

MASSACHUSETTS REINSURANCE BAR ASSOCIATION

THIRD ANNUAL SYMPOSIUM

Improving Reinsurer-Cedent-Regulator Relationships

Harvard Club
Back Bay
Boston, Massachusetts

REINSURANCE: INSURANCE FOR INSURANCE COMPANIES

MReBA SYMPOSIUM 2011

OCTOBER 6, 2011

TRACEY W. LAWS, SR. VICE PRESIDENT & GENERAL
COUNSEL

REINSURANCE ASSOCIATION OF AMERICA

AGENDA

1. What is Reinsurance?
2. The Reinsurance Marketplace
3. How is Reinsurance Regulated?
4. Current Reinsurance Regulatory Issues

WHAT IS REINSURANCE?

- ❖ Insurance for insurance companies
- ❖ Insurance company purchasing reinsurance is the **ceding insurer or cedent**; company selling reinsurance is **assuming insurer or reinsurer**
- ❖ Transaction in which one insurer indemnifies another insurer against all/part of the loss sustained under its policy or policies of insurance
 - Provides reimbursement to the cedent for losses covered by the reinsurance agreement
 - Provides premium to the reinsurer in exchange for the assumption of potential loss

WHY DO COMPANIES BUY REINSURANCE?

- ❖ Catastrophe protection
- ❖ Withdrawal from market
- ❖ Stabilize loss experience
- ❖ Surplus relief
- ❖ Increase capacity

REINSURANCE MARKET

TOP 25 P&C REINSURANCE GROUPS IN 2009

1.	Munich Re	Germany
2.	Swiss Re	Switzerland
3.	Hannover Re	Germany
4.	Lloyd's	U.K.
5.	Berkshire Hathaway Inc.	U.S.
6.	SCOR	France
7.	Reinsurance Group of America, Inc.	U.S.
8.	Transatlantic Re.	U.S.
9.	Everest Re	Bermuda
10	Partner Re	Bermuda
11	China Reinsurance (Group) Corporation	China
12	Korean Re	Korea

13	London Reinsurance Group	U.K.
14	MAPFRE S.A.	Spain
15	XL Group	Bermuda
16	AEGON N.V.	Netherlands
17	Assicurazioni Generali SpA	Italy
18	QBE Re	Australia
19	GIC Re	India
20	ACE Limited	Bermuda
21	Axis Capital	Bermuda
22	Caisse Centrale de Reassurance	France
23	Toa Reinsurance Company	Japan

Source: A.M. Best

U.S. REINSURANCE MARKETPLACE

- ❖ The U.S. is the largest property/casualty market. The U.S. has the largest amount of long-tail casualty business in the world.
- In 2010, U.S. reinsurance premium was ceded to thousands of entities in over 100 jurisdictions outside the U.S.
 - Companies in **10** countries received approximately **93%** of the unaffiliated premium.

Bermuda – 40%
United Kingdom – 18%
Germany – 10%
Cayman Islands – 9%
Switzerland – 5%

Channel Islands – 4%
Turks & Caicos – 2%
Ireland – 2%
Barbados – 2%
British Virgin Islands – 1%

U.S. REINSURANCE MARKETPLACE (CONT.)

- ❖ U.S. reinsurers assumed **40.1%** of the reinsurance risk in the U.S.
- ❖ Non-U.S. reinsurers assumed **59.9%** of this reinsurance risk in the U.S.
 - Total U.S. reinsurance premium ceded to non-U.S. companies was **\$55.1 billion**.
 - **\$22.9 billion** to unaffiliated reinsurers
 - **\$32.2 billion** to affiliated reinsurers

U.S. REINSURANCE INDUSTRY COMBINED RATIO

Period	Combined Ratio
2 nd Quarter 2011	116.2%
1 st Quarter 2011	129.3%
2010	94.5%
2009	92.3%
2008	100.4%
2007	93.5%
2006	94.2%
2005	126.0%
2004	105.5%
2003	101.1%
2002	117.4%
2001	139.3%

Source: RAA

CATASTROPHE BOND MARKET

Year	Issuance	# of Transactions
2 nd Quarter 2011	\$.6 BN	4
1 st Quarter 2011	\$1.0 BN	4
2010	\$4.9 BN	23
2009	\$3.4 BN	18
2008	\$2.7 BN	13
2007	\$7.0 BN	27
2006	\$4.7 BN	20
2005	\$2.0 BN	10

P/C REINSURANCE MARKET OBSERVATIONS

Fall 2010:

- ❖ Fitch: Stable (although profitability will decline)
- ❖ Standard & Poor's: Stable, well capitalized
- ❖ A.M. Best: Stable outlook

PURPOSE OF U.S. REINSURANCE REGULATION

- ❖ Focuses on solvency and therefore collectability of reinsurance recoveries
 - No consumer regulation element
 - No privity of contract with insured
- ❖ Historically has focused on reinsurance transaction

REGULATION OF REINSURERS

- ❖ U.S. reinsurers are subject to same entity regulation as U.S. primary insurers, e.g., risk-based capital, holding company laws, licensing laws, annual statement requirements, triennial examinations and investment laws
 - The exception is no regulation of rates and forms
 - Parties considered to be of equal bargaining power
 - Contracts tend to be “manuscript”

REGULATION OF REINSURANCE (CONT.)

