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Proposed Rules on Incentive-Based Compensation Arrangements

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Introduction

Under Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), various federal agencies¹ must issue rules which will require the reporting of incentive-based compensation arrangements by covered financial institutions (specified institutions with consolidated assets of more than \$1 billion) and prohibit incentive-based compensation arrangements at covered financial institutions that (i) provide excessive compensation; or (ii) that could expose the institution to inappropriate risks that could lead to a material financial loss.

On February 7, 2011, the FDIC issued a proposed rule (the “Proposed Rule”). Comments are due within 45 days of the publication of the rules in the Federal Register. The other Agencies must approve the Proposed Rule before it is published in the Federal Register.

The Proposed Rule would be effective six months after publication of the final rule in the Federal Register, with annual reports due within 90 days of the end of each covered financial institution’s fiscal year.

Summary of the Proposed Rule

The Proposed Rule would supplement the Agencies’ existing rules, guidance, and ongoing supervisory efforts. It prohibits:

- incentive-based compensation arrangements at a covered financial institution that encourage executive officers, employees, directors, or principal shareholders (“covered persons”) to expose the institution to inappropriate risks by providing the covered person excessive compensation; and
- a covered financial institution from establishing or maintaining any incentive-based compensation arrangements for covered persons that encourage inappropriate risks by the covered financial institution that could lead to a material financial loss.²

The Proposed Rule also requires:

- that the board of directors, or a committee thereof, of the institution must approve the incentive-based compensation arrangement for such individuals, and maintain documentation of such approval;

¹ The OCC, Federal Reserve Board (the “Board”), FDIC, OTS, NCUA, SEC, and FHFA (the “Agencies”).

² The standards for determining whether an incentive-based compensation arrangement may encourage inappropriate risk-taking are consistent with the principles established for incentive compensation in the Interagency Guidance on Sound Incentive Compensation Policies (“Banking Agency Guidance”) adopted by the Federal banking agencies (the OCC, the Board, the FDIC and the OTS). A memo discussing this guidance and other issues related to financial institution executive compensation may be found at <http://www.hinshawlaw.com/regulatory-issues-in-financial-institution-executive-compensation-02-01-2011/>.

- covered financial institutions to maintain policies and procedures appropriate to their size, complexity, and use of incentive-based compensation to help ensure compliance with these requirements and prohibitions;
- covered financial institutions to provide annually certain information to their appropriate Federal regulator concerning their incentive-based compensation arrangements for covered persons;
- deferral over three years of 50% of the incentive-based compensation for executive officers of “larger covered financial institutions”;³ and
- that, at larger covered financial institutions, the board of directors or a committee of such board identify those covered persons (other than executive officers) that have the ability to expose the institution to possible losses that are substantial in relation to the institution’s size, capital, or overall risk tolerance.

The Proposed Rule would supplement existing rules and guidance adopted by the Agencies regarding compensation and incentive-based compensation.⁴

Each Agency may issue supplemental guidance specific to their regulated entities, including guidance as necessary to clarify the regulatory requirements of the Proposed Rule.

The Proposed Rule

Definitions

Compensation. “Compensation” is defined to mean all direct and indirect payments, fees or benefits, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered financial institution. This would include payments or benefits pursuant to an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

For credit unions, the definition of compensation specifically excludes reimbursement for reasonable and proper costs incurred by covered persons in carrying out official credit union business; provision of reasonable health, accident and related types of personal insurance protection; and indemnification.

³ The term “larger covered financial institution” for the Federal banking agencies and the SEC means those covered financial institutions with total consolidated assets of \$50 billion or more. All credit unions and all Federal Home Loan Banks with total consolidated assets of \$1 billion or more are deemed to be larger covered financial institutions.

⁴ These include the Banking Agency Guidance, the Standards for Safety and Soundness adopted by the Federal banking agencies, the compensation-related disclosure requirements adopted by the SEC for public companies, the rules and guidance adopted by the FHFA for regulatory oversight of the executive compensation practices of its regulated entities and the compensation rules adopted by the NCUA for institutions under its supervision.

