Federal Deposit Insurance Corporation
550 17th Street NW, Washington, D.C. 20429-9990 General Counsel

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Kenneth E. Bentsen, Jr.
Executive Vice President
Public Policy and Advocacy
Securities Industry and Financial Markets Association
120 Broadway, 35th Floor
New York, NY 10271

Tom Deutsch
Executive Director
American Securitization Forum
One World Financial Center, 30th Floor
New York, NY 10281

By Email and Mail

RE: Certain Transfers under Section 210(a)(11) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq.*

Dear Messrs. Bentsen and Deutsch,

This is in reference to your recent inquiries about the appropriate interpretation and application of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act addressing the authority of the Federal Deposit Insurance Corporation, as receiver for a covered financial company, to avoid certain fraudulent transfers, preferential transfers, and unauthorized transfers of property of such covered financial company. Specifically, you have asked for clarification as to how the FDIC intends to interpret section 210(a)(11)(H)(i)(II), and whether such provision will be implemented in a manner consistent with the treatment of fraudulent transfers and preferential transfers under the Bankruptcy Code codified in Title 11 of the United States Code. This letter is being provided in order to clarify the interpretation of this provision.

As you are aware, the FDIC does not issue binding advisory opinions as to positions it would adopt in hypothetical situations that arise in future receiverships of covered financial companies. However, the FDIC's actions in its capacity as receiver of a covered financial company will be governed by the provisions of the Dodd-Frank Act and the questions you have posed principally involve our interpretation of relevant statutory provisions. Accordingly, we are providing our views on the interpretation of the relevant provisions in order to clarify their

meaning within the overall context of the Dodd-Frank Act. As noted below, I intend to recommend to our Board of Directors that it adopt a regulation confirming the applicable requirements for these provisions through notice and comment rulemaking.

The Avoidable Transfer Provisions

Section 210(a)(11) of the Dodd-Frank Act provides the FDIC, as receiver for a covered financial company, with powers comparable to those available under the Bankruptcy Code to avoid fraudulent and preferential transfers. As noted below, these provisions along with other provisions of Title II of the Dodd-Frank Act were intended to harmonize to the extent possible with otherwise applicable insolvency laws, including the Bankruptcy Code. The appropriate interpretation of the provisions of section 210(a)(11) should, as a result, take into consideration the similar provisions of the Bankruptcy Code in order to achieve this intended harmonization and avoid unnecessary disparities in creditor treatment.

Section 210(a)(11)(H) does incorporate some variations from the Bankruptcy Code. The legal interpretation of those variations by the FDIC must reflect the purposes to be accomplished by section 210(a)(11) and the extent to which the variations are necessary and appropriate to assist the FDIC in accomplishing those purposes. As under the Bankruptcy Code, it is fair to conclude that the purposes of subparagraphs (A), (B), and (C) of section 210(a)(11) are to discourage, and to provide authority to avoid, certain transfers that could unfairly reduce the value available to other creditors or impair the ability to maximize the value of the assets or continue operations essential to the implementation of the receivership or the bridge financial company.

For purposes of determining whether the FDIC as receiver can avoid a transfer as fraudulent or preferential under Title II, section 210(a)(11)(H)(i)(II) provides that a transfer is made (a) when the transfer is so perfected that a *bona fide* purchaser cannot acquire a superior interest or (b) if the transfer has not been so perfected before the FDIC is appointed as receiver, immediately before the date of appointment. Title II, therefore, appears to apply the *bona fide* purchaser construct to all fraudulent transfers (section 210(a)(11)(A) of the Dodd-Frank Act) and all preferential transfers (section 210(a)(11)(B) of the Dodd-Frank Act).

By contrast, the Bankruptcy Code uses the *bona fide* purchaser construct only for fraudulent transfers, and for preferential transfers of real property other than fixtures. Title II of the Dodd-Frank Act appears to apply this standard to potentially preferential transfers of fixtures and personal property as well.

Section 547(e)(1)(B) of the Bankruptcy Code provides that in the case of preferential transfers of personal property and fixtures, a transfer occurs at the time the transferee's interest in the transferred property is so perfected that a hypothetical lien creditor[1] cannot acquire an

[1] The term hypothetical lien creditor does not appear in the Bankruptcy Code, but is a commonly-used reference to the formulation in section 544(a)(1) of the Bankruptcy Code whereby the Bankruptcy Trustee has "the rights and powers of, or may avoid any transfer of property of the debtor...that is voidable by—(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial

interest in the property transferred that is superior to that of the transferee. Under one interpretation of section 210(a)(11)(H), the FDIC could, in a proceeding under Title II, in some possible circumstances avoid as preferential transfers grants of security interests perfected by filing that could not be avoided in a case under the Bankruptcy Code.

