQUIDATION AUTHORITY

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SOURCE: 76 FR 4215, Jan. 25, 2011, unless otherwise noted.

Subpart A—General and Miscellaneous Provisions

§ 380.1 Definitions.

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

Affiliate. The term “affiliate” means any company that controls, is controlled by, or is under common control with another company at the time of, or immediately prior to, the appointment of receiver of the covered financial company.

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

Board of Governors. The term “Board of Governors” means the Board of Governors of the Federal Reserve System.

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

Business day. The term “business day” means any day other than any Saturday, Sunday or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

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

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

Control. The term “control”, when used in the definitions of “affiliate” and “subsidiary”, has the meaning given to such term under 12 U.S.C. 1841(a)(2)(A) and (B) as such law, or any successor, may be in effect at the date of the appointment of the receiver, together with any regulations promulgated thereunder then in effect.

Corporation. The term “Corporation” means the Federal Deposit Insurance Corporation.

Covered financial company. The term “covered financial company” means (a) a financial company for which a determination has been made under 12 U.S.C. 5383(b) and (b) does not include an insured depository institution.

Covered subsidiary. The term “covered subsidiary” means a subsidiary of a covered financial company other than:

- (1) An insured depository institution;
- (2) An insurance company; or
- (3) A covered broker or dealer.

Creditor. The term “creditor” means a person asserting a claim.

Director. The term “director” means a member of the board of directors of a company or of a board or committee performing a similar function to a board of directors with authority to vote on matters before the board or committee.

Dodd-Frank Act. The term “Dodd-Frank Act” shall mean the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 12 U.S.C. 5301 *et seq.* (2010).

Employee benefit plan. The term “employee benefit plan” has the meaning set forth in the Employee Retirement Income Security Act, 29 U.S.C. 1002(3).

Insurance company. The term “insurance company” means any entity that is:

- (1) Engaged in the business of insurance,
- (2) Subject to regulation by a State insurance regulator, and
- (3) Covered by a State law that is designed to specifically deal with the rehabilitation, liquidation or insolvency of an insurance company.

Intermediate insurance stock holding company. The term “intermediate insurance stock holding company” means a corporation organized either at the time of, or at any time after, the organization of the mutual insurance holding company that:

- (1) Is a subsidiary of a mutual insurance holding company;
- (2) Holds a majority of the issued and outstanding voting stock of the converted mutual insurance company created at the time of formation of the mutual insurance holding company; and
- (3) Holds, as its largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter), an insurance company.

Mutual insurance company. The term “mutual insurance company” means an insurance company organized under the laws of a State that provides for the formation of such an entity as a non-stock mutual corporation in which the surplus and voting rights are vested in the policyholders.

Mutual insurance holding company. The term “mutual insurance holding company” means a corporation that:

- (1) Is lawfully organized under state law authorizing its formation in connection with the reorganization of a mutual insurance company that converts the mutual insurance company to a stock insurance company, and—
- (2) Holds either:
 - (i) A majority of the issued and outstanding voting stock of the intermediate insurance stock holding company, if any, or
 - (ii) If there is no intermediate insurance stock holding company, a majority of the issued and outstanding voting stock of the converted mutual insurance company.

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Senior executive. The term “senior executive” means any person who participates or has authority to participate (other than in the capacity of a director) in major policymaking functions of the company, whether or not: The person has an official title; the title designates the officer an assistant; or the person is serving without salary or other compensation. 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 are considered senior executives, unless the person is excluded, by resolution 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 a director) in major policymaking functions of the company, and the person does not actually participate therein.

Subsidiary. The term “subsidiary” means any company which is controlled by another company at the time of, or immediately prior to, the appointment of receiver of the covered financial company.

[76 FR 41639, July 15, 2011, as amended at 77 FR 25353, Apr. 30, 2012; 77 FR 63214, Oct. 16, 2012]

§ 380.2 [Reserved]

§ 380.3 Treatment of personal service agreements.

(a) For the purposes of this section, the term “personal service agreement” means a written agreement between an employee and a covered financial company or a bridge financial company setting forth the terms of employment. This term also includes an agreement between any group or class of employees and a covered financial company, or a bridge financial company, including, without limitation, a collective bargaining agreement.

(b)(1) If before repudiation or disaffirmance of a personal service agreement, the Corporation as receiver of a covered financial company, or a bridge financial company accepts performance of services rendered under such agreement, then:

(i) The terms and conditions of such agreement shall apply to the performance of such services; and

(ii) Any payments for the services accepted by the Corporation as receiver shall be treated as an administrative expense of the receiver.

(2) If a bridge financial company accepts performance of services rendered under such agreement, then the terms and conditions of such agreement shall apply to the performance of such services.

(c) No party acquiring a covered financial company or any operational unit, subsidiary or assets thereof from the Corporation as receiver or from any bridge financial company shall be bound by a personal service agreement unless the acquiring party expressly assumes the personal service agreement.

(d) The acceptance by the Corporation as receiver for a covered financial company, or by any bridge financial company or the Corporation as receiver for a bridge financial company of services subject to a personal service agreement shall not limit or impair the authority of the receiver to disaffirm or repudiate any personal service agreement in the manner provided for the disaffirmance or repudiation of any agreement under 12 U.S.C. 5390(c).

(e) Paragraph (b) of this section shall not apply to any personal service agreement with any senior executive or director of the covered financial company or covered subsidiary, nor shall it in any way limit or impair the ability of the receiver to recover compensation from any senior executive or director of a covered financial company under 12 U.S.C. 5390 and the regulations promulgated thereunder.

[76 FR 41640, July 15, 2011]

§ 380.4 [Reserved]

§ 380.5 Treatment of covered financial companies that are subsidiaries of insurance companies.

The Corporation as receiver shall distribute the value realized from the liquidation, transfer, sale or other disposition of the direct or indirect subsidiaries of an insurance company, that are not themselves insurance companies, solely in accordance with the

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order of priorities set forth in 12 U.S.C. 5390(b)(1) and the regulations promulgated thereunder.

[76 FR 41640, July 15, 2011]

§ 380.6 Limitation on liens on assets of covered financial companies that are insurance companies or covered subsidiaries of insurance companies.

(a) In the event that the Corporation makes funds available to a covered financial company that is an insurance company or to any covered subsidiary of an insurance company, or enters into any other transaction with respect to such covered entity under 12 U.S.C. 5384(d), the Corporation will exercise its right to take liens on any or all assets of the covered entities receiving such funds to secure repayment of any such transactions only when the Corporation, in its sole discretion, determines that:

(1) Taking such lien is necessary for the orderly liquidation of the entity; and

(2) Taking such lien will not either unduly impede or delay the liquidation or rehabilitation of such insurance company, or the recovery by its policyholders.

(b) This section shall not be construed to restrict or impair the ability of the Corporation to take a lien on any or all of the assets of any covered financial company or covered subsidiary in order to secure financing provided by the Corporation or the receiver in connection with the sale or transfer of the covered financial company or covered subsidiary or any or all of the assets of such covered entity.

[76 FR 41640, July 15, 2011]

§ 380.7 Recoupment of compensation from senior executives and directors.

(a) *Substantially responsible.* The Corporation, as receiver of a covered financial company, may file an action to recover from any current or former senior executive or director substantially responsible for the failed condition of the covered financial company any compensation received during the 2-year period preceding the date on which the Corporation was appointed as the receiver of the covered financial

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company, except that, in the case of fraud, no time limit shall apply. A senior executive or director shall be deemed to be substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act if he or she:

(1) Failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances, and

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

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

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

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

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

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

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

(2) The presumption under paragraph (b)(1)(i) of this section may be rebutted by evidence that the senior executive or director conducted his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The presumptions under paragraphs (b)(1)(ii), (b)(1)(iii) and (b)(1)(iv) of this section may be rebutted by evidence that the senior executive or director did not cause a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.

