Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064–AD84

DEPARTMENT OF THE TREASURY

31 CFR Part 149

RIN 1505–AC36

Calculation of Maximum Obligation Limitation

AGENCY: Federal Deposit Insurance Corporation; Departmental Offices, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking is published jointly by the Federal Deposit Insurance Corporation (the ''FDIC'') and the Departmental Offices of the Department of the Treasury (the ''Treasury'') (collectively, the ''Agencies'') and proposes rules to implement applicable provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[1] In accordance with the requirements of the Dodd-Frank Act, the proposed rules govern the calculation of the maximum obligation limitation (''MOL''), as specified in section 210(n)(6) of the Dodd-Frank Act. The MOL limits the aggregate amount of outstanding obligations that the FDIC may issue or incur in connection with the orderly liquidation of a covered financial company.

DATES: Comments must be received on or before January 24, 2012.

ADDRESSES: You may submit comments by any of the following methods:

FDIC

You may submit comments by any of the following methods:

- *FDIC Web Site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the agency Web site.
- *FDIC Email: Comments@fdic.gov.* Include RIN # [insert] on the subject line of the message.
- *FDIC Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery to FDIC:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please note: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided.

Please include your name, affiliation, address, email address and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary (no more than five single-spaced pages). All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Treasury

Federal eRulemaking Portal—''Regulations.gov.'' You are encouraged to submit comments electronically through the Federal eRulemaking Portal—''Regulations.gov.'' Go to *http://www.regulations.gov* to submit or view public comments. The Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket.

Mail: Department of the Treasury, Office of Financial Institutions Policy, Room 1310, Main Treasury Building, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Instructions: In general, the Treasury will enter all comments received into the docket and make them available without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may view comments and other related materials by any of the following methods:

Viewing Comments Electronically: Go to *http://www.regulations.gov* and follow the instructions on the Web site.

Viewing Comments Personally: You may personally inspect and photocopy comments at the Department of the Treasury Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue NW., Washington, DC. You can make an appointment to inspect comments by calling (202) 622–0990.

Commenters are requested to submit copies of comments to both Agencies.

FOR FURTHER INFORMATION CONTACT:

FDIC

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Treasury

Lance Auer, Deputy Assistant Secretary (Financial Institution Policy), at (202) 622–1262; Felton Booker, Acting Director, Office of Financial Institutions Policy, at (202) 622–0293; Peter A. Bieger, Acting Assistant General Counsel (Banking and Finance), at (202) 622–0480; and Steven D. Laughton, Senior Counsel, Office of General Counsel, at (202) 622–8413.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act

Title II of the Dodd-Frank Act establishes an Orderly Liquidation Authority (''OLA'') to resolve a large interconnected financial company upon a determination that its failure and resolution under otherwise applicable law would have serious adverse effects on financial stability in the United States and the use of OLA would avoid or mitigate such adverse effects. Under the systemic risk determination process

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 12 U.S.C. 5301 *et seq.* (2010).

set forth in the Dodd-Frank Act, certain designated Federal agencies,[2] on their own initiative or at the request of the Secretary of the Treasury (''Secretary''), may recommend that the Secretary appoint the FDIC as receiver of a financial company. Any written recommendation from the designated Federal agencies to the Secretary to make a systemic risk determination must include a number of specific findings, which are enumerated in section 203(a)(2) of the Dodd-Frank Act.[3] Then, based on the written recommendation of the appropriate agencies, the Secretary, in consultation with the President, must determine whether the conditions in section 203(b) of the Dodd-Frank Act have been satisfied so that the covered financial company can be placed into receivership. In making that determination, the Secretary must document any determination and retain such documentation.[4] This procedure is very similar to the way that systemic risk determinations are made under section 13 of the Federal Deposit Insurance Act (the ''FDIA'').[5] Under section 201(a)(8) of the Dodd-Frank Act, a ''covered financial company'' is a ''financial company'' [6] for which a systemic risk determination has been made pursuant to section 203(b) of the Dodd-Frank Act but does not include an insured depository institution.

