TITLE V – INSURANCE

A. Summary

Historically, the regulation of the insurance industry in the United States has been the province of the states. With the exception of the Liability Risk Retention Act of the 1980s and the post 9/11 backstop that the US government provided to property and casualty insurers under the TRIA, the federal government has played no direct role in the regulation of insurance companies. Other than large insurance firms that could be designated as systemically significant and thus subject to regulation by the FRB, the Dodd-Frank Act does not give the federal government a role in licensing or regulating the insurance industry in the United States, but it does represent an initial step in that direction.

The Dodd-Frank Act establishes the FIO within the Treasury. The scope of the authority of the FIO extends to all lines of insurance except health insurance, most long-term care insurance, and crop insurance. The FIO will be responsible for collecting information, monitoring the insurance industry and making recommendations on modernizing and improving insurance regulation in the United States. Additionally, the Dodd-Frank Act authorizes the FIO to preempt state laws if such laws conflict with the objectives of certain international insurance agreements. The Dodd-Frank Act attempts to create national uniformity in two areas of insurance regulation, the non-admitted insurance market and reinsurance. The Dodd-Frank Act gives large commercial purchasers of insurance a more streamlined route to obtain coverage from non-admitted companies, including companies outside the United States. The Dodd-Frank Act requires credit for reinsurance to be recognized for a ceding company if it is allowed by the ceding company's domiciliary state, preempts the extraterritorial application of most laws regarding reinsurance from states that are not the ceding company's domicile, and places the power to regulate reinsurer financial solvency primarily with the reinsurer's domiciliary state.

The insurance industry should also be aware of the impact of derivatives reform under Title VII of the Dodd-Frank Act. Insurers and reinsurers that use derivatives could be subjected to the requirements of central clearing and exchange trading. The language of Title VII is not definitive as to exactly what derivative products and which users of them will be subject to the enhanced regulation of the Dodd-Frank Act and is still subject to post-passage rulemaking. Notably, Title VII also adds a provision to Section 12 of the CEA stating that a swap shall not be considered to be insurance and may not be regulated as such under state law.

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B. Creation of the Federal Insurance Office

The FIO will be headed by a Director, a career civil service position, appointed by the Secretary. The Director is to serve in an advisory capacity on the FSOC. The FIO's primary functions include the following:

1. Monitoring

- Identify issues or gaps in the regulation of insurers that could contribute to a systemic crisis in the insurance industry or the United States financial system.
- Monitor the extent to which traditionally underserved communities and consumers, minorities, and low- and moderate-income persons, have access to affordable insurance products.

2. Advisory

- Recommend that the FSOC designate an insurer, including the affiliates of such insurer, as an entity that should be subject to regulation by the FRB on the basis that such insurer or affiliate presents a potential risk to the financial system.

  - Such regulation could result in, among other things, further federally imposed requirements with respect to enhanced risk-based capital levels, leverage limits, liquidity requirements, credit exposure requirements, concentration limits, enhanced public disclosures, short-term debt limits, overall risk management requirements, and a resolution plan.

- Advise the Secretary on major domestic and prudential international insurance policy issues.

3. Administrative

- Assist in the administration of the terrorism insurance program established pursuant to TRIA.
- Coordinate federal efforts and develop federal policy on prudential aspects of international insurance matters, including representing the United States, as appropriate, before the International Association of Insurance Supervisors (or a successor entity).
- Assist the Secretary in negotiating international agreements.
- Determine whether state insurance measures are preempted by certain types of international insurance agreements, defined as "covered" agreements (see below) entered into between the United States and foreign nations.

- Consult with the states (including state insurance regulators) regarding insurance matters of national importance and prudential insurance matters of international importance.

