

December 4, 2009

Proposed Federal Insurance Office Act of 2009 Moves Forward

On December 2, 2009, the House Committee on Financial Services passed H.R. 2609, the Federal Insurance Office Act of 2009 (FIO Act, or H.R. 2609). Representative Paul Kanjorski (D-PA) introduced the FIO Act earlier this year, and similar initiatives had been introduced in 2008. According to plans recently discussed by the Chairman of the Financial Services Committee, Barney Frank (D-MA), the FIO Act will be part of comprehensive legislation addressing financial services reform that will be brought to the House floor for debate on December 9, 2009. Chairman Frank has scheduled at least three full days of debate on the overall package prior to moving the package for vote. Some of the debate during the markup of H.R. 2609 focused on the prospects for an optional federal charter, and Chairman Frank indicated his intention to take on optional federal chartering again in 2010. Set forth below is a summary of the FIO Act.

H.R. 2609 calls for the establishment of the Federal Insurance Office (FIO) as an office within the Department of the Treasury. The FIO would be headed by a Director, who would be appointed by the Secretary of the Treasury. The Director would be a career reserved position in the Senior Executive Service. In addition, the FIO Act provides that the FIO will have a dedicated staff but is silent as to the qualifications of the staff. The FIO's role would consist primarily of:

- Monitoring the insurance industry to gain expertise;
- Identifying issues or gaps in insurance regulation that could result in a systemic crisis; and
- Making recommendations to the applicable systemic risk regulator that an insurer or its affiliates should be subject to heightened scrutiny.

In addition, the FIO would be given significant power with respect to international matters, that it would share, to some extent, with the Office of the United States Trade Representative (USTR) and the Secretary of the Treasury. This is a new development that was not part of previous iterations of the FIO. In particular, the FIO would be empowered jointly with the Secretary of the Treasury and the USTR to negotiate and enter into "covered agreements."¹ The FIO Act still reserves a significant role for Congress. Before any such negotiation can occur, certain Congressional committees would have to be consulted on the substance and implementation of the covered agreement. In addition, no such covered agreement shall become effective until it has been presented to Congress and 90 days have elapsed.

The FIO has specific but limited authority to preempt State insurance measures.² For example, the FIO has the power to determine whether a particular State insurance measure is preempted by prudential measures that are included in a covered agreement. The FIO Act does not, however, allow for the preemption of any State insurance measure that governs an insurer's rates, premiums, underwriting or sales practices.

¹ A "covered agreement" is defined generally as a written bilateral or multilateral recognition agreement that is entered into between the United States and one or more foreign governments or regulators. A covered agreement would provide for the recognition of "prudential measures with respect to the business of insurance or reinsurance that achieves a level of protection for" consumers similar to that provided under State law. (§ 313(n)(2)).

² "State insurance measure" is defined as any State law, regulation, administrative ruling, bulletin, guideline, or practice relating to or affecting prudential measures applicable to insurance or reinsurance. (§ 313(n)(9).)

In addition, the FIO would have the authority, under the direction of the Secretary of the Treasury, to:

- Assist the Secretary of the Treasury in administering the Terrorism Insurance Program under the Terrorism Risk Insurance Act;
- Coordinate Federal policy on prudential aspects of international insurance matters, including representing the United States in the International Association of Insurance Supervisors (or any successor organization), and assist the Secretary of the Treasury in negotiating covered agreements;
- Determine, after publication of notice and opportunity for comment, that a State insurance measure is preempted by covered agreements to the extent that the measure: (1) directly results in less favorable treatment of a non-U.S. insurer domiciled in a foreign jurisdiction that is subject to a covered agreement than would be given a U.S. insurer domiciled, licensed or admitted in that State, and (2) is inconsistent with a covered agreement; and
- Consult with the States regarding insurance matters of national importance and prudential insurance matters of international importance.

The FIO would be empowered to collect a broad range of information on and from the insurance industry, insurers and their affiliates. In collecting data, the FIO must coordinate with each relevant Federal agency or State insurance regulator to determine if the information is available from the regulator and, generally, must request the information from such sources rather than from the insurer or its affiliates. The FIO Act also explicitly states that the submission of any non-public information or data to the FIO “shall not constitute a waiver of, or otherwise affect, any privilege” arising out of law or court rules.

The Director would be required to submit an annual report to the President and to Congress on any preemptive action it took, and on any other information deemed relevant by the Director or as requested by the ranking members of certain Congressional committees.

Finally, we note that Representatives Bean and Royce, who have been actively engaged in efforts with respect to optional federal charter legislation, also offered an amendment that the Financial Services Committee approved by voice vote, that requires the Director to conduct a study on how to modernize and improve U.S. insurance regulation. In doing so, the Director is compelled to consult with State insurance regulators, consumer organizations and others deemed appropriate.

The press release issued by the House Financial Services Committee is available at:
http://www.house.gov/apps/list/press/financialsvcs_dem/pressfio_120209.shtml



We will continue to monitor developments related to the regulatory reform initiatives impacting our insurance company clients. If you have any questions regarding this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorneys with whom you regularly work.

James M. Cain	202.383.0180	james.cain@sutherland.com
Eric A. Arnold	202.383.0741	eric.arnold@sutherland.com
Stephen E. Roth	202.383.0158	steve.roth@sutherland.com
W. Thomas Conner	202.383.0590	thomas.conner@sutherland.com
Mary Jane Wilson-Bilik	202.383.0660	mj.wilson-bilik@sutherland.com

SUTHERLAND

Earl Zimmerman
Cynthia M. Krus
Annette L. Tripp
Bert Adams
David A. Massey
B. Scott Burton

212.389.5024
202.383.0218
713.417.6133
212.389.5004
202.383.0201
404.853.8217

earl.zimmerman@sutherland.com
cynthia.krus@sutherland.com
annette.tripp@sutherland.com
bert.adams@sutherland.com
david.massey@sutherland.com
scott.burton@sutherland.com