(3) The presumptions do not apply to:

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

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

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

(c) *Savings Clause.* Nothing in this section shall limit or impair any rights of the Corporation as receiver under other applicable law, including any rights under title II of the Dodd-Frank Act to pursue any other claims or causes of action it may have against senior executives and directors of the covered financial company for losses they cause to the covered financial

company in the same or separate actions.

[76 FR 41640, July 15, 2011]

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

(a) For purposes of sections 201(a)(11) and 201(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ ("Dodd-Frank Act") and this part, a company is predominantly engaged in activities that the Board of Governors of the Federal Reserve System ("Board of Governors") has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 ("BHC Act") (12 U.S.C. 1843(k)), if:

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

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

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

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

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

(ii) International Financial Reporting Standards, or

(iii) Such other accounting standards that are determined to be appropriate on a case-by-case basis.

(2) The terms "broker" and "dealer" have the same meanings as in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).

(3) The term "financial activity" means:

¹12 U.S.C. 5381(a)(11) and (b).

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(i) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.

(ii) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any state.

(iii) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).

(iv) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.

(v) Underwriting, dealing in, or making a market in securities.

(vi) Engaging in any activity that the Board of Governors has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, which include—

(A) Extending credit and servicing loans. Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.

(B) Activities related to extending credit. Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, including the following activities—

(1) Real estate and personal property appraising. Performing appraisals of real estate and tangible and intangible personal property, including securities.

(2) Arranging commercial real estate equity financing. Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors.

(3) Check-guaranty services. Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.

(4) Collection agency services. Collecting overdue accounts receivable, either retail or commercial.

(5) Credit bureau services. Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.

(6) Asset management, servicing, and collection activities. Engaging under contract with a third party in asset management, servicing, and collection² of assets of a type that an insured depository institution may originate and own.

(7) Acquiring debt in default. Acquiring debt that is in default at the time of acquisition.

(8) Real estate settlement servicing. Providing real estate settlement services.³

(C) Leasing personal or real property. Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if—

(1) The lease is on a nonoperating basis;⁴

(2) The initial term of the lease is at least 90 days; and

²Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

³For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.

⁴The requirement that the lease is on a nonoperating basis means that the company does not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease is on a nonoperating basis means that the company does not, directly or indirectly: (1) Provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts and accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor.

(3) In the case of leases involving real property:

(i) At the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

(ii) The estimated residual value of property for purposes of paragraph (b)(2)(vi)(C)(3)(i) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

(D) Operating nonbank depository institutions—(1) Industrial banking. Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company that is not a bank for purposes of the BHC Act.

(2) Operating savings associations. Owning, controlling, or operating a savings association.

(E) Trust company functions. Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law that is not a bank for purposes of section 2(c) of the BHC Act.

(F) Financial and investment advisory activities. Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing):

(1) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(2) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(3) Providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions,

and conducting financial feasibility studies;⁵

(4) Providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments;

(5) Providing educational courses, and instructional materials to consumers on individual financial management matters; and

(6) Providing tax-planning and tax-preparation services to any person.

(G) Agency transactional services for customer investments—(1) Securities brokerage. Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activities and custodial services).

(2) Riskless principal transactions. Buying and selling in the secondary market all types of securities on the order of customers as a "riskless principal" to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(3) Private placement services. Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 ("1933 Act") and the rules of the Securities and Exchange Commission.

(4) Futures commission merchant. Acting as a futures commission merchant ("FCM") for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract.

(5) Other transactional services. Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(2)(vi)(H) of this section, any transaction that is permissible for a state

⁵Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange.

(H) Investment transactions as principal—(1) Underwriting and dealing in government obligations and money market instruments. Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including banker's acceptances and certificates of deposit.

(2) Investing and trading activities. Engaging as principal in:

(i) Foreign exchange;

(ii) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal), nonfinancial asset, or group of assets, other than a bank-ineligible security,⁶ if: a state member bank is authorized to invest in the asset underlying the contract; the contract requires cash settlement; the contract allows for assignment, termination, or offset prior to delivery or expiration, and the company makes every reasonable effort to avoid taking or making delivery of the asset underlying the contract, or receives and instantaneously transfers title to the underlying asset, by operation of contract and without taking or making physical delivery of the asset; or the contract does not allow for assignment, termination, or offset prior to delivery or expiration and is based on an asset for which futures contracts or options on futures contracts have been approved for trading on a U.S. contract market by the Commodity Futures Trading Commission, and the company makes every reasonable effort to avoid taking or making delivery of the asset under-

⁶A bank-ineligible security is any security that a state member bank is not permitted to underwrite or deal in under 12 U.S.C. 24 and 335.

lying the contract, or receives and instantaneously transfers title to the underlying asset, by operation of contract and without taking or making physical delivery of the asset.

(iii) Forward contracts, options,⁷ futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets, if the contract requires cash settlement.

(3) Buying and selling bullion, and related activities. Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(I) Management consulting and counseling activities—(1) Management consulting. Providing management consulting advice:⁸

(i) On any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

⁷This reference does not include acting as a dealer in options based on indices of bank-ineligible securities when the options are traded on securities exchanges. These options are securities for purposes of the federal securities laws and bank-ineligible securities for purposes of section 20 of the Glass-Steagall Act, 12 U.S.C. 337. Similarly, this reference does not include acting as a dealer in any other instrument that is a bank-ineligible security for purposes of section 20. Bank holding companies that deal in these instruments must do so in accordance with the Board of Governor's orders on dealing in bank-ineligible securities.

⁸In performing this activity, companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board of Governors' interpretation of bank management consulting advice (12 CFR 225.131).

(ii) On any financial, economic, accounting, or audit matter to any other company.

(2) Revenues derived from a company's management consulting activities under this paragraph (b)(3)(vi) will not be considered to be financial if the company:

(i) Owns or controls, directly or indirectly, more than 5 percent of the voting securities of the client institution; or

(ii) Allows a management official, as defined in 12 CFR 212.2(h), of the company or any of its affiliates to serve as a management official of the client institution, except where such interlocking relationship is permitted pursuant to an exemption permitted by the Board of Governors.

(3) Up to 30 percent of a nonbank company's revenues related to management consulting services provided to customers not described in paragraph (b)(3)(vi)(I)(i) or regarding matters not described in paragraph (b)(3)(vi)(I)(ii) of this section will be included in the company's financial revenues.

(4) Employee benefits consulting services. Providing consulting services to employee benefit, compensation and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(5) Career counseling services. Providing career counseling services to:

(i) A financial organization⁹ and individuals currently employed by, or recently displaced from, a financial organization;

(ii) Individuals who are seeking employment at a financial organization; and

(iii) Individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

(J) Support services—(1) Courier services. Providing courier services for:

(i) Checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and

(ii) Audit and accounting media of a banking or financial nature and other business records and documents used in processing such media.¹⁰

(2) Printing and selling MICR-encoded items. Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require Magnetic Ink Character Recognition (MICR) encoding.

(K) Insurance agency and underwriting—(1) Credit insurance. Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is:

(i) Directly related to an extension of credit by the company or any of its subsidiaries; and

(ii) Limited to ensuring the repayment of the outstanding balance due on the extension of credit¹¹ in the event of the death, disability, or involuntary unemployment of the debtor.

(2) Finance company subsidiary. Acting as agent or broker for insurance directly related to an extension of credit by a finance company¹² that is a subsidiary of a company, if:

(i) The insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the

¹⁰See also the Board of Governors' interpretation on courier activities (12 CFR 225.129), which sets forth conditions for company entry into the activity.

¹¹Extension of credit includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(2)(vi)(C) of this section.

¹²Finance company includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

⁹Financial organization refers to insured depository institution holding companies and their subsidiaries, other than non-banking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the BHC Act (12 U.S.C. 1842(c)(8)).

