

ClientAlert

Financial Markets Developments

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Dodd-Frank Wall Street Reform and Consumer Protection Act

Orderly Liquidation Authority

To address concerns that certain large interconnected financial companies, including broker-dealers, are simply “too big to fail,” Congress enacted Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”), titled “Orderly Liquidation Authority.” Title II authorizes the appointment of the Federal Deposit Insurance Corporation (the “FDIC”) as receiver to liquidate and unwind failing financial companies that pose a “significant risk to the financial stability of the US in a manner that mitigates such risk and minimizes moral hazard.” Upon a determination by the Secretary of the Treasury (the “Secretary”) that a financial institution is a “covered financial company” for which the FDIC has been appointed as receiver due to a systemic risk determination, then no other federal or state insolvency laws will apply except as provided in the Act.

Any company that could potentially be a “financial company” under the Act should be familiar with Title II of the Act. Title II is derived, in large part, from the Federal Deposit Insurance Act and Title 11 of the US Code (the “Bankruptcy Code”). Unlike the Bankruptcy Code, however, the judicial intervention in the liquidation proceedings is minimal and the government is granted broad powers in determining how to liquidate and unwind the financial company. Although Congress was implored to enact legislation that would regulate the wind-down of financial companies in the past year, Title II appears harsh, as the financial companies that will be subject to orderly liquidation have little chance at succeeding during the short-term judicial process as provided in Title II. Moreover, any appeal of the US District Court for the District of Columbia’s decision with respect to the Secretary’s determination to place the financial company into receivership does not create a stay on the orderly liquidation proceedings. Rather, despite the financial company’s appeal of any final order, the FDIC has authority to immediately commence the receivership. This unprecedented authority granted to the FDIC will undoubtedly cause much tension by and between the government and financial companies.

Below is an overview of the key provisions of Title II of the Act and the liquidation process provided for thereunder.

1. Which entities are subject to the Orderly Liquidation Authority?

An entity that is considered a “**covered financial company**” under Title II of the Act is generally subject to the FDIC’s Orderly Liquidation Authority.



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For purposes of Title II of the Act, the term “covered financial company” includes a financial company for which the Secretary has made a **systemic risk determination**, including the determination that failure of the financial company would have serious adverse effects on financial stability in the US.¹ An insured depository institution cannot be a covered financial company.² While insurance companies are technically covered by the Act, the liquidation or rehabilitation of an insurance company, and any subsidiary or affiliate of the insurance company, is required to be conducted under state insolvency laws, except that if the appropriate state agency fails to act within 60 days of a systemic risk determination, then the FDIC may act in place of such agency and pursue relief under state law.³

The term “financial company,” in turn, is defined as any of the following:

- **A bank holding company (“BHC”), as defined in section 2(a) of the BHC Act of 1956 (“BHC Act”).** In general, a “bank holding company” means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of the BHC Act.⁴
- **A nonbank financial company supervised by the Board of Governors.** A “nonbank financial company supervised by the Board of Governors” (an “NFC”) is defined as a nonbank financial company that the Financial Stability Oversight Council (“FSOC”), established by the Act, has determined shall be supervised by the Board of Governors of the Federal Reserve System (the “Board”). In order to qualify as a US or foreign nonbank financial company, a company must be “predominately engaged in financial activities.”⁵ Although the Board must adopt regulations for determining when a company is “predominately engaged in financial activities,” the Act sets a floor requiring that either:
 - The annual gross revenues derived by the company and its subsidiaries from financial activities (as defined in section 4(k) of the BHC Act), including the ownership or control of insured depository institutions, represent at least 85 percent of the consolidated annual gross revenues of the company; or
 - The consolidated assets of the company and its subsidiaries related to financial activities, including the ownership or control of insured depository institutions, represent at least 85 percent of the consolidated assets of the company.
- **Any company that is predominantly engaged in activities that are financial in nature for purposes of section 4(k) of the BHC Act.**
- **Any subsidiary of any of the foregoing three categories of companies that is predominantly engaged in activities that are financial in nature for purposes of section 4(k) of the BHC Act.**⁶

- Title II of the Act expressly excludes from the definition of financial company any Farm Credit System institutions chartered under and subject to the provisions of the Farm Credit Act of 1971, a governmental entity, or a regulated entity as defined under section 1303 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.⁷

2. What is the process for making a systemic risk determination, and thus designating a covered financial company for orderly liquidation?

Title II of the Act sets forth **procedures** by which a systemic risk determination may be made such that a financial company will be subject to orderly liquidation under the Act:

- For cases involving “**covered financial companies**” (other than a covered broker or dealer), the FDIC and the Board shall make a written recommendation, which recommendation shall be made upon a vote of not fewer than two thirds of the members of the Board then serving **and** two thirds of the members of the board of directors of the FDIC then serving.⁸
- For cases involving **brokers or dealers** (or in which the largest US subsidiary of a financial company is a broker or dealer), the US Securities and Exchange Commission (the “SEC”) and the Board shall make a written recommendation, which recommendation shall be made upon a vote of not fewer than two thirds of the members of the Board then serving and two thirds of the members of the SEC then serving, and in consultation with the FDIC.⁹
- For cases involving **insurance companies** (or in which the largest US subsidiary of a financial company is an insurance company), the director of the Federal Insurance Office and the Board shall make a written recommendation, which recommendation shall be made upon a vote of not fewer than two thirds of the Board then serving and the affirmative approval of the director of the Federal Insurance Office, and in consultation with the FDIC.¹⁰

Written recommendations of any of the foregoing agencies must include:

- An evaluation of whether the financial company is in default or in danger of default.¹¹
- A description of the effect that the default would have on financial stability in the US.
- A recommendation regarding the nature and the extent of actions to be taken under Title II of the Act regarding the financial company.

- 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.
- An evaluation of the likelihood of a private sector alternative to prevent the default of the financial company.
- An evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company.
- An evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants.
- An evaluation of whether the company satisfies the definition of a "financial company" under Title II.¹²

Upon the foregoing written recommendation, the Act **requires** that a covered financial company be placed in receivership if the Secretary, in consultation with the **President of the US**, determines that:

- The financial company is in default or in danger of default.
- 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 US.
- No viable private sector alternative is available to prevent the default of the financial company.
- 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 to be taken under Title II is appropriate, given the impact that any action taken under Title II would have on financial stability in the US.
- The orderly liquidation 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.
- A federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order.
- The company is a covered financial company.¹³

Notice to financial companies.

Once the Secretary has made a determination that the financial company shall be orderly liquidated under Title II, the Secretary is required to notify the FDIC and the covered financial company. If

the board of directors of the financial company consents to the appointment of the FDIC as receiver, the Secretary will appoint the FDIC as receiver.¹⁴ If the board of directors withholds such consent, the Secretary is required to file a petition with the US District Court for the District of Columbia for an order authorizing the Secretary to appoint the FDIC as receiver.¹⁵

Confidential hearing if financial company does not consent.

In its petition to the district court, the Secretary is required present all relevant findings and the recommendations made to the district court under seal.¹⁶ After notice to the covered financial company and a confidential hearing, the district court's review is limited to whether it was arbitrary and capricious for the Secretary to determine that the covered financial company (a) is in default or in danger of default; and (b) satisfies the definition of a financial company.¹⁷

If the district court determines that the determination of the Secretary was not arbitrary and capricious, the court is required to issue an order authorizing the Secretary to appoint the FDIC as receiver of the financial company.¹⁸ On the other hand, if the court determines that the determination of the Secretary was arbitrary and capricious, it must immediately provide the Secretary with a written statement of each reason supporting its determination and afford the Secretary an immediate opportunity to amend and refile the petition.¹⁹

Hearing within 24 hours.

If the district court does not make a determination within 24 hours of receipt of the petition, the petition shall be deemed granted and the Secretary may appoint the FDIC as receiver, whereby liquidation under Title II shall automatically be commenced.²⁰

Appeal of decision.

