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## OFAC, AML and FCPA Compliance

### *State Departments of Insurance Lend a Helping Hand to Uncle Sam*

While supervision and enforcement of international trade sanction, bribery and money laundering laws and regulations resides with federal authorities, the National Association of Insurance Commissioners (the "NAIC") and state insurance regulators are being drafted — or voluntarily enlisting — to assist Uncle Sam in the war on terror, drugs and those posing a threat to the safety and security of the United States.

Federal authorities have been making a concerted effort to work with the NAIC to help educate state insurance regulators on these federal laws and regulations and to seek their assistance in identifying violations. These efforts have paid dividends. At the NAIC 2006 Summer National Meeting, the Financial Examiners Handbook Technical Group adopted revisions to the NAIC Financial Condition Examiners Handbook (the "Handbook") instructing the examiner to determine whether insurers that sell or underwrite "covered products" have established anti-money laundering programs required under the USA Patriot Act and, if not, suggesting that it may be appropriate to notify the applicable federal regulator.<sup>1</sup> The Handbook revisions, however, make it clear that the examiner is not required to examine the anti-money laundering program because that is the responsibility of the appropriate federal authorities.

In addition to complying with anti-money laundering requirements, the insurance industry must also comply with U.S. trade sanctions regulations administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"). OFAC currently administers and enforces 13 country-based sanctions programs, and 5 list-based programs. Unlike the anti-money laundering requirements, there are no exemptions for P&C and A&H operations, or for agents and brokers.

Although representatives of OFAC have made several presentations to the NAIC to incorporate a measurement for compliance with OFAC's eco-

nomics and trade sanctions requirements in the state examination process, the Handbook has not been revised to expressly include OFAC compliance (this initiative was tabled pending the issuance of additional guidance from OFAC). OFAC has, however, prepared a detailed insurance industry-specific OFAC compliance overview which we recommend you review. It provides numerous examples of insurance-specific transactions which may trigger OFAC blocking and reporting requirements and is available at [www.treas.gov/offices/enforcement/ofac/regulations/facin.pdf](http://www.treas.gov/offices/enforcement/ofac/regulations/facin.pdf).

### **New York Takes Action**

As evidence of the heightened interest by state insurance regulators in assisting with the enforcement of these federal laws, on June 29, 2009, the New York State Insurance Department published Circular Letter No. 11 (2009) to all entities licensed by the Department ("Licensees") setting forth the Superintendent's expectations regarding Licensees' efforts to comply with federal money laundering, bribery of foreign persons, and trade sanctions laws.

The federal laws specifically mentioned in the New York Department's Circular Letter are: (1) the anti-money laundering prohibitions of the Bank Secrecy Act ("BSA"), 31 U.S.C. §§ 5311-5330; (2) prohibitions against bribery under the Foreign Corrupt Practices Act ("FCPA"), 31 U.S.C. § 78dd-1 – 78dd-3; and (3) transactions involving Specially Designated Nationals ("SDNs") and governments against whom the United States has imposed trade sanctions pursuant to various laws administered and enforced by OFAC.

Although acknowledging that supervision and enforcement of these laws resides with federal regulators, the New York Department's Circular Letter encourages Licensees to develop and update their policies and programs to ensure they are complying with these federal laws.

The Department warns that part of its future examination processes may involve "limited inquiry" into a Licensee's compliance function to assess how well the Licensee takes into consideration the risks of money laundering, bribery of foreign persons, and recognition of U.S. economic sanctions programs.

As part of the New York Department's enhanced examination process, Licensees, their governing bodies, and their senior management should expect inquiries about how their business operations are able to identify, respond to and report prohibited activities. The Circular Letter states:

"A licensee's policies should be commensurate with its assessment of the risk that its products or operations could be used to launder money, finance terrorism, bribe foreign persons, or violate national economic sanctions. Accordingly, at a minimum, the policies should:

- establish that the licensee will adopt procedures and internal controls that are, in its opinion, reasonably designed to enable the licensee to comply with the requirements of the referenced regulatory regimes;
- identify a specific person responsible for the design and implementation of procedures and internal controls commensurate with the risks presented;
- ensure that the procedures and internal controls are updated as changes in the law and circumstances warrant, and that those modifications are communicated in a timely manner to all appropriate personnel;
- ensure that where the licensee's business, circumstances, or risks warrant, the procedures and controls are subject to independent

testing and monitoring by internal audit and/or external audit; and

- ensure that procedures are in place to apprise senior management of non-compliance with regulations and compliance policies.

The Department may review a licensee's policies addressing any of the above items as part of its examination process to ensure that prudent policies have been established."

