

Three Legislative Instruments modify Bermuda's Insurance Legislative and Regulatory Framework



Two pieces of legislation and one statutory instrument amending the Insurance Act 1978¹ and related regulations came into effect at the end of March, reflecting this jurisdiction's continued determination to remain at the vanguard of international standards for reinsurance.

The Insurance Amendment Act 2010² was assented to by the Governor and became operative on 25 March 2010; it inserted an additional clause to Section 53 of the Act to allow for the Minister to make regulations relating to the statutory financial statements or return which have retroactive application for a period of up to 90 days before their coming into operation. This amendment was necessary in order to allow for the promulgation, on 26 March 2010 by Ministerial Order, of the Insurance Accounts Amendment Regulations 2010,³ which were deemed to have come into operation as of 31 December 2009. The Amendment Regulations modify certain portions of the Insurance Accounts Regulations 1980⁴ proscribing reporting items on the statutory balance sheets of Class 4 insurers. A copy of the Amendment Regulations can be obtained by the interested reader from Appleby upon request.

¹ *Insurance Act 1978*, 1978 : 39, as amended in 1981, 1983, 1985, 1995, 1998, 2000, 2001, 2002, 2004, 2006, 2008, 2009 (hereinafter, the "Act").

² *Insurance Amendment Act 2010*, 2010 : 11

³ *Insurance Accounts Amendment Regulations 2010*, BR 24/2010 (hereinafter, the "Amendment Regulations").

⁴ *Insurance Accounts Regulations 1980*, BR 18/1980

The Insurance Amendment Act (No.2) 2010⁵, which was assented to and became operative on 29 March 2010, contains the bulk of the legislative changes which have come forth at this time, and it is with this Amendment Act that the balance of this Brief is concerned. Emerging international norms in the regulation of global insurance and reinsurance groups are trending increasingly towards the imposition of group-wide supervisory regimes by one principal "home" regulator over all the legal entities in the group, no matter where incorporated. The Amendment Act, which is the fruit of extensive consultation with the industry and other stakeholders by the Bermuda Monetary Authority ("the Authority"), introduces such a regime into the Bermuda regulatory landscape, initially applicable principally to the Class 3B and Class 4 registrants in the Bermuda insurance industry. This framework of group supervision further prepares the Bermuda market for achieving regulatory equivalence under Europe's Solvency II Directive.

The thrust of the Amendment Act regarding group supervision is aimed at large commercial insurance and reinsurance groups defined as class 3B or class 4 insurers under the Act. The purpose of the new supervisory regime is to enable the Authority to form a comprehensive view of the overall risk exposure of an insurance group.

⁵ *Insurance Amendment Act (No.2) 2010*, 2010 : 22 (hereinafter, the "Amendment Act").

In addition to group supervision, the Amendment Act also makes key changes to the obligations on controllers and registered persons to notify and/or obtain consent from the Authority regarding changes of controllers or officers of a registered person. Finally, the Amendment Act also expands the powers of the Authority regarding prudential standards and the Authorities power to obtain information. The Insurance Code of Conduct is being extended to cover designated insurers in relation to insurance groups and is expected to be published by the Authority by the end of summer 2010.

Key Definitions

The Amendment Act amends certain definitions in the Act and makes provision for the definition of new terms used in the Amendment Act. In particular, it introduces a new definition for “groups”, “insurance groups” and “designated insurer”. The Amendment Act also introduces new and more comprehensive definitions of “parent company” and “subsidiary company”. These new and amended definitions all support the provisions on group-wide supervision detailed more fully below.

Requirement to notify the Authority regarding changes

The statutory obligations on controllers⁶ to notify and/or obtain the permission of the Authority to become a controller or increase the level of their control have been modified in three key ways in the Amendment Act. Firstly, the distinction which hitherto existed between private and public companies in this regard has been removed. All notifications now follow the same procedure, regardless of whether the subject insurer (or its parent) is a publicly or a privately held company. Secondly, the ambit of the changes which require notification have been broadened. The previous regime only applied to shareholder controllers. The Amendment Act extends the notification requirements to any changes of controller, such as a managing director, chief executive and the

⁶ These obligations were codified in Sections 30D and 30E of the Act prior to the promulgation of the Amendment Act. Now, as a result of the Amendment Act, 30E has been repealed and 30D has been modified in the manner described in this paragraph.

other persons who fall under the definition of “controller” in the Act. Thirdly, whereas previously these obligations related only to controllers of insurers, the Amendment Act extends the provisions to include all registered persons, so both insurers and registered intermediaries, such as brokers, managers and agents must also comply with these provisions.

The obligation of the registered person itself to notify the Authority of certain changes⁷ has also been expanded by the Amendment Act. Previously, a registered person (an insurer or an intermediary, such as a broker) was obligated to notify the Authority of the fact that any person had become, or ceased to be, a controller of the registered person. This notification needed to be made within 45 days after the effective date of the change. The Amendment Act extends the notification requirement to include officers of the registered person as well as controllers. This means that there is now an obligation to notify the Authority of the change of any single director, or the secretary, of a registered person. Hitherto, those changes, not being a change of “controller” did not fall within the ambit of the notification obligation.