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event of loss or damage to any property used as collateral for the extension of credit; and

(ii) The extension of credit is not more than \$10,000, or \$25,000 if it is to finance the purchase of a residential manufactured home¹³ and the credit is secured by the home; and

(iii) The applicant commits to notify borrowers in writing that: they are not required to purchase such insurance from the applicant; such insurance does not insure any interest of the borrower in the collateral; and the applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(3) Insurance in small towns. Engaging in any insurance agency activity in a place where the company or a subsidiary has a lending office and that:

(i) Has a population not exceeding 5,000 (as shown in the preceding decennial census); or

(ii) Has inadequate insurance agency facilities, as determined by the Board of Governors, after notice and opportunity for hearing.

(4) Insurance-agency activities conducted on May 1, 1982. Engaging in any specific insurance-agency activity¹⁴ if the company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received approval from the Board of Governors to conduct such activity on or before May 1, 1982.¹⁵ Revenues derived from a com-

pany's specific insurance agency activity under this clause will be considered financial only if the company:

(i) Engages in such specific insurance agency activity only at locations: in the state in which the company has its principal place of business (as defined in 12 U.S.C. 1842(d)); in any state or states immediately adjacent to such state; and in any state in which the specific insurance-agency activity was conducted (or was approved to be conducted) by such company or subsidiary thereof or by any other subsidiary of such company on May 1, 1982; and

(ii) Provides other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by the company or subsidiary.

(5) Supervision of retail insurance agents. Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell:

(i) Fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the company or its subsidiaries; and

(ii) Group insurance that protects the employees of the company or its subsidiaries.

(6) Small companies. Engaging in any insurance-agency activity if the company has total consolidated assets of \$50 million or less. Revenues derived from a company's insurance-agency activities under this paragraph will be considered financial only if the company does not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(3)(vi)(K)(I) and (3) of this section, and does not continue to engage in insurance-agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the company and its subsidiaries exceed \$50 million.

(7) Insurance-agency activities conducted before 1971. Engaging in any insurance-agency activity performed at

¹³These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.

¹⁴Nothing contained in this provision precludes a subsidiary that is authorized to engage in a specific insurance-agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes.

¹⁵For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board of Governors on May 1, 1982, and approved subsequently by the Board of Governors or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company en-

gaged in such activities at the time of the acquisition.

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any location in the United States directly or indirectly by a company that was engaged in insurance-agency activities prior to January 1, 1971, as a consequence of approval by the Board of Governors prior to January 1, 1971.

(L) Community development activities —(1) Financing and investment activities. Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.

(2) Advisory activities. Providing advisory and related services for programs designed primarily to promote community welfare.

(M) Money orders, savings bonds, and traveler's checks. The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

(N) Data processing.

(1) Providing data processing, data storage and data transmission services, facilities (including data processing, data storage and data transmission hardware, software, documentation, or operating personnel), databases, advice, and access to such services, facilities, or databases by any technological means, if the data to be processed, stored or furnished are financial, banking or economic.

(2) Up to 30 percent of a nonbank company's revenues related to providing general purpose hardware in connection with providing data processing products or services described in (b)(2)(vi)(N)(1) of this section will be included in the company's financial revenues.

(O) Administrative services. Providing administrative and other services to mutual funds.

(P) Securities exchange. Owning shares of a securities exchange.

(Q) Certification authority. Acting as a certification authority for digital signatures and authenticating the identity of persons conducting financial and nonfinancial transactions.

(R) Employment histories. Providing employment histories to third parties for use in making credit decisions and

to depository institutions and their affiliates for use in the ordinary course of business.

(S) Check cashing and wire transmission. Check cashing and wire transmission services.

(T) Services offered in connection with banking services. In connection with offering banking services, providing notary public services, selling postage stamps and postage-paid envelopes, providing vehicle registration services, and selling public transportation tickets and tokens.

(U) Real estate title abstracting.

(vii) Engaging, in the United States, in any activity that a bank holding company may engage in outside of the United States; and the Board has determined, under regulations prescribed or interpretations issued pursuant to section 4(c)(13) of the BHC Act of 1956 (12 U.S.C. 1843(c)(13)) to be usual in connection with the transaction of banking or other financial operations abroad. Those activities include—

(A) Providing management consulting services, including to any person with respect to nonfinancial matters, so long as the management consulting services are advisory and do not allow the company to control the person to which the services are provided.

(B) Operating a travel agency in connection with financial services.

(C) Organizing, sponsoring, and managing a mutual fund.

(D) Commercial banking and other banking activities.

(viii) (A) Acting as a finder in bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate, including providing any or all of the following services through any means—

(1) Identifying potential parties, making inquiries as to interest, introducing, and referring potential parties to each other, and arranging contacts between and meetings of interested parties;

(2) Conveying between interested parties expressions of interest, bids, offers, orders and confirmations relating to a transaction; and

(3) Transmitting information conveying products and services to potential parties in connection with the activities described paragraphs (b)(3)(viii)(A)(I) and (2) of this section.

(B) The following are examples of finder services when done in accordance with paragraphs (b)(3)(viii)(C)–(D) of this section. These examples are not exclusive.

(1) Hosting an electronic marketplace on the company’s Internet Web site by providing hypertext or similar links to the Web sites of third party buyers or sellers.

(2) Hosting on the company’s servers the Internet Web site of—

(i) A buyer (or seller) that provides information concerning the buyer (or seller) and the products or services it seeks to buy (or sell) and allows sellers (or buyers) to submit expressions of interest, bids, offers, orders and confirmations relating to such products or services; or

(ii) A government or government agency that provides the information concerning the services or benefits made available by government or government agency, assists persons in completing applications to receive such services or benefits from the government or agency, and allows persons to transmit their applications for services or benefits to the government or agency.

(3) Operating an Internet Web site that allows multiple buyers and sellers to exchange information concerning the products and services that they are willing to purchase or sell, locate potential counterparties for transactions, aggregate orders for goods or services with those made by other parties, and enter into transactions between themselves.

(4) Operating a telephone call center that provides permissible finder services.

(C) To be a finder service for purposes of this section, the company providing the service must comply with the following limitations.

(1) A company providing the service may act only as an intermediary between a buyer and a seller.

(2) A company providing the service may not bind any buyer or seller to the terms of a specific transaction or nego-

tiate the terms of a specific transaction on behalf of a buyer or seller, except that the company may—

(i) Arrange for buyers to receive preferred terms from sellers so long as the terms are not negotiated as part of any individual transaction, are provided generally to customers or broad categories of customers, and are made available by the seller (and not by the company); and

(ii) Establish rules of general applicability governing the use and operation of the finder service, including rules that govern the submission of bids and offers by buyers and sellers that use the finder service and the circumstances under which the finder service will match bids and offers submitted by buyers and sellers, and govern the manner in which buyers and sellers may bind themselves to the terms of a specific transaction.

(3) Services provided by a company will not be considered finder services if the company providing the service—

(i) Takes title to or acquires or holds an ownership interest in any product or service offered or sold through the finder service;

(ii) Provides distribution services for physical products or services offered or sold through the finder service;

(iii) Owns or operates any real or personal property that is used for the purpose of manufacturing, storing, transporting, or assembling physical products offered or sold by third parties; or

(iv) Owns or operates any real or personal property that serves as a physical location for the physical purchase, sale or distribution of products or services offered or sold by third parties.

(D) Services provided by a company will not be considered finder services if the company providing such services engages in any activity that would require the company to register or obtain a license as a real estate agent or broker under applicable law.

(E) To be a finder service for purposes of this section, a company providing the service must distinguish the products and services offered by the company from those offered by a third party through the finder service.

(ix) Directly, or indirectly acquiring or controlling, whether as principal, on

behalf of one or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates, or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity, engaged in any activity not financial in nature as defined in this section if:

(A) Such shares, assets, or ownership interests are acquired and held as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment;

(B) Such shares, assets, or ownership interests are held for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities described in paragraph (b)(3)(ix)(A) of this section; and

(C) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company or entity except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition.