- ❖ Regulation of reinsurance transaction was historically necessary because of:
 - Significant amount of reinsurance ceded abroad
 - Substantial variance among jurisdictions regarding level of reinsurance regulation
 - Difficulty U.S. regulators faced in understanding the financial statements from multiple jurisdictions

- ❖ But ...

REGULATION OF REINSURANCE (CONT.)

- Regulatory reform in the EU, the UK and Bermuda have raised the bar for international reinsurance regulation
- Improved regulatory coordination and accounting convergence efforts have enhanced U.S. regulators' ability to analyze and understand financial statements from other jurisdictions
- U.S. Congress in 2010: Dodd-Frank Act was camel's nose under the tent

CURRENT REINSURANCE REGULATORY ISSUES

- ❖ Implementation of Dodd-Frank
 - Federal Insurance Office
 - Nonadmitted & Reinsurance Reform Act
- ❖ Systemic Risk
 - FSOC
 - IAIS/FSB
- ❖ U.S./Equivalence
- ❖ NAIC's Solvency Modernization Initiative
 - Corporate Governance/ORSA
 - Credit for Reinsurance
 - Group Supervision
 - Capital Requirements
 - Statutory Accounting & Financial Reporting

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

❖ Implementation of Dodd-Frank

➤ FIO

- Monitor industry
- Non-voting FSOC member
- Conduct studies
- Recommend insurers as “systemically important”
- TRIA
- Coordinate/develop federal policy on international matters
- “Covered agreements”

➤ NRRA

- Single financial regulator
- Credit for reinsurance decided by cedent’s domiciliary regulator
- Host states cannot require collateral
- Preemption

❖ Systemic Risk

- Financial Stability Oversight Council
- Financial Stability Board/International Ass’n of Ins. Supervisors (“IAIS”)

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

❖ U.S. Equivalence

- Third Country Equivalence is major catalyst for change in U.S. System
 - Reinsurance Collateral Issue – a leading indicator
 - State Regulators/NAIC – Protect their relevance

- Two main elements of Equivalence
 - Solvency II
 - IAIS Insurance Core Principles (ICP's)

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

❖ NAIC's Solvency Modernization Initiative

➤ Corporate Governance

- Review IAIS ICP's regarding corporate governance, ERM and internal controls
- Inventory best practices for corporate governance in the states
- Develop a whitepaper
- Controversial issues in first draft
 - Suitability of persons
 - Prescriptive requirements
 - Overlap with other NAIC/state requirements
 - Board legal duties to policyholders
 - General over-reach

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

➤ Credit for Reinsurance Reform

- Provides states with the option of requiring less than 100% collateral for unauthorized reinsurers
- Integrated with requirements of DFA (NRRRA provisions)
 - CFR determined by cedent's domestic regulator
 - Preempts host states from requiring collateral
- Several states have adopted similar legislation already (FL, NY, NJ, IN)

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

➤ Group Supervision

- Revised Holding Company Act in 2010
 - Annual Form F filing – Annual report identifying material risk within the holding co. system that could pose systemic risk to the insurer (financial contagion)
 - Increased requirements and reporting of affiliate transactions and management and service agreements
 - Required group financial filings to be made to and maintained by the NAIC
 - Authorized states to participate in supervisory colleges at the insurance group's expense
 - Developing Holding Company regulation best practices guidance

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

- Owned Risk Solvency Assessment (ORSA)/Group Solvency
 - ORSA – NAIC staff draft issued in February
 - Annual self assessment of all reasonably foreseeable and relevant materials risks
 - Legal entity basis
 - ORSA – Industry Response
 - Overall – too detailed, too prescriptive
 - Targeted completion date of December 2011 – Very Aggressive!
- Capital Requirements
 - Measure calibration levels of RBC and make targeted improvements

CURRENT REINSURANCE REGULATORY ISSUES (CONT.)

➤ Statutory Accounting & Financial Reporting

- Evaluate IASB Insurance Accounting standards and determine if they should form the basis of the future regulatory accounting model
- Evaluate other ICP's as appropriate
- Current Focus
 - ICP 14 Valuation – Does “economic valuation” mean that NAIC will be forced to adopt IASB model?
 - Decision on whether to adopt IASB as the basis for SAP accounting depends on GAAP and SEC convergence



www.reinsurance.org

Protecting Attorney-Client Privilege in Communications Between Cedents and Reinsurers

Patricia Taylor Fox

Chartis

Reka Koerner

Swiss Re

Tom Stillman

Arbitrator

Moderator:

Wm. Gerald McElroy, Jr.