4. Reports

- Annually, beginning on September 30, 2011, the Director is to make a report to the HFSC and SBC on the insurance industry.
- On September 30, 2012, the Director is required to report to the HFSC and SBC on the breadth and scope of the global reinsurance market and to update that report on January 1, 2013.
- On January 1, 2015, the Director is required to report to both the HFSC and SBC on the impact of the reinsurance provisions of NARRA (discussed below) and on the ability of state regulators to assess reinsurance information for regulated companies in their jurisdiction.
- Not later than 18 months following enactment, the Director is required to submit a report to Congress on how to modernize and improve the system of insurance regulation in the United States. That report is to cover:
    - systemic risk regulation as it pertains to insurance;
    - capital standards and the relationship between capital allocation and liabilities, including standards relating to liquidity and duration risk;
    - consumer protection for insurance products and practices, including gaps in state regulation;
    - the regulation of insurance companies and affiliates on a consolidated basis;
    - international coordination of insurance regulation;
    - the costs and benefits of potential federal regulation of insurance across various lines of insurance (except health);
    - the feasibility of only regulating certain lines of insurance at the federal level while leaving other lines of insurance to be regulated at the state level;
    - the ability of any federal regulation or federal regulators to minimize regulatory arbitrage;
    - the impact that developments in the regulation of insurance in foreign jurisdictions might have on potential federal regulation of insurance;
    - the ability of any potential federal regulation or federal regulator to provide robust consumer protection for policyholders;
    - the potential consequences of subjecting insurance companies to a federal resolution authority, including the impact such authority would have on the operation of state insurance guaranty systems (including the loss of guaranty fund coverage), on policy-holder protection (including the loss of priority status of policy-holder claims), and, in the case of life insurance companies, on the loss of the special account status of

separate account assets and separate account liabilities, and on the international competitiveness of insurance companies; and

- legislative, administrative, or regulatory recommendations the Director considers to be appropriate to carry out findings contained in the report.

C. Information Collection

In performing its monitoring function, the FIO is authorized to require any insurer (defined as "any entity that writes insurance or reinsures risks and issues contracts or policies in one or more States") or any "affiliate" of an insurer (defined as "any person who controls, is controlled by, or is under common control with the insurer") to submit data or information specified by the FIO. "Small" insurers, the definition of which is left to the discretion of the FIO, can be exempted from information reporting obligations; however, it is not clear whether it is intended that the FIO is to exempt small insurers from all information reporting or only from having to respond to certain types of information requests. Before imposing an information reporting obligation on insurers, the FIO is to coordinate with federal and state regulators to determine whether such information may be obtained from such agencies or other public sources. Where possible, the FIO is to obtain information from existing sources rather than impose new reporting obligations on the industry.

1. No Waiver of Privilege

The submission of non-public information to the FIO will not constitute a waiver of any privilege that might otherwise apply to such information. In addition, any preexisting confidentiality agreement that may have applied to information provided to another agency, such as a state regulatory agency, would apply to the FIO as well. The FIO is authorized to share information it obtains with other agencies as long as such agencies enter into an information-sharing agreement that complies with federal law. The sharing of information with another agency under the terms of an information-sharing agreement would not constitute a waiver of any privilege that might otherwise apply to such information.

2. Subpoena Power

The FIO is authorized to issue subpoenas, an unusual authority to be granted to an agency, such as the FIO, that lacks the ability to take enforcement actions. Prior to issuing a subpoena, the Director must make a written finding that the information is required and that the FIO has coordinated with the relevant agencies (presumably to demonstrate that the subpoenaed information cannot be obtained any other way). FIO subpoenas can be enforced by federal district courts.

D. Preservation of States' Authority to Regulate Insurance

The Dodd-Frank Act generally preserves the ability of state insurance regulators to supervise the business of insurance but authorizes the FIO to preempt state measures that, in the FIO's judgment, are inconsistent with covered agreements or otherwise result in less favorable treatment of insurers domiciled in foreign jurisdictions that are subject to covered agreements than the treatment accorded to United States insurers that are admitted in the state. Covered agreements are defined in the Dodd-Frank Act as bilateral or multi-lateral agreements entered into between the United States and foreign nations that enable non-US insurance companies to operate in the US insurance market, subject to prudential measures that achieve a level of protection for insurance or reinsurance consumers that is substantially equivalent to the level of protection achieved under state regulation.

