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Insurance Legislative and Regulatory Activity in the US and EU in Response to COVID-19

Insurance Legislative and Regulatory Activity in Response to COVID-19: U.S. and EU Developments

SUMMARY

Significant legislative and regulatory activity has occurred at both the U.S. federal and state levels, as well as in the European Union ("EU") and United Kingdom, in response to the novel coronavirus ("COVID-19") and its impact on the insurance industry and insurance consumers. This Memorandum summarizes certain key COVID-19-related insurance legislative and regulatory developments to date, including:

- U.S. state bills to require insurers to retroactively cover business interruption claims relating to COVID-19, which to date have been proposed in Massachusetts, Louisiana, New Jersey, New York, Ohio and Pennsylvania;
- Federal health insurance requirements pursuant to the Families First Coronavirus Response Act ("Families First Act")¹ and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act");²
- U.S. Congressional activity and legislative proposals involving business interruption insurance, federal pandemic loss-sharing programs and other insurance matters;
- New York State Department of Financial Services ("NYDFS") circular letters, industry guidance and emergency regulations relating to COVID-19 and its impact on insurers and policyholders;
- COVID-19-related guidance and directives issued by other state insurance regulators;
- Actions and proposals by the National Association of Insurance Commissioners ("NAIC") and the National Council of Insurance Legislators ("NCOIL"), as well as, at the international level, the International Association of Insurance Supervisors ("IAIS"); and
- Certain actions taken at the EU level, as well as in various EU Member States and in the United Kingdom.

PROPOSED BUSINESS INTERRUPTION LEGISLATION

As businesses assess the availability of insurance for losses due to the business closures and other interruptions caused by the COVID-19 crisis, legislators in a handful of U.S. states have proposed legislation that would, if enacted, require insurers to cover business interruption claims resulting from the pandemic, generally on a retroactive basis to early March 2020 and irrespective of virus-related policy exclusions or policy conditions that would otherwise preclude coverage for COVID-19-related business interruption. The proposed bills purport to apply to in-force commercial property policies with existing business interruption coverage and “to be subject to the limits under the policy.” The proposed bills are generally limited to policies issued to insureds with fewer than 100 full-time employees (the Massachusetts bill is limited to insureds with 150 or fewer full-time employees, the New York bill is limited to insureds with fewer than 250 full-time employees, and one of the Louisiana Senate bills has no limitation on workforce size).

As background, most commercial property insurance policies provide first-party property coverage for “business interruption” that protects the insured against the loss of business income, and the extra expenses incurred to continue or resume business, resulting from property damage caused by a covered peril. It is not uncommon for policies to extend those base coverages to cover business interruption and extra expenses resulting from the act or order of a “civil authority” that impairs or prohibits access to the policyholder’s property, and/or “ingress/egress” coverage for lost income due to the inability to access the policyholder’s premises resulting from a covered peril. A broader coverage that may be purchased is “contingent business interruption,” which provides coverage for lost business sustained by the policyholder due to losses that are suffered by the policyholder’s critical suppliers, customers or partners, as long as the underlying cause of damage to the supplier, customer or partner is of the type covered by the insured’s own property policy. Some policies may also provide supply chain or trade disruption coverage, which typically covers business interruption and contingent business interruption due to supply chain disruption or breakdowns in transportation. These business interruption and related coverages (including civil authority coverage) are, under many standard policy forms, typically triggered only by “direct physical loss of or damage” to relevant property.³ Even if physical damage has occurred or the policy does not require direct physical loss, however, a widely used 2006 Insurance Services Office (ISO) form entitled “Exclusion for Loss Due to Virus Or Bacteria” excludes business interruption coverage for any “loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease.” The exclusion, which is often included in standard commercial property package policies, was drafted following the 2002-2004 SARS outbreak to explicitly exclude loss of business income and other losses due to property contamination by any viruses or bacteria, specifically including rotavirus, SARS, influenza, legionella, and anthrax. Some policies may contain different but analogous exclusions for loss or damage caused by viruses, mold, fungus, or “pollutants or contaminants.”

Not all policies include the 2006 ISO or other related exclusions, and the scope of the various exclusions has yet to be tested in the COVID-19 context.

According to a Congressional Research Service (“CRS”) report⁴ issued to the U.S. Congress on March 31:

“[T]he determination of coverage related to the coronavirus may turn on the definition of physical damage. When a business remains habitable but has been closed as part of a mandatory or voluntary closure to protect against contamination, it has probably not suffered a direct physical loss. If a property has become physically contaminated and uninhabitable due to coronavirus, there may be a basis to claim that a direct physical loss has occurred. Some orders shutting businesses, such as that issued by the Mayor of New York, have specifically cited property damage from COVID-19 as one of the underlying reasons for shutdowns in which it discussed the issue of BI insurance coverage.”

According to the CRS report, there is some case law that supports an interpretation of direct physical loss to include damage that is not structural but could make the insured premises unfit for occupancy. The CRS report notes that some industry sources have estimated the cost of covering COVID-19-related U.S. business interruption claims for “small businesses” to range from \$110 billion to \$290 billion per month.

None of the proposed bills described below has been passed and each has been met with resistance by industry trade groups and other industry stakeholders. If adopted, legislation modifying existing business interruption policies is certain to face court challenges alleging, among other things, violation of the U.S. Constitution’s Contracts Clause, which prohibits state governments from “impairing the Obligation of Contracts.” To date, the bills have only been introduced by their respective sponsors (or withdrawn as in New Jersey), or at most referred to a committee, and the future course of the bills remains uncertain, particularly as most state legislatures have now adjourned as a result of the pandemic. In addition, small businesses eligible for relief under these bills may also be eligible for relief through the Paycheck Protection Program authorized by the CARES Act and/or potentially other programs that may be enacted at the federal level (discussed under Federal Developments below), which could further decrease momentum for state bills of this nature or raise significant issues as to the extent of the losses remaining to be covered.⁵

New Jersey A3844

On March 16, Assembly Bill A3844⁶ was introduced into the New Jersey General Assembly but was later withdrawn from consideration without a full Assembly vote. Although the bill is not currently under consideration in the New Jersey legislature, the bills proposed to date in other states are all generally similar to, and follow the framework of, the New Jersey bill. The proposed bill provided that:

Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in this State on the effective date of this Act, shall be construed to include among the covered perils under that policy, coverage for

business interruption due to global virus transmission or pandemic, as provided in [the Emergency Declaration issued by the Governor of New Jersey concerning COVID-19].

Under the bill, the insurer would “indemnify” the insured, subject to the limits under the policy, for “any loss of business or business interruption” for the duration of the State of Emergency. The bill would only apply to policies (1) issued to insureds with fewer than 100 eligible employees and (2) that are in force on the effective date of the legislation. Eligible employees are defined to mean full-time employees who work a normal work week of 25 or more hours.

