November 18, 2010

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th St., N.W.
Washington, D.C. 20429

Re: Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Provisions of Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Feldman:

We write on behalf of the National Association of Insurance Commissioners (NAIC) to submit this comment in response to the Federal Deposit Insurance Corporation's (FDIC) Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) [1] published in the Federal Register on October 19, 2010. Founded in 1871, the NAIC is the voluntary association of the chief insurance regulatory officials of the 50 states, the District of Columbia and the five U.S. territories. The NAIC serves the needs of state insurance regulators as they protect consumers and maintain the financial stability of the marketplace.

Section 209 of the Act provides the FDIC authority to implement through rulemaking the provisions relating to the Orderly Liquidation of certain systemically important financial companies. However, the FDIC's authority is not without limits.[2] As with all rulemaking proceedings, any new rules must be consistent with the language of the statute and Congressional intent.

For decades, the state insurance regulatory regime has had an "orderly resolution" process for financially distressed or insolvent state licensed insurance companies. State insurance receivership laws are primarily designed to protect the policyholders of such insurers, and ensure policyholders can continue to have any claims paid. In furtherance of this goal, state receivership laws generally provide that policyholders receive higher payment priority than other unsecured creditors and state insurance regulators are given broad authorities to rehabilitate or liquidate insolvent insurance companies in a manner that protects policyholders and preserves the value of the insurance company for their benefit.

Title II of the Act recognizes this time-tested insurance company resolution regime already in place under state law. It explicitly requires that an insurance company be resolved pursuant to state law as opposed to the procedures set forth in Title II and requires that the FDIC harmonize any new rules involving insurance companies with the state insurance receivership regime already in place.[3] The

[1] Pub. L. No. 111-203.
[2] Id. at § 209.
[3] Id. at §§ 203, 209.

NAIC has reviewed the proposed rules promulgated by the FDIC and has significant concerns that proposed rule 380.6 is inconsistent with the language of the Act and Congressional intent in this regard.

§380.6: Limitation on Liens on Assets of Covered Financial Companies That Are Insurance Companies or Covered Subsidiaries of Insurance Companies.

Under the proposed rule, whenever the FDIC "makes funds available" to a covered financial company that is an insurer, an affiliate of an insurer, or a subsidiary of insurer, the FDIC can take a lien on "some or all" of the assets of such entities to secure repayment when the FDIC in its "sole discretion" determines that 1) taking such lien is necessary for the orderly liquidation of the entity and 2) taking such lien will not unduly impede or delay the liquidation or rehabilitation of the insurance company or recovery by its policyholders.[4] While we acknowledge, based on the section by section analysis accompanying the proposed rule, that the stated intent of this rule is to "limit" the ability of the FDIC to take liens on the assets of insurance companies or covered affiliates of such companies in order to protect policyholders[5], this proposed rule does precisely the opposite —it effectively provides the FDIC the unilateral right to impose a lien on the assets of an insurer whenever the FDIC deems it appropriate. This is in clear violation of the explicit language of the Act and Congressional intent.

Application to Insurance Companies

First, the proposed rule as applied to insurance companies would violate the explicit language of the Act. This rule implements authorities provided to the FDIC under Section 204 of the Act. However, that section only applies in circumstances where Title II orderly liquidation procedures are utilized and the FDIC is appointed receiver by a Federal District Court pursuant to Section 202 of the Act. However, insurance companies are not subject to Title II orderly liquidation procedures. In cases involving insurance companies, Section 203(e) applies. That section requires that ". . . the liquidation or rehabilitation of [an] insurance company . . . shall be conducted as provided under applicable State law." Indeed, even in the unlikely event that the state insurance regulators do not file a receivership petition in state court within 60 days and the FDIC has to utilize its backstop authority provided in Section 203(e)(3), that authority only allows the FDIC to stand in the place of the insurance regulator, file the appropriate action in state court and conduct the receivership pursuant to state law. Under no circumstances would Section 202 apply to the resolution of an insurance company. Therefore, the application of this rule to insurance companies violates the explicit language of the Act and, for this reason, the NAIC requests that the rule be changed so it does not apply to insurance companies.