Zelle Hofmann Voelbel & Mason LLP

Attorney-Client Privilege

- ❖ A communication
- ❖ Made between privileged persons (attorney, client, agent)
- ❖ In confidence
- ❖ For the purpose of obtaining legal advice for the client



Work Product Doctrine



- ❖ Protects from disclosure items prepared by or for a party in anticipation of litigation for trial

LEGAL OR BUSINESS ADVICE?

Business Advice

- ❖ Not attorney-client privileged
- ❖ A document generated in the normal course of business is likely outside the attorney-client privilege even if it is sent to, copied to, or authored by an attorney

Business Advice

- *AIU Ins. Co. v. TIG Ins. Co.*, No. 07-CV-7052, 2008 U.S. Dist. LEXIS 66370 (S.D.N.Y. Aug. 28, 2008)
- Where in-house counsel was “clearly” acting in his capacity as vice president by offering business advice, those documents were not privileged

Business Advice

- *AIU* court adopted case-by-case approach to determining whether a document is privileged, since in the context of work product doctrine and attorney-client privilege, it has been “particularly troublesome” to determine what is protected “because it is the routine business of insurance companies to investigate and evaluate claims.”

Business Advice...After Litigation?

- “It is the very nature of an insurer’s business to investigate and evaluate the claims of its insured, and the fact that the investigation and evaluation continues after litigation commences is not conclusive proof that material has been created to aid in that litigation.”
- *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 134 (N.D. Ill. 1993)

Legal Advice

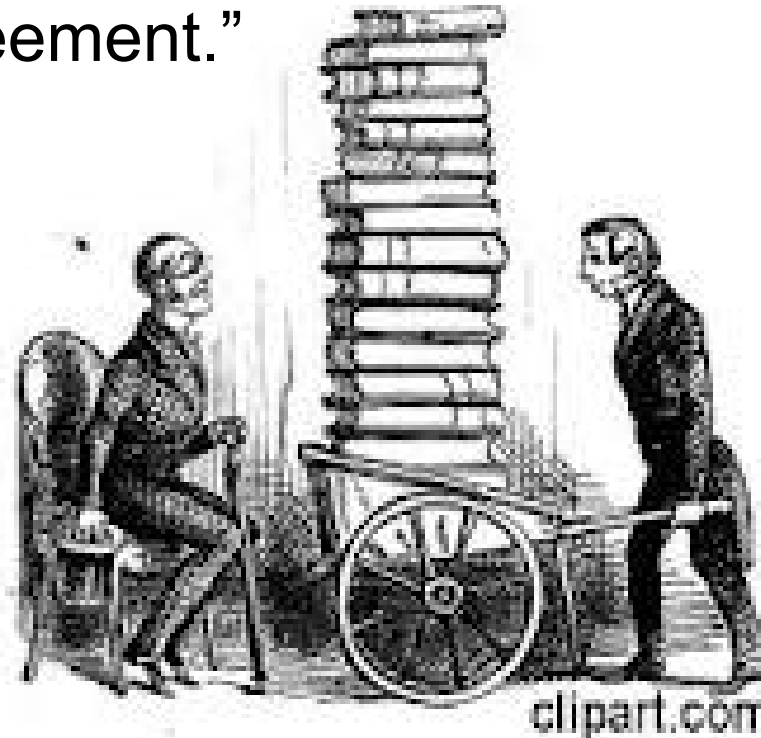
- When there is a mixture of legal and business advice, does the legal advice predominate?
- *Durham Indus. Inc. v. North River Ins. Corp.*, No. 79 Civ 1705, 1980 U.S. Dist. LEXIS 15154 (S.D.N.Y. Nov. 21, 1980)

ACCESS TO RECORDS CLAUSES

Access to Records

- ❖ Audit clause, cooperation clause
- ❖ “[T]he Reinsurers . . . will have the right to inspect . . . all records of the Company that pertain in any way to this Agreement.”

???



Access to Records = Waiver?

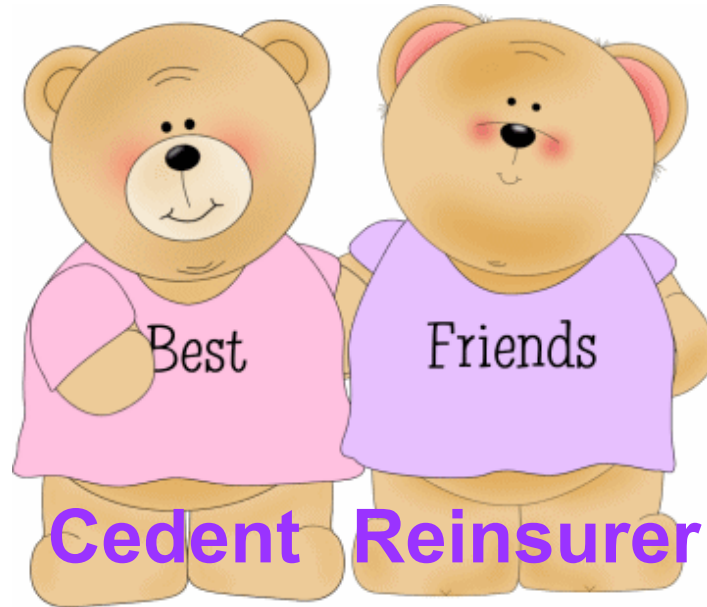
- “Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client privilege. To hold otherwise would render these privileges meaningless.”
- ***Gulf Ins. Co. v. Transatlantic Reins. Co.*, 788 N.Y.S.2d 44 (N.Y. App. Div. 2004)**
- ***North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363, 369 (D.N.J. 1992)**

