Nationwide

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

Subject: Orderly Liquidation

Dear Executive Secretary Feldman:

Nationwide appreciates the opportunity, in followup to our letter to the Corporation dated November 17, 2010 (see attached) to comment on the second set of questions contained in the NPR issued under Title II of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "Act") concerning proposed Part 380 of the FDIC Regulations.

Title II of the Act establishes an orderly liquidation authority to unwind large and complex, systemically important firms that threaten stability to the U.S. financial system. In implementing Title II, the Corporation, to effectively attain the goal to preserve financial stability, should preserve to the greatest extent possible, the economic rights of the financial system stakeholders, including the covered financial institutions and their creditors. An effective regime to preserve financial stability depends upon certainty, transparency, clarity, precision and specificity in regulation while limiting regulatory discretion. Doing so preserves the rights of stakeholders, provides a mechanism for fair and equal treatment and naturally alleviates uncertainty by providing advance notice to stakeholders and to the markets of clear and precise rules. And with respect to insurance companies, stability for policyholders and certainty depends upon the Corporation's recognition of the role of the States in the rehabilitation and liquidation of the insurer. With these preliminary comments, Nationwide's response to the Corporation's specific questions follows.

1. **What other specific areas relating to the FDIC's orderly liquidation authority under Title II would benefit from additional rulemaking?**

Holding Company-Subsidiary Liquidations—The regulations need to provide for Corporation coordination with other regulatory authorities in liquidation of a holding company and its subsidiaries. Insurance companies are liquidated under State law. To the extent the Corporation provides funds to an insurer or its subsidiaries, any liens should attach only to the extent of actual funding and only with respect to funds actually received. Doing so protects the insurer's estate and therefore the policyholders who have a higher priority than general creditors under the State law of rehabilitation and liquidation of insurers. The rules need to address with specificity the coordination between claims against the holding company and subsidiaries thereof recognizing that the holding company can be a regulated insurance company subject to State rehabilitation and liquidation laws.

Removal of Directors and Officers—The Corporation should provide specific criteria and procedures for the removal of directors and officers as prescribed by Sections 204(4) and 206(5) of the Act. Doing so promotes transparency and certainty in the interest of financial stability.

Custodial and Trust Assets held by Non-Banks—The Corporation should squarely address the handling and disposition of custodial and trust off balance sheet assets such as investment advisory accounts.

Liquidation of Broker Dealers—The Corporation should propose rules implementing Section 205 of the Act concerning broker-dealers. The rules should recognize the different authority of SIPC from FDIC; set forth procedures for transfer of customer accounts to a bridge financial company in the event of liquidation; procedures for notification of customers in connection with a liquidation; specify how the Corporation will exercise its authority as receiver under Section 205(d) of the Act to prevent adverse effects on broker-dealer customers in the event of a liquidation.

Living Wills—The Corporation should coordinate with the other agencies to make living will or resolution plan requirements consistent.

2. **Section 209 of the Dodd-Frank Act requires the FDIC, "[t]o the extent possible,""harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company." What are the key areas of Title II that may require additional rules or regulations in order to harmonize them with otherwise**

applicable insolvency laws. In your answer, please specify the source of insolvency laws to which you are making reference.

Securitizations—To provide greater clarity and certainty to the markets, the Corporation should specify by rule that securitizations sponsored by nonbank affiliates of covered financial companies are subject to the Bankruptcy Code and existing interpretations. Securitizations should not be subject to the discretion of the Corporation as envisioned for insured depository institutions in Section 11 of the Federal Deposit Insurance Act.

Subsidiaries—The Corporation should specify by rule treatment of subsidiaries including subsidiaries for which the Corporation has not been appointed receiver.

3. **With the exception of the special provisions governing the liquidation of covered brokers and dealers (see section 205), are there different types of covered financial companies that require different rules and regulations in the application of the FDIC's powers and duties.**

Applicability of Orderly Liquidation to Insurance Companies—As indicated in our previous letter, we believe that the Corporation should confirm that it would not apply Title II to insurers subject to the State law of rehabilitation and liquidation and that the Corporation's authority is limited to initiating rather than conducting an orderly liquidation of an insurer. *See* Section 203(e) of the Act.

Liens on Insurer Assets—As indicated in our previous letter, the Corporation's lien on insurer assets should be limited to amounts the Corporation actually extended to the insurer or its subsidiaries. The Corporation should set forth this limitation in the regulation.

4. **Section 210 specifies the powers and duties of the FDIC acting as receiver under Title II. Are regulations necessary to define how these specific powers should be applied in the liquidation of a covered company?**

Powers of the Corporation as Receiver. The powers and duties of the Corporation as receiver of a covered financial firm should mirror the powers of bankruptcy judges and trustees under the Bankruptcy Code to the maximum extent possible. Doing so will enhance certainty and market stability.

5. **Should the FDIC adopt regulations to define how claims against the covered financial company and the receiver are determined under section 210(a)(2)? What specific elements of this process require clarification?**

The Corporation should adopt regulations to define how claims against the covered financial company and the receiver are determined under Section 210(a)(2). The regulations should address procedures for information and periodic updates regarding outstanding claims; procedures for appealing adverse claim determinations enabling a creditor to contest the existence of a valid claim and the valuation of the claim by the receiver (such procedures should include a right of appeal and should permit direct judicial review without need to exhaust administrative process); declaration of the Corporation to keep current information concerning pending claims; and timeframes for the resolution of claims.

