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**COMMITTEE ON  
INSURANCE LAW**

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The Honorable María L. Pagán  
Acting United States Trade Representative  
600 17th Street, NW  
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Dear Secretary Mnuchin and Acting Trade Representative Pagán:

The Committee on Insurance Law<sup>1</sup> of the New York City Bar Association (the “Committee”) notes the January 13, 2017 announcement by the U.S. Department of the Treasury (the “Treasury Department”) and the Office of the U.S. Trade Representative (“USTR”) concerning the completion of the “Covered Agreement” between the United States and the European Union on prudential insurance regulatory matters. The Covered Agreement is authorized by provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) that contemplate a “substantially equivalent” level of consumer protection as between the U.S. and non-U.S. governments in the area of insurance, in which “the prudential measures of [such] foreign government, authority or regulatory entity achieve a similar outcome in consumer protection as the outcome achieved under state insurance or reinsurance regulation.”<sup>2</sup> We note parenthetically the February 16, 2017 hearing on the Covered Agreement held by the Housing and Insurance Subcommittee of the Financial Services Committee of the U.S. House of Representatives.

The Committee has identified certain provisions of the Covered Agreement that, in its view, either require further clarification, possibly by means of amendment, or appear to lack a compelling rationale or

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<sup>1</sup> Two members of the Committee, Martha Lees and Steven Harris, have recused themselves from all Committee deliberations on the matters discussed herein and from the preparation of this letter.

<sup>2</sup> 31 U.S.C. § 313(r)(9).

purpose in light of the objectives set forth in Dodd-Frank. In this letter we highlight five such items.

## **SUMMARY**

**1. *The definition of “Home Party” could lead to anomalous results*** insofar as it is based on the location of the top-tiered company in a group of affiliated entities. This location is not necessarily the most logical jurisdiction to exercise group-wide supervision.

**2. *It is not clear which, if any, aspects of U.S. state holding company and group regulation would be affected by the Covered Agreement.*** The Covered Agreement should clarify that the extensive laws of U.S. states governing relationships between insurers and their affiliates would survive the Covered Agreement even where a group’s parent is outside the U.S.

**3. *The impact of the Covered Agreement on the recognition of the U.S. as “equivalent” under Solvency II seems unclear.*** We suggest that the Covered Agreement explicitly clarify whether, as a result of the Covered Agreement’s entry into force, and so long as the U.S. complies with all of its obligations under the Covered Agreement: (i) it will not be necessary for the U.S. to be recognized as “equivalent” under the EU’s Solvency II Directive (“Solvency II”); or (ii) the U.S. will effectively be recognized as “equivalent” under Solvency II.

**4. *The time limit for U.S. preemption determination seems textually inconsistent with the Covered Agreement’s provisions on cross-conditionality of requirements and unclear as to the posture of individual states within the time limit.*** The Covered Agreement should harmonize two provisions that seem internally inconsistent – (i) the provision that contemplates U.S. preemption of state laws within 60 months and (ii) the provision on cross conditions to effectiveness of the Covered Agreement. It should also clarify whether a state that relaxes its collateral requirements earlier than others, before the 60-month requirement has been fulfilled, automatically becomes entitled to reciprocity or instead needs to wait until all states have complied.

**5. *The Covered Agreement should specify that the changes to regulatory requirements for posting collateral would apply only to those amendments to reinsurance agreements that are material.*** Such a change would prevent minor amendments to reinsurance agreements from altering the collateral regime governing the entire agreement.

## **DISCUSSION**

**1. *The definition of “Home Party” could lead to anomalous results.*** The term “Home Party” is a key component of the provisions on group supervision (Article 4 of the Covered Agreement). For example, Article 4, paragraph (a) provides as follows:

“a Home Party insurance or reinsurance group is subject only to worldwide prudential insurance group supervision . . . by its Home

supervisory authorities, and is not subject to group supervision at the level of the worldwide parent undertaking of the insurance or reinsurance group by any Host supervisory authority.”

Thus, the concept of Home Party is, appropriately, oriented toward identifying that jurisdiction that should, from the standpoint of public policy, exercise the most complete financial oversight over an insurer’s entire group of companies.

