

## Obama Proposal Would Create Office of National Insurance But is Unclear on Federal Chartering

June 17, 2009

The Obama Administration's proposal for financial regulatory reform, released June 17 and available at [www.financialstability.gov/docs/regs/FinalReport\\_web.pdf](http://www.financialstability.gov/docs/regs/FinalReport_web.pdf), includes a brief insurance component that may have a broad impact upon the insurance industry if enacted. The proposal, however, is short on several key details and it will fall to Congress to make some of the more difficult decisions in the weeks and months ahead. This report focuses specifically upon the insurance aspects of the Obama proposal – please see our separate report for a discussion of the Obama proposal as a whole.

### Office of National Insurance

The Obama proposal, entitled "A New Foundation: Rebuilding Financial Supervision and Regulation," would create an Office of National Insurance ("ONI") within the Treasury Department. Although the proposal at this point more closely resembles the Office of Insurance Information ("OII") legislation considered in the House last year, the choice of ONI as its name is interesting, as the ONI term has been used in prior optional federal chartering legislation. Its usage here may be a signal that the Administration is supportive conceptually of federal chartering, at least on some level.

Semantics aside, however, the proposal takes no firm position on the notion of federal insurance chartering, instead creating an office that appears to be a more robust version of the OII proposal. Under the Obama plan, the ONI would be responsible for "monitoring all aspects of the insurance industry" and "for identifying the emergence of any problems or gaps in regulation that could contribute to a future crisis." The ONI would also be tasked with identifying insurers that may be systemically significant for supervision by the Federal Reserve, and with administering the federal Terrorism Risk Insurance Program.

Additionally, the proposal notes the difficulty for the United States to participate in discussions with other nations on international insurance issues with a single voice. Therefore, like the OII proposal, it would empower ONI to enter into international agreements, and to represent the US in the International Association of Insurance Supervisors. Here, the proposal notes in particular the EU's Solvency II requirement for "a foreign insurance company operating in [the EU's] member states to be subject to

supervision in the company's home country comparable to the supervision required in the EU." We believe the Administration's specific mention of Solvency II indicates a strong willingness to address the "equivalence" issue on a national basis. With respect to international agreements generally, the proposal does not mention whether the ONI would have any preemption authority of inconsistent state laws – a critical issue in the ongoing OII debate – but the proposal does speak to the lack of uniformity in the state-based insurance regulatory system, so the Administration would presumably support a preemption authority. Nevertheless, Congress would need to address the details of state preemption.

As noted above, the extent of ONI's authority over insurers in the domestic arena is left to Congress. The proposal notes that the Administration supports "increased national uniformity" and would be open to supporting a federal charter or action by the states to achieve it. The proposal also calls for "strong capital standards" and "meaningful and consistent consumer protection for insurance products," but does not indicate the extent of any authority, if any, that the ONI would have in those areas.

Lastly, there is no mention of any specific lines of insurance. At a recent hearing before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, the panel's Chairman, Paul Kanjorski (D-PA), indicated his support for federal regulation of reinsurance, bond insurance and mortgage insurance, and it appears that this point of view is beginning to gain some traction on Capitol Hill. Nevertheless, the Obama Administration's proposal does not discuss the treatment of certain lines, leaving the question to Congress – which thus gives Rep. Kanjorski's views added importance.

### **Systemic Risk Oversight and Resolution Authority**

The proposal gives authority to the Federal Reserve to oversee the systemic risk of large financial holding companies ("Tier 1 FHCs"), and it makes clear that insurers will be included among those that could be found to be Tier 1 FHCs. In particular, the proposal gives the ONI the authority to "recommend to the Federal Reserve any insurance companies that the ONI believes should be supervised as Tier 1 FHCs."

Additionally, the Administration's proposal recommends the "creation of a resolution regime to avoid disorderly resolution" of failing bank holding companies, including Tier 1 FHCs, "in situations where the stability of the financial system is at risk." This creation of a resolution regime directly impacts the insurance industry in two ways. First, the resolution regime may reach an insurance company within the bank holding company

("BHC") structure if the BHC is failing. Specifically, the proposal states that "if the failing firm includes an insurance company, the ONI would be involved in consultations to the Federal Reserve and FDIC Boards on insurance specific matters." Second, as noted above the Administration's proposal allows the ONI to identify systemically significant insurers. Thus, a failing insurance company that poses a systemic risk (if identified as a Tier 1 FHC by the ONI) may also be resolved under the proposed resolution regime.

### **Consumer Financial Protection Agency**

The Administration's proposal calls for the establishment of the "Consumer Financial Protection Agency" and for that new agency "to have broad authority to protect consumers of credit, savings, payment and other consumer protection products and services and to regulate all providers of such products and services." It appears that the Administration does not intend that this new agency will have jurisdiction over the insurance industry or insurance marketplace practices, but there is no language in the proposal that expressly excludes insurance from the scope of the agency's authority.

For example, the proposal contains a number of specific references to the scope of the authority of this new agency, such as to enforce fair lending laws and the Community Reinvestment Act, and in none of these specific references are the insurance industry or insurance products mentioned as being within the scope of the new agency's jurisdiction. On the other hand, the Administration intends for this new agency to have broad power and a number of the "Principles For Action" that the Administration has used to characterize the scope of the agency's agenda, such as "transparency", "simplicity" and "access," are terms that clearly could apply to insurance regulation. In any case, given that the proposal is simply the starting point for a debate in the Congress regarding financial services reform, it seems likely that during the course of the debate at least some voices will call for the agency to have some oversight over the insurance market.

### **Ratings Agencies**

The proposal also contains a brief discussion concerning ratings agencies that should be of interest to insurers, in light of the direct repercussions that rating agency actions have on insurers' ratings, as well as the indirect impact of actions on matters such as insurers' RBC levels. Although no detail is provided, the proposal calls for adequate practices and procedures for managing conflicts of interest at ratings agencies and to maintain the transparency and quality of the ratings process.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

No part of this publication may be reproduced, in whole or in part, in any form, without our prior written consent.

© 2009 Dewey & LeBoeuf LLP  
All rights reserved.

For further information on Dewey & LeBoeuf, please visit [www.dl.com](http://www.dl.com)

## Outlook

As it relates to insurance, the Obama proposal is quite skeletal at this juncture, and it appears that some of the more controversial decisions – such as state law preemption for international agreements – will be left to Congress to decide. For this reason, we anticipate that the insurance aspects of the proposal will be received on Capitol Hill without much controversy. We also anticipate that, due to its skeletal nature, the ONI proposal will serve as the starting point for the Congressional reform efforts, and it may be that Congress will enact ONI but leave to the future whether to enact broader federal chartering or other reforms. We do believe, however, that Congress will at least consider federal regulation for certain lines, such as reinsurance, mortgage insurance and bond insurance, as indicated recently by Rep. Kanjorski. We also believe that Congress will be pressed to provide greater clarity as to the potential application of the Consumer Financial Protection Agency to insurance products.

Treasury Secretary Timothy Geithner will be testifying before both the House and the Senate in the coming days to discuss the Administration proposal in further detail. As always, we continue to follow these matters closely and will update you as developments warrant.

*For further information, please contact L. Charles Landgraf at +1 202 346-8067 or [landgraf@dl.com](mailto:landgraf@dl.com); Peter S. Rice at +1 617 748-6849 or [price@dl.com](mailto:price@dl.com); Carla Small at +1 212 259-8559 or [csmall@dl.com](mailto:csmall@dl.com); Paul A. Howard at +1 202 346-7749 or [phoward@dl.com](mailto:phoward@dl.com); or your Dewey & LeBoeuf relationship partner.*