The finding by the district court shall be considered a final order and subject to appeal in the US Court of Appeals for the District of Columbia, not later than 30 days after the date on which the decision of the district court was rendered. The court of appeals shall consider any such appeal on an expedited basis.²¹ Such appeal may only be taken if the covered financial company did not acquiesce or consent to the appointment of a receiver.

The court of appeal's decision is subject to appeal to the US Supreme Court, not later than 30 days after the date on which the decision of the court of appeals is rendered. Such review is discretionary and shall be considered on an expedited basis.

3. Who operates the covered financial company that is in receivership?

During the period of orderly liquidation, the FDIC has all authority to operate the covered financial company.²²

4. When does the receivership authority of the FDIC expire as to a particular covered financial company?

Three-year period with possible one-year extension.

The appointment of a receiver under the Act terminates at the end of the three-year period beginning on the date on which such appointment is made. This three-year period may be extended by one year if the Chairperson of the FDIC determines and certifies in writing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that continuation of the receivership is necessary to protect the stability of the financial system of the US and to (a) maximize the net present value return from the sale or other disposition of the assets of the covered financial company; or to (b) minimize the amount of loss realized upon the sale or other disposition of the assets of the covered financial company. The receivership authority may be extended an additional one-year period if the Chairperson of the FDIC, with the concurrence of the Secretary, submits the same certification.

5. What are the principles governing orderly liquidation?

The stated purpose of Title II is to provide the necessary authority to liquidate failing financial companies that pose a significant risk to financial stability in the US in a manner that mitigates such risk and minimizes moral hazard.²³ As such, the authority provided in Title II is required to be exercised in the manner that best fulfills such purpose, so that:

- Creditors and shareholders will bear the losses of the financial company.
- Management responsible for the condition of the financial company will not be retained.

- The FDIC and other appropriate agencies will take all steps necessary and appropriate to assure that all parties, including management and third parties, having responsibility for the condition of the financial company bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility.²⁴

6. What are the mandatory terms and conditions for all orderly liquidation actions?

The Act outlines certain mandatory terms and conditions that the FDIC is subject to in taking any actions thereunder,²⁵ including that the FDIC must:

- Determine any such action is necessary for purposes of the financial stability of the US, and not for the purpose of preserving the covered financial company.
- Ensure that the shareholders of a covered financial company do not receive payment until after all other claims and the Orderly Liquidation Fund (discussed below) are fully paid.
- Ensure that unsecured creditors bear losses in accordance with the priority of claim provisions set forth in the Act.
- Ensure that management responsible for the failed condition of the covered financial company is removed (if such management has not already been removed at the time at which the FDIC is appointed receiver).
- Not take an equity interest in or become a shareholder of any covered financial company or any covered subsidiary.

7. What rulemaking authority, if any, will the FDIC have with respect to the Act?

- In consultation with the FSOC, the FDIC is required to establish rules and regulations that are necessary or appropriate to implement Title II, including rules and regulations with respect to the rights, interests, and priorities of creditors, counterparties, security entitlement holders, or other persons with respect to any covered financial company or any assets or other property of or held by such covered financial company.²⁶
- The FDIC is required to establish rules to address the potential for conflicts of interest between or among individual receiverships established under Title II or under the Federal Deposit Insurance Act.²⁷
- The FDIC is required, to the extent possible, to harmonize applicable rules and regulations promulgated with insolvency laws that would otherwise apply to a covered financial company.²⁸

8. What are the obligations, powers, and duties of the FDIC as receiver?

Upon appointment as the receiver, the FDIC succeeds to all rights, titles, powers, and privileges of the covered financial company and its assets, and of any shareholder, member, officer, or director of such company.²⁹ Title II provides the FDIC with the following powers and duties as receiver:

■ **Functions of covered financial company officers, directors, and shareholders. The FDIC may:**

- Provide for the exercise of any function by any member, shareholder, director, or officer of any covered financial company.³⁰ A strong presumption exists that the FDIC, as receiver for a covered financial company, will remove management responsible for the failed condition of the covered financial company.³¹

■ **Termination of Rights of Shareholders and creditors of covered financial company. The FDIC, as receiver, is required to:**

- Terminate all rights and claims that the shareholders and creditors of the covered financial company may have against the assets of the covered financial company or the FDIC arising out of their status as shareholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under section 210 of the Act.³²
- Ensure that shareholders and unsecured creditors bear losses, consistent with the priority of claims provisions under section 210 of the Act.³³

■ **Liquidate.** The FDIC, as receiver, is **required** to:

- Liquidate and wind-up the affairs of a covered financial company, including taking steps to realize upon the assets of the covered financial company, 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 to the receiver under section 210 of the Act.³⁴

The FDIC's foregoing obligations shall be subject to all legally enforceable and perfected security interests and all legally enforceable security entitlements in respect of assets held by the covered financial company.³⁵

■ **Payment of valid obligations.** The FDIC, as receiver, is **required** to:

- Pay all valid obligations of the covered financial company that are due and payable at the time of the appointment of the FDIC as receiver, to the extent that funds are available.³⁶

■ **Coordination with foreign financial authorities.** The FDIC, as receiver, is **required** to:

- Coordinate with appropriate foreign financial authorities regarding the orderly liquidation of any covered financial company that has assets or operations in a foreign country.³⁷

■ **Determination of valid claims.**³⁸ As discussed below in further detail, the FDIC, as receiver, has the authority to determine the validity or invalidity of claims filed against the covered financial company and the FDIC, as receiver.

■ **Operation of the covered financial company.** The FDIC, as receiver, **may**:³⁹

- Take over the assets of and operate the covered financial company with all of the powers of the members or shareholders, the directors, and the officers of the covered financial company.
- Collect all obligations and money owed to the covered financial company.
- Perform all functions of the covered financial company, in the name of the covered financial company.
- Manage the assets and property of the covered financial company, consistent with the maximization of the value of the assets in the context of the orderly liquidation.
- Provide by contract for assistance in fulfilling any function, activity, action, or duty of the FDIC as receiver.

■ **Merger; transfer of assets and liabilities.** Subject to certain federal agency requirements, the FDIC, as receiver, **may**:

- Merge the covered financial company with another company.⁴⁰
- Transfer any asset or liability of the covered financial company (including any assets and liabilities held by the covered financial company for security entitlement holders, any customer property, or any assets and liabilities associated with any trust or custody business) without obtaining any approval, assignment, or consent with respect to such transfer (with the exception of antitrust review).⁴¹

- With respect to a transaction that requires approval by a federal agency, (i) the transaction may not be completed prior to the 5th calendar day after the date of approval by the federal agency that is responsible for granting such approval; (ii) if a report on competitive factors is required in connection with such approval, the Attorney General of the US, upon notice by the federal agency, must provide the report not later than 10 days after the date of the request; and (iii) if notification under section 7A of the Clayton Antitrust Act is required with respect to such transaction, then the waiting period shall terminate on the 15th day after the Attorney General of the US and the Federal Trade Commission receive such notification, unless such period is terminated earlier or extended, as applicable, pursuant to section 7A of the Clayton Antitrust Act.⁴²

- **Subpoena authority.** The FDIC, as receiver, **may**:

- For purposes of carrying out any power, authority, or duty with respect to the covered financial company (including determining any claim against the covered financial company and determining and realizing upon any asset of any person in the course of collecting money due the covered financial company), exercise any power established under section 8(n) of the Federal Deposit Insurance Act.⁴³

- **Incidental powers.** The FDIC, as receiver, **may**:

- Exercise all incidental powers as shall be necessary to carry out such powers under Title II.⁴⁴

- **Utilization of private sector.** The FDIC, as receiver, **may**:

- Utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, if such services are available to the private sector and the FDIC determines that utilization of such services is practicable, efficient, and cost effective.⁴⁵

- **Additional powers with respect to failing subsidiaries of a covered financial company.**⁴⁶ The FDIC, as receiver, has authority to appoint itself as receiver of any covered subsidiary of the covered financial company that is organized under federal or state law, provided that the FDIC and the Secretary jointly determine that:

- The covered subsidiary is in default or danger of default.
- Such action would avoid or mitigate serious adverse effects on the financial stability or economic conditions of the US.
- Such action would facilitate the orderly liquidation of the covered financial company.

