FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 302

RIN 3235-AL-51

Release No. 34-89394; File No. S7-02-16

Covered Broker-Dealer Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Federal Deposit Insurance Corporation ("FDIC" or "Corporation"); Securities and Exchange Commission ("SEC" or "Commission" and, collectively with the FDIC, the "Agencies").

ACTION: Final rule.

SUMMARY: The Agencies, in accordance with section 205(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), are jointly adopting a final rule to implement provisions applicable to the orderly liquidation of covered brokers and dealers under Title II of the Dodd-Frank Act ("Title II").

DATES: The final rule is effective on [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[1] (the "Dodd-Frank Act") provides an alternative insolvency regime for the orderly liquidation of large financial companies that meet specified criteria.[2] Section 205 of Title II sets forth certain provisions specific to the orderly liquidation of certain large broker-

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1 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (2010) and codified at 12 U.S.C. 5301 et seq. Title II of the Dodd-Frank Act is codified at 12 U.S.C. 5381-5394.

2 See 12 U.S.C. 5384 (pertaining to the orderly liquidation of covered financial companies).

dealers, and paragraph (h) of section 205 requires the Agencies, in consultation with the Securities Investor Protection Corporation ("SIPC"), jointly to issue rules to implement section 205.[3]

In the case of a broker-dealer, or a financial company[4] in which the largest U.S. subsidiary is a broker-dealer, the Board of Governors of the Federal Reserve System ("Board") and the Commission are authorized jointly to issue a written orderly liquidation recommendation to the U.S. Treasury Secretary ("Secretary"). The FDIC must be consulted in such a case.

The recommendation, which may be sua sponte or at the request of the Secretary, must contain a discussion regarding eight criteria enumerated in section 203(a)(2)[5] and be approved by a vote of not fewer than a two-thirds majority of the Board then serving and a two-thirds majority of the Commission then serving.[6] Based on similar but not identical criteria enumerated in section 203(b), the Secretary would consider the recommendation and (in consultation with the President) determine whether the financial company poses a systemic risk meriting liquidation under Title II.[7]

Title II also provides that in any case in which the Corporation is appointed receiver for a covered financial company, [8] the Corporation may appoint itself receiver

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3 See 12 U.S.C. 5385 (pertaining to the orderly liquidation of covered broker-dealers).

4 Section 201(a)(11) of the Dodd-Frank Act (12 U.S.C. 5381(a)(11)) (defining financial company) and 12 CFR 380.8 (defining activities that are financial in nature or incidental thereto).

5 See 12 U.S.C. 5383(a)(2)(A) through (G).

6 See 12 U.S.C. 5383(a)(1)(B) (pertaining to vote required in cases involving broker-dealers).

7 See 12 U.S.C. 5383(b) (pertaining to a determination by the Secretary).

8 See 12 U.S.C. 5381(a)(8) (definition of covered financial company).

for any covered subsidiary[9] if the Corporation and the Secretary make the requisite joint determination specified in section 210.[10]

A company that is the subject of an affirmative section 203(b) (or section 210(a)(1)(E)[11]) determination would be considered a covered financial company for purposes of Title II.[12] As discussed below, a covered broker or dealer is a covered financial company that is registered with the Commission as a broker or dealer and is a member of SIPC.[13] Under the process specified in section 203 or 210, the broker-dealer will be a "covered broker-dealer," section 205 and the final rule will apply, the covered broker-dealer will be placed into orderly liquidation, and the FDIC will be appointed receiver.[14]

The FDIC and the SEC jointly published for public comment a notice of proposed rulemaking titled "Covered Broker-Dealer Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act" in the **Federal Register** on March 2, 2016. The 60-day comment period ended on May 2, 2016.[15] In keeping with the statutory mandate, the proposed rule, among other things, (i) clarified how the relevant

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9 See 12 U.S.C. 5381(a)(9) (definition of covered subsidiary). A covered subsidiary of a covered financial company could include a broker-dealer.

10 See 12 U.S.C. 5390(a)(1)(e).

11 See id.

12 See 12 U.S.C. 5381(a)(8) (definition of covered financial company); 12 U.S.C. 5390(a)(1)(E)(ii) (treatment as covered financial company).

13 See 12 U.S.C. 5381(a)(7) (definition of covered broker or dealer). For convenience, we hereinafter refer to entities that meet this definition as covered broker-dealers.

14 See 12 U.S.C. 5384 (pertaining to orderly liquidation of covered financial companies).

15 81 FR 10798 (March 2, 2016).

provisions of the Securities Investor Protection Act of 1970 ("SIPA")[16] would be incorporated into a Title II proceeding, (ii) specified the purpose and the content of the application for a protective decree required by section 205(a)(2)(A) of the Dodd-Frank Act,[17] (iii) clarified the FDIC's power as receiver with respect to the transfer of assets of a covered broker-dealer to a bridge broker-dealer, (iv) specified the roles of the FDIC as receiver and SIPC as trustee with respect to a covered broker-dealer, (v) described the claims process applicable to customers and other creditors of a covered broker-dealer, (vi) provided for SIPC's administrative expenses, and (vii) provided that the treatment of qualified financial contracts ("QFCs") of the covered broker-dealer would be governed exclusively by section 210 of the Dodd-Frank Act.[18]

II. COMMENTS ON THE PROPOSED RULE

A. Overview

Six comment letters were submitted to the FDIC and the SEC on the proposed rule. Three are from individuals (the "Individual Letters"), one is from students in a law school financial markets and corporate law clinic (the "Legal Clinic Letter"), one is from a group that states it is a "group of concerned citizens, activists, and financial professionals that works to ensure that financial regulators protect the interests of the public" (the "OSEC Letter"), and one is a joint letter from three trade groups representing

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16 15 U.S.C. 78aaa-lll.

17 12 U.S.C. 5385(a)(2)(A) (application for a protective decree).

18 12 U.S.C. 5390.

various segments of the financial services industry (the "Joint Letter").[19] The contents of the comments and the Agencies' responses thereto are addressed below.

B. The Individual Letters

Two individual commenters are generally supportive of the proposed rule.[20] The first individual commenter requests that the notification requirements of the proposed rule be extended to apply to holding companies as well as the broker-dealer.[21] Section 205 of the Dodd-Frank Act and the proposed rule apply only in situations where the broker-dealer itself is subject to a Title II liquidation.[22] Other provisions of Title II address the orderly liquidation of other financial companies, including holding companies. Therefore, the Agencies have made no changes in the final rule based on this comment. The second individual commenter states that the proposed rule might limit an individual consumer's right to sue a broker-dealer, particularly if the claim would be heard in an arbitration with the Financial Industry Regulatory Authority ("FINRA").[23] Any such limitations regarding an individual consumer's right to sue a broker-dealer that would arise because of the commencement of orderly liquidation exist by virtue of Title II of the Dodd-Frank Act, and are not a result of any matters addressed in the proposed rule.[24] Accordingly, the Agencies have made no changes in the final rule as a result of

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19 See comments to File No. S7-02-16 (available at: *https://www.sec.gov/comments/s7-02-16/s70216.htm*).

20 See generally letter from Keith E. Condemi and letter from Matt Bender.

21 See letter from Keith E. Condemi at 1.

22 12 U.S.C. 5385; see also 12 U.S.C. 5383 (setting forth that the Commission would also be able to make a recommendation in a case where the largest U.S. subsidiary of a financial company is a broker or dealer).

23 See letter from Matt Bender at 1.

24 See 12 U.S.C. 5385(c).

this comment. The third individual commenter is concerned that the proposed rule may disadvantage the customers of a covered broker-dealer.[25] As discussed below, in implementing section 205 of the Dodd-Frank Act, consistent with the statutory directive contained therein,[26] the Corporation and the Commission are seeking to ensure that all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to the customers as would have been the case if the broker-dealer were liquidated under SIPA.[27] Accordingly, the final rule preserves customer status as would be the case in a SIPA proceeding. Therefore, the Agencies have made no changes in the final rule based on this comment.

C. The Law Clinic Letter

The Law Clinic Letter addresses two specific situations in which the commenter believes the application of the proposed rule might in some manner or on some facts have the possibility of delaying or obstructing consumer access to property in a Title II liquidation of a covered broker-dealer. First, in this commenter's view, the discretion provided to SIPC under the proposed rule to use estimates for the initial allocation of assets to customer accounts at the bridge broker-dealer is too broad and may result in over-allocations to these accounts to the detriment of other customers when the overpayments are recalled.[28] In particular, the commenter opines that a conservative

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25 See letter from Pamela D. Marler at 1.

26 See 12 U.S.C. 5385(f)(1) (pertaining to the statutory requirements with respect to the satisfaction of claims).

27 Id.

28 See Law Clinic Letter at 2.

initial allocation intended to minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements is "too vague and is not codified in the rule itself."[29] Further, the commenter asserts as "irresponsible" the Agencies' decision to base customer allocations on the books and records of the covered broker-dealer without fully understanding the potential costs to customers.[30] The commenter also pointed out that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts actually constitute an actionable problem.[31] The commenter requests that the Agencies modify the final rule to make it clear that estimates may be used only when the liquidated entity acts in bad faith to impede the reconciliation process.[32]

As stated in the preamble to the proposed rule, the purpose of using estimates in the customer property allocation process is to ensure that customers receive the assets held for their customer accounts, together with SIPC payments, if any, as quickly as is practicable. Historically, the trustees in SIPA liquidations have utilized estimates to allow customers partial access to their customer accounts before a final reconciliation is possible. Returning customer assets to customers as quickly as possible is important for a number of reasons. For example, customers may depend financially on these assets. By way of additional example, it is possible that customers may need access to their assets in order to be able to de-risk positions or re-hedge positions. In the case of an orderly liquidation of a covered broker-dealer, SIPC, as trustee, is charged with making a prompt

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29 See id.

30 See id. at 5.

31 See id.

32 See id.

and accurate determination of customer net equity and allocation of customer property. Although the circumstances of a particular orderly liquidation may make this process difficult, consistent with historical practice in SIPA liquidations, the Agencies would endeavor to provide customers prompt access to their accounts to the extent possible based upon estimates while that reconciliation is being completed. Accordingly, the Agencies have made no changes in the final rule as a result of this comment.

In response to the commenter's concern that the notion of a conservative initial allocation is vague and not codified in the proposed rule, the Agencies note that the manner in which an orderly liquidation of a covered broker-dealer would proceed would depend on the relevant facts and circumstances. A prescriptive definition of conservative initial allocation that is codified may not be appropriate for the orderly liquidations of covered broker-dealers under all circumstances. Therefore, the Agencies have chosen not to define or to codify the notion of a conservative initial allocation in the final rule.[33]

Second, the Law Clinic Letter suggests two scenarios where a customer of a covered broker-dealer potentially could be worse off under the proposed rule than such customer would have been in a SIPA liquidation.[34] The first scenario the commenter describes is whenever a customer's net equity claim is not fully satisfied by the allocation

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[33] For reasons explained in the Economic Analysis, the Agencies disagree with the commenter's assertion that the Agencies decided to allow estimates of customer allocations to be based on the books and records of the covered broker-dealer without fully understanding the potential costs to customers. Further, and for reasons explained in the Economic Analysis, the Agencies disagree with the commenter's point that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts constitute an actionable problem. See infra Section V.E.1.

[34] See Law Clinic Letter at 5.

of customer property and the SIPC advance.[35] The commenter states that under the proposed rule, this residual claim, which becomes a general unsecured claim against the broker-dealer's general estate, is satisfied only after SIPC is repaid for its advances to customers.[36] The commenter further points out that, by contrast, under SIPA, SIPC would receive limited subrogation rights against customers in exchange for the advance,[37] and that SIPA does not allow SIPC to recover its advance before a customer with a residual net equity claim is made whole.[38]

Title II requires that all obligations of a covered broker-dealer relating to, or net equity claims based upon, customer property or customer name securities shall be promptly discharged by SIPC, the Corporation, or the bridge financial company, as applicable, by the delivery of securities or the making of payments to or for the account of such customer, in a manner and in an amount at least as beneficial as would have been the case had the covered broker-dealer been liquidated in a proceeding under SIPA.[39] The Agencies note that under the proposed rule, "SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff-3."[40] This language incorporates the limits on SIPC's subrogation rights applicable in a SIPA liquidation.[41]

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35 See id. at 6.

36 See 12 CFR 380.65(c); 17 CFR 302.105(c), as proposed.

37 See 15 U.S.C. 78fff-3(a).

38 See Law Clinic Letter at 6.

39 See 12 U.S.C. 5385(f)(1).

40 See 12 CFR 380.64(a)(2); 17 CFR 302.104(a)(2), as proposed.

41 See 15 U.S.C. 78fff-3(a).

The commenter states that customers with residual unpaid net equity claims could be worse off than they would be in a SIPA liquidation if the combined trustee and receiver's expenses in the Title II liquidation exceed the expenses of a hypothetical trustee in a SIPA liquidation because sections 205(g)(2) and 210(b) of the Dodd-Frank Act subordinate these residual unpaid net equity claims to the expenses of the trustee and the receiver.[42] The Agencies understand the commenter's concern about the potential for increased costs. However, one of the goals of this rulemaking is to describe the respective roles of the FDIC and SIPC for the purpose of promoting coordination between the FDIC and SIPC and reducing potential overlap of functions (and associated expenses) to be performed by the trustee and receiver. The Agencies believe that the rule will accomplish this goal. Even if the combined expenses of the trustee and the receiver in a Title II orderly liquidation were to exceed the expenses of a trustee in a SIPA liquidation, the operation of Commission Rules 15c3-1[43] and 15c3-3,[44] and the resulting history of customer recoveries in SIPA liquidations, should mitigate the commenter's concern that such costs will materially impact customer recoveries in an orderly

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42 See Law Clinic Letter at 6.

43 See 17 CFR 240.15c3-1; see also, e.g., Financial Responsibility Rules for Broker-Dealer, Exchange Act Rel. No. 70072 (July 30, 2013), 78 FR 51824, 51849 (August 21, 2013) (explaining that the purpose of Rule 15c3-1 is to help ensure that a broker-dealer holds, at all times, more than one dollar in highly liquid asset for each dollar of unsubordinated liabilities (i.e., current liabilities)).

44 See 17 CFR 240.15c3-3. Rule 15c3-3 is designed to "give more specific protection to customer funds and securities, in effect forbidding brokers and dealers from using customer assets to finance any part of their businesses unrelated to servicing securities customers . . . ." Financial Responsibility Rules for Broker-Dealers, Exchange Act Release No. 70072 (July 30, 2013), 78 FR 51824, 51826 (August 21, 2013). See also Net Capital Requirements for Brokers and Dealers, Exchange Act Release No. 21651 (January 11, 1985), 50 FR 2690, 2690 (January 18, 1985); Broker-Dealers; Maintenance of Certain Basic Reserves, Exchange Act Release No. 9856 (November 10, 1972), 37 FR 25224, 25224 (November 29, 1972).

liquidation. These rules help ensure that, in the event of a broker-dealer failure, there is an estate of customer property available, plus additional liquid assets of the broker-dealer in an amount in excess of all the broker-dealer's unsubordinated liabilities, available to pay customer claims. During SIPC's 49-year history, cash and securities distributed for the accounts of customers totaled approximately $141.5 billion. Of that amount, approximately $140.5 billion came from debtors' estates and $1.0 billion from the SIPC Fund.[45] Further, of the approximately 770,400 claims satisfied in completed or substantially completed cases as of December 31, 2019, a total of 355 were for cash and securities whose value was greater than the limits of protection afforded by SIPA.[46] These customer recovery figures generally support the Agencies' view that incorporating the existing SIPA customer claims process into the orderly liquidation should help ensure that customers in an orderly liquidation of a covered broker-dealer would fare as well as they would have in a SIPA liquidation. Additionally, the vast majority of such recoveries came from the pool of customer property established pursuant to the requirements of Commission Rule 15c3-3.[47] Such pool of customer property will be available to satisfy customer claims in Title II. Accordingly, the Agencies have made no changes in the final rule as a result of this comment.

D. The OSEC Letter

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45 See SIPC 2019 Annual Report, at 8, available at *https://www.sipc.org/media/annual-reports/2019-annual-report.pdf*.

46 See id. at 9.

47 17 CFR 240.15c3-3.

The OSEC Letter generally supports the proposed rule and outlines several benefits to the proposed rule, recognizing that the proposed rule relied upon the established framework for liquidations under SIPA in describing the orderly liquidation claims process.[48] The commenter highlights one perceived difference between the SIPA process and the process described in the proposed rule, however, and suggests that the rule would be improved by increasing the amount of time that customers have to file claims.[49] The OSEC Letter states that the proposed rule tracks section 8(a)(3) of SIPA by mandating that customer claims for net equity must be filed within 60 days after the date the notice to creditors to file claims is first published, while general creditors of the covered broker-dealer have up to six months to file their claims and have a good faith exception for late filings.[50] The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers.[51] The OSEC letter states that the proposed rule "fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability."[52] The OSEC Letter supports the establishment of a bridge broker-dealer and suggests that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk.[53]

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48 See generally OSEC Letter.

49 See id. at 3.

50 See id.

51 See id.

52 See id.

53 See id. at 5.

While the Agencies appreciate the comments raised in the OSEC Letter, the Agencies have not made changes in the final rule as a result of these comments. First, the OSEC Letter has misconstrued the proposed rule with respect to the time allowed for claims. The proposed rule provides that all creditors—customers as well as general unsecured creditors—have the opportunity to file claims within time frames consistent with the requirements of SIPA and of the Dodd-Frank Act. Under the proposed rule, customers would have the same six-month period to file claims as all other creditors and have an exception for late filings comparable to the SIPA good faith exception. However, under both SIPA and the proposed rule, if a customer files its claim within 60 days after the date the notice to creditors to file claims is first published, the customer is assured that its net equity claim will be paid, in kind, from customer property or, to the extent such property is insufficient, from SIPC funds. If the customer files a claim after the 60 days, the claim need not be paid with customer property and, to the extent such claim is paid by funds advanced by SIPC, it would be satisfied in cash, securities, or both, as SIPC determines is most economical to the estate. Therefore, the Agencies have made no changes in the final rule as a result of the comment.

The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers.[54] The OSEC letter states that the proposed rule "fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability."[55] Restrictions on executive compensation are

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54 See OSEC Letter at 3.

55 See id.

outside the scope of the rulemaking requirement of section 205(h) of the Dodd-Frank Act.[56] The Agencies have made no changes in the final rule as a result of this comment.

