THE DOUBTFUL IMPACT OF AN OPTIONAL FEDERAL CHARTER ON THE REINSURANCE COLLATERAL DEBATE

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I. INTRODUCTION

Standards and practices in the field of reinsurance supervision vary widely among jurisdictions, with prudential approaches varying from direct supervision of reinsurers to supervision through cedants to little or no supervision at all. The supervision of reinsurance is experiencing a convergence in significant jurisdictions, including the European Union and the United States. Important topics include the anticipated single passport to Europe and, in the United States, the reinsurance collateral debate and the potential move toward an optional federal charter. Who is behind these issues, and do the issues share common ground?

The European Union is progressing toward a single market for reinsurance and a federalized system of reinsurance regulation. Important principles of mutual recognition and at least minimal harmonization of rules are some of the important foundations being implemented to make that system work. If and when the 2005 Reinsurance Directive (E.U. law allowing for free movement of insurance and reinsurance among member states) is implemented, it will result in the complete elimination of reinsurance collateral requirements among E.U. member states, although European Union member states will be able to impose such requirements on reinsurers from countries outside the European Union.

Some E.U. spokesmen have suggested that the United States should learn from the European Union's experience and adopt a federal system of reinsurance regulation in lieu of the current system of regulation by individual states. These commentators suggest that there is a likely nexus between a possible federal system of regulation in the United states and the eventual abolishment of U.S. reinsurance collateral requirements.

In the United States, collateral from unauthorized reinsurers satisfies "credit for reinsurance" regulations in the various states. However, reinsurers that are required to post collateral are at a competitive disadvantage compared to those that are not required, and insurers may have fewer options.

To understand these issues, this paper will survey the reinsurance regulatory schemes of the European Union and the United States. For the law of the European Union, the article discusses the Reinsurance Directive as it pertains to the ability of E.U. insurers to require collateral of third-country reinsurers, including those domiciled in the United States. The analysis of law in the United States will include the current law of New York State, followed by a discussion of a recent regulatory proposal by New York State, that softens the collateral requirements, leads to mutual recognition, and sets the groundwork for minimal harmonization of rules between unauthorized reinsurers and New York State.

The balance of the article should appeal to both the historian and the scholar of insurance law. Lloyd's is a company with its head office in the United Kingdom, which is a member state of the European Union. Because Lloyd's is a strong proponent of elimination of collateral requirements in the United States, this section reviews the failure of the old "Lloyd's of London," along with legacy issues that have concerned U.S. insurance regulators. The new "Lloyd's" is then studied in view of its current self-regulation initiatives, its governmental oversight from the nascent Financial Services Authority (FSA), and the treatment given to it by the rating agencies.

The article concludes with a historical overview of the arguments for and against an optional federal charter in the United States, with an analysis tailored to the purpose of this paper, which is refuting the unfounded notion that an optional federal charter is necessary for the elimination of reinsurance collateral requirements.

II. THE REINSURANCE COLLATERAL DEBATE

A. *Current Regulatory Scheme in the United States*

Ensuring the solvency of primary insurance companies, or cedants, is a focal point of insurance regulation. Regulators establish rules to ensure that cedants have adequate funds available to respond to claims. When a cedant enters into a reinsurance transaction with a reinsurer, the assets of the reinsurer become one source of funds to satisfy the obligations of the ceding insurance company to policyholders. One means by which insurance regulators guard against insolvency of cedants is exercising control over their reinsurers.

Regulators distinguish between authorized reinsurers, which are not required to post collateral, and unauthorized reinsurers, which are required to do so. Authorized reinsurers are licensed by and pay taxes in one or more states plus the District of Columbia, each with its own requirements with respect to credit for reinsurance.[1] Credit for reinsurance involves the ability of cedants to offset case reserves and unearned premium reserves by the amount of risk ceded to reinsurance companies. By either statute or administrative practice,[2] most states allow financial statement credit for reinsurance transactions with reinsurers licensed in the same state, or with reinsurers licensed in another state where the company meets the solvency requirements of the state where the credit is taken. Regulators permit cedants to rely upon the authorized status of these reinsurers simply by referencing the name and the National Association of Insurance Commissioners (NAIC) number of the reinsurer in the cedant's annual statements and other financial statements. In contrast, the credit for reinsurance laws requires unauthorized reinsurers to post collateral for purposes of consumer protection and solvency protection of their cedants. The collateral takes the form of trust funds, letters of credit, or funds withheld (all discussed below). Their collateral requirements are the subject of much discussion in the insurance com-

1. *See, e.g.*, Report of the National Association of Insurance Commissioners (NAIC) and the Federal Reserve System Joint Troubled Company Subgroup: A Comparison of the Insurance and Banking Regulatory Frameworks for Identifying and Supervising Companies in Weakened Financial Condition app. A-3 (Apr. 19, 2005) ("Credit for reinsurance is heavily regulated through statutes, regulations, statutory accounting and reporting rules."), *available at* www.federalreserve.gov/boarddocs/staffreports/naicfrs/naicfrs.pdf.

2. *Id.*

munity, even to the point of whether the requirements are necessary in any form.

Unauthorized reinsurers, including both foreign reinsurers and those domiciled in but not licensed in the United States, can participate in the U.S. marketplace on an authorized basis without collateral requirements simply by becoming licensed and consequently admitted in the states in which they wish to do business. Unauthorized reinsurers post collateral pursuant to regulator-imposed rules, which can be satisfied, at least partially, by contractual arrangements with cedants. As stated by New York State Insurance Superintendent Eric Dinallo, "[N]othing prevents insurance companies from negotiating their own collateral requirements or from choosing to do business with reinsurers who are willing to put up collateral, if that is what the insurance company prefers."[3]

The insurance regulatory scheme in the United States is unique in comparison with other countries discussed in this paper because the business of insurance in the United States has historically[4] been regulated by the insurance departments[5] of the respective states. As more fully discussed later in this paper, the authority of states to regulate insurance, to the exclusion of the federal government, was unqualifiedly confirmed initially in the 1868 case of *Paul v. Virginia*[6] and then codified in the McCarran-Ferguson Act (MFA), which included certain exceptions related to antitrust activities. "[I]t has been the insistent position of the Congress that regulation of the insurance industry be left to the states."[7] With Congress going to great lengths to avoid federal regulation of insurance, the insurance departments of the various states developed their own sets of rules and procedures for protection of policyholders through solvency, rate, and form regulation.

The reinsurance collateral debate does not involve issues of antitrust, and there are no legal issues involving the courts. The study of insurance

3. *N.Y. Moves to Level Playing Field on Collateral for All Reinsurers*, Ins. J. (Oct. 18, 2007), *available at* www.insurancejournal.com/news/national/2007/10/18/84395.htm.

4. There was an exception of a period of less than one year, following the case of *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which prompted enactment of the McCarran Ferguson Act of 1945, 15 U.S.C. §§ 1011–1015 (MFA), confirming the federal grant of power to the states to regulate the business of insurance.

5. "Insurance commissions were established by New Hampshire in 1851 (N.H.Laws 1851, c. 1111); by Massachusetts in 1852 (Mass. Laws 1852, c. 231); by Rhode Island in 1855 (R.I. Pub. Laws, October 1854, p. 17, § 17). By 1890, when the Sherman Act became law, seventeen states had established supervisory authorities. Patterson, *The Insurance Commissioner in the United States* (1927) p. 536, n. 62." *South-Eastern Underwriters*, 322 U.S. at 584 (Jackson, J., dissenting).

6. 75 U.S. 168 (1868).

7. Mackey v. Nationwide Ins. Co., 724 F.2d 419, 423 (4th Cir. 1984).

regulation often involves tension between agencies and the courts, but there are no such issues in this debate. This debate is one involving economics and politics and, in particular, the efforts of unauthorized reinsurers to effect insurance regulatory reform in the United States. The tension in this debate exists between reinsurers from various countries and the insurance regulators of the individual U.S. states.

Alien reinsurers argue that if collateral requirements were eliminated, the increased capacity would be $2 billion, or 1.3 percent globally.[8] These costs and related discrimination arguments from alien reinsurers serve as the major points of contention in the debate over whether alien reinsurers should be required to post such collateral. These same alien reinsurers make no reference regarding who is really picking up the cost of the reinsurance collateral requirements.

> There is no doubt that there are costs involved with maintaining [letters of credit] and trust funds and while the actual (cost) is funded by the reinsurer, it is built into the price paid by the buyer for reinsurance coverage. Many U.S. ceding insurers view these balances as a small price to pay for the added security provided by collateral, whatever form it takes.[9]

1. Prominence of New York State in the Collateral Debate

The insurance regulations of New York State are especially important in the analysis of the reinsurance collateral debate. New York is widely accepted as a leader in the field of insurance regulation in the United States, and through its Appleton Rule[10] controls what insurance companies in other states can and cannot do. New York City is widely regarded as the financial hub of the world, and "New York remains the most prominent reinsurance business center in the United States."[11] For the foregoing reasons, the insurance regulations of New York, and regulatory reform proposals from New York's insurance regulator, will be used as examples in this analysis of the reinsurance collateral debate.

8. National Association of Insurance Commissioners Reinsurance Task Force of the Financial Condition (E) Committee, U.S. Reinsurance Collateral White Paper 28 (Mar. 5, 2006) [hereinafter NAIC].