(x) Directly or indirectly acquiring or controlling, whether as principal, on behalf of one or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity engaged in any activity not financial in nature as defined in this section if—

(A) Such shares, assets, or ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance (other than credit-related insurance) or providing and issuing annuities;

(B) Such shares, assets, or ownership interests represent an investment made in the ordinary course of business of such insurance company in accord-

ance with relevant State law governing such investments; and

(C) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

(xi) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.

(xii) Providing any device or other instrumentality for transferring money or other financial assets.

(xiii) Arranging, effecting, or facilitating financial transactions for the account of third parties.

(xiv) Ownership or control of one or more depository institutions.

(4) The term “recommending agencies” means:

(i) The Board of Governors and the Securities and Exchange Commission in consultation with the FDIC, for a company;

(A) That is a broker or a dealer; or

(B) Whose largest U.S. subsidiary is a broker or a dealer;

(ii) The Board of Governors and the Director of the Federal Insurance Office in consultation with the FDIC, for a company that is an “insurance company”, or whose largest U.S. subsidiary is an insurance company, as that term is defined in section 201(a)(13) of the Dodd-Frank Act;¹⁶ and

(iii) The Board of Governors and the FDIC, for any other company.

(5) The term “total consolidated revenues” means the total gross revenues of the company and all entities subject to consolidation by the company for a fiscal year.

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

(1) A bank holding company (including a financial holding company or a foreign bank) may be authorized to engage in the activity, or own or control shares of a company engaged in such activity, under any other provisions of

¹⁶ 12 U.S.C. 5381(a)(13).

the BHC Act or other Federal law including, but not limited to, section 4(a)(2), section 4(c)(5), section 4(c)(6), section 4(c)(7), section 4(c)(9), or section 4(c)(13) of the BHC Act (12 U.S.C. 1843(a)(2), (c)(5), (c)(6), (c)(7), (c)(9), or (c)(13)) and the Board of Governors' implementing regulations; or

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

(d) *Rule of construction.* Revenues derived from an investment by the company in an entity whose financial statements are not consolidated with those of the company will be treated as revenues derived from financial activities, unless such treatment is not appropriate based on information that the recommending agencies or the Secretary, have at the time a written recommendation or determination is made under section 203 of the Dodd-Frank Act.

[78 FR 34731, June 10, 2013]

§ 380.9 Treatment of fraudulent and preferential transfers.

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

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

(2) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of real property, other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee. For purposes of this section, the term fixture shall be interpreted in accordance with U.S. Federal bankruptcy law.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) The earlier of

(1) The date of the filing, if any, of a petition by or against the transferor under title 11 of the United States Code; and

(2) The date of the appointment of the Corporation as receiver of such covered financial company or such covered subsidiary; or

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

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

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

[76 FR 41641, July 15, 2011]

§ 380.10 Maximum obligation limitation.

(a) *General rule.* The FDIC shall not, in connection with the orderly liquidation of a covered financial company, issue or incur any obligation, if, after issuing or incurring the obligation, the aggregate amount of such obligations outstanding for each covered financial company would exceed—

(1) An amount that is equal to 10 percent of the total consolidated assets of the covered financial company, based on the most recent financial statement available, during the 30-day period immediately following the date of appointment of the FDIC as receiver (or a shorter time period if the FDIC has calculated the amount described under paragraph (a)(2) of this section); and

(2) The amount that is equal to 90 percent of the fair value of the total consolidated assets of each covered financial company that are available for repayment, after the time period described in paragraph (a)(1) of this section.

(b) *Definitions:* For purposes of paragraph (a) of this section:

(1) The term “fair value” means the expected total aggregate value of each asset, or group of assets that are managed within a portfolio, of a covered financial company on a consolidated basis if such asset, or group of assets, was sold or otherwise disposed of in an orderly transaction.

(2) The term “most recent financial statement available” means a covered financial company’s:

(i) Most recent financial statement filed with the Securities and Exchange Commission or any other regulatory body;

(ii) Most recent financial statement audited by an independent CPA firm; or

(iii) Other available financial statements. The FDIC and the Treasury will jointly determine the most pertinent of the above financial statements, taking

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into consideration the timeliness and reliability of the statements being considered.

(3) The term “obligation” means, with respect to any covered financial company:

(i) Any guarantee issued by the FDIC on behalf of the covered financial company;

(ii) Any amount borrowed pursuant to section 210(n)(5)(A) of the Dodd-Frank Act; and

(iii) Any other obligation with respect to the covered financial company for which the FDIC has a direct or contingent liability to pay any amount.

(4) The term “total consolidated assets of each covered financial company that are available for repayment” means the difference between:

(i) The total assets of the covered financial company on a consolidated basis that are available for liquidation during the operation of the receivership; and

(ii) To the extent included in (b)(4)(i) of this section, all assets that are separated from, or made unavailable to, the covered financial company by a statutory or regulatory barrier that prevents the covered financial company from possessing or selling assets and using the proceeds from the sale of such assets.

[77 FR 37557, June 22, 2012]

§ 380.11 Treatment of mutual insurance holding companies.

A mutual insurance holding company shall be treated as an insurance company for the purpose of section 203(e) of the Dodd-Frank Act, 12 U.S.C. 5383(e); provided that—

(a) The company is subject to the insurance laws of the state of its domicile, including, specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default;

(b) The company is not subject to bankruptcy proceedings under title 11 of the United States Code;

(c) The largest United States subsidiary of the company (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company; and

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(d) The assets and investments of the company are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.

[77 FR 25353, Apr. 30, 2012]

§ 380.12 Enforcement of subsidiary and affiliate contracts by the FDIC as receiver of a covered financial company.

(a) *General.* (1) Contracts of subsidiaries or affiliates of a covered financial company that are linked to or supported by the covered financial company shall remain in full force and effect notwithstanding any specified financial condition clause contained in such contract and no counterparty shall be entitled to terminate, accelerate, liquidate or exercise any other remedy arising solely by reason of such specified financial condition clause. The Corporation as receiver for the covered financial company shall have the power to enforce such contracts according to their terms.

(2) Notwithstanding paragraph (a)(1) of this section, if the obligations under such contract are supported by the covered financial company then such contract shall be enforceable only if—

(i) Any such support together with all related assets and liabilities are transferred to and assumed by a qualified transferee not later than 5 p.m. (eastern time) on the business day following the date of appointment of the Corporation as receiver for the covered financial company; or

(ii) If and to the extent paragraph (a)(2)(i) of this section is not satisfied, the Corporation as receiver otherwise provides adequate protection to the counterparties to such contracts with respect to the covered financial company’s support of the obligations or liabilities of the subsidiary or affiliate and provides notice consistent with the requirements of paragraph (d) of this section not later than 5 p.m. (eastern time) on the business day following the date of appointment of the Corporation as receiver.

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(3) The Corporation as receiver of a subsidiary of a covered financial company (including a failed insured depository institution that is a subsidiary of a covered financial company) may enforce any contract that is enforceable by the Corporation as receiver for a covered financial company under paragraphs (a)(1) and (2) of this section.

(b) *Definitions.* For purposes of this part, the following terms shall have the meanings set forth below:

(1) A contract is “*linked*” to a covered financial company if it contains a specified financial condition clause that specifies the covered financial company.

