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Insurance Industry Group: Global Corporate Insurance & Regulatory Bulletin

US - NAIC's Summer 2010 National Meeting

The National Association of Insurance Commissioners (**"NAIC"**) held its 2010 Summer National Meeting from 11 August until 17 August 2010. Among the many matters considered at the meeting were the NAIC's solvency modernization initiative, the use of retained assets accounts for death benefit payments, principle-based reserving and capital standards as well as risk based capital for life insurance companies, and credit for reinsurance.

With respect to solvency modernization, the NAIC's Solvency Modernization Initiative Task Force (**"SMITF"**) adopted the "Solvency Modernization Initiative Roadmap", which sets forth the areas of focus and priorities of SMITF for the next two and a half years. SMITF is part of the NAIC's critical self-examination to identify any necessary updates to the US insurance solvency regulation framework. Various groups within the NAIC are working on different aspects of this initiative, such as group solvency issues and potential changes to the model holding company laws and regulations. The roadmap addresses the key areas of the SMI initiative: capital requirements, governance and risk management, group supervision, statutory accounting and financial reporting, and reinsurance.

Separately, the NAIC has created the Retained Asset Account Working Group to review the use of retained asset accounts by life insurance companies and to consider potential recommendations, including appropriate consumer disclosures. The proceeds of life insurance policies are typically held in retained asset accounts following the death of an insured. Retained asset accounts typically pay interest and are guaranteed by the state life and health guarantee associations. The assets in such accounts are part of the general account of the insurance company, which benefits from any excess investment returns but faces the risk of any losses. However, the retained asset accounts have raised concerns as to whether consumers are receiving adequate disclosures about the accounts, and particularly about the beneficiary's right to receive the proceeds in a lump sum. Such accounts are also the subject of ongoing investigations by the New York State Attorney General and other agencies.

The NAIC's developments with respect to credit for reinsurance issues are discussed in greater detail below.

Vikram Sidhu

US - NAIC Reinsurance Task Force's "Reinsurance Collateral Reduction and Accreditation Recommendations"

The NAIC Reinsurance Task Force (**"RTF"**) has released draft "Reinsurance Collateral Reduction and Accreditation Recommendations" (**"RTF Recommendations"**), on which the NAIC RTF is seeking comments by 16 September 2010.

The NAIC RTF is seeking to achieve harmony among various state regulatory initiatives that involve reductions in reinsurance collateral requirements. In addition, the NAIC RTF will consider any changes that might be necessary to the NAIC Credit for Reinsurance Model Law and Credit for Reinsurance Model Regulation.

These draft recommendations follow upon the adoption by NAIC in 2009 of the draft "Reinsurance Regulatory Modernization Act of 2009", which the NAIC agreed to submit to the US Congress but which has not yet progressed at the federal level. The draft legislation, in turn, had followed upon the Reinsurance Regulatory Modernization Framework Proposal, which was adopted by the NAIC at the end of 2008.

The RTF Recommendations are driven to a significant extent by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **"Dodd-Frank Act"**), as well as various proposals in certain states for changes to their credit for reinsurance requirements. Under the Dodd-Frank Act, beginning 21 July 2011, all states will be required to recognize credit for reinsurance if it is allowed by the cedent's domiciliary state and such state is NAIC-accredited or has financial solvency requirements substantially similar to those necessary for accreditation. Additionally, the laws of the cedent's domiciliary state will preempt extraterritorial application of most laws regarding reinsurance from other states. The power to regulate reinsurer solvency will be primarily vested in the reinsurer's domiciliary state if such state is NAIC-accredited or has financial solvency requirements substantially similar to those necessary for accreditation.

Even prior to the passage of the Dodd-Frank Act, Florida had revised its credit for reinsurance laws and regulations in 2008 to allow its P&C insurers to receive credit for reinsurance from a non-admitted reinsurer posting less than 100% collateral if the reinsurer meets certain criteria, including having more than $100 million in surplus and meeting certain ratings requirements. A non-admitted reinsurer has to post collateral on a sliding scale (0%, 10%, 20%, 75% or 100%) depending on its ratings. Since the passage of the Dodd-Frank Act, other states like New Jersey and New York are considering similar changes to their credit for reinsurance laws and regulations.

The RTF Recommendations set forth required elements that states will need to address and incorporate when modifying reinsurance collateral requirements in their credit for reinsurance laws and regulations in order to maintain NAIC accreditation. For instance, the RTF Recommendations would require a reinsurer to possess a minimum capital and surplus of $250 million in order to be eligible to post reduced collateral. The states would also have to evaluate non-US reinsurance supervisory systems or use a list of jurisdictions prepared by NAIC for purposes of identifying the non-US jurisdictions from which reinsurers could qualify for posting reduced collateral. Moreover, the states would have to demonstrate that they maintain an acceptable level of prudential supervision.