Regarding the commenter's suggestion that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk, the Agencies note that both the Dodd-Frank Act and the proposed rule permit the FDIC to establish multiple bridge broker-dealers in a Title II orderly liquidation and therefore the Agencies have made no changes in the final rule as a result of this comment.

E. The Joint Letter

The Joint Letter is generally supportive of the proposed rule but states that certain portions of the proposed rule would benefit from additional clarification, either through additional rulemaking or interpretive statements.[57]

1. Necessity for rule

The Joint Letter states that the proposed rule is likely to have an extremely narrow scope of application and calls into question the necessity of the proposed rule.[58] In the preamble to the proposed rule, the Agencies specifically acknowledged the limited circumstances in which the rule would be applied. However, the Dodd-Frank Act requires the Agencies jointly to issue rules to implement section 205 of the Dodd-Frank Act.[59] The Agencies believe that the clarifications provided by the final rule will prove

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56 Section 956 of the Dodd-Frank Act addresses incentive-based payment arrangements. 12 U.S.C. 5641.

57 See generally Joint Letter.

58 See id. at 2.

59 See 12 U.S.C. 5385(h).

valuable should a broker-dealer ever be subject to a Title II orderly liquidation and, therefore, the Agencies are promulgating this final rule.

2. Liquidation under SIPA

The Joint Letter notes the concern that the proposed rule could create, rather than reduce, uncertainty because the proposed rule does not repeat the full statutory text of section 205(a) that SIPC will act as trustee for the liquidation under the Securities Investor Protection Act of the covered broker-dealer.[60]

The proposed rule clarifies that although the trustee will make certain determinations, such as the allocation of customer property, in accordance with the relevant definitions under SIPA, the orderly liquidation of the covered broker-dealer is in fact pursuant to a proceeding under the Dodd-Frank Act, rather than a process under SIPA. The Agencies acknowledge that the reference to a liquidation "under SIPA" in section 205 of the statute may create ambiguity. The purpose of the rulemaking required by section 205(h) of the Dodd-Frank Act is to clarify these provisions and provide a framework for implementing a Title II orderly liquidation of a broker-dealer. Thus, in the preamble to the proposed rule, the Agencies explained that the omission of the reference to the appointment of SIPC as a trustee for a liquidation "under [SIPA]" is intended to make clear that the rule applies to an orderly liquidation of a covered broker-dealer under the Dodd-Frank Act, not a SIPA proceeding.[61] The proposed rule seeks to eliminate any potential confusion caused by referring to a "liquidation under [SIPA]" in the Dodd-

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60 See Joint Letter at 4.

61 See Section III.B. See also 12 U.S.C. 5383(b)(2).

Frank Act when there is, in fact, no proceeding under SIPA and the broker-dealer is being liquidated under Title II, while implementing the statutory objective that the protections afforded to customers under SIPA are recognized in the Title II process. Therefore, the Agencies have made no changes in the final rule as a result of this comment.

3. Coordination with the Commodity Futures Trading Commission

The Joint Letter requests that the Agencies clarify how the orderly liquidation process would operate if the broker-dealer were a joint broker-dealer/futures commission merchant ("FCM").[62] The Joint Letter points out that many broker-dealers in the United States are both broker-dealers registered with the SEC and FCMs registered with the U.S. Commodity Futures Trading Commission (the "CFTC").[63] FCMs fall under the definition of "commodity broker" under the Bankruptcy Code.[64] The Joint Letter states that, based on recent precedent, in the event a joint broker-dealer/FCM were to become subject to liquidation proceedings under SIPA, the trustee appointed by SIPC would be subject to the same duties as a trustee in a commodity broker liquidation under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with SIPA.[65] The Joint Letter also states that, based on recent precedent, while the proceeding itself would be conducted under SIPA, there would likely be a parallel claims process in which

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62 See Joint Letter at 6.

63 See id.

64 See 11 U.S.C. 101(6) ("Commodity broker means futures commission merchant . . . as defined in [11 U.S.C. 761] with respect to which there is a customer, as defined in [11 U.S.C. 761].").

65 15 U.S.C. 78fff-1(b).

the rules for determining what constitutes "customer property" with respect to commodity customers and the satisfaction of commodity customer claims through account transfers or distributions of customer property would be determined under the commodity broker liquidation provisions of subchapter IV of chapter 7 of the Bankruptcy Code and the CFTC Part 190 Rules.[66]

The Agencies believe that Title II addresses the commenter's question. More specifically, section 210(m) of the Dodd-Frank Act addresses the resolution of a commodity broker in Title II.[67] The section provides that the FDIC as receiver shall apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such commodity broker were a debtor for purposes of such subchapter.

4. The incorporation of the rules of SIPC contained in 17 CFR Part 300

The Joint Letter recommends that the final rule clarify that any reference to SIPA also includes the rules of SIPC in 17 CFR Part 300.[68] These rules are extensive and cover many topics including topics specifically covered by the proposed rule and in some cases may conflict with the claims process established by the Dodd-Frank Act and the rule. Furthermore, the purpose of the final rule is to address the orderly liquidation of brokers and dealers under Title II, which is distinct and separate from a proceeding under

66 17 CFR Part 190.

67 12 U.S.C. 5390(m).

68 See Joint Letter at 8.

SIPA.[69] The Agencies therefore have made no changes in the final rule as a result of this comment.

5. Other comments contained in the Joint Letter

The Joint Letter also requests three clarifications of the proposed rule. First, the Joint Letter requests that the final rule clarify that certain past SIPC practices with respect to the treatment of customers whose accounts have been transferred to another institution will govern the treatment of customers in similar circumstances under Title II.[70] More specifically, the Joint Letter states that it is important for the stability of the financial markets that the Agencies affirmatively clarify that they intend to follow these past SIPC practices with respect to the treatment of customers whose accounts have been transferred to another institution.[71] The purpose of the rule is largely to clarify certain procedural matters and the particular requirements of the Dodd-Frank Act with respect to the orderly liquidation of broker-dealers. The rule is not intended to interpret SIPA or codify SIPC's past practices. However, the Agencies note that the involvement of SIPC in the orderly liquidation, as well as the Agencies' stated desire to model the orderly liquidation customer claims process on the SIPA customer claims process, make it clear that the Agencies and SIPC will endeavor to coordinate in a manner to promote financial market stability, consistent with the statutory imperatives in Title II.[72]

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69 See, e.g., Section III.B.

70 See Joint Letter at 7.

71 See id.

72 See id.

Second, the Joint Letter requests that the final rule clarify that if customer accounts are transferred to a bridge broker-dealer, the FDIC, in consultation with SIPC, will endeavor to transfer to the bridge broker-dealer any liabilities that are secured by customer property that has been rehypothecated by the covered broker-dealer.[73] While it is possible that a transfer to the bridge broker-dealer of any liabilities secured by customer property would be more expeditious and less burdensome than closing financing transactions in the covered broker-dealer and re-opening equivalent financing transactions with the bridge broker-dealer, the Agencies cannot commit to such an approach in the final rule because it is not known whether such an approach would prove appropriate in all cases. Moreover, the Agencies note that this practice is not required in a SIPA liquidation. Nevertheless, the Agencies restate their intention that the use of the bridge broker-dealer would be designed to give customers access to their accounts as quickly as practicable in the form and amount that they would receive in a SIPA liquidation.[74]

Third, the Joint Letter requests that the final rule clarify that the FDIC will cooperate with SIPC in allocating property from the broker-dealer's general estate to the pool of customer property if shortfalls in customer property resulted from regulatory compliance failures.[75] The Agencies, in consultation with SIPC, have cooperated to develop the final rule that, among other things, addresses this issue. The rule provides that SIPC, as trustee for a covered broker-dealer, shall determine, among other things,

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73 See Joint Letter at 8.

74 See 12 U.S.C. 5385(f)(1); see also, 81 FR at 10804.

75 See Joint Letter at 8.

whether the property of the covered broker-dealer qualifies as customer property.[76] The rule incorporates the definition of "customer property" from SIPA,[77] with only a change from the term "debtor" to the term "covered broker-dealer" to reflect the use of the "customer property" definition in the context of orderly liquidation.[78] These provisions reflect the statutory requirement that all customer claims relating to, or net equity claims based upon, customer property or customer name securities be satisfied in a manner and in an amount at least as beneficial to customers as would have been the case if the broker-dealer were liquidated under SIPA.[79] The Agencies are of the view that these provisions of the rule directly address the commenter's concern.

III. SECTION-BY-SECTION ANALYSIS

A. Definitions[80]

The definitions section of the final rule defines certain key terms. Consistent with the remainder of the final rule, the definitions are designed to help ensure that, as the statute requires, all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to them as would have been the case if the broker-dealer were liquidated under SIPA, without the appointment of the FDIC as receiver and without any transfer of assets or liabilities to a bridge financial company, and with a filing date as of

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76 See 12 CFR 380.64(a)(1); 17 CFR 302.104(a)(1).

77 See 15 U.S.C. 78lll(4).

78 See 12 CFR 380.60(g); 17 CFR 302.100(g).

79 See 12 U.S.C. 5385(f)(1); see also 12 CFR 380.60(f)-(h); 17 CFR 302.100(f)-(h)..

80 The definitions section appears in 12 CFR 380.60 for purposes of the Corporation and 17 CFR 302.100 for purposes of the Commission.

the date on which the FDIC was appointed as receiver.[81] To effectuate the statutory requirement, the definitions in the final rule are very similar or identical to the corresponding definitions in SIPA and Title II, and where they differ, it is for purposes of clarity only and not to change or modify the meaning of the definitions under either act.

1. Definitions Relating to Covered Broker-Dealers

The final rule defines the term covered broker or dealer as "a covered financial company that is a qualified broker or dealer."[82] Pursuant to section 201(a)(10) of the Dodd-Frank Act, the terms customer, customer name securities, customer property, and net equity in the context of a covered broker-dealer are defined as having the same meanings as the corresponding terms in section 16 of SIPA.[83]

Section 16(2)(A) of SIPA defines customer of a debtor, in pertinent part, as "any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral, security, or for purposes of effecting transfer."[84] Section 16(3)

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81 See 12 U.S.C. 5385(f)(1) (pertaining to obligations to customers) and 12 U.S.C. 5385(d)(1)(A)-(C) (limiting certain actions of the Corporation that would adversely affect, diminish or otherwise impair certain customer rights).

82 See 12 CFR 380.60(d) and 17 CFR 302.100(d). See also 12 U.S.C. 5381(a)(7).

83 12 U.S.C. 5381(a)(10) ("The terms 'customer', 'customer name securities', 'customer property', and 'net equity' in the context of a covered broker or dealer, have the same meanings as in section 16 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78lll)."). See also 15 U.S.C. 78lll and sections 380.60 and 302.100.

84 15 U.S.C. 78lll(2)(A). See also 12 CFR 380.60(e) and 17 CFR 302.100(e) ("The term customer of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78lll(2) provided that the references therein to debtor shall mean the covered broker or dealer.").

of SIPA defines customer name securities as "securities which were held for the account of a customer on the filing date by or on behalf of the debtor and which on the filing date were registered in the name of the customer, or were in the process of being so registered pursuant to instructions from the debtor, but does not include securities registered in the name of the customer which, by endorsement or otherwise, were in negotiable form."[85] Section 16(4) of SIPA defines customer property, in pertinent part, as "cash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted."[86] Section (16)(11) of SIPA defines net equity as "the dollar amount of the account or accounts of a customer, to be determined by – (A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date – (i) all securities positions of

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[85] 15 U.S.C. 78lll(3). See also 12 CFR 380.60(f) and 17 CFR 302.100(f) ("The term customer name securities shall have the same meaning as in 15 U.S.C. 78lll(3) provided that the references therein to debtor shall mean the covered broker or dealer and the references therein to filing date shall mean the appointment date.").

[86] 15 U.S.C. 78lll(4). The definition of customer property goes on to include: (1) "securities held as property of the debtor to the extent that the inability of the debtor to meet his obligations to customers for their net equity claims based on securities of the same class and series of an issuer is attributable to the debtor's noncompliance with the requirements of section 15(c)(3) of the 1934 Act and the rules prescribed under such section"; (2) "resources provided through the use or realization of customers' debit cash balances and other customer-related debit items as defined by the Commission by rule"; (3) "any cash or securities apportioned to customer property pursuant to section 3(d) [of SIPA]"; (4) "in the case of a portfolio margining account of a customer that is carried as a securities account pursuant to a portfolio margining program approved by the Commission, a futures contract or an option on a futures contract received, acquired, or held by or for the account of a debtor from or for such portfolio margining account, and the proceeds thereof"; and (5) "any other property of the debtor which, upon compliance with applicable laws, rules, and regulations, would have been set aside or held for the benefit of customers, unless the trustee determines that including such property within the meaning of such term would not significantly increase customer property." See also 12 CFR 380.60(g) and 17 CFR 302.100(g) ("The term customer property shall have the same meaning as in 15 U.S.C. 78lll(4) provided that the references therein to debtor shall mean the covered broker or dealer.").

such customer (other than customer name securities reclaimed by such customer); and (ii) all positions in futures contracts and options on futures contracts held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission, including all property collateralizing such positions, to the extent that such property is not otherwise included herein; minus (B) any indebtedness of such customer to the debtor on the filing date; plus (C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section (8)(a) [of SIPA])."[87]

The final rule defines the term appointment date as "the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer."[88] The appointment date constitutes the filing date as that term is used under SIPA[89] and, like the filing date under SIPA, is the reference date for the computation of net equity.[90]

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87 15 U.S.C. 78lll(11) (emphasis added). See also 12 CFR 380.60(h) and 17 CFR 302.100(h) ("The term net equity shall have the same meaning as in 15 U.S.C. 78lll(11) provided that the references therein to debtor shall mean the covered broker or dealer and the references therein to filing date shall mean the appointment date.").

88 See 12 CFR 380.60(a) and 17 CFR 302.100(a).

89 See 12 CFR 380.60(a) and 17 CFR 302.100(a).

90 See 12 CFR 380.60(a) and 17 CFR 302.100(a). See also 12 U.S.C. 5385(a)(2)(C) ("For purposes of the liquidation proceeding, the term 'filing date' means the date on which the Corporation is appointed as receiver of the covered broker or dealer."); 15 U.S.C. 78lll(7) ("The term 'filing date' means the date on which an application for a protective decree is filed under section 5(a)(3), except that – (A) if a petition under title 11 of the United States Code concerning the debtor was filed before such date, the term 'filing date' means the date on which such petition was filed; (B) if the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced; or (C) if the debtor is the subject of a direct payment procedure or was the subject of a direct payment procedure

2. Additional Definitions

In addition to the definitions relating to covered broker-dealers under section 201(a)(10) of the Dodd-Frank Act,[91] the final rule defines the following terms: (1) bridge broker or dealer;[92] (2) Commission;[93] (3) qualified broker or dealer;[94] (4) SIPA[95] and (5) SIPC.[96]

The term bridge broker or dealer is defined as "a new financial company organized by the Corporation in accordance with section 210(h) of the Dodd-Frank Act for the purpose of resolving a covered broker or dealer."[97] The term Commission is defined as the "Securities and Exchange Commission."[98] The term qualified broker or dealer refers to "a broker or dealer that (A) is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and (B) is a member of SIPC," but is not itself subject to a Title II receivership.[99] This definition is consistent with the statutory definition but is abbreviated for clarity. It is not intended to

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discontinued by SIPC pursuant to section 10(f), the term 'filing date' means the date on which notice of such direct payment procedure was published under section 10(b).").

91 See 12 U.S.C. 5381(a)(10) ("The terms 'customer', 'customer name securities', 'customer property', and 'net equity' in the context of a covered broker or dealer, have the same meanings as in section 78lll of title 15.").

92 See 12 CFR 380.60(b) and 17 CFR 302.100(b).

93 See 12 CFR380.60(c) and 17 CFR 302.100(c).

94 See 12 CFR 380.60(i) and 17 CFR 302.100(i).

95 See 12 CFR 380.60(j) and 17 CFR 302.100(j).

96 See 12 CFR 380.60(k) and 17 CFR 302.100(k).

97 See 12 CFR 380.60(b) and 17 CFR 302.100(b). See also 15 U.S.C. 5390(h)(2)(H) (setting forth that the FDIC, as receiver for a covered broker or dealer, may approve articles of association for one or more bridge financial companies with respect to such covered broker or dealer).

98 See 12 CFR 380.60(c) and 17 CFR 302.100(c).

99 See 12 CFR 380.60(i) and 17 CFR 302.100(i).

change or modify the statutory definition. The term SIPA refers to the "Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–lll."[100] The term SIPC refers to the "Securities Investor Protection Corporation."[101]

B. Appointment of Receiver and Trustee for Covered Broker-Dealer[102]

Upon the FDIC's appointment as receiver for a covered broker-dealer, section 205 of the Dodd-Frank Act specifies that the Corporation "shall appoint . . . [SIPC] to act as trustee for the liquidation under [SIPA] of the covered [broker-dealer]."[103] The final rule deviates from the statutory language in some cases to clarify the orderly liquidation process. For example, the final rule makes it clear that SIPC is to be appointed as trustee for the covered broker-dealer but does not repeat the phrase "for the liquidation under SIPA" since there is no proceeding under SIPA and the covered broker-dealer is being liquidated under Title II. As noted above, the orderly liquidation process under Title II is an alternative to a liquidation under SIPA.[104] Section 205 of the Dodd-Frank Act also states that court approval is not required for such appointment.[105] For ease and clarity, the final rule specifies the statutory roles of SIPC as trustee and the FDIC as receiver, which are further explained in other sections of the final rule.[106]

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100 See 12 CFR 380.60(j) and 17 CFR 302.100(j).

101 See 12 CFR 380.60(k) and 17 CFR 302.100(k).

102 The section about the appointment of receiver and trustee for covered broker-dealers appears in 12 CFR 380.61 for purposes of the Corporation and 17 CFR 302.101 for purposes of the Commission. The rule text for both agencies is identical.

