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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:

For more than 80 years, Nationwide's insurance and financial products and services have helped millions of Americans protect what matters most to them—their homes, their cars, their businesses, and their financial security as they prepare to live in retirement. We operate under the assumption that market and economic downturns are an unfortunate, but inevitable, aspect of the business cycle.

Accordingly, when the latest crisis erupted in 2008, we were prepared with a strong balance sheet and significant capital on hand. As the severity of the crisis became evident, we took immediate action to reduce risk, enhance liquidity and preserve our capital. Because of our preparation and decisive actions, Nationwide remained strong, stable and financially sound during the darkest days of late 2008 and early 2009, while some of our peers accepted bailout funds through the Troubled Asset Relief Program or raised capital under distressed circumstances.

Managing our business through difficult economic cycles is a challenge we've faced before. During the Great Depression, Nationwide not only survived, but thrived. In the 1930s, we increased our policies in force, assets, premiums and surplus, establishing a historical record of financial performance that continues to be recognized in our industry. In 2009, *Best's Review* listed Nationwide among the property and casualty and the life and health insurers that had maintained at least an "A" rating in each business line for 75 years. Nationwide is time tested as a source of financial strength and stability.

As a mutual insurance company, we see our mutual standing as another reflection of our roots and historical strength. Mutual ownership enables us to focus more on our customers and to make decisions and investments with a longer-term perspective than many of our publicly traded peers that often must focus on short-term results.

Our diverse mix of businesses is another key advantage for Nationwide. We're able to serve the lifetime insurance and financial services needs of our customers through four key businesses:

- Personal Protection—Auto and homeowners insurance, life insurance, banking, and farm coverage
- Personal Investments—Fixed and variable annuities, variable and universal life insurance, and mutual funds
- Retirement Planning—Public- and private-sector retirement plans
- Commercial and Specialty—Agribusiness and commercial insurance, excess and surplus lines, specialty health, and health management

This diverse, balanced business portfolio ensures our ability to drive consistent levels of performance regardless of economic or market forces, and it's one of the reasons we've been able to weather these recent turbulent times.

Nationwide operates through an insurance holding company system registered with the Ohio Department of Insurance. By virtue of its ownership of Nationwide Bank, member FDIC, Nationwide is registered with the Office of Thrift Supervision as a savings and loan holding company pursuant to Section 10 of the Home Owners' Loan Act of 1933. As a U.S. nonbank financial company, Nationwide appreciates the opportunity to provide comment upon the NPR issued under Title II of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "Act") and proposed Part 380 of the FDIC Regulations.

1. Should "long-term senior debt" be defined in reference to a specific term, such as 270 or 360 days or some different term, or should it be defined through a functional definition.

   A definition of "long-term senior debt" has significance under proposed Section 380.2 which as the staff comment states, clarifies that the authority to make additional payments to certain creditors will never be used to provide additional payments, beyond those appropriate under the defined priority of payments to shareholders, subordinated debtholders and bondholders. Thus Section 380.2(b) provides that the Corporation shall not exercise its discretionary authority to make payments or credit amounts in a manner that would result in the following recovering more

than the amount established and due in accordance with statutory priorities:

- Holders of long-term senior debt who have a claim entitled to priority of payment as any other general or senior liability
- Holders of subordinated debt who have a claim entitled to priority of payment as any obligation subordinated to general creditors
- Shareholders, members, general partners, limited partners, or other persons who have a claim entitled to priority of payment as any obligation to shareholders, members general partners, limited partners or other persons with equity interests.
- Other holders of claims entitled to priority of payment as any other general or senior liability, unless the Corporation through a vote of the members of the Board then serving and in its sole discretion, specifically determines that additional payments or credit amounts to such holders are necessary and meet the statutory requirements.

In distinguishing long-term senior debtholders, subordinated debtholders and shareholders from shorter term unsecured debt, the proposed rule would permit short term unsecured debtholders to receive additional payments or credit if the Corporation by a vote of its Board authorizes such payments or credits as necessary provided they meet statutory requirements. A Board vote is designed to ensure that payments are necessary for essential operations of the receivership or the bridge financial company to maximize the value of assets or to minimize losses. The effect of the rule would be to create a preference for short term unsecured debtholders to the detriment of longer term debtholders.

The proposal has the effect of favoring short term debtholders over long term debtholders by allowing the Corporation in its discretion (and based on necessity and statutory requirements) to make additional payments and credits to the short term but not long term debtholders. This could have an impact upon investment in long term debt by making it less desirable and driving up borrowing costs for financial institutions in general.

