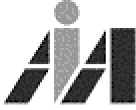


American Insurance Association

2101 L Street. NW
Suite 400
Washington, DC 20037
202-828-7100
Fax 202-293-1219
www.aiadc.org

January 17, 2011

**VIA ELECTRONIC MAIL (Comments@FDIC.gov)**

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

**Re: Proposed Orderly Liquidation Rulemaking – Responses to Additional Questions**

Ladies and Gentlemen:

The American Insurance Association ("AIA") appreciates the opportunity to provide supplemental comments on the Federal Deposit Insurance Corporation's ("FDIC") notice of proposed rulemaking[1] regarding implementation of certain provisions of the FDIC's authority to resolve covered financial companies under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] These comments specifically respond to the additional questions posed by the FDIC in its notice, which also relate to the orderly liquidation provisions of Title II and the scope of the FDIC's responsibilities and authority under that title.

AIA represents approximately 300 major U.S. insurance companies that provide all lines of property-casualty insurance to U.S. consumers and businesses, writing more than $117 billion annually in premiums. Our members have a significant interest in the orderly liquidation authority provisions of Title II and regulations implementing those provisions, particularly where they intersect with state-based insolvency laws and procedures, guaranty associations, and related assessment mechanisms that involve property-casualty insurers. To this end, our

---

[1] 75 *Fed. Reg.* 64173-02 (October 19, 2010).
[2] Public Law 111-203, 111th Cong., 124. Stat. 1376, 12 U.S.C. § 5301 note (July 21, 2010) (the "Dodd-Frank Act").

supplemental comments focus on Additional Questions 1, 2 and 4,[3] which ask what other areas under Title II would benefit from additional rulemaking both generally and specifically with respect to the need for harmonization with other applicable insolvency laws, as well as to how the FDIC's receivership authority should be applied in liquidating a covered company.

Specifically, we believe that the FDIC should (1) promulgate assessment regulations that reflect the low systemic risk presented by property-casualty insurance companies; (2) adopt resolution regulations that recognize the primacy of state insurance receivership and guaranty fund laws whenever an insurance company is the object of a resolution action; and (3) reaffirm the application of state receivership and guaranty fund laws to insurers, irrespective of whether an insurer is part of a larger financial company.

**FDIC Assessment Rules Must Be Risk-Based And Differentiate Among Financial Industries**

Additional Question #1 asks for comment on "[w]hat other specific areas relating to the FDIC's orderly liquidation authority under Title II would benefit from additional rulemaking?"[4] AIA believes that the assessment provisions in subsection 210(o) would benefit from the FDIC's promulgation of regulations.

Section 210(o) provides for assessments if "necessary" to repay the federal government for taxpayer dollars used for the orderly liquidation of a covered financial company under Title II. That subsection further specifies that assessments are to be imposed "on any claimant that received additional payments or amounts" from the FDIC "pursuant to subsection (b)(4), (d)(4), or (h)(5)(E)" that reflect the additional value that a claimant received over and above what it would have otherwise been entitled to receive on its claim from the proceeds of the liquidation of the covered financial company.[5]

If the amounts collected from those claimants are "insufficient" to repay the full amount of funds that the FDIC advanced in a Title II liquidation, then (and only then) the FDIC is authorized to impose assessments on "eligible financial companies" and other financial companies that have $50 billion or more in total consolidated assets.[6] Consequently, Title II establishes a first "tranche" of claimants to be assessed and authorizes additional tranches only where the recovery from claimants is insufficient to collect FDIC advances.