Even if it could somehow be interpreted that Section 204 applies to resolutions conducted under Section 203(e), the proposed rule would, in circumstances where funds were "made available" to an insurer during the resolution process, allow the FDIC to impose a lien "in its sole discretion." As explained above, Title II requires that insurance companies be resolved pursuant to state law and that any rules implementing Title II be harmonized with the state laws and regulations governing state insurance receiverships. At bare minimum, state law provides that the imposition of such a lien could be voidable by the Court under some circumstances upon petition by the receiver, creditors, or other interested parties.[6] Under certain state's laws, post-petition liens, transfers of property, and other post-petition obligations can only be incurred by an insurer when authorized by 1) the receiver appointed by the state

[4] Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. at 64182 (October 19, 2010).
[5] Id. at 64179.
[6] *See, e.g.,* Iowa Code § 507C.28 (1992); New York Ins. Law § 7425(c)(1989).

insurance regulators and/or 2) the state court.[7] In either event, the FDIC would not have "sole discretion" to impose such a lien. In light of the proposed language's clear conflict with the Act and state law, the rule should be amended to state that such liens can only be imposed on an insurance company in consultation with the receiver, and with the approval of the receiver or Court in accordance with the law of the state where the insurance company is domiciled.

Application to Non-Insurance Subsidiaries and Affiliates of Insurers

Second, even as applied to non-insurance subsidiaries and affiliates, the language is potentially inconsistent with the letter of the law requiring harmonization with the state regulatory regime and with Congressional intent. As presently drafted, if funds are made available to a non-insurance subsidiary or affiliate, the FDIC can impose a lien on some or all assets of the company, potentially including assets of an affiliated insurer or, in the case of a parent, any majority ownership interest. We understand the intent of this provision is to allow the FDIC to protect its interest when it injects funds into a non-insurance subsidiary or affiliate it is resolving, but are concerned that such actions may interfere with the regulation or resolution of an insurance company under state law. Typically, state law requires that any material lien or change of control exercised on an insurance company be approved by the insurance regulator. If the intent of this language is to enable, among other scenarios, the FDIC to reach into the affiliated insurance company and exercise a lien on its assets or, alternatively, to exercise a lien on any majority ownership interest in that insurance company without the approval of the state insurance regulators, such an application would be in conflict with state law, and, therefore, inconsistent with Congressional intent in passing this Act.

In passing the Act, Congress intended to preserve the state regulation of insurance and its receivership regime. Section 203 of Title II explicitly preserves the role of the states in resolving insurance companies. Title X specifically excludes the business of insurance from regulation by the newly formed Bureau of Consumer Financial Protection. Title V significantly limits the newly formed Federal Insurance Office's ability to preempt state insurance laws. Importantly, Title II specifically preserves the state law regime for insurance company receiverships and requires the FDIC to harmonize its actions with that regime. To this end, the NAIC respectfully requests that the rule be clarified that the imposition of such liens be limited only to the assets of non-insurance subsidiaries or affiliates and, where the exercise of such a lien could result in a change of control, require the approval of the appropriate state insurance regulator in accordance with state law.

"Making Funds Available"

Third, as presently drafted, the language "making funds available" in the rule could lead to unintended results. We understand the need and desire of the FDIC to ensure that when government funds are actually provided to a covered financial institution, it must, to the best of its ability, ensure the repayment of such funds. As drafted, however, the proposed rule is triggered when the FDIC "makes funds available" to the insurer or affiliate, not when funds are actually provided by the FDIC and used by the company. On its face, the language allows the FDIC to take a lien when it provides a backstop guaranty even though the guaranty is never triggered and the FDIC may never provide a single dollar to the insurer or the affiliate under its terms. This language also allows the FDIC to impose a lien on an insurer upon the mere announcement of a program to provide funds to troubled companies by application along the lines of some of the TARP funding programs administered by the Treasury Department during the financial crisis. The imposition of a lien in such circumstances would be

[7] *See, e.g.*, Texas Ins. Code Ann. § 443.203 (Vernon 2009).

unnecessary and be disruptive to what will likely be an already complex resolution process. For this reason, we respectfully request that the language be changed to ensure that the rule is triggered only in circumstances where funds are actually provided to and used by the insurer.

<u>Liens on Affiliates</u>

Last, Section 380.6 of the proposed rule refers to FDIC authority to impose liens on affiliates in addition to covered financial companies and covered subsidiaries. Section 204(d) of the Dodd-Frank Act does not reference any authorities provided to the FDIC to impose liens on affiliates. We, therefore, respectively request that the references to affiliates in Section 380.6 be removed.

In conclusion, we appreciate the opportunity to comment to these proposed rules. Should you wish to discuss this response or any other matter relating to the NAIC's views on the rulemaking process, please do not hesitate to contact Ethan Sonnichsen, Director of Government Relations, at (202) 471-3980, Moira Campion McConaghy, Government Relations Manager, at (202) 649-4997, or Mark Sagat, Government Relations Analyst and Counsel, at (202) 471-3987.

Sincerely,

Jane L. Cline, Commissioner
West Virginia Insurance Department
NAIC President

Therese M. Vaughan, Ph.D.
NAIC Chief Executive Officer