COMMON INTEREST DOCTRINE

Common Interest

- Sharing documents with a reinsurer when the interests of the cedent and reinsurer are not aligned is waiver of attorney-client privilege/work product doctrine
- *Regence Group v. TIG Specialty Ins. Co.*, No. 07-1337, 2010 U.S. Dist. LEXIS 9840 (D. Or. Feb. 4, 2010)
- *North River Ins. Co. v. Columbia Cas.*, No. C90 Civ. 2518, 1995 U.S. Dist. LEXIS 53 (S.D.N.Y. Jan. 5, 1995)

Common Interest Doctrine



?

The mere fact of a reinsurer-cedent relationship is not enough to establish common interest.

Common Interest Doctrine

- Exception to attorney-client privilege and work product doctrine
- “The clearest indication of common interest is **dual representation** Common interest also extends to a situation where there is a **joint defense or strategy**, but separate representation.” *American Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 837 N.Y.S.2d 616 (N.Y. App. Div. 2007) (emphasis added)

Common Interest Doctrine

- Common interest doctrine still limited to dual representation in some jurisdictions:
- “In the Court’s view, the common interest doctrine is completely unshackled from its moorings in traditional privilege law when it is held broadly to apply in contexts other than when there is dual representation.”
- ***North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363, 369 (D.N.J. 1992)**

Common Interest Doctrine

- No common interest in *North River Ins. Co. v. Columbia Cas. Co.* because:
 - Different counsel
 - Columbia Casualty did not contribute to North River's legal expenses
 - Columbia Casualty did not control North River's conduct
 - No evidence of coordinated litigation strategies
 - Even though the two had common **commercial interests**, there was no common **legal interest** that acted as an exception to attorney-client privilege

Commercial vs. Legal Interests

- Meeting minutes from reinsurance market meetings were not privileged because any common interests were of a commercial, rather than legal nature
- In New York, “the common interest doctrine is construed narrowly to encompass communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest.”
- ***Aetna Cas. & Sure. Co. v. Certain Underwriters at Lloyds*, 676 N.Y.S.2d 727 (N.Y. App. Div. 1998)**

Common Interest Doctrine as a Sword

- Reinsurers attempt to compel production by claiming an common interest
- *American Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 837 N.Y.S.2d 616 (N.Y. App. Div. 2007)
- *North River Ins. Co. v. Columbia Cas.*, No. C90 Civ. 2518, 1995 U.S. Dist. LEXIS 53 (S.D.N.Y. Jan. 5, 1995)

Common Interest Doctrine as a Shield

- Where a cedent shares document with a reinsurer with which it shares a common interests, no waiver
- *Employer Reins. Corp. v. Laurier Indem. Co.*, No. 8:03-cv-1650, 2006 U.S. Dist. LEXIS 10943 (M.D. Fla. Mar. 3, 2006)
- *North River Ins. Co. v. Columbia Cas.*, No. C90 Civ. 2518, 1995 U.S. Dist. LEXIS 53 (S.D.N.Y. Jan. 5, 1995)

“AT ISSUE” DOCTRINE

“At Issue” Doctrine

- Implied waiver of attorney-client privilege and/or work product doctrine where a party affirmatively places otherwise privileged information “at issue” in the case
- *Munich Reins. Am., Inc. v. Am. Nat’l Ins. Co.*, No. 09-6435, 2011 U.S. Dist. LEXIS 41826 (D.N.J. Apr. 18, 2011)

“At Issue” Doctrine

- Construed narrowly
- For the doctrine to apply, the party must specifically put “at issue” the contents of the attorney client communication
- *North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363, 369 (D.N.J. 1992)
- *American Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 837 N.Y.S.2d 616 (N.Y. App. Div. 2007)

WAIVER

Is Forced Production Waiver?

- In *Regence Group v. TIG Specialty Ins. Co.*, No. 07-1337, 2010 U.S. Dist. LEXIS 9840 (D. Or. Feb. 4, 2010), TIG attempted to argue that since it was forced to produce documents to its reinsurers, there was no waiver of privilege
- The court found waiver: “[A]n insurance company can be construed as waiving any privilege if it has shared its counsel’s documents with a reinsurer when the parties’ interests are not aligned.”

