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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: Orderly Liquidation Authority

Ladies and Gentlemen:

The American Insurance Association ("AIA") appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC") proposed rule 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 (the "Dodd-Frank Act").[1] 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 FDIC's proposed rule as it could impact property-casualty insurance companies.

Introduction

As we indicated in our November comment letter on the FDIC's proposed rule,[2] property-casualty insurers are extensively regulated under state law and closely supervised by state insurance authorities. As a result, they present a low risk profile to our nation's financial system. Accordingly, we believe that property-casualty insurers engaged in traditional insurance activities will never present a significant risk to the financial stability of the United States. Moreover, in recognition of the state-regulated nature of insurance supervision and regulation, the Dodd-Frank Act directs that the liquidation or rehabilitation of an insurance

[1] 76 *Fed. Reg*. 16324 (March 23, 2011).
[2] *See*, American Insurance Association comment letter of November 18, 2010 to Robert E. Feldman regarding "Proposed Orderly Liquidation Rulemaking."

company shall be conducted as provided under applicable state law.[3] Accordingly, by all accounts, it is highly unlikely that an insurance company will become subject to the orderly liquidation provisions of the Dodd-Frank Act. We believe that the FDIC should factor these considerations into its deliberations when finalizing its orderly liquidation rule. AIA is concerned that the proposed rule does not indicate that under the Dodd-Frank Act, insurers are excluded from the FDIC's orderly liquidation authority. We believe that the FDIC's rule should expressly state that insurance companies are not subject to the FDIC's rules on orderly liquidation, and that the orderly resolution of insurance companies is to be conducted as provided under applicable state law rather than under Title II.[4]

The FDIC's proposed rule is a further step in its actions to implement the orderly liquidation provisions of Title II of the Dodd-Frank Act. The proposed rule addresses issues regarding recoupment of compensation from senior executives and directors, priorities of expenses and unsecured claims and the administrative process for initial determination of claims. AIA is pleased to provide the following comments on certain issues raised by the FDIC's proposed rule.

Recoupment Of Compensation

Section 380.7 of the proposed rule establishes criteria for the circumstances under which the FDIC as receiver will seek to recoup compensation from persons who are substantially responsible for the failed condition of a covered financial company. The Dodd-Frank Act directs the FDIC to take steps necessary and appropriate to assure that all parties, including management, directors and third parties, having responsibility for the condition of the financial company bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility.[5] The FDIC, as receiver of a covered financial company, may recover from any current or former senior executive and director who was substantially responsible for the failed condition of the covered financial company any compensation that was received during the two-year period preceding the date on which the FDIC was appointed receiver of the covered financial company, or during an unlimited time period in the case of fraud.[6] The Dodd-Frank Act directs the FDIC to promulgate regulations to implement this provision.[7]

A Presumption Of Responsibility Is Inappropriate

The FDIC proposes to establish a presumption of substantial responsibility when the senior executive or director is the chairman of the board of directors, chief executive officer, president, chief financial officer, or acts in any other similar role if in this role he or she had responsibility for the strategic, policymaking, or company-wide operational decisions of the

[3] Dodd-Frank Act § 203(e).
[4] *Id*.
[5] Dodd-Frank Act § 204(a)(3).
[6] Dodd-Frank Act § 210(s)(1).
[7] Dodd-Frank Act § 210(s)(3).

covered financial company. The FDIC will also presume substantial responsibility of a senior executive or director who has been adjudged by a court or tribunal to have breached his or her duty of loyalty to the covered financial company. The presumption will also apply to a senior executive or director who has been removed from his or her position with a covered financial company under section 206(4) or section 206(5) of the Act.[8] A person who is presumed to be substantially responsible for the failed condition of a covered financial company may rebut the presumption of substantial responsibility for the condition of the covered financial company by "proving" that he or she performed his or her duties with the requisite degree of skill and care required by the position. The FDIC states that this determination will be made on a case-by-case basis.