“Home Party” is defined as “the Party [*i.e.*, the U.S. or EU] in whose territory the worldwide parent of the insurance or reinsurance group or undertaking has its head office or is domiciled.”<sup>3</sup> “Worldwide parent undertaking”<sup>4</sup> means “the ultimate parent undertaking of a group.”<sup>5</sup> In turn, “parent” means “a regulated *or unregulated* undertaking that directly or indirectly owns or controls another undertaking”<sup>6</sup> (emphasis added). Based on these definitions, it is possible that the ultimate parent of an insurance group, regardless of its regulated status or size as a stand-alone entity would be the party whose jurisdiction exercises prudential authority over the entire group. In situations where the top-tier parent entity is

- a non-regulated entity;
- a regulated company in some other sector (such as banking, investment management, etc.);
- a regulated insurance entity but not necessarily the largest or most consequential entity in the group;
- a company whose principal executives work remotely or from multiple jurisdictions; or
- a company whose head office is in a location where the group does not conduct any insurance operations,

these definitions could lead to the anomalous result that the regulator having jurisdiction over the group’s worldwide operations would not be the best-situated or most natural regulator to have such role. In none of these cases would there be a compelling reason for the top-tier entity’s jurisdiction to be the prudential group regulator, based on size, familiarity, geographical nexus or other logical factors. (Indeed, in the case of a non-operating holding company, the result would be especially inapt insofar as the holding company alone would not be subject to any particular regulatory scheme at all.)

We concede that in such a circumstance, the nations or states involved could agree to a more sensible outcome, such as by means of a supervisory college, and would not automatically be bound to make the top-tier jurisdiction the global regulator for the group. However, we would advocate re-drafting the definition of “Home Party” to avoid even the possibility of anomalous results. The definition should embody a more sensible,

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<sup>3</sup> Covered Agreement, Art. 2, para. (h).

<sup>4</sup> The terms “worldwide parent undertaking” and “worldwide parent” appear to be used interchangeably.

<sup>5</sup> Covered Agreement, Art. 2, para. (t).

<sup>6</sup> *Id.*, Art. 2, para. (k).

rational basis for determining the jurisdiction whose regulators should have the broadest ambit over the group.<sup>7</sup>

For instance, “Home Party” could be defined in a similar fashion to the “lead state” concept adopted in the U.S. by the National Association of Insurance Commissioners (“NAIC”). Identifying the lead state of a group of companies with multiple U.S. domiciles is key under the U.S. insurance regulatory system for purposes of financial examinations, as well as regulatory requirements such as enterprise risk and own risk and solvency assessment (“ORSA”) filings (described below). The NAIC guidance on lead state determination is as follows:

“In most situations to date, the Lead State has emerged by mutual agreement (i.e., self-initiative on its part and recognition by other states), generally as a result of the organizational structure of the group or as a result of the domicile of primary corporate and operational offices. The input of domestic regulators within the group also plays [a] critical role in determining which state should be chosen to fulfill the role of the Lead State. Other factors that may be considered when determining the Lead State are:

- State with the largest number of domestic insurance companies in the group.
- State of large or largest premium volume or exposure.
- Domiciliary state of top-tiered insurance company in an insurance holding company system.
- Physical location of the main corporate offices or largest operational offices of the group.
- Expertise in the area of concern and experience of staff in like situations.
- State whose regulatory requirements have driven the design of the organization's infrastructure.”<sup>8</sup>

Moreover, the NAIC’s model law and regulation regarding insurance holding companies (the “Model Insurance Holding Company Act”)<sup>9</sup> sets out criteria under which a state insurance regulator may “acknowledge another regulatory official as the group-wide supervisor” in the case of a domestic insurer that is a member of an international group. The state insurance commissioner can make this acknowledgement based on the

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<sup>7</sup> We note parenthetically that Section 7.1 of the NAIC’s model insurance holding company act (discussed in more depth below) specifically contemplates that where a group straddles international boundaries, the U.S. state insurance regulator must cooperate with his or her counterparts in other states and outside the U.S. to determine “a single group-wide supervisor.” These provisions are not necessarily consistent with the “Home Party” definition in the Covered Agreement and could lead to another source of possible discrepancy.

<sup>8</sup> NAIC Financial Condition Examiners Handbook, § 1-I-D.