Finally, section 547(e)(2) of the Bankruptcy Code contains a 30-day grace period in which a transfer may be perfected after it has taken effect between the parties. Section 547(e)(2) states that a transfer is made (i) when the transfer takes effect between the transferor and the transferee, if the transfer is perfected at or within 30 days after that time, (ii) when the transfer is perfected, if the transfer is perfected after the 30-day period, or (iii) otherwise immediately before the date when the petition is filed. Section 210(a)(11)(H) of the Dodd-Frank Act does not contain any express grace period.

Rulemaking Authority and Treatment of Creditors

The orderly liquidation authority provided under Title II of the Dodd-Frank Act provides a resolution scheme that, to the extent possible, should be harmonized with the "insolvency laws that would otherwise apply to a covered financial company." In implementing Title II, and in harmonizing the orderly liquidation authority with the provisions of the Bankruptcy Code, the FDIC, in consultation with the Financial Stability Oversight Council is expressly empowered to "prescribe such rules or regulations as the [FDIC] considers necessary or appropriate to implement this title, including rules and regulations with respect to the rights, interests, and priorities of creditors ...."[2]

The avoidable transfer provisions of section 210(a)(11) are based upon the respective provisions in the Bankruptcy Code, and are intended to produce a similar result under both insolvency frameworks. For example, the preferential transfer provisions in section 210(a)(11)(B) of the Dodd-Frank Act and in section 547 of the Bankruptcy Code include substantively identical requirements. A transferee from which the FDIC, as receiver, seeks to recover assets based upon a fraudulent transfer, preferential transfer, or certain unauthorized post-receivership transactions, is given the same defenses as under sections 547, 548, and 549 of the Bankruptcy Code.

As was previously noted by the FDIC in its Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] "[t]he liquidation rules of Title II are designed to create parity in the treatment of creditors with the Bankruptcy Code" and, specifically in the case of avoidable transfers, the "provisions that empower the FDIC to avoid and recover fraudulent transfers, preferential transfers, and unauthorized transfers of property by the covered financial company are drawn from Bankruptcy Code provisions."

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lien, whether or not such a creditor exists ...." A similar, but abbreviated, formulation is found in section 547(e)(1)(B) of the Bankruptcy Code.

[2] Section 209 of the Dodd-Frank Act.

[3] 75 Fed. Reg. 64,181 (Oct. 19, 2010) (to be codified at 12 C.F.R. pt. 380).

Conclusion

Consistent with the direction provided in section 209, and to facilitate implementation of the avoidable transfer provisions of section 210(a)(11)(A) and (B), such provisions should be reconciled with the treatment of avoidable transfers under the Bankruptcy Code. We are of the opinion that the appropriate interpretation of section 210(a)(11)(H)(i)(II) of the Dodd-Frank Act is as follows:

- The avoidance provisions in section 210(a)(11) would apply the *bona fide* purchaser construct only in the case of fraudulent transfers alleged under subparagraph (A) and preferential transfers of real property (other than fixtures) alleged under subparagraph (B);

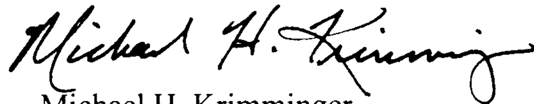
- The avoidance provisions in section 210(a)(11)(B) would apply the hypothetical lien creditor construct as applied under section 547(e)(1)(B) of the Bankruptcy Code to any alleged preferential transfers of personal property and fixtures; and

- The avoidance provisions in section 210(a)(11)(B) would apply the 30-day grace period as provided in section 547(e)(2) of the Bankruptcy Code.

In order to eliminate any uncertainty regarding these issues, I will recommend to the FDIC's Board of Directors that it adopt a regulation under section 209 of the Dodd-Frank Act to the same effect as the foregoing through notice and comment rulemaking.

Should you have any questions, please do not hesitate to contact me at 202-898-8950 or through email.

Sincerely,



Michael H. Krimminger
Acting General Counsel

cc: R. Penfield Starke