103 See 12 U.S.C. 5385(a)(1).

104 See 12 U.S.C. 5383(b)(2).

105 Id.

106 See 12 CFR 380.61 and 17 CFR 302.101.

C. Notice and Application for Protective Decree for Covered Broker-Dealer[107]

Upon the appointment of SIPC as trustee for the covered broker-dealer, Title II requires SIPC, as trustee, promptly to file an application for a protective decree with a federal district court, and SIPC and the Corporation, in consultation with the Commission, jointly to determine the terms of the protective decree to be filed.[108] Although a SIPA proceeding is conducted under bankruptcy court supervision,[109] a Title II proceeding is conducted entirely outside of the bankruptcy courts, through an administrative process, with the FDIC acting as receiver.[110] As a result, a primary purpose of filing a notice and application for a protective decree is to give notice to interested parties that an orderly liquidation proceeding has been initiated. The final rule provides additional clarification of the statutory requirement of notice and application for a protective decree by setting forth the venue in which the notice and application for a protective decree is to be filed. It states that a notice and application for a protective decree is to be filed with the federal district court in which a liquidation of the covered broker-dealer under SIPA is pending, or if no such SIPA liquidation is pending, the federal district court for the district within which the covered broker-dealer's principal place of business is located.[111] This court is a federal district court of competent

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107 The notice and application for protective decree for the covered broker-dealer section appears in 12 CFR 380.62 for purposes of the FDIC and 17 CFR 302.102 for purposes of the Commission.

108 See 12 U.S.C. 5385(b)(3) (pertaining to the filing of a protective decree by SIPC).

109 See 15 U.S.C. 78eee(b).

110 See 15 U.S.C. 5388 (requiring the dismissal of all other bankruptcy or insolvency proceedings upon the appointment of the Corporation as receiver for a covered financial company).

111 See 12 CFR 380.62(a) and 17 CFR 302.102(a).

jurisdiction specified in section 21 or 27 of the Exchange Act, 15 U.S.C. 78u, 78aa.[112] It also is the court with jurisdiction over suits seeking de novo judicial claims determinations under section 210(a)(4)(A) of the Dodd-Frank Act.[113] While the statute grants authority to file the notice and application for a protective decree in any federal court of competent jurisdiction specified in section 21 or 27 or the Securities Exchange Act of 1934, the final rule restricts the filing to the courts specified above in order to make it easier for interested parties to know where the protective decree might be filed. The final rule also clarifies that if the notice and application for a protective decree is filed on a date other than the appointment date (i.e., the date the FDIC is appointed as receiver), the filing shall be deemed to have occurred on the appointment date for purposes of the rule.[114]

This section of the final rule governing the notice and application for a protective decree also includes a non-exclusive list of notices drawn from other parts of Title II.[115] The goal of the application for protective decree is to inform interested parties that the covered broker-dealer is in orderly liquidation and to highlight the application of certain provisions of the orderly liquidation authority, particularly with respect to applicable stays and other matters that might be addressed in a protective decree issued under SIPA. The final rule specifies that a notice and application for a protective decree under Title II

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112 See 12 U.S.C. 5385(a)(2)(A) (specifying the federal district courts in which the application for a protective decree may be filed).

113 See 12 U.S.C. 5390(a)(4)(A) (a claimant may file suit in the district or territorial court for the district within which the principal place of business of the covered financial company is located).

114 See 12 CFR 380.62(a) and 17 CFR 302.102(a).

115 See 12 CFR 380.62(b) and 17 CFR 302.102(b).

may, among other things, provide for notice: (1) that any existing case or proceeding under the Bankruptcy Code or SIPA would be dismissed, effective as of the appointment date, and no such case or proceeding may be commenced with respect to a covered broker-dealer at any time while the Corporation is the receiver for such covered broker-dealer;[116] (2) of the revesting of assets, with certain exceptions, in a covered broker-dealer to the extent that they have vested in any entity other than the covered broker-dealer as a result of any case or proceeding commenced with respect to the covered broker-dealer under the Bankruptcy Code, SIPA, or any similar provision of state liquidation or insolvency law applicable to the covered broker-dealer;[117] (3) of the request of the Corporation as receiver for a stay in any judicial action or proceeding in which the covered broker-dealer is or becomes a party for a period of up to 90 days from the appointment date;[118] (4) that except with respect to QFCs,[119] no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which the covered broker-dealer is a party or to obtain possession of or exercise control

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116 See 12 CFR 380.62(b)(2)(i) and 17 CFR 302.102(b)(2)(i). See also 12 U.S.C. 5388(a) (regarding dismissal of any case or proceeding relating to a covered broker-dealer under the Bankruptcy Code or SIPA on the appointment of the Corporation as receiver and notice to the court and SIPA).

117 See 12 CFR 380.62(b)(2)(ii) and 17 CFR 302.102(b)(2)(ii). See also 12 U.S.C. 5388(b) (providing that the notice and application for a protective decree may also specify that any revesting of assets in a covered broker or dealer to the extent that they have vested in any other entity as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer shall not apply to assets of the covered broker or dealer, including customer property, transferred pursuant to an order entered by a bankruptcy court).

118 See 12 CFR 380.62(b)(2)(iii) and 17 CFR 302.102(b)(2)(iii). See also 12 U.S.C. 5390(a)(8) (providing for the temporary suspension of legal actions upon request of the Corporation).

119 See 12 U.S.C. 5390(c)(8)(D) (defining qualified financial contract as "any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph").

over any property of the covered broker-dealer or affect any contractual rights of the covered broker-dealer without the consent of the FDIC as receiver of the covered broker-dealer upon consultation with SIPC during the 90-day period beginning from the appointment date;[120] and (5) that the exercise of rights and the performance of obligations by parties to QFCs with the covered broker-dealer may be affected, stayed, or delayed pursuant to the provisions of Title II (including but not limited to 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.[121]

The final rule makes clear that the matters listed for inclusion in the notice and application for a protective decree are neither mandatory nor all-inclusive. The items listed are those that the Agencies believe might provide useful guidance to customers and other parties who may be less familiar with the Title II process than with a SIPA proceeding. It is worth noting that the language relating to QFCs is rather general. In certain circumstances it may be worthwhile specifically to highlight the one-day stay provisions in section 210(c)(10) of the Dodd-Frank Act, the provisions relating to the enforcement of affiliate contracts under section 210(c)(16) of the Dodd-Frank Act, and other specific provisions relating to QFCs or other contracts.

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120 12 U.S.C. 5390(c)(13)(C)(i) .

121 See 12 CFR 380.62(b)(2)(iv) and 17 CFR 302.102(b)(2)(iv). See also 12 U.S.C. 5390(c)(8)(F) (rendering unenforceable all QFC walkaway clauses (as defined in 12 U.S.C. 5390(c)(8)(F)(iii)) including those provisions that suspend, condition, or extinguish a payment obligation of a party because of the insolvency of a covered financial company or the appointment of the FDIC as receiver) and 12 U.S.C. 5390(c)(10)(B)(i) (providing that a person who is a party to a QFC with a covered financial company may not exercise any right that such person has to terminate, liquidate, or net such contract solely by reason of or incidental to the appointment of the FDIC as receiver (or the insolvency or financial condition of the covered financial company for which the FDIC has been appointed as receiver) –until 5:00 p.m. (eastern time) on the business day following the appointment, or after the person has received notice that the contract has been transferred pursuant to 12 U.S.C. 5390(c)(9)(A)).

D. Bridge Broker-Dealer[122]

1. Power to Establish Bridge Broker-Dealer; Transfer of Customer Accounts and other Assets and Liabilities

Section 210 of the Dodd-Frank Act sets forth the Corporation's powers as receiver of a covered financial company.[123] One such power the Corporation has, as receiver, is the power to form bridge financial companies.[124] Paragraph (a) of this section of the final rule states that the Corporation as receiver for a covered broker-dealer, or in anticipation of being appointed receiver for a covered broker-dealer, may organize one or more bridge broker-dealers with respect to a covered broker-dealer.[125] Paragraph (b) of this section of the final rule states that if the Corporation were to establish one or more bridge broker-dealers with respect to a covered broker-dealer, then the Corporation as receiver for such covered broker-dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge broker[s]-dealer[s] unless the Corporation, after consultation with the Commission and SIPC, determines that: (1) the transfer of such customer accounts, customer name securities, and customer property to one or more qualified broker-dealers will occur promptly such that the use of the bridge broker[s]-dealer[s] would not facilitate such transfer to one or more qualified broker-dealers; or (2) the transfer of such customer accounts to the bridge

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122 The bridge broker or dealer section appears in 12 CFR 380.63 for purposes of the Corporation and 17 CFR 302.103 for purposes of the Commission.

123 12 U.S.C. 5390.

124 See 12 U.S.C. 5390(h)(1)(A) (granting general power to form bridge financial companies). See also 12 U.S.C. 5390(h)(2)(H)(i) (granting authority to organize one or more bridge financial companies with respect to a covered broker-dealer).

125 See 12 CFR 380.63 and 17 CFR 302.103. See also 12 U.S.C. 5390(h)(2)(H) (granting the Corporation as receiver authority to organize one or more bridge financial companies with respect to a covered broker-dealer).

broker[s]-dealer[s] would materially interfere with the ability of the FDIC to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.[126] The use of the word "promptly" in the final rule, in this context, is intended to emphasize the urgency of transferring customer accounts, customer name securities, and customer property either to a qualified broker-dealer or to a bridge broker-dealer as soon as practicable to allow customers the earliest possible access to their accounts.

Paragraph (c) of this section of the final rule states that the Corporation as receiver for the covered broker-dealer also may transfer to such bridge broker[s]-dealer[s] any other assets and liabilities of the covered broker-dealer (including non-customer accounts and any associated property) as the Corporation may, in its discretion, determine to be appropriate. Paragraph (c) is based upon the broad authority of the Corporation as receiver to transfer any assets or liabilities of the covered broker-dealer to a bridge financial company in accordance with, and subject to the requirements of, section 210(h)(5) of the Dodd-Frank Act[127] and is designed to facilitate the receiver's ability to continue the covered broker-dealer's operations, minimize systemic risk, and maximize the value of the assets of the receivership.[128] The transfer of assets and liabilities to a

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126 See 12 CFR 380.63(b) and 17 CFR 302.103(b). See also 12 U.S.C 5390(a)(1)(O)(i)(I)-(II) (listing the specific conditions under which customer accounts would not be transferred to a bridge financial company if it was organized).

127 See 12 U.S.C. 5390(h)(5)(A) (providing that the receiver "may transfer any assets and liabilities of a covered financial company"). The statute sets forth certain restrictions and limitations that are not affected by this final rule. See, e.g., 12 U.S.C. 5390(h)(1)(B)(ii) (restricting the assumption of liabilities that count as regulatory capital by the bridge financial company) and 12 U.S.C. 5390(h)(5)(F) (requiring that the aggregate liabilities transferred to the bridge financial company may not exceed the aggregate amount of assets transferred).

128 See 12 CFR 380.63(f) and 17 CFR 302.103(f). See also 12 U.S.C. 5390(h)(5) (granting authority to the Corporation as receiver to transfer assets and liabilities of a covered financial company to a

bridge broker-dealer under the final rule will enable the receiver to continue the day-to-day operations of the broker-dealer and facilitate the maximization of the value of the assets of the receivership by making it possible to avoid a forced or other distressed sale of the assets of the covered broker-dealer. In addition, the ability to continue the operations of the covered broker-dealer may help mitigate the impact of the failure of the covered broker-dealer on other market participants and financial market utilities and thereby minimize systemic risk.

Finally, paragraph (c) of this section of the final rule clarifies that the transfer to a bridge broker-dealer of any account or property pursuant to this section does not create any implication that the holder of such an account qualifies as a "customer" or that the property so transferred qualifies as "customer property" or "customer name securities" within the meaning of SIPA or within the meaning of the final rule. Under Title II, the Corporation may transfer all the assets of a covered broker-dealer to a bridge broker-dealer.[129] Such a transfer of assets may include, for example, securities that were sold to the covered broker-dealer under reverse repurchase agreements. Under the terms of a typical reverse repurchase agreement, it is common for the broker-dealer to be able to use the purchased securities for its own purposes. In contrast, Commission rules specifically protect customer funds and securities and essentially forbid broker-dealers from using

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bridge financial company). Similarly, under Title II, the Corporation, as receiver for a covered broker-dealer, may approve articles of association for such bridge broker-dealer. See 12 U.S.C. 5390(h)(2)(H)(i). The bridge broker-dealer would also be subject to the federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission as is necessary or appropriate in the public interest or for the protection of investors. See 12 U.S.C. 5390(h)(2)(H)(ii).

[129] See 12 U.S.C 5390(h)(2)(H) and 12 U.S.C. 5390(h)(5) (granting authority to the Corporation as receiver to transfer assets and liabilities of a covered broker-dealer).

customer assets to finance any part of their businesses unrelated to servicing securities customers.[130] An integral component of the broker-dealer customer protection regime is that, under SIPA, customers have preferred status relative to general creditors with respect to customer property and customer name securities.[131] Given the preferred status of customers, litigation has arisen regarding whether, consistent with the above example, claims of repurchase agreement ("repo") counterparties are "customer" claims under SIPA.[132] In implementing section 205 of the Dodd-Frank Act, consistent with the statutory directive contained therein,[133] the Corporation and the Commission are seeking to ensure that all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to the customers as would have been the case if the broker-dealer were liquidated under SIPA.[134] Accordingly, the final rule preserves customer status as would be the case in a SIPA proceeding. Thus, the final rule clarifies that moving assets to a bridge financial company as part of a Title II orderly liquidation is not determinative as to whether the holder of such an account qualifies as a "customer" or if the property so transferred qualifies as "customer property" or "customer name securities." Rather, the status of the account holder and the assets in the orderly liquidation of a covered broker-

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130 See Net Capital Requirements for Brokers and Dealers, Exchange Act Release No. 21651 (January 11, 1985), 50 FR 2690, 2690 (January 18, 1985). See also Broker-Dealers; Maintenance of Certain Basic Reserves, Exchange Act Release No. 9856 (November 10, 1972), 37 FR 25224, 25224 (November 29, 1972).

131 See 15 U.S.C. 78fff(a).

132 See, e.g., In re Lehman Brothers Inc., 492 B.R. 379 (Bankr. S.D.N.Y. 2013), aff'd, 506 B.R. 346 (S.D.N.Y. 2014).

133 See 12 U.S.C. 5385(f)(1) (pertaining to the statutory requirements with respect to the satisfaction of claims).

134 Id.

dealer will depend upon whether the claimant would be a customer under SIPA.[135]

2. Other Provisions with respect to Bridge Broker-Dealer

The final rule addresses certain matters relating to account transfers to the bridge broker-dealer.[136] The process set forth in this part of the final rule is designed to ensure that all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to customers as would have been the case if the broker-dealer were liquidated under SIPA.[137] In a SIPA proceeding, the trustee would generally handle customer accounts in two ways. First, a trustee may sell or otherwise transfer to another SIPC member, without the consent of any customer, all or any part of a customer's account, as a way to return customer property to the control of the customer.[138] Such account transfers are separate from the customer claim process. Customer account transfers are useful insofar as they serve to allow customers to resume trading more quickly and minimize disruption in the securities markets. If it is not practicable to transfer customer accounts, then the second way of returning customer property to the control of customers is through the customer claims process. Under bankruptcy court supervision, the SIPA trustee will

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135 See 15 U.S.C. 78lll(2)(B) (SIPA definition of customer). See also 12 U.S.C. 5381(a)(10) (defining customer, customer name securities, customer property, and net equity in the context of a covered broker- dealer as the same meanings such terms have in section 16 of SIPA (15 U.S.C. 78lll)); In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 236 (2d Cir. 2011).

136 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

137 See 12 U.S.C. 5385(f) (obligations of a covered broker-dealer to customers shall be "satisfied in the manner and in an amount at least as beneficial to the customer" as would have been the case had the actual proceeds realized from the liquidation of the covered broker-dealer been distributed in a proceeding under SIPA).

138 See 15 U.S.C. 78fff-2(f).

determine each customer's net equity and the amount of customer property available for customers.[139] Once the SIPA trustee determines that a claim is a customer claim (an "allowed customer claim"), the customer will be entitled to a ratable share of the fund of customer property. As discussed above, SIPA defines "customer property" to generally include all the customer-related property held by the broker-dealer.[140] Allowed customer claims are determined on the basis of a customer's net equity,[141] which, as described above, generally is the dollar value of a customer's account on the filing date of the SIPA proceeding less indebtedness of the customer to the broker-dealer on the filing date.[142] Once the trustee determines the fund of customer property and customer net equity claims, the trustee can establish each customer's pro rata share of the fund of customer property. Customer net equity claims generally are satisfied to the extent possible by providing the customer with the identical securities owned by that customer as of the day the SIPA proceeding was commenced.[143]

Although a Title II orderly liquidation is under a different statutory authority than a SIPA proceeding, under the final rule, the process for determining and satisfying customer claims will follow a substantially similar process to a SIPA proceeding. Upon the commencement of a SIPA liquidation, customers' cash and securities held by the broker-dealer are returned to customers on a pro rata basis.[144] If sufficient funds are not

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139 See generally 15 U.S.C. 78fff.

140 See 15 U.S.C. 78lll(4). See also Section II.A.1.

141 See 15 U.S.C. 78lll(11).

142 Id. See also Section II.A.1.

143 See 15 U.S.C. 78fff-2(d).

144 15 U.S.C. 8fff-2(b).

available at the broker-dealer to satisfy customer net equity claims, SIPC advances will be used to supplement the distribution, up to a ceiling of $500,000 per customer, including a maximum of $250,000 for cash claims.[145] When applicable, SIPC will return securities that are registered in the customer's name or are in the process of being registered directly to each customer.[146] As in a SIPA proceeding, in a Title II orderly liquidation of a covered broker-dealer, the process of determining net equity thus begins with a calculation of customers' net equity. A customer's net equity claim against a covered broker-dealer is deemed to be satisfied and discharged to the extent that customer property of the covered broker-dealer, along with property made available through advances from SIPC, is transferred and allocated to the customer's account at the bridge broker-dealer. The bridge broker-dealer undertakes the obligations of the covered broker-dealer only with respect to such property. The Corporation, as receiver, in consultation with SIPC, as trustee, will allocate customer property and property made available through advances from SIPC in a manner consistent with SIPA and with SIPC's normal practices thereunder. The calculation of net equity will not be affected by the assumption of liability by the bridge broker-dealer to each customer in connection with the property transferred to the bridge broker-dealer. The use of the bridge broker-dealer is designed to give customers access to their accounts as quickly as practicable, while ensuring that customers receive assets in the form and amount that they would receive in a SIPA liquidation.[147]

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145 15 U.S.C. 8fff-3(a).