The bill proposed that an insurer that indemnifies an insured pursuant to the Act may apply to the Commissioner of the New Jersey Department of Banking and Insurance (“Commissioner”) for reimbursement from funds “collected and made available” for this purpose. The Commissioner would be authorized to establish a special purpose apportionment to be imposed on property and casualty insurance companies doing business in New Jersey and collect from them such additional amounts as may be necessary to recover the amounts paid as reimbursement to insurers mandated to pay claims under the legislation. The special purpose apportionment would be distributed in the proportion that the net written premiums received by each applicable company for risks written or renewed in New Jersey for the prior calendar year, bears to the total sum of all such net written premiums received by all such companies within the state during the calendar year. The bill was proposed to take effect immediately upon enactment and to be retroactive to March 9.

Ohio HB 589

On March 24, H.B. No. 589⁷ was introduced into the Ohio State House of Representatives that is in substance the same as the New Jersey proposed bill. The Ohio bill makes clear that claims for reimbursement by insurers mandated to pay coverage under the proposed law would either be paid as the claims are received from funds available to the Superintendent of the Ohio Department of Insurance, or would be paid after assessments are collected from the special assessment fund imposed on property and casualty insurers engaged in business in Ohio. Funds collected from the special assessment would be deposited into a Business Interruption Insurance Fund. Any amounts remaining in the Fund after all claims have been paid would be returned to insurers in a manner to be prescribed by the Superintendent. The bill is proposed to take effect immediately upon enactment, but does not explicitly provide that it is retroactive.

Massachusetts SD 2888

On March 24, S.D. No. 2888⁸ was introduced into the Commonwealth of Massachusetts Senate. The Massachusetts bill is in most respects similar to the New Jersey bill, but it includes additional language negating express policy exclusions to the contrary:

Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to

property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes ... the loss of use and occupancy and business interruption ... shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, no insurer ... may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property.

(Emphases added)

The Massachusetts bill applies to policies issued to insureds with 150 or fewer full-time employees (as opposed to 100 in most other proposed bills). The bill is proposed to take effect immediately upon enactment, but does not explicitly provide that it is retroactive.

New York A.10226

On March 27, Assembly Bill 10226⁹ was introduced in the New York State Assembly. The New York bill in its original form was nearly identical to the proposed bill introduced in New Jersey. The original bill was referred to the Assembly Insurance Committee for further consideration, which then amended and recommitted the bill to the same committee on April 8. The bill as amended makes key changes to the original bill, including: (1) addition of a new section providing that every policy insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, which policy is due to expire during the state's COVID-19 state of emergency, will be subject to an automatic renewal of the policy at the current rate of charge; (2) addition of a new section providing that any clause or provision of a policy insuring against loss or damage to property that allows the insurer to deny coverage based on a virus, bacterium or other microorganism that causes, or is capable of causing, disease, illness or physical distress shall be null and void; and (3) amending the bill to apply to policies issued to insureds with fewer than 250 (as opposed to the original 100) eligible employees. Both the original and amended forms of the bill do not limit the special apportionment to property and casualty insurers, but rather provide that the special apportionment is to be collected from "companies engaged in business pursuant to the insurance law." The bill is proposed to take effect immediately upon enactment and to be retroactive to March 7.

Louisiana Bills

Four bills relating to business interruption or commercial property coverage were introduced in the Louisiana state legislature on March 31:

- ***HB 858:*** HB 858¹⁰ was introduced into the Louisiana State House of Representatives. The bill largely follows the language of the New Jersey proposed bill, including that its application be limited to policies issued to insurers who have fewer than 100 full-time employees. However, unlike the

bills proposed in other states, the bill provides for no special apportionment or reimbursement mechanism for insurers mandated to provide coverage under the bill. The bill is proposed to take effect immediately upon enactment and to be retroactive to March 11.

- **SB 477:** Louisiana State Senate Bill SB 477¹¹ also largely follows the language of the New Jersey proposed bill, except that the bill contains no limitation as to the insureds to which it would apply, and thus would by its terms apply to all insureds with business interruption coverage regardless of size. Moreover, like the Louisiana House bill, the bill provides for no special apportionment or reimbursement mechanism for insurers mandated to provide coverage under the bill. In addition, the proposed bill would require every policy covering business interruption that is delivered or issued in Louisiana on or after August 1, 2020 to include a “notice of all exclusions on a form prescribed by the commissioner of insurance,” which notice is to be signed by the insurer and the named insured (or its legal representative). The signed form would create a “rebuttable presumption that the insured knowingly contracted for coverage with the stated exclusions.” These notice requirements would apply to any property insurance covering any business interruption that occurs in Louisiana and involves a Louisiana business. The bill is proposed to take effect immediately upon enactment and to be retroactive to March 11.
- **SB 495:** Unlike the other state legislative bills discussed above, Louisiana State Senate Bill SB 495¹² would create a private Business Compensation Fund (the “Compensation Fund”) for the purpose of expediting certain property insurance claims and providing coverage for losses sustained as a result of the COVID-19 pandemic. Any insurer writing commercial insurance of any kind in Louisiana could participate in the Compensation Fund by contributing to the Fund the greater of \$50 million or 80% of the aggregate limits of all in-force commercial policies during the pandemic. Insurers would be required to apply for participation within 60 days after expiration of the state’s COVID-19 emergency declaration. Participating insurers would be “immune from claims of bad faith brought by any person seeking payment for claims under a policy written in this state for losses associated with the COVID-19 pandemic.” An insured under a commercial insurance policy in Louisiana could apply for a payment from the Compensation Fund if the insured sustained commercial income or revenue loss due to the COVID-19 threat, but such application would have to be received within 90 days after expiration of the COVID-19 emergency declaration. The insured would have to agree to accept 80% of “actual losses up to the policy limits” in satisfaction of all claims for such commercial income or revenue loss. Participating insurers could challenge a claim as fraudulent or contest the amount of a claim, but would waive the right to contest liability.
- **SB 506:** Finally, Louisiana State Senate Bill SB 506¹³ provides that any contract to insure a commercial or residential building shall include coverage for the cost of fumigating the building if a person residing or working therein has a positive diagnosis for COVID-19, “based upon ten cents per square foot of the area fumigated.”