Once the Secretary makes a systemic risk determination, the FDIC can be appointed as receiver of the covered financial company. If the board of directors (or similar governing body) of the company consents to the appointment, the Secretary shall appoint the FDIC as receiver. If the company's governing body does not consent, section 202 of the Dodd-Frank Act requires the Secretary to petition the United States District Court for the District of Columbia for an order authorizing the Secretary to appoint the FDIC as receiver. In determining whether to grant the petition, the court will determine whether two of the Secretary's seven determinations—that the covered financial company is in default or in danger of default and that it meets the definition of financial company under Title II—are arbitrary and capricious.[7] If the court upholds the two reviewable determinations of the Secretary, the court will issue an order authorizing the Secretary to appoint the FDIC as receiver. If the court does not make a determination within twenty-four hours of receiving the Secretary's petition, then the appointment of the FDIC as receiver takes effect by operation of law.

The OLA in the Dodd-Frank Act is intended as a limited exception to bankruptcy or other applicable insolvency laws for purposes of ensuring that the resolution of a failing non-depository financial company does not have serious adverse effects on U.S. financial stability. Section 204(a) of the Dodd-Frank Act expressly provides that the purpose of OLA is to provide the means ''to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.'' Section 214(a) expressly provides that ''[a]ll financial companies put into receivership under this title shall be liquidated. No taxpayer funds shall be used to prevent the liquidation of any financial company under this title.'' Moreover, section 214(b) provides that ''[a]ll funds expended in the liquidation of a financial company under this title shall be recovered from the disposition of assets of such financial company, or shall be the responsibility of the financial sector, through assessments.'' Finally, section 214(c) provides that, ''[t]axpayers shall bear no losses from the exercise of any authority under this title.''

To achieve the orderly liquidation of systemically important financial companies, the FDIC is given broad authority under the Dodd-Frank Act to: Transfer assets or liabilities to a bridge financial company, operate or liquidate businesses, sell assets, and resolve the liabilities of a covered financial company just after the FDIC's appointment as receiver or as soon as

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[2] The Board of Governors of the Federal Reserve System (''FRB'') and the Securities and Exchange Commission (''SEC'') will make the recommendation if the company or its largest U.S. subsidiary is a broker or a dealer. The FRB and the Director of the Treasury's Federal Insurance Office will make the recommendation and provide affirmative approval, respectively, if the company or its largest U.S. subsidiary is an insurance company, and the FRB and the FDIC will make the recommendation in all other cases. In cases involving the FRB and FDIC, the systemic risk recommendation must be approved by at least ⅔ of the members of the Federal Reserve Board then serving and at least ⅔ of the members of the FDIC Board of Directors then serving.

[3] Section 203(a)(2) of the Dodd-Frank Act provides that all written recommendations from the designated Federal agencies to the Secretary to make a systemic risk determination must include the following:

(1) An evaluation of whether the financial company is in default or in danger of default;

(2) A description of the effect that the default of the financial company would have on financial stability in the United States;

(3) A description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities;

(4) A recommendation regarding the nature and the extent of actions to be taken under Title II of Dodd-Frank regarding the financial company;

(5) An evaluation of the likelihood of a private sector alternative to prevent the default of the financial company;

(6) An evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company;

(7) An evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and

(8) An evaluation of whether the company satisfies the definition of a financial company under section 201 of the Dodd-Frank Act.

[4] Section 203(b) of the Dodd-Frank Act requires the Secretary of Treasury to determine that:

(1) The financial company is in default or in danger of default;

(2) The failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States;

(3) No viable private sector alternative is available to prevent the default of the financial company;

(4) Any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions taken under this title is appropriate, given the impact that any action taken under this title would have on financial stability in the United States;

(5) Any action under section 204 would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties and shareholders in the financial company;

(6) A Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and

(7) The company satisfies the definition of a financial company under section 201.

[5] 12 U.S.C. 1823(c)(4).

[6] Section 201(a)(11) of the Dodd Frank Act defines the term ''financial company'' to mean any company that:

(A) Is incorporated or organized under any provision of Federal law or the laws of any State;

(B) Is—

(i) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a));

(ii) A nonbank financial company supervised by the Board of Governors;

(iii) Any company that is predominantly engaged in activities that the 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 (12 U.S.C. 1843(k)) other than a company described in clause (i) or (ii); or

(iv) Any subsidiary of any company described in any of clauses (i) through (iii) that is predominantly engaged in activities that the 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 (12 U.S.C. 1843(k)) (other than a subsidiary that is an insured depository institution or an insurance company); and

(C) Is not a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971, as amended (12 U.S.C. 2001 et seq.), a governmental entity, or a regulated entity, as defined under section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4502(20)).

