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Financial Stability Board
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Ladies and Gentlemen:

This letter is submitted by the American Council of Life Insurers (ACLI) in response to the request of the Financial Stability Board (FSB) for comments on its Consultative Document on Information Sharing for Resolution Purposes, dated 12 August 2013 (Consultative Document). The ACLI represents more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. ACLI member companies represent over 90% of the assets and premiums of the life insurance and annuity industry and are major participants in the long term care and disability income insurance markets in the United States. ACLI's membership also includes every professional life reinsurer doing business in North America.

ACLI acknowledges and appreciates the FSB's recognition of the importance of confidentiality protections for non-public company information shared for resolution purposes and of the difficulties inherent to developing a framework for information sharing to be effective across legal jurisdictions with differing confidentiality regimes. We appreciate and thank you for the opportunity to comment on the proposed draft guidance "Information Sharing for Resolution Purposes," set forth in the Consultative Document, and to be included as a new Annex in the "Key Attributes of Effective Resolution Regimes for Financial Institutions (Key Attributes).

We respectfully submit these comments on the draft guidance because ACLI member companies strongly believe that confidentiality and security protections are critically important and an essential precondition to effective cooperation and information exchange among supervisory or resolution authorities.

Our comments on the draft guidance, set forth below, are informed by our view that any framework for sharing non-public company information of insurers, among domestic or foreign supervisory or regulatory authorities, should include the following tenets.

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A framework for sharing non-public company information should:

- Provide legally enforceable confidentiality and security protections for non-public company information;
- Provide for home country confidentiality protections to be preserved when non-public company information is exchanged among supervisory or regulatory authorities; and
- Prohibit any disclosure of non-public company information to any recipient unless the proposed recipient agrees, and has the legal authority, to both keep the information confidential and protect it from disclosure except where required by a court of competent jurisdiction or by law, other than a freedom of information law.

Draft Implementation Guidance: Information Sharing for Resolution Purposes - Questions for Consultation

Below are responses to the questions for consultation that are relevant to ACLI member companies. Our views on particular paragraphs of the two sections of the draft guidance, the "Principles on information sharing for resolution purposes" and the "Information sharing provisions for COAGs," referenced in the questions, are incorporated into our responses.

Question #1

Question #1 inquires whether any considerations arise in relation to exchange of information on particular kinds of financial institutions that require sector-specific provisions.

ACLI believes that the answer to this question is yes. Both sections of the new Annex should include provisions specific to the insurance industry. ACLI believes that these provisions should take into account and preserve the significant confidentiality protections for insurers' non-public company information, that laws enacted in the United States require regulators to provide. Generally these laws track various model laws of the National Association of Insurance Commissioners (NAIC).[1] Both sections of the new Annex should provide for the preservation and continued application of these protections when insurers' non-public company information is shared among resolution or supervisory authorities.

Question #2

Question #2 inquires whether the provisions on legal gateways for disclosure of non-public information, proposed in paragraphs 1.1 to 1.8, outline the key elements that should be included in a jurisdiction's legal framework to allow sharing of information for resolution purposes.

ACLI notes the following with respect to the key elements of the legal gateways as proposed:

Paragraph 1.4

[1] The NAIC Risk Management and Own Risk and Solvency Assessment Model Act; the Insurance Holding Company System Regulatory Act, the Standard Valuation Law, the Model Law on Examinations, and the Risk Based Capital (RBC) Model Act

ACLI appreciates that paragraph 1.4 would require disclosure to "… always be conditional on the recipient authority being subject to adequate confidentiality requirements and safeguards…" However, as explained more fully below, we urge that disclosure of non-public company information also should be conditioned on a requirement for the recipient to be subject to adequate requirements to protect the physical security of the information, including requirements for administrative, technical and physical safeguards.

Paragraph 1.5

ACLI submits that paragraph 1.5 should not only provide for the legal framework to be clear about the conditions under which information received from a foreign authority may be disclosed, but should also specify, and circumscribe, the conditions or circumstances under which the information may be disclosed. The legal framework should prohibit any disclosure of non-public company information to any recipient unless the proposed recipient agrees, and has the legal authority, to both keep the information confidential and protect it from disclosure except where required by a court of competent jurisdiction or by law, other than a freedom of information law. The legal framework also should require any recipient to provide notice to the company prior to any legally compelled disclosure of non-public company information.