6. **Should the FDIC adopt regulations governing the avoidable transfer provisions of Section 210(a)(11)? What are the most important issues to address for the fraudulent transfer provisions? What are the most important issues to address for the preferential transfers provisions? How should these issues be addressed?**

Avoidable Transfer Provisions—The Corporation should adopt regulations implementing the avoidable transfer provisions of Section 210(a)(11) mirroring the Bankruptcy Code to the greatest extent possible. The regulations should specify that the outcomes would be the same under Title II and the Bankruptcy Code.

Fraudulent Transfer Provisions—The Corporation should adopt regulations implementing the fraudulent transfer provisions of the Act mirroring the Bankruptcy Code to the greatest extent possible. The regulations should specify that the outcomes would be the same under Title II and the Bankruptcy Code.

7. **What are the key issues that should be addressed to clarify the application of the setoff provisions in section 210(a)(12)? How should these issues be addressed?**

   Regulations should state that the Corporation as receiver will not transfer assets in a manner that eliminates setoff rights. If setoff is not possible as a result of a transfer of assets to a bridge financial company, a mechanism should be established to put the counterparty in the same position that it would be under the Bankruptcy Code. If there are no assets left in the shell company or if there is a shortfall, then the regulation should permit a clawback from the bridge financial company.

8. **Do the provisions governing the priority of payments of expenses and claims in section 210(b) and other sections require clarification? If so, what are the key issues to clarify in any regulation?**

   The provisions governing the priority of payments of expenses and claims in Section 210 (b) and other sections do require clarification. The Corporation should provide more specificity on the administrative expenses and secured claims.

9. **Section 210(b)(4), (d)(4), and (h)(5)(E) address potential payments to creditors "similarly situated" that are addressed in this Proposed Rule. Are there additional issues on the application of this provision, or related provision, that require clarification or regulation?**

As indicated in our prior letter, the Corporation should not differentiate, discriminate or create a preference among unsecured creditors based upon class of debt. By avoiding discrimination among unsecured creditors by maturity, the Corporation would facilitate smooth functioning of the credit markets and the ability of the companies to issue debt more efficiently and less expensively. Treatment of unsecured creditors without regard to maturity avoids the possibility of a sell-off of a class of securities falling outside a preference established by the Corporation. An unintended consequence of distinctions based on maturity could be further destabilization of the troubled nonbank firm.

By shifting focus from class of debt to if the debt supports critical functions, the Corporation would avoid preferences that could lead to a decline in demand for long term debt and therefore market distortions that would drive up the cost of borrowing for financial firms in general. Likewise, the approach addresses the statutory command to preserve asset value and minimize loss by permitting payments for debt holders critical to operations of the nonbank.

In short, elimination of distinctions based upon debt maturity with respect to unsecured credits results indicates treatment of unsecured creditors similarly situated.

10. **Section 210(h) provides the FDIC with authority to charter a bridge financial company to facilitate the liquidation of a covered financial company. What issues surrounding the chartering, operation, and termination of a bridge company would benefit from a regulation? How should those issues be addressed?**

    The Corporation should specify default provisions that are enforceable against the bridge financial company. Rules should set forth the documentary requirements necessary for creditors of covered financial institutions to ensure that bridge financial company transactions are authorized. Rules should specify the rights of review applicable to creditors of a covered financial company with claims against the bridge company. In connection with a subsequent transfer to purchasers of a bridge financial company or a merger of the bridge financial company with another entity, the rules should set forth the rights of the creditors of the bridge financial company. The Corporation should establish by rule a mechanism to determine which contracts become a part of the bridge financial company. The rules should set forth the procedures to provide notice to the economic stakeholders of the covered financial firm.

    It is critical in the interests of transparency, certainty, clarity and market stability that any net economic value derived from the bridge financial company by the Corporation must be exclusively for the benefit of the receivership (for example through a spin-off or public offering of the bridge financial company).

11. **Regarding actual direct compensatory damages for the repudiation of a contingent obligation in the form of a guarantee, letter of credit, loan commitment, or similar credit obligation, should the Proposed Rule be amended to specifically provide for determining the estimated value of the claim? In**

addition to the statutory considerations in valuation, including the likelihood that the contingent claim would become fixed and its probable magnitude, what other factors are appropriate? If so, what methods for determining such estimated value would be appropriate? Should the regulation provide more detail on when a claim is contingent?

The proposed rule should provide for a determination of the estimated value of a claim by reference to the Bankruptcy Code. Valuation practices with respect to any given obligation such as a letter of credit or guarantee should be consistently applied and reflect current market conditions.

12. **Are the provisions of the Dodd-Frank Act relating to the classification of claims as administrative expenses of the receiver sufficiently clear, or is additional rulemaking necessary to clarify such classification?**

Yes. Additional rulemaking is necessary with respect to classification of claims as administrative expenses. Such rulemaking should add clarity and certainty and therefore promote financial stability.

13. **Should the Proposed Rule's definition of "long-term senior debt" be clarified or amended?**

Please see Item 9 above.

In conclusion, we applaud the Corporation for timely kicking off the process to implement orderly liquidation regulations under the Act. We thank the Corporation for the opportunity to provide input into this NPR. We urge the Corporation to consult with State insurance regulatory authorities when the covered financial company is a holding company that is an operating insurance company (as well as with respect to insurance companies that are subsidiaries of a covered financial company). We urge greater detail, transparency, clarity and certainty as the constant principles in rulemaking in this critical area in the interest of stability of the U.S. financial system.

We thank the Corporation for the opportunity to provide input into this NPR and look forward to future NPRs. Please let us know if you have any questions regarding this letter.

Very truly yours,

NATIONWIDE

Mark R. Thresher
Executive Vice President & Chief Financial Officer

Attachment