146 15 U.S.C. 8fff-2(b)(2)

147 This outcome will satisfy the requirements of section 205(f)(1) of the Dodd-Frank Act. See 12 U.S.C. 5385(f)(1) ("Notwithstanding any other provision of this title, all obligations of a covered

The final rule also provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based upon the books and records of the covered broker-dealer or other information deemed relevant by the Corporation as receiver, in consultation with SIPC as trustee.[148] This approach is based upon experience with SIPA liquidations where, for example, there were difficulties reconciling the broker-dealer's records with the records of central counterparties or other counterparties or other factors that caused delay in verifying customer accounts.[149] This provision of the final rule is designed to facilitate access to accounts for the customers at the bridge broker-dealer as soon as is practicable under the circumstances while facilitating the refinement of the calculation of allocations of customer property to customer accounts as additional information becomes available. This process will help ensure both that customers have access to their customer accounts as quickly as practicable and that customer property ultimately will be fairly and accurately allocated.

The final rule also states that the bridge broker-dealer undertakes the obligations of a covered broker-dealer with respect to each person holding an account transferred to

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broker or dealer or of any bridge financial company established with respect to such covered broker or dealer to a customer relating to, or net equity claims based upon, customer property or customer name securities shall be promptly discharged by SIPC, the Corporation, or the bridge financial company, as applicable, by the delivery of securities or the making of payments to or for the account of such customer, in a manner and in an amount at least as beneficial to the customer as would have been the case had the actual proceeds realized from the liquidation of the covered broker or dealer under this title been distributed in a proceeding under [SIPA] without the appointment of the Corporation as receiver and without any transfer of assets or liabilities to a bridge financial company, and with a filing date as of the date on which the Corporation is appointed as receiver.").

148 See 12 CFR 380.63(d) and 17 CFR 302.103(d). See also 12 U.S.C. 5385(h) (granting the Corporation and the Commission authority to adopt rules to implement section 205 of the Dodd-Frank Act).

149 See, e.g., In re Lehman Brothers Inc., (Bankr. S.D.N.Y 2008), Trustee's Preliminary Investigation Report and Recommendations, available at http://dm.epiq11.com/LBI/Project#).

the bridge broker-dealer, but only to the extent of the property (and SIPC funds) so transferred and held by the bridge broker-dealer with respect to that person's account.[150] This portion of the final rule provides customers of the bridge broker-dealer with the assurance that the securities laws relating to the protection of customer property will apply to customers of a bridge broker-dealer in the same manner as they apply to customers of a broker-dealer which is being liquidated outside of Title II.[151] In the view of the Agencies, such assurances will help to reduce uncertainty regarding the protections that will be offered to customers.

This portion of the final rule also provides that the bridge broker-dealer will not have any obligations with respect to any customer property or other property that is not transferred from the covered broker-dealer to the bridge broker-dealer.[152] A customer's net equity claim remains with the covered broker-dealer and, in most cases, will be satisfied, in whole or in part, by transferring the customer's account together with customer property, to the bridge broker-dealer.[153] In the event that a customer's account and the associated account property is not so transferred, the customer's net equity claim will be subject to satisfaction by SIPC as the trustee for the covered broker-dealer in the same manner and to the same extent as in a SIPA proceeding.[154]

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150 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

151 See also 12 U.S.C. 5390(h)(2)(H)(ii) (stating that the bridge financial company shall be subject to the federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission, as is necessary or appropriate in the public interest or for the protection of investors).

152 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

153 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

154 See 12 U.S.C. 5385(f)(2).

The bridge broker-dealer section of the final rule[155] also provides that the transfer of assets or liabilities of a covered broker-dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker-dealer for non-customer creditors, and assets and liabilities associated with any trust or custody business, to a bridge broker-dealer, will be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.[156] This section is based on the Corporation's authority, under three separate statutory provisions of Title II.[157] The broad language of this paragraph of the final rule is intended to give full effect to the statutory provisions of the Dodd-Frank Act regarding transfers of assets and liabilities of a covered financial company,[158] which represent a determination by Congress that, in order to mitigate risk to the financial stability of the United States and minimize moral hazard following the failure of a covered financial company, the Corporation as receiver must be free to determine which contracts, assets, and liabilities of the covered financial company are to be transferred to a bridge financial company, and to transfer such contracts, assets, and liabilities expeditiously and irrespective of whether any other person or entity consents to or approves of the transfer. The impracticality of requiring

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155 See 12 CFR 380.63(e) and 17 CFR 302.103(e).

156 See 12 CFR 380.63(e) and 17 CFR 302.103(e); see also12 U.S.C. 5390(h)(5)(D).

157 See 12 U.S.C. 5390(h)(5)(D). See also 12 U.S.C.5390(a)(1)(G); 12 U.S.C. 5390(a)(1)(O). Notably, the power to transfer customer accounts and customer property without customer consent is also found in SIPA. See 15 U.S.C. 78fff-2(f).

158 The final rule text omits the reference to "further" approvals found in 12 U.S.C. 5390(h)(5)(D). The reference in the statute is to the government approvals needed in connection with organizing the bridge financial company, such as the approval of the articles of association and by-laws, as established under 12 U.S.C. 5390(h). These approvals will already have been obtained prior to any transfer under the proposed rule, making the reference to "further" approvals unnecessary and superfluous.

the Corporation as receiver to obtain the consent or approval of others in order to effectuate a transfer of the failed company's contracts, assets, and liabilities arises whether the consent or approval otherwise would be required as a consequence of laws, regulations, or contractual provisions, including as a result of options, rights of first refusal, or similar contractual rights, or any other restraints on alienation or transfer. Paragraph (e) of the final rule will apply regardless of the identity of the holder of the restraint on alienation or transfer, whether such holder is a local, state, federal or foreign government, a governmental department or other governmental body of any sort, a court or other tribunal, a corporation, partnership, trust, or other type of company or entity, or an individual, and regardless of the source of the restraint on alienation or transfer, whether a statute, regulation, common law, or contract. It is the Corporation's view that the transfer of any contract to a bridge financial company would not result in a breach of the contract and would not give rise to a claim or liability for damages. In addition, under section 210(h)(2)(E) of the Dodd-Frank Act, no additional assignment or further assurance is required of any person or entity to effectuate such a transfer of assets or liabilities by the Corporation as receiver for the covered broker-dealer. Paragraph (e) of the final rule will facilitate the prompt transfer of assets and liabilities of a covered broker-dealer to a bridge broker-dealer and enhance the Corporation's ability to maintain critical operations of the covered broker-dealer. Rapid action to set-up a bridge broker-dealer and transfer assets, including customer accounts and customer property, may be critical to preserving financial stability and to giving customers the promptest possible access to their accounts.

Paragraph (f) of the bridge broker-dealer provision of the final rule provides for the succession of the bridge broker-dealer to the rights, powers, authorities, or privileges of the covered broker-dealer.[159] This provision of the final rule draws directly from authority provided in Title II and is designed to facilitate the ability of the Corporation as receiver to operate the bridge broker-dealer.[160] Pursuant to paragraph (g) of the bridge broker-dealer provision,[161] the bridge broker-dealer will also be subject to the federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission as is necessary or appropriate in the public interest or for the protection of investors.[162] This provision of the final rule also draws closely upon Title II.[163]

Paragraph (h) of the bridge broker-dealer provision of the final rule states that at the end of the term of existence of the bridge broker-dealer, any proceeds or other assets that remain after payment of all administrative expenses of the bridge broker-dealer and all other claims against the bridge broker-dealer will be distributed to the Corporation as receiver for the related covered broker-dealer.[164] Stated differently, the residual value in the bridge broker-dealer after payment of its obligations will benefit the creditors of the covered broker-dealer in satisfaction of their claims.

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159 See 12 CFR 380.63(f) and 17 CFR 302.103(f).

160 See 12 U.S.C. 5390(h)(2)(H)(i).

161 See 12 CFR 380.63(g) and 17 CFR 302.103(g).

162 See 12 U.S.C. 5390(h)(2)(H)(ii).

163 Id.

164 See 12 CFR 380.63(h) and 17 CFR 302.103(h). See also 12 U.S.C. 5385(d)(2); 12 U.S.C. 5390(h)(15)(B).

E. Claims of Customers and Other Creditors of a Covered Broker-Dealer[165]

The final rule's section on the claims of the covered broker-dealer's customers and other creditors addresses the claims process for those customers and other creditors as well as the respective roles of the trustee and the receiver with respect to those claims.[166] This section provides SIPC with the authority as trustee for the covered broker-dealer to make determinations, allocations, and advances in a manner consistent with its customary practices in a liquidation under SIPA.[167] Specifically, the section provides: "The allocation of customer property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA."[168] Each customer of a covered broker-dealer will receive cash and securities at least equal in amount and value, as of the appointment date, to what that customer would have received in a SIPA proceeding.[169]

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165 The section of the final rule on claims of customers and other creditors of a covered broker-dealer appears in 12 CFR 380.64 for purposes of the Corporation and 17 CFR 302.104 for purposes of the Commission. The rule text for both agencies is identical.

166 See 12 CFR 380.64 and 17 CFR 302.104.

167 See 12 CFR 380.64(a)(4) and 17 CFR 302.104(a)(4). See also 15 U.S.C. 78aaa et seq..

168 See 12 CFR 380.64(a)(4) and 17 CFR 302.104(a)(4).

169 See 15 U.S.C. 78aaa et seq.

This section further addresses certain procedural aspects of the claims determination process in accordance with the requirements set forth in section 210(a)(2)-(5) of the Dodd-Frank Act.[170] The section describes the role of the receiver of a covered broker-dealer with respect to claims and provides for the publication and mailing of notices to creditors of the covered broker-dealer by the receiver in a manner consistent with both SIPA and the notice procedures applicable to covered financial companies generally under section 210(a)(2) of the Dodd-Frank Act.[171] The section provides that the notice of the Corporation's appointment as receiver must be accompanied by notice of SIPC's appointment as trustee.[172] In addition, the Corporation, as receiver, will consult with SIPC, as trustee, regarding procedures for filing a claim including the form of claim and the filing instructions, to facilitate a process that is consistent with SIPC's general practices.[173] The claim form will include a provision permitting a claimant to claim customer status, if applicable, but the inclusion of any such claim to customer status on the claim form will not be determinative of customer status under SIPA.

The final rule sets the claims bar date as the date following the expiration of the six-month period beginning on the date that the notice to creditors is first published.[174] The claims bar date in the final rule is consistent with section 8(a) of SIPA, which provides for the barring of claims after the expiration of the six-month period beginning

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170 12 U.S.C. 5390(a)(2)-(5).

171 See 12 CFR 380.64(b) and 17 CFR 302.104(b). See also 12 U.S.C. 5390(a)(2).

172 See 12 CFR 380.64(b)(1) and 17 CFR 302.104(b)(1) ("The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's Web site at www.sipc.org. . . .").

173 See 12 CFR 380.64(b)(2) and 17 CFR 302.104(b)(2).

174 See 12 CFR 380.64(b)(3) and 17 CFR 302.104(b)(3) (discussing claims bar date).

upon publication.[175] The six-month period is also consistent with section 210(a)(2)(B)(i) of the Dodd-Frank Act, which requires that the claims bar date be no less than ninety days after first publication.[176] As required by section 210(a)(3)(C)(i) of the Dodd-Frank Act, the final rule provides that any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, except that a claim filed after the claims bar date will be considered by the receiver if (i) the claimant did not receive notice of the appointment of the receiver in time to file a claim before the claim date, and (ii) the claim is filed in time to permit payment of the claim, as provided by section 210(a)(3)(C)(ii) of the Dodd-Frank Act.[177] This exception for late-filed claims due to lack of notice to the claimant serves a similar purpose (i.e., to ensure a meaningful opportunity for claimants to participate in the claims process) as the "reasonable, fixed extension of time" that may be granted to the otherwise applicable six-month deadline under SIPA to certain specified classes of claimants.[178]

Section 8(a)(3) of SIPA provides that a customer who wants to assure that its net equity claim is paid out of customer property must file its claim with the SIPA trustee within a period of time set by the court (not exceeding 60 days after the date of publication of the notice provided in section 8(a)(1) of SIPA) notwithstanding that the claims bar date is later.[179] The final rule conforms to this section of SIPA by providing that any claim for net equity filed more than 60 days after the notice to creditors is first

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175 See 15 U.S.C. 78fff-2(a).

176 See 12 U.S.C. 5390(a)(2)(B)(i).

177 See 12 CFR 380.64(b)(3) and 17 CFR 302.104(b)(3). See also 12 U.S.C. 5390(a)(3)(C)(i)–(ii).

178 See 15 U.S.C. 78fff-2(a)(3).

179 See 15 U.S.C. 78fff-2(a)(3) and 15 U.S.C. 78fff-2(a)(1).

published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it will be satisfied in cash or securities, or both, as SIPC, the trustee, determines is most economical to the receivership estate.[180]

Under the final rule, the Corporation as receiver is required to notify a claimant whether it allows a claim within the 180-day period[181] as such time period may be extended by written agreement,[182] or the expedited 90-day period,[183] whichever would be applicable. The process established for the determination of claims by customers of a covered broker-dealer for customer property or customer name securities constitutes the exclusive process for the determination of such claims.[184] This process corresponds to the SIPA provision that requires that customer claims to customer property be determined pro rata based on each customer's net equity applied to all customer property as a whole.[185] While the Dodd-Frank Act provides for expedited treatment of certain claims within 90 days, given that all customers may have preferred status with respect to customer property and customer name securities, no one customer's claim, or group of customer claims, will be treated in an expedited manner ahead of other customers' claims. Consequently, the concept of expedited relief will not apply to customer

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180 See 12 CFR 380.64(b)(3) and 17 CFR 302.104(b)(3). See also 15 U.S.C. 78fff-2(a)(3).

181 See 12 CFR 380.64(c) and 17 CFR 302.104(c). See also 12 U.S.C. 5390(a)(3)(A)(i).

182 See 15 U.S.C. 5390(a)(3)(A).

183 See 12 CFR 380.64(c) and 17 CFR 302.104(c). See also 12 U.S.C. 5390(a)(5)(B).

184 See 12 CFR 380.64(c) and 17 CFR 302.104(c).

185 See 15 U.S.C. 78fff-2.

claims.[186] The receiver's determination to allow or disallow a claim in whole or in part will utilize the determinations made by SIPC, as trustee, with respect to customer status, claims for net equity, claims for customer name securities, and whether property held by the covered broker-dealer qualifies as customer property.[187] A claimant may seek a de novo judicial review of any claim that is disallowed in whole or in part by the receiver, including but not limited to any claim disallowed in whole or part based upon any determination made by SIPC.[188]

F. Additional Sections of the Rule

In addition to the previously discussed sections, the Agencies have included sections in the final rule addressing: (1) the priorities for unsecured claims against a covered broker-dealer;[189] (2) the administrative expenses of SIPC;[190] and (3) QFCs.[191] The Dodd-Frank Act sets forth special priorities for the payment of claims of general unsecured creditors of a covered broker-dealer, which are addressed in the final rule's section on priorities for unsecured claims against a covered broker-dealer.[192] The

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186 See 12 CFR 380.64(c) and 17 CFR 302.104(c).

187 Id.

188 See 12 CFR 380.64(d) and 17 CFR 302.104(d) ("The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) made by SIPC as trustee . . . by the appropriate district or territorial court of the United States. . . ."). See also 12 U.S.C. 5390(a)(4)-(5).

189 The priorities for unsecured claims against a covered broker-dealer section appears in 12 CFR 380.65 for purposes of the Corporation and 17 CFR 302.105 for purposes of the Commission. The rule text for both agencies is identical.

190 The SIPC administrative expenses section appears in 12 CFR 380.66 for purposes of the Corporation and 17 CFR 302.106 for purposes of the Commission. The rule text for both agencies is identical.

191 The QFC section appears in 12 CFR 380.67 for purposes of the Corporation and 17 CFR 302.107 for purposes of the Commission. The rule text for both agencies is identical.

192 See 12 U.S.C. 5390(b)(6) (providing the priority of expenses and unsecured claims in the orderly liquidation of SIPC members).

priorities for unsecured claims against a covered broker-dealer include claims for unsatisfied net equity of a customer and certain administrative expenses of the receiver and SIPC.[193] The priorities set forth in the final rule express the cumulative statutory requirements set forth in Title II.[194] First, the priorities provide that the administrative expenses of SIPC as trustee for a covered broker-dealer will be reimbursed pro rata with administrative expenses of the receiver for the covered broker-dealer.[195] Second, the amounts paid by the Corporation as receiver to customers or SIPC will be reimbursed on a pro rata basis with amounts owed to the United States, including amounts borrowed from the U.S. Treasury for the orderly liquidation fund.[196] Third, the amounts advanced by SIPC for the satisfaction of customer net equity claims will be reimbursed subsequent to amounts owed to the United States, but before all other claims.[197]

Title II provides that SIPC is entitled to recover administrative expenses incurred in performing its responsibilities under section 205 on an equal basis with the Corporation.[198] Title II also sets forth a description of the administrative expenses of the receiver.[199] In order to provide additional clarity as to the types of administrative expenses that SIPC will be entitled to recover in connection with its role as trustee for the

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193 See 12 CFR 380.65 and 17 CFR 302.105.

194 See 12 U.S.C. 5390(b)(6) (providing the priority of expenses and unsecured claims in the orderly liquidation of SIPC members). See also 12 CFR 380.65 and 17 CFR 302.105.

195 See 12 CFR 380.65(a) and 17 CFR 302.105(a). See also 12 U.S.C. 5390(b)(6)(A).

196 See 12 CFR 380.65(b) and 17 CFR 302.105(b). See also 12 U.S.C. 5390(b)(6)(B); 12 U.S.C. 5390(n) (establishing the "orderly liquidation fund" available to the Corporation to carry out the authorities granted to it under Title II).

197 See 12 CFR 380.65(c) and 17 CFR 302.105(c). See also 12 U.S.C. 5390(b)(6)(C).

198 See 12 U.S.C. 5390(b)(6)(A). The regulation governing the Corporation's administrative expenses in its role as receiver under Title II is located at 12 CFR 380.22.

199 See 12 U.S.C. 5381(a)(1).

covered broker-dealer, the final rule provides that SIPC, in connection with its role as trustee for the covered broker-dealer, has the authority to "utilize the services of private persons, including private attorneys, accountants, consultants, advisors, outside experts and other third party professionals." The section further provides SIPC with an allowed administrative expense claim with respect to any amounts paid by SIPC for services provided by these persons if those services are "practicable, efficient and cost-effective."[200] The definition of administrative expenses of SIPC in the final rule conforms to both the definition of administrative expenses of the Corporation as receiver and the costs and expenses of administration reimbursable to SIPC as trustee in the liquidation of a broker-dealer under SIPA.[201] Specifically, the definition includes "the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts and other third parties, and other proper expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e)."[202] The definition excludes advances from SIPC to satisfy customer claims for net equity because the Dodd-Frank Act specifies that those advances are treated differently than administrative expenses with respect to the priority of payment.[203]

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200 See 12 CFR 380.66(a) and 17 CFR 302.106(a).