Covered Financial Institution. A “covered financial institution” is defined to include any of the following types of institutions that have \$1 billion or more in assets: (A) a depository institution or depository institution holding company, as such terms are defined in section 3 of the Federal Deposit Insurance Act (“FDIA”); (B) a broker-dealer registered under section 15 of the Securities Exchange Act of 1934; (C) a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act; (D) an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940; (E) the Federal National Mortgage Association (Fannie Mae); (F) the Federal Home Loan Mortgage Corporation (Freddie Mac); and (G) any other financial institution that the appropriate Federal regulators, jointly, by rule, determine should be treated as a covered financial institution for these purposes.

A more detailed description of covered financial institutions is set out at Appendix A.

The uninsured branches and agencies of a foreign bank, as well as the other U.S. operations of foreign banking organizations that are treated as bank holding companies pursuant to section 8(a) of the International Banking Act of 1978 would also be considered covered financial institutions.

The Federal Home Loan Banks with assets of more than \$1 billion and the Office of Finance will be subject to the Proposed Rule.

Covered Person. A “covered person” would be any executive officer, employee, director, or principal shareholder of a covered financial institution. No specific categories of employees are excluded from the scope of the Proposed Rule. Certain prohibitions in the Proposed Rule apply only to a subset of covered persons (see discussion at pages 8-9 below).

For federal credit unions, only one director, if any, may be considered a covered person since, under the Federal Credit Union Act and NCUA’s regulations, only one director may be compensated as an officer of the board.

Director and Board of Directors. A “director” of a covered financial institution is defined to mean a member of the board of directors of the covered financial institution, or of a board or committee performing a similar function to a board of directors.

The “board of directors” means the governing body of any covered financial institution performing functions similar to a board of directors.

For a foreign banking organization, “board of directors” refers to the relevant oversight body for the firm’s U.S. branch, agency or operations, consistent with the foreign banking organization’s overall corporate and management structure.

Executive Officer. An “executive officer” is any person who holds the title or performs the function (regardless of title, salary or compensation) of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief lending officer, chief legal officer, chief risk officer, or head of a major business line.

Incentive-based Compensation. The Proposed Rule defines “incentive-based compensation” to mean any variable compensation that serves as an incentive for

performance. The form of payment, whether it is cash, an equity award, or other property, does not affect whether compensation meets the definition of “incentive-based compensation.”

There are types of compensation that would not fall within the scope of this definition. For example,

- Compensation that is awarded solely for, and the payment of which is solely tied to, continued employment (e.g., salary) would not be considered incentive-based compensation.
- Compensation arrangements that provide rewards solely for activities or behaviors that do not involve risk-taking. For example, payments solely for achieving or maintaining a professional certification or higher level of educational achievement would not be considered incentive-based compensation under the proposal.
- Compensation arrangements that are determined based solely on the employee’s level of fixed compensation and do not vary based on one or more performance metrics. For example, employer contributions to a 401(k) retirement savings plan computed based on a fixed percentage of an employee’s salary are not covered under the Proposed Rule.
- Dividends paid and appreciation realized on stock or other equity instruments that are owned outright by a covered person are not covered. However, stock or other equity instruments awarded to a covered employee under a contract, arrangement, plan or benefit would not be considered owned outright while subject to any vesting or deferral arrangement (irrespective of whether such deferral is mandatory).

Principal Shareholder. A “principal shareholder” means an individual that directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10% or more of any class of voting securities of a covered financial institution. Shares owned or controlled by a member of an individual’s immediate family are considered to be held by the individual. The NCUA’s proposed rule does not include this definition since credit unions are not-for-profit financial cooperatives with member owners.