<sup>9</sup> NAIC Insurance Holding Company Systems Regulatory Act (Model 440) and Regulation (Model 450). There are variations among the state versions of these models, but for the most part holding company regulation in the U.S. is uniform across all states.

following factors, which could be instructive in developing the “Home Party” concept for purposes of the Covered Agreement:

- (1) which insurers (and where are they domiciled) hold the largest share of the group's written premiums, assets or liabilities;
- (2) the place of domicile of the top-tiered insurer;
- (3) the location of the executive offices or largest operational offices;
- (4) whether another regulatory official is acting as the group-wide supervisor under a regulatory system that is substantially similar to the state's or “otherwise sufficient”; and
- (5) whether another regulatory official acting as the group-wide supervisor provides the state insurance commissioner with “reasonably reciprocal recognition and cooperation”.<sup>10</sup>

**2. It is not clear which, if any, aspects of U.S. state holding company and group regulation would be affected by the Covered Agreement.** Article 4, paragraph (f) of the Covered Agreement provides as follows:

“[P]rudential insurance group supervision reporting requirements as set out in the applicable law in the territory of the Host Party do not apply *at the level of the worldwide parent undertaking . . . unless they directly relate to the risk of a serious impact on the ability of undertakings within the insurance or reinsurance group to pay claims* in the territory of the Host Party” (emphasis added).

In a similar vein, the following paragraph (g) provides that the Host Party retains information-gathering authority where such information is “deemed necessary” to “protect against serious harm to policyholders,” a “serious threat to financial stability or a serious impact on” claims-paying ability.

The principle expressed in these provisions is sound, but in practice, without further clarification, this will resist easy implementation insofar as the meaning of “at the level of the worldwide parent undertaking” is not self-evident in light of the nature of state insurance holding company regulation in the U.S. Such regulation is based on the model law and regulation regarding insurance holding companies promulgated by the NAIC. (It should be noted that the NAIC’s various model laws and regulations lack any force of law on their own, but, by being adopted in substantially similar form across the states, these models promote uniformity and similar regulatory results.)

Under these laws, generally, insurers have obligations to report to their domiciliary regulators periodically on the identity, financial condition and activities of parent entities and all affiliates and relationships between the insurers and their

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<sup>10</sup> *Id.*, § 7.1(b).

affiliates.<sup>11</sup> Insurers must also give notice to the domiciliary regulator prior to entering into certain types of transactions with affiliates, which are then subject to the regulator’s non-objection.<sup>12</sup> In addition, the “ultimate controlling person” of the insurer (not the insurer itself) must submit annually to the lead state of the group, as determined under NAIC guidelines (referred to above), an annual “enterprise risk” filing that details risks within the entire group.<sup>13</sup> Yet another example of a requirement that could operate on an insurance company affiliate in another jurisdiction is a provision authorizing the regulator, when the insurer fails to comply with an order to produce certain information, to “examine the affiliates to obtain the information” including subpoena power.<sup>14</sup> Under a related model law, the lead state may also require the insurer itself to submit an ORSA summary report.<sup>15</sup> We believe that textually any of these requirements could be characterized as applying “at the level of the worldwide parent” because they may implicate, bind or require information from or about the worldwide parent. We do not necessarily agree that this is the most natural interpretation of the phrase “at the level of the worldwide parent”, but in any given instance of holding company act requirements, a persuasive argument could be made that the requirement “applies” extraterritorially.

Suppose a hypothetical insurance group has its ultimate parent entity outside the U.S. The group includes, downstream from the ultimate parent, various U.S. insurance entities, each domiciled in a distinct state (let us suppose, Texas, California and Illinois). Let us suppose further that Illinois, which is one of the domiciliary states, is the lead state of the group according to NAIC criteria. Each of the domiciliary states exercises holding company act jurisdiction over the insurer domiciled in that state vis-à-vis all of its affiliates<sup>16</sup> and the lead state, Illinois, has principal oversight in the group on enterprise risk and ORSA matters.

Holding company act provisions operate on the insurers in each domiciliary state and require information from and about the non-U.S. parent. Under the Covered Agreement, can Texas, California and Illinois continue to require the insurers in those states to report annually on, for instance, transactions with the ultimate non-U.S. parent? Can they require the insurers to give the regulator prior notice of a material transaction with the ultimate parent? To register as a controlled insurer at all? To compel production of information? The Covered Agreement’s criterion – namely, that such laws (assuming they are treated as applying at the parent “level”) apply *only* where “*they directly relate to the risk of a serious impact on the ability of undertakings within the insurance or reinsurance group to pay claims in the territory of the Host Party*” – yields no self-

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<sup>11</sup> *Id.*, § 4.