### California Takes Action

In addition, on July 2, 2009, the California Department of Insurance requested of all insurers licensed in California (foreign and domestic), under the general examination authority given it pursuant to Section 730 of the California Insurance Code, to provide very specific information regarding any investments they may hold in the Government of Iran, in securities denominated in the currency of Iran, or in entities that conduct business in the defense, nuclear, petroleum, natural gas or banking sectors of Iran, to evaluate whether such investments are sound and in compliance with applicable law. The due date for reporting the requested information is September 30, 2009, and the California Department advises that it may share this information with federal and other government officials, as appropriate. The Data Call Worksheet distributed by the Department specifically requests whether the investment was made pursuant to an exemption granted by the U.S. Treasury Department. Some of the insurers that have received the Data Call Worksheet have questioned the need for such an investigation considering that insurers are already barred under federal laws from investing in Iran, as well as under Section 1241.1 of the California Insurance Code, which prohibits domestic insurers from acquir-

ing investments relating to a foreign jurisdiction which is designated as a state sponsor of terrorism by the United States Secretary of State.

In a press release dated June 29, 2009, in which the California Department announced the launching of its investigation of insurance company investments for ties to Iran, the California Commissioner is quoted as stating that he has "directed California insurers to divest of Iranian government holdings and ordered a survey of these insurance companies to ensure compliance with the law." The California Department's directive that California insurers must divest their Iranian related investments could cause a Licensee to violate OFAC regulations because such property is "blocked" and no action whatsoever may be taken with respect thereto without OFAC authorization.

Failure to comply with federal trade sanction and similar global financial regulations can expose a company to significant civil and criminal penalties, as well as damage to a company's reputation, which should provide sufficient incentive for companies to take their compliance obligations seriously. Although OFAC does not require companies to have an OFAC compliance program, developing and implementing an effective compliance program may be a significant consideration in determining whether regulators will pursue enforcement in the event of a violation, and it also may be a significant factor in the amount of any penalty the regulators may assess in the event enforcement is pursued. It is therefore imperative that the insurance industry adopt and implement comprehensive OFAC, AML, and FCPA compliance programs and procedures, as applicable to their respective business and operations.

We discussed in our *Client Alerts* dated April 24, 2002, "[Insurers Must Comply With USA Patriot Act](#)," and October 2, 2002,

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*State Departments of Insurance Lend a Helping Hand to Uncle Sam* (cont'd.)

"Treasury Issues Proposed Rule for Insurers," the structure and organization of an effective anti-money laundering program which provides an equally appropriate framework for compliance with the OFAC and FCPA regulations.

**Conclusion**

The insurance industry is a cornerstone to international commerce and, like all other industries and businesses, has a current obligation to comply with the federal money laundering, bribery of foreign persons, and trade sanctions laws, as applicable to their respective business and operations. With the assistance of state insurance regulators, the federal government has perhaps acquired new lieutenants to assist in policing the insurance industry's compliance with federal laws, or - at a minimum - it has gained an ally in its efforts to educate the industry about its need to comply with federal global financial regulations. We recommend that, following a careful examination of your company's business, operations and products, and an assessment of the vulnerabilities of your business to prohibited activities, programs and procedures be designed and implemented to ensure compliance with these federal laws. Because "one size does not fit all," companies will face operation and product-specific questions and issues when implementing their compliance programs and we are ready to assist you in that regard.

**Endnotes**

- 1 The anti-money laundering requirements of the BSA apply to insurers' and reinsurers' life operations, but not their P&C or A&H operations. The anti-money laundering requirements also expressly exclude agents and brokers.

**About the Authors**

Jon Biasetti is a partner at LLB&L. Mr. Biasetti represents U.S. and foreign clients on a variety of corporate, transactional and insurance regulatory matters. He is the co-chair of the Insurance Practice Group. A substantial portion of Mr. Biasetti's practice includes counseling clients on such matters as financial examination and market conduct issues, terrorism exclusions, licensing of producers, administrators and insurers, affiliated and other holding company act transactions, investment compliance, corporate governance, withdrawal from lines of business, redomestication, organizing alternative risk transfer vehicles; product development and affinity group programs; compliance with surplus line regulations; reinsurance including coinsurance, mod-co and assumption reinsurance transactions; mergers, acquisitions and divestitures; and joint ventures and marketing alliances. Mr. Biasetti also focuses on state and federal insurance regulation relating to climate change-related matters.

David C. Butman is an associate at LLB&L where he concentrates on complex insurance, reinsurance and commercial litigation. Mr. Butman regularly counsels and represents domestic and international insurers in a variety of insurance and reinsurance disputes involving casualty, property and professional liability risks. Mr. Butman also counsels insurers and reinsurers on matters involving U.S. economic and trade sanction regulations enforced by the U.S. Office of Foreign Assets Control (OFAC).