

NAIC ADDRESSES CONSTITUTIONAL CONCERNS IN REVAMPED RRMA

By John Pitblado

We previously reported on federal legislation proposed by the National Association of Insurance Commissioners (the “NAIC”) entitled the Reinsurance Regulatory Modernization Act (“RRMA”).¹ The NAIC’s first draft bill was exposed for comment in March 2009, and comments submitted from various industry participants² reflected a number of concerns with the proposed legislation, including constitutional questions about the apparent delegation to the NAIC of regulatory authority under the proposed law. After seeking legal advice on constitutional questions, the NAIC exposed a revised draft in late July 2009. The comments³ on the revised draft reveal that the constitutional concerns have been largely addressed, though many of the commenters continue to express other concerns, particularly with respect to the collateral requirements.

At its September 15, 2009 meeting, the NAIC’s Reinsurance Task Force adopted the revised RRMA and presented it to the Government Relations Leadership Council, which approved the proposal. The NAIC will now seek congressional sponsors for the proposed bill.

As reported more fully in our previous articles, the broad purposes of the RRMA include the following:

- Establishing a Reinsurance Supervision Review Board (“RSRB”)
- Establishing two new classes of reinsurers in the U.S.: “national reinsurers” (licensed and domiciled in a U.S. state) and “port of entry” (“POE”) reinsurers (non-U.S. reinsurers certified in a port of entry state in the U.S.), with each being regulated solely by the corresponding U.S. supervising jurisdiction.
- The determination of a state’s eligibility as a POE state.

¹ See Cicchetti, Anthony, “Update on NAIC Reinsurance Collateral Proposals,” [Reinsurancefocus.com](http://reinsurancefocus.com) (available at: <http://reinsurance/uploads/NAICreinsuranceregulatoryupdate4.22.09.pdf>) (April 20, 2009); Pitblado, John, “Constitutional Concerns with the Reinsurance Regulatory Modernization Act” [ReinsuranceFocus.com](http://www.reinsurancefocus.com) (available at: <http://www.reinsurancefocus.com/uploads/SpecialFocusRRMA.pdf>) (June 29, 2009).

² The original commenters included the American Council of Life Insurers (“ACLI”), the American Insurance Association (“AIA”), Allstate Insurance Company (“Allstate”), CEA Insurers of Europe (“CEA”), the Financial Services Authority (“FSA”), Hannover Rückversicherung AG (“Hannover Re”), the International Underwriters Association of London (“IUA”), Lloyd’s America, Inc. (“Lloyd’s”), Property Casualty Insurers Association of America (“PCI”), the Reinsurance Association of America (“RAA”), State Farm Insurance (“State Farm”), Tawa Management, Ltd. (“Tawa”), and the W.R. Berkeley Corporation (“W.R. Berkeley”).

³ The draft legislation and comments are posted on the NAIC website (available at: http://www.naic.org/committees_e_reinsurance.htm).

- Allowing ceding companies credit for reinsurance ceded to national and POE reinsurers.
- Assigning financial strength ratings for national and POE reinsurers (and calculating required collateral based thereon).
- Preemption of inconsistent state laws

The Revised Draft

The most oft-cited constitutional concern expressed in the original comments was prompted by the quasi-governmental nature of the proposed RSRB. The revised draft makes apparent that the RSRB is intended to be a federal government agency, describing it as “an instrumentality of the United States” and an “agency” of the United States for the purposes set forth in the proposed bill. The revised draft also establishes an appropriation that previous commenters felt would be necessary to fund the initial enterprise of establishing the RSRB (though the amount of the appropriation has been left blank). A further revision also explicitly provides that parties to a reinsurance agreement may establish collateral requirements that exceed the requirements under the proposed Act. The proposed collateral requirements remain the same as under the previous version of the draft legislation.

The Comments

Many of the original commenters did not comment on the revised draft. Some original commenters expressed satisfaction that the revisions have addressed their concerns. Other original commenters, however, continue to take issue with aspects of the draft, and have indicated that they will oppose the bill should it be introduced in Congress. Some new commenters have also added their voice.

Generally, representatives of the interests of domestic cedents, such as Allstate, the American Insurance Association and PCI, continue to disagree with the need for reform of the current collateral requirements. They also reiterated their concern that the reform proposed by NAIC unfairly alters the balance in favor of foreign reinsurers who are not licensed and who do not maintain assets in the United States. PCI notes its explicit intention to oppose the bill in its current iteration.

Voices from overseas, however, strike a more positive note than their domestic counterparts. Lloyd’s, CEA, IUA and Hannover Re all note their appreciation that the revised draft incorporates some of their prior suggestions. New commenter The General Insurance Association of Japan notes that while its goal is that “collateral requirements on reinsurance transactions should be ever abolished,” it nevertheless appreciates the “positive step” toward reinsurance regulation reform in the United States.

Comments on behalf of domestic reinsurers are more ambivalent in tone. The RAA notes its support for comprehensive reinsurance regulatory reform, but expresses concern that the

revised draft continues to fall short of “meaningful” reform. It reiterates many of its previous concerns (and continues to believe the proposed bill raises constitutional concerns about the improper delegation of legislative and executive authority, because of the concern that the RSRB is not overseen by an appropriate executive department or agency). New commenter AIG suggests that affiliated reinsurance transactions should not be included within the scope of the proposed regulation.

On balance, however, the tenor and the number of comments indicate that the revised draft appears to have significant industry support. Jordan Burt will continue to monitor the bill as it is pushed toward Capitol Hill.

This article does not constitute legal or other professional advice or service by JORDEN BURT LLP and/or its attorneys. For further information contact the author at (860) 392-5024