



February 18, 2014

By electronic submission to www.fdic.gov

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: FDIC's Notice and Request for Comments on the Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy (FR Docket No. 2013-30057)

Ladies and Gentlemen:

The Clearing House Association L.L.C. (“**The Clearing House**”), the Securities Industry and Financial Markets Association (“**SIFMA**”), the American Bankers Association, the Financial Services Roundtable and the Global Financial Markets Association (collectively, the “**Associations**”)¹ welcome the opportunity to comment on the notice and request for comments of the Federal Deposit Insurance Corporation (the “**FDIC**”), entitled *Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy* and published in the *Federal Register* on December 18, 2013 (the “**SPOE Notice**” or “**Notice**”).² The Notice describes the FDIC’s single-point-of-entry (“**SPOE**”) recapitalization within resolution strategy (the “**SPOE Strategy**”) for resolving global systemically important banking groups (“**G-SIBs**”)³ with top-tier U.S. parent companies (“**U.S. G-SIBs**”)⁴ under Title

¹ See Annex A for a description of each of the Associations.

² 78 *Fed. Reg.* 76614 (Dec. 18, 2013).

³ This comment letter uses the terms G-SIB and G-SIFI to refer to G-SIB groups and G-SIFI groups, not individual systemically important legal entities. The distinction between a legal entity and a group of legal entities is important for purposes of understanding the FDIC’s SPOE Strategy. See Simon Gleeson, Partner, Clifford Chance, *The Importance of Group Resolution*, in THE BANK RECOVERY AND RESOLUTION DIRECTIVE – EUROPE’S SOLUTION FOR “TOO BIG TO FAIL”?, at 25 (2013); *Too Big to Fail: The Path to a Solution*, A Report of

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II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**” or the “**Act**”) and requests comments on certain details and issues regarding how the FDIC would expect to carry out the SPOE Strategy with respect to U.S. G-SIBs. The Notice also requests comment on a number of related issues, including the amount of combined capital and long-term unsecured debt (“**loss-absorbing resources**”) needed at the holding company level to facilitate the SPOE Strategy, the appropriate characterization of temporary secured liquidity under Title II, the purported funding advantages of U.S. G-SIBs, and whether U.S. G-SIBs should be required to subsidiarize their cross-border operations.

The Notice is the most important milestone to date in the FDIC’s domestic and international leadership in developing an effective solution under Title II to what has been described as the “too-big-to-fail” dilemma (“**TBTF dilemma**”).⁵ The Associations believe that the FDIC’s SPOE Strategy is an effective strategy for resolving U.S. G-SIBs in an orderly manner, and we are providing these comments to support a final Notice or other FDIC statement that will achieve that crucial objective. By providing important details about how the FDIC will carry out this strategy, the final Notice will send a strong signal to investors, counterparties, rating agencies, foreign supervisors and the public at large that the FDIC is prepared to liquidate the top-tier parent of a failed U.S. G-SIB, after using the parent’s full loss-absorbing resources to recapitalize the group’s operating subsidiaries, keeping the subsidiaries open and operating, preserving their going-concern value, continuing their essential operations and distributing the group’s residual value to the failed parent’s creditors in satisfaction of their claims. By resolving U.S. G-SIBs in this manner, the SPOE Strategy should be able to achieve the “dual objectives” of a Title II resolution, which are “promoting market discipline and maintaining financial stability.”⁶

With respect to the Notice’s request for comment on the long-term unsecured debt and other loss-absorbing resources needed at holding companies to facilitate the SPOE Strategy, we note that the Board of Governors of the Federal Reserve System (the “**Federal Reserve**”) has publicly stated that it will issue a proposed rulemaking that would establish a minimum amount of long-term unsecured debt and other loss-absorbing resources to support the FDIC’s SPOE Strategy.⁷ Because we believe these parent-company loss-

the Failure Resolution Task Force of the Financial Regulatory Reform Initiative of the Bipartisan Policy Center, at 6-7 (May 2013).

⁴ The Financial Stability Board has designated the following U.S. banking groups as G-SIBs: Bank of America, BNY Mellon, Citigroup, Goldman Sachs, JP Morgan Chase, Morgan Stanley, State Street and Wells Fargo. Financial Stability Board, *2013 update of group of global systemically important banks (G-SIBs)* (Nov. 11, 2013).

⁵ See Statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation, *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearings Before the Senate Committee on Banking, Housing, & Urban Affairs*, 111th Congress, 63-64 (2010).

⁶ 78 *Fed. Reg.* at 76622.

⁷ Daniel K. Tarullo, Member of the Board of Governors of the Federal Reserve System, *Toward Building a More Effective Resolution Regime: Progress and Challenges*, at 11, Remarks at the Federal Reserve Board and Federal Reserve Bank of Richmond Conference, “Planning for the Orderly Resolution of a Globally

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absorbing resources are extremely important to ensuring that the SPOE Strategy is effective, and because we believe that the FDIC's questions in this regard can be fully evaluated and addressed only in the context of the Federal Reserve's forthcoming proposal, we do not comment on those aspects of the Notice in this letter. We intend to comment on the FDIC's questions in this area after the Federal Reserve has released its proposal.

With respect to the scope of the Notice's application, we note that the FDIC has indicated that its SPOE Strategy was developed primarily as a means to resolve U.S. G-SIBs under Title II.⁸ It was not designed for other U.S. banking or other financial organizations, including nonbank financial companies and the U.S. subsidiaries of G-SIBs with top-tier non-U.S. parents ("**Non-U.S. G-SIBs**"). Since Title II does not apply to non-U.S. companies, the resolution strategies for Non-U.S. G-SIBs will be selected by their home-country resolution authorities. These strategies could include an SPOE, a multiple-point-of-entry ("**MPOE**") or any other strategy, as appropriate for the structure of the particular Non-U.S. G-SIB.⁹ We therefore comment on this Notice based on the understanding that the FDIC's SPOE Strategy was developed primarily for U.S. G-SIBs.

Part I of this letter sets forth an executive summary of our principal comments and recommendations. Part II notes the widespread recognition of the utility and benefits of the SPOE Strategy. Part III describes our strong support for the SPOE Strategy and provides our recommendations for further strengthening the effectiveness of the strategy. Part IV responds to other questions raised in the Notice, including the appropriate characterization of temporary liquidity support under Title II, purported funding advantages of U.S. G-SIBS, and whether U.S. G-SIBs should be required to subsidiarize their cross-border operations. Part V of this letter addresses various technical issues not otherwise covered in the other parts.

I. Executive Summary

As required by Dodd-Frank, the presumptive resolution path for any U.S. G-SIB is a proceeding under the Bankruptcy Code or otherwise applicable insolvency law.¹⁰ The SPOE Strategy was developed as an alternative under Title II to resolve a U.S. G-SIB when necessary under extraordinary circumstances. The Associations have ten key comments and suggestions designed to ensure the effectiveness of the SPOE Strategy under those circumstances:

Systemically Important Bank," Washington, D.C. (Oct. 18, 2013) [*hereinafter* Tarullo, Richmond Conference]; Statement of Daniel K. Tarullo, Member of the Board of Governors of the Federal Reserve System before the Committee on Banking, Housing, and Urban Affairs, at 11-12 (Feb. 6, 2014).

⁸ 78 *Fed. Reg.* at 76615 (background section).

⁹ Financial Stability Board, *Recovery and Resolution Planning: Making the Key Attributes Requirements Operational* (Nov. 2012).

¹⁰ See Dodd-Frank Act, §§ 165(d), 203(a)(2)(F), 203(b)(2).

1. **The Associations strongly support the FDIC's SPOE Strategy as an effective strategy for resolving U.S. G-SIBs in an orderly manner.** The SPOE Strategy involves putting the top-tier parent of a U.S. G-SIB into a Title II receivership, transferring all of its assets including its operating subsidiaries to a newly established bridge financial company, using the parent's full loss-absorbing resources to recapitalize its former operating subsidiaries as necessary and keep them open and operating, liquidating the parent in receivership, and distributing the residual value of the bridge financial company in satisfaction of any and all claims against the parent in accordance with the statutory priority of such claims.¹¹

In this way, the SPOE Strategy ensures that shareholders and creditors of the parent would absorb losses, as they should; management responsible for the failed condition of the financial group would be removed, as they should be; taxpayers would bear no losses, as they should not; critical operating businesses of the organization would stay open to serve the broader economy, as they must; and the U.S. G-SIB's failure would not destabilize the U.S. financial system.¹² The purpose of Title II, as recognized in the SPOE Notice, is to resolve a failing financial institution in a manner that addresses moral hazard, promotes market discipline and mitigates risk to the financial stability of the United States. We support the FDIC's efforts to realize these goals through its SPOE Strategy.

2. **The FDIC's articulated SPOE Strategy should expressly state that it is the preferred strategy for resolving U.S. G-SIBs if Title II is invoked.** Such an express statement will further promote market discipline by reinforcing the credibility of the FDIC's determination to impose losses on the shareholders and creditors of the failed parent of a U.S. G-SIB while giving investors, counterparties, rating agencies, foreign supervisors and the public at large further confidence that the FDIC will do so in a manner that maximizes value and maintains financial stability.
3. **The FDIC should continue to play a global leadership role in facilitating cross-border cooperation and coordination around resolution issues.** We are supportive of the significant efforts that the FDIC and other U.S. and non-U.S. regulators have made to develop cross-border plans for the implementation of SPOE. The FDIC should continue its demonstrated leadership in fostering cooperation and coordination with the host-country supervisors of the foreign

¹¹ For a step-by-step graphical illustration of how the FDIC's SPOE Strategy would work, see the Bipartisan Policy Center Report, *supra* note 3, at 23-32.

¹² The Clearing House, *Ending "Too-Big-to-Fail": Title II of the Dodd-Frank and the Approach of "Single Point of Entry" Private Sector Recapitalization of a Failed Financial Company*, Banking Brief White Paper Series (Jan. 2013).

countries where a U.S. G-SIB has any material operating subsidiaries or branches.

4. **The FDIC should confirm that it will use loss-absorbing resources to recapitalize U.S. and foreign operating subsidiaries in an equitable manner.** In order to encourage host-country cooperation, the FDIC should include an express statement in the final Notice that it will use all available parent loss-absorbing resources to recapitalize U.S. and foreign operating subsidiaries in an equitable manner.
5. **The FDIC should confirm that it will treat creditors in a way that is consistent with creditor experiences under the Bankruptcy Code and will not use its authority to discriminate in favor of any subset of similarly situated creditors, unless demonstrably necessary to maximize value for all creditors or to preserve essential operations.** The Associations recommend that the FDIC expressly confirm in the main body of the SPOE Notice that the statute does not permit it to discriminate in favor of any subset of similarly situated creditors unless demonstrably necessary to maximize the value of the covered financial company or to initiate or continue essential operations. Thus, although the statute permits the FDIC to affirm critical operating obligations that maximize value, just as in a bankruptcy proceeding, or that are necessary to preserve essential operations, as noted in its regulation on this matter,¹³ it does not give the FDIC unfettered discretion to “pick winners and losers”.
6. **The FDIC should strongly reaffirm its statement that any funding provided through the Orderly Liquidation Fund (“OLF”) under Title II will only be used to provide temporary secured liquidity in accordance with the long-standing principles for central bank lender-of-last-resort facilities.** We appreciate the FDIC’s confirmation that the OLF, if used, would only be used to provide temporary secured liquidity that is fully supported by and repayable from the assets of the bridge company successor of the failed G-SIB. We agree with the FDIC, Federal Reserve Board Governor Tarullo and the Financial Stability Board that the OLF does not amount to a taxpayer-funded bailout. To dispel any misperceptions about the nature and purpose of OLF funding, we recommend that the FDIC provide in the final Notice strong confirmation that it will only use the OLF in accordance with the long-standing principles for central bank lender-of-last-resort facilities – to provide temporary liquidity to a solvent bridge financial company, on a fully secured basis and at above-market interest rates.
7. **The final Notice should confirm that the FDIC’s statutory duties to maximize value and minimize losses under Title II apply to the implementation of its SPOE Strategy.** By doing so, the FDIC will promote the goal of maintaining

¹³ See 12 C.F.R. § 380.27(b)(4).

financial stability by providing greater confidence to investors, counterparties, rating agencies, foreign supervisors and the public at large that it will use its authority to carry out its SPOE Strategy in an efficient manner that maximizes value and minimizes losses. This will enable the long-term unsecured creditors of the parent holding company and other persons exposed to the risk of loss to estimate those losses in advance more accurately and with greater confidence. This will both mitigate the risk that the U.S. G-SIB's failure might have on financial stability and promote market discipline.