Pennsylvania HB 2372

On April 3, HB 2372¹⁴ was introduced into the Pennsylvania House of Representatives, and has been referred to the Pennsylvania House of Representatives Insurance Committee. The bill follows the New Jersey bill in most respects, but in a slight difference to the other bills, the Pennsylvania bill provides that the mandated coverage would indemnify the insured “subject to the broadest or greatest limit and lowest deductible afforded to the business interruption coverage under the insurance policy,” for any loss of business or business interruption for the duration of the state’s emergency declaration. The bill is proposed to take effect immediately upon enactment, but does not explicitly provide that it is retroactive.¹⁵

FEDERAL DEVELOPMENTS

While federal legislation and regulatory actions enacted to date have not, aside from certain health insurance requirements relating to COVID-19, addressed insurance regulatory or coverage matters, they are expected to have important implications for all U.S. businesses, including insurers and other insurance market participants.¹⁶

- **Health Insurance:** On March 18, President Trump signed the Families First Act into law. The Act mandates that all private group health insurance plans (including fully insured, self-insured and grandfathered plans) are required to provide coverage for COVID-19 testing, and the applicable provider, urgent care or emergency visit associated with the testing, to plan participants without cost-sharing (including deductibles, co-payments or coinsurance). In addition, Medicare, Medicare Advantage and Medicaid (as well as CHIP, TRICARE and Indian Health Service plans) are required to waive cost-sharing for COVID-19 testing and provider, urgent care or emergency visits associated with such testing. With respect to uninsured individuals, states will have the option to extend Medicaid eligibility to uninsured individuals for COVID-19 testing; the federal government will cover the costs of such extension, and the National Disaster Medical System will reimburse uninsured individuals for costs associated with COVID-19 laboratory testing. Under the Act, employer plans are not required to cover the cost for *treatment* of COVID-19.

The CARES Act, which President Trump signed into law on March 27, builds on the above provisions by further requiring that health plans provide coverage without cost sharing (including deductibles, copayments or coinsurance) or prior authorization for all diagnostic tests for COVID-19, provided that: (i) the test has been approved, cleared or authorized by the Food and Drug Administration ("FDA"); (ii) the test developer intends or has requested FDA authorization for emergency use; (iii) a state has authorized it and notified the U.S. Department of Health and Human Services ("HHS"); or (iv) HHS has otherwise deemed it appropriate. Health plans and insurers are required to reimburse at either the negotiated rate set forth in a contract with the provider or, if the plan or insurer does not have a negotiated rate with the provider, at the price listed by the provider. The CARES Act also includes a number of temporary policy changes relating to telehealth services in order to increase access to care during the COVID-19 crisis.

- **Business Interruption Insurance:** On March 18, a bipartisan group of 18 members of the U.S. House of Representatives sent a letter to four leading insurance industry trade organizations (American Property Casualty Insurance Association ("APCIA"), National Association of Mutual Insurance Companies ("NAMIC"), Independent Insurance Agents & Brokers of America ("IIABA"), and Council of Insurance Agents and Brokers ("CIAB")) to "urge [their] member companies and brokers to make financial losses related to COVID-19 and other infectious disease-related losses part of their commercial business interruption coverage for policyholders." In response, the chief executive officers of the four trade organizations sent a letter on March 18 to Representative Nydia M. Velazquez, Chair of the House Committee on Small Business and one of the signatories of the letter, stating that "[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."

On March 19, the Problem Solvers Caucus, a bipartisan group of 48 U.S. Representatives (composed of 24 Democrats and 24 Republicans) released a package of policy recommendations for consideration in connection with debate involving passage of the CARES Act. The outline of policy recommendations, titled the "Health Crisis & Economic Revival Package," included a proposal to legislatively declare COVID-19 "a public health crisis and, as such, a qualifying event for all existing force majeure contract provisions and business interruption insurance policies." Following passage of the CARES Act, it is unlikely that the caucus' package of policy recommendations will see any movement in its proposed form.

In response to the Problem Solvers Caucus proposal, the NAIC issued a public statement on March 25 urging Congress not to enact such legislation and opposing proposals that would require

insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover. According to the NAIC statement, “[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. ... While the U.S. insurance sector remains strong, if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.”

In a later development, on March 31, U.S. Representative Gilbert Cisneros along with 32 bipartisan House Members representing California sent a letter to California Insurance Commissioner Ricardo Lara urging the Commissioner to use his authority to ensure insurance companies comply with their business interruption policies. According to the letter, “many businesses have in good faith purchased and paid for business interruption insurance to cover the loss of business income sustained due to a necessary suspension of the business operations ... [but] some insurers are choosing to deny these business interruption claims and not uphold their responsibility to cover these insured losses.” In response, on April 2, the APCIA, NAMIC, IIAB, CIAB and the Reinsurance Association of America (“RAA”) sent a letter to Representative Cisneros stating that standard business interruption policies “do not, and were not designed to, provide coverage against communicable diseases such as COVID-19, and as such, were not actuarially priced to do so.” The response letter indicates that recent estimates show that business continuity losses only for small businesses of 100 employees or fewer could amount to between \$220 billion to \$383 billion per month, whereas the total surplus for all U.S. home, auto and business insurers combined to pay all future losses on all types of policies is only \$800 billion.

- **Pandemic Risk Insurance:** There have been discussions in the House of Representatives and proposals from various insurance and other industry trade organizations with respect to establishing a federal reinsurance program similar to the Terrorism Risk Insurance Act (“TRIA”) for pandemic risks. TRIA, which established a federal backstop for insurance claims related to acts of terrorism, was enacted into law in November 2002 in response to the September 11 attacks and has since been extended four times and is currently reauthorized through 2027. PRIA legislation would be expected to establish a federal reinsurance program similar to TRIA for pandemics, by mandating or permitting participating commercial insurers to cover pandemic risks under commercial insurance policies, with the federal government providing a reinsurance backstop. The threshold amount for triggering federal payouts, requirements and conditions (including premium payments) for insurer participation, and any caps on total federal coverage available, would all need to be considered as any applicable legislation progresses through Congress. Based on information to date, it is unclear whether any future PRIA legislation would apply retroactively and therefore might not be available for losses arising from the current COVID-19 crisis.
- **Recovery Fund Proposal:** Following enactment of the CARES Act, on March 31, a group of 36 trade associations, including the APCIA, NAMIC, IIABA and RAA, as well as trade groups representing the hotel, real estate, franchise, food service, travel and other industries, sent a letter to President Trump, Treasury Secretary Mnuchin and House and Senate leaders, requesting that Congress “advance a proposal to further assist with economic recovery and mitigate a larger financial crisis resulting from widespread disruption of economic activity.” Although the letter acknowledges that the loan programs instituted by the CARES Act “provide a down payment on economic support for Main Street businesses,” the groups contend that “additional liquidity will be required for impaired industries and businesses to avoid an unprecedented systemic, economic crisis.” In particular, the letter proposes the establishment of a “COVID-19 Business and Employee Continuity and Recovery Fund,” which is modeled after the 9/11 Victims Compensation Fund. The Fund “would leverage private sector contractors to facilitate both expedited applications and interim payments as well as auditing of ongoing relief.” The Fund would be run by a special federal administrator and be funded through advanced authorization of federal appropriations. Small businesses, nonprofits, veterans’ organizations and tribal businesses (with 500 or fewer employees) would be eligible for relief, as well as businesses of any size that can demonstrate impairment by COVID-19, with prioritization for businesses most impacted by COVID-19, that have

high proportions of employees who would otherwise be employed or that provide “essential critical infrastructure.” The proposal contemplates a 30-day turnaround for prioritized applications, and 15-day turnaround for expedited interim relief.