CONSEQUENCES OF WAIVER

PANEL DISCUSSION

**FACTORS INFLUENCING
WHEN PRIVILEGED
COMMUNICATIONS ARE
DISCLOSED TO
REINSURERS & THE
IMPACT OF WAIVER**

LOGISTICAL ISSUES RELATED TO AN ARBITRATION PANEL'S RESOLUTION OF DISPUTES

CHOICE OF LAW AND EVIDENTIARY ISSUES IN AN ARBITRATION PANEL'S RESOLUTION OF DISPUTES

INADVERTENT PRODUCTION OF PRIVILEGED DOCUMENTS

DISTINGUISHING BETWEEN PRIVILEGED COMMUNICATIONS AND CLAIMS HANDLING DOCUMENTS

QUESTIONS?

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Right of Association and Claims Control Clauses

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Introduction

- ❖ “Rarely used,” yet they appear in virtually every contract
- ❖ What role can and should the clauses play in the handling of claims
- ❖ What are the risks and dangers for both Reinsurers and Ceding companies

Materials

- ❖ Summary of relevant case law
- ❖ Representative examples of right of association and claims control clauses
- ❖ Draft Associational Agreement

The Right to Associate

- ❖ What does it mean?
- ❖ Is it comparable to excess and other policies where an insurer has no duty to defend but does have a right to associate?
- ❖ How does it compare to “control” clauses

“Association”

A flexible concept with benefits and risks for ceding companies and reinsurers alike.

“The Right to Associate” Defined

The right of the reinsurer “to consult with and advise the reinsured in its handling of a claim.”

Unigard Sec. Ins. Co. v. North River Ins. Co. Inc., 79 N.Y.2d 576, 594 N.E.2d 571, 575 (1992)

Sample Clauses

A Continuum:

- ❖ Cooperation/association/control
- ❖ Many variations to meet varied objectives
- ❖ Significance of wording

Reinsurer “Cooperation” Type Association Clause

- ❖ It is understood and agreed that in the event of loss or an event likely to result in loss, the Reinsurers shall have the right if they so elect, to cooperate with the Insurer in the defense or settlement of losses under this agreement.

➤ Excess of Loss GL Treaty, Claims Article

“Right and Opportunity to Associate” Clause

❖ Although the Reinsurer does not undertake to investigate or defend claims or suits it nevertheless shall have the right and be provided the opportunity to associate with the Company and its representatives at its own expense in the defense and control of any claim involving this reinsurance with the Company’s full cooperation.

➤ Facultative Certificate Reinsuring GL Umbrella, Notice of Occurrence Paragraph

“Right and Opportunity to Participate in Defense” Clause

❖ The Reinsurers, at their own expense, shall have the right and opportunity to participate in the defense of any claim, suit or proceeding which does or may involve this contract, however, the Reinsurers shall not be obligated to assume the defense of any such matter.

➤ Excess of Loss GL Treaty, Claims Against Reinsurers Article

Ceding Co. Claims Cooperation Clause

- Notwithstanding anything contained in the Reinsurance Agreement and/or Policy wording to the contrary, it is a **condition precedent** to any liability under this Policy that: -

The Reinsured shall, upon knowledge of any circumstances which may give rise to a claim against them, advise the Reinsurers immediately and in any event not later than 30 days;

The Reinsured shall co-operate with Reinsurers and/or their Appointed Representatives subscribing to this Policy in the investigation and assessment of any loss and/or circumstances giving rise to a loss;

No settlement and/or compromise shall be made and liability admitted without the prior approval of Reinsurers.

- SCOR (UK) Clause 012 4/83

“Right to...Control” Claims Clause

❖ “The Reinsurers shall have the right to appoint adjusters and/or representatives acting on their behalf to control all negotiations, adjustments and settlements in connection with such claim or claims.

- **Leviathan Facility, Leviathan Supplementary Wordings 2008, Claims Control Clause**

Question

❖ *Is there a fundamental difference between the “right to associate” and the right to “control” a claim? Discuss.*

Condition Precedent: “Right to...Control” Clause

- ❖ “[I]t is a condition precedent to the Reinsurers' liability... that:
 - c) The Reinsured shall co-operate fully with the Reinsurer ...in the investigation adjustment and settlement of any claim ... and the Reinsured shall not without the consent of the Reinsurer or its representative litigate any such claim.

Policy Condition

- d) The Reinsurer shall have the right at any time to take full control of the investigation adjustment and settlement of any claim ... and any settlement agreed by the Reinsurer shall be binding on the Reinsured.

How Do These Clauses Relate to Notice?

- ❖ Is prejudice required?
- ❖ A dearth of case law
- ❖ Do you have to show better result?
- ❖ Effect on settlements/follow fortunes

Drafting Issues Re: Association Rights

- ❖ Condition precedent
- ❖ Location of clause, integration with notice
- ❖ Nature of right:
Cooperation/association/control
- ❖ Mechanics of exercise
- ❖ Cost of exercise
- ❖ Allocation of claims responsibilities and reciprocal cooperation obligations

The Real World

- ❖ Are there certain common factual situations or types of claims where you see these clauses being used?
- ❖ Are these clauses fundamentally different than the right to inspect records clause?
- ❖ Are there new situations where a reinsurer should consider their use?

