

TITLE V: Insurance

Subtitle A of Title V establishes a Federal Insurance Officer (“FIO”) within the Treasury Department, which will primarily be an information gathering, monitoring and advisory agency. Title V does not provide FIO with general supervisory or regulatory authority over the business of insurance. Following enactment of Title V, the FIO will have 18 months to conduct a study and report on how to modernize and improve the U.S. system of insurance regulation and, in addition, will have to provide additional periodic reports to Congress. Subtitle A also provides that state insurance measures will be preempted if they: (i) result in less favorable treatment of a non-U.S. insurer domiciled in a foreign jurisdiction that is subject to an international prudential insurance agreement than a U.S. insurer domiciled or licensed in that state; or (ii) are otherwise inconsistent with an international prudential insurance agreement.

Subtitle B of Title V, the Nonadmitted and Reinsurance Reform Act of 2010, establishes certain regulatory reforms for nonadmitted (or surplus lines) insurance and for reinsurance generally. Under Subtitle B, only the home state of an insured may require premium tax payments for nonadmitted insurance. Congress intends that each state adopt uniform nationwide requirements and procedures for the reporting, collection, and allocation of premium taxes for nonadmitted insurance. In addition, the placement of nonadmitted insurance will be subject only to the regulatory requirements of the insured’s home state, and only the insured’s home state could require a surplus lines broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to the insured.

Subtitle B’s reinsurance provisions relate to credit for reinsurance and the preemption of certain state laws as they relate to ceding insurers. The legislation provides that if a ceding insurer’s state of domicile is accredited by the National Association of Insurance Commissioners (“NAIC”) and recognizes credit for reinsurance for the insurer’s ceded risk, then other states cannot not deny credit for reinsurance. Further, all regulations of a state that is not the domicile of the ceding insurer (except those with respect to taxes and assessments) will be pre-empted to the extent that they restrict the rights of the ceding insurer to resolve disputes under contractual arbitration or otherwise apply the state’s laws to reinsurance agreements of ceding insurers not domiciled in that state. The provisions also limit the regulation of the financial solvency of a reinsurer to its domiciliary state if the state is NAIC accredited.

A. Establishment of Federal Insurance Office

Title V establishes the FIO within the Treasury Department. The FIO is headed by a Director, to be appointed by the Secretary. **Sec. 502 (p. 209).**

1. Functions of FIO

The scope of the FIO’s authority extends to all lines of insurance except health insurance and certain long-term care insurance. Among other things, FIO will be charged with:

- i. Monitoring the insurance industry, consulting with the states on insurance matters, identifying issues that could contribute to a systemic crisis, and recommending that an insurer be designated as

- an entity subject to regulation as a NBFC;
- ii. Monitoring the extent to which traditionally underserved communities and consumers, minorities, and low- and moderate-income persons have access to affordable insurance products;
 - iii. Coordinating federal efforts and developing policy on prudential aspects of international insurance matters, advising the Secretary on major domestic and prudential international insurance policy issues, and assisting the Secretary in negotiating international prudential insurance agreements;
 - iv. Determining whether state insurance measures are preempted by “covered agreements”;¹⁰
 - v. Consulting with states and state insurance regulators regarding insurance matters of national and international importance;
 - vi. Performing such other related duties as may be assigned by the Secretary;
 - vii. Advising the Secretary on major domestic and prudential international insurance policy issues; and
 - viii. Serving (Director of FIO) in an advisory capacity on the Financial Council. **Sec. 502 (pp. 209-210).**

2. Collection of Information From Insurers

In order to carry out these functions, the FIO is authorized to receive and collect data and information from the insurance industry and insurers. Before collecting any such data or information, the FIO needs to coordinate with each relevant federal agency and state insurance regulator (or other relevant federal or state regulatory agency in the case of an affiliate of an insurer) and any publicly available sources to determine if the information can be obtained from the agency, regulator, or another publicly available source. The Director can, upon a written finding, require by subpoena an insurer to produce data or information necessary for the FIO to

