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December 21, 2010

Michael Krimminger
Acting General Counsel
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: Avoidance Powers Under the Orderly Liquidation Authority Title of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**")

Dear Mr. Krimminger,

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to address an important issue regarding the treatment of certain security interests under the Orderly Liquidation Authority title ("**Title II**") of the Dodd-Frank Act.[2] As we have discussed with you and your staff, certain apparent inconsistencies in the treatment of secured creditors under the Bankruptcy Code and Title II have created concerns among securitization issuers and investors, as well as recipients of secured lending more generally. These issuers and investors are concerned about the potential impact of, and the market risk imposed by, such inconsistencies. The lack of clarity as to how this issue, described in more detail below, will be resolved will affect issuances and the ability of securitization issuers to economically fund lending.

The concern is that as a result of a difference in the statutory language of Title II and the Bankruptcy Code, certain security interests may be treated differently under the Orderly Liquidation Authority than under the Bankruptcy Code for the purpose of determining whether a grant of a security interest may be treated as a preferential transfer. Specifically, there are two concerns regarding Section 210(a)(11) of Title II, which contains the provisions regarding preferential transfers: First, that the grant of security interests perfected by filing alone, rather than by control, may be avoided as preferential transfers in the event a financial company is resolved under the Orderly Liquidation Authority, whereas such grants would not be avoidable

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] Pub. L. No. 111-203, § 201 et seq., 124 Stat. 1376 (2010).

under the Bankruptcy Code. Second, that perfection by filing within 30 days would not be sufficient to protect against preference risk with respect to debtors who are potentially subject to the Orderly Liquidation Authority, where perfection within such period would generally be sufficient under the Bankruptcy Code.

We request that the FDIC take action to narrow this gap between the Orderly Liquidation Authority and the Bankruptcy Code, consistent with its statutory mandate.

"Transfer" Under Title II

Under Section 210(a)(11)(H) of the Orderly Liquidation Authority, for purposes of the subparagraphs on fraudulent transfers and preferential transfers, "a transfer is made when such transfer is so perfected that a bona fide purchaser from the covered financial company 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."[3] The subsection goes on to provide that "if such transfer is not so perfected before the date on which the Corporation is appointed as receiver for the covered financial company, such transfer is made immediately before the date of such appointment."[4]

Under this provision of Title II, the transfer will be deemed to be made when the transfer is perfected against a hypothetical bona fide purchaser. This provision of Title II does not distinguish between a transfer of real property and property other than real property.

Security Interest in Property Other than Real Property

Unlike Title II, the preferential transfer section of the Bankruptcy Code distinguishes between a transfer of real property, other than fixtures, and a transfer of a fixture or property other than real property for purposes of determining when a transfer is perfected. Under Section 547(e)(1)(A) of the Bankruptcy Code, a transfer of real property, other than fixtures, is perfected when a hypothetical bona fide purchaser cannot take a superior interest to that of the transferee,[5] similar to Section 210(a)(11) of Title II. Under Section 547(e)(1)(B), however, a transfer of a fixture or property other than real property, is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."[6] In other words, in the case of a grant of a security interest in property other than real property, the transfer is perfected when a hypothetical lien creditor cannot take a superior interest to that of the transferee.[7] Therefore, filing a financing statement in the case of property other than real property

[3] Dodd-Frank Act, § 210(a)(11)(H)(i)(II).

[4] *Id.*

[5] 11 U.S.C. § 547(e)(1)(A).

[6] 11 U.S.C. § 547(e)(1)(B).

[7] *Id.*

is sufficient for the transfer to be deemed to be perfected under the Bankruptcy Code for preference purposes.

However, a grant of a security interest by filing would not be superior to a hypothetical bona fide purchaser who takes control or possession in some circumstances,[8] and so, under the literal wording of Section 210(a)(11)(H), such a transfer would not be deemed to be made when the filing was made.[9] Because the transfer would not be deemed to have occurred until immediately before the date of the appointment of the FDIC as receiver of the debtor,[10] it could be avoided by the FDIC as receiver in the event the debtor is placed under the Orderly Liquidation Authority as a transfer on account of an antecedent debt pursuant to the FDIC's power to avoid preferential transfers.[11] This difference in the statutory provisions of the Bankruptcy Code and the Orderly Liquidation Authority could result in a security interest being respected in bankruptcy and avoided under the Orderly Liquidation Authority. This discrepancy could impact various forms of secured lending to financial companies, including certain types of asset backed securities ("**ABS**") transactions such as common auto ABS structures.