[7] Dodd-Frank Act § 202(a)(1)(A)(iii).

conditions make this appropriate.[8] This authority enables the FDIC to act immediately to sell any assets and liabilities of the covered financial company to another entity, or if that is not possible or consistent with maximizing the value of the assets of the covered financial company, to transfer assets and liabilities to a bridge financial company established by the FDIC and either sell the assets or liabilities over time while maintaining critical functions. Oftentimes, in administering a receivership, it is necessary to continue key operations, services, and transactions that will maximize the value of the firm's assets and avoid a disorderly collapse in the marketplace.

Section 210(n) of the Dodd-Frank Act establishes an Orderly Liquidation Fund (''OLF'') in the U.S. Treasury that will be available to the FDIC to carry out its responsibilities as receiver of a covered financial company and pay the costs of actions authorized under Title II of the Dodd-Frank Act, including: The orderly liquidation of covered financial companies, payment of administrative expenses, and the payment of principal and interest by the FDIC on obligations issued under section 210(n)(5) of the Dodd-Frank Act. The OLF will be comprised of amounts received by the FDIC, including: The proceeds of obligations issued to Treasury pursuant to section 210(n)(5), assessments received under section 210(o), interest and other earnings from investments, and repayments to the FDIC by covered financial companies.[9]

In order for the FDIC to fulfill its obligations as receiver of a covered financial company, it may be necessary for the FDIC to borrow funds from the Treasury. Under section 210(n)(5) of the Dodd-Frank Act, the FDIC is authorized to issue obligations to Treasury upon the FDIC's appointment as receiver, and Treasury may purchase any such obligations, ''upon such terms and conditions as to yield a return at a rate determined by the Secretary, taking into consideration the current average yield on outstanding marketable obligations of the United States of comparable maturity, plus an interest rate surcharge to be determined by the Secretary, which shall be greater than the difference between—(i) the current average rate on an index of corporate obligations of comparable maturity; and (ii) the current average rate on outstanding marketable obligations of the United States of comparable maturity.'' Section 210(n)(9) of the Dodd-Frank Act provides that the FDIC must develop an Orderly Liquidation Plan (''OLP'') that is acceptable to the Secretary for each covered financial company for which the FDIC is appointed receiver, prior to funds in the OLF being made available to the FDIC with regard to such covered financial company. The FDIC may amend any OLP at any time with the concurrence of the Secretary. Section 210(n)(9) further requires that a mandatory repayment plan between the FDIC and Treasury be agreed to and in effect before Treasury may provide certain amounts to the FDIC within the limits defined in subparagraph (B) of section 210(n)(6) of the Dodd-Frank Act.

The Maximum Obligation Limitation (''MOL''), as set forth in section 210(n)(6) of the Dodd-Frank Act, limits the aggregate amount of outstanding obligations that the FDIC may issue or incur in connection with the orderly liquidation of a covered financial company. Specifically, the MOL provides as follows:

> The [FDIC] may 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 under this subsection, for each covered financial company would exceed—
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> (A) 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 subparagraph (B)); and
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> (B) 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 subparagraph (A).

II. The Proposed Rule

Section 210(n)(7) of the Dodd-Frank Act requires the Agencies, in consultation with the Financial Stability Oversight Council (''FSOC''), to jointly prescribe regulations governing the calculation of the MOL. In accordance with this section, the Agencies have consulted with the FSOC, and have determined that it would be most appropriate to adopt regulations that closely follow the statutory language for calculating the MOL, while defining certain terms referenced in the statute and seeking comment on those definitions. The terms in this proposed rule are defined solely for the purpose of calculating the MOL and are not applicable to any other statutory or regulatory requirements.