1. Preconditions for Implementing Preemption Authority

Prior to preempting a state law, the FIO must:

- issue a notice of potential inconsistency to the appropriate state regulator;
- notify and consult with the USTR;
- advise the HFSC and SBC;
- issue a notice in the *Federal Register;*
- give interested parties an opportunity to comment; and
- establish a reasonable time for the notice to become effective.

State law can only be preempted to the extent that the law conflicts with the subject matter of the relevant international agreement. FIO preemption cannot extend to any state insurance measure that governs:

- rates
- premiums
- underwriting
- sales practices
- coverage requirements
- the application of state antitrust laws or state capital or insolvency requirements (unless such requirements result in less favorable treatment of a non-US insurer versus a US insurer)

A notice regarding the decision to preempt state law must be published in the *Federal Register*. The FIO's decision to preempt a state law can be appealed to a federal court.

E. Authority of the FIO to Negotiate International Insurance Agreements

The Dodd-Frank Act establishes authority at the federal level for the USTR and the Secretary to negotiate covered agreements.

1. Authority of the Secretary and USTR

Prior to negotiating an international insurance agreement, the Secretary and the USTR must consult with the HFSC and SBC and brief them on the nature of the agreement, the purposes it will advance, and its impact on state law. Agreements cannot go into effect for 90 days following their submission to the HFSC and SBC, and that time limit can only be triggered during a period when Congress is in session.

F. Regulatory Reform Governing Non-Admitted Insurance Coverage

The Dodd-Frank Act incorporates, as Subtitle B of Title V, NARRA, a bill that was passed by the House of Representatives in 2009 and had been pending in the Senate. NARRA is intended to streamline the patchwork scheme of existing regulation in a manner that is designed to increase market choice by making it easier for large commercial purchasers to obtain insurance from companies not admitted to write insurance in their state. Subtitle B of Title V takes effect 12 months after the date of enactment of the Dodd-Frank Act.

1. Treatment of Premium Tax Payments

Under the Dodd-Frank Act, only the home state of an insured party may impose a premium tax on insurance obtained from a non-admitted insurer. States may enter into compacts to allocate among them the premium taxes paid to a home state. Congress expresses the clear intent in the Dodd-Frank Act that states are to adopt, on a nationwide basis, uniform requirements, forms, and procedures that provide for the reporting, payment, collection, and allocation of premium taxes for non-admitted insurance.

2. Regulation of Non-Admitted Insurance by Home State of Insured Party

The Dodd-Frank Act further provides that the placement of non-admitted insurance is only to be subject to regulation by the home state of the insured party, and no state other than the insured's home state may require a surplus lines broker to be licensed in that state in order to sell, negotiate or solicit non-admitted insurance. With the exception of workers' compensation insurance, any attempts by other states to regulate non-admitted insurance activities are preempted. In addition, two years following enactment, no state can collect fees relating to the licensing of surplus lines brokers, unless that state is participating in the national insurance producer database of the NAIC or an equivalent uniform database.

States additionally are prohibited from imposing eligibility requirements or criteria on US domiciled non-admitted insurers, unless the state has adopted uniform requirements, forms and procedures in accordance with a nationwide system described above. States also are barred from prohibiting a surplus lines broker from placing non-admitted insurance with, or procuring non-admitted insurance from, a non-admitted insurer domiciled outside the United States if the non-admitted insurer is listed on the Quarterly Listing of Alien Insurers maintained by the NAIC.

3. Streamlined Application for Commercial Purchasers

Surplus lines brokers that place coverage with a non-admitted insurer on behalf of purchasers that meet the statute's definition of "exempt commercial purchaser" are not required to satisfy any state requirement to conduct a due diligence search to determine if the insurance can be obtained from an admitted insurer if:

- the broker placing the insurance has informed the commercial purchaser that such insurance may or may not be available from the admitted market that may provide greater protection with more regulatory oversight
- the commercial purchaser has subsequently requested the non-admitted coverage from the broker in writing

For these purposes, an exempt commercial purchaser is defined as:

- a purchaser of insurance who employs or retains a qualified risk manager to negotiate insurance coverage;
- has paid over $100,000 in property and casualty insurance premiums in the past 12 months; and
- meets at least one of the following criteria:
    - possesses a net worth of $20 million;
    - generates $50 million in annual revenue;
    - employs more than 500 full-time employees or is a member of an affiliated group that employs more than 1,000 full-time employees;

- is a not-for-profit organization or public entity that generates annual budgeted expenditures of $30 million; or
- is a municipality with a population in excess of 50,000.