- **National Restaurant Association Proposal:** The National Restaurant Association on March 18 wrote a letter to President Trump, Speaker of the House Pelosi and Senate Majority Leader McConnell urging a series of proposals, including \$100 billion in federally backed business interruption insurance. In addition to a recovery fund, block grants, federal loan programs, unemployment assistance and various tax measures directed to the restaurant and food service industries, the letter proposes that, “rather than engage in a protracted dispute and arbitration process” with respect to coverage for business interruption and contingent business interruption, Congress should approve a timely \$100 billion insurance program that would allow businesses to receive business interruption payments under an expedited time frame, utilizing a federal backstop similar to the program created for airlines after the September 11 attacks.

It remains unclear to what extent, following passage of the CARES Act, such recovery fund or federal backstop proposals will gain traction as Congress considers additional stimulus legislation relating to COVID-19.

- **Travel Insurance:** On March 4, the House Subcommittee on Economic and Consumer Policy sent letters to Allianz Global Assistance USA, Travel Guard Group, Inc. and Generali Global Assistance, Inc. regarding reports that travel insurance companies are not covering trip cancellations connected to COVID-19. A hearing was scheduled for March 11 but has since been postponed indefinitely. The subcommittee sought data on the number of claims the insurers received from policyholders for reimbursement of trip cancellations or medical expenses and how many of those claims have been paid or denied.¹⁷
- **Critical Essential Services:** A number of states and municipalities have issued orders or requests that all “non-essential businesses” close. Although a number of states have issued state-specific guidance as to whether insurers and insurance producers are to be considered to constitute “essential businesses” that may, or should, continue operating during the COVID-19 crisis, several states have relied on, or adopted, federal guidelines respecting what services constitute “critical essential services.” In this light, the U.S. Department of Treasury issued a memorandum on March 22 announcing that the Department of Homeland Security has identified the financial services sector as a “critical infrastructure sector” and outlining individuals within the “Essential Critical Infrastructure Workforce” within the industry, which include workers who “process and maintain systems for processing financial transactions and services, such as ... insurance services.”
- **CECL:** On March 27, the American Council of Life Insurers (“ACLI”) sent a letter to the Financial Accounting Standards Board (“FASB”) requesting that FASB consider: (1) “codifying the language” in the CARES Act regarding the delay of the current expected credit losses (“CECL”) standard for certain depository institutions, and (2) “expanding the scope of the optional deferral to all financial institutions, including insurance companies, insurance holding companies and any subsidiary or affiliate thereof.” The CECL methodology for estimating allowances for credit losses was issued by FASB in June 2016 as part of Accounting Standards Update No. 2016-13 (“ASU 2016-13”). Under U.S. GAAP, CECL replaces an “incurred loss” approach to the recognition of credit losses on financial assets measured on an amortized cost basis with a “forward-looking” approach based on the expected credit loss over the life of the instrument. The CARES Act provides that, notwithstanding any other provision of law, no insured depository institution, credit union, bank holding company, or any affiliate thereof is required to comply with ASU 2016-13, including the CECL methodology, during the period beginning on the enactment date of the CARES Act and ending on the earlier of the “Coronavirus Emergency Termination Date” and December 31, 2020, but does not provide relief for other financial institutions, such as insurance holding companies.¹⁸

STATE DEVELOPMENTS

U.S. state insurance regulators have been very active in response to the COVID-19 health and related economic crisis, resulting in a panoply of orders, directives, guidance and emergency regulations across all 50 states, the District of Columbia and U.S. territories. The NYDFS has been particularly active, having issued multiple insurance-related circular letters, industry guidance letters, emergency regulations and other communications in response to COVID-19. This Memorandum summarizes key NYDFS actions and guidance in March 2020 specific to the insurance industry, and provides a brief synopsis of regulatory actions taken by other state insurance regulators, which broadly cover a similar set of topics and issues as those addressed by the NYDFS.

A. NEW YORK DEPARTMENT OF FINANCIAL SERVICES

- **Operational Preparedness:** The NYDFS issued Insurance Circular Letter No. 5 on March 10, which requires that “regulated insurance entities” submit a response to NYDFS describing their plans of preparedness to manage the risk of disruption to their operations and the financial risk arising from COVID-19.¹⁹ The NYDFS has advised that for purposes of this circular letter, a regulated insurance entity is a domestic or foreign insurer licensed to do business in New York, and certain insurance producers that were specifically notified by the NYDFS. Responses are to be provided to NYDFS as soon as possible and no later than April 9, although the NYDFS has now extended the deadline.

The submitted plan must include: (1) preventative measures to mitigate the risk of operational disruption, including identifying the impact on consumers and vendors; (2) a documented strategy addressing the impact of the outbreak in stages; (3) assessment of all facilities, systems, policies and procedures necessary to continue critical operations and services, including the effectiveness and security of remote access; (4) employee protection strategies; (5) assessment of the preparedness of critical third-party service providers and suppliers; (6) development of a communication plan to effectively communicate with consumers and vendors; (7) testing of the plan; and (8) governance and oversight of the plan. In addition, the NYDFS is requiring insurers to submit a plan to assess and monitor the financial risk that may arise from COVID-19, which is to include: assessment of the overall impact of COVID-19 on reserve requirements; consumers’ ability to make timely premium payments and the resources required to timely process claims; credit risk of and credit exposure to counterparties and business sectors impacted by COVID-19; the scope and size of admitted assets or other investments adversely impacted by COVID-19; and the overall impact of COVID-19 on earnings, profits, capital, and liquidity.

- **Business Interruption:** On March 10, the NYDFS issued a *Call for Special Report Pursuant to Section 308 of the New York Insurance Law* to all New York-licensed property and casualty insurers regarding business interruption coverage written in New York. According to the letter, in the interest of “the timely and equitable fulfillment of insurance contracts, insurers must explain to policyholders the benefits under their policies and the protections provided in connection with COVID-19.” The letter required such insurers to provide to the NYDFS by March 18: (1) information on the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage (by direct premium, policy types and numbers of policies for each type) written by the insurer that has not lapsed as of March 10; and (2) copies of explanations sent to policyholders regarding the coverage afforded by each policy as applied to COVID-19, including a representation that such explanations have been provided to policyholders. The letter directed that the explanation to policyholders should indicate whether the policy contains a requirement for “physical loss or damage” and explain whether contamination related to a pandemic may constitute such, and describe what type of damage or loss is sufficient for coverage under the policy. Likewise, for policies with “civil authority” coverage, the explanation to policyholders should

explain “whether a civil authority prohibiting or impairing the policyholder’s access to its covered property in connection with COVID-19” is sufficient for coverage under the policy.