<sup>12</sup> *Id.*, § 5.

<sup>13</sup> *Id.* § 4.L.

<sup>14</sup> *Id.*, § 6E.

<sup>15</sup> NAIC Risk Management and Own Risk and Solvency Assessment Model Act (Model 505), § 5. As with the holding company act, there is a high degree of uniformity among states that have adopted this model law, which was adopted in 2012.

<sup>16</sup> See, *e.g.*, Model Insurance Holding Company Act § 4 (registration obligations), § 5 (certain reporting requirements), § 6 (examination authority).

evident answer when applied to these (and possibly other) scenarios. In other words, it is highly subjective whether a particular law, either on its face or as applied, will “directly” relate to a risk of non-payment of claims.

Similarly, the enterprise risk reporting provisions operate on the *ultimate parent*, in the case of our example principally in Illinois, the lead state, although the ultimate parent is domiciled outside the U.S. This makes it even more likely that the state law would be deemed to apply at the parent “level” because it operates *directly on* the parent. Under the Covered Agreement, are these requirements still applicable? Again, determining whether the content of an enterprise risk report relates to claims-paying ability could be a highly fact-specific and subjective exercise. Indeed, it is not even apparent whether the NAIC concept of a lead state would still be applicable under this regime, another area of potential ambiguity.

For these reasons, the Committee believes that this criterion (that a state may impose group supervision, at the level of a non-U.S. parent, only where there is a risk to claims-paying ability), although sensible in concept, is not practicable and would likely lead to uneven outcomes as between jurisdictions, as between groups and as among particular components of the holding company acts. We would suggest clarifying paragraphs (f) and (g) of Article 4 to make it clear that state holding company acts and regulations by definition are deemed *not* to “apply at the level” of any entity other than the subject insurer, and/or are deemed to “directly relate to” claims-paying risk. Therefore, these would not be affected by the Covered Agreement.

**3. *The impact of the Covered Agreement on the recognition of the U.S. as “equivalent” under Solvency II seems unclear.*** The prudential measures that were originally intended to be addressed by the Covered Agreement, as set forth in the letters issued by the Treasury Department and the USTR announcing their intent to enter into discussions with the EU (the “Letters to Congress”)<sup>17</sup>, included, among others: (i) obtaining treatment of the U.S. insurance regulatory system by the EU as “equivalent” under the provisions of Solvency II; and (ii) obtaining permanent “equivalent” treatment for the U.S. solvency regime that would be applicable to insurers and reinsurers. The same letters noted that Solvency II would subject an insurer to disadvantageous treatment if the insurer’s domiciliary jurisdiction were not recognized as “equivalent” under Solvency II.

As background, Solvency II provides that the European Commission may make an “equivalence” determination with respect to a jurisdiction in the areas of group supervision, group solvency (*i.e.*, group capital), and reinsurance. The Covered Agreement, in its current form, addresses each of these three areas, but does not clearly describe the impact (if any) of the Covered Agreement’s entry into force on the recognition or treatment of the U.S. as “equivalent” under Solvency II. As a result, conflicting readings of the impact of the Covered Agreement on the recognition of the

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<sup>17</sup> Letters dated November 20, 2015 from Anne Wall, Assistant Treasury Secretary for Legislative Affairs, and Mike Harney, Assistant U.S. Trade Representative, to certain Committee chairs and ranking members of the U.S. House of Representatives and the U.S. Senate, available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0284.aspx>.

U.S. as “equivalent” under Solvency II are possible, and, if ambiguity exists as to U.S. “equivalency”, it is possible that regulators in the EU could impose Solvency II requirements on U.S. insurers and reinsurers notwithstanding the Covered Agreement.

For example, the NAIC has historically taken the position that it is not necessary for the existing U.S. insurance regulatory regime to be recognized as “equivalent” under Solvency II, and that the U.S. and the EU should instead strive to enhance their mutual understanding of their respective insurance regulatory regimes, eventually resulting in some form of mutual recognition of existing regulatory structures and processes. The NAIC has pointed out as an example of the effectiveness of this mutual recognition approach the fact that the U.S. has been granted provisional “equivalence” under Solvency II for the purposes of group solvency calculation. The Covered Agreement could be interpreted as advancing this goal of mutual recognition with respect to group supervision, group capital and reinsurance, while at the same time making it unnecessary for the U.S. to be recognized as “equivalent” under Solvency II.