9. *Id.* at 27.

10. This provision of the New York Insurance Code requires insurance companies licensed in that state to follow specific New York laws even when operating outside of the state. N.Y. Ins. Law § 1106 (1984). Violation can result in the suspension or termination of the operations of a New York–licensed insurer. *Id.*

11. Robert M. Hall, *Pre-Answer Security and Reinsurance Arbitrations*, XII Mealey's Reinsurance Rep. No. 18, at 20, *available at* www.robertmhall.com/articles/Pre-AnswerArt.htm.

2. Current New York State Insurance Regulations: Regulation No. 20 (11 N.Y.C.R.R. 125)

In order for an unauthorized reinsurer to be "accredited" or permitted by the New York State Department of Insurance (NYSID) to operate as an authorized reinsurer, it must meet the collateral requirements set forth in Regulation No. 20, which states in pertinent part as follows:

> (c)(1) In the case of an alien [i.e., unauthorized] assuming insurer, not otherwise entered as a United States branch in another state, such assuming insurer meets the standards of solvency required of licensed insurers of like character, such terms and conditions as prescribed by the superintendent, and otherwise complies substantially with related requirements, and such assuming insurer has deposited and continues to maintain in one or more New York state banks and/or members of the Federal Reserve System located in New York state, a trust fund or trust funds, constituting a trust surplus, in cash, readily marketable securities, or letters of credit, in an amount of not less than $20,000,000 for the protection of the United States insurers, and United States beneficiaries under reinsurance policies (contracts) issued by such alien assuming insurers. Such trusteed amount shall be in addition to any other trust fund required by this department, including, but not limited to, a trusteed amount at least equal to the liabilities attributable to United States insurers and United States beneficiaries under reinsurance policies (contracts) issued by such alien assuming insurers.[12]

Regulation 20 references two specific categories of collateral (discussed below), followed by another category of collateral required specifically of a "Lloyd's plan."

One category is the "trusteed amount" in the sum of liabilities under individual reinsurance contracts with ceding insurers. Individual ceding companies often require such collateral in their respective, private reinsurance arrangements with reinsurers, both authorized and unauthorized, and this category of collateral is not the subject of regulation in New York.

The other category of collateral is the trust surplus funds in the amount of $20 million per unauthorized reinsurer as a surplus over and above each unauthorized reinsurer's liabilities under individual reinsurance contracts. For unauthorized reinsurers (other than Lloyd's (previously "Lloyd's of

12. 11 N.Y.C.C.R. 125 (2003), *available at* www.ins.state.ny.us/r_finala/2003/pdf/fr20a9tx.pdf. A proposed revision would qualify the regulation's initial reference to *alien assuming insurer* to mean "non-U.S. assuming insurer" and require the balance of subsection (c)(1) to substitute *non-U.S. assuming insurer*. This is presumably a response to the sensitivity of European reinsurers who take offense at the word *alien*. *See* www.ins.state.ny.us/press/2007/rp071018rein.pdf (proposed revision). This proposed change is in addition to more sweeping reforms proposed by NYSID and discussed later in this article. *See infra* Part II.F.

London")), it is this trust fund requirement that is the crux of the reinsurance collateral debate.

Finally, in the case of "a group located outside the United States whose members consist of individuals incorporated assuming insurers who are not engaged in any business other than underwriting as a member of the group and individual unincorporated assuming insurers" (referring to Lloyd's-style reinsurers without mentioning any company or market names), there is an additional requirement of trust surplus funds in the amount of $100 million.[13] Lloyd's has always been a market, not a company or insurance corporation, and it thus appears that this section refers to Lloyd's. Thus, Lloyd's is required to post collateral equal to (a) liabilities under reinsurance contracts, plus (b) trust surplus funds in the amount of $20 million, plus (c) trust surplus funds in the amount of $100 million. Therefore, as discussed later in this section, it is not surprising that Lloyd's is the most vocal opponent of U.S. reinsurance collateral requirements and is the leader of the pan-European effort to abolish such requirements.

New York law permits several methods of collateralizing reserves for unauthorized reinsurers. The most popular methods are single beneficiary trusts and letters of credit (LOCs), followed by multiple beneficiary trusts, funds held, and ceded balances options. "The vast majority of reinsurance collateral is funded via trusts or LOCs that are negotiated with an individual beneficiary."[14] It is presumed that reinsurers, cedants, and state insurance regulators take account of those private dealings when determining what balance of funds must be trusteed with the state insurance regulators.

a. Single Beneficiary Trusts—Under the NAIC model laws and those of New York and other states, a ceding insurer obtains credit for reinsurance ceded to an unauthorized reinsurer to the extent of funds held in a trust acceptable to the insurance regulator for the exclusive benefit of the ceding insurer as security for the payment of obligations under the reinsurance agreement. This vehicle is known as a single beneficiary trust (SBT).

b. Letters of Credit—"The use of LOCs has become predominant over trusts, as the maintenance costs for LOC's have fallen"[15] and cedants prefer the relative ease of negotiating LOCs. Cedants and regulators prefer LOCs because they are backed by the credit of the bank, not the reinsurer. A failure of a bank to honor an LOC exposes the bank to sanctions under federal law.

13. 11 N.Y.C.C.R. 125 § 125.4(c)(5)(d)(1)(iv)(a), *available at* www.ins.state.ny.us/r_finala/2003/pdf/fr20a9tx.pdf.

14. NAIC, *supra* note 8, at 10.

15. *See* truthaboutlloyds.com, a website of the American Names Association, which distinctly has the tone and orientation of an advocate in favor of American Names and against Lloyd's. *See* http://truthaboutlloyds.com.

According to the NAIC *U.S. Reinsurance Collateral White Paper* report (*NAIC Collateral White Paper*), the acquisition cost of an LOC is between forty and sixty basis points.[16] Also, there are associated bank charges from drawing down an LOC.[17] These are significant enough to incline a reinsurer to pay a claim from other available funds. This further advances the convenience interests of cedants and regulators because the party that draws down on an LOC has some administrative paperwork in preparing sight drafts and cover letters and in tracking deadlines. When a reinsurer pays with separate funds, the beneficiary/cedant can simply advise the reinsurer and issuing bank that the cedant releases any interest in the LOC, or the LOC can remain in place to secure other, or future, obligations of the same reinsurer to the same cedant.

c. Multiple Beneficiary Trusts—Multiple beneficiary trusts (MBTs) are another means by which unauthorized reinsurers may meet their collateral requirements. These are more expensive to administer; and, as mentioned above, in addition to the calculated reserve requirements per individual reinsurance contract, unauthorized reinsurers are required to fund a trust surplus account of $20 million,[18] with Lloyd's syndicates collectively funding an additional trust surplus reserve account in the amount of $100 million.[19] As an illustration of the market share of Lloyd's, as of December 2004, Lloyd's credit for reinsurance MBTs were valued at $7.39 billion, compared with non-Lloyd's MBTs valued at $7.14 billion.[20] This market share helps explain why Lloyd's is so prominent in making demands of the insurance regulators in the United States to change their regulations with respect to reinsurance collateral requirements.

Unlike LOCs, MBTs are not easy for cedants or liquidators to negotiate. The *NAIC Collateral White Paper* notes the following difficulties:

> Companies must go through the entire claims process first in order to put a claim into the trusts. For example, liquidation officers have indicated that the process of collecting from a MBT is extensive, expensive and time consuming. Unlike a LOC, which can be quickly and easily drawn and collected upon, it can take years and significant expense to collect from a MBT. The process of collecting from Lloyd's MBT is first to meet the contractual requirements for submitting proofs of loss, which almost no reinsurer honors for an insolvent cedent, requiring many rounds of documentation and

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16. NAIC, *supra* note 8, at 9–27. A basis point is a unit of measure used in finance to describe the percentage change in the value or rate of a financial instrument. One basis point is equivalent to 0.01 percent (1/100th of a percent), or 0.0001 in decimal form.
17. *Id*. at 14.
18. 11 N.Y.C.C.R. 125.
19. *Id.*
20. NAIC, *supra* note 8, at 10, citing data received from the New York State Department of Insurance as of Dec. 31, 2004.

> explanation far beyond contractual requirements. When the cedent finally loses patience at this vexatious conduct, an arbitration demand is the only resort. After getting an award (which can take 18 months to 2 years), they must file for a confirming award in a court and weather possible appeals. Once you have an unappealable award you must initially try to collect from Names, and then the Central Fund, all without success, and then finally you try to access the Lloyd's MBT. What liquidator or cedent in their right mind would go through that process.[21]

d. Funds Held Accounts—For the purpose of a reinsurer satisfying the required trust surplus accounts, a reinsurer can agree to the "funds held" option. Rather than funding an LOC in a private arrangement with a cedant or placing trusteed accounts with a regulator, reinsurers can agree to permit cedants to maintain premiums at the ceding company level. Cedants in this case do not remit funds to the reinsurer via an immediate payment or bordereau[22] credit transaction. This can involve considerable opportunity cost for the reinsurer because the latter loses the potential investment income on the premium it would have otherwise received in the normal course of business (unless netted out partially or wholly in a bordereau transaction). Thus, the funds held option must be carefully weighed against the collateral alternatives discussed in this section.