Total Consolidated Assets. The Proposed Rule would apply to all covered financial institutions that have total consolidated assets of \$1 billion or more. Additional requirements would apply to certain larger covered financial institutions (see discussion at pages 8-10 below). A detailed discussion of how asset size will be calculated is set out on Appendix B.

Prohibition of Certain Incentive-based Compensation Arrangements

The Proposed Rule would prohibit a covered financial institution from having incentive-based compensation arrangements that may encourage inappropriate risks (i) by providing excessive compensation or (ii) that could lead to a material financial loss.

Excessive Compensation. Standards for determining whether an incentive-based compensation arrangement provides excessive compensation are set out below. These are

based on the standards established under section 39 of the FDIA. Compensation for a covered person would be considered excessive when amounts paid are unreasonable or disproportionate to, among other things, the amount, nature, quality, and scope of services performed by the covered person.

Calculating Compensation. In making such a determination, the Agencies will consider:

- The combined value of all cash and non-cash benefits provided to the covered person;
- The compensation history of the covered person and other individuals with comparable expertise at the covered financial institution;
- The financial condition of the covered financial institution;
- Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the institution's operations and assets;
- For postemployment benefits, the projected total cost and benefit to the covered financial institution;
- Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered financial institution; and
- Any other factors the Agency determines to be relevant.

Inappropriate Risks that May Lead to a Material Financial Loss. The Proposed Rule prohibits a covered financial institution from establishing or maintaining any incentive-based compensation arrangement, or any feature of such an arrangement, that encourages a covered person to expose the institution to inappropriate risks that could lead to a material financial loss at the covered financial institution.

This prohibition will apply only to those incentive-based compensation arrangements for individual covered persons, or groups of covered persons, whose activities may expose the covered financial institution to a material financial loss. Such covered persons include:

- Executive officers (as defined on pages 3-4 above) and other covered persons who are responsible for oversight of the covered financial institution's firm-wide activities or material business lines;
- Other individual covered persons, including non-executive employees, whose activities may expose the covered financial institution to a material financial loss (e.g., traders with large position limits relative to the covered financial institution's overall risk tolerance); and
- Groups of covered persons who are subject to the same or similar incentive-based compensation arrangements and who, in the aggregate, could expose

the covered financial institution to a material financial loss, even if no individual covered person in the group could expose the covered financial institution to a material financial loss (e.g., loan officers who, as a group, originate loans that account for a material amount of the covered financial institution's credit risk).

Compensation Standards For Incentive-Based Compensation Arrangements

The Proposed Rule provides that an incentive-based compensation arrangement maintained by a covered financial institution for covered persons must:

- Balance risk and financial rewards, for example by using deferral of payments, risk adjustment of awards, longer performance periods, or reduced sensitivity to short-term performance;
- Be compatible with effective controls and risk management; and
- Be supported by strong corporate governance.

These three standards are consistent with the principles for sound compensation practices in the Banking Agency Guidance. When adopting procedures to ensure compliance with the Proposed Rule, covered financial institutions should review these standards as discussed in this guidance. A memo discussing this guidance and other issues related to financial institution executive compensation may be found at <http://www.hinshawlaw.com/regulatory-issues-in-financial-institution-executive-compensation-02-01-2011/>.

Balance of Risk and Financial Rewards

Incentive-based compensation arrangements at a covered financial institution should balance risk and financial rewards in a manner that does not provide covered persons with incentives to take inappropriate risks that could lead to material financial loss at the covered financial institution.

The full range of risks associated with a covered person's activities, as well as the time horizon over which those risks may be realized, should be considered when assessing whether incentive-based compensation arrangements are balanced. The activities of a covered person may create a wide range of risks for a covered financial institution, including credit, market, liquidity, operational, legal, compliance, and reputational risks. Some of these are short-term risks, while others may become apparent only over the long-term.