On the other hand, an alternative reading of the Covered Agreement is that the Covered Agreement obtains permanent “equivalent” treatment for the U.S. insurance regulatory regime under Solvency II—in line with the items originally intended to be addressed by the Covered Agreement, as set forth in the Letters to Congress.

As a result, the Committee suggests adding language to the Covered Agreement to clarify whether, as a result of the Covered Agreement’s entry into force, and so long as the U.S. complies with all of its obligations under the Covered Agreement: (i) it will not be necessary for the U.S. to be recognized as “equivalent” under Solvency II; or (ii) the U.S. will effectively be recognized as “equivalent” under Solvency II.

Such a resolution of this issue might also produce the added benefit of obviating the complexity of Article 10, paragraph 2, sub-paragraph (b) of the Covered Agreement. This sub-paragraph provides that certain requirements, in order to be applicable to a party, are dependent on the other party’s observing certain *other* specified requirements. This paragraph may have been motivated by Solvency II’s “equivalence” requirements.

Specifically, on the later of the date of “entry into force” and the date that is 60 months from the date the Covered Agreement was signed,

- a party’s obligation not to impose collateral requirements for a cedent in its territory, and the various implementation requirements of Article 9 (requiring states to implement collateral reductions etc.), are applicable only for so long as the other party is observing the group supervision requirement and the local-presence prohibition for reinsurance;
- the group supervision requirement and local-presence prohibition are applicable only for so long as the other party is observing the mandate not to impose collateral requirements; and
- the local presence prohibition is applicable only for so long as the other party is observing the group supervision requirement and the obligation not to impose collateral requirements.



We refer to this set of conditions as the “Cross Conditions.” The linkages between the Cross Conditions may arise from the perception that the U.S. imposes collateral requirements to the detriment of the EU, and the perception that EU jurisdictions impose other requirements (such as local presence) to the detriment of the U.S. In this view, the Cross Conditions incentivize the parties to relax the restrictions that are perceived as most detrimental to uniform treatment of insurers, even if these conditions are not exactly reciprocal.

However, if the Covered Agreement were to codify the U.S.’s equivalence as suggested above, by requiring the U.S. to comply with the *entire* agreement, the Cross Conditions might become academic insofar as the parties would be incentivized to fully comply. In other words, a specific equivalence reference would make it less likely that future compliance by the parties is lopsided, with each party observing some sub-set (but not the same sub-set) of the agreement. Such uneven compliance would appear to be inconsistent with the very goals of mutuality and reciprocity embodied in the Covered Agreement and contemplated by Dodd-Frank.

***4. The time limit for U.S. preemption determination seems textually inconsistent with the Covered Agreement’s provisions on cross-conditionality of requirements and unclear as to the posture of individual states within the time limit.*** Under Article 9, paragraph 4, provided that the Agreement has entered into force, in the first 42 months post-signing, the U.S. is required to:

“begin evaluating a potential preemption determination. . . with respect to any U.S. State insurance measure that the United States determines is inconsistent with this Agreement and results in less favorable treatment of an EU insurer or reinsurer than a U.S. insurer or reinsurer domiciled, licensed or otherwise admitted in that U.S. State.”

By the end of 60 months post-signing, the U.S. must *complete* any necessary preemption determination with respect to state laws.

The consequence for not complying with these mandates, in light of the Cross Conditions discussed above (and assuming those remain as set forth in the existing agreement), seems ambiguous. First of all, under Article 10, paragraph 1, the Covered Agreement “shall apply” on the 60-month anniversary of signing.<sup>18</sup> This would suggest that, even if the U.S. has not complied with the preemption deadline, the Covered Agreement would go into full effect. It is implicit, but not expressly set out, that the Cross Conditions would control in that case. Consequently, if the U.S. is not in compliance with the collateral requirements (*i.e.*, the requirements that were supposed to

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<sup>18</sup> Oddly, this 60-month timeframe does not line up identically with the 60-month deadline for the U.S. to take preemptive action. In the preemption provision, the U.S. determinations must be completed “on a date no later than the first day of the month 60 months after the date of signature of this Agreement” whereas the “application” date is simply the 60-month anniversary of signing. There does not seem to be an obvious reason for this discrepancy.

