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Dodd Legislation Would Enhance Proposed Office of National Insurance

November 18, 2009-- Last week, Senator Chris Dodd, Chairman of the Senate Committee on Banking, Housing and Urban Affairs, unveiled sweeping financial reform legislation. As part of the reform, Title V of the Restoring American Financial Stability Act of 2009 (the "Dodd Draft"), proposes to create an Office of National Insurance ("ONI") within the Department of the Treasury. The most recent version of the Dodd Draft was published this week as the Chairman's Mark Text and is available [here](#).

The Dodd Draft contains provisions similar to other proposals for a national insurance office, including last month's proposal by Representative Paul Kanjorski (the "Kanjorski Draft") creating a Federal Insurance Office ("FIO") (available [here](#)). The Kanjorski draft was discussed in an October 12, 2009 Alert (available [here](#)) from our Task Force on Modernizing Financial Services Regulation. The below discussion focuses particularly on how the ONI proposed in the Dodd Draft compares to the FIO proposed in the Kanjorski Draft.

Coordination with State Regulation

The Dodd Draft explicitly states that it *does not* preempt (i) any state "insurance measure governing the capital or solvency of an insurer," except to the extent that such state insurance measure treats a non-US insurer less favorably than a U.S. insurer, (ii) any state insurance measures governing an insurer's rates, premiums, underwriting, or sales practices, (iii) state coverage requirements, or (iv) the application of state antitrust laws. The Kanjorski Draft does not contain the preemption exclusion relating to capital or solvency but does contain the other three. Additionally, the Dodd Draft, but not the Kanjorski Draft, provides that the establishment of the ONI would not be construed to provide the ONI or the Treasury Department "with general supervisory or regulatory authority over the business of insurance."

The Dodd and Kanjorski Drafts both provide that a "state insurance measure" would be preempted *only* to the extent that the ONI or the FIO makes a determination (an "Inconsistency Determination") that a non-U.S. insurer is being treated (a) less favorably than a U.S. insurer and (b) in a way that is inconsistent with an international insurance agreement on prudential matters. Accordingly, the positive and negative preemption provisions and the inclusion of the other additional language in the Dodd Draft would leave unchanged

most regulatory structures of the states, such as the conservation, rehabilitation, and liquidation structures, although other aspects of the Dodd Draft dealing with the proposals for systemic regulation and resolution authority may have an impact on these structures.

In addition, before making any Inconsistency Determination, the Dodd Draft would require that the Director "notify and consult with" the relevant state regarding the potential inconsistency or preemption. Additionally, the Dodd Draft provides that Inconsistency Determinations would be subject to the Administrative Procedures Act and judicial review. The Kanjorski Draft would not impose any of these conditions on Inconsistency Determinations.

ONI Study and Report to Congress Concerning Insurance Regulation

Under the Dodd Draft, the Director of the ONI, within 18 months of its enactment, is directed to conduct a major study and submit a report to Congress on "how to modernize and improve the system of insurance regulation in the United States." The Kanjorski Draft does not contain similar study and report requirements but does provide the FIO with much of the same authority as the Dodd Draft provides to the ONI, including the ability to monitor all aspects of the insurance industry and consult with the states regarding insurance matters.

In connection with the study and report, the Dodd Draft requires that the ONI Director consult with the NAIC, consumer organizations, representatives of the insurance industry and policyholders, and other organizations and experts "as appropriate." Nevertheless, the "considerations" and "factors," specified in the Dodd Draft and summarized below, that must be considered by the Director as part of the study and report appear to favor federal regulation. The study and report would be "required to be based on and guided by" the following considerations:

1. Systemic risk regulation with respect to insurance;
2. Capital standards and the relationship between capital allocation and liabilities, including standards relating to liquidity and duration risk;
3. Consumer protection for insurance products and practices, including gaps in state regulation;
4. The degree of national uniformity of state insurance regulation;
5. The regulation of insurance companies and affiliates on a consolidated basis; and
6. International coordination of insurance regulation.

In addition, the study and report would be required to examine the following factors:

- The costs and benefits of potential federal regulation of insurance across various lines of insurance (except health insurance);
- The feasibility of regulating only 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 potential federal regulation or federal regulators to eliminate or minimize regulatory arbitrage;

- The impact that developments in the regulation of insurance in foreign jurisdictions might have on the potential federal regulation of insurance;
- The ability of potential federal regulation or federal regulators to provide robust consumer protection for policyholders; and
- Such other factors as the Director determines necessary or appropriate, consistent with considerations 1.-6. listed above.

Collection of Information

The Dodd Draft grants subpoena power to the Director of the ONI for any data or information from an insurer or its affiliate that the ONI "may reasonably require." While the Kanjorski Draft provides the FIO with the authority to "require" an insurer or its affiliate to provide information to the FIO, the draft does not include explicit subpoena power. Before subpoenaing the data or information, the ONI would be required to coordinate with the relevant state insurance regulators, which also would be required under the Kanjorski Draft to determine if the information could be collected by or from the regulators or from publically available sources instead.

The Dodd Draft includes a provision allowing the ONI to make available to state insurance regulators, individually or collectively, through information sharing agreements, any data or information obtained by the ONI, which will help state regulators be more effective. While the Kanjorski Draft allows the FIO to "enter into information-sharing agreements, analyze and disseminate data and information," it does not define "information-sharing agreement" or specify who the FIO may share the information with.

Periodic Reporting to Congress

Under the Dodd Draft, similar to the Kanjorski Draft, the Director of the ONI is required to annually notify Congress of any Inconsistency Determinations made by the Director and "any other information as deemed relevant by the Director or as requested by" Congress. This provision, along with the study and report referred to above, subjects the ONI and its Director to the enhanced status and scrutiny of dealing with Congress directly, rather than through the Secretary of the Treasury.

For additional information:

Jorden Burt has formed a special Task Force to monitor this legislation and other proposals relating to reform of financial services regulation. To obtain additional information about particular proposals that might have an impact on the insurance or reinsurance industries, you may contact Roland Goss (rcg@jordenusa.com or (202) 965-8148). To obtain additional information about particular proposals that might have an impact on the investment adviser and fund industries you may contact Tom Lauerman (tcl@jordenusa.com or (202) 965-8156). Or you may contact any of Jorden Burt's other regulatory attorneys.

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