8. **Forced subsidiarization of cross-border operations will not reduce the risk of foreign ring-fencing or improve the resolvability of U.S. G-SIBS.** We believe the FDIC should not require the bank subsidiaries of U.S. G-SIBs to convert their foreign branches into separately incorporated subsidiaries. Forced subsidiarization of foreign branches will not reduce the risk of foreign ring-fencing or contagion, or improve resolvability. Both foreign subsidiaries and foreign branches can be ring-fenced; the legal structure has no inherent bearing on the ring-fencing or contagion risk or resolvability.
9. **Proposals to require pre-positioned loss-absorbing resources at the foreign subsidiaries of U.S. G-SIBs are unnecessary, but if imposed they should be limited to the minimum amount that regulators believe may be needed to reinforce host-country confidence in the FDIC's SPOE Strategy and should be done in a way that avoids unintended consequences.** Certain regulators have raised the possibility of requiring U.S. G-SIBs to pre-position some amount of loss-absorbing resources at their foreign operating subsidiaries. The stated purpose is to reinforce the confidence of host-country supervisors in the FDIC's commitment to carry out its SPOE Strategy in a manner that uses a top-tier parent's resources to recapitalize its foreign subsidiaries. Such pre-positioning should not be necessary to reinforce that confidence or otherwise make the SPOE Strategy effective because the premise of the SPOE Strategy is to preserve the continuing operations of the group. If the regulators nevertheless decide to impose such pre-positioning requirements, they should be limited to the minimum amount that regulators believe may be needed to reinforce host-country confidence in the FDIC's SPOE Strategy and should be done in a way that avoids unintended consequences and leaves in all events sufficient loss-absorbing resources at the parent as required for SPOE to be most effective. Excessive pre-positioning requirements could hinder the FDIC's SPOE Strategy by trapping loss-absorbing resources in local jurisdictions instead of being available at the top-tier parent to be used by the FDIC wherever they are needed to keep operating subsidiaries open and operating. Excessive pre-positioning requirements could also reduce the efficiency of U.S. G-SIBs under normal market conditions and their resiliency under stressed conditions.
10. **U.S. G-SIBS do not enjoy funding advantages as a result of a market perception of implicit government support, and the FDIC's SPOE Strategy will**

help mitigate the risk that such perceptions may arise in the future. A balanced and thorough evaluation of the most reliable empirical evidence currently available does not support a conclusion that U.S. G-SIBs currently enjoy any funding advantage arising from implicit government support. Moreover, we believe that the FDIC's SPOE Strategy prevents any such misperception from arising. Finally, we do not believe that the availability of the OLF to provide temporary secured liquidity will create such an advantage.

II. Impact of SPOE Strategy and Its Scope

A. SPOE Strategy Has Been Widely Praised

Given the importance of broad awareness and acceptance of the SPOE Strategy for confidence to be maintained, it is important to note the increasing focus and support for SPOE that is emerging among key thought leaders.

The FDIC's SPOE Strategy under Title II of Dodd-Frank has been widely praised and developed significant momentum as the most effective solution to the TBTF dilemma for U.S. G-SIBs.¹⁴ Federal Reserve Board Governor Daniel K. Tarullo described it as follows:

"The [FDIC's] single-point-of-entry approach offers the best potential for the orderly resolution of a systemic financial firm under Title II, in part because of its potential to mitigate run risks and credibly impose losses on parent holding company creditors, and thereby, to enhance market discipline."¹⁵

In her confirmation hearing, Federal Reserve Chair Janet Yellen said:

¹⁴ See, e.g., Tarullo, Richmond Conference, *supra* note 7; Jerome Powell, Member of the Board of Governors of the Federal Reserve System, *Ending "Too Big to Fail"*, Remarks at the Institute of International Bankers 2013 Washington Conference, Washington, D.C. (Mar. 4, 2013); Mike Konczal, *Sheila Bair: Dodd-Frank really did end taxpayer bailouts*, WASHINGTON POST (May 18, 2013); Testimony of Sheila C. Bair, Chair of the Systemic Risk Council of the CFA Institute and the Pew Charitable Trusts and Former Chair of the Federal Deposit Insurance Corporation Before the House Committee on Financial Services (June 26, 2013); William C. Dudley, *Ending Too Big to Fail*, Remarks at the Global Economic Policy Forum, New York City (Nov. 7, 2013); Paul Tucker, Deputy Governor for Financial Stability at the Bank of England and Chairman of the Resolution Steering Group of the Financial Stability Board, *Solving too big to fail: where do things stand on resolution?*, Speech given at the Institution of International Finance 2013 Annual Membership meeting, Washington, D.C. (Oct. 12, 2013); Moody's Investor Services, *Rating Action: Moody's concludes review of eight large US banks*, Global Credit Research (Nov. 14, 2013); Bipartisan Policy Center Report, *supra* note 3, at 2; The Clearing House, *supra* note 12; The Clearing House, *Report on the Orderly Liquidation Authority Resolution Symposium and Simulation (Jan. 2013) [hereinafter The Clearing House, Simulation Report]*; Statement of Donald S. Bernstein, Partner and Co-Head of the Insolvency and Restructuring Practice at Davis Polk & Wardwell LLP and former Chairman of the National Bankruptcy Conference, Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary (Dec. 3, 2013).

¹⁵ Tarullo, Richmond Conference, *supra* note 7, at 8.

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“Right now, the FDIC has the capacity and the legal authority to resolve, possibly using Orderly Liquidation Authority, a systemically important firm that finds itself in trouble. And they’ve designed an architecture that I think is very promising in terms of being able to accomplish that.”¹⁶

Federal Reserve Board Governor Jerome Powell said that the FDIC’s innovative SPOE approach transformed his way of thinking about the TBTF dilemma during a public simulation of the failure of a large financial institution that he helped design before he became a member of the Federal Reserve Board¹⁷:

“From the outset, my earlier experience had led me to be skeptical about the possibility of resolving one of the largest financial companies without destabilizing the financial system. . . . What changed my mind was the FDIC’s innovative ‘single-point-of-entry’ approach, which was just coming into focus in 2011. This approach is a classic simplifier, making theoretically possible something that seemed impossibly complex.”¹⁸

Former FDIC Chairman Sheila Bair praised the FDIC’s SPOE Strategy in the following words:

“I think the FDIC has come up with a viable strategy for resolving a large complex financial institution. This is their strategy of using a single-point-of-entry. The FDIC will take control of a holding company and put creditors and shareholders into a receivership where they, not taxpayers, will absorb any losses. This will allow the subsidiaries to remain operational, avoiding systemic disruptions, as the overall entity is unwound over time.”¹⁹

Federal Reserve Bank of New York President William Dudley said he very much endorses the FDIC’s SPOE Strategy:

“I very much endorse the FDIC’s single point of entry framework for resolution. I think it is the best plan for implementing Title II given the

¹⁶ Testimony of Janet Yellen, Federal Reserve Board Chair, *Hearing on the Nomination of Janet L. Yellen, of California, to be Chairman of the Board of Governors of the Federal Reserve System, before the Senate Committee on Banking, Housing & Urban Affairs, 113th Congress* (Nov. 14, 2013).

¹⁷ *What Happens When a Global Bank Fails?*, The Buttonwood Gathering 2011, Organized by Greg Ip of THE ECONOMIST and moderated by former Treasury Secretary Lawrence H. Summers (Oct. 2011), available at http://fora.tv/2011/10/27/What_Happens_When_A_Global_Bank_Fails/Greg_Ip_The_Dodd-Frank_Effect.

¹⁸ Powell, *supra* note 14, at 6.

¹⁹ Konczal, *supra* note 14; *see also* Bair, *supra* note 14, at 3 (“the FDIC . . . has developed an innovative strategy for the orderly resolution of a large, internationally active bank which involves seizing control of its holding company through a so-called ‘single point of entry’ approach”).

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complexity and scope of large, global financial institutions, and I also think it is well suited to the U.S. bank holding company framework.”²⁰

Paul Tucker, former Deputy Governor for Financial Stability at the Bank of England and Chairman of the Resolution Steering Committee of the Financial Stability Board, expressed his confidence that the FDIC’s SPOE Strategy gave it the technology to resolve a U.S. G-SIB today:

“[T]he US authorities have the technology – via Title II of Dodd Frank; and, just as important, most US bank and dealer groups are, through an accident of history, organized in a way that lends them to top-down resolution on a group-wide basis. I don’t mean it would be completely smooth right now; it would be smoother in a year or so as more progress is made. But in extremis, it could be done now. That surely is a massive signal to bankers and markets.”²¹

Moody’s Investor Services, taking that signal, “removed all uplift from US government support in the ratings for bank holding company debt” of the eight large U.S. banking groups²² and simultaneously downgraded the parent debt ratings of four of these eight banking groups based on its belief in the effectiveness of the FDIC’s SPOE Strategy:

“We believe that US bank regulators have made substantial progress in establishing a credible framework to resolve a large, failing bank. . . . Rather than relying on public funds to bail-out one of these institutions, we expect that bank holding company creditors will be bailed-in and thereby shoulder much of the burden to help recapitalize a failing bank.”²³

On November 8-9, 2012, The Clearing House conducted a comprehensive simulation of the resolution of a U.S. G-SIB using the FDIC’s SPOE Strategy. The results indicated that by effective use of its SPOE Strategy, the FDIC could resolve a U.S. G-SIB without the need for taxpayer-funded bailouts and without destabilizing the U.S. financial system.²⁴ The results of that simulation have been shared with the FDIC, the Federal Reserve and the Financial Stability Board, among others.

²⁰ Dudley, *supra* note 14, at 4.

²¹ Tucker, *supra* note 14, at 2.

²² The eight large banking groups were the U.S. banking groups that have been designated by the Financial Stability Board as U.S. G-SIBs. Moody’s, *supra* note 14. *Cf.* Financial Stability Board, *supra* note 4.

²³ Moody’s, *supra* note 14, at 1.

²⁴ The Clearing House, Simulation Report, *supra* note 14.

The FDIC has also been widely praised for having played a leadership role in solving the TBTF dilemma around the world because of its groundbreaking work on its SPOE Strategy.²⁵ Federal Reserve Board Governor Tarullo has stated that:

“In many ways, Title II has become a model resolution regime for the international community. . . . The FDIC’s work on the single-point-of-entry approach continues to help frame the terms of international discussions at the [Financial Stability Board].”²⁶

The FDIC’s SPOE Strategy has been accepted as an effective and perhaps the most effective solution to the TBTF dilemma for U.S. G-SIBs, and such strategy is being adopted in other countries for non-U.S. G-SIBs. Reflecting its leadership role in achieving this outcome, the FDIC published a joint paper with the Bank of England promoting the SPOE Strategy as a viable strategy for resolving the vast majority of G-SIBs.²⁷ The U.K. government subsequently introduced the Financial Services (Banking Reform) Act 2013 (the “**U.K. Banking Reform Bill**”), a bill that contains a “bail-in” option²⁸ and makes certain amendments to the bridge bank tool that was already contained in the U.K. Banking Act 2009 (the “**U.K. Banking Act 2009**”),²⁹ and Germany and Switzerland subsequently indicated that SPOE is their preferred strategy for resolving German and Swiss G-SIBs.³⁰ The

²⁵ For example, in its peer review of resolution regimes around the world, the Financial Stability Board singled out Title II and the FDIC’s SPOE Strategy as the regime that most comprehensively and effectively implements the Financial Stability Board’s *Key Attributes for Effective Resolution Regimes for Financial Institutions*. See Financial Stability Board, *Thematic Review on Resolution Regimes: Peer Review Report*, Chaired by Martin J. Gruenberg, Chairman of the FDIC (Apr. 11, 2013) [*hereinafter* Financial Stability Board, Peer Review]. See also Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Nov. 4, 2011) [*hereinafter* Financial Stability Board, Key Attributes].

