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Captive insurance update: State actions and the impact of Dodd-Frank adoption

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On July 21, 2010, President Obama signed [P.L. 111-203](#), the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). A portion of that legislation, the Nonadmitted and Reinsurance Reform Act (Title V, Subtitle B, Sections 511 - 527), significantly changes the state tax regime applicable to non-admitted insurance companies, including certain captive insurance companies. This portion of Dodd-Frank had a delayed effective date of July 21, 2011.

In summary, this portion of Dodd-Frank provides that:

- No state other than the home state of an insured may require any premium tax payment for nonadmitted insurance.
- "Home state" is generally defined as the state where an insured maintains its principal place of business, but may be another state in certain circumstances.
- "Nonadmitted insurance" is any property and casualty insurance placed directly or through a surplus lines broker with an insurer not licensed to engage in the business of insurance in a state.
- States may enter into a multi-jurisdictional compact to administer and allocate the premium tax paid to the insured's home state.

Prior to Dodd-Frank, *Todd Shipyards (State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962)) was arguably the standard states used as a basis for determining nexus for nonadmitted insurers. The *Todd Shipyards* nexus standard requires more



than the mere presence of insured property within the state in order to impose a state premium-based tax. Dodd-Frank provides states with a significant basis to challenge *Todd Shipyards*, as they may now have the ability to tax insurance premiums based solely on the location of the insured. (The extent to which *Todd Shipyards* provides a Due Process barrier to such taxation, as opposed to interpreting federal law in place at the time, may inform whether Dodd-Frank in fact overcomes Due Process protections for nonadmitted insurers with no other in-state contacts.)

Since the enactment of Dodd-Frank, all states, with the exception of Colorado, Illinois, Michigan, South Carolina, and Wisconsin (plus the District of Columbia), have passed legislation to provide some degree of conformity to the Act. Further, Colorado and Illinois have issued bulletins detailing how their current tax regimes may meet the Dodd-Frank provisions. It should be noted that state adoption of Dodd-Frank has not been uniform; therefore, there will be inconsistency with regard to how states apply these federal guidelines.

PwC Observes

"Dodd-Frank has wide-ranging impacts on a broad range of industries," observes Michelle Zahler, State and Local Tax Partner with PwC in Chicago, and co-leader of PwC's SALT Insurance Practice. "Corporate groups that are either considering a captive insurance structure or that already have one in place must anticipate the potential for taxation of the captive in states other than its state of domicile, based on the location of property and risks insured. The impact may be particularly felt by captive insurance companies that are not licensed in the home state of any of their insureds and that state imposes a procurement tax."

Zahler notes that, in addition to the impact of Dodd-Frank, another challenging issue for captive insurance companies is the increasing number of states examining the implications of imposing an income tax directly on such companies. PwC continues to monitor legislative, regulatory and audit activity as it pertains to captives and can assist in accessing the tax implications of such developments.

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