B. *Proposed Reinsurance Regulatory Reform in the United States*

The proposed National Insurance Act of 2007[23] was introduced in both houses of Congress with support from both sides of the aisle. The goal was to establish an optional federal charter (OFC) allowing insurance companies to choose to be regulated by a newly created federal insurance regulatory authority instead of by state insurance departments pursuant to state law. The sponsors reintroduced this landmark legislation for the purpose of bringing "uniformity and predictability to how life and property/casualty insurance is regulated."[24] "Neither the House nor the Senate version made it out of committee."[25]

The proposed OFC would provide insurers with an option, or alternative, to be regulated by the federal government rather than multiple

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21. *Id.* at 13. NYSID Regulation No. 20 specifically requires 100 percent collateral of reinsured obligations with respect to cedants in liquidation.

22. A bordereau is a report by an insurance company to its reinsurer listing and summarizing certain insurance transactions affecting the reinsurance.

23. S. 40, 110th Cong. (2007); H.R. 3200, 110th Cong. (2007).

24. Press Release, John E. Sununu, Sununu, Johnson: Marketplace Demands Insurance Regulatory Reform. Senators Re-introduce "National Insurance Act" to Respond to the Needs of America's Insurers and Consumers (May 24, 2007), *available at* http://sununu.senate.gov/pressapp/record.cfm?id=275014.

25. *Top Insurance Stories in 2007*, Ins. J. (Dec. 31, 2007), *available at* www.insurancejournal.com/news/national/2007/12/31/86018.htm.

state governments. It is assumed that insurers choosing to be regulated by one supervisor would experience benefits in terms of saving on costs and time in the filing of rates and forms, delivering insurance products, and generally complying with various other regulations promulgated by state regulators. The federal government would provide charters to companies and licenses to agents and brokers and regulate the business of a national insurer. Using the dual federal banking system as a model, the act proposed that the states continue taxing the business of insurance conducted within their borders. In addition, state law would regulate guarantee funds, unclaimed property under escheat laws, participation in assigned risk plans and other mandatory residual market mechanisms, and compulsory coverage of workers' compensation or motor vehicle insurance.

Included within the Senate proposal[26] is a section contemplating credit for reinsurance, as follows:

> **1222. Credit for Insurance Ceded by a National Insurer or Federally Licensed Reinsurer**
>
> (a) Credit for Insurance Ceded to a National Insurer or a Federally Licensed Reinsurer—A national insurer may establish an asset or reduce its liabilities, to the extent of such liabilities, for insurance ceded to another national insurer or federally licensed reinsurer.
> (b) Other Asset or Reduction from Liability for Insurance Ceded—A national insurer may establish an asset or reduce its liabilities, to the extent of such liabilities, for insurance—
> (1) that is ceded to—
> (A) a State insurer;
> (B) a United States branch entered through a State; or
> (C) a non–United States insurer; and
> (2) if such insurance is ceded consistent with the standards established by the Commissioner pursuant to subsection (c).
> (c) Regulation—The Commissioner shall establish, by regulation, standards governing insurance ceded by a national insurer, as the Commissioner may determine to be necessary to protect the policyholders of a national insurer.

The House of Representatives version of the bill[27] is similar.

These proposals are relevant to the collateral debate. Both proposed versions of the National Insurance Act of 2007 contain references to "collateral,"

26. S. 40, 110th Cong. (2007).
27. H.R. 3200, 110th Cong. (2007).

but not in the context of credit for reinsurance. Cedants (referred to in the bills as "national insurers") may rely on reinsurance provided by "another national insurer or federally licensed reinsurer."[28] The source of the reinsurance (domestic or foreign) does not matter provided it "is ceded consistent with the standards established by the [to-be-established National Insurance] Commissioner."[29] These standards are addressed to security "in order to protect the policyholders of a national insurer" and are to be established by regulation.[30]

It should be noted that the OFC is supported by the Reinsurance Association of America,[31] which has historically been a proponent of collateral requirements.[32]

There is no language in either version of the proposed OFC to suggest that a federal charter would lead to suppression of U.S. collateral requirements for alien reinsurers. To the contrary, the bills, as presently introduced, literally set forth a framework for a federal regulator to demand collateral from unauthorized reinsurers. This is consistent with the treatment of reinsurance under current state regulation, not a major departure to be embraced by alien reinsurers hoping for a break from collateral requirements.

C. *Reinsurance Regulatory Scheme in the European Union*

The business of primary or direct insurance[33] has some history of regulation in Europe, but the business of reinsurance has been mostly unregulated. Now, reinsurance regulation in Europe is experiencing a convergence.[34]

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28. *E.g.*, S. 40, 110th Cong. § 1222(a) (2007).
29. *Id.* § 1222(b)(2).
30. *Id.* § 1222(c).
31. *See* Press Release, *supra* note 24. Other supporters of the National Insurance Act, according to this press release, include "the Agents for Change, the American Bankers Association, the American Bankers Insurance Association, the American Council of Life Insurers, the American Insurance Association, the Council of Insurance Agents and Brokers, the Financial Services Forum, the Financial Services Roundtable, the Life Insurers Council, the National Association of Independent Life Brokerage Agencies." *Id.*
32. *See, e.g.*, Letter from Reinsurance Association of America to John Oxendine, Comm'r, NAIC (Sept. 21, 2007) (on file with author).
33. The first insurance company in England was established in 1696. This was a company called Contributors for Insuring Houses, Chambers or Rooms from Loss by Fire by Amicable Contributionship (Amicable Contributionship). It was nicknamed "Hand-in-Hand" because of its fire mark, one hand clasping another, symbolizing aid and assistance. Mutual Assurance Society of Virginia, *available at* www.mutual-assurance.com/newInsInAmerica.asp (last visited Oct. 20, 2008).
34. One commenter refers to this as a "global regulatory maelstrom" (tumultuous changes in global regulation of (re)insurance) spreading across Europe. The phrase implies sweeping and universally accepted change, which is not necessarily the case. *See* David Howell, The Global Regulatory Framework, Address at the Global Conference of Actuaries (Feb. 15, 2005), *available at* www.ficci.com/media-room/speeches-presentations/2005/feb/actuaries/feb15-actuaries-David-Muiry.ppt.

This is due to approval of a November 2005 law known as the Reinsurance Directive.[35] The approval was given by the European Parliament, which is the legislative body of the European Union.

The Reinsurance Directive is the result of E.U. efforts toward a unified regulatory and supervisory market for reinsurance. If the latest revised schedule holds, the majority of the E.U. member states will incorporate the Reinsurance Directive into their respective national laws no later than October 2008.

The Reinsurance Directive contains three essential provisions, including (1) the establishment of a single "passport" to Europe,[36] (2) the elimination of collateral requirements within the European Union,[37] and (3) prudential[38] rules for the supervision of reinsurance companies and finite reinsurance.[39]

In studies known as Solvency I and Solvency II, commissioned by Europe's executive body, the European Commission, the focus was on prudential rules relating to assessment of risk management, finance methods, accounting, supervision, actuarial analysis and practices, and financial reporting. Studies have been protracted and frustrated with compromise, an example of which is inclusion in the Reinsurance Directive of "optional"

35. Council Directive 2005/68/EC, 2005 O.J. (L 323) 1 [hereinafter Reinsurance Directive]; *see also* Amending of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_323/l_32320051209en00010050.pdf.

36. The passport is the ability to conduct reinsurance business throughout Europe on the basis of a single authorization from a reinsurer's home member state. Reinsurance Directive, *supra* note 35, art. 4.

37. Collateral requirements are referred to as "pledged assets" in Article 32 of the Reinsurance Directive. "Member States shall not retain or introduce a system with gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions if the reinsurer is a reinsurance undertaking authorized in accordance with this Directive or an insurance undertaking authorized in accordance with Directives 73/239/EEC or 2002/83/EC." *Id*. art. 32. This arguably leaves open the possibility of requiring collateral of U.S. reinsurers. These pledged assets are sometimes referred to as "deposit accounts." *See*, *e.g.*, Ralph Vogelgesanga & Matthias Kubicek, *Toward a Global Approach to Reinsurance Regulation*, Geneva Papers 32, 413–25 (2007), *available at* www.palgrave-journals.com/gpp/journal/v32/n3/full/2510136a.html.

38. *Prudential* is defined as exercising prudence, good judgment, or common sense. Reinsurance Directive, *supra* note 35, art. 2.

39. *Finite reinsurance* is defined in Article 2(q) of the Reinsurance Directive as "reinsurance under which the explicit maximum economic risk transferred, arising both from a significant underwriting risk and from a timing risk transfer, exceeds the premium over the lifetime of the contract by a limited but significant amount, together with at least one of the following two features: (i) explicit and material consideration of the time value of money, (ii) contractual provisions to moderate the balance of economic experience between the parties over time to achieve a target risk transfer." *Id.*, art. 2(q).

provisions relating to finite reinsurance.[40] According to one observer, this "is but the latest example of the sheer impossibility of Europe agreeing on a common vision pertaining to specific aspects of reinsurance."[41]

The Reinsurance Directive contains three provisions concerning reinsurance dealings with third countries, such as the United States. These are Article 26 of Title III, Conditions Governing the Business of Reinsurance; and Articles 49 and 50 of Title VI, Reinsurance Undertakings Whose Head Offices Are Outside the Community and Conducting Reinsurance Activities in the Community.