²⁶ Tarullo, Richmond Conference, *supra* note 7, at 12.

²⁷ FDIC & Bank of England, Joint Paper, *Resolving Globally Active, Systemically Important, Financial Institutions* (Dec. 10, 2012). See also Martin J. Gruenberg, Chairman of the FDIC, & Paul Tucker, Deputy Governor for Financial Stability at the Bank of England, Op. Ed., *Global Banks Need Global Solutions When They Fail*, FINANCIAL TIMES (Dec. 10, 2012).

²⁸ U.K. Banking Reform Bill, Schedule 2, at 121-123. The term “bail-in within resolution” is the phrase most commonly used internationally to describe a group of strategies of which the FDIC’s SPOE Strategy is a subset. “Bail-in within resolution” has been defined by the Financial Stability Board as “restructuring mechanisms to recapitalise a firm in resolution or effectively capitalise a bridge institution, under specified conditions, through the write-down, conversion or exchange of debt instruments and other senior or subordinated unsecured liabilities of the firm in resolution into, or for, equity or other instruments in that firm, the parent company of that firm or a newly formed bridge institution, as appropriate to legal frameworks and market capacity.” Financial Stability Board, Peer Review, *supra* note 25, at 2.

²⁹ U.K. Banking Act 2009, Article 12.

³⁰ FINMA Position Paper, “Resolution of Globally Systemically Important Banks” (Aug. 7, 2013) available at <http://www.finma.ch/e/finma/publikationen/Documents/pos-sanierung-abwicklung-20130807-e.pdf>. See also Martin J. Gruenberg, Chairman of the FDIC, Remarks at the Volcker Alliance Program, at 9-10, Washington, D.C. (Oct. 13, 2013) (“We have had significant principal and staff level engagements with the

recently agreed-upon final version of the proposed European Bank Recovery and Resolution Directive (“**BRRD**”)³¹ contains a bail-in tool and a bridge institution tool that together will empower regulatory agencies in individual member states and a proposed future European single resolution mechanism (“**SRM**”) to develop a comprehensive framework that encompasses both SPOE and MPOE strategies to resolve SIBs with top-tier European parent banks or holding companies.³²

B. Scope of SPOE Strategy

The FDIC developed its SPOE Strategy as a way to resolve U.S. G-SIBs in an orderly manner under Title II.³³ This approach reflects the particular and common structure of the U.S. G-SIBs. The U.S. G-SIBs are all organized with a parent holding company at the top and operating subsidiaries below, and have historically raised substantial amounts of long-term unsecured debt at the parent level.³⁴ Because of their position in the corporate structure, the equity and long-term unsecured debt holders at the parent holding company have no claim on and are thus structurally subordinated with respect to the assets of the group’s operating subsidiaries, and, as a result, in a recapitalization they are the residual, loss-absorbing stakeholders for the entire group. This is a critical consideration for the SPOE Strategy because it concentrates the resolution and loss absorption on those parent-level shareholders and creditors so that the parent can fulfill its role as a source of strength for its subsidiaries. The FDIC’s SPOE Strategy is well-suited for a banking group that has these

responsible authorities in both jurisdictions, FINMA in the case of Switzerland, BAFIN in the case of Germany. Interestingly both jurisdictions have come to the conclusion that the single point of entry strategy is the most viable approach to the resolution of their SIFIs.”).

³¹ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms (final compromise text), document 17958/13 (Dec. 18, 2013); *see also* Freshfields Bruckhaus Deringer, European Bank Recovery and Resolution Directive (Jan. 2014).

³² Freshfields, *supra* note 31, at 7-10.

³³ FDIC, The Single Point of Entry Resolution Strategy, Presentation to its Advisory Committee on Systemic Resolution, slide 8 (Dec. 11, 2013) (“The FDIC is developing the Single Point of Entry (SPOE) strategy as a possible approach to resolving a G-SIFI”).

³⁴ Each of the U.S. G-SIBs currently has a substantial amount of loss-absorbing resources at the parent holding company level, including a substantial amount of senior or subordinated long-term debt (debt with an original maturity of more than one year). *See* Goldman Sachs Research, *Adding Debt to the Capitalization Equation* (May 28, 2013); Morgan Stanley Research North America, *Large and Midcap Banks, OLA: More Debt Sooner?* (Dec. 13, 2012); Goldman Sachs Research, *Loss Absorbency in Banks* (Dec. 2012); J.P. Morgan North America Credit Research, *Tarullo Speech Increases Momentum for Debt Buffers* (Dec. 6, 2012). By contrast, in light of the different business models and structure of U.S. banking organizations with over \$50 billion in assets that are not G-SIBs, only a few such organizations have significant long-term debt at the holding company level. *Id.* The Federal Reserve has indicated that it plans to issue a regulation that would define minimum loss-absorbing capacity in the form of combined equity and long-term debt on the unconsolidated balance sheets of the parents of the U.S. G-SIBs. *See, e.g.,* Tarullo, Richmond Conference, *supra* note 7, at 11.

characteristics, and the Associations believe that it should be the preferred resolution strategy for them under Title II.

The FDIC did not design its SPOE Strategy for other U.S. banking or other financial organizations, including nonbank financial companies and the U.S. subsidiaries of Non-U.S. G-SIBs. In addition, since Title II does not apply to non-U.S. companies, the resolution strategies for Non-U.S. G-SIBs will be selected by their home-country resolution authorities. These strategies could include an SPOE, MPOE or any other strategy, as appropriate for the structure of the particular Non-U.S. G-SIB.³⁵ For example, although an SPOE strategy may be effective for Non-U.S. G-SIBs with centralized parent structures and sufficient loss-absorbing resources at the parent level, an MPOE strategy may be more effective for banking groups that have a decentralized or archipelago structure, consisting of separately incorporated bank subsidiaries with independent rather than interconnected capital, liquidity, operations and services,³⁶ where virtually all of their loss-absorbing resources are located at their operating subsidiaries rather than their parent companies.

In light of these considerations, we comment on this Notice based on the understanding that the FDIC's SPOE Strategy was developed primarily for U.S. G-SIBs under Title II.

III. Recommendations to Further Strengthen the SPOE Strategy

The SPOE Notice represents the most significant milestone to date in the FDIC's leadership in developing an effective strategy for resolving U.S. G-SIBs under Title II of Dodd-Frank. The Notice describes the FDIC's SPOE Strategy, and provides certain details about how the FDIC expects to carry it out. In taking this action, the FDIC is fulfilling its mandate in Section 209 of Dodd-Frank to prescribe rules and regulations that increase the legal certainty and predictability of Title II and its SPOE Strategy.

We understand that the FDIC has spent considerable time consulting with various stakeholders to develop a sound, robust and practical strategy, and we encourage the FDIC to continue engaging in these efforts and even expanding them.

Our comments relate to the specific questions posed by the FDIC in the Notice as well as certain additional details and specifications that, if included by the FDIC in its final Notice about its SPOE Strategy, would further enhance confidence in the reliability and predictability of its strategy.

³⁵ FDIC & Bank of England, *supra* note 27, at 4; Financial Stability Board, *supra* note 9, at 14-16.

³⁶ Institute of International Finance, *Making Resolution Robust – Completing the Legal and Institutional Frameworks for Effective Cross-Border Resolution of Financial Companies*, at 19, 54 (June 2012).

A. Supporting and Strengthening the SPOE Strategy

We believe that the FDIC's SPOE Strategy is an effective strategy for resolving U.S. G-SIBs in an orderly manner without taxpayer funded bailouts or severe systemic consequences. The rest of this section describes recommendations for ensuring that the FDIC's SPOE Strategy is implemented in a manner that promotes market discipline, avoids moral hazard and maintains financial stability.

1. Public Commitment to SPOE as Preferred Strategy in Title II

As required by Dodd-Frank, the presumptive resolution path for any U.S. G-SIB is a proceeding under the Bankruptcy Code or otherwise applicable insolvency law.³⁷ The SPOE Strategy was developed as an alternative under Title II to resolve a U.S. G-SIB when necessary under extraordinary circumstances. One of the most important conditions for the successful implementation of the SPOE Strategy is for the FDIC to reinforce its already strong public commitment to using its SPOE Strategy as its preferred strategy for resolving U.S. G-SIBs in Title II.

To ensure that its SPOE Strategy is effective, the FDIC should continue to reinforce its already strong public commitment to using its SPOE Strategy in a manner that:

- **Enhances Market Discipline.** Eliminates any misperception by shareholders or creditors of a U.S. G-SIB that they will be bailed out or otherwise insulated from bearing the losses of the U.S. G-SIB in accordance with the statutory priority of their claims and by senior management responsible for the failure that they will be retained rather than removed;³⁸ and
- **Promotes Financial Stability.** Reinforces confidence of shareholders, creditors, counterparties, and domestic and foreign supervisors, that the FDIC will use its SPOE Strategy as its preferred strategy in Title II to resolve U.S. G-SIBs in a manner that will satisfy the following goals:
 - **Value Maximization.** Maximize the value of the covered financial company, and minimize its losses, for the benefit of its creditors and other claimants,

³⁷ See Dodd-Frank Act, §§ 165(d), 203(a)(2)(F), 203(b)(2).

³⁸ See, e.g., Remarks of Mary John Miller, Under Secretary of the Treasury, at the Hyman P. Minsky Conference, 1-2 (Apr. 18, 2013) (“[I]t is also important to ask why the market would continue to [provide any funding advantage] in light of the law’s clarity that taxpayer support will not be forthcoming and thus whether any funding advantage might be attributable to other reasons... to the extent the largest financial companies have been benefiting from a funding advantage based on their ratings, that uplift has been declining and appears to be continuing to go away as implementation of the Dodd-Frank Act progresses.”). See also Tarullo, Richmond Conference, supra note 7, at 8 (“The single-point-of-entry approach... [has potential to] credibly impose losses on parent holding company creditors and, thereby, to enhance market discipline.”).

which will also bolster confidence in the financial system and support Title II's systemic stability objective;

- **Equal Treatment.** Treat foreign and domestic claimants within the same class equally;
- **Minimize Impact on Operating Subsidiaries.** Impose all of the group's losses on the top-tier parent's shareholders and creditors until loss-absorbing resources are consumed, and use the top-tier parent's unconsolidated assets to recapitalize its material operating subsidiaries, including its non-U.S. material subsidiaries, in a manner that keeps them open and operating rather than being put into insolvency proceedings; and
- **Preferred Strategy.** Provide a resolution strategy that is transparent, predictable and understandable by market participants and G-SIB stakeholders, and enables such participants and stakeholders to make risk and pricing decisions on the basis of this clearly articulated strategy.

As Federal Reserve Board Governor Daniel K. Tarullo has indicated, a strong commitment by the FDIC to the SPOE Strategy as its preferred strategy will both promote market discipline and maintain financial stability. With respect to financial stability, he said:

"[U]nless creditors and counterparties have well-grounded expectations as to how they will be treated in a resolution setting, they may need to charge a premium to compensate for the additional uncertainty associated with the disposition of their claims, which can lead to a mispricing of risk. In some cases, particularly in periods of increasing stress in the financial system, they may be unwilling to deal with certain firms altogether. Parties who have short-term lending to, or contractual arrangements with, these firms may 'run' as those loans or contracts lapse, thereby potentially crippling the ongoing business of the firm and creating adverse effects in other parts of the financial system."³⁹

Governor Tarullo also indicated that a strong public commitment to the SPOE Strategy as the FDIC's preferred strategy under Title II would promote market discipline.