While the staff states that the Corporation has not made additional payments to shareholders, subordinated debt, or long-term senior debt of banks placed into receivership because such payments would not have helped maximize recoveries or contribute to orderly liquidation of the failed banks, it seems to us that situations could arise in connection with nonbanks that long term debtholders could be critical to ongoing business functions or operations of the nonbank as much as short term creditors.

We think a better approach would be to base additional payments upon if the debt is critical to ongoing operations. Thus the Corporation should consider

establishing quantitative and qualitative criteria to determine if debt of any maturity is essential to support operations of the nonbank. One such criterion could be if the debt is designed as a hedge to provide financial stability to the nonbank. For example debt that is a multi-year hedge could be critical to the financial stability of the nonbank and therefore to its operations. This is especially important if the wind down of the nonbank occurs over a period of years. Notably, Section 209 of the Act requires the Corporation to harmonize its rules with the insolvency laws that would otherwise apply to the nonbank. The concept is similar to the Bankruptcy Code concept that would permit payments to critical vendors of the firm. Such an approach is consistent with Section 210(b)(4) of the Act in that it would treat unsecured claimants of a covered financial company that are similarly situated in a similar manner. Any unsecured claimant could received additional payments if the Corporation determines that such action would be necessary:

(i) to maximize the value of the assets of the covered financial company;
(ii) to initiate and continue operations essential to implementation of the receivership or any bridge financial company;
(iii) to maximize the present value return from the sale or other disposition of the assets of the covered financial company; or
(iv) to miminize the amount of any loss realized upon the sale or other disposition of the assets of the covered financial company.

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. It 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.

Please note that procedures in connection with additional payments and credits with respect to insurance company creditors are controlled by the State insurance rehabilitation and liquidation laws. For example Ohio Revised Code Section 3903.21 (A) empowers the State insurance department as liquidator to pay

additional amounts. Section 3903.21(A)(10) empowers the department as liquidator to borrow money from creditors on the security of the insurer's assets and without security. Notably, under Ohio insurance law, the borrowing power of the liquidator makes no distinction as to maturity of the debt. The apparent statutory scheme is to maintain essential operations. That same focus should obtain in the nonbank context without regard to maturity of debt.

2. Is the description of "partially funded, revolving or other open lines of credit" adequately descriptive? Is there a more effective definition that could be used? If so, what and how is it more effective?

   The term "partially funded, revolving or other open lines of credit" is excluded from the term "long-term senior debt" under proposed Section 380.2. As we discussed in the answer to the first question above, we do not believe the classification of debt and preference for short term debt to long term debt should be the appropriate focus. Rather we believe that any debt should qualify for additional payments or credits as long as the debt is critical to operations. Thus, it would be better to develop a set of quantitative and qualitative criteria that would enable an objective determination if any class of debt is essential to the nonbank's operations.

   Please note that insurance company additional payments or credits would be controlled under State rehabilitation and liquidation laws.

3. Should there be further limits to additional payments or credit amounts that can be provided to shorter term general creditors? Are there further limits that should be applied to ensure that any such payments maximize value, minimize losses, or are to initiate and continue operations essential to the implementation of the receivership or any bridge financial company? If so, what limits should be applied consistent with other applicable provisions of law?

   Additional payments and credit amounts should be made if necessary to support ongoing business functions or operations of the nonbank to maximize the value of assets and to minimize losses. As indicated in the preceding questions, additional payments or credit amounts should not be limited to shorter term general creditors, but should be available to any class of creditors if necessary to support operations.

4. Under the Proposed Rule, the FDIC's Board of Directors must determine to make additional payments or credit amounts available to shorter term general creditors only if such payments or credits meet the standards specified in 12 U.S.C. 5390(b)(4), (d)(4), and (h)(5)(E). Should additional requirements be imposed on this decision-making process for the Board? Should a super-majority be required?

   As a matter of corporate governance, it is appropriate for the Board of the Corporation in the exercise of its statutory and fiduciary obligations by a non-delegable recorded decision that additional payments and credits are necessary and meet the statutory requirements. This procedure ensures transparency and certainty in the process and that such payments are necessary to the essential operation of the receivership or bridge financial company to maximize value of the assets and mitigate losses.

   As a practical matter, the Corporation should ensure that the procedures enable timeliness and operational agility. Thus, as long as the Board makes the determination in the exercise of its sound business judgment, the need for an extraordinary supermajority should not be required if additional time for consideration could undermine the preservation of assets or minimization of losses to the receivership or to the bridge financial company.