- **Health Insurance:** The NYDFS has issued various emergency regulations, circular letters and other guidance and information relating to specific health insurance topics, addressing: waiver of cost sharing associated with testing for COVID-19; telehealth medical advice and treatment; keeping consumers informed of available benefits; coverage of costs if a COVID-19 immunization should become available; preparing provider networks for increased caseloads; expanding access to prescription drugs; ensuring emergency care at in-network cost-sharing even if the hospital is out-of-network or overseas; prohibiting requirements that a patient must seek preauthorization prior to seeking emergency care; reminding insurers that lifetime or annual limits cannot be placed on in-patient care; requiring insurers to hold harmless insureds who receive surprise medical bills; and suspension of pre-authorization and administrative requirements, including certain utilization review and notification requirements for hospitals. In addition, on April 2 the NYDFS announced that an emergency regulation will be enacted providing that, through June 1, 2020, consumers and businesses experiencing financial hardship due to COVID-19 may defer paying premiums under individual and small group commercial health insurance plans.
- **Travel Insurance:** The NYDFS issued Insurance Circular Letter No. 4 on March 6 in order to clarify for New York-licensed property and casualty insurers and licensed travel insurance producers the position of the NYDFS on “cancel for any reason” (“CFAR”) benefits in the travel insurance context and potential coverage for COVID-19 under travel insurance policies. Under New York law, CFAR benefits in the travel context do not technically qualify as insurance because the cancellation of a trip “for any reason” does not depend on the occurrence of a fortuitous event; as a result, until the guidance issued in March 2020, CFAR coverage had been unavailable in New York. The circular letter and supporting guidance letter issued to travel agents and travel insurers provides that, effective March 6, travel insurers and travel agents may sell CFAR policies to New York residents and businesses. However, the NYDFS guidance notes that CFAR policies are separate and distinct from standard travel insurance, and should not be sold together.
- **Support for Consumers:** The NYDFS issued Insurance Circular Letter No. 7 on March 19 to urge all “regulated insurance entities” to do their part to alleviate the adverse impact caused by COVID-19 on consumers and small businesses suffering financial hardship caused by COVID-19. The circular letter urges regulated insurance entities to: (1) offer payment accommodations, such as allowing consumers to defer payments, extending payment due dates, or waiving late or reinstatement fees; (2) work with consumers to avoid cancellation of insurance policies for failure to pay premiums on time or for underwriting reasons; (3) work with consumers to avoid non-renewal of insurance policies; (4) increase resources to accommodate increased claim submissions and consumer inquiries about policy benefits; (5) prepare clear and concise descriptions of coverage benefits that may be triggered by COVID-19; (6) alert consumers to the heightened risk of scams and price gouging; (7) avoid any disruption of service to consumers; (8) provide flexibility regarding proof of death, disability, or other conditions that trigger benefits under life insurance or annuity contracts; and (9) provide consumers with information on medically necessary covered health care services. The circular letter also urges regulated entities to work with and provide accommodations to their borrowers to the extent reasonable and prudent, including refraining from exercising rights and remedies based on potential technical defaults under material adverse change and other contractual provisions that might be triggered by the COVID-19 crisis.
- **Premium Grace Periods:** On March 27, Governor Cuomo announced that, for a 90-day period, consumers experiencing financial hardship due to COVID-19 may defer paying life insurance premiums and, for a 60-day period, consumers and small businesses experiencing financial hardship may defer paying premiums for property and casualty insurance, including auto, homeowners, renters, workers compensation, medical malpractice, livery and taxi. No late fees will be assessed and no negative data will be reported to credit bureaus during this time, and late payments will be payable over a one-year period. In connection with the Governor’s order, the NYDFS adopted on March 30 an emergency regulation applicable to New York-regulated life and annuity insurers, property and casualty insurers, and premium finance agencies.

Under the emergency regulation, the 90-day grace period for the payment of premiums and fees is applicable to any person to whom a life insurance policy or annuity contract is issued, including a certificate holder under a group insurance policy or annuity contract, and who demonstrates financial hardship as a result of the COVID-19 pandemic. The 60-day grace period is applicable to any “property/casualty policyholder” facing financial hardship as a result of the COVID-19 pandemic, including holders of policies written on a surplus lines (i.e., “excess lines”) basis. For purposes of the regulation, a “property/casualty policyholder” means an individual or “small business” to whom a property and casualty policy is issued, including a certificate holder under a group insurance policy. “Small business” is defined as any business that is resident in New York, is independently owned and operated, and employs 100 or fewer individuals. Insurers are required to accept a written attestation from a policyholder as proof of financial hardship as a result of COVID-19. The emergency regulation also provides that, with respect to any policyholder that did not timely pay premium and who attests to experiencing financial hardship due to COVID-19: (1) insurers may not impose any late fees relating to late premium payments; (2) insurers may not report the policyholder to a credit reporting agency or refer the policyholder to a debt-collection agency respecting the late premium payments; and (3) insurers are required to permit affected policyholders who do not make a timely premium payment, and who attest to still experiencing financial hardship due to COVID-19, to pay the late premium over a 12-month period. According to the regulation, insurers must include with each insurance premium bill, starting no later than April 13, a notice of the provisions of the emergency regulation and a toll-free number that the policyholder may call to discuss billing and make alternative payment arrangements. Each insurer must notify applicable insurance producers and third-party administrators of the provisions of the emergency regulation. Licensed insurance producers who service an in-force policy subject to the regulation must mail or deliver a notice to the policyholder of the provisions of the emergency regulation. The emergency regulation also provides special requirements relating to premium finance agencies and premium finance arrangements with policyholders.

- **Producer Licensing:** The NYDFS issued Insurance Circular Letter No. 9 on March 25, which provides New York-licensed insurance producers that are adversely impacted by COVID-19 with temporary relief in connection with licensing requirements. As a temporary accommodation, the NYDFS will suspend the expiration of licenses for all individual producers for the next 60 days and waive any late fees resulting from, and accruing during, this suspension period.

The NYDFS has issued additional guidance permitting insurers and producers to sign documents, provide notices and make filings with the NYDFS through electronic means.

B. OTHER STATES

Nearly every state insurance department has issued some guidance, directive or request for information to regulated insurance entities relating to COVID-19. The scope and subject matter of these regulatory bulletins, notices, directives and orders vary from state to state, with some broadly directed at all regulated insurance entities and others directed only at domestic or foreign licensed insurers. Some state insurance regulators have only issued guidance or clarifications of the department's position on a particular issue, whereas others have issued revised regulations or binding orders or have required insurers to provide affirmative responses. State insurance regulatory actions can be broken down into certain broad categories, as summarized below.

- **Health Insurance.** Nearly all state insurance departments have issued guidance or orders to health insurance carriers, which generally provide for one or more of the following: (1) require waiver of cost-sharing for COVID-19 testing; (2) prohibit prior authorization requirements for COVID-19 testing; (3) require insurers to permit early prescription drug refills; (4) direct insurers to keep policyholders informed of COVID-19-related health insurance coverage; (5) direct insurers to expand telehealth and telemedicine platforms; and (6) direct insurers to ensure network adequacy

in light of increased demand for health services. Several states have also issued guidelines or orders relating to utilization review requirements, coverage for COVID-19 immunizations once available, inclusion of inpatient hospital, emergency and ambulatory services as “essential health benefits,” and prohibitions on “surprise medical bills.”