201 See 12 CFR 380.66(a) and 17 CFR 302.106(a). See also 12 U.S.C. 5381(a)(1) (defining administrative expenses of the receiver); 15 U.S.C. 78eee(5) (providing for compensation for services and reimbursement of expenses).

202 See 12 CFR 380.66(a) and 17 CFR 302.106(a). See also 15 U.S.C. 78eee(b)(5)(A); 15 U.S.C. 78fff(e).

203 See 12 CFR 380.66(b) and 17 CFR 302.106(b) (defining the term administrative expenses of SIPC). See also 12 U.S.C. 5390(b)(6)(C) (stating SIPC's entitlement to recover any amounts paid out to meet its obligations under section 205 and under SIPA).

Lastly, the final rule's section on QFCs states that QFCs are governed in accordance with Title II.[204] Paragraph (b)(4) of section 205 of the Dodd-Frank Act states: "Notwithstanding any provision of [SIPA] . . . the rights and obligations of any party to a qualified financial contract (as the term is defined in section 210(c)(8)) to which a covered broker or dealer for which the Corporation has been appointed receiver is a party shall be governed exclusively by section 210, including the limitations and restrictions contained in section 210(c)(10)(B)."[205] Paragraph (c)(8)(A) of section 210 states that, "no person shall be stayed or prohibited from exercising – (i) any right that such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a covered financial company which arises upon the date of appointment of the Corporation as receiver for such covered financial company or at any time after such appointment; (ii) any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts described in clause (i); or (iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more contracts or agreements described in clause (i), including any master agreement for such contracts or agreements."[206] Paragraph (c)(10)(B)(i)(I)-(II) of section 210 provides in pertinent part that a person who is a party to a QFC with a covered financial company may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (c)(8)(A) of section 210 solely by reason of or incidental to the appointment

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204 See 12 CFR 380.67 and 17 CFR 302.107.

205 See 12 U.S.C. 5385(b)(4) ("Notwithstanding any provision of [SIPA]. . .the rights and obligations of any party to a qualified financial contract. . . to which a covered broker or dealer . . .is a party shall be governed exclusively by section 210 [of the Dodd-Frank Act]").

206 See 12 U.S.C. 5390(c)(8)(A).

under Title II of the Corporation as receiver for the covered financial company: (1) until 5:00 p.m. eastern time on the business day following the date of the appointment; or (2) after the person has received notice that the contract has been transferred pursuant to paragraph (c)(9)(A) of section 210.[207] The final rule reflects these statutory directives and states: "The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder."[208]

IV. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act of 1995[209] ("PRA") states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The final rule clarifies the process for the orderly liquidation of a covered broker-dealer under Title II of the Dodd-Frank Act. The final rule addresses only the process to be used in the liquidation of the covered broker-dealer and does not create any new, or revise any existing, collection of information pursuant to the PRA. Consequently, no information has been submitted to the OMB for review.

V. ECONOMIC ANALYSIS

A. Introduction and General Economic Considerations

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207 See 12 U.S.C. 5390(c)(10)(B).

208 See 12 CFR 380.67 and 17 CFR 302.107.

209 44 U.S.C. 3501 et seq.

The Agencies are jointly adopting this rule to implement provisions applicable to the orderly liquidation of covered broker-dealers pursuant to section 205(h) of the Dodd-Frank Act in a manner that protects market participants by clearly establishing expectations and equitable treatment for customers and creditors of failed broker-dealers, as well as other market participants. The Agencies are mindful of the expected costs and benefits of their respective rules. The following economic analysis seeks to identify and consider the expected benefits and costs as well as the expected effects on efficiency, competition, and capital formation that would result from the final rule. Overall, the Agencies believe that the primary benefit of the final rule is to codify additional details regarding the process for the orderly liquidation of failed broker-dealers pursuant to Title II, which will provide additional structure and enable consistent application of the process. Importantly, the final rule does not affect the set of resolution options available to the Agencies in the event of the failure of a broker-dealer, nor does it affect the range of possible outcomes. The detailed analysis of the expected costs and benefits associated with the final rule is discussed below.

The Dodd-Frank Act specifically provides that the FDIC may be appointed receiver for a systemically important broker-dealer for purposes of the orderly liquidation of the company using the powers and authorities granted to the FDIC under Title II.[210] Section 205 of the Dodd-Frank Act sets forth a process for the orderly liquidation of covered broker-dealers that is an alternative to the process under SIPA, but incorporates many of the customer protection features of SIPA into a Title II orderly liquidation.

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[210] See 12 U.S.C. 5382, 12 U.S.C. 5383, and 12 U.S.C. 5384.

Congress recognized that broker-dealers are different from other kinds of systemically important financial companies in several ways, not the least of which is how customers of a broker-dealer are treated in an insolvency proceeding relating to the broker-dealer.[211] Section 205 of the Dodd-Frank Act is intended to address situations where the failure of a large broker-dealer could have broader impacts on the stability of the United States financial system. The financial crisis of 2007-2009 and the ensuing economic recession resulted in the failure of many financial entities. Liquidity problems that initially began at a small set of firms quickly spread as uncertainty about which institutions were solvent increased, triggering broader market disruptions, including a general loss of liquidity, distressed asset sales, and system-wide redemption runs by some participants.[212] The final rule seeks to implement the orderly liquidation provisions of the Dodd-Frank Act in a manner that is designed to help reduce both the likelihood and the severity of financial market disruptions that could result from the failure of a covered broker-dealer.

In the case of a failing broker-dealer, the broker-dealer customer protection regime is primarily composed of SIPA and the Exchange Act, as administered by SIPC and the Commission. Among other Commission financial responsibility rules, Rule 15c3-3 specifically protects customer funds and securities held by a broker-dealer and essentially forbids broker-dealers from using customer assets to finance any part of their businesses unrelated to servicing securities customers.[213] With respect to SIPA, and as a

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211 See 12 U.S.C. 5385 (orderly liquidation of covered brokers and dealers).

212 See Brunnermeier, M. (2009), Deciphering the Liquidity and Credit Crunch 2007-2008, Journal of Economic Perspectives 23, 77-100.

213 See Net Capital Requirements for Brokers and Dealers, Exchange Act Release No. 21651 (January 11, 1985), 50 FR 2690, 2690 (January 18, 1985). See also Broker-Dealers; Maintenance of

general matter, in the event that a broker-dealer enters into a SIPA liquidation, customers' cash and securities held by the broker-dealer are returned to customers on a pro-rata basis.[214] If the broker-dealer does not have sufficient funds to satisfy customer net equity claims, SIPC advances may be used to supplement the distribution, up to a ceiling of $500,000 per customer, including a maximum of $250,000 for cash claims.[215] When applicable, SIPC or a SIPA trustee will return securities that are registered in the customer's name or are in the process of being registered directly to each customer.[216] An integral component of the broker-dealer customer protection regime is that, under SIPA, customers have preferred status relative to general creditors with respect to customer property and customer name securities.[217] SIPC or a SIPA trustee may sell or transfer customer accounts to another SIPC member in order for the customers to regain access to their accounts in an expedited fashion.[218]

Title II of the Dodd-Frank Act supplemented the customer protection regime for broker-dealers. As described above in more detail, in the event a covered broker-dealer fails, Title II provides the FDIC with a broad set of tools to help ensure orderly liquidation, including the ability to transfer all assets and liabilities held by a broker-dealer – not just customer assets – to a bridge broker-dealer, as well as the ability to borrow from the U.S. Treasury to facilitate the orderly liquidation should the need

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Certain Basic Reserves, Exchange Act Release No. 9856 (November 10, 1972), 37 FR 25224, 25224 (November 29, 1972).

214 See 15 U.S.C. 78fff-2(b).

215 See 15 U.S.C. 78fff-3(a).

216 See 15 U.S.C. 78fff-2(c).

217 See 15 U.S.C. 78fff(a).

218 See 15 U.S.C. 78fff-2(f).

arise.[219] Upon the commencement of an orderly liquidation under Title II, the FDIC is appointed the receiver of the broker-dealer and SIPC is appointed as the trustee for the liquidation process. The FDIC is given the authority to form and fund a bridge broker-dealer,[220] which would facilitate a quick transfer of customer accounts to a solvent broker-dealer and therefore would accelerate reinstated access to customer accounts.[221] To further reduce the risk of such a run on a failed broker-dealer, Title II imposes an automatic one-business day stay on certain activities by the counterparties to QFCs, so as to provide the FDIC an opportunity to inform counterparties that the covered broker-dealer's liabilities were transferred to and assumed by the bridge broker-dealer.[222]

The final rule is designed to implement the provisions of section 205 so that an orderly liquidation can be carried out for certain broker-dealers with efficiency and predictability and the intended benefits of orderly liquidation, as established by the Dodd-Frank Act, on the overall economy can be realized. Specifically, the final rule implements the framework for the liquidation of covered broker-dealers and includes definitions for key terms such as customer, customer property, customer name securities, net equity, and bridge broker-dealer. It sets forth three major processes regarding the orderly liquidation – the process of initiating the orderly liquidation (including the appointment of receiver and trustee and the notice and application for protective decree),

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219 Under a SIPA liquidation, the Commission is authorized to make loans to SIPC should SIPC lack sufficient funds. In addition, to fund these loans, the Commission is authorized to borrow up to $2.5 billion from the U.S. Treasury. See 15 U.S.C. 78ddd(g)-(h).

220 See 12 CFR 380.63 and 17 CFR 302.103 (regarding the FDIC's power to "organize one or more bridge brokers or dealers with respect to a covered broker or dealer").

221 See Section III.D.2 on the FDIC's power to transfer accounts to a bridge broker-dealer.

222 See Section III.F on the additional sections of the adopted rule that relate to qualified financial contracts.

the process of account transfers to the bridge broker-dealer, and the claims process for customers and other creditors. While establishing orderly liquidation generally, section 205 does not specifically provide the details of such processes.

The final rule provides several clarifications to the provisions in the statute. For example, under Title II, the FDIC has authority to transfer any assets without obtaining any approval, assignment, or consents.[223] The final rule further provides that the transfer to a bridge broker-dealer of any account, property, or asset is not determinative of customer status, nor that the property so transferred qualifies as customer property or customer name securities.[224] The final rule also clarifies terms such as the venue for filing the application for a protective decree and the filing date.[225]

In addition, the final rule clarifies the process for transferring assets to the bridge broker-dealer, which should help expedite customer access to their respective accounts. For example, the final rule provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based upon the books and records of the covered broker-dealer or other information deemed relevant by the Corporation in consultation with SIPC.[226] This means that customers may potentially access their accounts more expeditiously, before the time-consuming record reconciliation process concludes.

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223 See 12 CFR 380.63 and 17 CFR 302.103.

224 These determinations will be made by SIPC in accordance with SIPA. See 12 CFR 380.64(a)(1) and 17 CFR 302.104 (explaining "SIPC, as trustee for a covered broker or dealer, shall determine customer status . . .").

225 See 12 CFR 380.62 and 17 CFR 302.102.

226 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

Therefore, overall, the Agencies believe that the primary benefit of the final rule is to codify additional details regarding the process for the orderly liquidation of covered broker-dealers, which will provide additional structure and enable consistent application of the process. Importantly, the final rule does not affect the set of resolution options available to the Agencies upon failure of a covered broker-dealer, nor does it affect the range of possible outcomes. In the absence of the final rule, the Commission, the Board and the Secretary could still determine that an orderly liquidation under Title II is appropriate, and the FDIC would still have broad authority to establish a bridge broker-dealer and transfer all assets and liabilities held by the failed entity.[227] However, in the absence of the final rule, uncertainty could arise regarding the definitions (e.g., the applicable filing date or the nature of the application for a protective decree) and the claims process, which could cause delays and undermine the goals of the statute. By establishing a uniform process for the orderly resolution of a broker-dealer, the final rule should improve the orderly liquidation process while implementing the statutory requirements so that orderly liquidations can be carried out with efficiency and predictability. Such efficiency and predictability in the orderly liquidation process should generally minimize confusion over the status of customer accounts and property and conserve resources that otherwise would have to be expended in resolving delays in the claims process or in connection with any potential litigation that could arise from delays. There has not been a liquidation of a broker-dealer under Title II in the interim that would clarify and bring certainty to the process.

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227 See 12 U.S.C. 5383(a)(1)(B).

The discussion below elaborates on the likely expected costs and benefits of the final rule and its expected potential impact on efficiency, competition, and capital formation, as well as potential alternatives.

B. Economic Baseline

To assess the economic impact of the final rule, the Agencies are using section 205 of the Dodd-Frank Act as the economic baseline which specifies provisions for the orderly liquidation of certain large broker-dealers. Section 205(h) directs the Agencies, in consultation with SIPC, jointly to issue rules to fully implement the section.[228] Although no implementing rules are currently in place, the statutory requirements of section 205 of the Dodd-Frank Act are self-effectuating and currently in effect. Therefore, the appropriate baseline is the orderly liquidation authority in place pursuant to section 205 without any implementation rules issued by the Agencies.

1. SIPC's Role

Section 205 provides that upon the appointment of the FDIC as receiver for a covered broker-dealer, the FDIC shall appoint SIPC as trustee for the liquidation of the covered broker-dealer under SIPA without need for any approval.[229] Upon its appointment as trustee, SIPC shall promptly file with a federal district court an application for protective decree, the terms of which will jointly be determined by SIPC and the Corporation, in consultation with the Commission.[230] Section 205 also provides

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228 12 U.S.C. 5385(h).

229 12 U.S.C. 5385(a).

230 See 12 U.S.C. 5385(a)(2).

that SIPC shall have all of the powers and duties provided by SIPA except with respect to assets and liabilities transferred to the bridge broker-dealer.[231] The determination of claims and the liquidation of assets retained in the receivership of the covered broker-dealer and not transferred to the bridge financial company shall be administered under SIPA.[232]

2. The Corporation's Power to Establish Bridge Broker-Dealers

Section 205 of the Dodd-Frank Act does not contain specific provisions regarding bridge broker-dealers. However, section 210 of the Dodd-Frank Act provides that, in connection with an orderly liquidation, the FDIC has the power to form one or more bridge financial companies, including bridge broker-dealers with respect to a covered broker-dealer.[233] Under Title II, the FDIC has the authority to transfer any asset or liability held by the covered financial company without obtaining any approval, assignment, or consent with respect to such transfer.[234] Title II further provides that any customer of a covered broker-dealer whose account is transferred to a bridge financial company shall have all rights and privileges under section 205(f) of the Dodd-Frank Act and SIPA that such customer would have had if the account were not transferred.[235]

3. Satisfaction of Customer Claims

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231 12 U.S.C. 5385. See also 12 CFR 380.64(a) and 17 CFR 302.104(a) (regarding SIPC's role as trustee).

232 Id.

233 See 12 U.S.C. 5390(h)(1)(A). See also 12 U.S.C. 5390(h)(2)(H).

234 12 U.S.C. 5390(a)(1)(G).

235 See 12 U.S.C. 5390(h)(2)(H)(iii).

Section 205(f) of the Dodd-Frank Act requires that all obligations of a covered broker-dealer or bridge broker-dealer to a customer relating to, or net equity claims based on, customer property or customer name securities must be promptly discharged in a manner and in an amount at least as beneficial to the customer as would have been the case had the broker-dealer been liquidated in a SIPA proceeding.[236]

4. Treasury Report

On February 21, 2018, the Treasury Department published a report on the orderly liquidation authority and bankruptcy reform[237] ("Treasury Report") pursuant to the Presidential Memorandum issued on April 21, 2017.[238] Among other things, the Treasury Report recommended retaining the orderly liquidation authority as an emergency tool for use only under extraordinary circumstances.[239] The Treasury Report also recommended specific reforms to the orderly liquidation authority to eliminate opportunities for ad hoc disparate treatment of similarly situated creditors, reinforce existing taxpayer protections, and strengthen judicial review.[240] While some of these reforms relate to Title II of the Dodd-Frank Act, the Treasury Report did not recommend against implementing Section 205.[241]

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236 See 12 U.S.C. 5385(f)(1).

237 See Report to the President of the United States Pursuant to the Presidential Memorandum Issued April 21, 2017: Orderly Liquidation Authority and Bankruptcy Reform (Feb. 21, 2018). ("Treasury Report") (available at *https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf*)

238 See Presidential Memorandum for the Secretary of the Treasury, Orderly Liquidation Authority (Apr. 21, 2017) (available at *https://www.govinfo.gov/content/pkg/DCPD-201700266/pdf/DCPD-201700266.pdf*).

239 See Treasury Report at 2.

240 See ibid. at 1-2.

241 Ibid. Appendix A at 44-45.

C. Expected Benefits, Costs and Effects on Efficiency, Competition, and Capital Formation

1. Expected Benefits

a. Overall Expected Benefits

The key expected benefit of the final rule is that it creates a more structured framework to implement section 205 of the Dodd-Frank Act, so that the orderly liquidation of a covered broker-dealer can be carried out with efficiency and predictability if the need arises. As discussed in the economic baseline, section 205 provides parameters for the orderly liquidation of covered broker-dealers, while the final rule implements these statutory parameters. The final rule first provides definitions for certain key terms including customer, customer property, customer name securities, net equity, and bridge broker-dealer, among others.[242] It then sets forth three major processes regarding the orderly liquidation: the process of initiating the orderly liquidation,[243] the process of account transfers to the bridge broker-dealer,[244] and the claims process for customers and other creditors.[245]

First, besides incorporating the statutory requirement of appointing SIPC as the trustee for covered broker-dealers, the final rule provides a more detailed process for notice and application for protective decree. It provides clarification for the venue in which the notice and application for a decree is to be filed.[246] It clarifies the definition of the filing date if the notice and application is filed on a date other than the appointment

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242 See 12 CFR 380.60 and 17 CFR 302.100.