"[I]f investors and other market actors think the prospects for orderly resolution seem low, they may assume the firm will be rescued by the government, and any moral hazard present in these markets will continue. . . . The aim of the single-point-of-entry approach is to stabilize the failed firm quickly . . . without supporting the firm's equity holders

³⁹ Tarullo, Richmond Conference, supra note 7, at 6.

and other capital liabilities holders or exposing U.S. taxpayers to losses.”⁴⁰

In addition to promoting market discipline and financial stability, a clearly articulated preferred strategy will be important to the determinations required to be made under Title II in order to trigger its application (the so-called “three keys”).⁴¹ Such a clearly articulated strategy is also important for the market to accurately understand and price the risks of dealing with the institution in advance of a resolution.

Foreign regulators are an important group of stakeholders whose confidence in the FDIC’s commitment to SPOE as the preferred strategy is important. The FDIC should consider further strengthening the confidence of foreign and other domestic resolution authorities, and the markets, in its public commitment by entering into bilateral or multilateral agreements, so-called cooperation agreements, or “COAGs,” with the domestic or foreign resolution authorities of the material affiliates and branches of each G-SIB,⁴² as discussed in Subsection 2 below. While the Associations do not believe such agreements are essential, they would be useful in reinforcing the confidence of foreign regulators in relying on the SPOE Strategy as the FDIC’s preferred strategy for resolving U.S. G-SIBs under Title II.

2. FDIC Leadership on Cross-Border Cooperation

The SPOE Notice describes the FDIC’s leadership in building cross-border cooperation. These efforts were further described at the Systemic Resolution Advisory Committee meeting on December 11, 2013.⁴³ They include principal-to-principal discussions and cooperation agreements among regulators, table top exercises and crisis management groups. The Associations believe that the FDIC has made significant progress on cross-border cooperation which will help to facilitate the SPOE Strategy.

The SPOE Notice requests comment on “the most important additional steps that can be taken with foreign regulatory authorities to achieve a successful resolution using the SPOE strategy.”⁴⁴

⁴⁰ *Id.* at 7-8.

⁴¹ Dodd-Frank Act § 203(a) (describing required recommendation to be certified by votes of, in most cases, at least two-thirds of the Board of the FDIC and two-thirds of the Board of Governors of the Federal Reserve); § 203(b) (describing required determinations to be made by the Secretary of the Treasury in consultation with the President of the United States, including that a Title II proceeding would “avoid or mitigate” the serious adverse effects on financial stability that might arise in a bankruptcy proceeding).

⁴² See Financial Stability Board, Key Attributes, *supra* note 25, at Annex I.

⁴³ See 78 *Fed. Reg.* at 76624; FDIC, International Coordination, Presentation to its Advisory Committee on Systemic Resolution (Dec. 11, 2013), *available at* http://www.fdic.gov/about/srac/2013/2013_12_11_presentation_international-coordination.pdf.

⁴⁴ 78 *Fed. Reg.* at 76624.

The Associations strongly encourage the FDIC to continue to actively engage with foreign regulators, including continuing staff-level meetings and consultations, and entering into new and more detailed memoranda of understanding (“**MOUs**”) on resolution-related matters.⁴⁵ The FDIC has been actively engaged with foreign regulators, including staff-level meetings and consultations, and MOUs in certain jurisdictions.⁴⁶ For example, the FDIC and the Bank of England, in addition to releasing a joint paper on resolution, have conducted a staff-level cross-border resolution tabletop exercise and plan to organize a principal-level exercise in 2014.⁴⁷ There have also been significant principal- and staff-level engagements with the Swiss Financial Market Supervisory Authority (“**FINMA**”) and the German Federal Financial Supervisory Authority (“**BaFin**”).⁴⁸ An FDIC principal-level delegation has visited Japanese authorities to engage on resolution-related matters, including the conclusion of an exchange of letters for the purpose of information sharing, and an MOU on resolution is anticipated.⁴⁹ The FDIC also recently concluded a resolution-related MOU with the People’s Bank of China (“**PBOC**”).⁵⁰ There have been two meetings of a joint working group of the FDIC and the European Commission held in 2013.⁵¹ The FDIC has had detailed discussions with EC officials on the FDIC’s experience with resolution and deposit insurance as well as the FDIC’s SIFI resolution strategy.⁵²

We support the efforts of the FDIC and other global regulators to convene in crisis management groups to discuss and coordinate resolution plans with respect to individual institutions. International developments have further facilitated such cooperation. The recent agreement on a final text of the European BRRD⁵³ and progress in adopting the SRM will facilitate the FDIC’s implementation of its SPOE Strategy with respect to U.S. G-SIBs by allowing resolution authorities in each EU member state to cooperate on a strategy in which home and host interests are aligned.⁵⁴ The BRRD will provide European resolution authorities with important new regulatory powers to cooperate with the FDIC and support a resolution of a U.S. G-SIB under an SPOE Strategy, including the power to override the cross-

⁴⁵ See FDIC, *supra* note 43; Gruenberg, *supra* note 30; Martin J. Gruenberg, Chairman, FDIC, Remarks to the Exchequer Club, Washington, D.C. (May 15, 2013), *available at* <http://www.fdic.gov/news/news/speeches/spmay1513.pdf>.

⁴⁶ See *supra* note 45.

⁴⁷ Gruenberg, *supra* note 30, at 10.

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.*

⁵¹ *Id.* at 10-11.

⁵² *Id.* at 11.

⁵³ See BRRD, *supra* note 31.

⁵⁴ The FDIC and Bank of England joint paper reflects that such coordination has been a goal of regulators. See FDIC and the Bank of England, *supra* note 27. The BRRD makes this coordination goal practically viable by introducing the regulatory powers that were previously lacking.

default rights of counterparties to European contracts, including qualified financial contracts, triggered by a U.S. Title II proceeding.⁵⁵

In particular, Article 84 will establish a framework for the resolution authorities of European member states to enter into bilateral agreements with the resolution authorities of non-EU states, such as the FDIC. It will also establish a process for the European Commission to enter into an international agreement on behalf of the EU member states with the FDIC. Those agreements may define the processes and arrangements for cooperation in carrying out some or all of the powers set forth in Article 88.

Article 88 will confirm that the resolution authorities of each member state may enter into bilateral or multilateral cooperation arrangements with the resolution authorities of non-EU states, such as the FDIC. It will provide that such cooperation arrangements may include provisions on the following matters:

- Exchange of information necessary for the preparation and maintenance of resolution plans;
- Consultation and cooperation in the development of resolution plans;
- Exchange of information necessary for the application of resolution tools and the exercise of resolution powers;
- Early warning to or consultation of parties to the cooperation arrangement before taking any significant action;
- Coordination of public communication in case of joint resolution actions; and
- Procedures and arrangements for the exchange of information and cooperation in connection with the foregoing through the establishment and operation of crisis management groups.

Article 88 will also authorize the European Banking Authority (“EBA”) to enter into non-binding framework cooperation arrangements with non-EU resolution authorities like the FDIC, unless and until an international agreement is entered into between the EU and the FDIC pursuant to Article 84. Those non-binding arrangements may define the processes and arrangements for cooperation in carrying out some or all of the following powers:

- Developing resolution plans;

⁵⁵ BRRD, supra note 31, Article 60a. The power to override cross-defaults in contracts, including qualified financial contracts, addresses one of the few remaining material challenges to a successful resolution of a U.S. G-SIB using the FDIC’s SPOE Strategy. See Joint Letter dated Nov. 5, 2013 from the FDIC, the Bank of England, the German BaFin and the Swiss FINMA to the International Swaps and Derivatives Association; 78 *Fed. Reg.* at 76624.

- Assessing resolvability;
- Addressing or removing impediments to resolvability;
- Undertaking early intervention measures; and
- Using resolution tools and exercising resolution powers.

Like Chapter 15 of the Bankruptcy Code,⁵⁶ Article 85 allows a European regulator to “recognize” or make enforceable under European law the FDIC’s exercise of powers under Title II. Together with Article 60a, this will allow European regulators to recognize the overriding of cross defaults arising under European contracts triggered by the holding company of a U.S. G-SIB being placed into resolution under Title II, and to support the transfer to the bridge financial company of liabilities governed by European law and assets located in or governed by European law. Recognition of cross-default overrides would help ensure the continuity of operating subsidiaries both in the United States and in Europe and is a key element of addressing some of the challenges that arise in resolving a cross-border financial company. In addition, the U.K.’s proposed bail-in law will provide further support to the SPOE Strategy and similar strategies in other jurisdictions.⁵⁷

There are two essential elements of enhancing cross-border cooperation in resolving U.S. G-SIBs. The first is to develop a clearly defined and sufficiently detailed resolution strategy that maximizes the value of the U.S. G-SIB for both home and host-country stakeholders. The second is to treat home and host-country stakeholders that are otherwise within the same class equally. If the strategy satisfies those conditions, it should be in the self-interest of both home and host country resolution authorities to cooperate.

The Associations believe that the FDIC’s SPOE Strategy satisfies this home/host self-interest condition. The remaining need is to confirm and enhance the confidence of the host country resolution authorities that the FDIC is committed to using the SPOE Strategy to resolve a U.S. G-SIB in a manner that preserves host-country operations, maximizes value for creditors and assures equitable treatment.

One of the advantages of the SPOE Strategy is that it aligns the interests of home and host jurisdictions. Foreign supervisors are understandably assumed to act in their own

⁵⁶ Chapter 15 provides authority for the recognition in the United States of a foreign bankruptcy proceeding. While Chapter 15 excludes foreign resolution proceedings with respect to a non-U.S. bank with a U.S. branch or agency, there is an argument that U.S. courts should recognize and give effect to the exercise of statutory bail-in powers in a foreign resolution proceeding such as those contemplated under the BRRD or the proposed U.K. Banking Reform Bill with respect to non-U.S. banks under the judicial doctrine of international comity. *See, e.g., The Argo Fund Ltd. v. Board of Directors of Telecom Argentina, S.A.*, 528 F.3d 162, 175 (2d Cir. 2008) ; *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 247 (2d Cir. 1999); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

⁵⁷ U.K. Banking Reform Bill, *supra* note 28.

self-interest, and the SPOE Strategy aligns the interests of the various regulators by providing for an outcome that maximizes value, minimizes disruption of critical operations and maintains the network of the financial institution. The Associations believe that cross-border cooperation and market understanding of the SPOE Strategy could be further enhanced by providing stronger assurances about how foreign subsidiaries and branches will be recapitalized and maintained on an equitable basis under a Title II SPOE Strategy.

These steps should be viewed as part of an on-going process around the globe towards a more resilient financial system and resolvable financial companies. This process is being guided under the auspices of the *Key Attributes for Effective Resolution Regimes of Financial Institutions* by the Financial Stability Board,⁵⁸ and is resulting in the leading financial centers adopting a system of legal frameworks that are compatible with Title II. The BRRD and progress in adopting the SRM are key developments in the global implementation of the *Key Attributes* and of the FDIC's SPOE Strategy. The BRRD will provide European resolution authorities with important new regulatory powers to cooperate with the FDIC in, and recognize and give effect to, a U.S. resolution proceeding under Title II.⁵⁹

An important additional step the FDIC should consider to bring U.S. law into line with Article 85 of the BRRD, which should foster greater cross-border cooperation and coordination, would be to support efforts to amend Chapter 15 of the Bankruptcy Code to confirm that U.S. courts should apply the same standards to decide whether to recognize and give effect to foreign resolution proceedings as are now applied to foreign bankruptcy proceedings, including with respect to a foreign bank with a branch or agency in the United States, if the conditions of Chapter 15 are satisfied.⁶⁰

3. Disparate Treatment of Similarly Situated Creditors

The FDIC has authority under Title II to treat similarly situated creditors differently under certain very limited circumstances and subject to certain constraining conditions.⁶¹ This authority could create moral hazard or be destabilizing, if market participants and foreign supervisors do not have confidence that it will be reserved for exceptional circumstances or if it is used in unpredictable ways. The Notice helpfully provides multiple statements to that effect, describing various ways in which the FDIC has further constrained

⁵⁸ Financial Stability Board, *Key Attributes*, supra note 25, at Annex I.

