

October 18, 2016

The Honorable Thomas J. Curry  
Comptroller of the Currency  
400 7<sup>th</sup> Street SW  
Suite 3E-218, Mail Stop 9W-11  
Washington, DC 20219

**Re: Docket ID OCC-2016-0009 – Mandatory Contractual Stay Requirements for Qualified Financial Contracts**

Dear Comptroller Curry,

On behalf of the National Association of Insurance Commissioners (NAIC)<sup>1</sup>, we write today regarding the Office of Comptroller of the Currency (OCC) proposed rule on qualified financial contract (QFC) restrictions and the definition of qualifying master netting agreements. The NAIC respectfully submits the following comments to the Notice of Proposed Rulemaking and Request for Comment published in the August 19, 2016 issue of the Federal Register.

The proposed rule would amend several definitions in the OCC’s capital and liquidity rules to ensure the proposal would not have unintended effects for the treatment of covered entities’ netting sets under those rules, including “qualifying master netting agreement,” “collateral agreement,” “eligible margin loan,” and “repo-style transaction.” The NAIC believes that the proposed definitions should include references to state insurance resolution regimes, and encourages the OCC to do so.

**Background and Related NAIC Activity**

As the primary regulators of insurance companies in the United States, state regulators are charged with protecting insurance company policyholders. In October, 2013, state regulators, through the NAIC, adopted a *Guideline for Stay on Termination of Netting Agreements and Qualified Financial Contracts* (#1556) (Attached). This guideline encourages states to amend insurance receivership law to adopt a 24-hour stay provision, similar to those found in the federal bankruptcy code and the Federal Deposit Insurance Act (FDIA)<sup>2</sup>, which would prohibit the exercise of early termination rights under a QFC during the stay. As the immediate exercise of termination rights can cause a rapid dissipation of an

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<sup>1</sup> Founded in 1871, the NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and the five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

<sup>2</sup> 12 U.S.C. § 1821(e)(9)-(12).

insurer's assets, a stay can help to preserve the insurer's funds, and mitigate the impact of an insolvency on policyholders and other claimants.

### **Subsequent Federal Rules' Failure to Include State-Based Stays Raises Problems**

Subsequent to the NAIC's adoption of *Guideline #1556*, proposed and interim final rules from the OCC and other federal financial regulators in 2014 and 2015 failed to include state-based stays in their definitions of "eligible master netting agreement."<sup>3</sup> These rules recognize stays from (i) the FDIA, (ii) Title II of the Dodd-Frank Act, (iii) similar laws applicable to government sponsored enterprises, and (iv) similar laws of foreign jurisdictions. However, the rules did not recognize stays found in state law. This non-recognition of state-based stays renders netting agreements entered into by insurance companies and counterparties in states with stay provisions ineligible for consideration under the final definition of "eligible master netting agreement."<sup>4</sup> This in turn has negative consequences for insurers subject to state-based stay provisions including higher collateral requirements and credit charges from counterparties.

At least one state that had enacted a 24-hour stay provision pursuant to the NAIC guideline has been forced to repeal or remove these provisions in order to avoid harm to its domestic insurance companies. Continued non-recognition of state-based stays in federal rules related to netting will also discourage additional states from enacting them. The absence of such stays also subjects the U.S. regulatory system to international criticism. The Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes) envisions all jurisdictions having a temporary stay on termination of netting agreements and QFCs. (See Key Attribute 4.3 and Appendix I - Annex 5.) In its 2015 review of the Key Attributes for the U.S. banking and insurance sectors, the International Monetary Fund noted that *NAIC Guideline #1556* had been enacted "to a very limited extent" by the states.

### **Conclusion**

We encourage you to incorporate state insurance resolution regimes into all applicable federal rules related to QFC's, qualifying master netting agreements, and all related definitions. The objectives of the proposed rules support the inclusion of stays under state insurance insolvency laws. There is no rational basis for disregarding stays in U.S. insurance receivership proceedings, while recognizing stays in similar foreign proceedings. Further, insurance companies should not be penalized for states putting into place the same limited stay provisions that federal and international regulators acknowledge to be prudent for resolution. We believe updating the definitions in question to incorporate state law resolution regimes would encourage states to resume efforts to put the stays laid out in *NAIC Guideline #1566* into place, put the insurance receivership regime on parity with other financial sector resolution regimes, and ensure U.S. insurers are on a level playing field with other financial market participants.

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<sup>3</sup> See CFTC Proposed Rule at 79 FR 59898 (October 3, 2014); OCC and Board Interim Final Rule at 79 FR 78287 (December 30, 2014); FDIC Proposed Rule at 80 FR 5063 (January 30, 2015).

<sup>4</sup> Board, OCC, FDIC, FHFA, Farm Credit Administration Joint Final Rule at 80 FR 74840 (November 30, 2015).

Sincerely,



John M. Huff  
NAIC President  
Director  
Missouri Department of Insurance



Theodore K. Nickel  
NAIC President-Elect  
Commissioner  
Wisconsin Department of Insurance



Julie Mix McPeak  
NAIC Vice President  
Commissioner  
Tennessee Department of Commerce and Insurance



Eric A. Cioppa  
NAIC Secretary-Treasurer  
Superintendent of Insurance  
Maine Bureau of Insurance

Enclosure:

NAIC Guideline for Stay on Termination of Netting Agreements and Qualified Financial Contracts  
(#1556)

## GUIDELINE FOR STAY ON TERMINATION OF NETTING AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS

**Drafting Note:** State receivership and insolvency laws may permit a contractual right to cause the termination, liquidation, acceleration or close-out obligations with respect to any netting agreement or qualified financial contract (QFC) with an insurer because of the insolvency, financial condition or default of the insurer, or the commencement of a formal delinquency proceeding. These laws are based upon similar provisions contained in the federal bankruptcy code and the Federal Deposit Insurance Act (FDIA). The FDIA also provides for a twenty-four-hour stay to allow for the transfer of QFCs by the receiver to another entity rather than permitting the immediate termination and netting of the QFC. 12 U.S.C. § 1821(e)(9)-(12). States that permit the termination and netting of QFCs may want to consider adopting a similar stay provision following the appointment of a receiver. The following statutory language is not an amendment to the NAIC receivership models, but is intended as a Guideline for use by those states seeking to require a stay with respect to the termination of a netting agreement or QFC of an insurer in insolvency:

### **Stay on Termination of Netting Agreements and Qualified Financial Contracts**

A person who is a party to a netting agreement or qualified financial contract under [cite to applicable state law addressing qualified financial agreements] with an insurer that is the subject of an insolvency proceeding may not exercise any right that the person has to terminate, liquidate, accelerate or close-out the obligations with respect to the contract by reason of the insolvency, financial condition or default of the insurer, or by the commencement of a formal delinquency proceeding,

- (1) until 5:00 p.m. (eastern time) on the business day following the date of appointment of a receiver; or
- (2) after the person has received notice that the contract has been transferred pursuant to [cite applicable state law addressing transfer of qualified financial contracts].

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*Chronological Summary of Action (all references are to the Proceedings of the NAIC)*

*2013 Summer National Meeting – adopted by Plenary*

Guideline for Stay on Termination of Netting Agreements  
and Qualified Financial Contracts

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