Article 26, Cooperation Agreements with Third Countries, provides for the concluding of cooperation agreements with competent authorities of third countries regarding the exchange of information.[42] The article provides for guarantees of secrecy for the disclosure of information. In the United States, the competent authorities are the insurance regulators of the various states. Such exchange of information is intended only for the performance of the supervisory tasks of the respective regulatory bodies.

Article 49, Principle and Conditions for Conducting Reinsurance Business, forbids a member state from applying to reinsurers having their head offices outside the European Union and operating in the European Union, a provision resulting in "treatment more favourable than that accorded to reinsurance undertakings having their head office in that Member State."[43]

Article 50, Agreements with Third Countries, sets forth rules by which the European Commission may submit proposals to the European Council for the negotiation of agreements with third countries regarding the means of exercising supervision of (a) reinsurers that have their head offices in a third country and conduct reinsurance business in the European Union and (b) reinsurance undertakings that have their head offices in the European Union and conduct reinsurance business in a third country.[44] In particular, these agreements shall "seek to ensure under conditions of equivalence of prudential regulation, effective market access for reinsurance undertakings in the territory of each contracting party and provide for mutual recognition of supervisory rules and practices on reinsurance."

40. Recital No. 31 of the Reinsurance Directive states thus: "This Directive should be applicable to finite reinsurance activities; therefore, a definition of finite reinsurance for the purposes of this Directive is necessary; owing to the special nature of this line of reinsurance activity, the home Member State should be given the option of laying down specific provisions for the pursuit of finite reinsurance activities. These provisions could differ from the general regime laid down in this Directive on a number of specific points." *Id*. recital no. 31.

41. Michael Haravon, *The Harmonization of European Reinsurance: In Whose Interest?* Nat'l Underwriter, Prop. & Casualty / Risk & Benefits Mgmt. Ed. (Sept. 5, 2005), *available at* www.milbank.com/en/NewsEvents/NewsByPractice/Reinsurance+and+Insurance+Articles.htm.

42. Reinsurance Directive, *supra* note 35, art. 26.

43. *Id*. art. 49.

44. *Id*. art. 50.

This article also provides for ensuring that the competent authorities of the contracting parties "are able to obtain the information necessary for the supervision of reinsurance undertakings."

Finally, Title VII, Subsidiaries of Parent Undertakings Governed by the Laws of a Third Country and Acquisitions of Holdings by Such Parent Undertakings, provides for the provision of information from member states to the commission and addresses third-country treatment of E.U. reinsurance undertakings.[45] Article 52 requires that member states "inform the Commission of any general difficulties encountered by their reinsurance undertakings in establishing themselves and operating in a third country or carrying on activities in a third country."

Prior to the Reinsurance Directive, reinsurance regulation in Europe had not been uniform. For example, "France has enacted only a few supervisory rules that essentially regulate the market entry of reinsurance entities, and some of which have not even been fully implemented."[46] France has used collateral as a proxy to direct reinsurance regulation, creating extra costs for foreign reinsurers doing business in that country.[47] "Hannover Re, a German company, for example, estimated that additional charges and administrative costs linked to collaterals added $618 million annually to operating costs."[48]

This has resulted in criticism of France as being discriminatory against reinsurers from other E.U. member states. Sufficient pressure was applied by the European Union to force France to agree to abandon its collateral requirements effective October 2008.[49] It remains to be seen whether France will cooperate.

As for reinsurance in the United Kingdom, change has come and more change is certain. Lloyd's and the London insurance market in general have gone from no external regulation[50] to regulation by FSA starting in 2002.

45. *Id.* arts. 51, 52.

46. Haravon, *supra* note 41.

47. Countries requiring collateral include the United States, Canada, France, Germany, and Portugal. As planned, France and Portugal eliminate collateral requirements in October 2008, per anticipated full implementation of the Reinsurance Directive.

48. Haravon, *supra* note 41 (citing La Trib. (Feb. 12, 2004)). Compare to the reported $500 million transactional costs for all alien reinsurers combined to operate in the United States. News Centre, Credit for Reinsurance, What It Means for Lloyd's, *available at* www.lloyds.com/News_Centre/Credit_for_reinsurance/What_it_means_for_Lloyds.htm.

49. Conspicuous by its absence is any prohibition in the Reinsurance Directive preventing member states from applying collateral requirements to non-E.U. businesses. *See* Freshfields Bruckhaus Deringer, Insurance and Reinsurance News (July 2005), *available at* www.freshfields.com/publications/newsletters/sectors/iandr-news/12310.pdf.

50. As stated by one Name, "We know the 300-year-old history; it was like the monarchy. That was our mistake. Lloyd's failed us and it should not be allowed to regulate itself any more." *See* Cathy Gunn, Nightmare on Lime Street: Whatever Happened to Lloyd's of London? 148 (Smith Gryphon Publishers, London, 1993).

Only time will tell what has really changed at Lloyd's other than its name (as stated, it is now simply "Lloyd's"). As a result, and with particular regard to Lloyd's, it may be premature for U.S. regulators to assume that the business of reinsurance is now regulated to such an extent in the United Kingdom, France, and the European Union generally that American regulators should have confidence that the solvency of their insurers is protected, thus permitting a wholesale abandonment of reinsurance collateral requirements.

D. *Framing the Debate: Competing Arguments Regarding Reduction or Elimination of Reinsurance Collateral in the United States*

1. The Level Playing Field Issue

The most frequent phrase encountered in the reinsurance collateral debate is *level playing field*. Alien reinsurers claim that the U.S. collateral rules unfairly discriminate against them such that there is not a level playing field.[51]

State law requires the posting of collateral if a cedant wants or needs to take credit for reinsurance transactions. New York's Regulation 20 mandates collateral from alien and domestic unauthorized reinsurers, but ceding companies, at their own discretion, can waive it. However, without such collateral, the ceding company is not permitted to take advantage of the accounting and statutory benefits of "credit for reinsurance" as against surplus. Breaking it down, it appears that the focus of alien reinsurers is the requirement of trusteed funds in the amount of $20 million and, in the case of Lloyd's, an additional $100 million.

The U.S. response to this part of the collateral debate is discussed throughout the balance of this paper.

a. Origin of E.U. Reforms: E.U. Member State vs. E.U. Member State—The E.U. Reinsurance Directive includes suppression of an E.U. reinsurance company collateral requirement because the reinsurers in the member states desire to eliminate collateral for commercial or economic reasons. The provision was not an inevitable result of the single passport to Europe, which might be viewed as a corollary to an optional federal charter in the United States. The prohibition of the collateral requirement in Europe came as a result of the desired integration of the European market. Maintenance of collateral requirements among E.U. members impedes the freedom of services within the European Union; thus, the Reinsurance Directive makes much sense for Europe.

51. If alien reinsurers are making distinctions between the required trusteed funds and the collateral demanded by cedants in their respective contractual arrangements, it is in private conversations and not making it to the press.

b. E.U. Hope for Transport of E.U. Experience to the U.S. Reinsurance Collateral Debate—Articles commenting upon this collateral debate make statements such as "U.S. and foreign reinsurers agree that the dispute over the fairness of U.S. collateral requirements for alien reinsurers can be mitigated by the availability of an optional federal charter."[52] These articles do not give objective reasons why this should be so. Alien reinsurers certainly cannot point to their own experience with reinsurance reform and claim that they have done away with reinsurance collateral requirements among themselves or that they have a comprehensive reinsurance regulation for all of Europe. Such articles thus appear to make conclusory statements or arguments and do not fairly advance the debate.

Despite unmet and rescheduled deadlines, the apparent stubbornness of France, the difficulty in building sufficient consensus and momentum, and other shortcomings, the E.U. reinsurers claim to have made great strides toward uniformity in their approach to reinsurance regulation. Alien reinsurers hope to expand that perceived momentum to the United States with a design to suppress, or eliminate, collateral requirements, as if the United States should want "to be like" the Europeans.

Credit for reinsurance laws, with variations from state to state, are at the heart of the collateral controversy. The European Union has threatened action against the United States before the World Trade Organization unless the United States drops its strict rules governing alien reinsurers. As early as September 11, 2001, Lloyd's chairman Lord Peter Levene was calling for a significant overhaul of the U.S. trust fund requirements relative to non-U.S. reinsurers.[53] "Following the Sept. 11 attacks Lloyd's says it had to come up with over $3 billion in 6 months."[54] Levene noted as follows:

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52. David Pilla, *Agreeing to Disagree: In a Best's Review Roundtable About U.S. Collateral Requirements, Reinsurers Clash on U.S. Regulation, but United on the Need for Universal Rules*, Best's Rev., Dec. 1, 2006, at 33. Contrast the more logical argument that E.U. reforms regarding collateral might have some impact on U.S. reforms regarding collateral, short of any suggestion that this would be accomplished through enactment of a federal charter in the U.S. *See* Meg Green, *Alien Forces at Work (Regulation: Reinsurance/Capital Markets)*, Best's Rev., Aug. 1, 2005, *available at* http://goliath.ecnext.com/coms2/gi_0199-4613154/Alien-forces-at-work-Regulation.html. "Now that the European Union has agreed to a single reinsurance protocol to regulate the industry, some say the United States will face increased pressure to simplify its regulatory structure, including reducing or eliminating its collateral requirements for foreign reinsurers doing business within its borders." *Id.; see also* A.M. Best Co., Inc., Face to face: The Forthcoming Reinsurance Directive Will Be a Factor as Renewal Talks Begin in Monte Carlo in September (2006), *available at* www.thefreelibrary.com/Face+to+face:+the+forthcoming+Reinsurance+Directive+will+be+a+factor . . . -a0149508523. "The Reinsurance Directive will end collateralization within the European Union, something that is likely to strengthen the argument from Europe for an end to collateralization requirements in the United States." *Id.*

53. *Insurers Again Call for U.S. Reinsurance Collateral Changes at World Insurance Forum*, Ins. J. (Feb. 24, 2006), *available at* www.insurancejournal.com/news/international/2006/02/24/65886.htm.