⁵⁹ See BRRD, supra note 31, Articles 45, 60a.

⁶⁰ See Bipartisan Policy Center Report, supra note 3, at 14 (recommending such an amendment to Chapter 15). There is a strong argument that U.S. courts should recognize and give effect to the exercise of statutory bail-in powers in a foreign resolution proceeding such as those contemplated under the BRRD or the proposed U.K. Banking Reform Bill with respect to non-U.S. banks under the judicial doctrine of international comity. See supra note 56. But the proposed amendment to Chapter 15 would increase the certainty that such foreign proceedings would be recognized and given effect by a U.S. court.

⁶¹ 78 *Fed. Reg.* at 76622.

its limited discretion.⁶² For example, in both the main body and Request for Comments sections of the SPOE Notice, the FDIC states that it does not expect to use its authority to treat similarly situated creditors differently except “in very limited circumstances.”⁶³ It also states in the Request for Comments section, but not the main body, of the SPOE Notice that such disparate treatment is “permissible under the statute only if such an action is necessary to continue operations essential to the receivership or the bridge financial company, or to maximize recoveries.”⁶⁴ The SPOE Notice specifically requests comment on “whether there should be further limits or other ways to assure creditors of our prospective use of disparate treatment.”⁶⁵

The Associations believe the FDIC has provided clarity on what steps would have to be taken to exercise any discretion, including a decision by the FDIC Board⁶⁶ and a report to Congress.⁶⁷ The very high bar that the FDIC has laid out will help set expectations for market participants that holding company creditors should assume they will suffer losses in a Title II resolution. The guidance the FDIC has provided will help strengthen SPOE by setting expectations which in the long run will reduce contagion and panic which result when misperceptions exist and expectations change suddenly.

The Associations believe that there are no additional substantive limitations that are necessary, but that further confirmation would be useful as to the limits of the FDIC’s discretion. We believe that the FDIC should expressly state in the main body of the SPOE Notice that Title II prohibits it from treating similarly situated creditors differently unless such disparate treatment is demonstrably necessary to maximize the value of the company or minimize its losses for the benefit of its creditors or to initiate and continue operations essential to implementation of the receivership or any bridge financial company.⁶⁸ It should also expressly confirm in the main body of the SPOE Notice that even in those narrow circumstances where disparate treatment is permitted, the FDIC is only permitted to do so if all claimants left behind in the receivership receive at least as much as they would have received in a hypothetical liquidation of the covered company under Chapter 7 of the Bankruptcy Code.⁶⁹ It is important for the FDIC to confirm that these limits are statutory and therefore not within the discretion of the FDIC to change, even by a board vote.

⁶² *Id.*

⁶³ *Id.* at 76618, 76622.

⁶⁴ *Id.* at 76622.

⁶⁵ *Id.*

⁶⁶ *See* 12 C.F.R. § 380.27(b)(4).

⁶⁷ *See* Dodd-Frank Act, § 203(c)(3)(A)(vi).

⁶⁸ *Id.* § 210(b)(4)(A); 12 C.F.R. § 380.27(b)(4).

⁶⁹ *Id.* § 210(b)(4)(B).

The FDIC identified critical vendor contracts and secured claims as the types of claims it might transfer to a bridge, and equity, subordinated debt and other unsecured liabilities as the type of claims it would expect to leave behind in the receivership.⁷⁰ The FDIC explained that critical vendor contracts are typically affirmed in a bankruptcy proceeding in order to maximize the value of the bankrupt enterprise for the benefit of its creditors.⁷¹ It explained that transferring secured obligations to the bridge would not diminish the net value of the assets securing the obligations.⁷²

The FDIC should also include a statement in its final Notice to the effect that there will be almost no opportunity to use its already narrow disparate treatment power when resolving the parents of U.S. G-SIBs using its SPOE Strategy. This is because of their holding company structures, the structural subordination of holding company liabilities to operating company liabilities, and the fact that the parents of U.S. G-SIBs today have very few liabilities other than long-term unsecured debt.

4. Maximize Value

Section 210(a)(9)(E) of Title II imposes a statutory duty on the FDIC to “conduct its operations [under Title II] in a manner that . . . maximizes the net present value return from the sale or disposition of its assets; and . . . minimizes the amount of any loss realized in the resolution of cases.” The final Notice should confirm that the FDIC is subject to this statutory duty when carrying out its SPOE Strategy. By doing so, the FDIC will promote the goal of maintaining financial stability by providing confidence to investors, counterparties, rating agencies, foreign supervisors and the public at large that it is required to implement its SPOE Strategy in an efficient manner that maximizes value and minimizes losses. This will give long-term unsecured creditors of the parent holding company and other persons exposed to the risk of losses greater confidence in the predictability of the FDIC’s SPOE Strategy. It will allow them to estimate their losses in advance more accurately and with greater confidence. This will both mitigate the risk that the U.S. G-SIB’s failure might have on financial stability and promote market discipline.

IV. Responses to Other Questions Raised in the Notice

A. Use of the OLF

Given the increased capital, liquidity, stress-testing and recovery and resolution planning requirements imposed over the past five years, U.S. G-SIBs are significantly more

⁷⁰ 78 Fed. Reg. at 76618; *see also id.* at 76622.

⁷¹ *Id.* at 76618. *Cf.* Douglas G. Baird, ELEMENTS OF BANKRUPTCY 225-26 (5th ed. 2010) (describing the availability under Chapter 11 of so-called “critical vendor orders” and other immediate payments to certain unsecured creditors where such payments are “in the interests of the estate as a whole”).

⁷² 78 Fed. Reg. at 76618.

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resilient and less likely to fail than they were before the financial crisis.⁷³ The weighted average of tier 1 risk-based common equity ratios of the largest U.S. bank holding companies have more than doubled since the financial crisis.⁷⁴ If any U.S. G-SIB fails despite these enhanced requirements, it should have more liquidity available to support effective resolution, given that post-financial crisis regulatory requirements applicable to U.S. G-SIBs, including the Liquidity Coverage Ratio and the Net Stable Funding Ratio, have changed the liquidity profile of G-SIBs both qualitatively and quantitatively.⁷⁵

The SPOE Notice requests comment on whether the FDIC's efforts to prevent the Orderly Liquidation Fund ("OLF") from becoming the functional equivalent of a bailout are effective.⁷⁶ We believe those efforts are effective. The Notice observes that the OLF "can only be used for liquidity purposes, and may not be used to provide capital support to the bridge company."⁷⁷ Instead, the bridge would be capitalized by receiving all of the failed company's assets, but not assuming its long-term unsecured liabilities.⁷⁸

⁷³ According to the Federal Reserve, the largest U.S. bank holding companies have increased their common equity to more than twice the amount they had during the financial crisis of 2008. Specifically, the weighted average of the tier 1 risk-based common equity ratios, which is the ratio of common equity to risk-weighted assets, of the 18 bank holding companies that participated in the Federal Reserve's Comprehensive Capital Analysis and Review (CCAR) has more than doubled from 5.6% at the end of 2008 to 11.3% in the fourth quarter of 2012, reflecting an increase in common equity from \$393 billion to \$792 billion during the same period. See Federal Reserve, Press Release – Federal Reserve Announces Results of Comprehensive Capital Analysis and Review (CCAR) (Mar. 14, 2013), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20130314a.htm> [hereinafter Federal Reserve, Press Release]. The results of the Federal Reserve's 2013 Dodd-Frank and CCAR stress tests show that all the largest U.S. bank holding companies have enough common equity to absorb all of their projected losses under the Federal Reserve's severely adverse stress scenario and still have enough common equity left to exceed the minimum risk-based and leverage capital requirements. See Federal Reserve, Comprehensive Capital Analysis and Review 2013: Assessment Framework and Results (Mar. 14, 2013), available at <http://www.federalreserve.gov/newsevents/press/bcreg/ccar-2013-results-20130314.pdf>.

⁷⁴ See Federal Reserve, Press Release, supra note 73.

⁷⁵ As former Federal Reserve Chairman Ben Bernanke has noted, "banks' holdings of cash and high-quality liquid securities have more than doubled since the end of 2007 and now total more than \$2.5 trillion." Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System, Stress Testing Banks: What Have We Learned (Apr. 8, 2013), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20130408a.htm>. According to the Basel Committee, the weighted average Liquidity Coverage Ratio was 119% for Group 1 banks (those with Tier 1 capital in excess of € 3 billion) and 126% for Group 2 banks (all others) under the revised Basel Committee standard issued in January 2013. For the Net Stable Funding Ratio, a longer-term structural ratio, Group 1 banks had a weighted average of 100% and Group 2 banks' average was 99%. Basel Committee on Bank Supervision, Basel III Monitoring Report (Sept. 2013), available at <http://www.bis.org/publ/bcbs262.pdf>.

⁷⁶ 78 Fed. Reg. at 76622.

⁷⁷ *Id.*

⁷⁸ *Id.*

According to the SPOE Notice “[t]he well-capitalized bridge financial company should be able to fund its ordinary operations through customary private market sources.”⁷⁹ We agree with this statement, although we understand the reference to the bridge’s ordinary operations refer mainly to the operations of the bridge’s operating subsidiaries. Nonetheless, we also think it is important to have the OLF as a backstop temporary secured liquidity facility – similar to, and subject to the safeguards relating to, traditional government liquidity back-up – in case liquidity is temporarily not available from the market, whether because of credit tightening, limitations on interbank lending, the leverage ratio, the single counterparty credit limits, general market disruption or other conditions.

The SPOE Notice also states that “OLF borrowings would be fully secured through the pledge of assets of the bridge financial company and its subsidiaries”⁸⁰ and priced at above-market rates.⁸¹ Finally, the SPOE Notice indicates that in the unlikely event that the collateral or the bridge financial company’s unencumbered resources would be insufficient to repay the borrowings, the FDIC has the authority to obtain repayment from other large U.S. financial institutions.⁸² The clear consequence of these statements is that neither the government nor the taxpayer is at risk. We agree, and therefore the OLF is not a form of bailout.

Governor Tarullo has similarly stated his belief that the use of the OLF to provide secured liquidity to bridge financial companies in a Title II resolution proceeding would not be a form of bailout:

“[F]unding from the FDIC, drawing on a line from Treasury . . . is not a capital injection and does not put taxpayers at risk. The FDIC has indicated that it will, in order to protect taxpayers more fully, require that the financing be collateralized and if, for any reasons, the FDIC cannot recover the full amount of credit extended, the shortfall is to be made up by a tax on other large financial firms.”⁸³

The Financial Stability Board also defines “bailout” in a way that similarly distinguishes capital from liquidity:

“‘Bail-out’ – any transfer of funds from public sources to a failed firm or a commitment by a public authority to provide funds with a view to

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 76617. This would ensure that the FDIC’s use of the OLF is consistent with the classic principles for sound central bank lender-of-last-resort facilities – that the central bank lend freely, but only during a financial panic, to solvent firms, fully secured by good collateral, and at penalty rates. Walter Bagehot, *LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET (1873)*.

⁸² *78 Fed. Reg.* at 76622.