(2)(i) A “*specified financial condition clause*” means any provision of any contract (whether expressly stated in the contract or incorporated by reference to any other contract, agreement or document) that permits a contract counterparty to terminate, accelerate, liquidate or exercise any other remedy under any contract to which the subsidiary or affiliate is a party or to obtain possession or exercise control over any property of the subsidiary or affiliate or affect any contractual rights of the subsidiary or affiliate directly or indirectly based upon or by reason of

(A) A change in the financial condition or the insolvency of a specified company that is a covered financial company;

(B) The appointment of the FDIC as receiver for the specified company or any actions incidental thereto including, without limitation, the filing of a petition seeking judicial action with respect to the appointment of the Corporation as receiver for the specified company or the issuance of recommendations or determinations of systemic risk;

(C) The exercise of rights or powers by the Corporation as receiver for the specified company, including, without limitation, the appointment of the Securities Investor Protection Corporation (SIPC) as trustee in the case of a specified company that is a covered broker-dealer and the exercise by SIPC of all of its rights and powers as trustee;

(D) The transfer of assets or liabilities to a bridge financial company or other qualified transferee;

(E) Any actions taken by the FDIC as receiver for the specified company to effectuate the liquidation of the specified company;

(F) Any actions taken by or on behalf of the bridge financial company to operate and terminate the bridge financial company including the dissolution, conversion, merger or termination of a bridge financial company or actions incidental or related thereto; or

(G) The transfer of assets or interests in a transferee bridge financial company or its successor in full or partial satisfaction of creditors’ claims against the covered financial company.

(ii) Without limiting the general language of paragraphs (b)(1) and (2) of this section, a specified financial condition clause includes a “walkaway clause” as defined in 12 U.S.C. 5390(c)(8)(F)(iii) or any regulations promulgated thereunder.

(3) The term “*support*” means undertaking any of the following for the purpose of supporting the contractual obligations of a subsidiary or affiliate of a covered financial company for the benefit of a counterparty to a linked contract—

(i) To guarantee, indemnify, undertake to make any loan or advance to or on behalf of the subsidiary or affiliate;

(ii) To undertake to make capital contributions to the subsidiary or affiliate; or

(iii) To be contractually obligated to provide any other financial assistance to the subsidiary or affiliate.

(4) The term “*related assets and liabilities*” means—

(i) Any assets of the covered financial company that directly serve as collateral for the covered financial company’s support (including a perfected security interest therein or equivalent under applicable law);

(ii) Any rights of offset or setoff or netting arrangements that directly arise out of or directly relate to the covered financial company’s support of the obligations or liabilities of its subsidiary or affiliate; and

(iii) Any liabilities of the covered financial company that directly arise out of or directly relate to its support

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of the obligations or liabilities of the subsidiary or affiliate.

(5) A “qualified transferee” means any bridge financial company or any third party (other than a third party for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed, or which is otherwise the subject of a bankruptcy or insolvency proceeding).

(6) A “successor” of a bridge financial company means

(i) A company into which the bridge financial company is converted by way of incorporation under the laws of a State of the United States; or

(ii) The surviving company of a merger or consolidation of the bridge financial company with another company (whether before or after the conversion (if any) of the bridge financial company).

(c) *Adequate protection.* The Corporation as receiver for a covered financial company may provide adequate protection with respect to a covered financial company’s support of the obligations and liabilities of a subsidiary or an affiliate pursuant to paragraph (a)(2)(ii) of this section by any of the following means:

(1) Making a cash payment or periodic cash payments to the counterparties of the contract to the extent that the failure to cause the assignment and assumption of the covered financial company’s support and related assets and liabilities causes a loss to the counterparties;

(2) Providing to the counterparties a guaranty, issued by the Corporation as receiver for the covered financial company, of the obligations of the subsidiary or affiliate of the covered financial company under the contract; or

(3) Providing relief that will result in the realization by the counterparty of the indubitable equivalent of the covered financial company’s support of such obligations or liabilities.

(d) *Notice of transfer of support or provision of adequate protection.* If the Corporation as receiver for a covered financial company transfers any support and related assets and liabilities of the covered financial company in accordance with paragraph (a)(2)(i) of this section or provides adequate protection in accordance with paragraph (a)(2)(ii)

of this section, it shall promptly take steps to notify contract counterparties of such transfer or provision of adequate protection. Notice shall be given in a manner reasonably calculated to provide notification in a timely manner, including, but not limited to, notice posted on the Web site of the Corporation, the covered financial company or the subsidiary or affiliate, notice via electronic media, or notice by publication. Neither the failure to provide actual notice to any party nor the lack of actual knowledge on the part of any party shall affect the authority of the Corporation to enforce any contract or exercise any rights or powers under this section.

[77 FR 63214, Oct. 16, 2012]

§ 380.13 Restrictions on sale of assets of a covered financial company by the Federal Deposit Insurance Corporation.

(a) *Purpose and applicability.* (1) *Purpose.* The purpose of this section is to prohibit individuals or entities that profited or engaged in wrongdoing at the expense of a covered financial company or an insured depository institution, or seriously mismanaged a covered financial company or an insured depository institution, from buying assets of a covered financial company from the FDIC.

(2) *Applicability.* (i) The restrictions of this section apply to the sale of assets of a covered financial company by the FDIC as receiver or in its corporate capacity.

(ii) The restrictions in this section apply to the sale of assets of a bridge financial company if:

(A) The sale is not in the ordinary course of business of the bridge financial company, and

(B) The approval or non-objection of the FDIC is required in connection with the sale according to the charter, articles of association, bylaws or other documents or instruments establishing the governance of the bridge financial company and the authorities of its board of directors and executive officers.

(iii) In the case of a sale of securities backed by a pool of assets that may include assets of a covered financial company by a trust or other entity, this

section applies only to the sale of assets by the FDIC to an underwriter in an initial offering, and not to any other purchaser of the securities.

(iv) The restrictions of this section do not apply to a sale of a security or a group or index of securities, a commodity, or any qualified financial contract that customarily is traded through a financial intermediary, as defined in paragraph (b) of this section, where the seller cannot control selection of the purchaser and the sale is consummated through that customary practice.

(v) The restrictions of this section do not apply to a judicial sale or a trustee's sale of property that secures an obligation to the FDIC where the sale is not conducted or controlled by the FDIC.

(vi) The restrictions of this section do not apply to the sale or transfer of an asset if such sale or transfer resolves or settles, or is part of the resolution or settlement of, one (1) or more claims or obligations that have been, or could have been, asserted by the FDIC against the person with whom the FDIC is settling regardless of the amount of such claims or obligations.

(3) The FDIC retains the authority to establish other policies restricting asset sales. Neither 12 U.S.C. 5390(r) nor this section in any way limits the authority of the FDIC to establish policies prohibiting the sale of assets to prospective purchasers who have injured the respective covered financial company, or to other prospective purchasers, such as certain employees or contractors of the FDIC, or individuals who are not in compliance with the terms of any debt or duty owed to the FDIC in any of its capacities. Any such policies may be independent of, in conjunction with, or in addition to the restrictions set forth in this part.

(b) *Definitions.* Many of the terms used in this section are defined in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301, *et seq.* Additionally, for the purposes of this section, the following terms are defined:

(1) *Associated person.* An "associated person" of an individual or entity means:

(i) With respect to an individual:

(A) The individual's spouse or dependent child or any member of his or her immediate household;

(B) A partnership of which the individual is or was a general or limited partner or a limited liability company of which the individual is or was a member; or

(C) A corporation of which the individual is or was an officer or director;

(ii) With respect to a partnership, a managing or general partner of the partnership or with respect to a limited liability company, a manager; or

(iii) With respect to any entity, an individual or entity who, acting individually or in concert with one or more individuals or entities, owns or controls 25 percent or more of the entity.

(2) *Default.* The term "default" means any failure to comply with the terms of an obligation to such an extent that:

(i) A judgment has been rendered in favor of the FDIC or a covered financial company; or

(ii) In the case of a secured obligation, the lien on property securing such obligation has been foreclosed.