In the event that the FDIC is appointed as receiver of a subsidiary of a covered financial company, the subsidiary shall thereafter be considered a covered financial company under Title II, and the FDIC shall thereafter have all the powers and rights with respect to that subsidiary as it has with respect to a covered financial company.

9. What special procedures apply to the orderly liquidation of covered brokers and dealers?

The Act provides special procedures for the orderly liquidation of covered brokers and dealers.

- **Appointment of the Securities Investor Protection Corporation (“SIPC”) as trustee.** If the FDIC is appointed as the receiver of a covered broker or dealer, the FDIC is required to appoint the SIPC to act as trustee for the liquidation.⁴⁷

- **Administration by SIPC.** Once appointed, and after the obtaining of a protective decree as to the covered broker or dealer from a federal district court of competent jurisdiction, the determination of claims and the liquidation of assets retained in the receivership of the covered broker or dealer and not transferred to a bridge financial company shall be administered under the Securities Investor Protection Act of 1970 (“SIP Act”), by SIPC as trustee for the covered broker or dealer.⁴⁸

- **Powers and duties of SIPC; limitations.** SIPC shall have all of the powers and duties provided by the SIP Act, including, without limitation, all rights of action against third parties, but shall have no powers or duties with respect to assets and liabilities transferred by the FDIC from the covered broker or dealer to any bridge financial company. The exercise by SIPC of such powers and functions as trustee are required to generally not impair or impede the exercise of the powers and duties of the FDIC with regard to any action (i) to make funds available to a covered financial company; (ii) to organize, establish, operate, or terminate any bridge financial company; (iii) to transfer assets and liabilities; (iv) to enforce or repudiate contracts; or (v) to take any other action relating to such bridge financial company or the FDIC’s determination of claims.⁴⁹

- **QFCs.** Provisions in the SIP Act relating to qualified financial contracts (“QFCs”) are overruled to the extent applicable by the rights and obligations under Title II (as discussed herein).⁵⁰

- **Actions by FDIC, as receiver.** The FDIC, as receiver, is prohibited, with respect to a covered broker or dealer, from (i) adversely affecting the rights of a customer to customer property or customer name securities; (ii) diminishing the amount or timely payment of net equity claims of customers; or (iii) otherwise impairing the recoveries provided to a customer under the SIP Act.

- **Satisfaction of customer claims.** The Act requires the FDIC, SIPC, or bridge financial company, as applicable, to satisfy the covered brokers' and dealers' obligations in the same manner and amount as provided under the SIP Act.⁵¹ Further, the Act explicitly provides the SIPC the power to satisfy customer claims in the manner and amount provided under the SIP Act.⁵² Additionally, as trustee of the covered brokers and dealers, the SIPC is to allocate customer property and deliver customer name securities in accordance with section 8(c) of the SIP Act.⁵³
- **Restriction on transfer.** In the event the FDIC establishes a bridge financial company with respect to a covered broker or dealer, the FDIC shall transfer to such bridge financial company: all customer accounts of the covered broker or dealer **and** all associated customer name securities and customer property, unless the FDIC (after consulting with the SEC and SIPC) determines that (i) such accounts and information are likely to promptly be transferred to another broker or dealer registered with the SEC and a member of the SIPC, or (ii) the transfer of the accounts to a bridge financial company would materially interfere with the FDIC's ability to avoid or mitigate serious adverse effects on financial stability or economic conditions in the US.⁵⁴
- **Priority of expenses and unsecured claims.** Claims against the covered broker or dealer or the FDIC as receiver that are allowed are entitled to priority as provided in section 210(b)(1) of the Act (as set forth in Question No. 13 below), except that (i) the administrative expenses incurred by the SIPC in performing its responsibilities are entitled to the same priority (paid first) as those incurred by the FDIC; (ii) the FDIC is entitled to recover any amounts paid to customers or to the SIPC as a second priority; (iii) SIPC is entitled to recover any amounts paid out of the SIPC Fund to meet its obligations under section 205 of Title II and under the SIP Act, which claim shall have a third priority; and (iv) the FDIC may, after paying any allowed claims to customers under section 205 of Title II and the SIP Act, and as provided above, pay dividends on other proven claims in its discretion in accordance with the priorities set forth in section 210(b)(1).

10. What is the impact of the receivership on other actions involving the covered financial company?

- **Dismissal of cases.** Any case or proceeding commenced with respect to a covered financial company under the Bankruptcy Code or the SIP Act shall be dismissed upon notice to the bankruptcy court or SIPC, as applicable, and no such case or proceeding may be commenced with respect to a covered financial company at any time while the orderly liquidation is pending effective as of the date of the appointment of the FDIC as receiver or the appointment of SIPC as trustee for a covered broker or dealer.⁵⁵

- **Revesting of assets.** Any assets of the covered financial company that vested in another entity as a result of any case commenced by the covered financial company under the Bankruptcy Code, the SIP Act, or any similar provision of state liquidation or insolvency law applicable to the covered financial company, shall revert in the covered financial company effective as of the date of the appointment of the FDIC as receiver.⁵⁶
- **Existing bankruptcy orders not affected.** Orders entered by the bankruptcy court prior to the appointment of the FDIC as receiver shall continue with the same validity as if an orderly liquidation had not been commenced.⁵⁷

11. What protections are provided directors who acquiesce or consent to the appointment of a receiver under the Act?

Members of a board of directors, or other body performing a similar function, that acquiesce in, or consent in good faith to, the appointment of the FDIC as receiver for a covered financial company will not be liable to the shareholders or creditors thereof for such acquiescence.⁵⁸

12. What impact will Title II have on existing or future standstill, confidentiality, or other similar agreements?

Under the Act, certain existing agreements will be deemed unenforceable as a matter of law, the violation of which will not impose liability on any person, as such enforcement or liability is contrary to public policy.⁵⁹ In particular, the Act prohibits the enforcement of any term contained in any existing or future standstill, confidentiality, or other agreement that, directly or indirectly, (i) affects, restricts, or limits the ability of any person to offer to acquire or acquire; (ii) prohibits any person from offering to acquire or acquiring; or (iii) prohibits any person from using any previously disclosed information in connection with any such offer to acquire or the acquisition of, all or part of any covered financial company, including any liabilities, assets, or interest therein, in connection with any transaction in which the FDIC exercises its authority under Title II.⁶⁰

13. How will claims against the covered financial company and the receivership be addressed under the Act?

The Act establishes a comprehensive scheme for addressing claims against the covered financial company and the FDIC, as receiver.

- **Priority of expenses and unsecured claims.** The Act establishes the following priorities for unsecured claims against the covered financial company or the FDIC, as receiver:

- **Administrative expenses** of the FDIC, as receiver.
- **Amounts owed to the US**, unless the US agrees or consents otherwise.
- **Wages, salaries, or commissions**, including vacation, severance, and sick leave pay earned by an individual, but only to the extent of US\$11,725 for each individual (as indexed for inflation, by regulation of the FDIC) earned not later than 180 days before the date of appointment of the FDIC as receiver (subject to certain exceptions for senior executive and directors).
- **Contributions owed to employee benefit plans** arising from services rendered not later than 180 days before the appointment of the FDIC as receiver, subject to a specified cap.
- **Any other general or senior liability** of the covered financial company.
- **Any obligation subordinated to general creditors.**
- **Any wages, salaries, or commissions owed to senior executives and directors** of the covered financial company.
- **Any obligations to shareholders, members, general or 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.⁶¹
- **Secured claims remain unaffected.**
 - Secured claims are not affected, except to the extent that the security is insufficient to satisfy the claim, and then only with regard to the difference between the claim and the amount realized from the security, in which case the difference will be treated as an unsecured claim subject to the priorities set forth above.⁶²
- **Similarly situated claims and preferred creditors.** The Act requires that all claimants of a covered financial company that are similarly situated in terms of priority shall be treated in a similar manner, except that the FDIC may take any action that does not comply with this provision if the FDIC determines that such action is necessary:
 - To **maximize the value of the assets** of the covered financial institution.
 - To **initiate and continue operations essential** to implementation of the receivership or any bridge financial company.
 - To **maximize the present value** return from the sale or other disposition of the assets of the covered financial company.
 - To **minimize the amount of any loss** realized upon the sale or other disposition of the assets of the covered financial company.
 - For all **claimants that are similarly situated** to receive not less than the amount that the claimant would have received if the FDIC had not been appointed receiver with respect to the covered financial company, and the company had been liquidated under Chapter 7 of the Bankruptcy Code or any similar provision of state insolvency law applicable to the covered financial company.⁶³
- **Notice to creditors for filing claims.** The FDIC is required to provide notice to creditors for purposes of allowing them the opportunity to file claims.⁶⁴ In conjunction therewith, the FDIC is required to (i) promptly publish a notice to creditors to present their claims, together with proof, to the receiver by the date specified on the notice (not earlier than 90 days after publication) and (ii) republish such notice one month and two months, respectively, after the initial publication.⁶⁵ Additionally, the FDIC is required to mail such notice to the creditors on the books and records of the covered financial company.⁶⁶
- **Determination of claims.** The FDIC is charged with determining the validity or invalidity of claims.⁶⁷ Prior to the 180th day after the date on which a claim against a covered financial company is filed with the FDIC, as receiver (or such later date as may be agreed upon), the FDIC is required to notify the claimant whether it accepts or objects to the claim.⁶⁸ Claims filed after the date specified in the notice shall be disallowed on a final basis, subject to certain exceptions.⁶⁹ Furthermore, the FDIC may object to any portion of any claim by a creditor which is not proved to the satisfaction of the FDIC.⁷⁰
 - **Judicial determination of claims.**
 - A claimant may file suit on a claim in the US District Court for the district within which the principal place of business of the covered financial company is located.⁷¹ Such claim may be filed before the end of the 60-day period provided for in the statute.⁷² If the claimant fails to file a claim prior to the end of this period, the claim will be disallowed on a final basis.⁷³
 - **Expedited determination of secured claims.**
 - The FDIC is required to establish a procedure for expedited relief (where the FDIC makes its *determination* within a shortened 90-day period) outside of the claims process for any claimant that alleges (i) the existence of a legally valid and enforceable or perfected security interest in property of a covered financial company and (ii) that irreparable injury will occur if the general claims procedure is followed.⁷⁴

- After the earlier of (i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or (ii) the date on which the FDIC denies the claim or a portion thereof, the claimant will be permitted to file suit (or continue a suit filed before the date of appointment of the FDIC as receiver) seeking a determination of the rights of the claimant with respect to such security interest (or such security entitlement).⁷⁵

– **Agreements against interest of the receiver.**

- The Act contains a provision which provides that no agreement that tends to diminish or defeat the interest of the FDIC, as receiver, shall be valid against the FDIC, unless such agreement (i) is in writing; (ii) was executed by an authorized officer or representative of the covered financial company, or confirmed in the ordinary course of business by the covered financial company; and (iii) has been, since the time of its execution, an official record of the company, or the party claiming under the agreement provides documentation, acceptable to the FDIC, of such agreement and its authorized execution or confirmation by the covered financial company.⁷⁶

– **Payment of claims.**

- The FDIC may, in its discretion and to the extent funds are available, pay creditor claims that are allowed by the receiver or are determined by the final judgment of a court.⁷⁷ The FDIC may, in its sole discretion, pay dividends on proven claims and no liability shall attach to the FDIC by reason of any such payment or for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.⁷⁸ The FDIC may prescribe rules to establish an interest rate for or to make payments of post-insolvency interest to creditors holding proven claims against the receivership of a covered financial company, except that no such interest shall be paid until the FDIC has satisfied the principal amount of all creditor claims.⁷⁹
- **Additional payments authorized.** The Act provides the authority to the FDIC, with the approval of the Secretary, to make additional payments or credit additional amounts to or with respect to or for the account of any claimant or category of claimants of the covered financial company, if the FDIC determines that such payments or credits are necessary or appropriate to minimize losses to the FDIC, as receiver, from the orderly liquidation of the covered financial company under section 210 of the Act.⁸⁰ In this regard, the FDIC is prohibited from making payments or crediting amounts if it would result in any claimant receiving more than the face value amount of its allowed claim.⁸¹

14. How are contracts that are entered into prior to appointment of the receiver treated, and does the receiver have any special authority to repudiate these contracts?

- **Authority to repudiate contracts and associated damage claims.** Under the Act, the FDIC may, within a reasonable period of time,⁸² disaffirm or repudiate any contract or lease:
 - To which the covered financial company is a party;⁸³
 - The performance of which the FDIC, as receiver, in the discretion of the FDIC, determines to be burdensome;⁸⁴ and
 - The disaffirmance or repudiation of which the FDIC, as receiver, determines, in its discretion, will promote the orderly administration of the affairs of the covered financial company.⁸⁵
- Generally, the damages for the disaffirmance or repudiation of these contracts are limited to “actual direct compensatory damages” (not including (i) punitive or exemplary damages;⁸⁶ (ii) damages for lost profits or opportunity;⁸⁷ or (iii) damages for pain and suffering⁸⁸) determined as of (x) the date of the appointment of the FDIC as receiver or (y) in the case of a QFC, the date of the disaffirmance or repudiation of such contract or agreement.⁸⁹
- In the case of any QFC or agreement, compensatory damages shall include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract.⁹⁰
- In the case of any debt obligations, actual direct compensatory damages shall be no less than the amount lent plus accrued interest plus any accreted original issue discount as of the date the FDIC was appointed receiver.⁹¹
- In the case of contingent obligations, consisting of any obligation under a guarantee, letter of credit, loan commitment, or similar credit obligation, the FDIC may prescribe that actual direct compensatory damages shall be no less than the estimated value of the claim as of the date the FDIC was appointed receiver, as such value is measured based on the likelihood that such contingent claim would become fixed.⁹²
- **Authority to enforce contracts.**
 - The FDIC, as receiver, may enforce any contract (other than a liability insurance contract of a director or officer, or a financial institution bond entered into by the covered financial company) notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency, the appointment of or the exercise of rights and powers of the FDIC as receiver, the filing of a petition for receivership, or matters associated with the filing of the petition.⁹³