Cooperation and Association Rights Frequently Available, Rarely Used?

- ❖ Circumstances where R/I may exercise “association” rights:
 - Sudden unexplained and precipitous spike in claim reserve
 - R/I lacks confidence in defense or coverage counsel in high stakes exposures
 - Effort to influence settlement or allocation
 - Information gathering, adjunct to access to records

How Do You Do It?

- ❖ Is a formal exercise of the clause required?
- ❖ Must or should the exercise be in writing?
- ❖ What are the relevant considerations regarding timing of exercise?

Advantage Reinsurer

- ❖ What are the advantages for the reinsurer of exercising these rights?
- ❖ Are the advantages different for “associational” rights vs. “right to control”?

Advantage Ceding Company

- ❖ What if you are the cedent receiving a notice from a reinsurer of an exercise of the right to associate or control a claim?
- ❖ What can you do to protect yourself?
- ❖ Can these clauses be a “sword” for ceding company to prevent second-guessing?

Are There Downside Risks?



R/I Issues Re: Exercise of Association Rights

- ❖ Increased exposure for R/I and cedent bad faith, unfair and deceptive claims practices
- ❖ Increased potential for direct action exposure

R/I Issues Re: Exercise of Association Rights

Q: Can a reinsurer exercise association or control rights in “*bad faith*”?

Cedent Concerns Where Reinsurer Associates:

- ❖ Increased exposure to claimants for acts of R/I
- ❖ Potential waiver of insurers or underlying insureds A/C and/or W/P privileges
- ❖ Potential regulatory exposures
- ❖ Impact on follow the fortunes/allocations

Reservation of Rights

Question for the panel/audience:

How does a reservation of rights impact the Reinsurer's ability to invoke the right to associate or control a claim?

Privilege Concerns

- ❖ Reservation of rights situation?
- ❖ How can the parties safeguard the privilege?

Practical Considerations and Solutions

- ❖ Use of Association Agreement
- ❖ Elements of Association Agreement
 - Duration/termination
 - Impact of association on privileges
 - Impact of exercise of association on parties to reinsurance agreement, third parties
- ❖ Disclosure of R/I role to Insured

Role of Counsel

- ❖ Use of counsel to insulate communications
- ❖ Counsel as the conduit for “association”

Questions/Final Thoughts



**MASSACHUSETTS REINSURANCE
BAR ASSOCIATION**

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OCTOBER 6, 2011**

**Harvard Club
374 Commonwealth Avenue
Boston, Massachusetts**

INTERACTIVE WORKSHOP

William N. Erickson – Robins, Kaplan, Miller & Ciresi L.L.P.

Alexander G. Henlin – Edwards Wildman

Nicholas C. Cramb – Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo LLP

Robert A. Whitney – Massachusetts Division of Insurance

GETWELL PHARMACEUTICALS



THE PLAYERS

- **INSURED – GetWell Pharmaceuticals (GetWell)**
 - Earl E. Notice – Risk Manager
 - Fuller Morales – Defense Counsel
- **INSURER – Healthcare Insurance Co. (HIC)**
 - Howie Juggles – V.P. Claims
 - Constance Goodfaith – Coverage Counsel
- **REINSURER – Bermuda Re (Bermuda)**
 - Philona D. Fortunes – Claims Examiner
- **PLAINTIFFS – Class of those who used Slimdown**
 - Rich E. Rich – Plaintiffs’ Counsel

THE COVERAGES

- November 1, 2010 – November 1, 2011
 - Claims-made form \$10M limits
 - Defense costs erode limits
 - \$1M deductible
- November 1, 2009 – November 1, 2010
 - Occurrence form \$5M limits
 - Defense costs erode limits
 - \$3M deductible
- Both policies provide:
 - This insurance does not apply to bodily injury expected or intended by the insured

SLIMDOWN

BEFORE



AFTER



SLIMDOWN

- Slimdown goes on sale September 2, 2010
- Side effects include:
 - Dizziness
 - Loss of consciousness
- Instructions include:
 - Do not drive vehicle for first week of use
 - If dizziness or loss of consciousness occurs, discontinue use immediately

SLIMDOWN

- Last 2 Clinical Tests
 - No “paralysis”
 - Dizziness, etc. occurs during first week of use

THE LAWSUIT

- **Class Action**
 - Those injured as a result of side effects
 - Seriously injured following dizziness and loss of consciousness
 - Severe and permanent disability as a result of unwarmed against paralysis
- **Date of “Injury”?**
 - Injuries occurred “sometime after September 2010”
 - Specific dates of injury all after January 2011

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OFAC Reinsurance Compliance



OFAC
Office of Foreign Assets Control

Massachusetts Reinsurance Bar Association
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Presentation Outline

- OFAC Overview
- OFAC Reinsurance Case Profile
- OFAC Compliance and Reinsurance