54. *Id.*

> [T]he reinsurance industry is essentially global and as such 80 percent of the reinsurance utilized by the U.S. primary market is supplied by companies outside of the U.S. Alien insurers are being discriminated against and that is totally unacceptable. . . . What is happening at the moment amounts to protectionism and the market wants to see a level playing field.[55]

Those who closely follow this collateral debate view both Lloyd's and the U.K. lobby in general as the primary sources for the anticollateral campaign in the United States.[56] As discussed in Part II.F, New York State's insurance regulator is listening and proposing reforms that should meet most of the demands of the alien reinsurers.

(i) Unfair, Anticompetitive Regulation—Alien reinsurers argue that maintaining collateral, reserved to burdensome "gross liabilities" standards, is unfair and anticompetitive. When assets are not allocated where they are most needed, the result "is inefficient, costly, and gives an unfair preference to some customers at the expense of others."[57] The gross liabilities argument may not be accurate with respect to trust funds as the combined exposures of each alien reinsurer, on a contract-by-contract, exposure-by-exposure basis, would likely far exceed the statutory collateral requirements, and collateral balances are not always effectively monitored by the various states. On the other hand, the gross liabilities argument may be accurate with respect to cedants in receivership or liquidation as 100 percent collateral is required from unauthorized reinsurers in such cases. This allocation issue goes to the diversification point addressed below.

Those in favor of the status quo argue that "the purpose of the collateral requirements is not simply to have assets within the United States, but to have them where they are accessible to the ceding company and to regulators if there is a dispute or if the reinsurer is simply unwilling or unable to pay."[58] Collection difficulties would be exacerbated if assets were located outside the United States, requiring pursuit under foreign judicial systems with the associated delays and added expense of obtaining and enforcing judgments on foreign soil. The issue of enforcement of foreign judgments will be discussed in greater detail.

"The U.S. stakeholder's view is that the U.S. credit for reinsurance system is not discriminatory because it provides options that are available to both U.S. and non-U.S. entities."[59] Non-U.S. reinsurers have alternatives.

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55. *Id.*
56. *See* truthaboutlloyds.com, *supra* note 15.
57. NAIC, *supra* note 8, at 32.
58. *Id.*
59. *Id.* at 37. Thus, it is not a violation of the 1977 World Trade Organization (WTO) regime for liberalizing trade in financial services, including insurance and reinsurance. WTO has no jurisdiction over state regulatory authorities and does not tell governments how to

They can domesticate in the United States, and they can become licensed in the United States. Due to the high costs of licensing and taxes, these alien reinsurers prefer to operate offshore as unauthorized reinsurers. This comes at the cost of posting collateral when dealing with state regulators in the United States.

Lloyd's does not have the option of domesticating or becoming licensed in the United States because of its unique structure, i.e., a market rather than a company. The legal framework and capital structure of Lloyd's are discussed below.

(ii) Failure to Properly Reserve and Unrecoverable Reinsurance—"(U)nrecoverable reinsurance has been an ingredient in some of the largest insurance insolvencies."[60] A major component of reinsurance company insolvency is a failure to adequately reserve for losses, with prime examples being Lloyd's and HIH Insurance Group of Australia.[61]

"The British tax regime was partly to blame for the state of affairs at Lloyd's."[62] The structure of that tax regime was such that the very wealthy faced incredibly high income tax rates. It thus made sense to join Lloyd's for tax purposes, i.e., to pay cash calls and obtain favorable tax treatment based upon such participation. "'Lloyd's had not written insurance for profit for years', said one former underwriter in 1972."[63] Accordingly, at least until quite recently, U.S. insurance regulators have had mistrust for Lloyd's. It does appear that Lloyd's, under its new name and management, along with governmental oversight from the nascent FSA, has shown improvement in its business management and operations. This is likely to be influencing NYSID in its proposed reinsurance reforms.

(iii) Enforceability of U.S. Judgments Overseas—The U.S. State Department claims that there is a problem with enforcement of valid U.S. judgments in foreign jurisdictions. "[T]he law and practice in most foreign countries is not generally favorable to the prompt, predictable enforcement of U.S. civil judgments."[64] "There is no international counterpart to the 'full faith and credit' clause of the U.S. Constitution."[65] Experts engaged in assisting clients to collect from reinsurance companies in certain parts of the world struggle with first obtaining a judgment in one country;

conduct their trade policies. WTO only has a direct impact on a government's policies where disputes are brought to it for resolution. *See generally* What Is the WTO? www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

60. NAIC, *supra* note 8, at 11.

61. Sungard Ambit Erisk, Case Study: HIH Insurance (Nov. 2001), *available at* www.erisk.com/Learning/CaseStudies/HIHInsurance.asp.

62. Gunn, *supra* note 50, at 34.

63. *Id.*

64. NAIC, *supra* note 8, at 34.

65. *Id.*

then domesticating that judgment in another, where they are lucky to have some comity and uniformity of judicial systems; and finally attempting to collect on the domesticated judgment.[66]

A frequent debate topic is "the historical difficulties of collecting reinsurance recoverables from non-U.S. reinsurers in the case of a cedant's insolvency."[67] "Receivers have reported that having access to collateral makes a tremendous difference in the collection process, both in getting timely responses to billings and other correspondence as well as tempering the extreme positions taken by some reinsurers."[68]

(a) NYSID Proposed Reform: Memorandum of Understanding on Enforcement of Judgments—As part of the reforms suggested by NYSID, collateral requirements will be relaxed for alien reinsurance companies that "[a]ccept required contract terms, including consent to the jurisdiction of U.S. courts for disputes" and "[h]ave a primary regulator that has a memorandum of understanding with the NYSID that addresses information sharing and considers such matters as regulatory equivalency and enforceability of judgments."[69] Whether a memorandum of understanding that "considers such matters as . . . enforceability of judgments" equates with actual recognition and enforcement of judgments may be an open issue. Perhaps the insurance regulators in the E.U. member states will find a way to overcome the hurdles presented by international enforcement of judgments, hurdles that have not been overcome even by the ambitious Hague Choice of Court Agreements Convention.

(b) Hague Choice of Court Agreements Convention—The *NAIC Collateral White Paper*[70] suggests that the Hague Choice of Court Agreements Convention, adopted by the Hague Conference on Private International Law on June 30, 2005, may lead to better enforcement of judgments related to reinsurance contracts in the international marketplace.

Although many efforts have been made over the years to negotiate more comprehensive international treaties for mutual recognition of judgments, significant differences between legal systems have caused negotiators to narrow their focus. Nevertheless, despite its limited scope, a recently negotiated treaty represents a significant step forward because if it is imple-

66. Tom Riddell & Michael Maccallum, Presentation to UCONN School of Law (concerning the conduct of insurance company insolvency in the United Kingdom) (Mar. 15, 2007) (on file with author).

67. *NAIC Members "Dialogue" with European Commission, Supervisors: CEIOPS Hosts NAIC-EU Regulation Dialogue in Frankfurt*, Int'l Rep. no. 19 (Mar. 2005), *available at* www.naic.org/documents/committees_g_spring05_int_report.pdf.

68. NAIC, *supra* note 8, at 12.

69. *N.Y. Moves to Level Playing Field on Collateral for All Reinsurers*, *supra* note 3.

70. NAIC, *supra* note 8, at 35.

mented, it will allow the parties to control the forum in which contractual disputes are resolved.[71]

One of the limitations on the international enforcement of reinsurance treaties, at least in the United Kingdom, is the U.S. requirement of preappearance security. Most states in the United States have preappearance security statutes, the majority of which are based on the NAIC Model Unauthorized Insurers Process Act adopted in 1949. That act does not use the term *reinsurer* or *reinsurance*. It uses the term *unauthorized insurer*.[72] The purpose of the act is as follows:

> The purpose of this Act is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of beneficiaries under insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to these residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under these policies.[73]

As to a remedy, the act provides thus:

> Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the unauthorized insurer shall deposit with the clerk of the court in which the action, suit or proceeding is pending, cash or securities or file with the clerk of the court a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action; or procure a certificate of authority to transact the business of insurance in this state.[74]

Several states have adopted preappearance security statutes that are variations on the act. New York's statute requires that security be deposited with the court but provides that "the court may in its discretion, make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding."[75]

71. *Id*. at 34–35. This refers to the Hague Choice of Court Agreements Convention. *See also* Anthony J. Woodhouse, *The Importance of Jurisdiction and Choice of Law Clauses: A European Perspective*, 42 Tort Trial & Ins. Prac. L.J. 1027 (2007), which discusses service of suit and arbitration clauses, but not enforcement of judgments, in the United Kingdom, United States, Australia, and France. Pages 1031–32 discuss the English Civil Jurisdiction and Judgments Act of 1982 and the civil procedure rules, concluding that "[t]he rules on jurisdiction over insurance contracts do not apply to reinsurance."