- In general, no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which the covered financial company is a party (and no such provision shall be enforceable) or to obtain possession of or exercise control over any property of the covered financial company or affect any contractual rights of the covered financial company without the consent of the FDIC, as receiver, during the 90-day period beginning from the appointment of the FDIC as receiver.⁹⁴ These prohibitions do not apply to director or officer liability insurance contracts, a financial institution bond, the rights of parties to certain QFCs (as discussed below) or to the rights of parties to certain netting contracts.⁹⁵ Additionally, these prohibitions may not be construed to permit the FDIC to fail to comply with otherwise enforceable provisions of a contract.⁹⁶
- In the event that the FDIC recognizes any contract to extend credit to the covered financial company or bridge financial company, any valid and enforceable obligation to repay such debt shall be paid by the FDIC, as receiver, as an administrative expense of the receivership.⁹⁷
- **Enforcement of contracts guaranteed by a covered financial company.**
 - The Act provides the FDIC, as receiver for a covered financial company or for a subsidiary of a covered financial company (including an insured depository institution) the power to enforce contracts of subsidiaries or affiliates of the covered financial company, the obligations under which are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition, or receivership of the covered financial company, if
 - Such guaranty or other support and all related assets and liabilities are transferred to and assumed by a bridge financial company or a 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) within the same period of time as the FDIC is entitled to transfer the QFCs of such covered financial company.⁹⁸
 - The FDIC, as receiver, otherwise provides adequate protection with respect to such obligations.⁹⁹
- **Leases where the covered financial company is lessee.**
 - In the circumstance where the covered financial company is a lessee under a lease, the lessor shall be entitled to the contractual rent accruing before the later of the date on which (i) the notice of disaffirmance or repudiation is mailed or (ii) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease.¹⁰⁰
 - The lessor shall have no claim for damages under any acceleration clause or other penalty provision in the lease.¹⁰¹
 - Additionally, the lessor shall have a claim for any unpaid rent, subject to offsets and defenses, due as of the date of the appointment of the receiver.¹⁰²
- **Leases where the covered financial company is lessor.**
 - In the circumstance where the covered financial company is a lessor under a lease, if the FDIC, as receiver, repudiates an unexpired written lease of real property under which the covered financial company is the lessor and the lessee is not in default, the lessee may either (i) treat the lease as terminated or (ii) remain in possession of the leasehold interest for the balance of the term, without default.¹⁰³ If the lessee remains in possession, it is obligated to continue to pay contractual rent and may offset, against any rent payment which accrues after repudiation, any damages which accrue after such date due to the nonperformance of any obligation of the covered financial company.¹⁰⁴
- **Contracts for the sale of real property.**
 - If the FDIC, as receiver, repudiates any contract for the sale of real property, and the purchaser is in possession and not in default as of the repudiation date, the purchaser may:
 - Treat the contract as terminated.
 - Remain in possession subject to making all payments due under the contract after the date of repudiation of the contract.¹⁰⁵
 - If such a contract is assigned and sold by the FDIC, the FDIC shall have no further liability under the contract.¹⁰⁶
- **Service contracts.**
 - The claims of persons who are party to a service contract for services performed before the date of appointment of the receiver shall be deemed to have arisen as of the date the receiver was appointed.¹⁰⁷
 - If the FDIC accepts performance by the other person before determining whether to exercise the right of repudiation, the other party shall be paid according to the terms of the contract for the services performed and such amount shall be treated as an administrative expense of the receivership.¹⁰⁸
 - Acceptance of performance by the FDIC does not affect the right of the FDIC to repudiate such contract.¹⁰⁹

■ Qualified financial contracts.

- **Special treatment.** QFCs, including securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and any other similar agreement that the FDIC determines by regulation, resolution, or order to be a QFC,¹¹⁰ receive special treatment under the Act.¹¹¹
- **Ipsso factor clauses enforceable.** In the case of a QFC, no person shall be stayed or prohibited from exercising (i) any right to termination, liquidation, or acceleration of a QFC that arises upon the date of appointment of the receiver or any time thereafter; (ii) any right under any security agreement or arrangement or other credit enhancement related to one or more QFCs; or (iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more QFCs, including any master agreement for such QFCs.¹¹² Further, the FDIC may not, whether acting as a receiver or the FDIC, avoid any transfer of money or other property in connection with any QFC with a covered financial company, unless such transferee had actual intent to hinder, delay, or defraud such company, the creditors of such company, or the FDIC, as receiver appointed for such company.¹¹³
- **Walkaway clauses.** Walkaway clauses are not enforceable in QFCs of a covered financial company in default.¹¹⁴ Generally, upon termination of a derivatives contract, a party who is “out of the money” must pay the party who is “in the money.” A walkaway clause overrides this outcome and allows the nondefaulting party the right to walk away from a termination payment it would otherwise owe the defaulting party.
- **Limitations on transfers of QFCs.** In making any transfer of assets or liabilities of a covered financial company in default, which includes any QFC, the FDIC as receiver must either (i) transfer to one financial institution which is not in receivership or bankruptcy all QFCs between a person or any affiliate thereof and the company, and related claims, security property, and credit enhancements, or (ii) transfer none of the QFCs, claims, property, or credit enhancements.¹¹⁵ Such transfers shall not be made to a foreign bank, financial institution, or branch or agency thereof unless, under the law applicable to such institutions, the QFCs, and any netting contract, security agreement or arrangement or other credit enhancement related to one or more QFCs, the contractual rights of the parties to such QFCs, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under Title II.¹¹⁶ Additionally, transfers of QFCs, and related claims, property, or credit enhancements, which contracts are cleared by or subject to the rules of a clearing organization, shall not mean that the clearing organization shall be required to accept the transferee as a member of the clearing organization.¹¹⁷
- **Notice of transfer of QFC, limits on right to terminate, liquidate or net.** The FDIC must provide notice if it transfers any QFC by not later than 5:00 p.m. Eastern time on the business day after the FDIC is appointed receiver.¹¹⁸ A person that is a party to a QFC with a covered financial company may not exercise any right to terminate, liquidate, or net such contract solely by reason of the appointment of the FDIC as receiver or the insolvency or financial condition of the company until the earlier of (i) the time at which the person has received notice that the QFC has been transferred or (ii) 5:00 p.m. Eastern time on the business day following the date of the appointment of the FDIC as receiver.¹¹⁹
- **Disaffirmance or repudiation of QFCs.** The FDIC, as receiver, is required to either (i) disaffirm or repudiate all QFCs between (A) any person or its affiliate and (B) the covered financial company in default or (ii) disaffirm or repudiate none of such QFCs.¹²⁰

15. What role will bridge financial companies serve in the orderly liquidation process?

The Act permits the FDIC to establish one or more bridge companies for use in exercising its liquidation responsibilities, either in connection with an existing receivership or in expectation of a potential receivership.¹²¹ **The bridge financial company may assume liabilities of, purchase assets of, and perform any other temporary function for such covered financial company, as the FDIC may determine appropriate.**¹²² The bridge financial company appears to be intended to be used as a vehicle to house the valuable assets of the covered financial company, while leaving the “bad” assets and liabilities of the covered financial company behind.

- **Corporate governance; capitalization.** Upon its establishment, a bridge financial company is managed by a board of directors appointed by the FDIC.¹²³ It may operate without any capital or surplus, although the FDIC may authorize the company to issue stock or other securities.¹²⁴ The FDIC may also make funds available to the bridge financial company for its operations in lieu of capital.¹²⁵
- **Length of existence; termination.** A bridge financial company terminates at the end of the two-year period following the date on which it was granted a charter, subject to the potential for up to three additional one-year extension periods.¹²⁶ A company’s status as a bridge financial company will terminate, among other events, upon the earliest of (i) a merger or consolidation with another company that is not a bridge financial company, (ii) at the election of the FDIC, the sale of a majority of the capital stock of the bridge financial company, (iii) the sale of 80 percent, or more, of the capital stock of the bridge financial company, (iv) at the election of the FDIC, either the assumption of all or substantially all of the liabilities of the bridge financial company by a company that is not a bridge financial company, or the

acquisition of all or substantially all of the assets of the bridge financial company by a company that is not a bridge financial company, or other entity as permitted under applicable law, or (v) the expiration of the periods provided above, or the earlier dissolution of the bridge financial company by the FDIC.¹²⁷

- **Issuance of debt.** A bridge financial company is authorized to obtain unsecured credit and issue unsecured debt.¹²⁸ If a bridge financial company is not able to obtain unsecured credit or debt, it may, with the approval of the FDIC, obtain credit or issue debt with priority over (i) any obligations of the bridge financial company, (ii) debt secured by a lien on property of the bridge financial company that is not otherwise subject to a lien, or (iii) debt secured by a junior lien on property of the bridge financial company that is subject to a lien.¹²⁹
- **Priming liens.** The FDIC, after notice and a hearing before the court, may authorize the obtaining of credit or issuance of debt by the bridge financial company secured by a senior or equal lien on property of the bridge financial company that is already subject to a lien if the bridge financial company is unable to otherwise obtain such credit or issue such debt, and there is adequate protection of the interest of the holder of the lien on the property with respect to which the senior or equal lien is proposed to be granted.¹³⁰ No credit or debt obtained or issued by a bridge financial company may impair the rights of a counterparty to a QFC, other than with respect to the priority of any unsecured claim, unless the QFC consents in writing.¹³¹

Many of the same principles discussed herein with respect to the treatment of creditors of a covered financial company, including the potential to treat similarly situated creditors differently, subject to satisfaction of a minimum payment requirement to disfavored creditors, apply in connection with the establishment and operation of a bridge financial company.