Transfer Timing Provisions

In addition to this drafting discrepancy between Title II and the Bankruptcy Code, there is a difference in how the timing of the perfection relates back to the timing of the transfer. Under the Bankruptcy Code, for preference purposes, a transfer takes effect when the transfer is made, if it is perfected within 30 days.[12] So, if a creditor extends a loan and takes a security interest that it then perfects (by control or filing) within 30 days, the security interest would not later be avoided as a preferential transfer (even if the debtor files for bankruptcy within the preference period) because the perfection would be deemed not to be on account of antecedent debt. Title II does not expressly have the equivalent provision relating back a security interest that is perfected within 30 days to the transfer date. At best, as discussed above, for certain security interests a transfer is deemed to have been made when the transfer was perfected. Therefore, there is a concern that, unlike under the Bankruptcy Code, perfection, whether by possession or by filing, even within 30 days would not be sufficient to protect against preference risk in the event the debtor is placed under the Orderly Liquidation Authority in the preference period.

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[8] UCC § 9-330.

[9] Dodd-Frank Act, § 210(a)(11)(H)(i)(II).

[10] *Id.*

[11] Dodd-Frank Act, § 210(a)(11)(B).

[12] 11 U.S.C. § 547(e)(2).

Request for Rulemaking

There is no reason to believe that these discrepancies between the treatment of security interests under the Orderly Liquidation Authority and under the Bankruptcy Code were intended. It may be that the perfection provision from the fraudulent transfer section of the Bankruptcy Code, Section 548(d), was included in Title II and then applied to both the fraudulent transfer and preferential transfer powers. If Section 210(a)(11) of the Orderly Liquidation Authority were to be amended to correct these drafting errors, we suggest that it could be amended as reflected in Annex A to this letter.

Absent a legislative amendment to the statute, we request that the FDIC issue a regulation to correct the error. We believe that such a regulation would be consistent with the FDIC's duty under Section 209 of the Orderly Liquidation Authority to harmonize the rules and regulations implementing the Orderly Liquidation Authority with applicable insolvency laws, including the Bankruptcy Code.[13] It is supported by Section 210(a)(11)(F) which provides that under the Orderly Liquidation Authority a transferee has the same defenses against avoidance as under Section 547 of the Bankruptcy Code.[14] Finally, it would be consistent with the requirement in Section 210(a)(7) of the Orderly Liquidation Authority that a creditor shall, in no event, receive less than the amount that the creditor is entitled to receive in a liquidation proceeding under Chapter 7 of the Bankruptcy Code.[15]

We request that the FDIC clarify this issue by issuing a regulation specifying that it would exercise its authority under Section 210(a)(11) of Title II consistent with the power to avoid preferential transfers under Section 547 of the Bankruptcy Code. Specifically, the regulation should provide that for purposes of avoiding preferential transfers under Section 210(a)(11) of Title II, (i) perfection by filing will be recognized for property other than real property; and (ii) the timing provisions of Section 547(e)(2) that determine when a transfer is made based on when the transfer is perfected, will be incorporated into Section 210(a)(11) of Title II. Eventually, we think that a legislative fix would be the best solution. However, until a legislative correction can be achieved, we request that the FDIC issue immediate guidance in the form of a policy statement or a General Counsel's opinion and issue a regulation as soon as practicable.

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[13] Dodd-Frank Act, § 209.

[14] *Id.* § 210(a)(11)(F).

[15] *Id.* § 210(a)(7).

SIFMA thanks the FDIC for the opportunity to comment on this important issue. If you have any questions, please do not hesitate to call me at 202-962-7400, or SIFMA's counsel, Randall D. Guynn or Reena Agrawal Sahni, Davis Polk & Wardwell LLP, at 212-450-4000.