OFAC Mission

To administer and enforce economic and trade sanctions based on U.S. foreign policy and national security goals against selected targets

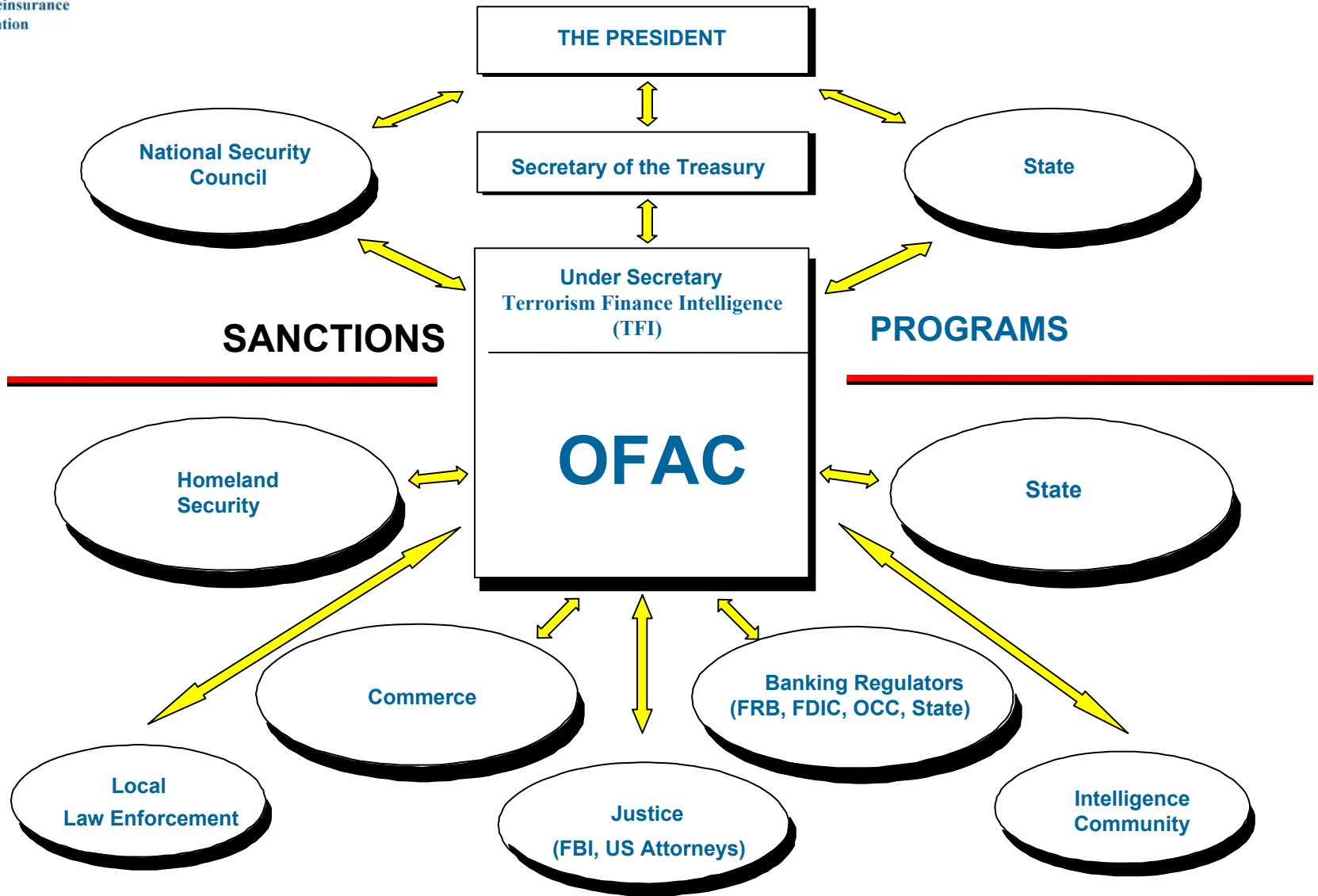
Sanctions Legal History

- Secretary Gallatin – Embargo Act of 1807
- Civil War “Trading with Enemy Act” (TWEA)
- Trading with Enemy Act of 1917 – Modern TWEA
 - WW I: Axis Powers
 - WW II: Nazi Germany – 1939
 - North Korea/China – 1950
 - Cuba Missile Crisis – 1963
- International Emergency Economic Powers Act -1977
 - ❑ Peacetime sanctions – “economic emergencies”
 - ❑ Presidential Implementation - Executive Orders
 - Iranian Hostages – 1979
 - Panama (Noriega) – 1988
 - Somalia – 2010
 - Libya & Syria – 2011