The Dodd-Frank Act does not define the term ''obligation.'' The proposed rule includes a definition of the term ''obligation'' that is derived from the definition of the term ''obligation'' in section 15(c) the FDIA (12 U.S.C. 1825(c)). Section 15(c) of the FDIA contains an MOL that limits the amount of obligations the FDIC may issue or incur in connection with the resolution of failed insured depository institutions. A comparison of the two MOLs reveals that the MOL under section 210(n)(6) of the Dodd-Frank Act is modeled after the FDIA MOL. The Agencies thus believe that defining the term ''obligation'' in a manner similar to the definition of such term in the FDIA is appropriate. More specifically, the proposed rule provides that in calculating the MOL, the term ''obligation'' means—

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

(ii) Any amount borrowed pursuant to Section 210(n)(5) in connection with each covered financial company; and

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

For purposes of calculating the MOL, the FDIC shall value any contingent liabilities with respect to each covered financial company, including any guarantee issued by the FDIC, at their expected cost to the FDIC.[10]

Section 210(n)(6)(A) of the Dodd-Frank Act provides that, in calculating the MOL, the amount of the total consolidated assets for each covered financial company shall be ''based on the most recent financial statement available.'' The Dodd-Frank Act does not define this term. Under the proposed rule, the term ''most recent

[8] Section 210 of the Dodd-Frank Act prescribes the FDIC's powers and duties once it is appointed as receiver of a covered financial company, including, *inter alia,* its powers and duties to: (1) Succeed to all rights, titles, powers and privileges of the covered financial company and its assets, and of any stockholder, member, officer or director of such company; (2) take over the assets and operate the company with all the powers of the shareholders, members, directors and officers, and conduct all business of the company; (3) liquidate the company through the sale of assets or transfer of assets to a bridge financial company, as provided under section 210(h) of the Dodd-Frank Act; (4) merge the company with another company or transfer assets or liabilities; (5) pay valid obligations that come due, to the extent that funds are available; (6) exercise subpoena powers; (7) use private sector services to manage and dispose of assets; (8) terminate rights and claims of stockholders and creditors (except for the right to payment of claims consistent with the priority of claims provision); and (9) determine and pay claims. However, a receivership of an insurance company would generally be conducted in accordance with state law.

[9] Dodd-Frank Act § 210(n)(2).

[10] Dodd-Frank Act § 210(n)(8)(B).

financial statement available'' means: (1) The covered financial company's most recent financial statement filed with the SEC or any other regulatory body; (2) the covered financial company's most recent financial statement audited by an independent CPA firm; or (3) other available financial statements of the covered financial company. The Agencies will jointly determine which of the three types of financial statements is, in the judgment of the FDIC and the Secretary, most pertinent, taking into consideration the timeliness and reliability of the statements being considered. Generally, the Agencies intend to use financial statements filed with a regulatory body or financial statements audited by an independent CPA firm when they are available and timely as under most circumstances they would be considered to be reliable. However, if the covered financial company is both privately held and unregulated, statements filed with a regulatory body would not exist. In addition, financial statements audited by an independent CPA firm may not also exist or may not be as timely or relevant as unaudited financial statements. Accordingly, the Agencies propose to use the financial statements that they believe are most pertinent taking into consideration the timeliness and reliability of the statements being considered.

Section 210(n)(6)(B) of the Dodd-Frank Act provides that the total consolidated assets of each covered financial company be measured at their ''fair value.'' The Dodd-Frank Act does not define the term ''fair value'' for this purpose. The proposed rule defines ''fair value'' as the expected total aggregate value of each asset, or group of assets that are managed within a portfolio, of a covered financial company if such asset, or group of assets, was sold or otherwise disposed of in an orderly transaction. The Agencies initially considered a fair value definition based on a forced liquidation value or distressed sale basis, such as a liquidation under chapter 7 of the Bankruptcy Code. However, the Agencies determined that defining the term ''fair value'' based on a forced liquidation value would not accurately reflect the FDIC's responsibilities and authorities as receiver. For example, Section 210(a)(1)(B)(i) of the Dodd-Frank Act allows the FDIC as receiver to take over the assets of and operate the covered financial company with all the powers of the members or shareholders, the directors, and the officers of the covered financial company, and conduct all business of the covered financial company during the period of orderly liquidation. Section 210(a)(1)(B)(iv) of the Dodd-Frank Act requires the FDIC as receiver to manage the assets and property of the covered financial company, consistent with the maximization of the value of the assets in the context of an orderly liquidation. Section 202(d) gives the FDIC a three-year period to liquidate the covered financial company, which period may be extended for up to two additional years to maximize the net present value return from the sale of the assets of the covered financial company. Hence, the Agencies believe that the term ''fair value'' should be based on an orderly liquidation value using valuation analysis consisting of relevant factors estimating asset prices commensurate with the characteristics of the assets held by the covered financial company. Such measures are consistent with the authority of the FDIC to conduct an orderly liquidation in a manner that maximizes the value of the assets of the covered financial company over a three- to five-year period. The Agencies also believe that the proposed rule reflects this mandate by recognizing that fair value measurement is context dependant and the result of numerous variables, including the attributes of the specific asset; the period of time and the circumstances the asset is allowed to be marketed; and the presence of willing and able third-party buyers.