(3) *Financial intermediary.* The term "financial intermediary" means any broker, dealer, bank, underwriter, exchange, clearing agency registered with the SEC under section 17A of the Securities Exchange Act of 1934, transfer agent (as defined in section 3(a)(25) of the Securities Exchange Act of 1934), central counterparty or any other entity whose role is to facilitate a transaction by, as a riskless intermediary, purchasing a security or qualified financial contract from one counterparty and then selling it to another.

(4) *Obligation.* The term "obligation" means any debt or duty to pay money owed to the FDIC or a covered financial company, including any guarantee of any such debt or duty.

(5) *Person.* The term "person" means an individual, or an entity with a legally independent existence, including: A trustee; the beneficiary of at least a 25 percent share of the proceeds of a trust; a partnership; a limited liability company; a corporation; an association; or other organization or society.

(6) *Substantial loss.* The term "substantial loss" means:

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(i) An obligation that is delinquent for ninety (90) or more days and on which there remains an outstanding balance of more than \$50,000;

(ii) An unpaid final judgment in excess of \$50,000 regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding;

(iii) A deficiency balance following a foreclosure of collateral in excess of \$50,000, regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; or

(iv) Any loss in excess of \$50,000 evidenced by an IRS Form 1099-C (Information Reporting for Cancellation of Debt).

(c) *Restrictions on the sale of assets.* (1) A person may not acquire any assets of a covered financial company from the FDIC if, prior to the appointment of the FDIC as receiver for the covered financial company, the person or its associated person:

(i) Has participated as an officer or director of a covered financial company or of an affiliate of a covered financial company in a material way in one or more transactions that caused a substantial loss to a covered financial company;

(ii) Has been removed from, or prohibited from participating in the affairs of, a financial company pursuant to any final enforcement action by its primary financial regulatory agency;

(iii) Has demonstrated a pattern or practice of defalcation regarding obligations to a covered financial company;

(iv) Has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 affecting any covered financial company and there has been a default with respect to one or more obligations owed by that person or its associated person; or

(v) Would be prohibited from purchasing the assets of a failed insured depository institution from the FDIC under 12 U.S.C. 1821(p) or its implementing regulation at 12 CFR part 340.

(2) For purposes of paragraph (c)(1) of this section, a person has participated in a “material way in a transaction that caused a substantial loss to a covered financial company” if, in connec-

tion with a substantial loss to the covered financial company, the person has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by a primary financial regulatory agency or by any component of the government of the United States or of any state:

(i) To have violated any law, regulation, or order issued by a federal or state regulatory agency, or breached or defaulted on a written agreement with a federal or state regulatory agency, or breached a written agreement with a covered financial company; or

(ii) To have breached a fiduciary duty owed to a covered financial company.

(3) For purposes of paragraph (c)(1) of this section, a person or its associated person has demonstrated a “pattern or practice of defalcation” regarding obligations to a covered financial company if the person or associated person has:

(i) Engaged in more than one transaction that created an obligation on the part of such person or its associated person with intent to cause a loss to any financial company or with reckless disregard for whether such transactions would cause a loss to any such financial company; and

(ii) The transactions, in the aggregate, caused a substantial loss to one or more covered financial companies.

(d) *Restrictions when FDIC provides seller financing.* A person may not borrow money or accept credit from the FDIC in connection with the purchase of any assets from the FDIC or any covered financial company if:

(1) There has been a default with respect to one or more obligations totaling in excess of \$1,000,000 owed by that person or its associated person; and

(2) The person or its associated person made any fraudulent misrepresentations in connection with any such obligation(s).

(e) *No obligation to provide seller financing.* The FDIC still has the right to make an independent determination, based upon all relevant facts of a person’s financial condition and history, of that person’s eligibility to receive any loan or extension of credit from the FDIC, even if the person is not in any way disqualified from purchasing

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assets from the FDIC under the restrictions set forth in this section.

(f) *Purchaser eligibility certificate required.* (1) Before any person may purchase any asset from the FDIC that person must certify, under penalty of perjury, that none of the restrictions contained in this section applies to the purchase. The person must also certify that neither the identity nor form of the person, nor any aspect of the contemplated transaction, has been created or altered with the intent, in whole or in part, to allow an individual or entity who otherwise would be ineligible to purchase assets from the FDIC to benefit directly or indirectly from the proposed transaction. The FDIC may establish the form of the certification and may change the form from time to time.

(2) Notwithstanding paragraph (f)(1) of this section, and unless the Director of the FDIC's Division of Resolutions and Receiverships, or designee, in his or her discretion so requires, a certification need not be provided by:

(i) A state or political subdivision of a state;

(ii) A federal agency or instrumentality such as the Government National Mortgage Association;

(iii) A federally-regulated, government-sponsored enterprise such as Federal National Mortgage Association or Federal Home Loan Mortgage Corporation; or

(iv) A bridge financial company.

[79 FR 20766, Apr. 14, 2014]

§§ 380.14–380.19 [Reserved]

Subpart B—Priorities

SOURCE: 76 FR 41642, July 15, 2011, unless otherwise noted.

§ 380.20 [Reserved]

§ 380.21 **Priorities.**

(a) The unsecured amount of allowed claims shall be paid in the following order of priority:

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

ered financial company from commercial sources.

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

(3) Any amounts owed to the United States, as defined in § 380.23 (which is not an obligation described in paragraphs (a)(1) or (2) of this section).

(4) Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual (other than an individual described in paragraph (a)(9) of this section), but only to the extent of \$11,725 for each individual (as adjusted for inflation in accordance with paragraph (b) of this section) earned within 180 days before the date of appointment of the receiver.

(5) Contributions owed to employee benefit plans arising from services rendered within 180 days before the date of appointment of the receiver, to the extent of the number of employees covered by each such plan multiplied by \$11,725 (as adjusted for inflation in accordance with paragraph (b) of this section); less the sum of (i) the aggregate amount paid to such employees under paragraph (a)(4) of this section, plus (ii) the aggregate amount paid by the Corporation as receiver on behalf of such employees to any other employee benefit plan.

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

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

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

(9) Any wages, salaries, or commissions, including vacation, severance, and sick leave pay earned, that is owed to senior executives and directors of the covered financial company.

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

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

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

(c) All unsecured claims of any category or priority described in paragraphs (a)(1) through (a)(10) of this section shall be paid in full or provision made for such payment before any claims of lesser priority are paid. If there are insufficient funds to pay all claims of a particular category or priority of claims in full, then distributions to creditors in such category or priority shall be made *pro rata*. A subordination agreement is enforceable with respect to the priority of payment of allowed claims within any creditor class or among creditor classes to the extent that such agreement is enforceable under applicable non-insolvency law.

§ 380.22 Administrative expenses of the receiver.

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

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

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

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

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

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

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

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

§ 380.23 Amounts owed to the United States.

(a) The term “amounts owed to the United States” as used in § 380.21(a)(3) includes all unsecured amounts owed to the United States, other than expenses included in the definition of administrative expenses of the receiver

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under § 380.22 that are related to funds provided for the orderly liquidation of a covered financial company, funds provided to avoid or mitigate adverse effects on the financial stability of the United States or unsecured amounts owed to the U.S. Treasury on account of tax liabilities of the covered financial company, without regard for whether such amounts are included as debt or capital on the books and records of the covered financial company. Such amounts shall include obligations incurred before and after the appointment of the Corporation as receiver. Without limitation, “amounts owed to the United States” include all of the following, which all shall have equal priority under § 380.21(a)(3):

(1) Unsecured amounts owed to the Corporation for any extension of credit by the Corporation, including any amounts made available under 12 U.S.C. 5384(d);

(2) Unsecured amounts owed to the U.S. Treasury on account of unsecured tax liabilities of the covered financial company;

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

(4) The unsecured amount of any debt owed to a Federal reserve bank including loans made through programs or facilities authorized under the Federal Reserve Act, 12 U.S.C. 221 *et seq.*; and

(5) Any unsecured amount expressly designated in writing in a form acceptable to the Corporation by the appropriate United States department, agency or instrumentality that shall specify the particular debt, obligation or amount to be included as an “amount owed to the United States” for the purpose of this rule at the time of such advance, guaranty or other transaction.