- **Operational Preparedness and Flexibility.** Several state insurance departments have issued directives requiring insurers to submit information related to their COVID-19 preparedness plans, or to review or provide information respecting their business continuity and contingency plans and procedures in light of the COVID-19 pandemic. States have also issued guidance or directives temporarily relaxing or providing regulatory flexibility on filing deadlines, examinations, continuing education requirements for producers, and use of electronic submissions and signatures in lieu of physical filings.
- **Support for Consumers.** Nearly all state insurance departments have issued bulletins or directives that provide relief to insurance consumers, including (depending on the state): providing grace periods for premium payments (typically 60-day grace periods but this varies by state); flexibility around cancellations and non-renewals, including non-cancellation periods; acceleration or waiver of certain underwriting requirements; and the fair treatment of consumers during the COVID-19 crisis.²⁰ For example, on March 18 the California Department of Insurance released a notice to all admitted and non-admitted insurers that provide any insurance coverage in California, requesting that such insurers provide their insureds with a 60-day grace period to pay insurance premiums. In addition, the notice requests that all insurance agents, brokers, and other licensees who accept premium payments on behalf of insurers take steps to ensure customers have the ability to make prompt insurance payments, including adopting alternate methods of payment such as online payments. As another example, the Louisiana Insurance Commissioner has suspended cancellation, nonrenewal and non-reinstatement (other than for fraud or misrepresentation) of policies in force as of March 12; any property and casualty insurer may offset, against claims during this period, premiums due and unpaid.

Of particular note, on March 23, the Wisconsin Office of the Commissioner of Insurance issued a bulletin that requires personal auto insurers to provide coverage for delivery drivers for restaurants during the COVID-19 public health emergency, even if those drivers or restaurants did not have coverage for such activities. The extra coverage must be provided at no extra cost to the insured. Further, under the Wisconsin order, commercial general liability insurers are required to notify restaurant-insureds that hired and non-owned auto coverage is available and, if requested, insurers must provide this coverage. In a related development, on March 27 the Washington Office of the Insurance Commissioner issued a bulletin urging all insurers doing business in Washington to immediately extend automobile insurance coverage for personal delivery drivers.

State requirements to provide premium grace periods present particular statutory accounting and premium tax issues for insurers, which insurers and trade associations have been requesting that the NAIC address. Under NAIC Statutory Accounting Principles, premium receivables that are more than 90 days past due must be treated as non-admitted assets, and thus insurers complying with the state-mandated premium grace periods may be required to treat the related premium receivable assets as such. In response to this concern, the Maryland Insurance Administration issued a bulletin on March 26 providing that Maryland-domiciled insurers that provide premium grace periods to policyholders may request a permitted accounting practice to waive, for the year 2020, the Statutory Accounting Principle at issue, with the number of permitted days past due to be based on the insurer's grace period. Many states have not, however, explicitly provided such relief. Insurance industry trade associations have also requested that state insurance departments concurrently delay premium tax deadlines so as not to tax insurers on premiums that have not been collected.

- **Travel Insurance.** To date, at least 18 state insurance departments have issued guidance to consumers regarding travel insurance coverage and COVID-19. This guidance generally notes that trip cancellations and trip interruptions due to known, foreseeable, or expected events, epidemics, or fear of travel are generally not covered. A few state insurance department bulletins have also advised that “[u]nless a travel insurance policy contains an exception applicable to

COVID-19, a policy of travel insurance that covers the risks sickness, accident, or death incident to travel presumptively must cover such risks relating to COVID-19.”

- **Data Calls / Business Interruption.** To date, at least 15 state insurance departments have issued guidance or FAQs regarding how COVID-19 implicates business interruption insurance coverage. Similar to the letters issued by the NYDFS, on March 25 the Washington Office of the Insurance Commissioner issued a letter instructing all property and casualty insurers authorized to write business in Washington to provide the Office with details on the business interruption coverage provided and the types of policies for which the insurer has ongoing business interruption exposure. In addition, for each policy type, insurers are required to prepare and send to policyholders a “clear and concise explanation of benefits.” Similarly, on March 26 the California Department of Insurance issued a notice to all admitted and non-admitted insurance companies writing insurance in California, requiring insurers to provide to the Department the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage the insurer wrote that has not lapsed as of March 26. Other states, including Delaware and New Mexico, have issued data calls related to lines of insurance expected to be most affected by COVID-19 (e.g., travel insurance and health insurance).

C. NAIC

On March 20, the NAIC held a two-and-a-half hour videoconference special session on COVID-19, in lieu of a COVID-19 symposium that had been scheduled to be held in Phoenix on March 22 as part of the NAIC Spring National Meeting. Shortly following the March 20 virtual session, the NAIC decided to suspend all remaining sessions of the virtual Spring National Meeting to allow regulators more time to focus on the crisis in their states. During the March 20 COVID-19 session, insurance industry representatives urged state regulators to coordinate their various data calls to avoid overtaxing insurer resources. Industry representatives expressed confidence that insurers will be able to adequately respond both to health and property and casualty insurance claims related to COVID-19, but warned that this may not hold if states mandate retroactive coverage for business interruption or other virus-related claims. The NAIC has created a Coronavirus Resource Center that serves as a repository for NAIC, state insurance department and industry resources relating to COVID-19 in the context of the insurance industry.²¹

SSAP No. 36. On March 25, ten insurance, real estate and hotel trade groups, including the ACLI, sent a letter to the NAIC Financial Condition Committee Chair, Virginia Bureau of Insurance Commissioner Scott White, and Vice Chair, Maine Bureau of Insurance Superintendent Eric Cioppa, requesting that the NAIC “issue immediate clarifying guidance that temporary forbearance, deferrals, or modifications of mortgage loans in response to the COVID-19 event will not trigger treatment as a restructured or delinquent loan for accounting purposes under SSAP No. 36 – Troubled Debt Restructurings, and for purposes of Life Risk-Based Capital.” According to the letter, servicers for mortgages held by life insurers are receiving requests from borrowers seeking temporary relief due to COVID-19, but the ability of life insurers to address such requests is impaired by uncertainty around the statutory accounting and risk-based capital consequences of those actions. The letter requests that the NAIC take immediate action to clarify the statutory accounting treatment of restructured loans and loans past due, such that:

- mortgage loans subject to short-term modifications or government-mandated modifications relating to COVID-19 economic effects will not be treated as restructured loans for purposes of Life Risk-Based Capital; and
- mortgage loans subject to short-term forbearances or deferrals related to COVID-19 economic effects will not be treated as delinquent for purposes of Life Risk-Based Capital, and if determined to be collectible would not be considered non-admitted for purposes of NAIC statutory accounting and reporting.

The letter notes that the requested clarifications would be consistent with comparable guidance provided to banks by their primary financial regulators in consultation with FASB (and since codified in Section 4013 of the CARES Act).