Finally, with respect to the term ''total consolidated assets of each covered financial company that are available for repayment'' in section 210(n)(6)(B) of the Dodd-Frank Act, the proposed rule defines this term to mean the difference between: (1) The total consolidated assets of the covered financial company that are available for liquidation during the operation of the receivership; and (2) to the extent included in (1), 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 and using the proceeds from the sale of such assets. The Agencies are proposing to define the term ''assets * * * available for repayment'' in a manner consistent with the FDIC's broad authority as receiver regarding the liquidation of assets of a covered financial company.

Under Title II, all of the assets on the books of the covered financial company would generally be available for sale and liquidation and, thereby, available as proceeds for repayment. It should be noted, for example, section 210(a)(1)(A)(i) provides that the FDIC as receiver succeeds to all rights, titles, powers, and privileges of the covered financial company and its assets. Section 210(a)(1)(D) further provides that the FDIC as receiver shall liquidate the covered financial company's assets and wind-up its affairs in such manner as the FDIC deems appropriate, including through the sale of assets, the transfer of assets to a bridge financial company, or the exercise of any other rights or privileges granted, but subject to all legally enforceable and perfected security interests and all legally enforceable security entitlements. Moreover, section 210(a)(1)(M) provides that notwithstanding any other provision of law, the FDIC's appointment as receiver terminates all rights and claims that shareholders and creditors of the covered financial company may have against the assets of the covered financial company, except for their right to payment or other satisfactory resolution of their underlying claims as provided by the Dodd-Frank Act.

Congress thus directed the FDIC as receiver to manage and liquidate the assets of a covered financial company, including assets that may be released from lien encumbrances by payment in the ordinary course of business, with a view toward maximizing the value of such assets over the course of the orderly liquidation. The Agencies believe that the FDIC's broad authority to liquidate the covered financial company's assets (including assets encumbered by liens), to pay secured creditors and to pay the FDIC's administrative expenses and other claimants in accordance with the priority of claims provisions, to the extent of available proceeds, renders those ''assets * * * available for repayment.'' However, the Agencies also recognize that there may be assets of a covered financial company that are not ''assets * * * available for repayment.'' For example, to the extent that the assets of a covered financial company's wholly-owned foreign subsidiary are ''ring-fenced'' by the subsidiary's foreign regulator, pursuant to valid statutory or regulatory authority, they would not be available for repayment. Other assets may not be on the balance sheet of a covered financial company and thus not available for repayment, such as customer name securities at a covered broker or dealer.[11]

[11] Moreover, even if customer name securities were on a covered financial company's balance sheet, they would not constitute ''assets * * * available for repayment'' because section 205(f) of the Dodd-Frank Act requires such customer name securities to be delivered to the customer.

III. Request for Comments

The Agencies invite comments on all aspects of the proposed rulemaking. In particular, the Agencies request comments on the following questions:

Is the proposed definition of ''obligation'' appropriate? Are there alternative definitions that should be considered?

In determining what constitutes ''the most recent financial statement available,'' is it appropriate to allow the Agencies to rely on financial statements that may have been provided internally to the covered financial company's management, Board of Directors, or both if the Agencies consider them more pertinent, after taking into consideration timeliness and reliability, than a publicly available financial statement filed with the SEC or other regulatory body or a financial statement audited by an independent CPA firm?

Is the proposed definition of ''fair value'' appropriate? Are there other standards or definitions that may be more appropriate in general or for certain types of assets? What risks should be considered in the assessment of ''fair value?'' Should ''fair value'' be determined differently for different asset classes? Given that many assets may have to be liquidated, should expected transaction costs be explicitly considered for the calculation of fair value?

Should the definition of the term ''total consolidated assets of each covered financial company that are available for repayment'' be limited to certain categories of assets (such as unencumbered assets) or should it extend to all assets available for repayment in the ordinary course of business?