243 See 12 CFR 380.61-380.62, 17 CFR 302.101-302.102.

244 See 12 CFR 380.63 and 17 CFR 302.103.

245 See 12 CFR 380.64 and 17 CFR 302.104.

246 See 12 CFR 380.62(a) and 17 CFR 302.102.

date.[247] And finally, it includes a non-exclusive list of notices drawn from other parts of Title II to inform the relevant parties of the initiation of the orderly liquidation process and what they should expect.[248]

Second, the final rule sets forth the process to establish one or more bridge broker-dealers and to transfer accounts, property, and other assets held by a covered broker-dealer to such bridge broker-dealers, pursuant to Title II.[249] Section 205 of the Dodd-Frank Act does not specifically provide for such a process. The final rule specifies that the Corporation may transfer any account, property, or asset held by a covered broker-dealer (including customer and non-customer accounts, property and assets) to a bridge broker-dealer as the Corporation deems necessary, based on the FDIC's authority under Title II to transfer any assets without obtaining any approval, assignment, or consents.[250] The transfer to a bridge broker-dealer of any account, property or asset is not determinative of customer status.[251] The determinations of customer status are to be made by SIPC as trustee in accordance with SIPA.[252] As discussed above, given the preferred status of customers, litigation has been brought on customer status under SIPA (e.g., repo counterparties' claims of customer status under SIPA). [253] Since the Corporation may transfer both customer and non-customer accounts, property, and assets held by a covered broker-dealer to a bridge broker-dealer according to the statute, some

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247 Id.

248 See 12 CFR 380.62(b) and 17 CFR 302.102(b).

249 See 12 CFR 380.63 and 17 CFR 302.103.

250 See 12 CFR 380.63(e) and 17 CFR 302.103(e).

251 See 12 CFR 380.64(a) and 17 CFR 302.104(a).

252 See 12 CFR 380.64(a) and 17 CFR 302.104(a) as proposed.

253 See, e.g., In re Lehman Brothers Inc., 492 B.R. 379 (Bankr. S.D.N.Y. 2013), aff'd, 506 B.R. 346.

non-customer creditors may mistakenly interpret such a transfer as conferring customer status on them in the absence of a final rule (especially since in a SIPA proceeding only customer assets are transferred). Such mistaken beliefs could give rise to litigation over customer status. The clarification in the final rule stresses that customer status is determined by SIPC separately from the decision to transfer an asset to a bridge broker-dealer, and could thus help prevent confusion concerning whether other creditors whose assets have also been transferred should be treated as customers. This clarification may mitigate a potential increase in litigation costs, although the economic benefit of such mitigation is likely to be *de minimis*.

Regarding the account transfers to bridge broker-dealers, in addition to the provisions on the specifics of a transfer (e.g., the calculation of customer net equity, the assumption of the net equity claim by the bridge broker-dealer and the allocation of customer property), the final rule further provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based upon the books and records of the covered broker-dealer or other information deemed relevant by the Corporation in consultation with SIPC.[254] Given that it could be time-consuming to reconcile the broker-dealer's records with the records of other parties, this provision may speed up the allocation of customer property to the customer accounts at the bridge broker-dealer, thus providing customers quicker access to their accounts.

Third, the final rule also addresses the claims process for customers and other creditors.[255] The final rule implements the statute's requirement that the trustee's

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254 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

255 See 12 CFR 380.64 and 17 CFR 302.104.

allocation to a customer shall be in an amount and manner, including form and timing, which is at least as beneficial as such customer would have received under a SIPA proceeding, as required by section 205(f).[256] In addition, the final rule further addresses certain procedural aspects of the claims determination process, such as the publication and mailing of notices to creditors, the notice of the appointment of the FDIC and SIPC, the claims bar date, and expedited relief.

In summary, the final rule will provide interested parties with details on the implementation of the orderly liquidation process. By providing for a uniform process, the final rule could improve the efficiency and predictability of the orderly liquidation process. Under the baseline scenario, in absence of the final rule, uncertainty may arise because various parties may interpret the statutory requirements differently. For example, under the baseline, the repo counterparties of the broker-dealer may not understand that the transfer of the rights and obligations under their contracts to the bridge broker-dealer is not determinative of customer status, because such a transfer to another broker-dealer is only available for customers under a SIPA proceeding. That is, repo counterparties of the broker-dealer may mistakenly believe that the transfer of rights and obligations implies customer status and may thus inappropriately manage their exposures to the broker dealer once orderly liquidation is initiated. Moreover, repo counterparties might choose to take advantage of ambiguity under the baseline scenario because under SIPA, customers have preferred status relative to general creditors with respect to customer property and customer name securities. The final rule provides that the transfer of accounts to a bridge broker-dealer is not determinative of customer status,

256 See 12 CFR 380.64(a)(4) and 17 CFR 302.104(a)(4).

and that such status is determined by SIPC in accordance with SIPA. Uncertainty regarding matters such as customer status could result in litigation and delays in the claims process if orderly liquidation were to be commenced with respect to a covered broker-dealer. Therefore, the structure provided by the final rule could conserve resources that otherwise would have to be expended in settling such litigation and resolving delays that may arise, creating a more efficient process for enabling orderly liquidation. Moreover, under the baseline scenario, uncertainties about how customer claims would be handled might lead some customer claimants to reduce exposure if doubts about a broker-dealer's viability arise, by withdrawing free credit balances. Similarly, uncertainties about initiation of orderly liquidations and the process of transferring assets to the bridge broker-dealer might lead creditors to reduce repo and derivatives exposure before such actions are warranted. Such uncertainties, if they were to persist, could undermine the broader benefits that orderly liquidation could provide to financial stability. In this sense, the processes set forth by the final rule could help realize the economic benefits of section 205.

b. Benefits to Affected Parties

The Agencies believe that the final rule provides benefits comparable to those under the baseline scenario to relevant parties such as customers, creditors, and counterparties. To the extent that it provides additional guidance on procedural matters, the final rule may reduce potential uncertainty, thereby providing for a more efficient and predictable orderly liquidation process. Therefore, the Agencies believe the final rule will improve the orderly liquidation process and provide benefits beyond the statute, although such benefits are likely to be incremental.

The Agencies believe that the final rule will be beneficial to customers.[257] The final rule states that the bridge broker-dealer will undertake the obligations of a covered broker-dealer with respect to each person holding an account transferred to the bridge broker-dealer. This will provide customers with transferred accounts assurance that they will receive the same legal protection and status as a customer of a broker-dealer that is subject to liquidation outside of Title II.[258] Further, under the final rule, the transfer of non-customer assets to a bridge broker-dealer will not imply customer status for these assets. The clarification in the final rule stresses that customer status is determined by SIPC separately from the decision to transfer an asset to a bridge broker-dealer, and could thus help prevent confusion concerning whether other creditors whose assets have also been transferred should be treated as customers. This clarification may mitigate a potential increase in litigation costs, although the economic benefit of such mitigation is likely to be *de minimis*. To the extent that the clarification reduces delays in the return of customer assets to customers, because it reduces the likelihood of litigation, the final rule would be beneficial to customers. Finally, the final rule also provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based on the books and records of the covered broker-dealer.[259] This provision could

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257 See Section II.D.1 discussing the preferred status of customer claims. See also 12 CFR 380.65(a)(1) and 17 CFR 302.105(a)(1) (explaining that "SIPC . . . shall determine customer status . . .").

258 See 12 CFR 380.63(d) and 17 CFR 302.103(d) ("With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b), the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer and allocated to the account as provided in section 380.64(a)(3) [for purposes of the FDIC and section 302.104(a)(3) for purposes of the SEC], including any customer property and any advances from SIPC.").

259 See 12 CFR 380.63(d) and 17 CFR 302.103(d).

help facilitate expedited customer access to their respective accounts, as customers will not have to wait for a final reconciliation of the broker-dealer's records with other parties' records.[260]

Additionally, the Agencies believe the final rule will yield benefits to both secured and unsecured creditors, as it clarifies the manner in which creditor claims could be transferred to a bridge broker-dealer. The Agencies believe that such clarification will reduce the likelihood of delayed access to creditor assets transferred from a covered broker-dealer.

2. Expected Costs

While the final rule ensures that in an orderly liquidation all customer claims are satisfied in a manner and in an amount at least as beneficial to them as would have been the case in a SIPA liquidation, orderly liquidation does entail a different treatment of QFC counterparties. Under SIPA, certain QFC counterparties may exercise specified contractual rights regardless of an automatic stay.[261] In contrast, Title II imposes an automatic one-day stay on certain activities by QFC counterparties,[262] which may limit

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260 See 12 CFR 380.63(e) and 17 CFR 302.103(e). See also 15 U.S.C. 78eee(b)(2)(C)(i)-(ii).

261 See 15 U.S.C. 78eee(b)(2)(C)(i)-(ii). See also Letter from Michael E. Don, Deputy General Counsel of SIPC to Robert A. Portnoy, Deputy Executive Director and General Counsel of the Public Securities Association, (February 4, 1986) (repurchase agreements); Letter from Michael E. Don to J. Eugene Marans, Cleary, Gottlieb, Steen & Hamilton, (August 29, 1988) (securities lending transactions); Letter from Michael E. Don to James D. McLaughlin, Director of the American Bankers Association, (October 30, 1990) (securities lending transactions secured by cash collateral or supported by letters of credit); Letter from Michael E. Don to John G. Macfarlane, III, Chairman, Repo Committee, Public Securities Association, (February 19, 1991) (securities lending transactions secured by cash collateral or supported by letters of credit); Letter from Michael E. Don, President of SIPC to Seth Grosshandler, Cleary, Gottlieb, Steen & Hamilton, (February 14, 1996) (repurchase agreements falling outside the Code definition of "repurchase agreement"); and Letter from Michael E. Don to Omer Oztan, Vice President and Assistant General Counsel of the Bond Market Association, (June 25, 2002) (repurchase agreements).

262 See 12 CFR 380.67 and 17 CFR 302.107 ("The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by

the ability of these counterparties to terminate contracts or exercise any rights against collateral. The stay will remain in effect if the QFC contracts are transferred to a bridge broker-dealer. While these provisions may impose costs, the Agencies' baseline subsumes these costs because they are a consequence of the statute and are already in effect.

In addition, as discussed above, the final rule could benefit customers by allowing the allocations to customer accounts at the bridge broker-dealer to be derived from estimates based on the books and records of the covered broker-dealer. Such a process may accelerate customers' access to their accounts, as they will not have to wait for a final account reconciliation to access their accounts. As provided for in the final rule, the calculation of allocations of customer property to customer accounts will be refined as additional information becomes available. The Agencies believe that initial allocations will be made conservatively, which, with the backstop of the availability of SIPC advances to customers in accordance with the requirements of SIPA, should minimize the possibility of an over-allocation to any customer. To the extent that initial estimates of allocations to some customers are excessive, it is possible that customer funds may need to be reallocated after customers initially gain access to their accounts, resulting in additional costs for customers. Thus, this particular aspect of the final rule is a trade-off between expedited access to customer funds and the possibility of subsequent reallocation. The costs associated with subsequent reallocation may vary significantly depending on broker-dealer systems and the specific events. In the preamble, the

12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.").

Agencies acknowledged that they lacked data that would allow them to estimate the costs associated with subsequent reallocation. Commenters on the proposal did not provide information that would help the Agencies estimate these costs. For these reasons, the Agencies believe the costs associated with subsequent reallocation cannot be quantified at this time. However, as noted above, the Agencies believe initial allocations will be made conservatively, which would minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements.

3. Expected Effects on Efficiency, Competition, and Capital Formation

The Commission and the Corporation have assessed the expected effects arising from the final rule on efficiency, competition, and capital formation. As discussed above, the Agencies believe the primary economic benefit of the final rule will be that it provides details on the implementation of section 205 of the Dodd-Frank Act, so that the orderly liquidation of a covered broker-dealer can be carried out with efficiency and predictability if the need arises. This structure could reduce uncertainty about the treatment of customer and creditor claims in an orderly liquidation, conserving resources and creating a more efficient process relative to orderly liquidation under the baseline.

In the absence of the final rule, uncertainty about the treatment of claims could encourage customers and creditors to reduce exposure to a broker-dealer facing financial distress, exacerbating the liquidity problems of the broker-dealer. These liquidity problems could drain cash from the broker-dealer and weaken its ability to meet its financial obligations to the point where the broker-dealer has to be liquidated, even if the

broker-dealer's business is still viable and profitable. Such an outcome is inefficient if the value realized from the liquidation of the broker-dealer is less than the value of the broker-dealer as a going concern. Additionally, such an outcome would be inefficient if the assets held by the covered broker-dealer were sold at fire sale prices in the process of trying to meet extraordinary liquidity demands. By clarifying the orderly liquidation process, the final rule could further reduce the likelihood of customers and creditors reducing their exposures to a broker-dealer facing financial distress, thereby further reducing the likelihood that the broker-dealer faces liquidity problems. This, in turn may reduce the likelihood of the inefficient liquidation of the broker-dealer.

In the absence of the final rule, creditors of a financially distressed broker-dealer that happen to hold the broker-dealer's assets as collateral might rapidly sell those collateral assets if they are uncertain about the treatment of their claims in an orderly liquidation under the statute. To the extent that the rapid selling of collateral assets by creditors generates large declines in the prices of those assets and creates a wedge between the prices of those assets and their intrinsic values–values based on the size and riskiness of asset cash flows–price efficiency could be reduced. A reduction in the price efficiency of collateral assets may dissuade other market participants from trading those collateral assets for hedging or investment purposes because they are concerned that the assets' prices may not accurately reflect their intrinsic values. By clarifying the treatment of creditor claims in an orderly liquidation, the final rule could promote the price efficiency of collateral assets by reducing the likelihood of rapid collateral asset sales.

Beyond these identified potential effects, the Agencies believe that the additional effects of the final rule on efficiency, competition, and capital formation will be linked to the existence of an orderly liquidation process itself, which is part of the baseline, and is an option available to regulatory authorities today. The Agencies' analysis of the effects of an orderly liquidation process on efficiency, competition, and capital formation focuses on those effects that derive from the process and structure created by the final rule, but not those that are due to the underlying statute, which is part of the economic baseline. By establishing a structured framework, the final rule sets clearer expectations for relevant parties and therefore could help reduce potential uncertainty and contribute to efficiency and liquidity as described above. Relative to the baseline scenario, where orderly liquidation exists as an option for regulatory authorities but without the framework provided in the final rule, having a structured process in place as a response to a potential crisis could also allow broker-dealers to more readily attract funding, thus facilitating capital formation.

D. Alternatives Considered

As described above, Title II establishes a process by which a covered broker-dealer would be placed into orderly liquidation. Furthermore, orderly liquidation is available as an option to regulators today, and the final rule does not affect the set of resolution options available to the Agencies, nor does it affect the range of possible outcomes. As an alternative to this final rule, the Agencies could rely on a very limited rule that focuses on defining key terms, in conjunction with statutory provisions, to implement Section 205. However, the Agencies believe this alternative approach would result in orderly liquidations, if any, that are less efficient and less predictable, and that

would fail to achieve the benefits of the final rule described above. In particular, the absence of the provisions of the final rule outlining the process for notice and application for a protective decree, the process for establishing a bridge broker-dealer, and the process governing the transfer of accounts, property, and other assets held by the covered broker-dealer to the bridge broker-dealer, could lead to inconsistent application of the statutory provisions. Such inconsistency could cause delays in the liquidation process and increase the likelihood of litigation over issues such as customer status, increasing costs for customers and creditors without corresponding benefits.

E. Comments on the Proposed Rule

As discussed in Section II supra, six comment letters were submitted to the FDIC and the SEC on the proposed rule. Three are from individuals (the "Individual Letters"), one is from students in a law school financial markets and corporate law clinic (the "Legal Clinic Letter"), one is from a group that states it is a "group of concerned citizens, activists, and financial professionals that works to ensure that financial regulators protect the interests of the public" (the "OSEC Letter"), and one is a joint letter from three trade groups representing various segments of the financial services industry (the "Joint Letter").[263] Three of the letters (Law Clinic Letter, OSEC Letter, and Joint Letter) provided comments that relate to the economic analysis of this rule. This section addresses those comments.

1. The Law Clinic Letter

[263] See comments to File No. S7-02-16 (available at: *https://www.sec.gov/comments/s7-02-16/s70216.htm*).

The Law Clinic Letter addresses two specific situations in which the commenter believes the application of the proposed rule might in some manner or on some facts have the possibility of delaying or obstructing consumer access to property in a Title II liquidation of a covered broker-dealer. First, in this commenter's view, the discretion provided to SIPC under the proposed rule to use estimates for the initial allocation of assets to customer accounts at the bridge broker-dealer is too broad and may result in over-allocations to these accounts to the detriment of other customers when the overpayments are recalled. In particular, the commenter opines that a conservative initial allocation intended to minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements is "too vague and is not codified in the rule itself." Further, the commenter asserts as "irresponsible" the Agencies' decision to base customer allocations on the books and records of the covered broker-dealer without fully understanding the potential costs to customers. The commenter also pointed out that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts actually constitute an actionable problem. The commenter requests that the Agencies modify the final rule to make it clear that estimates may be used only when the liquidated entity acts in bad faith to impede the reconciliation process.

The Agencies believe the commenter has misunderstood the discussion of anticipated costs as a justification for the provision of the proposed rule. The justification for the provision, as stated in the preamble, is to ensure that customers receive the assets held for their customer accounts, together with SIPC payments, if any, as quickly as is practicable. Returning customer assets to customers as quickly as possible is important

for a number of reasons. For example, customers may depend financially on these assets or may need access in order to be able to de-risk positions or re-hedge positions. It is for these and other similar reasons that the trustees in SIPA liquidations have utilized estimates to allow partial access to customer accounts before a final reconciliation is possible. Although the circumstances of a particular orderly liquidation may make this process difficult, the Agencies would endeavor to provide customers prompt access to their accounts to the extent possible based upon estimates while that reconciliation is being completed. As a result, the Agencies have made no changes in the final rule as a result of this comment.

In response to the commenter's concern that the notion of a conservative initial allocation is vague and not codified in the proposed rule, the Agencies believe that the orderly liquidations of different covered broker-dealers would likely occur under different circumstances. A prescriptive definition of conservative initial allocation that is codified may not be appropriate for the orderly liquidations of covered broker-dealers under all circumstances. Therefore, the Agencies have chosen not to define or to codify a conservative initial allocation in the final rule.

The Agencies reject the commenter's assertion that the Agencies decided to allow estimates of customer allocations to be based on the books and records of the covered broker-dealer without fully understanding the potential costs to customers. In the preamble, the Agencies not only addressed the potential costs associated with this allocation approach, but also the mitigation of such costs. Specifically, the Agencies acknowledged that to the extent that initial estimates of allocations to some customers are excessive, it is possible that customer funds may need to be reallocated after customers

initially gain access to their accounts, which could result in costs for customers.[264] Further, the Agencies recognized that these costs may vary significantly depending on broker-dealer systems and the specific events and acknowledged that the lack of data prevented a quantification of these costs. In the preamble, the Agencies also expressed the preliminary belief that initial allocations would be conservative and would minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements. None of the commenters provided information to support a different conclusion. Therefore, the Agencies believe that due consideration has been given to the potential costs that customers might incur under the allocation approach that is based on the books and records of the covered broker-dealer.

