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November 16, 2010

Ms. Sheila C. Bair
Chairman, Federal Deposit Insurance Corporation
550 17th St, NW
Washington, DC 20429

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

Dear Chairman Bair:

These comments are submitted on behalf of the American Council of Life Insurers (ACLI). The ACLI is a national trade association with over 300 member companies representing more than 90 percent of the assets and premiums of the life insurance and annuity industry in the U.S. On behalf of all our members, we appreciate the opportunity to submit commentary for consideration on the FDIC's Notice of Proposed Rulemaking (NPR) Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform & Consumer Protection Act (DFA).

This letter will focus on specific sections of the proposed rule. We are reviewing the additional 13 questions posed as part the NPR, and we may submit commentary on those questions for your consideration by January 18, 2011.

Comments on Proposed Rule Part 380 – Orderly Liquidation Authority

Section 380.2

First, while section 380.2(c) mentions the "fair market value" of collateral, there is no mention as of what date the valuations for establishing that value are to be made. We recommend establishing the date of valuation as the date the FDIC was appointed receiver of the covered financial company.

Second, section 380.2 clarifies that certain categories of stakeholders in a covered financial company will never receive preferential payments pursuant to sections 210(b)(4), 210(d)(4) or 210(h)(5)(E) of the DFA under any circumstances. Specifically, section 380.2(b) provides that the FDIC shall not permit shareholders, subordinated debtholders, and long-term unsecured senior debtholders of a covered financial company to recover more than others in their respective classes. Conversely—and as made clear in the memorandum accompanying the proposed rule—holders of short-term unsecured debt may receive additional payments or credits when the FDIC's Board of Directors, by majority vote, determines such payments or credits are "necessary" and provided that the statutory requirements have been satisfied. Thus, while clarifying that the FDIC cannot, for political reasons or otherwise, make additional payments to one long-term bondholder to the disadvantage of another, section 380.2(b) by implication elevates short-term (364-day) unsecured senior debt of a covered financial company above longer-term (365-day) ostensibly *pari passu* unsecured senior debt, allowing for the potential that the former can be preferred at the direct expense of the latter.

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We believe that the implementation of section 380.2 as drafted will create distortions and increased risks in the bond market—reducing demand for longer-term paper, increasing financing costs for financial institutions, and driving the ratings and prices of existing long-term debt downward. We submit that the FDIC can both: (a) avoid this unintended negative market impact, and (b) address its valid concerns about maintaining essential operations during the pendency of the receivership, by expressly limiting the application of sections 210(b)(4), 210(d)(4) and 210(h)(5)(E) of the DFA to creditors that "provide essential services related to the operations of the receivership or any bridge financial company." Similar to the administrative priority status conferred upon "critical vendors" in a chapter 11 proceeding, the FDIC, by majority vote of the Board, may elect to grant "additional payments" or other credits to creditors that provide essential ongoing services that it deems vital to the operations. This would allow the receivership or bridge financial company to maintain and maximize the value of its assets and operations for the benefit of creditors, without rewriting the absolute priority rule and disrupting general market expectations.

Section 380.4

Section 380.4 addresses certain contingent claims (guarantee, letter of credit, loan commitment or similar credit obligation) consistent with DFA section 210(c)(3)(E). However, it is silent on the possible existence of other types of contingent claims (*e.g.*, litigation). We believe the provisions of Title II of the DFA recognize the possibility of contingent claims other then those enumerated in this section of the proposed rule (see, *e.g.,* valuation of all contingent claims under DFA section 210(n)(8)(B)). We therefore request clarification that the language of this section does not, by negative implication, intend to bar non-enumerated contingent claims.

Section 380.5

We seek confirmation that, by referring to "the order of priorities set forth in 12 U.S.C. 5390(b)(1)," the FDIC intends this provision to act so that an insurance company's claim may be any class of claim under section 5390(b)(1), whether as general creditor (under section 5390(b)(1)(E)), shareholder (under section 5390(b)(1)(H)), or otherwise.

Section 380.6

1. *The FDIC's Title II Authority Over Insurance Companies*.