Sincerely,

Kenneth E. Bentsen, Jr.
Executive Vice President,
Public Policy and Advocacy
Securities Industry and Financial Markets Association

Mark Up of Section 210(a)(11)(H) of the Orderly Liquidation Authority

SEC. 210. POWERS AND DUTIES OF THE CORPORATION.
(a) Powers and Authorities.—
(11) Avoidable transfers.—
(A) Fraudulent transfers.—The Corporation, as receiver for any covered financial company, may avoid a transfer of any interest of the covered financial company in property, or any obligation incurred by the covered financial company, that was made or incurred at or within 2 years before the date on which the Corporation was appointed receiver, if—
(i) the covered financial company voluntarily or involuntarily—
(I) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the covered financial company was or became, on or after the date on which such transfer was made or such obligation was incurred, indebted; or
(II) received less than a reasonably equivalent value in exchange for such transferor obligation; and
(ii) the covered financial company voluntarily or involuntarily—
(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the covered financial company was an unreasonably small capital;
(III) intended to incur, or believed that the covered financial company would incur, debts that would be beyond the ability of the covered financial company to pay as such debts matured; or
(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.
(B) Preferential transfers.—The Corporation as receiver for any covered financial company may avoid a transfer of an interest of the covered financial company in property—
(i) to or for the benefit of a creditor;
(ii) for or on account of an antecedent debt that was owed by the covered financial company before the transfer was made;

(iii) that was made while the covered financial company was insolvent;

(iv) that was made—

(I) 90 days or less before the date on which the Corporation was appointed receiver; or

(II) more than 90 days, but less than 1 year before the date on which the Corporation was appointed receiver, if such creditor at the time of the transfer was an insider; and

(v) that enables the creditor to receive more than the creditor would receive if—

(I) the covered financial company had been liquidated under chapter 7 of the Bankruptcy Code;

(II) the transfer had not been made; and

(III) the creditor received payment of such debt to the extent provided by the provisions of chapter 7 of the Bankruptcy Code.

(C) Post-receivership transactions.—The Corporation as receiver for any covered financial company may avoid a transfer of property of the receivership that occurred after the Corporation was appointed receiver that was not authorized under this title by the Corporation as receiver.

(D) Right of recovery.—To the extent that a transfer is avoided under subparagraph (A), (B), or (C), the Corporation may recover, for the benefit of the covered financial company, the property transferred or, if a court so orders, the value of such property (at the time of such transfer) from—

(i) the initial transferee of such transfer or the person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(E) Rights of transferee or obligee.—The Corporation may not recover under subparagraph (D)(ii) from—

(i) any transferee that takes for value, including in satisfaction of or to secure a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(ii) any immediate or mediate good faith transferee of such transferee.

(F) Defenses.—Subject to the other provisions of this title—

(i) a transferee or obligee from which the Corporation seeks to recover a transfer or to avoid an obligation under subparagraph (A), (B), (C), or (D) shall have the same defenses available to a transferee or obligee from which a trustee seeks to recover a transfer or avoid an obligation under sections 547, 548, and 549 of the Bankruptcy Code; and

(ii) the authority of the Corporation to recover a transfer or avoid an obligation shall be subject to subsections (b) and (c) of section 546, section 547(c), and section 548(c) of the Bankruptcy Code.

(G) Rights under this section.—The rights of the Corporation as receiver under this section shall be superior to any rights of a trustee or any other party (other than a Federal agency) under the Bankruptcy Code.

(H) Rules of construction; definitions.—For purposes of—

(i) subparagraphs (A) and (B)—

(I) the term "insider" has the same meaning as in section 101(31) of the Bankruptcy Code;

(~~II~~ii) subparagraph (A)—

(I) a transfer is made when such transfer is so perfected that a bona fide purchaser from the covered financial company 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, but if such transfer is not so perfected before the date on which the Corporation is appointed as receiver for the covered financial company, such transfer is made immediately before the date of such appointment; and

(~~III~~II) the term "value" means property, or satisfaction or securing of a present or antecedent debt of the covered financial company, but does not include an unperformed promise to furnish support to the covered financial company; and

(~~ii~~iii) subparagraph (B)—

(I) 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, is perfected when a bona fide purchaser of such property from the covered financial company against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee;

(II) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee;

(III) except as provided in subsection (IV) of this subsection, a transfer is made—

(aa) 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 subsection 547(c)(3)(B) of the Bankruptcy Code;

(bb) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(cc) immediately before the date of the appointment of the receiver, if such transfer is not perfected at the later of—

(AA) the date on which the Corporation is appointed as receiver for the covered financial company; or

(BB) 30 days after such transfer takes effect between the transferor and the transferee;

(IV) a transfer is not made until the covered financial company has acquired rights in the property transferred;

(V) the covered financial company is presumed to have been insolvent on and during the 90-day period immediately preceding the date of appointment of the Corporation as receiver; and

(~~II~~VI) the term "insolvent" has the same meaning as in section 101(32) of the Bankruptcy Code.