Title II further qualifies the assessment process by requiring the application of a "risk matrix" whereby assessments are to be levied on individual companies based upon a company's risk profile, thereby codifying a risk-oriented approach.[7] In addition, Title II requires the FDIC to promulgate regulations that implement the assessment provisions of section 210(o), and mandates that those regulations "take into account the differences in risks posed to the financial stability of the United States by financial companies, the differences in the liability structures of financial companies and the different bases for other assessments that such financial companies may be required to pay, to ensure that assessed financial companies are

[3] *See* 75 *Fed. Reg.* at 64180.
[4] 75 *Fed. Reg.* at 64180.
[5] Dodd-Frank Act § 210(o)(1)(D)(i), 12 U.S.C. § 5390(o)(1)(D)(i).
[6] Dodd-Frank Act § 210(o)(1)(D)(ii), 12 U.S.C. § 5390(o)(1)(D)(ii).
[7] Dodd-Frank Act § 210(o)(4), 12 U.S.C. § 5390(o)(4).

treated equitably and that assessments… reflect such differences."[8] Thus, section 210(o) requires FDIC assessment rules to take into account both company-specific and industry-centric risk characteristics.

The statutory language of the Dodd-Frank Act and its legislative history strongly support the position that property-casualty insurers engaged in traditional insurance activities should be judged among the least risky financial sectors, if not the least risky sector. First, in its Report on the Senate version of the Dodd-Frank Act, the Committee on Banking, Housing, and Urban Affairs described the assessment process as follows:

> "The FDIC shall prescribe regulations to carry out this subsection in consultation with the Secretary and the Council, and such regulations shall take into account the differences in risks posed by different financial companies, the differences in the liability structure of financial companies, and the different bases for other assessments that such financial companies may be required to pay, to ensure that assessed financial companies are treated equitably and that assessments under this subsection reflect such differences. It is intended that the risk-based assessments may vary among different types or classes of financial companies in accordance with the risks posed to the financial stability of the United States. <u>For instance, certain types of financial companies such as insurance companies and other financial companies that may present lower risk to U.S. financial stability</u> (as indicated, for example, by higher capital, lower leverage, or similar measures of risk as appropriate depending on the nature of the business of the financial companies) <u>relative to other types of financial companies should be assessed at a lower rate</u>."[9]

The Report reflects Congressional intent that the FDIC is to apply the risk-based assessment process in a manner that yields lower assessment rates for insurance companies relative to other, more systemically risky financial sectors. This assessment provision remained unchanged in the Dodd-Frank Act as enacted.

Second, many of the factors that the FDIC is to take into account in the section 210(o)(4) risk matrix mirror criteria set forth in section 113 of the Dodd-Frank Act that are to be utilized by the Financial Stability Oversight Council in determining nonbank financial companies that are subject to heightened prudential supervision. Those factors include the nature of a financial company's activities,[10] the extent to which the company is leveraged,[11] and its importance as a source of credit and liquidity.[12] As AIA has detailed in separate comments provided to the

---

[8] Dodd-Frank Act § 210(o)(6), 12 U.S.C. § 5390(o)(6).

[9] Senate Report No. 111-176 (Committee on Banking, Housing, and Urban Affairs) accompanying S. 3217 (Apr. 30, 2010), p. 64 (*emphasis supplied*).

[10] *Cf.* Dodd-Frank Act § 210(o)(4)(C)(ii) (12 U.S.C.§ 5390(o)(4)(C)(ii)) *with* Dodd-Frank Act §§ 113(a)(2)(G), 113(b)(2)(G) (12 U.S.C. §§ 5323(a)(2)(G), 5323(b)(2)(G)).

[11] *Cf.* Dodd-Frank Act § 210(o)(4)(C)(iv) (12 U.S.C.§ 5390(o)(4)(C)(iv)) *with* Dodd-Frank Act §§ 113(a)(2)(A), 113(b)(2)(A) (12 U.S.C. §§ 5323(a)(2)(A), 5323(b)(2)(A)).

[12] *Cf.* Dodd-Frank Act § 210(o)(4)(C)(ix) (12 U.S.C.§ 5390(o)(4)(C)(ix)) *with* Dodd-Frank Act §§ 113(a)(2)(D), 113(b)(2)(D) (12 U.S.C. §§ 5323(a)(2)(D), 5323(b)(2)(D)).