AIA strongly objects to the FDIC's use of a presumption as the basis for its proposed rule. By using a presumption, the FDIC shifts the burden to the person under scrutiny to prove that he or she was without fault rather than requiring the FDIC to prove its case. While such a shift in the burden of proof may make it easier for the FDIC to recoup compensation from persons it believes may be responsible for a covered institution's failed condition, such an objective cannot justify a radical departure from the traditional burden of proof called for by the Due Process Clause. The burden of demonstrating responsibility for loss should fall on the FDIC's shoulders and not be borne by management or directors. Moreover, the authorities cited by the FDIC as support for its use of a presumption of responsibility do not support its use in this instance.

The FDIC cites regulations of the Office of the Comptroller of the Currency ("OCC") and Social Security Administration ("SSA") that make use of presumptions as examples to justify its position. We believe that reliance on those authorities is misplaced. The presumption used in the OCC's rule applies in the context of a notice filed with the OCC under the Change in Bank Control Act.[9] The OCC presumes that a person controls a national bank if the person seeks to acquire control of ten percent or more of a class of registered voting securities of a national bank or if no other person will control a greater proportion of that class of voting securities. This presumption is narrowly focused and applied in the context of a notice filed by a person who desires that the OCC not object to the person's proposed acquisition of shares. Use of a presumption of control in the context of an application or notification process to obtain a benefit from an agency is clearly distinguishable from efforts by the FDIC to impose financial liability on senior executives and directors.

SSA rules also do not support the FDIC's use of a presumption. The SSA's rules relate to the implementation of black lung benefits under the Federal Coal Mine Health and Safety Act. The presumptions set forth in the SSA's rules are beneficial to claimants and work in their favor rather than shifting the burden of proof to the claimant. For example, the rules establish an

[8] Sections 206(4) and (5) of the Dodd-Frank Act require the FDIC to ensure that management and the board of directors responsible for the failed condition of the covered financial company are removed if such parties have not already been removed at the time at which the FDIC is appointed receiver.
[9] 12 C.F.R. § 5.50(f)(2).

irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung.[10] SSA cannot rebut this presumption. Another SSA rule states that even though the existence of pneumoconiosis is not established, if a deceased miner was employed for ten years or more in coal mines and died from a respiration disease, it will be presumed, in the absence of evidence to the contrary, that his death was due to pneumoconiosis arising out of employment in a coal mine.[11] Under this rule, the burden is on SSA, rather than the individual, to rebut the presumption. Rather than providing support to the FDIC, SSA rules support the position that the burden of proof under orderly resolution rules should rest with the FDIC. Moreover, unlike SSA's rules, which are based upon the statutory presumptions established by the Federal Coal Mine Health and Safety Act, the FDIC points to nothing in the Dodd-Frank Act as the basis for overriding considerations of due process. Accordingly, AIA believes that the FDIC should rely upon the traditional notions of due process and be required to prove its case.

State Law Should be the Standard for Responsibility

The FDIC states that a senior executive or director will be deemed to be substantially responsible for the failed condition of a covered financial company if the FDIC determines that the senior executive or director failed to conduct his or her responsibilities with the requisite degree of skill and care required of that position and, as a result, individually or collectively caused a loss to the covered financial company that materially contributed to the failure of the covered financial company. AIA is concerned that the FDIC's proposed approach fails to consider well-established state statutory and case law in determining what standard of care is required by the senior executive that would potentially trigger a loss to the covered financial company that materially contributed to the failure of the covered financial company. Rather, the FDIC appears to create a new body of federal common law that is not developed. Moreover, the FDIC cannot rely upon the Dodd-Frank Act as a basis for its determinations because the act does not establish a standard of care applicable to the FDIC's determination in connection with recoupment of executive compensation. To be sure, state law appears to be the basis applicable to civil suits brought by the FDIC under section 210(f) of the Dodd-Frank Act. In the absence of a federal law, AIA believes that the FDIC should look to standards established by statutes or case law of the jurisdiction in which the covered financial company is organized or in which it maintains its principal office as the basis for its determinations. Accordingly, FDIC efforts as receiver to recoup compensation from senior executives and directors should be based upon an existing framework that has been developed by state law rather than creating a new body of federal common law.[12]

[10] 20 C.F.R. § 410.418.
[11] 20 C.F.R. § 410.462.
[12] *See Atherton v. FDIC*, 519 U.S. 213 (1997) ("There is no federal common law that would create a general standard of care applicable to this case . . . Normally, a federal court may fashion federal common law rules only upon a specific showing that the use of state law will create a significant conflict with, or threat to, some federal policy or interest . . . [H]ere . . . the FDIC is acting only as a receiver of a failed institution; it is not pursuing the government's interest as a bank insurer.")