Data Calls. On March 26, the NAIC issued a communication to all state insurance regulators, encouraging them to not launch any COVID-19-related data calls to insurers on their own. The NAIC is currently developing a streamlined data call that all states will be able to use in a coordinated fashion in order to reduce unnecessary compliance work for insurers during the pandemic. The NAIC is urging state regulators to refrain from further inquiries to regulated insurers on COVID-19 matters, pending completion of the NAIC data reporting template. The template is intended to cover three areas: insurer operational readiness, financial markets' impact, and policy coverage matters.

D. NCOIL

NCOIL, a legislative organization comprised principally of legislators serving on state insurance and financial institutions committees, has also been active on COVID-19-related developments. On March 25, NCOIL sent a letter to Representative Nydia Velazquez, Chair of the House Committee on Small Business, stating that state legislative efforts to enact business interruption coverage into existing policies despite express conclusions for communicable diseases “would violate the Contract Clause within Article I of the United States Constitution.” NCOIL proposes an alternative solution in the letter, modeled after the Victims Compensation Fund established following the 9/11 attacks, that would create a COVID-19-related fund to assist businesses with business interruption or event cancellation claims. NCOIL proposes that Congress create a “COVID-19 Business Interruption & Cancellation Claims Fund” that would “incorporate the usage of the insurance industry’s claims processing systems to handle claims processing for the Fund in order to ensure all claims are validated prior to payment, removing any that do not meet the established criteria.” The letter expresses NCOIL support for the PRIA proposal, noting, however, that while PRIA would only operate prospectively, the NCOIL proposal would provide relief to claimants suffering losses from COVID-19.²²

NON-U.S. DEVELOPMENTS

A. IAIS MATTERS

On March 27, the International Association of Insurance Supervisors (“IAIS”) announced that it will be taking the following actions to provide operational relief to IAIS member supervisors, insurers and other stakeholders during the COVID-19 pandemic:²³

- The IAIS will undertake a targeted assessment of the impact of COVID-19 on the global insurance sector using the framework that the IAIS has developed for forward-looking risk assessment.
- The IAIS will review, in consultation with the Financial Stability Board, the 2020 timelines for the implementation of the Holistic Framework for the mitigation of systemic risk in the global insurance sector, and review and adjust the timelines for the data collection for the International Capital Standard (“ICS”) confidential reporting in 2020, as well as the Aggregation Method (“AM”) data collection being supported by the IAIS.²⁴ As a first step, the IAIS is extending the ICS submission deadline to October 31, 2020, and such submissions are to be made on a best efforts basis. Additionally, the IAIS intends to reschedule the July 2020 consultation for the AM work plan to establish high-level principles that will inform the development of criteria to assess whether the AM provides comparable outcomes to the ICS.
- The IAIS will postpone development of supporting materials (e.g., issues papers and application papers providing guidance on supervisory practices) and generally defer public consultations by at least six months.

B. DIVIDEND / GOVERNANCE MATTERS

Similar to developments in the United States, insurance regulators in the EU, United Kingdom (“UK”) and across the globe have issued guidance, enacted regulations or taken other actions in response to the COVID-19 crisis. With respect to the EU and UK, of particular note are recommendations or requirements for insurance groups to temporarily suspend discretionary dividend payments and share buybacks for the benefit of shareholders, and variable remuneration policies such as cash bonuses.

Following the European Central Bank’s instruction to significant Eurozone banks in March to cease shareholder dividends and share buybacks until October 2020 in order to preserve capital so that they can continue lending during the pandemic, the European Insurance and Occupational Pensions Authority (“EIOPA”) issued a statement on April 2, urging that EU insurers and reinsurers temporarily suspend all discretionary dividend distributions and share buybacks aimed at remunerating shareholders. This approach should be applied by all EU (re)insurance groups at the consolidated level and also regarding significant intra-group dividend distributions or similar transactions, whenever those may materially influence the solvency or liquidity position of the group or its insurance entities. According to the EIOPA statement, this suspension will be reviewed as the financial and economic impact of the COVID-19 pandemic becomes clearer. EIOPA further stated that (re)insurers should review their current remuneration policies, practices and rewards, and noted that the variable part of remuneration policies should be set at a conservative level and should be considered for postponement. According to the

statement, (re)insurers that believe they are legally required to pay out dividends or large amounts of variable remuneration must explain the underlying reasons to their national regulators.

France's financial regulator, the Autorité de Contrôle Prudentiel et de Résolution ("ACPR"), likewise has announced support for EIOPA's recommendations, as have financial regulators in the Netherlands, Italy and Austria. However, Germany's financial regulator, Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"), issued the following statement on April 2 in response to the EIOPA statement:

BaFin reiterates its expectation published on March 24, 2020 that financial institutions refrain from share buy-backs and should balance carefully distributions of dividends, profits and bonuses. A general prohibition of distributions for insurance companies and pension funds is not deemed necessary by BaFin at this stage. "With respect to dividend policy, the individual situation of the insurers must be considered, in particular their risk-bearing capacity," states BaFin Executive Director Dr. Frank Grund. "We maintain a close dialogue with the companies and expect a compelling argument if they want to distribute dividends." Potential risks that evolve from the current crisis situation were to be taken into account appropriately.

In a related move, the Deputy Governor of the UK Prudential Regulatory Authority ("PRA"), Sam Woods, issued a letter to the chief executive officers of UK (re)insurers on March 31, stating that the PRA expects, when UK (re)insurers' boards are considering any distributions to shareholders or making decisions on variable remuneration, that they "pay close attention to the need to protect policyholders and maintain safety and soundness, and in so doing to ensure that their firm can play its full part in supporting the real economy throughout the economic disruption arising from COVID-19." The PRA further stated on April 3 that it supports EIOPA's guidance, adding that insurers should "pay close attention to the need to protect policyholders when making any decisions on the distribution of profits."²⁵