¹⁰ The term “covered agreement” refers to a written bilateral or multilateral agreement entered into between the United States and a foreign government, authority, or regulatory entity regarding prudential measures applicable to the business of insurance or reinsurance.

carry out its functions. The Director, however, cannot require a small insurer to submit such data or information, with the threshold for the minimum size for such exemption to be established by the FIO. **Sec. 502 (pp. 210-212).**

3. Preemption of State Insurance Measures

With regard to preemption of state insurance measures, Title V prescribes that a state insurance measure is preempted only to the extent that such measure (1) results in less favorable treatment of a non-U.S. insurer domiciled in a foreign jurisdiction that is subject to a covered agreement than a U.S. insurer, and (2) is inconsistent with a covered agreement. Before making a determination regarding such preemption, the Director needs to:

- i. Notify and consult with the appropriate State regarding any potential inconsistency or preemption;
- ii. Notify and consult with the U.S. Trade Representative regarding potential inconsistency or preemption;
- iii. Publish in the Federal Register notice of the issue regarding potential inconsistency or preemption, including a description of each state insurance measure at issue and any applicable covered agreement; and
- iv. Provide interested parties a reasonable opportunity to submit written comments to the FIO.

Title V clarifies that the FIO does not have authority to preempt any state insurance measure governing rates, premiums, underwriting, sales practices, coverage requirements, or state antitrust laws applicable to insurance. Further, nothing in this section preempts any state insurance measure governing the capital or solvency of an insurer except to the extent that such state insurance measure directly results in less favorable treatment of a non-U.S. insurer. Finally, nothing in this section establishes or provides the FIO or the Treasury Department with general supervisory or regulatory authority over the business of insurance. **Sec. 502 (pp. 212-214).**

4. Annual Reports

Title V provides that, beginning on September 30, 2011, the Director of the FIO will be required to submit to the President and to the respective House Committees on Financial Services and Ways and Means and the respective Senate Committees on Banking and Finance an annual report that describes any actions taken by the FIO regarding the preemption of state insurance measures. Also, beginning on September 30, 2011, the Director will be required to submit to the President and to the House Financial Services Committee and the Senate Banking Committee an annual report on the insurance industry and any other information as deemed relevant by the Director or requested by such committees.

Title V will also call on the Director to submit to the House Financial Services Committee and the Senate Banking Committee, not later than September 30, 2012, a report describing the breadth and scope of the global reinsurance market and the critical role such

market plays in supporting insurance in the United States. In addition, the Director will be required to submit to the noted committees, not later than January 1, 2013, a report describing the impact of the Nonadmitted and Reinsurance Reform Act of 2010 (Subtitle B of Title V). **Sec. 502 (p. 214).**

5. Study and Report on Regulation of Insurance

Finally, no later than 18 months after Title V is enacted, the Director is required to conduct a study and submit a report to Congress on how to modernize and improve the system of insurance regulation in the United States. This study and report will be guided by considerations of systemic risk regulation, capital standards, consumer protection, the degree of national uniformity of state insurance regulation, the regulation of insurance companies and affiliates on a consolidated basis, and international coordination of insurance regulation. The legislation also enumerates additional factors that the study should examine including the costs, benefits, feasibility, and effects of potential federal regulation of insurance, as well as the potential consequences of subjecting insurance companies to a federal resolution authority.