Amounts Owed to the United States

Section 210(b)(1) of the Dodd-Frank Act sets forth the priority of expenses and unsecured claims against a covered financial company. The first priority is administrative expenses of the FDIC as receiver, followed by amounts owed to the United States (unless the United States agrees or consents otherwise).[13] Section 380.23 of the proposed rule establishes a definition for the phrase "amounts owed to the United States" to include amounts advanced not only by the Department of Treasury, but also amounts advanced by any other department, agency or instrumentality of the United States, as well as unsecured claims for losses by a Federal Reserve Bank. The proposed rule does not include amounts owed to government-sponsored entities such as FNMA, FHMLC or the Federal Home Loan Banks as "amounts owed to the United States."

AIA does not believe that the FDIC has authority to expand the term "amounts owed to the United States" to include agencies and instrumentalities. As noted by the FDIC, the Dodd-Frank Act expressly treats unsecured claims for losses by a Federal Reserve Bank as having the same priority as amounts owed to the Treasury Department.[14] There is no similar provision in the Dodd-Frank Act that supports the proposed expansion of the term "United States" to include agencies and instrumentalities. Indeed, when Congress wished in the Dodd-Frank Act to cover agencies and instrumentalities as well as the United States, it knew how to do it. Section 619 of the Dodd-Frank Act adds section 13 to the Bank Holding Company Act ("BHCA"). This section is commonly referred to as the "Volcker Rule." Section 13(d) of the BHCA, as added by the Dodd-Frank Act, expressly provides that banking entities are permitted to engage in the following activities:

> (A) The purchase, sale, acquisition, or disposition of obligations of the United States *or any agency thereof*, . . . (emphasis added)

Congress intentionally chose the term "amount owed to the United States" and did not include agencies and instrumentalities when it enacted section 210(b)(1). We believe it is contrary to the clear, express language of the Dodd-Frank Act for the FDIC by rule to expand the statutory definition of "amounts owed to the United States" to include amounts owed to agencies and instrumentalities.[15]

Post Insolvency Interest and Oversecured Creditors

Section 380.25 of the proposed rule establishes a post-insolvency interest rate based on the coupon equivalent yield of the average discount rate for the three-month U.S. Treasury Bill. The FDIC indicates that this is the rate that it uses in connection with claims under the Federal

[13] Dodd-Frank Act § 210(b)(1)(A), (B).
[14] Dodd-Frank Act § 1101(a), amending section 13 of the Federal Reserve Act, 12 U.S.C. § 343.
[15] *See*, *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning.") (internal citations omitted).

Deposit Insurance Act, and was selected for use in its orderly liquidation rules for ease of administration. The Bankruptcy Code, however, provides for post-petition interest at the "legal rate." Bankruptcy courts diverge in their interpretation of this term, and accordingly, there is no established post-petition interest rate. AIA agrees with the FDIC that for ease of administration, it is appropriate to use the current procedure the FDIC employs to compute post-insolvency interest under the Federal Deposit Insurance Act.

Unlike the Bankruptcy Code, the Dodd-Frank Act does not contain a provision that allows interest at the contract rate (as well as certain fees and expenses) to be paid to oversecured creditors to the extent of the value of their collateral beyond the claim amount. AIA believes that the FDIC should seek to harmonize its rules with those of the Bankruptcy Code, as mandated by the Dodd-Frank Act.[16]

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AIA appreciates this opportunity to provide its views on the FDIC's proposed rule and would be pleased to discuss our comments further with you.

Respectfully submitted,

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[16] Dodd-Frank Act § 209 ("To the extent possible, the Corporation shall seek to harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company.")