The Proposed Rule identifies four methods that can be used to make compensation more sensitive to risk. These methods are:

Risk Adjustment of Awards: Under this method, the amount of the person's award could be adjusted based on measures that take into account the risk the covered person's activities pose to the covered financial institution. Such measures may be quantitative, or the size of a risk adjustment may be based on managerial judgment, subject to appropriate oversight.

Deferral of Payment: The actual payout of an award to a covered person is delayed significantly beyond the end of the performance period, and the award could be adjusted for

actual losses or other aspects of performance that become clear only during the deferral period.

The deferral period would have to be sufficiently long enough to allow for the realization of a substantial portion of the risks from the covered person's activities. Deferred payouts may be altered according to risk outcomes either formulaically or based on managerial judgment.

The measures of loss should be clearly explained to covered persons and closely tied to their activities during the relevant performance period.

Longer Performance Periods: The time period covered by the performance measures used in determining a covered person's award could be extended (for example, from one year to two years). Longer performance periods and deferral of payment are related in that both methods allow awards or payments to be made after some or all risk outcomes associated with a covered person's activities are realized or better known.

Reduced Sensitivity to Short-Term Performance: A covered financial institution could reduce the rate at which awards increase as a covered person achieves higher levels of the relevant performance measure(s) used in the person's incentive-based compensation arrangement. Rather than offsetting risk-taking incentives associated with the use of short-term performance measures, this method reduces the magnitude of such incentives. For example, providing for an incentive award equal to 110% of the proposed bonus when the employee achieves 150% of the goals rather than an award equal to 150% of the proposed bonus.

These methods for achieving balance are not exclusive. As methods and practices for making compensation sensitive to risk-taking evolve, these methods may have to be revised or other methods may have to be used. Because each method has its own advantages and disadvantages that may differ depending upon the situation in which they are used, each method should be carefully considered. Furthermore, it may be appropriate in some cases to use two or more methods in combination in order to balance an incentive-based compensation arrangement. The greater the potential incentives that an arrangement creates for a covered person to increase the risks borne by the covered financial institution, the stronger the effect should be of the methods applied to achieve balance.

Compatibility with Effective Controls and Risk Management

Strong controls governing the processes for designing, implementing and monitoring incentive-based compensation arrangements will have to be implemented. In addition, risk-management personnel must have an appropriate role in the institution's processes for designing incentive-based compensation arrangements, monitoring their use and assessing whether they achieve balance. Appropriate controls should be established to ensure that the processes for achieving balanced compensation arrangements are followed and to maintain the integrity of the risk management and other functions.

Strong Corporate Governance

The board of directors, or a committee thereof, of a covered financial institution should actively oversee incentive-based compensation arrangements. The board is ultimately

responsible for ensuring that the covered financial institution's incentive compensation arrangements are appropriately balanced. The board of directors, or a committee thereof, should actively oversee the development and operation of a covered financial institution's incentive-based compensation systems and related control processes.

A board of directors, or a committee thereof, should

- review and approve the overall goals and purposes of the covered financial institution's incentive-based compensation system and ensure its consistency with the institution's overall risk tolerance; and
- receive data and analysis to assess whether the overall design, as well as the performance, of incentive compensation arrangements are consistent with the Dodd-Frank Act.

Larger Covered Financial Institutions

Deferral Arrangements Required for Executive Officers

The Proposed Rule would establish a deferral requirement for larger covered financial institutions (i.e., generally those with \$50 billion or more in total consolidated assets). At least 50 percent of the incentive-based compensation of an "executive officer" (as defined at page 4 above), would have to be deferred over a period of at least three years. In addition, the deferred amounts must be adjusted for actual losses or other measures or aspects or performance that are realized or become better known during the deferral period.

Such deferral arrangements are consistent with international standards that establish the expectation that large interconnected firms require the deferral of a substantial portion of incentive-based compensation (identified as 40 to 60 percent of the incentive award, or more) for certain employees for a fixed period of time not less than three years and that incentives be correctly aligned with the nature of the business, its risks and the activities of the employee in question.

