CLIENT MEMORANDUM

U.S. Federal Authorities to Negotiate Covered Agreement on Insurance and Reinsurance with the European Union

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On November 20, 2015, the U.S. Department of the Treasury ("Treasury") and Office of the U.S. Trade Representative ("USTR") notified the U.S. Congress that the Treasury and the USTR intend to initiate negotiations to enter into a covered agreement with the European Union. The Treasury and the USTR were provided authority to negotiate covered agreements on behalf of the United States with foreign jurisdictions (including, e.g., the European Union) with the enactment of the Dodd–Frank Wall Street Reform and Consumer Protection Act. Such covered agreements are to set forth prudential measures for insurance and reinsurance that achieve a level of protection that is substantially equivalent to the level of protection under the state-based insurance regulatory scheme.

Importantly, a covered agreement with a foreign jurisdiction could preempt certain state insurance laws.

In the letters, the Treasury and the USTR state that the negotiations that will be commenced with the European Union are intended to result in a covered agreement that will: (i) level the regulatory playing field for U.S.-based insurers and reinsurers operating in the European Union; and (ii) confirm that the existing U.S. insurance regulatory system appropriately serves the goals of oversight of the insurance industry, consumer protection, and national and global financial stability. A covered agreement with the European Union could become the first-ever covered agreement to be entered into with a non-U.S. jurisdiction.

The Treasury and USTR further state that the covered agreement with the European Union will be negotiated to address the following five areas:

- Obtaining "equivalent" treatment of the U.S. insurance regulatory system by the European Union under the insurance regulatory reform known as Solvency II, effective as of January 1, 2016, so as to allow for a level playing field for U.S. insurers and reinsurers operating in the European Union;
- Obtaining recognition by the European Union of the integrated state and federal insurance regulatory and oversight system in the United States (including with respect to group supervision);
- Facilitating the exchange of confidential regulatory information between lead supervisors across national borders;
- Affording nationally uniform treatment in the United States of reinsurers based in the European Union, including with respect to reinsurance collateral requirements; and
- Obtaining permanent equivalent treatment for the solvency regime in the United States applicable to insurance and reinsurance undertakings.

The concept of covered agreements negotiated by the federal authorities has been met with uniform opposition by the state insurance regulators, who are loath to cede any of their regulatory supervisory authority over the insurance sector to the federal government. State regulators have repeatedly argued that there is no need for the federal government to enter into any covered agreements, since state insurance laws have already been, or are in the process of being, sufficiently modernized to ensure that the United States should already be considered "equivalent" under Solvency II. For example, most of the states have already adopted rules permitting an unauthorized reinsurer that is domiciled in a non-U.S. "qualified jurisdiction" and that has qualified as a "certified reinsurer" in the state to post reduced collateral with respect to its assumption of business via reinsurance from ceding insurers domiciled in the state.

The letters notifying the U.S. Congress concerning the intended negotiations with the European Union with respect to the covered agreement expressly state that the Treasury and the USTR support the "U.S. integrated system of state and federal insurance regulation," including the primary role of state insurance regulators as supervisors of the business of insurance. The letters go on to promise that state insurance regulators will have a "meaningful role" during the negotiations of the covered agreement with the European Union. The extent of this "meaningful role" remains to be determined. Additionally, it is understood that interested stakeholders will also have the opportunity to engage through a public process with those participating in the negotiations.

According to Federal Insurance Office (FIO) Director Michael McRaith, if negotiations with the European Union are successful, the Treasury and the USTR may also pursue covered agreement negotiations on similar or identical insurance and reinsurance topics with other non-U.S. jurisdictions soon thereafter.

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