The Agencies disagree with the Law Clinic's suggestion that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts constitute an actionable problem. In the preamble,[265] the Agencies relied on experience with SIPA liquidations to ascertain that delays experienced by customers in accessing their accounts are a problem during the liquidation of a broker-dealer. The experience with SIPA liquidations constitutes relevant data that informs the Agencies' deliberations in this rulemaking. While costs incurred by customers who experience delays could also help demonstrate that such delays constitute an actionable problem, the Agencies do not have the data to quantify such costs, which are likely associated with the lost investment and consumption opportunities that would result if customers could not access their accounts quickly. Because customers typically do not report such forgone opportunities,

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264 Ibid.

265 See 81 FR at 10804.

the Agencies do not have the data to quantify the costs incurred by customers who experience delays in accessing their accounts.

2. The OSEC Letter

The OSEC Letter generally supports the proposed rule and outlines several benefits to the proposed rule, recognizing that the proposed rule relied upon the established framework for liquidations under SIPA in describing the orderly liquidation claims process. The commenter highlights one perceived difference between the SIPA process and the process described in the proposed rule, however and suggests that the rule would be improved by increasing the amount of time that customers have to file claims. The OSEC Letter states that the proposed rule tracks section 8(a)(3) of SIPA by mandating that customer claims for net equity be filed within 60 days after the date the notice to creditors to file claims is first published, while general creditors of the covered broker-dealer have up to six months to file their claims and have a good faith exception for late filings. The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers. The OSEC letter states that the proposed rule "fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability." The OSEC Letter supports the establishment of a bridge broker-dealer and suggests that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk.

While the Agencies appreciate the comments raised in the OSEC Letter, the Agencies have not made changes in the final rule as a result of these comments. First, the

OSEC Letter has misconstrued the proposed rule with respect to the time allowed for claims. The proposed rule provides that all creditors—customers as well as general unsecured creditors—have the opportunity to file claims within time frames consistent with the requirements of SIPA and of the Dodd-Frank Act. Under the proposed rule, customers would have the same six-month period to file claims as all other creditors and have an exception for late filings comparable to the SIPA good faith exception. However, under both SIPA and the proposed rule, if a customer files his claim within 60 days after the date the notice to creditors to file claims is first published, the customer is assured that its net equity claim will be paid, in kind, from customer property or, to the extent such property is insufficient, from SIPC funds. If the customer files a claim after the 60 days, the claim need not be paid with customer property and, to the extent such claim is paid by funds advanced by SIPC, it would be satisfied in cash or securities or both as SIPC determines is most economical to the estate. Therefore, the Agencies have made no changes in the final rule as a result of the comment.

The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers. The OSEC Letter states that the proposed rule "fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability." Restrictions on execution compensation are outside the scope of the rulemaking requirement of section 205(h) of the Dodd-Frank Act.[266] Therefore, the Agencies have chosen not to act on the commenter's suggestion.

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[266] Section 956 of the Dodd-Frank Act requires the appropriate Federal regulators to prescribe regulations or guidelines with respect to incentive-based payment arrangements and other matters relating to executive compensation. 12 U.S.C. 5641.

Regarding the commenter's suggestion that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk, the Agencies note that both the Dodd-Frank Act and the proposed rule permit the FDIC to establish multiple bridge broker-dealers in a Title II orderly liquidation and therefore the Agencies have made no changes in the final rule as a result of the comment.

3. The Joint Letter

The Joint Letter is generally supportive of the proposed rule but states that certain portions of the proposed rule would benefit from additional clarification, either through additional rulemaking or interpretive statements.

The Joint Letter states that the proposed rule is likely to have an extremely narrow scope of application and calls into question the necessity of the proposed rule. In the preamble to the proposed rule, the Agencies specifically acknowledged the limited circumstances in which the rule would be applied. However, the Dodd-Frank Act requires the Agencies jointly to issue rules to implement section 205 of the Act. The Agencies believe that the clarifications provided by the final rule will prove valuable should a broker-dealer ever be subject to a Title II orderly liquidation and therefore the Agencies are promulgating this final rule.

The Joint Letter also notes the concern that the proposed rule could create, rather than reduce, uncertainty because the proposed rule does not repeat the full statutory text of section 205(a) that SIPC will act "as trustee for the liquidation under the Securities Investor Protection Act…" [emphasis added.].

The proposed rule clarifies that, although the trustee will make certain determinations, such as the allocation of customer property, in accordance with the relevant definitions under SIPA, the orderly liquidation of the covered broker-dealer is in fact pursuant to a proceeding under the Dodd-Frank Act, rather than a process under SIPA. The Agencies acknowledge that the reference to a liquidation "under SIPA" in section 205 of the statute may create ambiguity. The purpose of the rulemaking required by section 205(h) of the Dodd-Frank Act is to clarify these provisions and provide a framework for implementing a Title II orderly liquidation of a broker-dealer. Thus, in the preamble to the proposed rule, the Agencies explained that the omission of the reference to the appointment of SIPC as a trustee for a liquidation "under [SIPA]" is intended to make clear that the rule applies to an orderly liquidation of a covered broker-dealer under the Dodd-Frank Act, not a SIPA proceeding.[267] The proposed rule seeks to eliminate the confusion caused by referring to a "liquidation under [SIPA]" in the Dodd-Frank Act when there is, in fact, no proceeding under SIPA and the broker-dealer is being liquidated under Title II, while implementing the statutory objective that the protections afforded to customers under SIPA are recognized in the Title II process. Therefore, the Agencies have made no changes in the final rule as a result of this comment.

VI. REGULATORY ANALYSIS AND PROCEDURES

A. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA") generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a

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267 See Section III.B. See also 12 U.S.C. 5383(b)(2).

final regulatory flexibility analysis describing the impact of the proposed rule on small entities.[268] However, a regulatory flexibility analysis is not required if the agency certifies that the proposal will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined "small entities" to include broker-dealers if their annual receipts do not exceed $41.5 million.[269] For the reasons described below and under section 605(b) of the RFA, the Agencies certify that the final rule will not have a significant economic impact on a substantial number of small entities. The final rule clarifies rules and procedures for the orderly liquidation of a covered broker-dealer under Title II. A covered broker-dealer is a broker-dealer that is subject to a systemic risk determination by the Secretary pursuant to section 203 of the Dodd-Frank Act, 12 U.S.C. 5383, and thereafter is to be liquidated under Title II. The Agencies do not believe that a broker-dealer that would be considered a small entity for purposes of the RFA would ever be the subject of a systemic risk determination by the Secretary. Therefore, the Agencies are not aware of any small entities that would be affected by the final rule. As such, the final rule would not affect, and would impose no burdens on, small entities.

B. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[270] requires federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The

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268 5 U.S.C. 601 et seq.

269 The SBA defines a Securities Brokerage (NAICS 523120) as a small entity if it garners annual receipts of $41.5 million or less. See 13 CFR 121.201 as amended by Small Business Size Standards: Adjustment of Monetary-Based Size Standards for Inflation, 84 FR 34261 (July 18, 2019) (effective August 19, 2019).

270 Pub. L. 106–102, 113 Stat. 1338, 1471.

FDIC has sought to present the rule in a simple and straightforward manner. The FDIC invited comments on how to make the proposed rule easier to understand. No comments addressing this issue were received.

VII. OTHER MATTERS

If any of the provisions of the final rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[271] the Office of Information and Regulatory Affairs (OIRA) has designated this rule as a "major rule," as defined by 5 U.S.C. § 804(2).

VIII. STATUTORY AUTHORITY

The final rule is being promulgated pursuant to section 205(h) of the Dodd-Frank Act. Section 205(h) of the Dodd-Frank Act requires the Corporation and the Commission, in consultation with SIPC, jointly to issue rules to implement section 205 of the Dodd-Frank Act concerning the orderly liquidation of covered broker-dealers.

List of Subjects

12 CFR Part 380

Holding companies, Insurance.

17 CFR Part 302

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271 5 U.S.C. 801 et seq.

Brokers, Claims, Customers, Dealers, Financial companies, Orderly liquidation.

Federal Deposit Insurance Corporation

12 CFR Part 380

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation amends 12 CFR part 380 as follows:

PART 380-ORDERLY LIQUIDATION AUTHORITY

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

Authority: 12 U.S.C. 5385(h); 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D); 12 U.S.C. 5381(b); 12 U.S.C. 5390(r); 12 U.S.C. 5390(a)(16)(D).

2. Add subpart D to part 380 to read as follows:

Subpart D—Orderly Liquidation of Covered Brokers or Dealers

§ 380.60 Definitions.

For purposes of this subpart D, the following terms are defined as follows:

Appointment date. The term *appointment date* means the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer. This date shall constitute the *filing date* as that term is used in SIPA.

Bridge broker or dealer. The term *bridge broker or dealer* means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered broker or dealer.

Commission. The term *Commission* means the Securities and Exchange Commission.

Covered broker or dealer. The term *covered broker or dealer* means a covered financial company that is a qualified broker or dealer.

Customer. The term *customer* of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78*lll*(2) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

Customer name securities. The term *customer name securities* shall have the same meaning as in 15 U.S.C. 78*lll*(3) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

Customer property. The term *customer property* shall have the same meaning as in 15 U.S.C. 78*lll*(4) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

Net equity. The term *net equity* shall have the same meaning as in 15 U.S.C. 78*lll*(11) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

Qualified broker or dealer. The term *qualified broker or dealer* means a broker or dealer that:

(1) is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and

(2) is a member of SIPC.

SIPA. The term *SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–*lll*.

SIPC. The term *SIPC* means the Securities Investor Protection Corporation.

§ 380.61 Appointment of receiver and trustee for covered broker or dealer.

Upon the appointment of the Corporation as receiver for a covered broker or dealer, the Corporation shall appoint SIPC to act as trustee for the covered broker or dealer.

§ 380.62 Notice and application for protective decree for covered broker or dealer.

(a) SIPC and the Corporation, upon consultation with the Commission, shall jointly determine the terms of a notice and application for a protective decree that will be filed promptly with the Federal district court for the district within which the principal place of business of the covered broker or dealer is located; *provided that* if a case or proceeding under SIPA with respect to such covered broker or dealer is then pending, then such notice and application for a protective decree will be filed promptly with the Federal district court in which such case or proceeding under SIPA is pending. If such notice and

application for a protective decree is filed on a date other than the appointment date, such filing shall be deemed to have occurred on the appointment date for the purposes of this subpart D.

(b) A notice and application for a protective decree may, among other things, provide for notice:

(1) Of the appointment of the Corporation as receiver and the appointment of SIPC as trustee for the covered broker or dealer; and

(2) That the provisions of Title II of the Dodd-Frank Act and any regulations promulgated thereunder may apply, including without limitation the following:

(i) Any existing case or proceeding with respect to a covered broker or dealer under the Bankruptcy Code or SIPA shall be dismissed effective as of the appointment date and no such case or proceeding may be commenced with respect to a covered broker or dealer at any time while the Corporation is receiver for such covered broker or dealer;

(ii) The revesting of assets in a covered broker or dealer to the extent that they have vested in any entity other than the covered broker or dealer as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer; *provided that* any such revesting shall not apply to assets held by the covered broker or dealer, including customer property, transferred prior to the appointment date pursuant to an order entered by the bankruptcy court presiding over the case or proceeding with respect to the covered broker or dealer;

(iii) The request of the Corporation as receiver for a stay in any judicial action or proceeding (other than actions dismissed in accordance with paragraph (b)(2)(i) of this

section) in which the covered broker or dealer is or becomes a party for a period of up to 90 days from the appointment date;

(iv) Except as provided in paragraph (b)(2)(v) of this section with respect to qualified financial contracts, no person may exercise any right or power to terminate, accelerate or declare a default under any contract to which the covered broker or dealer is a party (and no provision in any such contract providing for such default, termination or acceleration shall be enforceable), or to obtain possession of or exercise control over any property of the covered broker or dealer or affect any contractual rights of the covered broker or dealer without the consent of the Corporation as receiver of the covered broker or dealer upon consultation with SIPC during the 90-day period beginning from the appointment date; and

(v) The exercise of rights and the performance of obligations by parties to qualified financial contracts with the covered broker or dealer may be affected, stayed, or delayed pursuant to the provisions of Title II of the Dodd-Frank Act (including 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.

§ 380.63 Bridge broker or dealer.

(a) The Corporation, as receiver for one or more covered brokers or dealers or in anticipation of being appointed receiver for one or more covered broker or dealers, may organize one or more bridge brokers or dealers with respect to a covered broker or dealer.

(b) If the Corporation establishes one or more bridge brokers or dealers with respect to a covered broker or dealer, then, subject to paragraph (d) of this section, the

Corporation as receiver for such covered broker or dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge brokers or dealers unless the Corporation determines, after consultation with the Commission and SIPC, that:

(1) The customer accounts, customer name securities, and customer property are likely to be promptly transferred to one or more qualified brokers or dealers such that the use of a bridge broker or dealer would not facilitate such transfer to one or more qualified brokers or dealers; or

(2) The transfer of such customer accounts to a bridge broker or dealer would materially interfere with the ability of the Corporation to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.

(c) The Corporation, as receiver for such covered broker or dealer, also may transfer any other assets and liabilities of the covered broker or dealer (including non-customer accounts and any associated property and any assets and liabilities associated with any trust or custody business) to such bridge brokers or dealers as the Corporation may, in its discretion, determine to be appropriate in accordance with, and subject to the requirements of, 12 U.S.C. 5390(h), including 12 U.S.C. 5390(h)(1) and 5390(h)(5), and any regulations promulgated thereunder.

(d) In connection with customer accounts transferred to the bridge broker or dealer pursuant to paragraph (b) of this section, claims for net equity shall not be transferred but shall remain with the covered broker or dealer. Customer property transferred from the covered broker or dealer, along with advances from SIPC, shall be allocated to customer accounts at the bridge broker or dealer in accordance with §380.64(a)(3). Such

allocations initially may be based upon estimates, and such estimates may be based upon the books and records of the covered broker or dealer or any other information deemed relevant in the discretion of the Corporation as receiver, in consultation with SIPC, as trustee. Such estimates may be adjusted from time to time as additional information becomes available. With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b) or (c) of this section, the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer, and allocated to the account as provided in §380.64(a)(3), including any customer property and any advances from SIPC. The bridge broker or dealer shall have no obligations with respect to any customer property or other property that is not transferred from the covered broker or dealer to the bridge broker or dealer. The transfer of customer property to such an account shall have no effect on calculation of the amount of the affected account holder's net equity, but the value, as of the appointment date, of the customer property and advances from SIPC so transferred shall be deemed to satisfy any such claim, in whole or in part.

(e) The transfer of assets or liabilities held by a covered broker or dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker or dealer for any non-customer creditor, and assets and liabilities associated with any trust or custody business, to a bridge broker or dealer, shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.

(f) Any succession to or assumption by a bridge broker or dealer of rights, powers,

authorities, or privileges of a covered broker or dealer shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court, and any such bridge broker or dealer shall upon its organization by the Corporation immediately and by operation of law —

(1) Be established and deemed registered with the Commission under the Securities Exchange Act of 1934;

(2) Be deemed to be a member of SIPC; and

(3) Succeed to any and all registrations and memberships of the covered broker or dealer with or in any self-regulatory organizations.

(g) Except as provided in paragraph (f) of this section, the bridge broker or dealer shall be subject to applicable Federal securities laws and all requirements with respect to being a member of a self-regulatory organization and shall operate in accordance with all such laws and requirements and in accordance with its articles of association; provided, however, that the Commission may, in its discretion, exempt the bridge broker or dealer from any such requirements if the Commission deems such exemption to be necessary or appropriate in the public interest or for the protection of investors.

(h) At the end of the term of existence of a bridge broker or dealer, any proceeds that remain after payment of all administrative expenses of such bridge broker or dealer and all other claims against such bridge broker or dealer shall be distributed to the receiver for the related covered broker or dealer.

§ 380.64 Claims of customers and other creditors of a covered broker or dealer.

(a) *Trustee's role.* (1) SIPC, as trustee for a covered broker or dealer, shall determine customer status, claims for net equity, claims for customer name securities, and whether property of the covered broker or dealer qualifies as customer property. SIPC, as trustee for a covered broker or dealer, shall make claims determinations in accordance with SIPA and with paragraph (a)(3) of this section, but such determinations, and any claims related thereto, shall be governed by the procedures set forth in paragraph (b) of this section.

(2) SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff-3. Where appropriate, SIPC shall make such advances by delivering cash or securities to the customer accounts established at the bridge broker or dealer.

(3) Customer property held by a covered broker or dealer shall be allocated as follows:

(i) First, to SIPC in repayment of advances made by SIPC pursuant to 12 U.S.C. 5385(f) and 15 U.S.C. 78fff-3(c)(1), to the extent such advances effected the release of securities which then were apportioned to customer property pursuant to 15 U.S.C. 78fff(d);

(ii) Second, to customers of such covered broker or dealer, or in the case that customer accounts are transferred to a bridge broker or dealer, then to such customer accounts at a bridge broker or dealer, who shall share ratably in such customer property on the basis and to the extent of their respective net equities;

(iii) Third, to SIPC as subrogee for the claims of customers; and

(iv) Fourth, to SIPC in repayment of advances made by SIPC pursuant to 15 U.S.C.

78fff-3(c)(2).

(4) The determinations and advances made by SIPC as trustee for a covered broker or dealer under this subpart D shall be made in a manner consistent with SIPC's customary practices under SIPA. The allocation of customer property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA. Any claims related to determinations made by SIPC as trustee for a covered broker or dealer shall be governed by the procedures set forth in paragraph (b) of this section.

(b) *Receiver's role.* Any claim shall be determined in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2) through (5) and the regulations promulgated by the Corporation thereunder, provided however, that –

(1) *Notice requirements.* The notice of the appointment of the Corporation as receiver for a covered broker or dealer shall also include notice of the appointment of SIPC as trustee. The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's public Web site in addition to the publication procedures set forth in §380.33.

(2) *Procedures for filing a claim.* The Corporation as receiver shall consult with SIPC, as trustee, regarding a claim form and filing instructions with respect to claims against the Corporation as receiver for a covered broker or dealer, and such information shall be provided on SIPC's public web site in addition to the Corporation's public web

site. Any such claim form shall contain a provision permitting a claimant to claim status as a customer of the broker or dealer, if applicable.