(b) Other than those amounts included in paragraph (a) of this section, unsecured amounts owed to a department, agency or instrumentality of the United States that are obligations in-

curring in the ordinary course of the business of the covered financial company prior to the appointment of the receiver generally will not be in the class of claims designated as “amounts owed to the United States” under section 380.21(a)(3), including, but not limited to:

(1) Unsecured amounts owed to government sponsored entities including, without limitation, the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Corporation;

(2) Unsecured amounts owed to Federal Home Loan Banks; and

(3) Unsecured amounts owed as satisfaction of filing, registration or permit fees due to any government department, agency or instrumentality.

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

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

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

(b) If the Corporation as receiver sells or transfers any asset free and clear of the setoff rights of any party,

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such party shall have a claim against the receiver in the amount of the value of such setoff established as of the date of the sale or transfer of such assets, provided that the setoff rights meet all of the criteria established under 12 U.S.C. 3590(a)(12).

(c) Any allowed claim pursuant to 12 U.S.C. 5390(a)(12) shall be paid prior to any other general or senior liability of the covered financial company described in section 380.21(a)(7). In the event that the setoff amount is less than the amount of the allowed claim, the balance of the allowed claim shall be paid at the otherwise applicable level of priority for such category of claim under § 380.21.

(d) Nothing in this section shall modify in any way the treatment of qualified financial contracts under title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

§ 380.25 Post-insolvency interest.

(a) *Date of accrual.* Post-insolvency interest shall be paid at the post-insolvency interest rate calculated on the principal amount of an allowed claim from the later of (i) the date of the appointment of the Corporation as receiver for the covered financial company; or (ii) in the case of a claim arising or becoming fixed and certain after the date of the appointment of the receiver, the date such claim arises or becomes fixed and certain.

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

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

(d) *Post-insolvency interest distributions.* (1) Post-insolvency interest shall only be distributed following satisfaction of the principal amount of all

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creditor claims set forth in § 380.21(a)(1) through 380.21(a)(9) and prior to any distribution pursuant to § 380.21(a)(11).

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

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

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

(b) In the event that the Corporation as receiver of a bridge financial company shall act to dissolve the bridge financial company, it shall wind up the affairs of the bridge financial company in conformity with the laws, rules and regulations relating to the liquidation of covered financial companies, including the laws, rules and regulations governing priorities of claims, subject however to the authority of the Corporation to authorize the bridge financial company to obtain unsecured credit or issue unsecured debt with priority

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over any or all of the other unsecured obligations of the bridge financial company, provided that unsecured debt is not otherwise generally available to the bridge financial company.

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

§ 380.27 Treatment of similarly situated claimants.

(a) For the purposes of this section, the term “long-term senior debt” means senior debt issued by the covered financial company to bondholders or other creditors that has a term of more than 360 days. It does not include partially funded, revolving or other open lines of credit that are necessary to continuing operations essential to the receivership or any bridge financial company, nor to any contracts to extend credit enforced by the receiver under 12 U.S.C. 5390(c)(13)(D).

(b) In applying any provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act permitting the Corporation as receiver to exercise its discretion, upon appropriate determination, to make payments or credit amounts, pursuant to 12 U.S.C. 5390(b)(4), (d)(4), or (h)(5)(E) to or for some creditors but not others similarly situated at the same level of payment priority, the receiver shall not exercise such authority in a manner that would result in the following recovering more than the amount established and due under 12 U.S.C. 5390(b)(1), or other priorities of payment specified by law:

(1) Holders of long-term senior debt who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(E);

(2) Holders of subordinated debt who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(F);

(3) Shareholders, members, general partners, limited partners, or other persons who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390 (b)(1)(H); or

(4) Other holders of claims entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(E) unless the Corporation, through the affirmative vote of a majority the members of the Board of Directors then serving, and in its sole discretion, specifically determines that additional payments or credit amounts to such holders are necessary and meet all of the requirements under 12 U.S.C. 5390(b)(4), (d)(4), or (h)(5)(E), as applicable. The authority of the Board to make the foregoing determination cannot be delegated.

§§ 380.28–380.29 [Reserved]

Subpart C—Receivership Administrative Claims Process

SOURCE: 76 FR 41644, July 15, 2011, unless otherwise noted.

§ 380.30 Receivership administrative claims process.

The Corporation as receiver of a covered financial company shall determine claims against the covered financial company and the receiver of the covered financial company in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2)–(5) and the regulations promulgated by the Corporation.

§ 380.31 Scope.

Nothing in this subpart C shall apply to any liability or obligation of a bridge financial company or its assets or liabilities, or to any extension of credit from a Federal reserve bank or the Corporation to a covered financial company.

§ 380.32 Claims bar date.

Upon its appointment as receiver for a covered financial company, the Corporation as receiver shall establish a claims bar date by which date creditors of the covered financial company shall present their claims, together with proof, to the receiver. The claims bar date shall be not less than 90 days after

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the date on which the notice to creditors to file claims is first published under § 380.33(a).

§ 380.33 Notice requirements.

(a) *Notice by publication.* Promptly after its appointment as receiver for a covered financial company, the Corporation as receiver shall publish a notice to the creditors of the covered financial company to file their claims with the receiver no later than the claims bar date. The Corporation as receiver shall republish such notice 1 month and 2 months, respectively, after the date the notice is first published. The notice to creditors shall be published in one or more newspapers of general circulation where the covered financial company has its principal place or places of business. In addition to such publication in a newspaper, the Corporation as receiver may post the notice on the FDIC's Web site at www.fdic.gov.

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

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

(d) *Discovered claimants.* Upon discovery of the name and address of a claimant not appearing in the books and records of the covered financial company, the Corporation as receiver shall, not later than 30 days after the discovery of such name and address, mail a notice to such claimant to file a claim no later than the claims bar date. Any claimant not appearing on the books and records that is discovered before the claims bar date shall be required to file a claim before the claims bar date, subject to the excep-

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tion of § 380.35(b)(2). If a claimant not appearing on the books and records is discovered after the claims bar date, the Corporation as receiver shall notify the claimant to file a claim by a date not later than 90 days from the date appearing on the notice that is mailed to such creditor. Any claim filed after such date shall be disallowed, and such disallowance shall be final.

§ 380.34 Procedures for filing claim.

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

(1) Providing contact information in the publication notice;

(2) Including in the mailed notice a proof of claim form that has filing instructions; or

(3) Posting filing instructions on the Corporation's public Web site at www.fdic.gov.

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

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

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

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

(2) *No prejudice to continuation of action.* Pursuant to 12 U.S.C. 5390(a)(3)(E)(ii) and subject to 12 U.S.C. 5390(a)(8), the filing of a claim with the receiver shall not prejudice any right

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of the claimant to continue, after the receiver's determination of the claim, any action which was filed before the date of appointment of the receiver for the covered financial company.

§ 380.35 Determination of claims.

(a) *In general.* The Corporation as receiver shall allow any claim received by the receiver on or before the claims bar date if such claim is proved to the satisfaction of the receiver. Except as provided in 12 U.S.C. 5390(a)(3)(D)(iii), the Corporation as receiver may disallow any portion of any claim by a creditor or claim of a security, preference, setoff, or priority which is not proved to the satisfaction of the receiver.

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

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

(i) The claimant did not receive notice of the appointment of the receiver in time to file such claim before the claims bar date, or the claim is based upon an act or omission of the Corporation as receiver that occurs after the claims bar date has passed, and

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

§ 380.36 Decision period.