   There is a lengthy discussion of section 380.6 as part of the narrative summary of the Proposed Rule (see: 75 Federal Register 201 (October 19, 2010) p. 64179). We are concerned that this narrative paints an over-broad picture of the FDIC's Title II authority over insurers in its reference to DFA section 203(e). Specifically, the NPR section-by-section analysis includes the following:

   > "Section 203(e) provides that, in general, if an insurance company is a covered financial company the liquidation or rehabilitation of such insurance company shall be *conducted* as provided under the laws and requirements of the State, either by the appropriate State regulatory agency, or by the FDIC if such regulatory agency has not filed the appropriate judicial action in the appropriate State court within sixty (60) days of the date of the determination that such insurance company satisfied the requirements for appointment of a receiver under section 202(a). However, a subsidiary or affiliate (including a parent entity) of an insurance company, where such subsidiary or affiliate is not itself an insurance company, will be subject to orderly liquidation under Title II without regard to State law." (*emphasis added*)

We do not agree with the statement that Title II of the DFA gives the FDIC authority to conduct the liquidation or rehabilitation of an insurance company. To the contrary, DFA section 203(e)(3) only provides the FDIC the authority "to stand in the place of the" insurer's domestic state insurance regulator and "file the appropriate judicial action in the appropriate State court to place such company into orderly liquidation under the laws and requirements of the State." The act of "filing . . . to place" the insurer into liquidation clearly refers just to the act of petitioning the state court to commence the state insurance insolvency proceeding. If the petition is granted, even if "filed" by the FDIC, the insurer's domestic state insurance regulator, not the FDIC, will still be designated the rehabilitator or liquidator of the insurer in accordance with applicable state law, and the rehabilitation or liquidation will be conducted subject to state court supervision. Nothing in DFA section 203(e)(3) suggests that a state court must designate the FDIC as rehabilitator or liquidator in substitution for the state insurance regulator. We are concerned that this narrative summary, by referring to a proceeding initiated by the FDIC as being "conducted" by the FDIC, suggests that the FDIC may be designated as rehabilitator or liquidator of an insurer. We request that any further statement regarding this NPR clarify that the FDIC authority under DFA section 203(e)(3) is limited to the filing of a petition when the state insurance regulator fails to act in a timely fashion but that, upon granting of the petition, whether initiated by the state insurance regulator or the FDIC, the state insurance regulator will be designated rehabilitator or liquidator as provided for under state law.

2. *The Effect of an FDIC Lien on Insurer Assets Under an Orderly Liquidation.*

We understand that it is the FDIC's intent that there may be circumstances under which it will make funds available to an insurance company, even though the insurance company will be subject to liquidation under relevant state insurance insolvency law. In this case, we seek confirmation and clarification that any necessary lien on the assets of an insurance company or a covered subsidiary of an insurance company will only be to the extent of the funds actually extended to the insurance company or the covered subsidiary of the insurance company. This will ensure that any secured claim afforded the FDIC due to its lien in the state insurance insolvency proceeding involving the insurance company will not diminish the amount of other unencumbered assets of the insurance company that support policyholder claims. Similarly, any secured claim afforded the FDIC due to its lien on assets of a covered subsidiary of an insurance company will not diminish the equity value of the covered subsidiary that will inure to the benefit of the insurance company (as shareholder) and ultimately its policyholder-claimants. Finally, we request clarification that any lien taken by the FDIC can only be placed on the assets of the entity that actually receives funds, and not on an affiliate or subsidiary of that entity.

3. *Clarification of Terms and Definitions.*

We believe that the term "covered . . . affiliate" is intended to mean an entity that is an affiliate of the insurance company and is a covered subsidiary of a person controlling the insurance company. Yet the word "affiliate" is undefined for purposes of the Proposed Rule, and may be capable of meaning any affiliate whether or not it is a covered subsidiary subject to DFA Title II – especially since the term "affiliate" is a generally defined term in DFA section 2(1) (by reference to the FDIA, 12 U.S.C. 1813(q)). We recommend appropriate wording be added to this section clarifying this issue.

"Covered entity" is another undefined term used in Part 380. We believe that the intent is that a "covered entity" means having the status of a "covered financial company" or a "covered subsidiary". We recommend clarifying wording or at least a clarification of this intent.

We appreciate the opportunity to share our comments to you, and we are available to discuss them with you should you have any questions.

Respectfully Submitted,

Julie A. Spiezio

cc: Mr. Michael H. Krimminger
FDIC Special Advisor for Policy
Office of the Chairman

Mr. Robert E. Feldman
Executive Secretary, FDIC