4. GAO Study of Non-Admitted Market

Within 30 months following enactment of the Dodd-Frank Act, the Comptroller General is directed to study, in consultation with the NAIC, the impact that the changes mandated by Title V of the Dodd-Frank Act have on the size and market share of the non-admitted market. Specifically, the study is to address:

- the change in the size and market share of the non-admitted insurance market and in the number of insurance companies and insurance holding companies providing such business in the 18-month period that begins upon enactment;
- the extent to which insurance coverage typically provided by the admitted insurance market has shifted to the non-admitted insurance market;
- the consequences of any change in the size and market share of the non-admitted insurance market, including differences in the price and availability of coverage available in both the admitted and non-admitted insurance markets;
- the extent to which insurance companies and insurance holding companies that provide both admitted and non-admitted insurance have experienced shifts in the volume of business between admitted and non-admitted insurance; and
- the extent to which there has been a change in the number of individuals who have non-admitted insurance policies, the type of coverage provided under such policies, and whether such coverage is available in the admitted insurance market.

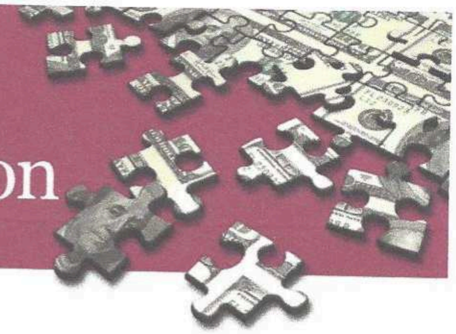
G. Regulatory Reform Governing Reinsurance and Reinsurance Agreements

The Dodd-Frank Act contains several provisions that preempt state law governing reinsurance arrangements. In this regard, the Dodd-Frank Act provides that if the state of domicile of a ceding insurer (the insurer purchasing the reinsurance) is NAIC-accredited or has financial solvency standards substantially similar to those mandated by the NAIC, and recognizes credit for reinsurance for the insurer's ceded risk, then no other state may deny such credit for reinsurance. In addition, all laws, regulations or actions on the part of a state that is not the domiciliary state of a ceding insurer, except those having to do with taxes, are preempted under Title V of the Dodd-Frank Act, if they:

- restrict or eliminate the rights of the ceding insurer or the assuming insurer to resolve disputes pursuant to contractual arbitration clauses to the extent such clauses are not inconsistent with the provisions of Title 9, United States Code;
- require that a certain state's law is to govern the reinsurance contract, disputes arising under the reinsurance contract, or requirements of the reinsurance contract;
- attempt to enforce a reinsurance contract on terms different than those set forth in the contract itself; or
- otherwise apply the laws of the state to reinsurance agreements of ceding insurers not domiciled in that state.

1. Regulation of Reinsurer Solvency

The Dodd-Frank Act provides that states that are NAIC accredited or have financial solvency requirements substantially similar to those imposed by the NAIC are solely responsible for regulating the financial solvency of reinsurers domiciled in their state. In addition, no state may require a reinsurer to file financial information beyond that which the reinsurer is required to file with its domiciliary state. Non-domiciliary regulators are permitted to receive copies of information filed with domiciliary state regulators.