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

(b) *Extension of time.* The 180-day period described in paragraph (a) of this section may be extended by a written agreement between the claimant and the Corporation as receiver executed not later than 180 days after the date

on which the claim against the covered financial company or the receiver is filed with the receiver. If an extension is agreed to, the Corporation as receiver shall notify the claimant whether it allows or disallows the claim prior to the end of the extended claims determination period.

§ 380.37 Notification of determination.

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

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

(c) *Failure to notify deemed to be disallowance.* If the Corporation as receiver does not notify the claimant before the end of the 180-day claims determination period, or before the end of any extended claims determination period, the claim shall be deemed to be disallowed, and the claimant may file or continue an action in court pursuant to 12 U.S.C. 5390(a)(4)(A).

§ 380.38 Procedures for seeking judicial determination of disallowed claim.

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

(1) File suit on such claim in the district or territorial court of the United States for the district within which the principal place of business of the covered financial company is located; or

(2) Continue an action commenced before the date of appointment of the

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receiver, in the court in which the action was pending.

(b) *Timing.* Pursuant to 12 U.S.C. 5390(a)(4)(B), a claimant who seeks a judicial determination of a claim disallowed by the Corporation as receiver must file suit on such claim before the end of the 60-day period beginning on the earlier of:

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

(2) The end of the 180-day claims determination period; or

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

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

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

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

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

§ 380.39 Contingent claims.

(a) The Corporation as receiver shall not disallow a claim based on an obligation of the covered financial company solely because the obligation is contingent. To the extent the obligation is contingent, the receiver shall

estimate the value of the claim, as such value is measured based upon the likelihood that such contingent obligation would become fixed and the probable magnitude thereof.

(b) If the receiver repudiates a contingent obligation of a covered financial company consisting of a guarantee, letter of credit, loan commitment, or similar credit obligation, the actual direct compensatory damages for repudiation shall be no less than the estimated value of the claim as of the date the Corporation was appointed 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 thereof.

(c) The Corporation as receiver shall estimate the value of a claim under paragraphs (a) or (b) of this section no later than 180 days after the claim is filed, unless such period is extended by a written agreement between the claimant and the receiver.

(d) Except for a contingent claim that becomes absolute and fixed prior to the receiver's determination of the estimated value, such estimated value of a contingent claim shall be recognized as the allowed amount of the claim for purposes of distribution.

(e) The estimated value of a contingent claim shall constitute the receiver's determination of the claim for purposes of §380.38(d) and 12 U.S.C. 5390(a)(9)(D).

§§ 380.40–380.49 [Reserved]

§ 380.50 Determination of secured claims.

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

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(b) The fair market value of any property of a covered financial company that secures a claim shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property and at the time of such proposed disposition or use.

(c) The Corporation as receiver may recover from any property of a covered financial company that secures a claim the reasonable and necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the claimant, including the payment of all ad valorem property taxes with respect to such property.

(d) To the extent that a claim is secured by property of a covered financial company and the value of such property, after any recovery under paragraph (c) of this section, is greater than the amount of such claim, there shall be allowed to the claimant a secured claim for interest on such claim and any reasonable fees, costs, or charges provided for under the agreement or State statute under which the claim arose to the extent of the value of such property.

§ 380.51 Consent to certain actions.

(a) *In general.* Any claimant alleging a legally valid and enforceable or perfected security interest in property of a covered financial company or control of any legally valid and enforceable security entitlement in respect of any asset held by the covered financial company for which the Corporation has been appointed receiver may seek the consent of the receiver for relief from the provisions of 12 U.S.C. 5390(c)(13)(C).

(b) *Contents of request.* A request for consent of the Corporation as receiver for relief from the provisions of 12 U.S.C. 5390(c)(13)(C) shall be in writing and contain the following information:

(1) The amount of the claim, with supporting documentation;

(2) A description of the property that secures the claim, with supporting documentation of the claimant's interest in the property;

(3) The value of the property, as established by an appraisal or other supporting documentation; and

(4) The proposed disposition of the property by the claimant, including the expected date of such disposition.

(c) *Determination by receiver.* The Corporation as receiver shall grant its consent to a request for relief from the provisions of 12 U.S.C. 5390(c)(13)(C) if it determines that the claimant has a legally valid and enforceable or perfected security interest or other lien against the property of a covered financial company and the receiver will not use, sell, or lease the property. If the Corporation as receiver determines that it will use, sell, or lease such property and that adequate protection is necessary and appropriate, the receiver may provide adequate protection instead of granting consent.

(d) *Consent deemed granted.* If the Corporation as receiver has not notified the claimant of the determination whether to grant or withhold consent under this section within 30 days after a request for consent has been submitted, consent shall be deemed to be granted.

(e) *Expiration by operation of law.* Notwithstanding any determination by the Corporation as receiver to withhold consent under this section, the prohibitions described in 12 U.S.C. 5390(c)(13)(C)(i) are no longer applicable 90 days after the appointment of the receiver.

(f) *Limitations.* Any consent granted by the Corporation as receiver under this section shall not act to waive or relinquish any rights granted to the Corporation in any capacity, pursuant to any other applicable law or any agreement or contract, and shall not be construed as waiving, limiting or otherwise affecting the rights or powers of the Corporation as receiver to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the receiver regarding transfers taken in contemplation of the covered financial company's insolvency or with the intent to hinder, delay or defraud the covered financial company or the creditors of such company, or that is a fraudulent transfer under applicable law.

(g) *Exceptions.* (1) This section shall not apply in the case of a contract that

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is repudiated or disaffirmed by the Corporation as receiver.

(2) This section shall not apply to a director or officer liability insurance contract, a financial institution bond, the rights of parties to certain qualified financial contracts pursuant to 12 U.S.C. 5390(c)(8), the rights of parties to netting contracts pursuant to 12 U.S.C. 4401 *et seq.*, or any extension of credit from any Federal reserve bank or the Corporation to any covered financial company or any security interest in the assets of a covered financial company securing any such extension of credit.

§ 380.52 Adequate protection.

(a) If the Corporation as receiver determines that it will use, sell, or lease or grant a security interest or other lien against property of the covered financial company that is subject to a security interest of a claimant, the receiver shall provide adequate protection by any of the following means:

(1) Making a cash payment or periodic cash payments to the claimant to the extent that the sale, use, or lease of the property or the grant of a security interest or other lien against the property by the Corporation as receiver results in a decrease in the value of such claimant's security interest in the property;

(2) Providing to the claimant an additional or replacement lien to the extent that the sale, use, or lease of the property or the grant of a security interest against the property by the Corporation as receiver results in a decrease in the value of the claimant's security interest in the property; or

(3) Providing any other relief that will result in the realization by the claimant of the indubitable equivalent of the claimant's security interest in the property.

(b) Adequate protection of the claimant's security interest will be presumed if the value of the property is not depreciating or is sufficiently greater than the amount of the claim so that the claimant's security interest is not impaired.

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§ 380.53 Repudiation of secured contract.

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

PART 381—RESOLUTION PLANS

Sec.

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381.9 Enforcement.

AUTHORITY: 12 U.S.C. 5365(d).

SOURCE: 76 FR 67334, Nov. 1, 2011, unless otherwise noted.

§ 381.1 Authority and scope.

(a) *Authority.* This part is issued pursuant to section 165(d)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the *Dodd-Frank Act*) (Pub. L. 111–203, 124 Stat. 1376, 1426–1427), 12 U.S.C. 5365(d)(8), which requires the Board of Governors of the Federal Reserve System (*Board*) and the Federal Deposit Insurance Corporation (*Corporation*) to jointly issue rules implementing the provisions of section 165(d) of the Dodd-Frank Act.

(b) *Scope.* This part applies to each covered company and establishes rules and requirements regarding the submission and content of a resolution plan, as well as procedures for review by the Board and Corporation of a resolution plan.

§ 381.2 Definitions.

For purposes of this part:

(a) *Bankruptcy Code* means title 11 of the United States Code.