(3) *Claims bar date.* The Corporation as receiver shall establish a claims bar date in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder by which date creditors of a covered broker or dealer, including all customers of the covered broker or dealer, shall present their claims, together with proof. The claims bar date for a covered broker or dealer shall be the date following the expiration of the six-month period beginning on the date a notice to creditors to file their claims is first published in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder. Any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i) and any regulations promulgated thereunder, except that a claim filed after the claims bar date shall be considered by the receiver as provided by 12 U.S.C. 5390(a)(3)(C)(ii) and any regulations promulgated thereunder. In accordance with section 8(a)(3) of SIPA, 15 U.S.C. 78fff-2(a)(3), any claim for net equity filed more than sixty days after the date the notice to creditors to file claims is first published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it shall be satisfied in cash or securities, or both, as SIPC, as trustee, determines is most economical to the receivership estate.

(c) *Decision period.* The Corporation as receiver of a covered broker or dealer shall notify a claimant whether it allows or disallows the claim, or any portion of a claim or any claim of a security, preference, set-off, or priority, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day

period may be extended by written agreement as provided therein) or within the 90-day period set forth in 12 U.S.C. 5390(a)(5)(B) and any regulations promulgated thereunder, whichever is applicable. In accordance with paragraph (a) of this section, the Corporation, as receiver, shall issue the notice required by this paragraph (c), which shall utilize the determination made by SIPC, as trustee, in a manner consistent with SIPC's customary practices in a liquidation under SIPA, with respect to any claim for net equity or customer name securities. The process established herein for the determination, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein), of claims by customers of a covered broker or dealer for customer property or customer name securities shall constitute the exclusive process for the determination of such claims, and any procedure for expedited relief established pursuant to 12 U.S.C. 5390(a)(5) and any regulations promulgated thereunder shall be inapplicable to such claims.

(d) *Judicial review*. The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) of SIPC as trustee made pursuant to §380.64(a), by the appropriate district or territorial court of the United States in accordance with 12 U.S.C. 5390(a)(4) or (5), whichever is applicable, and any regulations promulgated thereunder.

§ 380.65 Priorities for unsecured claims against a covered broker or dealer.

Allowed claims not satisfied pursuant to §380.63(d), including allowed claims for net equity to the extent not satisfied after final allocation of customer property in accordance with §380.64(a)(3), shall be paid in accordance with the order of priority set forth in §380.21 subject to the following adjustments:

(a) Administrative expenses of SIPC incurred in performing its responsibilities as trustee for a covered broker or dealer shall be included as administrative expenses of the receiver as defined in §380.22 and shall be paid *pro rata* with such expenses in accordance with §380.21(c).

(b) Amounts paid by the Corporation to customers or SIPC shall be included as amounts owed to the United States as defined in §380.23 and shall be paid *pro rata* with such amounts in accordance with §380.21(c).

(c) Amounts advanced by SIPC for the purpose of satisfying customer claims for net equity shall be paid following the payment of all amounts owed to the United States pursuant to §380.21(a)(3) but prior to the payment of any other class or priority of claims described in §380.21(a)(4) through (11).

§ 380.66 Administrative expenses of SIPC.

(a) In carrying out its responsibilities, SIPC, as trustee for a covered broker or dealer, may utilize the services of third parties, including private attorneys, accountants, consultants, advisors, outside experts, and other third party professionals. SIPC shall have an allowed claim for administrative expenses for any amounts paid by SIPC for such services to the extent that such services are available in the private sector, and utilization

of such services is practicable, efficient, and cost effective. The term *administrative expenses of SIPC* includes the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts, and other third party professionals, and other expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e).

(b) The term *administrative expenses of SIPC* shall not include advances from SIPC to satisfy customer claims for net equity.

§ 380.67 Qualified Financial Contracts.

The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.

Securities and Exchange Commission

17 CFR Part 302

Authority and Issuance

For the reasons stated in the preamble, the Securities and Exchange Commission is amending 17 CFR 302 as follows:

Add Part 302 to read as follows:

PART 302-ORDERLY LIQUIDATION OF COVERED BROKERS OR DEALERS

Sec.

AUTHORITY: 12 U.S.C. 5385(h)

§ 302.100 Definitions.

For purposes of §§ 302.100 through 302.107, the following terms shall have the following meanings:

(a) *Appointment date.* The term *appointment date* means the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer. This date shall constitute the *filing date* as that term is used in SIPA.

(b) *Bridge broker or dealer.* The term *bridge broker or dealer* means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered broker or dealer.

(c) *Commission.* The term *Commission* means the Securities and Exchange Commission.

(d) *Covered broker or dealer.* The term *covered broker or dealer* means a covered financial company that is a qualified broker or dealer.

(e) *Customer.* The term *customer* of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78*lll*(2) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

(f) *Customer name securities.* The term *customer name securities* shall have the same meaning as in 15 U.S.C. 78*lll*(3) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

(g) *Customer property.* The term *customer property* shall have the same meaning as in 15 U.S.C. 78*lll*(4) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

(h) *Net equity.* The term *net equity* shall have the same meaning as in 15 U.S.C. 78*lll*(11) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

(i) *Qualified broker or dealer.* The term *qualified broker or dealer* means a broker or dealer that (A) is registered with the Commission under Section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and (B) is a member of SIPC.

(j) *SIPA.* The term *SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–*lll*.

(k) *SIPC.* The term *SIPC* means the Securities Investor Protection Corporation.

(l) *Corporation.* The term *Corporation* means the Federal Deposit Insurance Corporation.

(m) *Dodd-Frank Act.* The term *Dodd-Frank Act* means the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, enacted July 21, 2010.

§ 302.101 Appointment of receiver and trustee for covered broker or dealer.

Upon the appointment of the Corporation as receiver for a covered broker or dealer, the Corporation shall appoint SIPC to act as trustee for the covered broker or dealer.

§ 302.102 Notice and application for protective decree for covered broker or dealer.

(a) SIPC and the Corporation, upon consultation with the Commission, shall jointly determine the terms of a notice and application for a protective decree that will be filed promptly with the Federal district court for the district within which the principal place of business of the covered broker or dealer is located; *provided that* if a case or proceeding under SIPA with respect to such covered broker or dealer is then pending, then such notice and application for a protective decree will be filed promptly with the Federal district court in which such case or proceeding under SIPA is pending. If such notice and application for a protective decree is filed on a date other than the appointment date, such filing shall be deemed to have occurred on the appointment date for the purposes of §§ 302.100 through 302.107.

(b) A notice and application for a protective decree may, among other things, provide for notice –

(1) Of the appointment of the Corporation as receiver and the appointment of SIPC as trustee for the covered broker or dealer; and

(2) That the provisions of Title II of the Dodd-Frank Act and any regulations

promulgated thereunder may apply, including without limitation the following:

(i) Any existing case or proceeding with respect to a covered broker or dealer under the Bankruptcy Code or SIPA shall be dismissed effective as of the appointment date and no such case or proceeding may be commenced with respect to a covered broker or dealer at any time while the Corporation is receiver for such covered broker or dealer;

(ii) The revesting of assets in a covered broker or dealer to the extent that they have vested in any entity other than the covered broker or dealer as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer; *provided that* any such revesting shall not apply to assets held by the covered broker or dealer, including customer property, transferred prior to the appointment date pursuant to an order entered by the bankruptcy court presiding over the case or proceeding with respect to the covered broker or dealer;

(iii) The request of the Corporation as receiver for a stay in any judicial action or proceeding (other than actions dismissed in accordance with paragraph (b)(i) of this section) in which the covered broker or dealer is or becomes a party for a period of up to 90 days from the appointment date;

(iv) Except as provided in paragraph (b)(v) of this section with respect to qualified financial contracts, no person may exercise any right or power to terminate, accelerate or declare a default under any contract to which the covered broker or dealer is a party (and no provision in any such contract providing for such default, termination or acceleration shall be enforceable), or to obtain possession of or exercise control over any property of the covered broker or dealer or affect any contractual rights of the covered broker or dealer without the consent of the Corporation as receiver of the covered broker or dealer upon consultation with SIPC during the 90-day period beginning from the appointment date; and

(v) The exercise of rights and the performance of obligations by parties to qualified financial contracts with the covered broker or dealer may be affected, stayed, or delayed pursuant to the provisions of Title II of the Dodd-Frank Act (including 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.

§ 302.103 Bridge broker or dealer.

(a) The Corporation, as receiver for one or more covered brokers or dealers or in anticipation of being appointed receiver for one or more covered broker or dealers, may organize one or more bridge brokers or dealers with respect to a covered broker or dealer.

(b) If the Corporation establishes one or more bridge brokers or dealers with respect to a covered broker or dealer, then, subject to paragraph (d) of this section, the Corporation as receiver for such covered broker or dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge brokers or dealers unless the Corporation determines, after consultation with the Commission and SIPC, that:

(1) The customer accounts, customer name securities, and customer property are likely to be promptly transferred to one or more qualified brokers or dealers such that the use of a bridge broker or dealer would not facilitate such transfer to one or more qualified brokers or dealers; or

(2) The transfer of such customer accounts to a bridge broker or dealer would materially interfere with the ability of the Corporation to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.

(c) The Corporation, as receiver for such covered broker or dealer, also may transfer any other assets and liabilities of the covered broker or dealer (including non-customer accounts and any associated property and any assets and liabilities associated with any trust or custody business) to such bridge brokers or dealers as the Corporation may, in its discretion, determine to be appropriate in accordance with, and subject to the requirements of, 12 U.S.C. 5390(h), including 12 U.S.C. 5390(h)(1) and 5390(h)(5), and any regulations promulgated thereunder.

(d) In connection with customer accounts transferred to the bridge broker or dealer pursuant to paragraph (b) of this section, claims for net equity shall not be transferred but shall remain with the covered broker or dealer. Customer property transferred from the covered broker or dealer, along with advances from SIPC, shall be allocated to customer accounts at the bridge broker or dealer in accordance with § 302.104(a)(3). Such allocations initially may be based upon estimates, and such estimates may be based upon the books and records of the covered broker or dealer or any other information deemed relevant in the discretion of the Corporation, as receiver, in consultation with SIPC, as trustee. Such estimates may be adjusted from time to time as additional information becomes available. With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b) or (c) of this section, the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer, and allocated to the account as provided in §302.104(a)(3), including any customer property and any advances from SIPC. The bridge broker or dealer shall have no obligations with respect to any customer property or other property that is not transferred from the covered broker or dealer to the bridge broker or dealer. The transfer of customer property to such an account shall have no effect on calculation of the amount of the affected accountholder's net equity, but the value, as of the appointment date, of the customer property and advances from SIPC so transferred shall be deemed to satisfy any such claim, in whole or in part.

(e) The transfer of assets or liabilities held by a covered broker or dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker or dealer for any non-customer creditor, and assets and liabilities associated with any trust or custody business, to a bridge broker or dealer, shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.

(f) Any succession to or assumption by a bridge broker or dealer of rights, powers, authorities, or privileges of a covered broker or dealer shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court, and any such bridge broker or dealer shall upon its organization by the Corporation immediately and by operation of law —

(1) Be established and deemed registered with the Commission under the Securities Exchange Act of 1934;

(2) Be deemed to be a member of SIPC; and

(3) Succeed to any and all registrations and memberships of the covered broker or dealer with or in any self-regulatory organizations.

(g) Except as provided in paragraph (f) of this section, the bridge broker or dealer shall be subject to applicable Federal securities laws and all requirements with respect to being a member of a self-regulatory organization and shall operate in accordance with all such laws and requirements and in accordance with its articles of association; provided, however, that the Commission may, in its discretion, exempt the bridge broker or dealer from any such requirements if the Commission deems such exemption to be necessary or appropriate in the public interest or for the protection of investors.

(h) At the end of the term of existence of a bridge broker or dealer, any proceeds that remain after payment of all administrative expenses of such bridge broker or dealer and all other claims against such bridge broker or dealer shall be distributed to the receiver for the related covered broker or dealer.

§ 302.104 Claims of customers and other creditors of a covered broker or dealer.

(a) *Trustee's role.*

(1) SIPC, as trustee for a covered broker or dealer, shall determine customer status, claims for net equity, claims for customer name securities, and whether property of the covered broker or dealer qualifies as customer property. SIPC, as trustee for a covered broker or dealer, shall make claims determinations in accordance with SIPA and with paragraph (a)(3) of this section, but such determinations, and

any claims related thereto, shall be governed by the procedures set forth in paragraph (b) of this section.

(2) SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff-3. Where appropriate, SIPC shall make such advances by delivering cash or securities to the customer accounts established at the bridge broker or dealer.

(3) Customer property held by a covered broker or dealer shall be allocated as follows: (i) first, to SIPC in repayment of advances made by SIPC pursuant to 12 U.S.C. 5385(f) and 15 U.S.C. 78fff-3(c)(1), to the extent such advances effected the release of securities which then were apportioned to customer property pursuant to 15 U.S.C. 78fff(d); (ii) second, to customers of such covered broker or dealer, or in the case that customer accounts are transferred to a bridge broker or dealer, then to such customer accounts at a bridge broker or dealer, who shall share ratably in such customer property on the basis and to the extent of their respective net equities; (iii) third, to SIPC as subrogee for the claims of customers; and (iv) fourth, to SIPC in repayment of advances made by SIPC pursuant to 15 U.S.C. 78fff-3(c)(2).

(4) The determinations and advances made by SIPC as trustee for a covered broker or dealer under §§ 302.100 through 302.107 shall be made in a manner consistent with SIPC's customary practices under SIPA. The allocation of customer

property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA. Any claims related to determinations made by SIPC as trustee for a covered broker or dealer shall be governed by the procedures set forth in paragraph (b) of this section.

(b) *Receiver's role.* Any claim shall be determined in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2)-(5) and the regulations promulgated by the Corporation thereunder, provided however, that –

(1) *Notice requirements.* The notice of the appointment of the Corporation as receiver for a covered broker or dealer shall also include notice of the appointment of SIPC as trustee. The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's public Web site in addition to the publication procedures set forth in 12 CFR 380.33.

(2) *Procedures for filing a claim.* The Corporation as receiver shall consult with SIPC, as trustee, regarding a claim form and filing instructions with respect to claims against the Corporation as receiver for a covered broker or dealer, and such

information shall be provided on SIPC's public Web site in addition to the Corporation's public Web site. Any such claim form shall contain a provision permitting a claimant to claim status as a customer of the broker or dealer, if applicable.

(3) *Claims bar date.* The Corporation as receiver shall establish a claims bar date in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder by which date creditors of a covered broker or dealer, including all customers of the covered broker or dealer, shall present their claims, together with proof. The claims bar date for a covered broker or dealer shall be the date following the expiration of the six-month period beginning on the date a notice to creditors to file their claims is first published in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder. Any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i) and any regulations promulgated thereunder, except that a claim filed after the claims bar date shall be considered by the receiver as provided by 12 U.S.C. 5390(a)(3)(C)(ii) and any regulations promulgated thereunder. In accordance with section 8(a)(3) of SIPA, 15 U.S.C. 78fff-2(a)(3), any claim for net equity filed more than sixty days after the date the notice to creditors to file claims is first published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it shall be satisfied in cash or securities, or both, as SIPC, as trustee, determines is most economical to the receivership estate.

(c) *Decision period.* The Corporation as receiver of a covered broker or dealer shall notify a claimant whether it allows or disallows the claim, or any portion of a claim or any claim of a security, preference, set-off, or priority, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein) or within the 90-day period set forth in 12 U.S.C. 5390(a)(5)(B) and any regulations promulgated thereunder, whichever is applicable. In accordance with paragraph (a) of this section, the Corporation, as receiver, shall issue the notice required by this paragraph (c), which shall utilize the determination made by SIPC, as trustee, in a manner consistent with SIPC's customary practices in a liquidation under SIPA, with respect to any claim for net equity or customer name securities. The process established herein for the determination, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein), of claims by customers of a covered broker or dealer for customer property or customer name securities shall constitute the exclusive process for the determination of such claims, and any procedure for expedited relief established pursuant to 12 U.S.C. 5390(a)(5) and any regulations promulgated thereunder shall be inapplicable to such claims.

(d) *Judicial review*. The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) of SIPC as trustee made pursuant to §

302.104(a), by the appropriate district or territorial court of the United States in accordance with 12 U.S.C. 5390(a)(4) or (5), whichever is applicable, and any regulations promulgated thereunder.

§ 302.105 Priorities for unsecured claims against a covered broker or dealer.

Allowed claims not satisfied pursuant to § 302.103(d), including allowed claims for net equity to the extent not satisfied after final allocation of customer property in accordance with § 302.104(a)(3), shall be paid in accordance with the order of priority set forth in 12 CFR 380.21 subject to the following adjustments:

(a) Administrative expenses of SIPC incurred in performing its responsibilities as trustee for a covered broker or dealer shall be included as administrative expenses of the receiver as defined in 12 CFR 380.22 and shall be paid *pro rata* with such expenses in accordance with 12 CFR 380.21(c).

(b) Amounts paid by the Corporation to customers or SIPC shall be included as amounts owed to the United States as defined in 12 CFR 380.23 and shall be paid *pro rata* with such amounts in accordance with 12 CFR 380.21(c).

(c) Amounts advanced by SIPC for the purpose of satisfying customer claims for net equity shall be paid following the payment of all amounts owed to the United States pursuant to 12 CFR 380.21(a)(3) but prior to the payment of any other class or

priority of claims described in 12 CFR 380.21(a)(4) through (11).

§ 302.106 Administrative expenses of SIPC.

(a) In carrying out its responsibilities, SIPC, as trustee for a covered broker or dealer, may utilize the services of third parties, including private attorneys, accountants, consultants, advisors, outside experts, and other third party professionals. SIPC shall have an allowed claim for administrative expenses for any amounts paid by SIPC for such services to the extent that such services are available in the private sector, and utilization of such services is practicable, efficient, and cost effective. The term *administrative expenses of SIPC* includes the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts, and other third party professionals, and other expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e).

(b) The term *administrative expenses of SIPC* shall not include advances from SIPC to satisfy customer claims for net equity.

§ 302.107 Qualified Financial Contracts.

The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390,

including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.

Federal Deposit Insurance Corporation.
By order of the Board of Directors.
Dated at Washington, DC, on July 24, 2020.
James P. Sheesley,
Acting Assistant Executive Secretary.

Dated this 24th day of July, 2020.
By the Securities and Exchange Commission.
Vanessa A. Countryman,
Secretary.