Council (and attached for reference here),[13] property-casualty insurers engaged in the traditional business of insurance do not possess the type of risk characteristics that would present a threat to U.S. financial stability and therefore should not warrant section 113 designation. Property-casualty insurers are well-capitalized, conservatively-invested and low-leveraged businesses that operate according to an industry model based on an inverted cycle of production that effectively prevents a "run" on the company by its policyholders. This conclusion is equally applicable in the assessment context, and in fact may be mandated by Title II's statutory admonition that the assessment rules account for the differences in risks and liability structures of the various financial sectors.[14]

Third, as AIA has noted in previous submissions, property-casualty insurers participate in a state-based guaranty fund system that is tied to state insolvency laws and procedures. Because of the industry business model, guaranty fund assessments occur on a *post-hoc* basis that permits future claims made to an insolvent insurer to be paid as they arise in the course of time. Accordingly, in addition to basing assessments on an individual company and industry-centric risk profile, property-casualty insurers must be treated equitably in terms of the credit given on any assessments for guaranty fund payments. While subsection 210(o)(4)(B)(iv) provides a mechanism for doing so,[15] we believe the process would be greatly enhanced if the FDIC adopts regulations that provide the specific course of action for achieving equitable treatment.

**Rules Promulgated Under Title II Should Be Harmonized To Reflect The Primacy of State Insurance Law Where An Insurance Company Is The Object of Resolution**

Additional Questions 2 and 4 ask, respectively, what areas of Title II may require additional rules "to harmonize them with otherwise applicable insolvency laws" and whether rules are needed to define the FDIC's powers as receiver under Title II.[16] With respect to property-casualty insurance companies that are financial companies in their own right or affiliates of a broader financial firm, AIA believes that FDIC orderly liquidation rules should formally recognize that state insolvency and guaranty fund laws and procedures are applicable instead of Title II insolvency provisions, and that the FDIC should defer to state insurance laws even where it exercises its "backup authority" to place an insurance company into liquidation under section 203(e)(3).[17]

As discussed in our November 18, 2010 submission to the FDIC, section 203(e) expressly provides for insurance company resolution to "be conducted as provided under applicable State law," thus affirming that Title II standards should yield to state resolution standards even where those standards may differ from the federal law.[18] The Senate Banking Committee Report

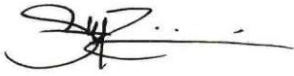
[13] *See Comments of the American Insurance Association in Response to Advance Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies Pursuant to Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Docket No. FSOC-2010-0001)* (Nov. 5, 2010) (available at www.regulations.gov, *Doc. ID FSOC-2010-0001-0029 through FSOC-2010-0001-0029.3*).
[14] Dodd-Frank Act § 210(o)(6)(B), 12 U.S.C. § 5390(o)(6)(B).
[15] Dodd-Frank Act § 210(o)(4)(B)(iv), 12 U.S.C. § 5390(o)(4)(B)(iv).
[16] 75 *Fed. Reg.* at 64180.
[17] Dodd-Frank Act § 203(e)(3), 12 U.S.C. § 5383(e)(3).
[18] *See Comments of the American Insurance Association in Response to Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and*

reinforces the legislative intent for exclusivity of the state resolution mechanism with respect to insurance company insolvencies, both acknowledging that insurers are subject to "their own separate resolution process[]" and reiterating the primacy of state insurance laws in such situations.[19] For this reason, AIA respectfully renews its request for regulatory clarity on these points.

* * *

AIA appreciates this opportunity to provide its views on the additional questions included in the FDIC's notice of proposed rulemaking and would be pleased to discuss our comments further with you.

Respectfully submitted,



J. Stephen Zielezienski
Senior Vice President & General Counsel
American Insurance Association
2101 L Street, N.W., Suite 400
Washington, DC 20037
202-828-7100

---

*Consumer Protection Act,* at pp. 2-3 (Nov. 18, 2010), available at http://www.fdic.gov/regulations/laws/federal/2010/10comOrderLiq.html.

[19] Senate Report No. 111-176 (Committee on Banking Housing, and Urban Affairs) accompanying S. 3217 (Apr. 30, 2010), pp. 58-59.