72. Hall, *supra* note 11.

73. Model Unauthorized Insurers Process Act, NAIC Model Laws, Regulations and Guidelines 850–51, § 1.

74. *Id*. § 3.

75. N.Y. Ins. Law §§ 1101(b)(2)(G), 1213(c)(1)(A) (1985 & Supp. 1996).

A common argument against the deposit of preappearance security is that trust funds are deposited with the relevant state and are sufficient to cover the reinsurance dispute. Further, requirements for preappearance security may contravene British common law[76] and, thus, with reference to litigation involving reinsurers in the United Kingdom, could impair an otherwise enforceable judgment under the Convention.[77]

There is also a reference in the Convention to nonenforceability of asbestos claims.[78] If asbestos-related claims are not enforceable under the Convention, this could dilute any practical application of the treaty to enforcement of judgments between and among insurers and reinsurers. Under the Convention, this would not be exclusive to U.S. insurers versus non-U.S. reinsurers. It could also prevent application between and among E.U. entities.

An additional complication is the fact that the Convention only deals with private matters. "The Convention relates to private international law only and not public law matters."[79] As state-mandated insurance reserves or trust funds are not private matters, it would appear that disputes regarding reserves or trust funds would not be addressed under the Convention. In recognition of the private matter versus public matter distinction under the Convention, NAIC has commented that collateral requirements "are a fundamental part of state-based solvency regulation, (i.e., not 'private' for purposes of the Convention) and as such they fall under the 'prudential' exception in the international trade rules."[80]

With all of these international law complexities, and despite the reform proposals of NYSID, there is seemingly little chance that the demands of alien reinsurers for complete elimination of U.S. collateral requirements are going to be met, at least not anytime soon.

76. *See, e.g.*, Muhl v. Ardra Ins. Co., 6 Re. L.R. 206, No. 484 (Berm. S. Ct. 1997) (refusing to enforce a New York security award because, *inter alia*, award offended British and Bermudian notions of substantial or natural justice); *see also* Barry R. Ostrager & Mary Kay Vyskocil, Modern Reinsurance Law and Practice, § 13.02 (Pre-Appearance Security Requirements) (2d ed. 2000).

77. *See* NAIC, *supra* note 8, at 35 ("[I]ndustry analysis of case law indicates that U.S. state insurance code requirements such as pre-answer security could render a judgment unenforceable under public policy exceptions in British Common Law and Swiss Law.").

78. *Id.* at 35–36. The Convention allows jurisdictions to declare that certain matters are not subject to the Convention as adopted in that jurisdiction. Matters dealing with asbestos have been of noted concern among particular countries during negotiation of the Convention. The language of the Convention addressing insurance does not provide a specific exception to the declaration provisions, so the declaration provisions will likely take precedent over the insurance provisions and will allow a country to refuse enforcement of insurance and reinsurance obligations related to such matters. *Id.*

79. *Id.* at 36.

80. *Id.* at 35–36.

(iv) Comparison of U.S. and International Accounting Standards—U.S. insurance regulators are concerned about "the challenges in understanding the non-U.S. reinsurers' finances given the lack of a single solvency framework—or even a single system of insurance accounting."[81] The global reinsurance industry has not been able to agree on acceptable standards of prudential regulation or accounting methods. Some countries have nascent regulatory schemes with little uniformity and transparency.

There is no mutual recognition (a) among the U.S. states and (b) among E.U. states concerning acceptable accounting standards. This must be achieved before there can be any meaningful discussion regarding mutual U.S.-E.U. recognition of the respective countries' accounting practices.

There are two main accounting standards used in the United States: generally accepted accounting principles (GAAP) and statutory accounting principles (SAP). The unique differences underscore the respective underlying philosophies of the two systems. GAAP is intended to fulfill the needs of various business users of financial statements (not regulators or policyholders), whereas SAP is intended to answer the concerns of regulators and policyholders. Consequently, GAAP emphasizes the measurement of emerging earnings, comparing quarter to quarter, whereas SAP stresses measurement of the ability of a reinsurer to pay claims.

In the European Union, only the GAAP accounting standard is used. The rating agencies make reference to U.K. GAAP, E.U. GAAP, and U.S. GAAP.[82] There is no reliance upon the SAP standard for insurance accounting. Thus, any contention that all countries and regulators are on the same page with respect to accounting methods and principles is simply unrealistic.

2. The Diversification Issue

Lloyd's wants to be able to use assets currently tied up in trust funds in the United States for diversification. "It had long been argued by some that removing burdensome collateral requirements on foreign reinsurers in the United States will unlock capital that could be used to provide more reinsurance and allow companies like Lloyd's to spread risk around the world. Diversify, that is."[83]

The same argument can be made for unauthorized U.S. reinsurers that are required to post collateral, so this is not a uniquely foreign problem.

81. *Id.*

82. *See, e.g.*, Standard & Poor's Rating of the Lloyd's Market (Sept. 2007), *available at* www.lloyds.com/NR/rdonlyres/59A74C5D-E7A8-4833-AE51-7EEA53F5AA66/0/SandPFALSeptember2006.pdf.

83. David Dankwa, *Insurers Disagree with New York View of Rate Reductions as Benefit of Collateral Reduction*, InsuranceNewsNet.com, www.insurancenewsnet.com/article.asp?neid=20071029200.1_4268002b953557cc.

The argument also skirts the protective purpose of the collateral requirements. As pointed out in the *NAIC Collateral White Paper*,

> [i]f collateral requirements were reduced for qualified professional reinsurers, what would these reinsurers do with those funds earmarked to pay claims for U.S. policyholders? One likely scenario of concern to regulators is that the reinsurers would leverage those funds in writing additional business globally, thus putting at risk precisely those monies ultimately owed to U.S. policyholders.[84]

3. The Capacity Issue

NYSID has recognized this lack of reinsurance capacity. According to New York State Insurance Superintendent Dinallo, "There is a growing need for reinsurance in . . . New York to deal with risks from terrorism and from natural catastrophes such as hurricanes."[85]

New York State's proposed reinsurance reforms are intended to increase capacity by relaxing collateral requirements. It is thus not clear that foreign reinsurers need to motivate U.S. regulators to budge on the collateral issue; it seems there is sufficient internal motivation in the United States to increase reinsurance capacity.

Not all agree that New York's proposed reforms would increase capacity. "Nowhere has anybody ever shown that a reduction in collateral will ever increase capacity," said Mike Koziol, assistant vice president and counsel for the Property Casualty Insurers Association of America.[86]

4. The Pricing or Rate Reduction Issue

The more frustrated alien reinsurers become with what they see as little to no movement of the United States on its collateral requirements, the more they develop new arguments. The latest argument being debated in the insurance news circles is that collateral pushes up reinsurance pricing and rates. According to one reporter, "The reinsurance collateral debate, until now, has been framed as a capacity issue, and hardly connected to pricing decisions."[87] "What role, if any, collateral requirements play in setting reinsurance and insurance rates wasn't really part of the debate."[88]

The United States relies heavily on foreign reinsurance, including the London market. Alien reinsurers argue that collateral requirements force premiums for reinsurance to be higher than they otherwise would be and

84. NAIC, *supra* note 8, at 27.
85. *N.Y. Moves to Level Playing Field on Collateral for All Reinsurers*, *supra* note 3.
86. Roberto Ceniceros, *N.Y. to Ease Reinsurer Collateral Requirements*, Bus. Ins. (Oct. 22, 2007), *available at* http://goliath.ecnext.com/coms2/gi_0199-7295809/N-Y-to-ease-reinsurer mobile.businessinsurance.com/palm/issuearticle.vmc?articlelink=cgi-bin/article.html.pl.
87. Dankwa, *supra*, note 83.
88. *Id.*

that a reduction or elimination of collateral requirements would lead to greater availability of reinsurance to the world market, including, notably, the United States.

E. *Legacy Issues: U.S. Distrust of European Insurance Regulation and the Rebuilding of Confidence*

Some non-U.S. reinsurers argue that their regulatory schemes are as good as those in the United States. Time will tell if this is true. For any observer of the London insurance market, it will take a long time for recovery from the failed Lloyd's of London, both in terms of new regulatory control by the nascent FSA and the indelible scar on British pride. The industry will not quickly forget that a self-regulated Lloyd's of London failed to adequately reserve for "delayed manifestation asbestos, pollution and health (APH) claims," "predominantly arising from exposures in the U.S. market."[89] This was the same company that had to mortgage its own Central Fund, sell its building, and demand fresh capital infusion from its brokers and the Names to deal with unreserved losses.

Perhaps there is a little patriotism and politics, and not just economics, that go along with sizing up competitors from foreign countries. This is certainly true of the British as they struggled with whether to join the European Union and become "European." The same may hold true for how Americans view Europeans in modern-day business transactions, and no doubt this somehow colors one's thinking when considering the collateral debate.