Vikram Sidhu

US - Comments Requested on Proposed "Key Definitions" of the Wall Street Transparency and Accountability Act

On August 20, 2010, the US Commodity and Futures Trading Commission (**"CFTC"**) and the US Securities and Exchange Commission (**"SEC"**) published their joint Advance Notice of Proposed Rulemaking (**"ANPR"**) in the Federal Register seeking public comments on the so-called "Key Definitions" of the Wall Street Transparency and Accountability Act (the **"Act"**), which is Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Specifically, the ANPR requests comments on the proposed definitions of the following terms:

- Swap
- Security-based swap
- Swap dealer
- Security-based swap dealer
- Major swap participant
- Major security-based swap participant
- Eligible contract participant
- Security-based swap agreement

In addition, the ANPR requests comments on the required regulations regarding "mixed swaps" under the Act.

This is an important rulemaking and will likely elicit extensive comments: indeed, some have already been made and many industry groups have already met with SEC and/or CFTC Staff regarding this rulemaking.

The definitions of these terms will effectively set the Act's regulatory boundaries. For example, the Act's definition of "swap" (especially clause (ii)) is quite broad and arguably includes the following:

- Certain insurance and reinsurance contracts, particularly non-traditional contracts such as industry-loss warranties or contracts with embedded derivatives
- Gaming contracts
- Catastrophe bonds
- Loan participations

The definition may also include other transactions that many (if not most) market participants would not regard as a swap, and certainly would not regard as transactions that require the extensive regulation and related oversight contemplated in the Act.

In the ANPR, the CFTC and the SEC note that they are required to jointly further define these terms in consultation with the Board of Governors of the Federal Reserve System.

Under the ANPR, comments are to be in writing in any of the several methods provided in the ANPR and are to be received not later than 5:00 p.m., Eastern time, on 20 September 2010.

Larry Hamilton, David R. Sahr, Joshua Cohn and J. Paul Forrester

UK - Finance (No.2) Act 2010 – changes to Insurance Premium Tax (IPT)

IPT at the standard rate applies to most general insurance, including property, motor and medical insurance. Higher rate IPT applies to travel insurance and to extended warranty insurance sold alongside motor vehicles and certain consumer goods, which was introduced in 1997 to stop perceived VAT avoidance through value-shifting between goods (subject to VAT) and related insurance (exempt from VAT).

Following the enactment of the Finance (No.2) Act 2010, the rates will increase from 4 January 2011 from 5% to 6% for the standard rate and from 17.5% to 20% for the higher rate (in the latter case, to match the new rate of VAT).

The Government has also introduced a new anti-avoidance rule that will apply when a transfer of a business avoids the rules for non-profit funds with unrecognised profits. The new rule will operate where a life insurance business is transferred from one company to another and will prevent manipulation to avoid tax on previously unrecognised profits. HMRC intend to consult more widely with the insurance industry to ensure that the final legislation is targeted.

Stephen Green

UK - Online insurance introductory services

HMRC are not appealing the decision of the Court of Appeal in the case of *InsuranceWide.com Services Ltd and Trader Media Group Ltd*. HMRC have issued Revenue & Customs Brief 31/10 explaining their position on insurance introductory services. The Brief confirms that insurance introductory services are exempt from VAT when a provider is doing more than acting as a mere conduit between an individual and an insurance provider. HMRC's view is that an intermediary acts as more than a mere conduit where the following four conditions are met:

1. The services are provided by someone engaged in the business of putting insurance companies in touch with potential clients or more generally acting as intermediaries between the two parties (although this may not necessarily be their principal business activity).
2. The business provides the means (that is, by way of an internet 'click through' or some other form of introduction) by which a person seeking insurance is introduced to a provider of insurance or to another intermediary in a chain leading to an insurance provider.
3. That introduction takes place at the time a customer is seeking to enter into an insurance contract (although in some instances an insurance contract may not actually go on to be concluded).
4. The introducer also plays a proactive part in putting in place the arrangements under which that introduction is effected.

The Brief also states that HMRC will repay overpaid VAT charged on insurance introductory services that fall within the scope of the *InsuranceWide and Trader Media Group* case, subject to the normal capping and unjust enrichment rules.

Stephen Green

UK - Speech by George Osborne, Chancellor of the Exchequer, regarding the UK's and India's new economic partnership

At the end of July, a UK trade delegation consisting of senior members of the UK government and representatives from business, sport and academia visited India. As part of that trip, George Osborne delivered a speech on 28 July 2010 at the Taj Mahal Hotel in Mumbai on the UK's and India's new economic partnership.