16. How will the FDIC fund the orderly liquidations?

The Act makes clear that no taxpayer funds will be used to pay for the receivership process. Specifically it provides that no taxpayer funds will be used to prevent the liquidation of any financial company under Title II.¹³² Additionally, it provides that all funds expended in the liquidation of a financial company will be recovered from the disposition of assets of such financial company, or shall be the responsibility of the financial sector through assessments.¹³³

- **Assessments.** In the event that the assets of the liquidating covered financial company are insufficient, the Act requires the FDIC to charge one or more risk-based assessments if such assessments are necessary for the FDIC to repay obligations issued to the Secretary within 60 months of the issuance of such obligations, or such later date if an extension is necessary to avoid a serious adverse effect on the US financial system.¹³⁴

- Under the Act, assessments are first imposed on claimants who received additional payments from the FDIC pursuant to its authority to treat certain creditors better than others, except that such recovery is limited to the amount received less that which the creditor should have received on account of the liquidation of the covered financial company.¹³⁵ If such amounts are still insufficient to satisfy the obligations to the Secretary, then the FDIC may assess the eligible financial companies and certain other financial companies with total consolidated assets equal to or greater than US\$50 billion.¹³⁶ An eligible financial company is a bank holding company with total consolidated assets of greater than US\$50 billion and any nonbank financial company supervised by the Board.¹³⁷ Assessments on such financial companies are to be imposed on a graduated basis, with financial companies having greater assets being assessed at higher rates.¹³⁸
- **Other Assessment Considerations.** In imposing assessments on financial companies and certain other financial companies with total consolidated assets equal to or greater than US\$50 billion, the FDIC is required to consider other relevant factors in imposing the assessments including, but not limited to:
 - General economic conditions.
 - Governmental assessments already imposed on the covered financial company or certain of its subsidiaries.
 - The financial condition of the financial company.
 - The risks presented by the financial company to the financial stability of the US economy.
 - The extent to which the financial company or group of financial companies has benefitted, or likely would benefit, from the orderly liquidation of a covered financial company and the use of the Orderly Liquidation Fund (discussed below).¹³⁹
- **Orderly Liquidation Fund.** The Act also establishes in the Treasury an Orderly Liquidation Fund¹⁴⁰ into which amounts received by the FDIC, including assessments received and proceeds of obligations issued, interest and other earnings from investments, and repayments to the FDIC by covered financial companies are required to be deposited.¹⁴¹ The funds in the Orderly Liquidation Fund may be used by the FDIC to pay for the costs of carrying out its responsibilities under Title II, including the orderly liquidation of covered financial companies, payment of administrative expenses, and the payment of principal and interest by the FDIC on obligations it issues to the Secretary.¹⁴² Amounts in the Orderly Liquidation Fund are available for use by the FDIC in connection with a receivership of a covered financial company only after the Secretary has approved an orderly liquidation plan that was developed by the FDIC for such company.¹⁴³

- The FDIC is also permitted borrow funds from the Secretary. Borrowings from the Secretary may not, in the aggregate, exceed (i) an amount that is equal to 10 percent of the total consolidated assets of the covered financial company during the 30-day period immediately following the date of appointment of the receiver and (ii) an amount that is equal to 90 percent of the fair value of the total consolidated assets of the covered financial company that are available for repayment.¹⁴⁴
- Finally, while the intent of the Act is to not use taxpayer funds to finance the FDIC's actions under Title II, the FDIC may, in its discretion and as necessary or appropriate, make available to the receivership funds for the orderly liquidation of the covered financial company.¹⁴⁵ Any of such funds borrowed by the receivership will be entitled to priority treatment in repayment.¹⁴⁶ As otherwise noted herein in greater detail, a bridge financial company may obtain financing, including financing secured by liens on assets that are already subject to liens.¹⁴⁷

17. Is there a stay of extra-receivership legal actions equivalent to the automatic stay in bankruptcy?

No. Any stay is at the discretion of the FDIC. The Act provides that the FDIC may request the suspension of any legal proceeding against a covered financial company for a period not to exceed 90 days.¹⁴⁸ All courts are bound to grant a stay requested by the FDIC as to all parties.¹⁴⁹

18. What rights do parties have to judicial review of the actions of the FDIC with respect to the covered company and its assets in receivership?

In general, and except as otherwise provide under Title II, the Act provides that no court shall have jurisdiction over claims or actions for payment from or with respect to the assets of a covered financial company, including any such assets the FDIC receives from itself as receiver.¹⁵⁰ Courts are further deprived of jurisdiction over any claim relating to the conduct of a covered financial company or that of the FDIC as receiver thereof.¹⁵¹ Exceptions to this broad prohibition on judicial review in a receivership include judicial review of disallowed claims¹⁵² and the continuation of pre-receivership claims.¹⁵³

19. How far back may the FDIC reach in prosecuting claims of the covered financial company in receivership?

- For **contract claims**, the FDIC may prosecute claims that accrued within the longer of (i) six years; or (ii) the limitations period under applicable state law.¹⁵⁴

- For **tort claims**, the FDIC may reach back the longer of (i) three years; or (ii) the applicable limitations period under applicable state law.¹⁵⁵
- **Statute of limitations.** For the purposes of determining the limitations periods above, the Act deems the accrual date of the claim to be the later of (i) the date the FDIC is appointed receiver; or (ii) the date on which the cause of action accrues.¹⁵⁶ Even if a claim for fraud, or intentional misconduct resulting in either unjust enrichment or substantial loss to the covered financial company, expired within the last five years under applicable state law, the FDIC may revive and prosecute such claim.¹⁵⁷

20. What transfers of a covered financial company may be avoided by the FDIC?

- **Fraudulent transfers.** The FDIC may avoid fraudulent transfers made by the covered financial company within the previous two years.¹⁵⁸ Fraudulent transfers under the Act are defined substantially the same as they are in the Bankruptcy Code,¹⁵⁹ and include actual fraudulent transfers (e.g., transfers made with the intent to defraud, hinder, or delay a creditor) and constructive fraudulent transfers (e.g., transfers made while insolvent).¹⁶⁰
- **Preferences.** Also in parallel to the Bankruptcy Code, preferential payments are recoverable if made within 90 days prior to the appointment of the FDIC as receiver, or up to one year prior to such date if the preferential payments were made to an insider.¹⁶¹ The same exceptions to recovery of a preferential payment or a fraudulent transfer by a trustee in bankruptcy are incorporated by reference into the Act as affirmative defenses.¹⁶²
- **Setoffs.** Setoffs under the Act are handled similarly to setoffs under the Bankruptcy Code. Indeed, subsection 210(a)(12) of the Act mirrors section 553 of the Bankruptcy Code in recognizing a right of setoff established by noninsolvency law and establishing the limits on the exercise of that right in the orderly liquidation context. The right of setoff is unaffected by the orderly liquidation except to the extent that (i) the creditor's claim is disallowed; (ii) an entity other than the covered financial company transferred the claim to the creditor (x) after the FDIC was appointed as receiver or (y) during the 90 days preceding the date of the appointment of the FDIC as receiver **and** the covered financial company was insolvent (except for a setoff in connection with a QFC); or (iii) the debt being offset was incurred by the covered financial company.¹⁶³ The covered financial company is presumed to have been insolvent during the 90 days preceding the appointment of the FDIC as receiver.¹⁶⁴

21. Who will police the FDIC in this expanded role?

The Act provides the Inspector General of the FDIC,¹⁶⁵ the Inspector General of the Department of the Treasury,¹⁶⁶ and the Inspectors General of primary financial regulatory agencies or the Board¹⁶⁷ with authority to conduct, supervise, and coordinate audits and investigations of the liquidation of any covered financial company by the FDIC as receiver.¹⁶⁸