be harmonized by preemption in the 60-month period), the EU would be excused from the group supervision requirement and local-presence prohibition. In other words, a main point of the Covered Agreement will have been frustrated, unless the U.S. can come into compliance with those at a later date at its option. Presumably the policy behind the Covered Agreement is that the U.S. *should* be allowed more than 60 months if this is case. Therefore, the rationale for the 60-month “deadline” for preemption seems dubious. Breaching the deadline, in and of itself, seems to have no specific ramification. To address this, we would suggest adding in Article 9, paragraph 4, a statement to the effect that the sole remedy available to the EU, in the event the U.S. does not complete its preemption efforts in 60 months, would be to invoke the Cross Conditions in paragraph 2(b), and would not include abrogating the entire agreement (assuming this is the result intended).

In addition, the 60-month requirement does not specify the impact on a particular state if that state relaxes its collateral requirements in accordance with the Covered Agreement before the successful fulfillment of the 60-month requirement. In other words, it is not clear whether a state that comes into compliance with the Covered Agreement becomes entitled to the collateral reciprocity provisions of the Covered Agreement (i) immediately or (ii) only when all of the other states (or the U.S. government by preemption) have relaxed *their* laws to comply with the 60-month requirement. We believe that the reciprocity benefits should be automatic for each individual state at the time that it meets the requirements mandated by the Covered Agreement.

***5. The Covered Agreement should specify that the changes to regulatory requirements for posting collateral would apply only to those amendments to reinsurance agreements that are material.*** Pursuant to Article 3, paragraph 8 of the Covered Agreement, the elimination of reinsurance collateral requirements under the Covered Agreement would apply:

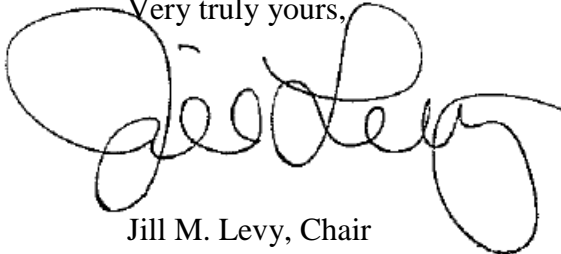
“only to reinsurance agreements entered into, amended, or renewed on or after the date on which a measure that reduces collateral pursuant to this Article takes effect, and only with respect to losses incurred and reserves reported from and after the later of (i) the date of the measure, or (ii) the effective date of such new reinsurance agreement, amendment, or renewal.”

The plain language of this provision could be read as resulting in the elimination of collateral requirements going forward as a result of *any* amendment to an existing reinsurance agreement to which the Covered Agreement applies. This reading would effectively require any minor amendment to such a reinsurance agreement to be accompanied by potentially significant negotiations as to the collateralization of future obligations under that reinsurance agreement.

Apparently recognizing this fact, the U.S. Department of the Treasury stated in its Fact Sheet describing the Covered Agreement that “[i]t is understood that changes [set forth in the Covered Agreement] to regulatory requirements for posting collateral would not apply to amended agreements unless such amendment constitutes a material change

to the underlying terms of the agreement”. The Committee agrees with this approach, but would suggest that this materiality provision be incorporated directly into Article 3, paragraph 8 of the Covered Agreement.

Thank you for your consideration of our comments, and please do not hesitate to contact the Committee with any questions or concerns.

Very truly yours,  
  
Jill M. Levy, Chair  
Insurance Law Committee

cc: The Honorable Jeb Hensarling  
Chairman, Committee on Financial Services, U.S. House of Representatives

The Honorable Maxine Waters  
Ranking Member, Committee on Financial Services, U.S. House of Representatives

The Honorable Kevin Brady  
Chairman, Committee on Ways and Means, U.S. House of Representatives

The Honorable Richard E. Neal  
Ranking Member, Committee on Ways and Means, U.S. House of Representatives

The Honorable Orrin Hatch  
Chairman, Committee on Finance, United States Senate

The Honorable Ron Wyden  
Ranking Member, Committee on Finance, United States Senate

The Honorable Mike Crapo  
Chairman, Committee on Banking, Housing, and Urban Affairs, United States Senate

The Honorable Sherrod Brown  
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Acting Director, Federal Insurance Office, U.S. Department of the Treasury

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