Index of Acronyms / Abbreviations

ACRONYM	TITLE
Advisers Act	Investment Advisers Act of 1940
AG	Attorney General
BCFP	Bureau of Consumer Financial Protection
BHC	Bank Holding Company
BHCA	Bank Holding Company Act
CAB	Consumer Advisory Board
CDFI	Community Development Financial Institution
CDS	Credit Default Swaps
CEA	Commodity Exchange Act
CFP Act	Consumer Financial Protection Act
CFTC	Commodities Futures Trading Commission
Comptroller	Comptroller of the Currency
CRA	Community Reinvestment Act
CRAB	Credit Rating Agency Board
DIF	Deposit Insurance Fund
ECOA	Equal Credit Opportunity Act
EESA	Emergency Economic Stabilization Act
EFTA	Electronic Funds Transfer Act
Exchange Act	Securities Exchange Act of 1934

ACRONYM	TITLE
FCM	Futures Commission Merchants
FCRA	Fair Credit Reporting Act
FCUA	Federal Credit Union Act
FDIA	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FHC	Financial Holding Company
FHFA	Federal Housing Finance Agency
FHLB	Federal Home Loan Bank
FINRA	Financial Industry Regulatory Authority
FIO	Federal Insurance Office
FIRREA	Financial Institutions Reform Recovery and Enforcement Act of 1989
FMU	Financial Market Utility
FRA	Federal Reserve Act
FRB	Federal Reserve Board
FSOC	Financial Stability Oversight Council
FTC	Federal Trade Commission
GAO	Government Accountability Office
GDP	Gross Domestic Product
GLBA	Gramm-Leach-Bliley Act
GSE	Government Sponsored Enterprises
HAC	House Committee on Agriculture
HAMP	Home Affordable Modification Program
HERA	Housing and Economic Recovery Act of 2008

ACRONYM	TITLE
HFSC	House Financial Services Committee
HJC	House Committee on the Judiciary
HMDA	Home Mortgage Disclosure Act
HOLA	Home Owners' Loan Act
House	United States House of Representatives
HUD	Department of Housing and Urban Development
HVCC	Home Valuation Code of Conduct
IBA	International Banking Act of 1978
ICA	Investment Company Act of 1940
IMF	International Monetary Fund
Mortgage Act	Mortgage Reform and Anti-Predatory Lending Act
MOU	Memorandum of Understanding
MSRB	Municipal Securities Rulemaking Board
NAIC	National Association of Insurance Commissioners
NARRA	Non-Admitted Reinsurance and Reform Act of 2010
NBA	National Bank Act
NCUA	National Credit Union Administration
NRSRO	Nationally Recognized Statistical Rating Organization
OCC	Office of the Comptroller of the Currency
OCIE	Office of Compliance Inspections and Examinations
OFR	Office of Financial Research
OMB	Office of Management and Budget
OTC	Over-The-Counter

ACRONYM	TITLE
OTS	Office of Thrift Supervision
PBGC	Pension Benefit Guaranty Corporation
PCA	Prompt Corrective Action
PCAOB	Public Company Accounting Oversight Board
PUHCA	Public Utility Holding Company Act of 1935
QTL	Qualified Thrift Lender
RESPA	Real Estate Settlement Procedures Act
SAC	Senate Committee on Agriculture, Nutrition, and Forestry
SAFE Act	Secure and Fair Enforcement for Mortgage Licensing Act of 2008
SBA	Small Business Administration
SBC	Senate Committee on Banking, Housing, and Urban Affairs
SBIA	Small Business Investment Act of 1958
SBIC	Small Business Investment Company
SEC	Securities and Exchange Commission
Secretary	Secretary of the Treasury
Securities Act	Securities Act of 1933
Senate	United States Senate
SIPA	Securities Investor Protection Act
SIPC	Securities Investor Protection Corporation
SJC	Senate Committee on the Judiciary
SRO	Self-Regulatory Organizations
TAG	Transaction Account Guarantee
TALF	Term Asset Backed Securities Loan Facility

ACRONYM	TITLE
TARP	Troubled Asset Relief Program
TILA	Truth in Lending Act
TRIA	Terrorism Risk Insurance Act
Treasury	Department of the Treasury
USTR	United States Trade Representative
VA	Department of Veterans Affairs
YSP	Yield Spread Premium