Paragraph 1.6

ACLI urges that, in addition to protecting authorities' employees from liability for certain breaches in the confidentiality of non-public company information, paragraph 1.6 also should provide for a legal framework to require prompt notice to the company when there is a breach in the confidentiality or the security of non-public company information.

Question #3

Question #3 inquires whether the draft guidance, in particular paragraph 1.4, provides an adequate standard of protection for all types of information, including supervisory information, that authorities may need to share for resolution purposes.

Paragraph 1.4

Again, ACLI appreciates that paragraph 1.4 would require disclosure to "… *always be conditional* on the recipient authority being subject to adequate confidentiality requirements and safeguards that are appropriate to the nature of the information and level of sensitivity." (*Italics added.)*

However, as indicated above, ACLI believes all types of non-public company information must be adequately protected, both as to security and confidentiality, whenever the information is maintained or being exchanged. Accordingly, we urge that the exchange of non-public company information should always be conditioned on the recipient authority being subject to adequate security as well as confidentiality requirements, including requirements for administrative, technical, and physical safeguards.

Paragraph 1.4, Paragraph 1.5, and Paragraphs 1.10 to 1.15

ACLI also is concerned that paragraphs 1.4, 1.5, and 1.10 to 1.15 do not provide adequate specificity as to what confidentiality requirements and safeguards a framework must provide to have "adequate" requirements and safeguards.

In particular, paragraph 1.5 and paragraphs 1.10 to 1.15 do not detail with sufficient specificity the circumstances under which non-public company information may or may not be disclosed. Consequently, we are concerned that different authorities may have differing views as to what constitute "adequate" protections, and as a result, that the disclosure of non-public company information will not always be subject to the requirements provided in paragraph 1.5, modified as proposed above.

Question #5

Question # 5 inquires whether the standards of "adequate confidentiality requirements," set out in the draft principles, in paragraphs 1.10 to 1.15, 2.4, and 2.5, are sufficient to protect the confidentiality of sensitive information, without being excessively restrictive so as to impede necessary exchange.

ACLI notes the following with respect to the sufficiency of the proposed standards:

Paragraph 1.10

ACLI appreciates that paragraph 1.10 provides that jurisdictions "…should *ensure* that their legal framework establishes a regime for the protection of confidential information that imposes adequate confidentiality requirements … and provides for effective sanctions and penalties for breach of confidentiality requirements." *(Italics added.)*

ACLI appreciates that jurisdictions are directed to "ensure" that their legal framework provides adequate confidentiality protections, and to provide for confidentiality protections to be legally enforceable, by directing jurisdictions to have effective sanctions and penalties for breach of confidentiality requirements.

Again, however, as indicated above, the level of confidentiality requirements and safeguards each jurisdiction should provide under its legal framework is unclear, particularly as to the conditions or circumstances under which non-public company information may or may not be disclosed. Without greater specificity, it is possible that different authorities will come to differing conclusions as to what constitutes adequate requirements and safeguards and permissible disclosures of non-public company information. Consequently, there is concern that non-public company information may not always be protected from inappropriate disclosure, as provided in paragraph 1.5.

Also, paragraph 1.10 does not direct jurisdictions to ensure that their legal frameworks require authorities to provide notice to the company prior to a disclosure of non-public company information, required by a court of competent jurisdiction or by law, other than a freedom of information law.

Accordingly, ACLI urges clarification to paragraph 1.10 by cross referencing paragraph 1.5, as proposed to be modified above.

ACLI notes further that paragraph 1.10 does not direct jurisdictions to ensure that their legal frameworks establish a regime for protection of the physical security of non-public company information received from foreign authorities, including requirements for administrative, technical and physical safeguards. ACLI urges that paragraph 1.10 be modified accordingly.

Lastly, while ACLI appreciates the direction to jurisdictions to ensure that their legal frameworks include effective sanctions and penalties for breach of confidentiality requirements, we believe that jurisdictions also should be directed to provide prompt notification to the company when there is a breach in the confidentiality or security of non-public company information.

Paragraph 1.11

Paragraph 1.11 provides criteria that authorities, that seek to disclose non-public company information, should take into account in considering whether a recipient authority is subject to adequate confidentiality requirements.

ACLI submits the following with respect to this paragraph:

Subparagraph (i)

We appreciate that subparagraph (i) directs disclosing authorities to consider whether the recipient authority and its employees are required to maintain the confidentiality of information received from another authority. However, again, it is not clear what is meant, from both a legal and practical standpoint, by a requirement to "maintain confidentiality of information," largely because the circumstances under which non-public company information may or may not be disclosed are not clear. Also there is no direction to consider whether the recipient authority is required to protect the security as well as the confidentiality of information it receives.

