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New York Insurance Department Orders FGIC to Stop Writing Policies and to Cease Paying Claims Until its Minimum Surplus Is Brought Into Compliance

Financial Guaranty Insurance Company (“FGIC”), a New York domiciled monoline financial guaranty insurer, has been ordered by James J. Wrynn, New York Superintendent of Insurance, to cease writing any new policies and to suspend payment of all claims effective November 24, 2009. The Superintendent’s order follows upon the issuance of FGIC’s Quarterly Statement for the third quarter of 2009, in which FGIC reported that as of September 30, 2009, it suffered a surplus to policyholders deficit of \$865,834,577 and an impairment of its required minimum surplus to policyholders of \$932,234,577.

The day before the order was issued, FGIC presented the Insurance Department with a proposed comprehensive “Surplus Restoration Plan” intended to remediate its exposure to certain residential mortgage-backed securities (“RMBS”) and collateralized debt obligations of asset-backed securities (“ABS CDOs”). Under the plan, FGIC proposes to do the following:

1. commence a tender offer for the acquisition or exchange of certain RMBS;
2. continue to pursue commutations with the holders of certain ABS CDOs; and
3. commute, terminate or restructure FGIC’s exposure with respect to other obligations for which it had established statutory loss reserves.

Under the Superintendent’s order, FGIC has been given until January 5, 2010 to submit a detailed and final proposed Surplus Restoration Plan to the Insurance Department. If the plan is not submitted by that date, the Superintendent will seek an order of rehabilitation or liquidation. Any liquidation or rehabilitation would be conducted pursuant to Article 74 of the New York Insurance Law as insurance companies are not eligible to be debtors under the United States bankruptcy laws. The Superintendent would serve as a rehabilitator or liquidator in any such proceeding.

FGIC has also been ordered to remedy its capital impairment and to bring its minimum surplus to policyholders into compliance with New York’s surplus and capital requirements by March 25, 2010, unless the Superintendent gives it additional time. The Superintendent retains the right to seek an order of liquidation or rehabilitation at any time. Until such time as FGIC is in compliance with the New York surplus and capital requirements, it is limited to operating only in the ordinary course of business and to effectuating the Surplus Restoration Plan.

In a November 24 press release, FGIC stated that its board of directors, in the exercise of its fiduciary duties, may ask the Insurance Department to seek a rehabilitation or liquidation order if a successful restructuring cannot be achieved.

The Department's order forbidding the writing of new business or paying claims states that it is based upon Section 1310 of the Insurance Law which addresses the impairment of a domestic stock insurer which lacks sufficient surplus of assets in excess of its liabilities. Significantly, that statute only allows the Superintendent to order the impaired insurer to cease writing new policies pending the Superintendent's acceptance of a plan to eliminate the impairment and allows the Superintendent to initiate rehabilitation or liquidation proceedings. However, Section 1310 says nothing about suspending the insurer's claims payments.

The Superintendent may argue that his authority to do so derives from Section 1104, which authorizes the Superintendent to order the restriction, suspension or revocation of an insurer's license. Alternatively, or in addition thereto, he may cite the Insurance Department's plenary authority over a domestic insurer's operations and its power to place an impaired insurer in rehabilitation or liquidation proceedings under Article 74 of the Insurance Law. In a liquidation or rehabilitation proceeding, claims payments could be suspended. The Department's order suspending claims payments could be challenged by policyholders although the filing of such a challenge could result in the Insurance Department placing FGIC into rehabilitation or liquidation, thereby mooting the challenge.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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