A larger covered financial institution may decide to: (i) release (or allow vesting of) the full deferred amount in a lump-sum only at the conclusion of the deferral period; or (ii) release the deferred amounts (or allow vesting) in equal increments, pro rata, for each year of the deferral period. Any such deferral arrangement must be accompanied by the loss adjustment provision mentioned above.

In no event, however, may the release or vesting of amounts required to be deferred be faster than a pro rata equal-annual-increments distribution. For instance, an institution required to apply a three-year deferral to a \$150,000 deferral amount could release a maximum of \$50,000 each year, or could withhold the entire sum for the entire period and distribute it as a lump-sum at the conclusion of the three-year period. The institution could also employ an alternate distribution that is less rapid than a pro-rata equal-annual-increments schedule, such as releasing no amount after the first year, and then releasing a maximum of \$100,000 the second year, and then \$50,000 for the third year.

Special Review and Approval Requirement for Other Designated Individuals

Other individuals at a larger covered financial institution may have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. Therefore, at a larger covered financial institution, the board of directors, or a committee thereof, must identify those covered persons (other than executive officers) that individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. These covered persons may include, for example, traders with large position limits relative to the institution's overall risk tolerance and other individuals that have the authority to place at risk a substantial part of the capital of the covered financial institution. The board of directors, or a committee thereof, must approve the incentive-based compensation arrangement for such individuals, and maintain documentation of such approval.

Furthermore, the board (or committee) of a larger covered financial institution may not approve the incentive-based compensation arrangement for an individual identified by the board (or committee) unless the board (or committee) determines that the arrangement, including the method of paying compensation under the arrangement, effectively balances the financial rewards to the employee and the range and time horizon of risks associated with the employee's activities.

The methods used to balance the rewards and risks of the individual's activities may include the methods discussed above (see discussion at pages 6-8): deferral of payments, risk adjustment of awards, reduced sensitivity to short-term performance, or extended performance periods; or may consider other appropriate methods.

However, the board (or committee) must determine that the method(s) effectively balance the financial rewards to the employee and the range and time horizons of the risks associated with the employee's activities. The board, or committee thereof, must evaluate the overall effectiveness of the balancing methods used in reducing incentives for inappropriate risk taking by the identified covered person, as well as the ability of the methods used to make payments sensitive to the full range of risks presented by that employee's activities, including those risks that may be difficult to predict, measure, or model.

While these employees will be subject to additional scrutiny, they will not be subject to the mandatory deferral provisions applicable to executive officers of larger covered financial institutions.

Policies and Procedures Governing Awards

Covered financial institutions would have to adopt policies and procedures governing the award of incentive-based compensation designed, at a minimum, to address the prohibitions contained in the Proposed Rule.

These should be appropriately tailored to balance risk and reward, taking into account, the institution's size, complexity, and business activity, as well as the scope and nature of the covered financial institution's incentive-based compensation arrangements.

Smaller covered financial institutions (with less complex incentive-based compensation programs) would be expected to have policies and procedures that are not as extensive than those of larger covered financial institutions with relatively complex programs and business activities.

Any covered financial institutions that offers incentive-based compensation must develop, maintain, and document its incentive-based compensation policies and procedures.

The prohibition on incentive-based compensation arrangements that could lead to a material financial loss is likely to affect only those arrangements for covered persons that, either individually or as a group, may expose the institution to a material financial loss. The policies and procedures, therefore, must be designed to address these issues.

Certain jobs and classes of jobs may not expose the organization to a material financial loss. Incentive-based compensation arrangements for employees within these job classes may be outside the scope of these restrictions. Examples of jobs and classes of jobs that may be unlikely to expose the institution to material risk include tellers, bookkeepers, couriers, or data processing personnel.