⁸³ Tarullo, Richmond Conference, *supra* note 7, at 5.

sustaining a failed firm (for example, by way of guarantees) that results in benefits to the shareholders or uninsured creditors of that firm, or the assumption of risks by the public authority that would otherwise be borne by the firm and its shareholders, where the value of the funds transferred is not recouped from the firm, its shareholders and unsecured creditors or, if necessary, the financial system more widely, or where the public authority is not compensated for the risks assumed.”⁸⁴

Under this definition, providing secured liquidity is not a bailout, especially if it is provided in accordance with the classic principles for sound central bank lender-of-last-resort facilities,⁸⁵ or is recoverable from large financial institutions as any losses suffered by the OLF would be.⁸⁶

The Associations agree with the FDIC, Governor Tarullo and the Financial Stability Board that use of the OLF would not constitute a bailout, particularly given that the industry would bear any ultimate losses. The OLF would not provide capital or absorb losses. It would only provide secured liquidity in accordance with the classic conditions that have guided central bankers in their use of lender-of-last-resort facilities for nearly 150 years – the borrower must be solvent, the liquidity fully secured by good collateral and the liquidity priced at above-market rates.⁸⁷ Because of these safeguards, there is no reasonable prospect that the OLF will not be repaid.⁸⁸

The SPOE Notice mentions the possibility of using the OLF to provide guarantees to facilitate the provision of liquidity from the private sector.⁸⁹ The Associations support this alternative as providing valuable flexibility, and encourage the FDIC to coordinate with the Treasury to provide more details about how such guarantee arrangements would work. The Associations look forward to continuing to engage with the FDIC regarding the possibility of a private lending facility backed by the OLF.

B. Unfounded Concern: Duty to Liquidate

The FDIC has a statutory duty to carry out its SPOE Strategy in a way that achieves the twin goals of promoting market discipline and maintaining financial stability. Consistent

⁸⁴ Financial Stability Board, Peer Review, *supra* note 25, at 2. *See also* Bipartisan Policy Center Report, *supra* note 3, at 46-54; Randall D. Guynn, *Are Bailouts Inevitable?*, 29 YALE J. ON REG. 121, 125-127 (2012) (defining bailout).

⁸⁵ Bagehot, *supra* note 81.

⁸⁶ Dodd-Frank Act § 210(o)(1)(B); 78 Fed. Reg. at 76616.

⁸⁷ Bagehot, *supra* note 81.

⁸⁸ Dodd-Frank Act § 210(o)(1)(D)(ii); 78 Fed. Reg. at 76616.

⁸⁹ 78 Fed. Reg. at 76616.

with these goals are its duties to maximize the value of financial companies put into a Title II receivership for the benefit of their creditors and to minimize their losses.

Nonetheless, certain members of the FDIC's Systemic Resolution Advisory Committee ("**SRAC**") recently asserted that the FDIC's SPOE Strategy may be inconsistent with the FDIC's duty to liquidate under Title II.⁹⁰ The thrust of their argument is that because the parent company's operating subsidiaries would be transferred to a bridge financial company, the FDIC's SPOE Strategy is more like a reorganization under Chapter 11 of the Bankruptcy Code than a liquidation as required by Title II.⁹¹

Although the Notice, which preceded the SRAC meeting, did not raise this assertion, we believe it worthwhile to explain why it is clearly wrong so as to remove any possible doubt as to the validity of the SPOE Strategy.

Section 214(a) of Title II does provide that "All financial companies put into receivership under this title shall be liquidated." But, under the SPOE Strategy, only a U.S. G-SIB's parent holding company is put into a Title II receivership, not its operating subsidiaries. The parent company is "liquidated" under any conceivable meaning of that term as required by Section 214.

There is no suggestion in the statute that the FDIC is required to put a U.S. G-SIB's operating subsidiaries in a Title II receivership. Indeed, certain subsidiaries such as insured depository institution ("**IDI**") subsidiaries are not even eligible to be put into a Title II receivership.⁹² Nor is there any suggestion in the statute that the FDIC has a duty to liquidate them if their parent is put into a Title II receivership. There is also no suggestion in the statute that the duty to liquidate the parent overrides the FDIC's authority under Section 210(a)(1)(G) and (h)(1)(B) to transfer all or some of the parent's operating subsidiaries or other assets to a bridge financial company. Indeed, the FDIC's duty to liquidate the parent under Section 214 needs to be read in the context of the entire language and structure of Title II. That language requires the FDIC to resolve any covered company put into a Title II receivership in a manner that is:

- "orderly" as described by Section 204 and implied by the statutory and section headings listed above;⁹³

⁹⁰ See, e.g., comments of Paul Volcker at the FDIC's SRAC meeting on December 11, 2013, available at: http://www.vodium.com/MediapodLibrary/index.asp?library=pn100472_fdic_SRAC.

⁹¹ *Id.*

⁹² See Dodd-Frank Act, § 201(a)(9)(B).

⁹³ Section 204(a) describes the purpose of Title II as providing the necessary authority for the FDIC "to liquidate failing financial companies that post a significant risk to the financial stability of the United States **in a manner that mitigates such risk and minimizes moral hazard.**" (Emphasis added.) The highlighted passage in Section 204(a) seems to be a statutory definition of "orderly" since the heading of Section 204 is "**Orderly** Liquidation of Covered Financial Companies." (Emphasis added.) This statutory

- “avoids and mitigates” any of the serious adverse effects on financial stability in the United States that might occur if the covered company were resolved under the Bankruptcy Code;⁹⁴
- “maximizes the net present value return from the sale or disposition of [the covered company’s] assets” and “minimizes the amount of any loss;”⁹⁵
- ensures that, if any subset within the same class of creditors (such as long-term unsecured debt holders left behind in the receivership) are treated worse than any other subset (such as the holders of critical operational liabilities transferred to the bridge), the disfavored creditors receive **at least** as much value in satisfaction of their claims as they would have received in a liquidation under Chapter 7 of the Bankruptcy Code;⁹⁶ and
- treats claimants as consistently as possible with how they would have been treated in a successful reorganization under the Bankruptcy Code.⁹⁷

requirement to liquidate a covered company in a manner that is orderly is also implied by the headings of Title II, “**Orderly** Liquidation Authority” and Section 206, “Mandatory Terms and Conditions for All **Orderly** Liquidation Actions.” (Emphasis added.)

⁹⁴ Indeed, the Secretary of the Treasury is not even legally permitted to put a covered financial company into a Title II receivership unless the Secretary determines that “the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States” and “any action under Section 204 would avoid or mitigate such adverse effects.” Dodd-Frank Act, § 203(b)(2) and (5).

⁹⁵ Dodd-Frank Act, § 210(a)(9)(E)(i) and (ii).

⁹⁶ See Dodd-Frank Act, §§ 210(a)(7)(B) and (d)(2)(B). The fact that liquidation value is the *minimum* recovery right to which a disfavored creditor is entitled strongly implies that the FDIC has a duty to liquidate the parent company in a manner that produces a greater average value for the benefit of all its creditors. Under the SPOE Strategy, that value enhancing purpose is achieved by transferring the operating subsidiaries to a bridge financial company and keeping them open and operating, not by liquidating them.

⁹⁷ This duty is clearly implied by the express language of Section 209 of the Dodd-Frank Act, which requires the FDIC “[t]o the extent possible, to harmonize applicable rules and regulations promulgated under [Title II] with the insolvency laws that would otherwise apply to a covered financial company,” which in the case of a U.S. bank holding company would be the Bankruptcy Code and its implementing regulations and judicial interpretations. It is also clearly implied by the requirement that Title II may only be invoked – legally – under circumstances in which reorganizing the covered company under the Bankruptcy Code would result in serious adverse effects on financial stability in the United States and the use of Title II would “avoid or mitigate” such adverse effects. It is hard to see how Title II could avoid or mitigate such adverse effects if the FDIC liquidated a U.S. G-SIB parent in a manner that treated its claimants worse than they would have been treated in a reorganization under the Bankruptcy Code. Such a strategy would foster contagious panic, not contain it, and therefore it would exacerbate, not mitigate, such adverse effects.

By liquidating the parent by transferring its operating subsidiaries to a bridge financial company and using the parent's other assets to recapitalize the subsidiaries in order to keep them open and operating and otherwise to preserve their going concern value, the FDIC's SPOE Strategy fulfills both the FDIC's duty to liquidate the parent and its duties to maximize the value of the former parent's subsidiaries for the benefit of the parent's creditors and promote financial stability.

C. "Perceived" Funding Advantage

The SPOE Notice asserts that "SIFIs have a widely perceived funding advantage over their smaller competitors," which perception "arises from a market expectation that a SIFI would receive public support in the event of financial difficulties."⁹⁸ The SPOE Notice discusses how the SPOE Strategy may mitigate or eliminate such perceptions, requests comment on this "perceived funding advantage" generally and asks whether (i) the potential use of the OLF in a Title II resolution creates a funding advantage for a SIFI and its operating subsidiaries and (ii) a potential funding advantage would lead to undue consolidation in the banking industry.⁹⁹ We address each of these matters in turn below.

1. U.S. G-SIBs Do Not Enjoy a Funding Advantage as a Result of Market Perceptions of Implicit Government Support

The Associations strongly disagree with the implication in the Notice—which has been asserted by others but has not been supported by persuasive evidence to date—that U.S. G-SIBs enjoy funding advantages as a result of a market perception of implicit government support. The studies to date do not support such a conclusion with respect to an existing funding advantage, and no such advantage is expected prospectively. As a result, we believe it would be ill-advised to base policy decisions on the assumption that funding advantages exist where none has been persuasively shown to exist and where no market perception of such a funding advantage should reasonably exist.

With respect to the unsubstantiated assertion that G-SIBs enjoy a funding advantage as a result of implicit government support, there is simply no persuasive evidence that U.S. G-SIBs are currently able to borrow more cheaply as a result of some market perception of implicit government support.¹⁰⁰ Although there have been a variety of attempts to study

⁹⁸ 78 *Fed. Reg.* 76622-76623. These advantages purportedly result from unsecured creditors' expectations of government support for U.S. G-SIBs during financial difficulties, making investments in these institutions safer compared to investments in smaller financial institutions that might not receive government support.

⁹⁹ 78 *Fed. Reg.* 76622-76623.

¹⁰⁰ We note that some research actually finds a significant funding disadvantage post-crisis for U.S. G-SIBs. See Steve Strongin, Amanda Hindlian, Sandra Lawson, Jorge Murillo, Koby Sadan, and Balakrishna Subramanian, "Measuring the TBTF Effect on Bond Pricing," The Goldman Sachs Group, Inc. Global Markets Institute Working Paper (2013) at 6; Credit Suisse, U.S. Financial Institutions: Regulatory Reform Impact on Bank Credit Spreads (July 2013) at 2.

this complex question, the existing research in this area suffers from a number of significant shortcomings.

As an initial matter, evaluating the relative funding costs of U.S. G-SIBs and other banks and identifying the drivers of any differences in their funding costs is a complex and challenging endeavor. For example, there is considerable diversity in the ways that differently-sized banks with different business models fund themselves: U.S. G-SIBs and other larger banks typically fund themselves through a broader mix of insured and uninsured deposits, senior and subordinated debt, and other sources, whereas other banks typically fund themselves principally through insured deposits.¹⁰¹ These differences in funding models have a significant impact on both the absolute and relative funding costs of banks, and recent research indicates that these differences are the primary reason that the average funding costs of U.S. G-SIBs are typically the same if not greater than those of U.S. non-G-SIBs that rely primarily on deposit funding.¹⁰²

Among the shortcomings in the research in this area, some of the existing research fails to evaluate funding costs during appropriate periods of time, including the more recent period following the enactment of a variety of regulatory reforms. These regulatory reforms, including the Title II resolution framework, are expressly intended to end TBTF perceptions.¹⁰³ An effective resolution framework arising from the combination of Title I resolution planning and Title II resolution strategies means that creditors cannot possibly have a reasonable expectation of government support in the future.¹⁰⁴

Second, most of the research to date fails to distinguish between an unfair advantage resulting from perceptions of possible government interventions in the failure of a G-SIB and other legitimate advantages enjoyed by large institutions in all industries.¹⁰⁵ These types of legitimate advantages may include, for example, greater product and geographic diversification, greater liquidity of debt issuances, broader access to funding during periods of economic difficulty, more historical loss data, economies of scale and scope, investment research coverage, and other possible factors.¹⁰⁶

¹⁰¹ Randall S. Kroszner, *A Review of Banking Funding and Cost Differentials* 13 (Nov. 16, 2013).