Subparagraph (iii)

Subparagraph (iii) provides for consideration of whether the recipient authority can refuse to disclose information without notification to and the express consent of the originating party. However, we submit that the disclosing authority also should be directed to account for the general conditions under which the recipient authority is permitted to disclose information it receives.

The disclosing party should be directed to consider: (i) whether the recipient authority agrees, and has the legal authority, to both keep the information confidential and protect it from further disclosure except where required by a court of competent jurisdiction or law, other than a freedom of information law; and (ii) whether the recipient authority is required to provide notice to the company prior to any legally compelled disclosure of non-public company information.

Paragraph 1.15

As explained more fully below in response to Question #6, ACLI appreciates and strongly believes that paragraph 1.15 appropriately excludes the application of freedom of information laws to information received from foreign authorities.

Paragraph 2.4

Paragraph 2.4 provides a list of topics, relating to the confidentiality of information provided under an institution-specific cross-border cooperation agreement (COAG), in connection with which there should be agreement by the Parties, set out in the COAG.

ACLI appreciates that paragraphs 3.10 and 6.6 of Annex 1 of the Key Attributes require commitments to share information "... as appropriate subject to appropriate confidentiality requirements ..." and "... to maintain confidentiality of shared information and measures to ensure confidentiality (for example ... procedure and responsibility if confidentiality is breached) ..."

We note that subparagraph (ii) of paragraph 2.4 provides that COAGs should set out the Parties' agreement that "... the protection of confidentiality should extend to analysis, evaluations or work products derived from the information shared under the COAG."

However, paragraph 2.4 includes no express requirement that COAGs include a general commitment to provide appropriate or adequate confidentiality protections or to maintain confidentiality, and no clear cross reference to the requirements of paragraphs 3.10 and 6.6 of Annex 1 of the Key Attributes.

Similarly, paragraph 2.4 does not make it clear that the precepts of the legal gateways for disclosure of non-public company information, set forth in the "Principles on information sharing for resolution purposes," that relate to confidentiality, are required to be incorporated or reflected in COAGs.

We note that paragraph 2.8 provides, as a general principle, information should be disclosed through secure communications channels, and similarly that paragraph 6.4 of Annex 1 of the Key Attributes provides for cooperation mechanisms and information sharing frameworks to include "[p]rocedures for information sharing ... (for example, use of secured website)."

However, paragraph 2.4 does not include any provision to require COAGs to provide for on-going protection of the security of non-public company information, including requirements for administrative,

physical, and technical safeguards. ACLI believes that further specificity as to security requirements should be required to be set out in COAGs.

ACLI notes that subparagraph (iv) of paragraph 2.4 provides that COAGs should set out the Parties' agreement that information received from another party will not be further disclosed without prior notification to and the express consent of the originating Party. We are concerned that there is no requirement for COAGs to include a provision reflecting agreement to prohibit further disclosure of non-public company information unless the proposed recipient of the information agrees, and has the legal authority, to both keep the information confidential and protect it from disclosure, except where required by a court of competent jurisdiction or by law, other than a freedom of information law.

Lastly, we note that paragraph 2.4 includes no provision requiring COAGs to provide for notification to the company prior to legally compelled disclosure of non-public company information or when there has been a breach in the confidentiality or security of non-public company information.

ACLI urges that paragraph 2.4 be modified as necessary to address the concerns noted above.

Question # 6

Question #6 inquires whether it is appropriate for information received from foreign authorities to be excluded from freedom of information regimes and if there are circumstances when such information should be subject to disclosure requests under such regimes.

As indicated above, ACLI appreciates and strongly believes that paragraph 1.15 appropriately excludes the application of freedom of information laws to information received from foreign authorities. ACLI acknowledges that generally it is appropriate for authorities, engaged in supervisory or resolution related activities, to have access to what may be extremely sensitive non-public company information. By contrast, public access to such information, particularly public access to material non-public inside information, could render insurers vulnerable to criminal, as well as civil, penalties and adverse effects within the marketplace.

Conclusion

Again, ACLI appreciates and thanks the FSB for the opportunity to submit and for its consideration of these comments.

We would be glad to answer questions regarding any of the above.

Respectfully,

Roberta Meyer