22. What types of liability or impact does the Act impose on senior executives and directors?

- **Personal liability for damages.** The Act imposes personal liability for money damages in a civil action against a director or officer of a covered financial company brought by the FDIC.¹⁶⁹ Directors or officers will be personally liable for gross negligence, or any similar conduct demonstrating a greater disregard of a duty of care than gross negligence.¹⁷⁰ Recoverable damages determined to result from the improvident or otherwise improper use or investment of any assets of the covered financial company include principal losses and appropriate interest.¹⁷¹ Further, as otherwise noted herein, the FDIC is required to ensure that management responsible for the failed condition of the covered financial company is removed.¹⁷²
- **Ban on participation.** In addition to personal liability and removal, the Board or the FDIC, as applicable, may ban a senior executive or director of a covered financial company from further participation in any manner in the conduct of the affairs of any financial company for a period of time of not less than two years upon a determination of the occurrence of certain actions or inactions by the executive or director.¹⁷³

Such a determination to ban further participation in a financial company's affairs will be made when:

- A senior executive or a director of the covered financial company, prior to the appointment of the FDIC as receiver, has, directly or indirectly (i) violated any law or regulation,¹⁷⁴ any cease-and-desist order which has become final,¹⁷⁵ any condition imposed in writing by a federal agency in connection with any action on any application, notice, or request by such company or senior executive,¹⁷⁶ or any written agreement between such company and such agency;¹⁷⁷ (ii) engaged or participated in any unsafe or unsound practice in connection with any financial company;¹⁷⁸ or (iii) committed or engaged in any act, omission, or practice which constitutes a breach of the fiduciary duty of such senior executive or director;¹⁷⁹
- By reason of the violation, practice, or breach described in the foregoing paragraph, such senior executive or director has received financial gain or other benefit by reason of such violation, practice, or breach and such violation, practice, or breach contributed to the failure of the company;¹⁸⁰ and

- Such violation, practice, or breach (i) involves personal dishonesty on the part of such senior executive or director;¹⁸¹ or (ii) demonstrates willful or continuing disregard by such senior executive or director for the safety or soundness of such company.¹⁸²

- **Recoupment of compensation.** Finally, the FDIC may 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 two-year period preceding the date on which the FDIC was appointed receiver.¹⁸³ Where senior executives or directors commit fraud, however, no time limit shall apply.¹⁸⁴ In determining to pursue such action, the FDIC is obligated to weigh the financial and deterrent benefits of such a recovery against the cost of executing the recovery.¹⁸⁵

23. How will the FDIC deal with conflicts of interest that arise in connection with multiple receiverships?

When the FDIC is appointed as receiver for more than one "covered company" or is appointed receiver for a covered financial company and receiver for any insured depository institution that is an affiliate of such covered financial company, the FDIC is obligated to take appropriate actions as necessary to avoid any conflicts of interest that may arise on account of such appointments.¹⁸⁶ The Act does not provide any further details as to what actions need to be taken nor does it appear to provide any remedy for the creditor who believes it is harmed by the FDIC's conflicts of interest.

24. What has Congress targeted next for consideration in the insolvency arena?

The Act mandates certain studies in the insolvency arena on the following subject matters:

- **Activities of the US District Court for the District of Columbia.** The Administrative Office of the US Courts and the Comptroller General shall each evaluate (i) the effectiveness of Chapter 7 or Chapter 11 of the Bankruptcy Code in facilitating the orderly liquidation or reorganization of financial companies; (ii) ways to maximize the efficiency and effectiveness of the US District Court for the District of Columbia; and (iii) ways to make the orderly liquidation process under the Bankruptcy Code for financial companies more effective. A summary of the results shall be provided to certain committees of Congress not later than one year after the date of the enactment of the Act, in each successive year until the third year, and every fifth year after the date of the enactment.¹⁸⁷
- **Secured creditor haircuts.** The FSOC is required to conduct a study on (i) how a haircut (of various degrees) on secured creditors could improve market discipline and protect taxpayers;

(ii) a comparison of the benefits and dynamics of prudent lending practices by depository institutions in secured loans for consumers and small businesses to the lending practices of secured creditors to large, interconnected financial firms; (iii) whether credit differs according to different types of collateral and different terms and timing of the extension of credit; and (iv) an examination of stakeholders who are unsecured or under-collateralized and seek collateral when a firm is failing, and the impact that such behavior has on financial stability and an orderly resolution that protects the taxpayers if the firm fails.¹⁸⁸ The FSOC is required to provide a report to Congress containing all of the findings and conclusions made by the FSOC in conjunction with this study no later than one year after the date of the enactment.

- **Bankruptcy process for financial and nonbank financial institutions.** The Board, in consultation with the Administrative Office of the US Courts, is required to conduct a study on (i) the effectiveness of Chapter 7 and Chapter 11 of the Bankruptcy Code in facilitating the orderly resolution or reorganization of systemic financial companies; (ii) whether a special financial resolution court or panel of special masters or judges should be established to oversee cases involving financial companies, to provide for the resolution of such companies under the Bankruptcy Code in a manner that minimizes adverse impacts on financial markets without creating moral hazard; (iii) whether amendments to the

Bankruptcy Code should be adopted to enhance the ability of the Bankruptcy Code to resolve financial companies in a manner that minimizes adverse impacts on financial markets without creating moral hazard; (iv) whether amendments should be made to the Bankruptcy Code, the Federal Deposit Insurance Act, and other insolvency laws to address the manner in which QFCs of financial companies are treated; and (v) the implications, challenges, and benefits to creating a new chapter or subchapter of the Bankruptcy Code to deal with financial companies.¹⁸⁹ A summary of the results shall be provided to certain committees of Congress not later than one year after the date of the enactment of the Act, and in each successive year until the fifth year after the date of the enactment.

- **International coordination relating to the resolution of systemic financial companies under the US Bankruptcy Code and applicable foreign law.** The Board, in consultation with the Administrative Office of the US Courts, is required to conduct a study on (i) the extent to which international coordination currently exists; (ii) current mechanisms and structures for facilitating international cooperation; (iii) barriers to effective international coordination; and (iv) ways to increase and make more effective international coordination of the resolution of financial companies.¹⁹⁰ A summary of the results shall be provided to certain committees of Congress not later than one year after the date of the enactment of the Act.

1. Act § 201(a)(7).

2. *Id.*

3. Act § 203(e).

4. 12 U.S.C. § 1841(a)(1). A company has control over a bank or a company if: "(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company; (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company." 12 U.S.C. § 1841(a)(2).

5. Act § 102(a)(4).

6. Act § 201(a)(11).

7. Act § 201(a)(11)(C).

8. Act § 203(a)(1)(A).

9. Act § 203(a)(1)(B).

10. Act § 203(a)(1)(C).

11. A company is in "default or in danger of default" if "(A) a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code; (B) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion; (C) the assets of the financial company are, or are likely to be, less than its obligations to creditors and others; or (D) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business." Act § 203(c)(4). The phrase "is likely to" inherently provides significant discretion to the governmental agencies when making a systemic risk determination.