Written comments must be received by the Agencies no later than January 24, 2012.

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

The proposed rule provides, in part, the manner in which the Agencies would implement the maximum obligation limitation for FDIC borrowings from the Treasury to fund the Orderly Liquidation Fund in the event that one or more covered financial companies are placed into receivership. It will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information collection has been submitted to the Office of Management and Budget for review.

B. The Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Agencies hereby certify that this rule will not have a significant economic impact on a substantial number of small entities. The rule governs the manner in which the FDIC would calculate the maximum obligation limitation for obligations incurred or issued by the FDIC in connection with the orderly liquidation of a covered financial company under Title II of the Dodd-Frank Act. Small entities will not be affected by this proposed rule. Moreover, under Small Business Administration size standards defining small entities, financial companies are generally considered small entities if their annual receipts do not exceed $7 million or their total assets do not exceed $175 million.[12] The Agencies do not expect that the OLA in the Dodd-Frank Act will be used to resolve financial companies that qualify as small entities, because the failure of such companies would be unlikely to have serious adverse effects on financial stability in the United States. Notwithstanding this certification, the Agencies invite comments on the impact of this rule on small entities.

C. Plain Language

Each Federal banking agency, such as the FDIC, is required to use plain language in all proposed and final rules published after January 1, 2000. 12 U.S.C. 4809. In addition, in 1998, the President issued a memorandum directing each agency in the Executive branch, such as Treasury, to use plain language for all new proposed and final rulemaking documents issued on or after January 1, 1999. The Agencies have sought to present the proposed rule in a simple and straightforward manner. The Agencies invite comments on whether the proposal is clearly stated and effectively organized, and how the Agencies might make the proposed text easier to understand.

D. Executive Order 12866

Executive Orders 13563 and 12866 directs Treasury to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

[12] 13 CFR 121.201.

List of Subjects in 12 CFR Part 380 and 31 CFR Part 149

Accounting, Administrative practice and procedure, Finance, and Loan programs.

Federal Deposit Insurance Corporation

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 380 of title 12 of the Code of Federal Regulations as follows:

PART 380—ORDERLY LIQUIDATION AUTHORITY

1. The authority citation for part 380 continues to read as follows:

Authority: 12 U.S.C. 5301 *et seq.*

2. Add § 380.10 to read as follows:

§ 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 (2)); 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 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 paragraph (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.

Department of the Treasury

Authority and Issuance

For the reasons set forth in the preamble, Treasury proposes to amend Title 31, Chapter I of the Code of Federal Regulations by adding a new part 149 as set forth below:

PART 149—CALCULATION OF MAXIMUM OBLIGATION LIMIT

Sec.

Authority: 31 U.S.C. 321 and 12 U.S.C. 5390.

§ 149.1 Authority and purpose.

(a) *Authority.* This part is issued by the Federal Deposit Insurance Corporation (FDIC) and the Secretary of the Department of the Treasury (Treasury) under section 210(n)(7) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).

(b) *Purpose.* The purpose of this part is to issue implementing regulations as required by the Act. The part governs the calculation of the maximum obligation limitation which limits the aggregate amount of outstanding obligations the FDIC may issue or incur in connection with the orderly liquidation of a covered financial company.

§ 149.2 Definitions.

As used in this part:

Fair value. 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.

Most recent financial statement available. (1) 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.

(2) The FDIC and the Treasury will jointly determine the most pertinent of the above financial statements, taking into consideration the timeliness and reliability of the statements being considered.

Obligation. The term ''obligation'' means, with respect to any covered financial company—

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

(2) Any amount borrowed pursuant to section 210(n)(5)(A) of the Act; and

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

Total consolidated assets of each covered financial company that are available for repayment. The term ''total consolidated assets of each covered financial company that are available for repayment'' means the difference between:

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

(2) To the extent included in paragraph (1) of this definition, 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.

§ 149.3 Maximum obligation limitation.

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—

(a) 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 (b) of this section); and

(b) 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) of this section.

Dated at Washington, DC, this 6th day of July 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: November 14, 2011.

By the Department of the Treasury.

Alastair Fitzpayne,

Deputy Chief of Staff and Executive Secretary.

[FR Doc. 2011–29993 Filed 11–23–11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0959; Directorate Identifier 2011–NE–25–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc (RR) RB211 Trent 800 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the