Lloyd's of London was a venerable institution, filled with mystery. Centuries old and thought to be as solid as the Rock of Gibraltar, it disappointed thousands when it came to its agonizing end, gasping its last breath as its remaining assets, and what could be collected from market participants, were transferred to the legally independent Equitas for runoff. At the same time, the new Lloyd's was surfacing and declaiming about its "latest" self-regulatory reforms, including its new Franchise Performance Directorate.[90]

A hard and evenhanded look at the new Lloyd's reveals some truly redeeming changes, perhaps the most significant of which is the option to avoid unlimited liability. Even the Names have new options to convert to limited liability. Corporations are now eligible for membership, and,

89. *See* Scott Moser, Equitas CEO, Presentation to the University of Connecticut School of Law Insurance Law Center's London Insurance Markets Course in London (Mar. 12, 2007), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=gregory_arnold.

90. Guy Carpenter, The Lloyd's Market in 2004, at 16, *available at* www.guycarpenter.com.

of course, they have limited liability as the only option.[91] To this extent, any argument that Lloyd's may be arrogant in demanding elimination of collateral in the United States when it demands collateral of its Names is greatly diluted. The syndicates are still required to place trust funds into the Lloyd's Central Fund, but at least the individual members, the Names, no longer face personal bankruptcy in the event of a syndicate failure.

The Lloyd's market and its syndicates have been rated by one or more of the rating agencies since October 1997. These agencies include A.M. Best, Fitch Ratings,[92] Moody's, and Standard & Poor (S&P). Moody's rates the syndicates but not the market.

1. Lloyd's Market Ratings

The exposure of the various syndicates is partially mutualized through the vehicle of the Lloyd's Central Fund. The Lloyd's market ratings apply to all business written by all syndicates post-1992, the year the long-tail exposures of Lloyd's of London, especially asbestos exposures, were reinsured into Equitas. "As a result of implementation of phase one of the Equitas agreement with National Insurance Company, Lloyd's exposure to uncertainty related to Equitas has been substantially reduced,"[93] leading to A.M. Best's upgrading its financial strength rating (FSR)[94] for Lloyd's from A− (Excellent) to A (Excellent) on July 19, 2007. All of the rating agencies that rate the Lloyd's market have given it high ratings.[95]

2. Lloyd's Syndicate Ratings

Although market ratings are the principal measure of financial strength for those analyzing the strength of Lloyd's, the demand for syndicate-specific information has increased. S&P does not deem syndicate-specific FSRs to be meaningful. It argues that the effective mutualization of all market risks through the Central Fund means that, for Lloyd's, the defaulting entity

91. *Id*. at 3. In 2004, the capital base of Lloyd's had limited liability corporate vehicles supplying 87.5 percent of the market's capacity and unlimited liability Names the remaining 12.5 percent. *Id.*

92. *See* Lloyd's website, www.lloyds.com/search/Search.aspx?q=Fitch.

93. *See* A.M. Best, 2007 Special Report: Lloyd's—2006 Market Review (July 17, 2007), *available at* www3.ambest.com/bestweek/purchase.asp?record_code=134784&AltSrc=26.

94. "A Best's Financial Strength Rating is an independent opinion, based on a comprehensive quantitative and qualitative evaluation, of a company's balance sheet strength, operating performance and business profile." "A Best's Financial Strength Rating (FSR) is an opinion of an insurer's ability to meet its obligations to policyholders." *See* A.M. Best's website, www.ambest.com/ratings/guide.asp.

95. As of the last report for each agency, these ratings are A.M. Best A (Excellent), *see* A.M. Best's website, www.ambest.com/ratings/guide.asp; Fitch Ratings A+ (Strong) (upgrade Mar. 28, 2007), Stable Outlook, *available at* www.fitchratings.com/corporate/ratings/issuer_content.cfm?issr_id=80361962; S&P A+ (Strong), Stable Outlook, *see* S&P's Rating of the Lloyd's Market (Sept. 2006), *available at* www.aecunderwriting.it/public/sandpfal.pdf.

would be the market as a whole rather than individual syndicates or their members.[96] For those interested in differentiations among syndicates, not just in terms of pure credit quality but also in terms of likely syndicate continuity, S&P started publishing Lloyd's Syndicate Assessments in September 2002. These are evaluations of the degree to which a syndicate is dependent upon Lloyd's Central Fund, brand, licenses, infrastructure, and, ultimately, Lloyd's market's FSR itself.

F. *New York's Response to E.U. Criticism: Leveling the Playing Field*

1. Past Accommodations

It is probably fair to say that New York insurance regulators have been accommodating alien reinsurers, at least Lloyd's, starting as early as the 1995 NYSID audit of Lloyd's for the period ended December 31, 1993. This audit found an $18.5 billion Lloyd's deficiency in required trusteed funds.[97] There was also a shortfall in new cash infused into Lloyd's/Equitas in September of 1996, required for Lloyd's of London's rehabilitation program known as Reconstruction & Renewal. In short, NYSID did not demand immediate funding of accounts to make up the shortfall, but worked with Lloyd's in overcoming its problems.

The degree of state regulation of insurance under the federal MFA is not great. The act states, in relevant part, as follows:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended (15 U.S.C. 41 et seq.), shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.[98]

As stated earlier in this paper, the collateral debate does not involve tension between agencies and courts. There are no federal versus state debates in a legal sense (only in the sense of a possible federal regulation in the possible OFC context). Because there are no acts of Congress challenging New York's arguably lax oversight of the trust funds, which allowed the shortfall in required trusteed funds, there have been no discussions about that audit in the context of the MFA.

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96. Carpenter, *supra* note 90, at 22.

97. *See* truthaboutlloyds.com, *supra* note 15; *see also* Green, *supra* note 52. "For 2004, reinsurers had posted about $98 billion in collateral, with about $88 billion coming from reinsurers outside the United States and the remaining $10 billion coming from U.S. reinsurers operating in states where they aren't licensed, according to the RAA." *Id.*

98. 15 U.S.C. § 1012(b) (1948).

2. Current Accommodations of the European Union: Proposed Reform to Collateral Requirements

The superintendent of insurance for NYSID has announced proposed new reinsurance collateral rules.[99] Alien and domestic unauthorized reinsurance companies with the highest credit ratings will be treated the same as authorized companies. Weaker reinsurance companies will be required to post collateral on a sliding scale from 10 percent to 100 percent. Unauthorized reinsurers with a triple A credit rating from two rating agencies would not have to post collateral. Unauthorized reinsurers with a double A or equivalent rating would have to post collateral equal to 10 percent of claims; single A, 20 percent; and triple B, 50 percent. Unauthorized reinsurers having a credit rating below triple B would still be required to post 100 percent collateral.

Other requirements would be as follows:

An unauthorized reinsurer must:

> Meet the standards of solvency, including standards for capital adequacy, established by its domestic regulator;
> Be authorized in its domiciliary jurisdiction to assume the specific kind of reinsurance it is offering;
> Maintain a policyholder's surplus or equivalent in excess of $250,000,000;
> Accept required contract terms, including consent to the jurisdiction of U.S. courts for disputes;
> Have a primary regulator that has a memorandum of understanding with the NYSID that addresses information sharing and considers such matters as regulatory equivalency and enforceability of judgments;[100]
> Be domiciled in a country that allows U.S. reinsurers access to its market on similar terms; and
> Post 100 percent collateral upon the entry of an order of rehabilitation, liquidation or conservation against the ceding insurance company.

Collateral requirements will not change for authorized reinsurers; they will still not be required to post any collateral. However, new safeguards will be put in place to help ensure the ability of these reinsurers to cover claims and thus protect consumers.

Insurance companies ceding risk to reinsurers have responsibility for vetting those reinsurers and developing risk management plans for their reinsurance placements.

99. *See N.Y. Moves to Level Playing Field on Collateral for All Reinsurers*, *supra* note 3.

100. Note that there is "some legal debate whether states can compel a foreign regulator to take or require specific legal actions against a company domiciled there." *See* Meg Fletcher, *New York Set to Relax Reinsurer Collateral*, Bus. J., July 7, 2008, *available at* www.businessinsurance.com/cgi-bin/article.pl?articleId=25319 (last viewed Oct. 6, 2008).

The Superintendent of Insurance will retain final authority over any particular transaction.[101]

The new collateral regulation was subjected to a comment period and, as of July 2008, was still undergoing the vetting process.

This schedule is in advance of the October 2008 anticipated effectiveness of the E.U.'s Reinsurance Directive, which involves complete elimination of collateral among E.U. member states, while New York's proposed reform falls short of that. The New York proposed reforms are encompassing, however, and come at a time when New York has also announced its principles-based insurance regulation reform initiatives.

As recently as November 2007, NYSID took the lead in the United States as the first insurance department to endorse European-like[102] principles-based insurance regulations, some of which are identical to those unveiled by the United Kingdom's FSA earlier this year.[103] (See Table 1 for a striking, side-by-side comparison of the language of the respective insurance regulation schemes.)