Title V requires that the study and report contain any legislative, administrative, or regulatory recommendations as the Director determines appropriate to carry out or effectuate the findings of the report. **Sec. 502 (pp. 215-216).**

6. Covered Agreements

Under Title V, the Secretary and the U.S. Trade Representative will be authorized, jointly, to negotiate and enter into covered agreements on behalf of the United States. In doing so, the Secretary and the U.S. Trade Representative will jointly consult with the respective House Committees on Financial Services and Ways and Means and the respective Senate Committees on Banking and Finance. **Sec. 502 (pp. 217-218).**

B. State-Based Insurance Reforms

Subtitle B of Title V, the “Nonadmitted and Reinsurance Reform Act of 2010,” provides for state-based reforms that seek to streamline the regulation of surplus lines of insurance and reinsurance. These reforms will take effect one year after the subtitle is enacted. **Sec. 512 (p. 218).**

1. Nonadmitted Insurance¹¹

Under Subtitle B, no state other than the home state¹² of an insured can require any premium tax payment for nonadmitted insurance. States can enter into a compact to allocate among themselves the premium taxes paid to an insured's home state and, according to the legislation, Congress intends that each state adopt nationwide uniform requirements, forms, and procedures that provide for the reporting, payment, collection, and allocation of such taxes. **Sec. 521(a-b) (pp. 218-219).**

To facilitate the payment of premium taxes among the states, an insured's home state may require surplus lines brokers and insureds who have independently procured insurance to annually file tax allocation reports with the insured's home state detailing the portion of the nonadmitted insurance policy premium or premiums attributable to properties, risks, or exposures located in each state. **Sec. 521(c) (p. 219).**

Additionally, the placement of nonadmitted insurance will be subject to the statutory and regulatory requirements of the insured's home state only. Thus, the home state (and not any other state) can require a surplus lines broker to be licensed in order to sell, solicit, or negotiate such nonadmitted insurance. **Sec. 522 (p. 219).**

Subtitle B also provides for uniform standards for surplus lines eligibility among states, as well as streamlined applications for surplus lines brokers who seek to procure nonadmitted insurance for commercial purchasers. **Sec. 524-525 (pp. 219-220).**

Finally, the legislation directs the Comptroller General to conduct a study of the nonadmitted insurance market to determine the effect of these regulations on the size and market share of the nonadmitted insurance market for providing coverage typically provided by the admitted insurance market. **Sec. 526 (pp. 220-221).**

¹¹ The term “nonadmitted insurance” means any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a non-admitted insurer eligible to accept such insurance. A nonadmitted insurer means, with respect to a state, an insurer not licensed to engage in the business of insurance in such state.

¹² The “home state” means, with respect to an insured, the state in which an insured maintains its principal place of business or, in the case of an individual, the individual's principal residence; or if 100 percent of the insured risk is located out of this state, the state in which the greatest percentage of the insured's taxable premium for that contract is allocated.

2. Reinsurance

Title V establishes regulations pertaining to credits for reinsurance and the preemption of certain state laws as it applies to a ceding insurer.¹³ Namely, the legislation provides that if the domiciliary state¹⁴ of a ceding insurer is a NAIC-accredited state and recognizes credit for reinsurance for the insurer's ceded risk, then other states will not be permitted to deny such credit. **Sec. 531(a) (p. 224).**

Further, all laws, regulations, provisions, or other actions of a state that is not the domiciliary of the ceding insurer (except those with respect to taxes and assessments) are preempted to the extent that they restrict the rights of the ceding insurer to resolve disputes pursuant to contractual arbitration or otherwise apply the state's laws to reinsurance agreements of ceding insurers not domiciled in that state. **Sec. 531(b) (p. 224).**

Finally, regulations of a state that is not the domicile of the ceding insurer (except those with respect to taxes and assessments) are pre-empted to the extent that they restrict the rights of the ceding insurer to resolve disputes under contractual arbitration or otherwise apply the state's laws to reinsurance agreements of ceding insurers not domiciled in that state. The regulation of the financial solvency of a reinsurer is limited to the reinsured's domiciliary state if the state is NAIC-accredited. **Sec. 532 (pp. 224-225).**

¹³ A "ceding insurer," in the context of reinsurance, is the original or primary insurer which purchases reinsurance.

¹⁴ The "domiciliary state" refers to the state in which the insurer or reinsure is incorporated, or entered through, and licensed.