   Please note that with respect to insurance companies, the procedures with respect to additional payments are governed by the State insurance rehabilitation and liquidation statutes and rules.

5. Under the Dodd-Frank Act, secured creditors will be paid in full up to the extent of the pledged collateral and the proposed rule specifies that direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States shall be valued for such purposes at par value. How should other collateral be valued in determining whether a creditor is fully secured or partially secured?

   Direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States should be valued at the greater of par value or market value as of the day before notice of receivership. Such a valuation methodology would encourage investment in U.S. government obligations and would provide the greatest flexibility to and increasing the liquidity of parties to the collateral arrangements.

6. During periods of market disruption, the liquidation value of collateral may decline precipitously. Since creditors are normally held to a duty of

commercially reasonable disposition of collateral [UniformCommercial Code], should the FDIC adopt a rule governing valuation of collateral other than United States or agency collateral? Would a valuation based on a rolling average prices, weighted by the volume of sales during the month preceding the appointment of the receiver, provide more certainty to valuation of other collateral? Would that help reduce the incentives to quickly liquidate collateral in a crisis?

The Corporation should adopt a rule governing valuation of collateral other than U.S. or agency collateral based upon average prices for the three day period immediately preceding the notice of receivership. Such a rule would improve the likelihood of assigning a true value. Use of a 30 day period could be subject to swings and volatility that might be less reflective of true value.

7. Are changes necessary to the provisions of proposed Section 380.3 through 380.6? What other specific issues addressed in these sections should be addressed in the proposed rule or in future proposed rules?

In the commentary to Rule 380.6, the staff suggests that the Corporation has the authority to conduct a liquidation or rehabilitation of an insurance company that is a covered financial company if State insurance regulatory authorities have not filed an appropriate action in State court within sixty days of the date of a determination under Section 202(a) of the Act that the insurer meets the requirements for appointment of a receiver.

We believe that this view conflicts with Section 203(e) of the Act. Section 203(e)(1) provides that if an insurance company is a covered financial company or an affiliate or subsidiary of a covered financial company, the liquidation or rehabilitation of such insurance company or any affiliate or subsidiary of a covered financial company "shall be conducted as provided under applicable State law". Section 203(e) goes on to provide as follows:

> (3) BACKUP AUTHORITY.—Notwithstanding paragraph (1), with respect to a covered financial company described in paragraph (1), if, after the end of the 60-day period beginning on the date on which a determination is made under section 202(a) with respect to such company, the appropriate regulatory agency has not filed 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 Corporation shall have the authority **to stand in the place of** the appropriate regulatory agency **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**. [Emphasis added.]

We believe that the Act simply authorizes the Corporation to file in State court if the State insurance department does not timely file. The Act does not authorize the Corporation to assume the role of liquidator and rehabilitator under State insurance law. Rather, once the Corporation files a petition in State court and the court grants the petition, then under State insurance law as required by the Act, the State insurance department is appointed by the court as liquidator or rehabilitator. We would suggest that the rule be clarified to avoid any confusion on this critical point.

Section 380.6 (a) concerning liens provides as follows:

> (a) In the event that the Corporation makes funds available to a covered financial company that is an insurance company or is a covered subsidiary or affiliate of an insurance company or enters into any other transaction with respect to such covered entity under 12 U.S.C. 5384(d), the Corporation will exercise its right to take liens on some or all assets of such covered entities to secure repayment of any such transactions only when the Corporation, 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 either unduly impede or delay the liquidation or rehabilitation of such insurance company, or the recovery by its policyholders.

As noted, the procedures for the liquidation and rehabilitation of an insurance company are subject to State law. If the Corporation makes funds available to an insurance company that is a covered financial company or to a covered subsidiary or affiliate of an insurance company, the Corporation is entitled to take a lien on some or all of the assets of the covered entities to secure repayment, but only when the Corporation in the exercise of its sole discretion determines that the lien is necessary for orderly liquidation and the lien will not

not unduly delay the liquidation or recovery by policyholders of the insurance company.

We suggest that the Corporation revise the rule to make clear that the lien would attach to assets only to the extent of actual funding, and only on the assets of the entity actually receiving the funds. To carefully tailor the scope of the lien preference this way protects the insurer's estate so that policyholders, a higher class of priority than general creditors, are not prejudiced or impeded or delayed from recovery. *See* Section 3903.42 of the Ohio Revised Code (establishing policyholders as a Class 2 priority ahead of general creditors who are assigned to Class 5).

We thank the Corporation for the opportunity to provide input into this NPR. We will consider providing input with respect to the next set of questions in this NPR for which comments are due January 17, 2011.

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