The speech highlighted the growing trade and financial links between the two countries and called for both the UK and Indian governments to take steps to strengthen their cooperation in developing both countries' global financial centres. The UK Chancellor stated that such steps must be reciprocal in nature and include Indian financial services firms establishing themselves in the UK, as well as UK firms establishing presences in India.

With regard to insurance, George Osborne specifically called upon the Indian government *"to follow through on India's welcome commitment to raise the cap on foreign investment from 26% to 49%"*.

To view a summary of George Osborne's full speech, please click here.

Ian Slingsby

Vietnam - Price-fixing Decision Includes a Warning for All Businesses in the Country

Vietnam's Ministry of Industry and Trade recently announced that 19 insurance companies operating in Vietnam had been fined a total of VND 1.7 million (approximately US$89,000) for their involvement in unlawful price-fixing activities.

The price-fixing decision, announced on 29 July 2010, follows a long running investigation into collusive practices in the motor vehicle insurance sector in Vietnam, and is the most significant anti-cartel enforcement efforts yet by the Vietnamese authorities under a cross-sector competition regime that became operational in 2005.

In this update we examine the decision and the message it sends regarding the future of competition law enforcement in Vietnam.

BACKGROUND - THE INVESTIGATION PROCESS

The Vietnam Competition Authority ("VCA") began its investigation into cartel practices in the insurance sector in November 2008, following allegations of collusion made by several customers and other industry participants.

At that time, the VCA's investigation was seen as a significant step in the development of Vietnam's competition regime, as enforcement efforts had previously been extremely low.

VCA's investigation ran for over 12 months, and focussed on 19 insurance companies that, according to government data, account for 99.79% of the national motor vehicle insurance market (although at least one of the relevant insurance companies disputed the VCA's findings regarding the relevant market affected by the arrangements).

During its investigation, VCA found that in September 2008, 15 insurance company executives met and reached a cooperative agreement on the level of motor vehicle insurance premiums that would be applied going forward. VCA also determined that four more insurance companies subsequently became involved in the price-fixing agreement. According to reports, these facts were largely admitted by the participating companies, some of whom cited a perceived need to respond to severe price competition in their industry as a primary reason for their actions.

In accordance with the standard enforcement process under Vietnam's competition regime, VCA then passed its findings to the country's Competition Council, which has adjudicative powers in relation to relevant competition cases. The Competition Council conducted its own investigative hearings and confirmed the existence of the unlawful price-fixing arrangements, leading to imposition of the penalties.

DETERMINATION OF THE FINE AMOUNTS

Under Vietnam's Competition Law, companies found to have engaged in unlawful cartel activities can be fined up to 10% of their annual turnover in the financial year preceding the year of the relevant infringement.

However, in this case, the Competition Council determined that the fine applied to each of the insurance companies participating in the price-fixing agreement would be calculated as 0.025% of their total turnover in 2007 (the year preceding the year in which the price-fixing agreement was implemented). Additionally, the 19 insurance companies involved in the violation of the Competition Law have been ordered to pay administrative fees of VND 100 million.

In a press release relating to the decision, the VCA stated that the penalty was of a "warning nature", and noted that this was due to factors including "low awareness" of the Competition Law.

Notably, a number of the relevant insurance companies are reported to have requested the Competition Council to consider applying a reduced penalty on the basis of the emerging status of the insurance market in Vietnam, and the need to preserve the standing of this market. Although there is no indication that this factor was given significant weight by the Competition Council, it has been reported that the Council's decision to impose relatively low penalty levels on many of the participants in the collusive arrangements was influenced by the fact that those participants voluntarily suspended their relevant behaviour once contacted by the Vietnamese authorities and took steps to implement remedies for their behaviour.

THE CASE IS A 'WARNING SHOT' FOR BUSINESSES OPERATING IN VIETNAM

The VCA press release also indicated that penalties of a "warning nature" should not be expected going forward. Indeed, the press release states that "[f]rom now on, all and any practices in restraint of competition shall be strictly dealt with in accordance with the laws of Vietnam".

Accordingly, the decision should be seen as a signal to the business community in Vietnam about the likelihood for more vigorous enforcement of the Competition Law (and more significant penalties for identified violations of the law) going forward.

All companies with operations in Vietnam, or who sell into the country, should ensure they understand their obligations under the law and have appropriate procedures and policies in place to ensure compliance going forward.

John Hickin, Hannah Ha and Hoang Anh Nguyen

If you have any query in connection with anything in this Bulletin, please do not hesitate to get in touch with your usual Mayer Brown contact or one of the contacts referred to below.

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