Internal Review

Risk-management, risk oversight, and internal control personnel should be involved in all phases of the process for designing incentive-based compensation arrangements. An ongoing assessment of the policies should be made by risk-management and risk-oversight personnel to help to ensure that the processes remain up-to-date and effective relative to the incentive compensation practices. The personnel should be properly trained and compensated.

Such monitoring should be conducted, where practicable, by a group or person independent of the covered person so they can determine whether incentive-based compensation payments are reduced to reflect adverse risk outcomes or high levels of risk taken.

To be independent, the group or person monitoring or assessing incentive-based compensation awards must have a separate reporting line to senior management from the covered person who is creating the risks.

Deferral of Awards

When a covered financial institution defers an award, the institution's policies and procedures should provide for deferral of any such payments in amounts and for a period of time appropriate to the duties and responsibilities of the covered financial institution's covered persons, the risks associated with those duties and responsibilities, and the size and complexity of the covered financial institution. Deferred awards must be adjusted for actual losses or other measures or aspects of performance that are realized or become better known only during the deferral period.

The Agencies contemplate that the procedures relating to the adjustment of deferred amounts would be used by larger covered financial institutions required to defer a portion of

their incentive-based compensation under the Proposed Rule (see discussion at pages 8-9 above) to augment their compliance with the deferral obligation.

Board Involvement

In order to provide appropriate information to the board or committee, a covered financial institution will need to develop and maintain policies and procedures designed to ensure that the board, or a committee thereof, receive data and analysis from management and other sources sufficient to allow it to assess the overall design and performance of the entity's incentive-based compensation arrangements.

The policies and procedures relating to an incentive-based compensation arrangement must provide for ongoing oversight by the board of directors, or the committee.

Supporting Documentation

A covered institution must maintain sufficient documentation of the institution's processes for establishing, implementing, modifying, and monitoring incentive-based compensation arrangements. These must be sufficient to allow the institution's appropriate Federal regulator to determine the covered financial institution's compliance with section 956 of the Dodd-Frank Act and the Proposed Rule. The documentation should include, but not be limited to, the following:

- A copy of the covered financial institution's incentive-based compensation arrangement(s) or plan(s);
- The names and titles of individuals covered by such arrangement(s) or plan(s);
- A record of the incentive-based compensation awards made under the arrangement(s) or plan(s); and
- Records reflecting the persons or units involved in the approval and ongoing monitoring of the arrangement(s) or plan(s).

Hedging Strategies for Equity Compensation

The Agencies are aware that covered persons at certain covered financial institutions who have been awarded equity as part of a deferred incentive-based compensation arrangement may wish to use personal hedging strategies as a way to lock in value for equity compensation that is vested over time. Because such hedging strategies could defeat the purpose of the award deferral, the Agencies are considering whether a covered financial institution's policies and procedures should be required to specifically include limits on personal hedging strategies.

Annual Report

A covered financial institution must submit an annual report to its appropriate Federal regulator disclosing the structure of its incentive-based compensation arrangements. The

format for the annual report will be specified by the appropriate Federal agency. The report must contain:

- A clear narrative description of the components of the covered financial institution's incentive-based compensation arrangements applicable to covered persons and specifying the types of covered persons to which they apply;
- A succinct description of the covered financial institution's policies and procedures governing its incentive-based compensation arrangements;
- For "larger covered financial institutions", a succinct description of any specific incentive compensation policies and procedures for the institution's executive officers, and other covered persons who the board or a committee thereof determines under the Proposed Rule individually (see discussion at pages 8-10 above) have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance;
- Any material changes to the covered financial institution's incentive-based compensation arrangements and policies and procedures made since the covered financial institution's last report was submitted; and
- The specific reasons the covered financial institution believes the structure of its incentive-based compensation plan does not provide covered persons incentives to engage in behavior that is likely to cause the covered financial institution to suffer a material financial loss, and does not provide covered persons with excessive compensation.

Covered financial institutions will be encouraged to avoid submitting voluminous materials that could obfuscate the actual structure and likely effects of an institution's incentive-based compensation arrangements.