¹⁰² *Id.* at 30 and Figure 5. See also Michel Araten and Chris Turner, "Understanding the Funding Cost Differences Between Global Systemically Important Banks (G-SIBS) and non-G-SIBs in the USA" Figure 1, *Journal of Risk Management in Financial Institutions*, vol. 6, 4 (387-410) at Figure 1 (2013).

¹⁰³ Kroszner, *supra* note 101, at 6. Indeed, there is strong evidence that these regulatory reforms are clearly shaping market expectations as intended. See, e.g., Moody's, *supra* note 14, at 1 (finding significant progress in developing the Orderly Liquidation Authority and removing the credit-rating uplift for certain bank holding companies).

¹⁰⁴ See Moody's, *supra* note 14, at 1; Miller, *supra* note 38, at 1-2.

¹⁰⁵ Kroszner, *supra* note 101, at 2.

¹⁰⁶ *Id.*

Third, much of the existing research evaluates the funding costs of banks together with other non-bank financial companies, creating an over broad data set that fails to illuminate the relative funding costs of banks specifically.¹⁰⁷

Finally, much of this research fails to distinguish and differentiate funding liabilities with different risk characteristics, including different investors' rights, differences in the laws of the varying jurisdictions where the liabilities are issued, differences in maturities, etc., all of which affect the relative cost of those liabilities.¹⁰⁸

While the research in this area does not support a funding advantage based on government support, more recent developments have helped to offer a corrective view of the likelihood of government support. Through the SPOE Strategy, the government has signaled in the strongest possible terms that it will not step in to bail out a U.S. G-SIB. Moody's, for example, taking that signal, has removed all uplift from U.S. government support in the ratings for bank holding company debt of the U.S. G-SIBs.¹⁰⁹ These recent developments, combined with the absence of persuasive evidence of an existing funding advantage based on government support, make clear that no perceived funding advantage should be presumed to exist.

2. The OLF Does Not Create a Funding Advantage

Just as U.S. G-SIBs do not enjoy a funding advantage as a result of market perception of implicit government support, the existence of the OLF under Title II also does not create a funding advantage for U.S. G-SIBs. While the OLF may provide temporary secured liquidity in the resolution of a failed U.S. G-SIB under Title II, the shareholders and creditors of the U.S. G-SIB will bear all the losses arising from the failure. The proceeds of the OLF cannot be used to repay those shareholders and creditors.

As discussed in detail in Section IV.A, "Use of the OLF," above, the OLF is simply an alternative means to provide temporary secured liquidity in resolution. It is consistent with the basic central bank function to deal with the fact that a significant element of a bank's role in the economy is to transform short-term deposits into longer-term assets.¹¹⁰ This function is also carried out by discount window lending by the Federal Reserve, broad-based special lending programs under Section 13(3) of the Federal Reserve Act and lending by the FDIC to banks in receivership pursuant to Section 13(c) of the Federal Deposit Insurance Act. Smaller bank holding companies, through their principal bank subsidiaries, which typically represent almost all their consolidated assets, have access to FDIC liquidity in the case of an FDIC receivership under the Federal Deposit Insurance Act. This is comparable to the OLF

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *Id.* at 27.

¹⁰⁹ Moody's, *supra* note 14.

¹¹⁰ See Bipartisan Policy Center Report, *supra* note 3, at 36-42.

liquidity available for U.S. G-SIBs in a Title II receivership, and thus there is no meaningful competitive advantage associated with OLF liquidity.

To the extent that operating subsidiaries of a U.S. G-SIB enjoy a funding advantage over entities that are not subsidiaries of a U.S. G-SIB, this advantage results from the previously-mentioned diversification and liquidity and from the existence of the “debt shield” or “capital shield” provided by the parent company—not by the possibility of access to the OLF in resolution. The debt shield provides an additional layer of loss absorbency before losses would be imposed on operating subsidiary creditors under the SPOE Strategy. The debt shield is paid for by the parent holding company, not by taxpayers, and is not subsidized by the government. In other words, a U.S. G-SIB *pays* for any advantage at the operating subsidiary level through higher equity and debt costs at the holding company. The financial source of strength provided by the parent of the U.S. G-SIB to its operating subsidiaries is now considered in the Moody’s ratings of bank level senior debt.¹¹¹ However, this advantage is no different from the advantage enjoyed by senior creditors when they are supported by significant amounts of subordinated debt, and is not tied to the availability of the OLF.

3. Impact of Perceived Funding Advantage on Consolidation within the Banking Industry

As explained above, any perception that Title II, or the potential to use the OLF, creates a funding advantage for U.S. G-SIBs is misplaced. As a result, there is no perceived funding advantage which would incentivize consolidation within the banking industry, and there are numerous impediments and disincentives to consolidation either by the U.S. G-SIBs or by institutions that might seek to become large and systemically significant enough to be subject to Title II.

First, the largest U.S. G-SIBs are precluded from becoming larger through consolidation by the prohibition, provided by the Riegle-Neal Act, on approval of certain acquisitions that would cause the resulting institution to have greater than 10% of deposits of IDIs in the U.S.;¹¹² the prohibition, added by Dodd-Frank, on acquisitions that would cause the resulting institution to have greater than 10% of the liabilities of financial companies;¹¹³ and the Federal Reserve’s interpretation of the so-called “financial stability factor” added by Dodd-Frank which the Federal Reserve must weigh when considering whether to approve merger or acquisition applications.¹¹⁴

¹¹¹ Moody’s, *supra* note 14, at 2 (“Moody’s believes that if support were to be provided, it would be derived not from a bail-out by the government, but... from the bail-in of holding company creditors.”).

¹¹² Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, § 101(a).

¹¹³ Dodd-Frank Act, § 622.

¹¹⁴ Dodd-Frank Act, § 604(d)-(f).

Second, there are major disincentives, and perhaps insuperable obstacles, to any institution seeking to become designated as a SIFI under Title I of Dodd-Frank, including (i) a much more stringent regulatory regime, such as the previously mentioned common equity surcharge, supplemental leverage requirement for U.S. G-SIBs, the promised long-term unsecured debt requirement (as well as potential other restrictions such as a sharply lower single counterparty credit limits); and (ii) the Federal Reserve's signaling that it would be unlikely to approve any transactions that would create a new large U.S. banking organization.¹¹⁵

To the extent there has been consolidation activity in recent years, it has been the result not of the pursuit of a funding advantage, but rather of other factors, including (i) banks taking advantage of economies of scale as increased opportunities arose from technological progress and the removal of intra- and inter-state branching restrictions; (ii) banks expanding to meet the needs of their expanding multinational corporate clients; (iii) banks adapting to the shift in corporate long-term funding from bank lending to debt capital markets; and (iv) banks seeking to increase credit portfolio diversity, with respect to both types of lending and geographic coverage, to manage credit risk more effectively.

In summary, the best way to address any misperceived funding advantage is to dispel the misperception. The most critical element in accomplishing that objective is for the FDIC to adopt a robust SPOE Strategy that is expected by market participants and other stakeholders, including foreign regulators, to be a strategy that the FDIC can and, in the circumstances called for by Title II, will execute in coordination with other regulators around the world. The SPOE Strategy both minimizes the risk that resolution will have systemic consequences and ensures that the creditors and shareholders of a U.S. G-SIB will bear the losses resulting from any failure, thereby ensuring that a U.S. G-SIB's cost of funding reflects the risks arising from the U.S. G-SIB's operations.

D. Forced Subsidiarization and Pre-Positioned Loss-Absorbing Resources

The SPOE Notice asks a series of questions aimed at determining whether the resolvability of U.S. G-SIBs would be enhanced if they were forced to convert the foreign branches of their bank subsidiaries into foreign subsidiaries ("**forced subsidiarization**") and maintain minimum amounts of pre-positioned loss-absorbing resources at the new foreign subsidiaries.¹¹⁶ The Notice identifies lack of international cooperation, and especially the

¹¹⁵ See, e.g., the Federal Reserve's approval of Capital One Financial Corporation's acquisition of ING Bank, fsb and its associated brokerage company, available at www.federalreserve.gov/newsevents/press/orders/order20120214.pdf. In its approval order, the Federal Reserve indicated that the financial stability analysis involves review of quantitative metrics (including size, the availability of substitute providers, interconnectedness, contribution to the complexity of the financial system and extent of cross-border activities) and qualitative factors such as opacity and ease of resolution. The Federal Reserve in suggesting a "safe harbor" for proposals that involve an acquisition of less than \$2 billion in assets, result in a firm with less than \$25 billion in total assets, indicated that only *de minimis* acquisitions for G-SIBs would be permissible in the future.

¹¹⁶ 78 Fed. Reg. at 76623-76624.

possibility of foreign ring-fencing of local assets and other loss-absorbing resources, as among the key challenges to a successful resolution under the SPOE Strategy.¹¹⁷

The Notice asked whether forced subsidiarization would reduce the likelihood of foreign ring-fencing and improve the resolvability of a U.S. G-SIB under Title II or the Bankruptcy Code, or limit the spread of contagion across jurisdictions during a financial crisis.¹¹⁸ It also requested comment on the potential costs of forced subsidiarization, as well as the potential benefits of a branch structure in terms of flexibility in managing capital and liquidity, funding efficiency, and resiliency under normal market conditions.¹¹⁹

1. Forced Subsidiarization Will Not Reduce the Risk of Foreign Ring-fencing or Improve Resolvability

We agree that foreign ring-fencing and a general lack of international coordination and cooperation would present challenges to the successful resolution of a U.S. G-SIB under the SPOE Strategy. But we do not believe that forced subsidiarization is the solution. By forced subsidiarization, we mean a requirement imposed on a U.S. G-SIB to convert the foreign branches of one or more of its depository institution subsidiaries into separate corporate entities (subsidiaries). Forced subsidiarization does not include a voluntary decision by a U.S. G-SIB to structure its foreign operations through one or more separate subsidiaries, instead of branches, for reasons reflecting business, funding or similar factors facilitating the ongoing operations of the U.S. G-SIB.

U.S. G-SIBs should remain free to structure their international operations through foreign branches, separately incorporated subsidiaries or any combination of the two. They should be able to do so based on their own determinations about the relative operational, capital, liquidity and risk-management efficiency of any particular structure and whatever other factors they consider to be important to their international businesses. One of the great benefits of the SPOE Strategy is that it allows U.S. G-SIBs operational, capital and funding flexibility across their organizations, whether through branches or subsidiaries. This flexibility would be lost with forced subsidiarization.

Forced subsidiarization will not reduce the likelihood of foreign ring-fencing of local assets or other loss-absorbing resources, improve the resolvability of U.S. G-SIBs or limit the spread of contagion. Foreign supervisors are just as free to ring-fence the local assets and other loss-absorbing resources of foreign subsidiaries as they are to ring-fence the local assets and loss-absorbing resources of foreign branches. The very concept of SPOE, where the parent will recapitalize its operating subsidiaries, is inconsistent with the idea that subsidiarization will limit the spread of contagion. The SPOE Strategy and the amount of loss-absorbing resources at the top of a U.S. G-SIB determine resolvability—not whether the

¹¹⁷ *Id.* at 76623.

¹¹⁸ *Id.* at 76624.

¹¹⁹ *Id.*

group's foreign operations are structured as branches or subsidiaries. Forced subsidiarization will not limit the spread of contagion because in a stressful economic scenario the market does not distinguish between branches and subsidiaries based on their legal form. Forced subsidiarization can also be extremely costly in terms of legal costs, transition costs, regulatory approvals, operational disruption and other reasons. Forced subsidiarization would result in unnecessary restructuring costs and inefficiencies that could adversely affect the ability of U.S. G-SIBs to serve their clients effectively.

As a result, we believe that the costs of forced subsidiarization would greatly exceed any potential benefits of such a forced restructuring of a U.S. G-SIB's international operations.

