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What is the Proposed U.S.-EU Insurance Covered Agreement?

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On January 13, 2017, the United States and European Union (EU) concluded negotiations on the first insurance *covered agreement*. A covered agreement is a relatively new form of international agreement, established along with the Federal Insurance Office (FIO) in Title V of the Dodd-Frank Act (P.L. 111-203). The statute defines a covered agreement as a type of international insurance or reinsurance agreement for recognition of prudential measures that FIO and the United States Trade Representative (USTR) negotiate on a bilateral or multilateral basis. After such an agreement, FIO has relatively narrow authority to preempt state laws that are inconsistent with the agreement and result in less favorable treatment for foreign insurers. Such preemption, however, may not apply to any state insurance measure that "governs any insurer's rates, premiums, underwriting, or sales practices." Although FIO and USTR must consult with Congress on the negotiations, the statute does not require specific authorization or approval from Congress for the covered agreement to take effect.

The U.S.-EU covered agreement was submitted to the House Committees on Financial Services and Ways and Means and the Senate Committees on Banking, Housing, and Urban Affairs and Finance on January 13, 2017. House Financial Services and Senate Banking held subcommittee hearings on the agreement. The 90-day congressional layover period mandated in statute has passed, but the United States has not officially signed the agreement. The EU's European Council authorized the signing of the covered agreement and asked for the European Parliament's consent to conclude the agreement. The Trump Administration has not indicated its policy toward conclusion of the agreement.

A covered agreement can be seen as sharing some aspects of financial regulatory cooperation agreements, such as those entered into by U.S. banking regulators in the Basel Committee on Banking Supervision. Financial regulatory cooperation agreements have been undertaken without direct congressional direction under existing regulatory authorities and are implemented through the regulatory rulemaking process, as are other financial regulations. Such federal financial regulations may, in some cases, preempt state laws and regulations.

In contrast, free trade agreements (FTAs) are negotiated under congressionally passed Trade Promotion Authority

(TPA), which establishes negotiating objectives and notification and consultation requirements. If these conditions are met, implementing legislation authorizing changes in U.S. law necessary to meet the new obligations can be considered by Congress under expedited procedures. U.S. FTAs include market access commitments and rules and disciplines governing financial services measures, such as nondiscrimination and transparency obligations. Although FTAs customarily establish a *Financial Services Committee* comprised of each party's regulators to oversee implementation of the agreement and provide a forum for communication, U.S. FTAs to date exclude regulatory cooperation commitments for the financial services sector.

In U.S.-EU negotiations for the Transatlantic Trade and Investment Partnership (T-TIP) under the Obama Administration, the EU sought to include regulatory cooperation issues in the agreement that could have included some of the same matters as the covered agreement. Some Members of Congress supported this position, whereas U.S. regulators opposed the inclusion. The United States and EU did agree to establish the Joint U.S.-EU Financial Regulatory Forum, but T-TIP negotiations are on pause until the Trump Administration decides how it wants to proceed.

The Obama Administration notified Congress regarding plans to begin negotiations with the EU on a covered agreement in November 2015 with expressed goals to achieve recognition of the U.S. regulatory system by the EU, particularly through an "equivalency" determination under the EU's Solvency II that would allow U.S. insurers and reinsurers to operate throughout the EU without increased regulatory burdens, and to obtain uniform treatment of EU-based reinsurers operating in the United States, particularly with respect to collateral requirements. The issue of equivalency for U.S. regulation is a relatively new one, as Solvency II has only come into effect at the beginning of 2016, whereas the question of reinsurance collateral has been a concern of the EU for many years. The covered agreement negotiations also sought to facilitate the exchange of confidential information among supervisors across borders.

According to the USTR and Treasury, the new bilateral agreement

- 1. allows U.S. and EU insurers to rely on their home country regulators for worldwide prudential insurance group supervision when operating in either market;
- 2. eliminates collateral and local presence requirements for reinsurers meeting certain solvency and market conduct conditions; and
- 3. encourages information sharing between insurance supervisors.

The proposal sets timelines for each side to make the necessary changes and allows either side to not apply the agreement if the other side falls short on full implementation. Unlike the goals expressed to Congress when negotiations began, the agreement does not explicitly call for equivalency recognition of the U.S. insurance regulatory system by the EU. However, the agreement's provisions on group supervision would seem to meet the same goal of reducing the regulatory burden on U.S. insurers operating inside the EU. The proposal goes beyond a previous state-level proposal on reinsurance collateral requirements put forth by the National Association of Insurance Commissioners (NAIC) and adopted by many states, and allows for the possibility of federal preemption if states are not in compliance.

Several U.S. industry groups welcomed the agreement, including the American Insurance Association (AIA), the Reinsurance Association of America, and the American Council of Life Insurers (ACLI). The AIA's president particularly praised it for allowing U.S. insurers to compete in the EU "without the costly and duplicative regulations being imposed on them under Solvency II."

State regulators and state lawmakers, respectively represented by the NAIC and National Council of Insurance Legislators (NCOIL), expressed concern with the agreement due to the limited state involvement in the negotiation process and the potential federal preemption of state laws and regulations. Some insurers also question the utility of the agreement, with the president of the National Association of Mutual Insurers (NAMIC) seeing ambiguity that "will result in confusion and potentially endless negotiations with Europe on insurance regulation."