Finally the Amendment Act inserts provisions that require an approved auditor to notify the Authority of any matters which are likely to be of material significance for the discharge, in relation to the insurer of which he is auditor, of the Authority’s functions. It also makes provision for the Minister to prescribe in regulations the facts or matters which are likely to be of material significance for the discharge of the Authority’s functions.

These changes apply to all registered persons: insurers of all classes of general business and long-term/composite insurers as well as intermediaries (brokers, managers, agents or “salesmen”).

Group Supervision - New Part IVA has been inserted into the Act

A new Part IVA concerning group supervision has been added to the Act which includes new defining terms used in the new Part IVA. As a result of the new Part IVA the Authority will publish a statement of

⁷ This obligation is contained in Section 30J of the Act.

principles regarding the exercise of its discretion to determine whether it should be a group supervisor. The new Part IVA includes new provisions regarding group supervision, the authority to exclude specified entities from group supervision, the power for the Authority to withdraw as group supervisor, the functions of the Authority as group supervisor and the power of the Authority to make rules regarding group supervision. These new provisions are discussed in detail below.

The new legislation requires the Authority to take into account the following matters before reaching a decision on whether to be the group supervisor of a particular insurance group:

- whether the insurance group is headed by a specified insurer;
- where the insurance group is not headed by a specified insurer, whether the insurance group is headed by a parent company which is incorporated in Bermuda; and
- where the insurance group is headed by a parent company which is not incorporated in Bermuda, whether the Authority is satisfied that the insurance group is directed and managed from Bermuda or the insurer in the insurance group with the largest balance sheet total is a specified insurer.

A specified insurer is defined as a class 3B or class 4 insurer, or other class as may be specified by the Authority by order. Under this section the Authority must establish a register that will contain particulars of members of an insurance group of which it is the group supervisor.

The Authority is enabled to exclude from group supervision any body corporate that is a member of the group under the new Part IVA of the Act. It can do so if it is satisfied that certain matters apply such as the inability of the Authority to obtain information from the countries or territories where that body corporate operates, and the negligible impact of the body corporate on the group as a whole.

The Authority is allowed to withdraw as group supervisor of a particular group if it is satisfied that another competent authority has agreed to be group supervisor for that group under the new Part IVA of the Act. The Authority must make such determination on the basis of matters such as whether it would be appropriate to do so having regard to the structure of the insurance group and the relative importance of the insurance group's insurance business in different countries or territories, or if it determines that there has been a material change in the structure or operations of the insurance group, or an absence of cooperation by other competent authorities. Before making such a determination, the Authority is required to notify the group of its intention and consider their representations.

The new Part IVA of the Act makes provision for the functions of the Authority as group supervisor. These deal in the main with such issues as the assessment of the financial situation of insurance groups; compliance with rules on solvency and risk concentration; systems of governance; and planning and coordination of meetings with other competent authorities, including chairing by the Authority of supervisory colleges.

Under the new Part IVA of the Act the Authority is enabled to make rules for the purposes of group supervision. These rules would apply to the designated insurers which are members of the group and that are registered in Bermuda. The rules would impose obligations on the group through the designated insurer.

Without prejudice to the generality of group supervision provisions the Authority is also enabled to make specific rules regarding the assessment of the financial situation of the insurance group; the solvency position of the insurance group; intra-group transactions and risk concentration; the system of governance and risk management of the insurance group; and supervisory reporting and disclosures in respect of the insurance group.

The new Part IVA of the Act empowers the Authority in its rules to make provision for the giving of directions in the event that a designated insurer is in breach of provisions of the rules. Such directions must

be such as would be desirable for safeguarding the interests of clients and potential clients of the group.

Increase in the Authority's powers

The scope of the Authority's power has been extended to make orders in relation to prudential standards to include insurance reserves, and to extend the scope of the orders to cover designated insurers in relation to insurance groups. Therefore, prudential standards applying to registered insurers may contain requirements which take into account, in the case of a registered insurer that is a member of an insurance group, any activity of another member of the insurance group. The Authority now also has the power to exempt designated insurers in relation to insurance groups from prudential standards.

The Authority's power to make adjustments to enhanced capital requirements and available statutory capital and surplus have also been extended to insurance reserves and to insurance groups. Such adjustments may require an increase in the amount of insurance reserves to the level of prudential standards.

The Authority's power to obtain information and reports has been extended to designated insurers in relation to group supervision. The Amendment Act also widens the scope offences under the Act to include offences in relation to non-compliance with the power to obtain information and reports and the power to require production of documents.

Conclusion

Overall, the Amendment Act establishes the Authority as group wide supervisor with the goal to ensure that an insurance group's capital and solvency position is adequate given the insurance group's overall risk profile. The new provisions will result in the continued growth of the island's international business sector as they provide further evidence of Bermuda's commitment to international best practice standards of insurance.

¹ Please see our web site, www.applebyglobal.com, or contact your Appleby insurance lawyer for copies of our previous Appleby Brief or E-Alerts on this subject.

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