2. Possible Pre-Positioning Requirements

Certain regulators have raised the possibility of requiring U.S. G-SIBs to pre-position some amount of loss-absorbing resources at their foreign operating subsidiaries.¹²⁰ The stated purpose would be to reinforce the confidence of host-country supervisors in the FDIC's commitment to carry out its SPOE Strategy in a manner that uses a top-tier parent's resources to recapitalize its foreign subsidiaries.¹²¹

The Associations do not believe that such pre-positioning requirements are necessary to reinforce such confidence or otherwise make the FDIC's SPOE Strategy effective. The SPOE Strategy is premised upon a single resolution proceeding in the home country only, and sufficient loss absorbing resources available at the holding company level to ensure that there are sufficient resources available to downstream globally, on an equitable basis, to keep all operating subsidiaries open, operating, and serving clients and markets – and thus preserving value for holding company creditors. As long as the parent has sufficient loss absorbing resources, host-country supervisors should have sufficient confidence that the FDIC will use all of a parent's available loss-absorbing resources to recapitalize its U.S. and foreign subsidiaries in an equitable manner, as otherwise recommended in this comment letter.¹²²

If the regulators nevertheless decide to impose such pre-positioning requirements, they should be limited to the minimum amount that the regulators believe are needed to reinforce that confidence and should be done in a manner that avoids unintended consequences and leaves in all events sufficient loss-absorbing resources at the parent as required for SPOE to be most effective. Excessive pre-positioning requirements could have a number of unintended consequences, including the following:

¹²⁰ See, e.g., Tarullo, Richmond Conference, *supra* note 7, at 10-11.

¹²¹ *Id.*

¹²² See recommendations 2-4 in the Executive Summary of this letter.

- Hindering the FDIC's SPOE Strategy by trapping a significant amount of loss-absorbing resources in local jurisdictions instead of being available at the top-tier parent to be used by the FDIC wherever they are needed to keep operating subsidiaries open and operating and out of their own insolvency proceedings;
- Increasing the risk of a fragmented, uncoordinated set of separate resolution proceedings for each material operating subsidiary that will hinder the FDIC's goals under its Title II SPOE Strategy of maximizing value, minimizing losses and promoting financial stability and be inconsistent with the coordinated approach led by the home-country resolution authority as recommended by the FSB's *Key Attributes*;¹²³
- Increasing the risk that a single host-country supervisor could threaten or put a foreign subsidiary into local insolvency proceedings, triggering a risk of similar actions by other host-country supervisors – precisely the opposite outcome that SPOE and Title II of Dodd-Frank are designed to produce;
- Reducing the efficiency of U.S. G-SIBs under normal market conditions by restricting their ability to allocate capital and other resources efficiently, resulting in a misallocation of resources; and
- Reducing the resiliency of U.S. G-SIBs and limiting their recovery options under severe economic conditions by limiting the loss-absorbing resources available at the top-tier parent to be used by management wherever they are needed to help any troubled operating subsidiaries to recover.

The Associations intend to comment further on prepositioning of loss absorbing resources and other capital structure implications of the SPOE Strategy after the Federal Reserve issues its expected proposals on these issues.

E. Contingent Value Rights

The SPOE Notice describes how the bridge financial company would be capitalized upon exit through a debt-for-equity exchange. Another set of options for exit and capitalization would be a full or partial IPO or the sale of on-going operations or subsidiaries, the proceeds of which would be distributed to claimants in the receivership. A partial IPO could help establish an enterprise value when used in combination with a debt-for-equity swap.

The capitalization options described in the SPOE Notice include a possibility for equity holders and subordinated creditors to receive options or warrants. The Associations believe this is a valuable innovation in a resolution proceeding that would minimize the risk

¹²³ See Financial Stability Board, *Key Attributes*, supra note 25, at Annex I.

that the valuation upon exit is wrong, and would allow junior claimants, if any, to receive some value if losses are lower than expected.

In order to address this potential concern regarding valuation of the holding company's outstanding equity and debt, the Associations encourage the FDIC to consider designing a structure to distribute contingent value rights – such as warrants or options in the residual value of a bridge holding company – to claimants who otherwise would receive no value for their claims in the FDIC claims process.¹²⁴ If the business transferred to the bridge turns out to be worth more than the FDIC initially determined in the claims process, such claimants would be able to receive the value they are entitled to. We agree that the contingent value rights should have a limited duration and an appropriate exercise price. But the duration of these rights should be long enough for the market to stabilize, if issued in the middle of a financial crisis.

V. Technical Issues

As noted above, in addition to the key elements of the SPOE Strategy, there are certain areas of technical detail addressed in the SPOE Notice that are elaborated upon in further detail in this section. As noted above, the Associations believe further details on the SPOE Strategy would be welcome in the current, and future, releases, including on how the SPOE Strategy, resolution under the FDIA, and resolution under the Bankruptcy Code can align.

A. Claims Process

It is essential to the successful implementation of the SPOE Strategy that creditors and counterparties understand how the SPOE Strategy would work in practice, how creditors could provide consultation in an SPOE process, and how information would be provided to creditors. The Associations believe that input from an informal creditors committee to the FDIC and bridge financial company during the resolution process, for example, can help to facilitate market acceptance of the bridge and the ultimate resolution of the bridge.

The Associations believe it is important for the FDIC to provide guidance on how it would calculate the minimum recovery right. The minimum recovery right provides a floor to unsecured creditors to protect them from unequal treatment. The Associations believe it would be appropriate for the FDIC to provide further detail on how it would calculate the minimum recovery right under Title II, including the standards that would be used to measure the Chapter 7 liquidation floor.

¹²⁴ For a discussion of the utility of contingent value rights when valuation is uncertain, see Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L. J. 1930 (2006); Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARVARD L. REV. 775 (1988).

Furthermore, the Associations recommend that the FDIC expand on its existing regulation on the claims process and the discussion of the claims process in the SPOE Notice to further clarify the procedural rights available to creditors. This should include both the ability to challenge disparate treatment of similarly situated creditors and to pursue claims that a creditor, or class of creditors, failed to receive the statutorily required Chapter 7 minimum.

B. Further Alignment with the Bankruptcy Code

The SPOE Notice describes the claims process and notes that the FDIC intends to adapt certain forms and practices from a Chapter 11 proceeding. It would be helpful to have further details on how the SPOE Strategy would be aligned with the practices and procedures under the Bankruptcy Code.

C. Valuation and Accounting

The SPOE Notice states that the “FDIC has consulted with the SEC regarding the accounting framework that should apply in a Title II securities-for-claims exchange, and has determined that the ‘fresh start model’ is the most appropriate accounting treatment to establish as the new basis for financial reporting for the emerging company.”¹²⁵ It stated that the fresh start model is the same one used in a reorganization under the Bankruptcy Code.¹²⁶ That model “requires the determination of a fair value measurement of the assets of the company, which represents the price at which each asset would be transferred between market participants at an established date.”¹²⁷ “The valuation and auditing processes would establish the value of the financial instruments, including subordinated or convertible debt and common stock in Newco (or Newcos) issued to creditors in satisfaction of their claims.”¹²⁸

While the Associations are grateful for this information about the valuation and auditing process the FDIC would expect to use in valuing the financial instruments of Newco (or Newcos), we believe it will enhance the effectiveness of the FDIC’s SPOE Strategy for the FDIC to provide substantially more detail about the timing and accounting method or methods of valuing the assets and liabilities, and preparing and disclosing financial statements, of:

- the bridge financial company upon the transfer of the former parent's operating subsidiaries and other assets to, and the assumption of any liabilities of the former parent by, the bridge financial company;

¹²⁵ 78 Fed. Reg. 76619.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

- the bridge financial company during the period between the transfer of any of the former parent's assets to, or the assumption of any of the former parent's liabilities by, the bridge financial company and the bridge financial company's conversion into Newco (or Newcos) or the sale of any of its assets, including any operating subsidiaries; and
- Newco (or Newcos) upon their succession to the assets and liabilities of the bridge financial company or the transfer of any of the bridge financial company's assets to, or the assumption of its liabilities by, Newco (or Newcos) and the distribution of any shares or other securities (or the cash proceeds from any sale thereof) of Newco (or Newcos) to the receivership or in satisfaction of any claims against the receivership.

In addition, the Notice should specify the basis for the FDIC's conclusion that fresh start accounting, similar to the accounting method used in a reorganization under the Bankruptcy Code, was the most appropriate method for Newco (or Newcos). What are the details of that method? For example, since in the SPOE Strategy the only company being "reorganized" is the holding company, how is the fresh start method applied to subsidiaries? Did the FDIC consider any other methods? The financial statements of a company in reorganization are prepared by management and audited by independent auditors. In a Title II receivership, would the FDIC be involved? What assets and liabilities of Newco (or Newcos) would be required to be marked to fair value? What would be the timing of these valuations and the timing and extent of disclosure of any revaluated financial statements?

Would the FDIC also propose to use fresh start accounting to revalue the assets or liabilities of the bridge financial company, and if not, what methods would the FDIC use? The questions regarding the details of the accounting methodology raised with respect to the Newco (or Newcos) above should also be addressed with respect to the bridge holding company, as well.

The reference in the Notice to fresh start accounting being applicable to the "emerging company" appears to address only the accounting treatment of Newco, but not the accounting treatment of the bridge financial company prior to Newco's emergence. As suggested above, the Notice should clarify whether the assets or liabilities transferred to the bridge financial company prior to Newco's emergence will be required to be revalued so the market can have a more complete understanding of the accounting implications of the SPOE Strategy.

The Associations recommend that the FDIC consider having discussions with key stakeholders or even issuing a separate notice providing additional details about these valuation and accounting issues and soliciting appropriate comment.

D. Disclosure Requirements

The SPOE Notice commits the FDIC to providing the “best possible information” regarding the bridge financial company’s financial condition to creditors, and indicates that compliance with all disclosure and reporting requirements would be required. The FDIC requested comment on the information, reports, or disclosures that would be most important to claimants, the public, and other stakeholders. We would suggest that the FDIC look to its experience in the context of resolutions under the FDI Act, as well as relevant practices under U.S. bankruptcy procedures, for models of information reports or disclosures that might be useful to creditors, claimants, and other stakeholders in the context of a Title II resolution. Also, information of the type disclosed by publicly traded companies prior to failure may be of use to such stakeholders, including potential lenders to the bridge financial company. We also believe it would be useful for the FDIC to develop a reporting schedule that, barring unforeseen events, could be relied upon by market participants for periodic updates regarding progress on the resolution process. This would be particularly useful in regards to the first U.S. G-SIB resolution where all matters would be a case of first impression.

E. Coordination with Credit Rating Agencies

We suggest that the expectations for the ability of the bridge financial company to be rated by the credit rating agencies should be discussed, and any conclusions arrived at between the regulators and rating agencies should be shared with the institutions and the public.

* * * * *

Mr. Robert E. Feldman
February 18, 2014

The Associations thank the FDIC for the opportunity to respond to the FDIC's request for comments. If you have any questions, please do not hesitate to call John Court at 202-649-4628 (email: john.court@theclearinghouse.org) or Carter McDowell at 202-962-7327 (email: cmcdowell@sifma.org).

Respectfully Submitted,



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February 18, 2014

cc: The Honorable Martin Gruenberg
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The Honorable Thomas Hoenig
Federal Deposit Insurance Corporation

The Honorable Jeremiah Norton
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The Honorable Richard Cordray
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The Honorable Thomas J. Curry
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Annex A

The Clearing House. Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing – through regulatory comment letters, amicus briefs and white papers – the interests of its owner banks on a variety of important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing and settlement services to its member banks and other financial institutions, clearing almost \$2 trillion daily which represents nearly half of the automated clearing-house, funds transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

The Securities Industry and Financial Markets Association. The Securities Industry and Financial Markets Association (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 (GFMA). For more information, please visit www.sifma.org.

The American Bankers Association. The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its 2 million employees. Learn more at www.aba.com.

The Financial Services Roundtable. As *advocates for a strong financial future™*, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for \$98.4 trillion in managed assets, \$1.1 trillion in revenue, and 2.4 million jobs.

The Global Financial Markets Association. The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, visit <http://www.gfma.org>.