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ENDNOTES

- 1 Pub. L. No. 116-127.
- 2 Pub. L. No. 116-136.
- 3 Given the policy interpretation issues inherent in determining whether COVID-19-related losses are covered under business interruption policies that require a direct physical damage nexus, an increase in policyholder litigation relating to these issues is expected. Several lawsuits have already been filed in state courts, including: (1) on March 16, Oceana Grill, a restaurant in New Orleans, filed a suit in Louisiana state court seeking a declaratory judgment that its property insurance policy covers business interruption losses resulting from governmental orders to close restaurants; (2) on March 24, the Chickasaw and Choctaw nations filed lawsuits in Oklahoma state court seeking a declaratory judgment that business interruption losses to their casinos and other businesses as a result of COVID-19 will be covered; (3) on March 25, two Napa Valley restaurants owned by the Thomas Keller Restaurant Group brought suit in California state court seeking a ruling that the insurer must cover their losses due to government-mandated closures tied to COVID-19; and (4) on March 30, Big Onion Tavern sued its insurer in Illinois state court alleging bad faith for failure to investigate and denying coverage for COVID-19-related business interruption claims.
- 4 Congressional Research Service, [*Business Interruption Insurance and COVID-19*](#), March 31, 2020.
- 5 As of the date of this memorandum, state legislative efforts have also begun to be directed at mandating workers' compensation coverage for COVID-19 exposure. Minnesota passed a law on April 7 that provides a rebuttable presumption for COVID-19-related workers' compensation coverage for specified first responders and health care workers. Bills or emergency orders are in development in other states relating to presumptive workers' compensation coverage for employees who contract COVID-19, including in Florida, Louisiana, Michigan, Missouri and Wisconsin.
- 6 New Jersey State Legislature Bill A-3844, available at: https://www.njleg.state.nj.us/2020/Bills/A4000/3844_11.HTM.
- 7 Ohio State Legislature House Bill 589, available at: <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-589>.
- 8 Commonwealth of Massachusetts Senate Bill SD.2888, available at: <https://malegislature.gov/Bills/191/SD2888>.
- 9 New York State Senate Assembly Bill A10226, available at: <https://www.nysenate.gov/legislation/bills/2019/A10226>.
- 10 Louisiana State House Bill HB858, available at: <https://legiscan.com/LA/bill/HB858/2020>.
- 11 Louisiana State Senate Bill SB477, available at: <https://legiscan.com/LA/bill/SB477/2020>.
- 12 Louisiana State Senate Bill SB495, available at: <https://legiscan.com/LA/drafts/SB495/2020>.
- 13 Louisiana State Senate Bill SB506, available at: <https://legiscan.com/LA/bill/SB506/2020>.
- 14 Pennsylvania House Bill 2372, available at: <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2019&sind=0&body=H&type=B&bn=2372>.
- 15 Using a different approach, on March 25, Pennsylvania Representative Michael Driscoll requested that the Pennsylvania House of Representatives draft a resolution for presentation to the U.S. Congress that would urge Congress to use COVID-19 stimulus money to reimburse insurance companies that voluntarily pay business interruption claims due to COVID-19.
- 16 For additional information on the CARES Act, see our memorandum to clients: "*Coronavirus Aid, Relief, and Economic Security Act*" (March 29, 2020), available at: <https://www.sullcrom.com/files/upload/SC-Publication-Coronavirus-Aid,-Relief,-and-Economic-Security-Act.pdf>. Our firm expects

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- to issue additional Client Memoranda in connection with COVID-19 and federal and other related legislative developments, which can be found here <https://www.sullcrom.com/corona-virus-update>.
- 17 According to public statements issued by the travel insurance carriers, claims due to known, foreseeable, or expected events, epidemics, government prohibitions, warnings or travel advisories or fear of travel are generally not covered under most policies and can vary by state. However, “cancel for any reason” policies may provide partial or full coverage depending on the policy terms, and some policies may cover claims for trip cancellation or interruption if a policyholder’s plans are disrupted by a confirmed diagnosis of COVID-19.
- 18 For further information on the rules regarding the implementation of CECL, see our Client Memoranda, *Bank Capital Requirements: Federal Banking Agencies Release Final Rule Regarding the Implementation of CECL*, and *Federal Reserve Provides Guidance on CECL and CCAR* (December 27, 2018), available at: <https://www.sullcrom.com/cecl-final-rule-on-phase-in-and-frb-guidance-on-cecl-and-ccar>, and *Client Alert: FASB Expected Credit Loss Methodology* (June 23, 2016), available at: <https://www.sullcrom.com/client-alert-fasb-expected-credit-loss-methodology>.
- 19 Industry guidance, insurance circular letters, emergency regulations and press releases issued by the NYDFS in connection with the COVID-19 crisis are available at: <https://www.dfs.ny.gov/industry/coronavirus>.
- 20 Note that some insurance companies are independently, and not in response to regulatory orders, providing relief to policyholders. For example, given the reduced amount of driving during the COVID-19 pandemic, Allstate has announced that it will provide more than \$600 million in premium rebates to personal auto insurance customers in April and May, whereby customers will receive on average 15% of their monthly premium back in April and May. Allstate has also announced that it will automatically cover auto insurance customers who use their personal vehicles to deliver food, medicine and other goods for a commercial purpose during the COVID-19 emergency period. In addition, American Family Insurance has announced that it plans to give a \$50 rebate per insured car to its personal auto insurance customers.
- 21 The NAIC Coronavirus Resource Center, which includes a list of state bulletins and alerts, can be found at: https://content.naic.org/naic_coronavirus_info.htm.
- 22 On March 24, the NCOIL staff issued a communique to more than 1,000 state legislators outlining a staff-developed proposal for model legislation instituting a state insurance mechanism to handle business insurance claims. The recommended mechanism was later formally withdrawn by NCOIL. The withdrawn communique proposed to establish a claims fund mechanism to which businesses could turn following a business interruption claim denial, whereby: (1) the claims administrator would be authorized to review the business interruption denial to see if it was consistent with the policy terms; if not then the insurer would be required to pay the claim plus interest; (2) for claims falling outside of that category, the claims administrator would determine if a reasonable insured would have thought at the time of purchase that the claim was one a business interruption policy would cover even though the policy language does not cover it; if so, these claims would be funded directly by the claims administrator from an account funded equally by 50% of a state’s general fund, and 50% by a reduction in the insurer’s guaranty assessment premium tax credit; and (3) for claims falling outside both categories, but where the business claimant has suffered a cognizable business interruption loss, the claims administrator could make an award fully funded by the state.
- 23 IAIS, *IAIS Executive Committee takes steps to address impact of COVID-19 on the insurance sector*, March 27, 2020, available at: <https://www.iaisweb.org/news/iais-executive-committee-takes-steps-to-address-impact-of-covid-19-on-the-insurance-sector>.
- 24 For further information on these IAIS frameworks, see our memorandum to clients: *IAIS—International Capital Standard, ComFrame, Holistic Framework for Systemic Risk in the Insurance Sector* (December 18, 2019), available at: <https://www.sullcrom.com/iais-adopts-global-frameworks-for-insurance-supervision>.

ENDNOTES CONTINUED

- ²⁵ Reactions from EU and UK insurers to these recommendations have varied. As an example, as of the date of this memorandum: Munich Re has indicated it will continue dividend payments to shareholders but will discontinue its share buyback program; Legal & General has announced it will continue with its planned dividend payout; AXA has indicated it will postpone its planned April shareholders meeting until June to allow time for discussion with European, French and other insurance regulators; Allianz has confirmed it will pay its planned dividend but will suspend share buybacks; Aviva PLC has announced it will withdraw its proposed dividend in May and reconsider distributions in the final quarter of 2020; Hiscox has pledged not to propose an interim dividend payment or share buyback in 2020; and NN Group has indicated it will follow the EIOPA recommendations and suspend dividend distributions and its share buyback program.

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