12. Act § 203(a)(2).

13. Act § 203(b).

14. Act § 202(a)(1)(A)(i).

15. *Id.*

16. Act § 202(a)(1)(A)(ii).

17. Act § 202(a)(1)(A)(iii).

18. Act § 202(a)(1)(A)(iv)(I).

19. Act § 202(a)(1)(A)(iv)(II).

20. Act § 202(a)(1)(A)(v).

21. Act § 202(a)(1)(B) and (a)(2)(A).

22. Act § 210(a)(1).

23. Act § 204(a).

24. *Id.*

25. Act § 206.

26. Act § 209.

27. Act § 209.

28. Act § 209.

29. Act § 210(a)(1)(A).

30. Act § 210(a)(1)(C).

31. Act § 204(a)(2).

32. Act § 210(a)(1)(M).

33. *Id.*

34. Act § 210(a)(1)(D).

35. *Id.*
36. Act § 210(a)(1)(H).
37. Act § 210(a)(1)(N).
38. Act § 210(a)(2).
39. Act § 210(a)(1)(B).
40. Act § 210(a)(1)(G).
41. *Id.*
42. Act § 210(a)(1)(G)(ii).
43. Act § 210(a)(1)(J).
44. Act § 210(a)(1)(K).
45. Act § 210(a)(1)(L).
46. Act § 210(a)(1)(E).
47. Act § 205(a)(1).
48. Act § 205(a)(2).
49. Act § 205(b)(2).
50. Act § 205(b)(4).
51. Act § 205(f)(1).
52. Act § 205(f)(2).
53. Act § 205(g)(1).
54. Act § 210(a)(1)(O).
55. Act § 208(a).
56. Act § 208(b).
57. Act § 208(c).
58. Act § 207.
59. Act § 210(p)(1).
60. Act § 210(p)(2)(A)(B)(C).
61. Act § 210(b)(1).
62. Act § 210(b)(5).
63. Act § 210(b)(4).
64. Act § 210(a)(2)(B).
65. Act § 210(a)(2)(B).
66. Act § 210(a)(2)(C).
67. Act § 210(a)(2).
68. Act § 210(a)(3). By written agreement executed not later than 180 days after the date on which a claim against a covered financial company is filed with the FDIC, the period may be extended by written agreement between the claimant and the FDIC. Act § 210(a)(3)(A)(ii).
69. Act § 210(a)(3)(C). If the claimant did not receive notice of the appointment of a receiver in time to file a claim, or if such claim is filed in time to permit payment of such claim, then such claim will not be disallowed. Act § 210(a)(3)(C)(ii).
70. Act § 210(a)(3)(D)(i).
71. Act § 210(a)(4)(A).
72. Act § 210(a)(4)(B).
73. Act § 210(a)(4)(C).
74. Act § 210(a)(5)(A), (B).
75. Act § 210(a)(5)(C).
76. Act § 210(a)(6).
77. Act § 210(a)(7)(A).
78. Act § 210(a)(7)(C).
79. Act § 210(a)(7)(D).
80. Act § 210(d)(4)(A).
81. Act § 210(d)(4)(B)(i).
82. Act § 210(c)(2).
83. Act § 210(c)(1)(A).
84. Act § 210(c)(1)(B).
85. Act § 210(c)(1)(C).
86. Act § 210(c)(3)(B)(i).
87. Act § 210(c)(3)(B)(ii).
88. Act § 210(c)(3)(B)(iii).
89. Act § 210(c)(3)(A).
90. Act § 210(c)(3)(C).
91. Act § 210(c)(3)(D).
92. Act § 210(c)(3)(E).
93. Act § 210(c)(13)(A).
94. Act § 210(c)(13)(C)(i).
95. Act § 210(c)(13)(C)(ii).
96. *Id.*
97. Act § 210(c)(13)(D).
98. Act § 210(c)(16)(A)(i).
99. Act § 210(c)(16)(A)(ii).
100. Act § 210(c)(4)(B)(i).
101. Act § 210(c)(4)(B)(ii).
102. Act § 210(c)(4)(B)(iii).
103. Act § 210(c)(5)(A).
104. Act § 210(c)(5)(B).
105. Act § 210(c)(6)(A).
106. Act § 210(c)(6)(C)(ii).
107. Act § 210(c)(7)(A)(ii).
108. Act § 210(c)(7)(B)(i), (ii).
109. Act § 210(c)(7)(C).
110. Act § 210(c)(8)(D).
111. Act § 210(c)(8)(A).
112. *Id.*
113. Act § 210(c)(8)(C).
114. Act § 210(c)(8)(F).
115. Act § 210(c)(9)(A).
116. Act § 210(c)(9)(B).
117. Act § 210(c)(9)(C).
118. Act § 210(c)(10)(A)(ii).
119. Act § 210(c)(10)(B)(i).
120. Act § 210(c)(11)(A), (B).
121. Act § 210(h)(1).
122. *Id.* The FDIC, as receiver for a covered financial company, may transfer any assets and liabilities of a covered financial company to one or more bridge financial companies. Act § 210(h)(5)(A). The transfer of any assets or liabilities to a bridge financial company shall be effective without any further approval under federal or state law, assignment, or consent with respect thereto. Act § 210(h)(5)(D).
123. Act § 210(h)(2)(B).
124. Act § 210(h)(2)(G).

125. *Id.*
126. Act § 210(h)(12). The FDIC may, in its discretion, extend the status of the bridge financial company as such for no more than three additional one-year periods. Act § 210(h)(12).
127. Act § 210(h)(13).
128. Act § 210(h)(16)(A).
129. Act § 210(h)(16)(B).
130. Act § 210(h)(16)(C)(i).
131. Act § 210(h)(16)(E).
132. Act § 214(a).
133. Act § 214(b).
134. Act § 210(o)(1)(B), (C).
135. Act § 210(o)(1)(D)(i).
136. Act § 210(o)(1)(D)(ii).
137. Act § 210(o)(1)(A).
138. Act § 210(o)(2).
139. Act § 210(o)(4).
140. Act § 210(n)(1).
141. Act § 210(n)(2).
142. Act § 210(n)(1).
143. Act § 210(n)(9).
144. Act § 210(n)(6).
145. Act § 204(d).
146. *Id.*
147. Act § 210(h).
148. Act § 210(a)(8)(A).
149. Act § 210(a)(8)(B).
150. Act § 210(a)(9)(D)(i).
151. Act § 210(a)(9)(D)(ii).
152. Act § 210(a)(3)(A)(ii).
153. Act § 210(a)(4).
154. Act § 210(a)(10)(A)(i).
155. Act § 210(a)(10)(A)(ii).
156. Act § 210(a)(10)(B).
157. Act § 210(a)(10)(C).
158. Act § 210(a)(11)(A).
159. See 11 U.S.C. § 548(a).
160. Act § 210(a)(11)(A).
161. Act § 210(a)(11)(B).
162. Act § 210(a)(11)(F).
163. Act § 210(a)(12)(A).
164. Act § 210(a)(12)(D).
165. Act § 211(d)(1). The audit shall occur not later than six months after the date of appointment of the FDIC as receiver and every six months thereafter. Act § 211(d)(2). Additionally, the expenses of the Inspector General of the FDIC in carrying out its audit shall be considered administrative expenses of the receivership, with any additional amounts necessary that are in excess of the maximum amount available to the FDIC as receiver funded from assessments imposed under section 210. Act § 211(d)(4).
166. Act § 211(e)(1). The audit shall occur not later than six months after the date of appointment of the FDIC as receiver and every six months thereafter. Act § 211(e)(2).
167. Act § 211(f)(1).
168. Act § 211(f).
169. Act § 210(f). Recoverable damages resulting from the improvident or otherwise improper use or investment of any assets of the covered financial company shall include principal losses and appropriate interest. Act § 210(g).
170. Act § 210(f)(2).
171. Act § 210(g). These damages are also recoverable against an employee, agent, attorney, accountant, or appraiser of a covered financial company, or any other party employed by or providing services to a covered financial company.
172. Act § 206(4). Members of the board of directors, however, of a covered financial company shall not be liable to the shareholders or creditors thereof for acquiescing in or consenting in good faith to the appointment of the FDIC as receiver for the covered financial company under section 203. Act § 207.
173. Act § 213.
174. Act § 213(b)(1)(A)(i).
175. Act § 213(b)(1)(A)(ii).
176. Act § 213(b)(1)(A)(iii).
177. Act § 213(b)(1)(A)(iv).
178. Act § 213(b)(1)(B).
179. Act § 213(b)(1)(C).
180. Act § 213(b)(2).
181. Act § 213(b)(3)(A).
182. Act § 213(b)(3)(B).
183. Act § 210(s)(1).
184. *Id.*
185. Act § 210(s)(2).
186. Act § 212.
187. Act § 202(e).
188. Act § 215.
189. Act § 216.
190. Act § 217.

Client **Alert**

Dodd-Frank Wall Street Reform and Consumer Protection Act

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