Confidentiality

The Agencies generally will maintain the confidentiality of the information submitted to the Agencies; the information will be nonpublic to the extent permitted by law.

Evasion Prohibition

The Proposed Rule would prohibit a covered financial institution from evading the restrictions of the rule by doing any act or thing indirectly, or through or by any other person, that would be unlawful for the covered institution to do directly under the Proposed Rule. This anti-evasion provision is designed to prevent covered financial institutions from, for example, making substantial numbers of its covered employees independent contractors for the purpose of evading this subpart.

Appendix A
Covered Financial Institutions

- In the case of the OCC, a national bank, Federal branch and agency of a foreign bank, and their subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956.
- In the case of the Board, a state member bank; a bank holding company; a state-licensed uninsured branch or agency of a foreign bank; and the U.S. operations of a foreign bank with more than \$1 billion of U.S. assets that is treated as a bank holding company pursuant to section 8(a) of the International Banking Act of 1978. A covered financial institution includes the subsidiaries of the institution.
- In the case of the FDIC, a state nonmember bank and an insured U.S. branch of a foreign bank.
- In the case of the OTS, a savings association as defined in 12 U.S.C. 1813(b), an operating subsidiary of a federal savings association as defined in 12 CFR 559.2, and a savings and loan holding company as defined in 12 U.S.C. 1467a(a). The Board, OCC, and FDIC will assume supervisory and rulemaking responsibility for these entities on the transfer date provided in Title III of the Dodd-Frank Act. These agencies expect to adopt, or incorporate, as appropriate, any final rule adopted by OTS as part of this rulemaking for relevant covered financial institutions that come under their respective supervisory authority after the transfer date.
- In the case of the NCUA, a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act, meaning an insured credit union as defined under 12 U.S.C. 1752(7) or credit union eligible to make application to become an insured credit union under 12 U.S.C. 1781.
- In the case of the SEC, a broker-dealer registered under section 15 of the Securities Exchange Act of 1934, 15 U.S.C. 78o; and an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940, regardless of whether the firm is registered as an investment adviser under that act.
- In the case of the FHFA, the Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance as such term is defined in the Housing and Economic Recovery Act of 2008.

Appendix B
Calculating Total Consolidated Assets

- OCC: For national banks, asset size would be determined by calculating the mean of the total assets reported in the institution's four most recent Consolidated Reports of Condition and Income ("Call Report").
- Board: For a state member bank, total consolidated assets as determined based on the average of the bank's four most recent Call Report; for a bank holding company, total consolidated assets as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies; for a state-licensed uninsured branch or agency of a foreign bank, total consolidated assets as determined based on the average of the branch or agency's four most recent Call Reports; and for the U.S. operations of a foreign bank, total consolidated U.S. assets as determined by the Board.
- FDIC: For state nonmember banks, asset size would be determined by calculating the average of the total assets reported in the institution's four most recent Call Reports. For insured U.S. branches of foreign banks, asset size will be determined by calculating the average of the total assets reported in the branch's four most recent Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.
- OTS: For covered financial institutions regulated by the OTS, asset size will be determined by calculating the mean of total assets reported in the institution's four most recent Thrift Financial Reports.
- NCUA: For credit unions, asset size will be determined by calculating the mean of the total assets reported in the credit union's four most recent 5300 Call Reports.
- SEC: For brokers or dealers registered with the SEC, asset size would be determined by the total consolidated assets reported in the firm's most recent year-end audited Consolidated Statement of Financial Condition filed pursuant to Rule 17a-5 under the Securities Exchange Act of 1934. For investment advisers, asset size would be determined by the adviser's total assets shown on the balance sheet for the adviser's most recent fiscal year end.
- FHFA: For covered financial institutions regulated by the FHFA, consolidated asset size will be determined from total assets reported in the institution's most recent annual report of financial condition.