"Principles-based regulation requires aligning regulatory compliance with business goals while protecting consumers," Dinallo said. "The goal here is an effective, efficient reinsurance industry that will maximize the capital available to insurers and help insurers meet consumer needs."[104] Dinallo refers to "business-to-business transactions" where New York is moving to let the market decide. According to Dinallo, "[t]his risk-focused approach means principles-based regulation is being applied to all reinsurers."[105]

New York State's proposed relaxation of reinsurance collateral requirements for unauthorized reinsurers is the first major accommodation of alien reinsurers to date. With the exception of Florida,[106] the other U.S. insurance regulators have thus far not embraced widespread changes in the requirements for posting of collateral related to reinsurance transactions with unauthorized reinsurers, either domestic or international. With New York and Florida demonstrating strong leadership, however, other states are sure to follow.

101. *N.Y. Moves to Level Playing Field on Collateral for All Reinsurers*, *supra* note 3.

102. The news articles about NYSID's principles-based insurance regulations are silent as to the particular author of the proposed reforms, with an inference that they are the idea and creation of Insurance Superintendent Dinallo. The fact that FSA published a document with substantially similar, and in some cases, identical, wording, with the exception of *must* in FSA and *shall* in NYSID, strongly suggests that NYSID "borrowed" the idea and language from FSA.

103. *N.Y. Insurance Department Advances First Principles-Based Regulation*, Ins. J. (Nov. 5, 2007), *available at* www.insurancejournal.com/news/east/2007/11/05/84761.htm.

104. *N.Y. Moves to Level Playing Field on Collateral for All Reinsurers*, *supra* note 3.

105. *Id.*

106. *See* Florida Rule 69O-144.007, Ratings Based Collateral Requirements (Nov. 11, 2007) (draft), *available at* www.floir.com/pdf/ReinsuranceCollateralRule.pdf.

Table 1: Side-by-Side Comparison of Principles-Based Regulation, NYSID and FSA

FSA	**NYSID**
Principles for Business*	Principles for the Insurance Industry**
1. A firm must conduct its business with **integrity**.	
2. A firm must **conduct its business with due skill**, care **and diligence**.	1. A licensee shall lawfully **conduct its business with integrity**, **due skill, and diligence**.
3. A firm must **take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems**.	2. A licensee shall **take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems**.
4. A firm **must maintain adequate financial resources**.	3. A licensee shall **maintain adequate financial resources**.
5. A firm must **observe proper standards of market conduct**.	4. A licensee shall **observe proper standards of market conduct**.
6. A firm must **pay due regard to the interests of its** customers **and treat them fairly**.	5. A licensee shall **pay due regard to the interests of its** clients **and treat them fairly**.
7. A firm must **pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading**.	6. A licensee shall **pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading**.
8. A firm must **manage conflicts of interest fairly, both between** itself **and its** customers **and between** a customer and another client.	7. A licensee shall **manage conflicts of interest fairly, both between** the licensee **and its** clients **and between** clients.
9. A firm must **take reasonable care to ensure the suitability of its advice and discretionary decisions for any** customer who is **entitled to rely upon** its judgment.	8. A licensee shall **take reasonable care to ensure** the appropriateness or **suitability of its advice and discretionary decisions for any** person or other entity that **is entitled to rely upon** such.
10. A firm must arrange **adequate** protection for **client**s' **assets** when it is **responsible** for them.	9. A licensee shall ensure that the **assets** of any **client** for which the licensee is **responsible** are adequately protected.
11. A firm must deal with its **regulators in an open co-operative way, and** must **disclose to the** FSA appropriately anything **relating to the** firm **of which the** FSA **would reasonably expect notice**.	10. A licensee shall interact with the superintendent and other **regulators in an open** and **cooperative way, and** shall **disclose to the** superintendent **any** information **relating to the** licensee **of which the** superintendent **would reasonably expect notice**.

* *See* www.fsa.gov.uk/pubs/other/principles.pdf at 9.
** *See* www.insurancejournal.com/news/east/2007/11/05/84761.htm.

III. European Interest in an Optional Federal Charter in the United States

European reinsurers are hopeful that the United States will adopt a federal charter system of regulating insurance. This appears to flow, at least in part, from an unfounded assumption that a federal charter would in and of itself beget suppression or elimination of reinsurance collateral requirements. The single passport to Europe, however, is not necessarily tied to suppression of collateral requirements in the European Union, and there is no reason to assume that an OFC would necessarily lead to suppression or elimination of collateral requirements in the United States. The United States is not confronted with the same common market or economic integration issues facing the European Union. An analysis of the proposed OFC and a review of legal history and treatment of insurance in the United States dispels any notion that an OFC would have the results desired by the European Union.

NYSID has recently proposed reinsurance regulatory reform that would significantly relax, and in some cases eliminate, unauthorized reinsurer collateral requirements. This would be based upon a proposed system of credit rating. This proposed reform comes at a time when there has been no announcement of a projected date when an OFC might be a reality, if ever.

Whether an OFC will ever be a reality and the question of whether an OFC is a predicate to reform of collateral requirements are two separate studies. For the legal historian, and by way of review, it should be emphasized that Congress has never wanted to regulate the business of insurance. The prospect of federal regulation of insurance was anathema to Congress, so much so that the U.S. Supreme Court, starting with *Paul v. Virginia*[107] and continuing through a curious progeny of cases leading up to *United States v. South-Eastern Underwriters Ass'n*,[108] advanced the fiction[109] that insurance is not commerce.

In *Paul*, the U.S. Supreme Court held that "[t]he issuing of a policy of insurance is not a transaction of commerce . . . even though the parties be domiciled in different States, but is a simple contract of indemnity against loss,"[110] thus effectively, but only temporarily, establishing case law removing the business of insurance beyond the legislative reach of Congress.

107. 75 U.S. 168 (1868).

108. 322 U.S. 533 (1944).

109. *Id.* at 1190 (Jackson, J., dissenting). "In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress, that insurance is not commerce."

110. *Paul*, 75 U.S. at 3.

With respect to the fiction theory, the *Paul* court was not presented with any facts concerning international insurance or reinsurance or the business of "ceding" or "accepting" versus "issuing" of reinsurance. *Paul* does not contain a single reference to reinsurance, but a careful review of the case leads to the conclusion that such lack of reference to reinsurance is of no consequence. The Court did seriously consider other instruments of commerce; and it appears that had the court specifically considered international aspects of reinsurance, it would have come to the same conclusion, i.e., "[t]he issuing of a policy of insurance is not a transaction of commerce." Thus, the fiction referenced by Justice Jackson would have still been advanced.

Paul was overruled in *South-Eastern Underwriters*.[111] From a review of the dissents by Justices Jackson and Stone in that case, it is clear they shared the opinion that the *Paul* majority continued to advance the fiction that insurance was not commerce because Congress did not want to occupy the field of insurance. Justice Stone agonized over how the majority opinion would simply result in forcing the hand of Congress to take action it did not want to take.[112] With the enactment of the MFA, Congress acted but has effectively stayed its hand by leaving the regulation of the business of insurance to the states.

IV. CONCLUSION

The Europeans have had a unique experience with respect to pending elimination of reinsurance collateral requirements among the E.U. member states. The Reinsurance Directive has yet to be implemented into national law by the respective E.U. member states, and three member states still impose reinsurance collateral requirements on reinsurers in other E.U. member states.[113] That experience has been one motivated not so much by the usual regulatory interests in solvency and consumer protection, but by continental economics and a desire to become commercially competitive with third-country reinsurers. The E.U. interest in abolition of collateral in the United States has nothing to do with integration of the

111. 322 U.S. 533.

112. Justice Stone's preference, as stated in his dissenting opinion, would have been to ignore the issue of whether insurance is commerce and simply allow the Sherman Act to control insurance companies in the same way it would control other commercial endeavors. Current reform proposals would have that same effect. One reform proposal is to allow the MFA to exist but without the antitrust exemptions. As presently worded, there are no antitrust exemptions for boycott, intimidation, or coercion by insurance companies.

113. The US Reinsurance Collateral Debate: The Latest "Red Herring" (Nov. 6, 2007), *available at* www.lloyds.com/news_Centre/Features_from_Lloyds/The_US_Reinsurance_Collateral_Debate_the_latest_red_herring_061107.htm.

United States or world reinsurance markets but has everything to do with feeling discriminated against and wanting to be better able to compete in the United States.

There is no evidence to support the notion that federal regulation of insurance in the United States would in itself lead to any different results with respect to the credit for reinsurance laws that require collateral from alien reinsurers. NYSID is already setting the groundwork for regulatory reform, which will lead to relaxation of collateral requirements for alien reinsurers; Florida is following closely behind, and other states are sure to follow. This is proof that there is no necessary nexus or overlap in these two areas.

Congress has historically shown no interest in occupying the field of insurance regulation, resisting every early opportunity to change its course on this issue. This was made clear by Justices Jackson and Stone in the *South-Eastern Underwriters* case and Congress's immediate enactment of the MFA to ensure that the states would continue regulating the business of insurance. Neither *Paul* nor the MFA excludes the federal government from regulating insurance. *Paul* simply held that a state regulatory statute did not interfere with interstate commerce, and the MFA actually contemplates that the federal government may pass laws dealing with insurance as long as Congress specifically mentions insurance in the body of the statute. The proposed National Insurance Act has not passed both houses of Congress, despite being introduced last year.

NAIC has been proactive in responding to criticisms against the system of state regulation, and all indications are that it is willing to accept the role of a de facto nationwide regulator, addressing collateral and other issues as effectively as a de jure federal regulator would while at the same time maintaining the current system of state regulation of insurance.