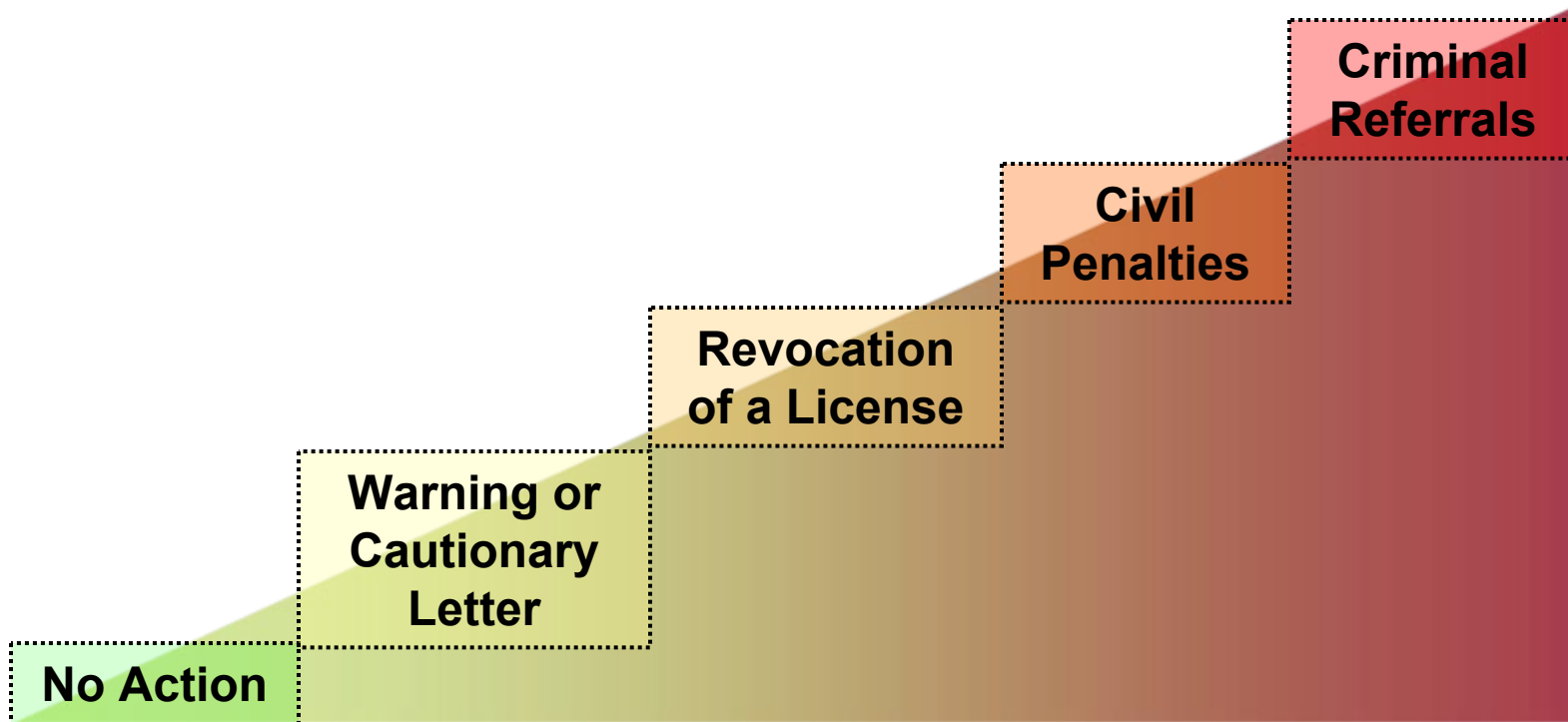
Active Sanctions Programs (22)

- Balkans
- Belarus
- Burma (Myanmar)
- Cote d'Ivoire (Ivory Coast)
- Congo
- Cuba
- Diamond Trading
- Global Terrorism
- Iran
- Iraq
- Kingpin Narcotics
- Lebanon
- Libya2
- Liberia
- Narcotics Trafficking
- Non-Proliferation WMD
- North Korea
- Sudan
- Syria
- Somalia
- Transnational Crime
- Zimbabwe

OFAC Overview



OFAC Response to Sanctions Violation



Presentation Outline

- OFAC Overview
- OFAC Reinsurance Case Profile
- OFAC Compliance and Reinsurance

OFAC Insurance Related Files

(July 1, 2006 – September 30, 2011)

Total Insurance Files	252
Reinsurance Files	36
Reinsurance Percent	14%

OFAC Reinsurance Cases

Open	8
Closed	28
Total	36

OFAC Reinsurance Cases: Open Case Status

Enforcement	2
Licensing	5
Inquiry	1
Total	8

OFAC Reinsurance Cases: Closed Case Summary

Cautionary Letter	3
Closed File	4
Guidance	6
License Denied	4
License Issued	8
License Renewed	1
Penalty Issued	2

Reinsurance Case Profile

OFAC Reinsurance Cases: Coverage Profile

REINSURANCE - Quota Share	12
REINSURANCE - Excess Loss	10
REINSURANCE	7
REINSURANCE – Retrocession	4
REINSURANCE – Life	3

OFAC Reinsurance Cases: Sanctions Program Profile

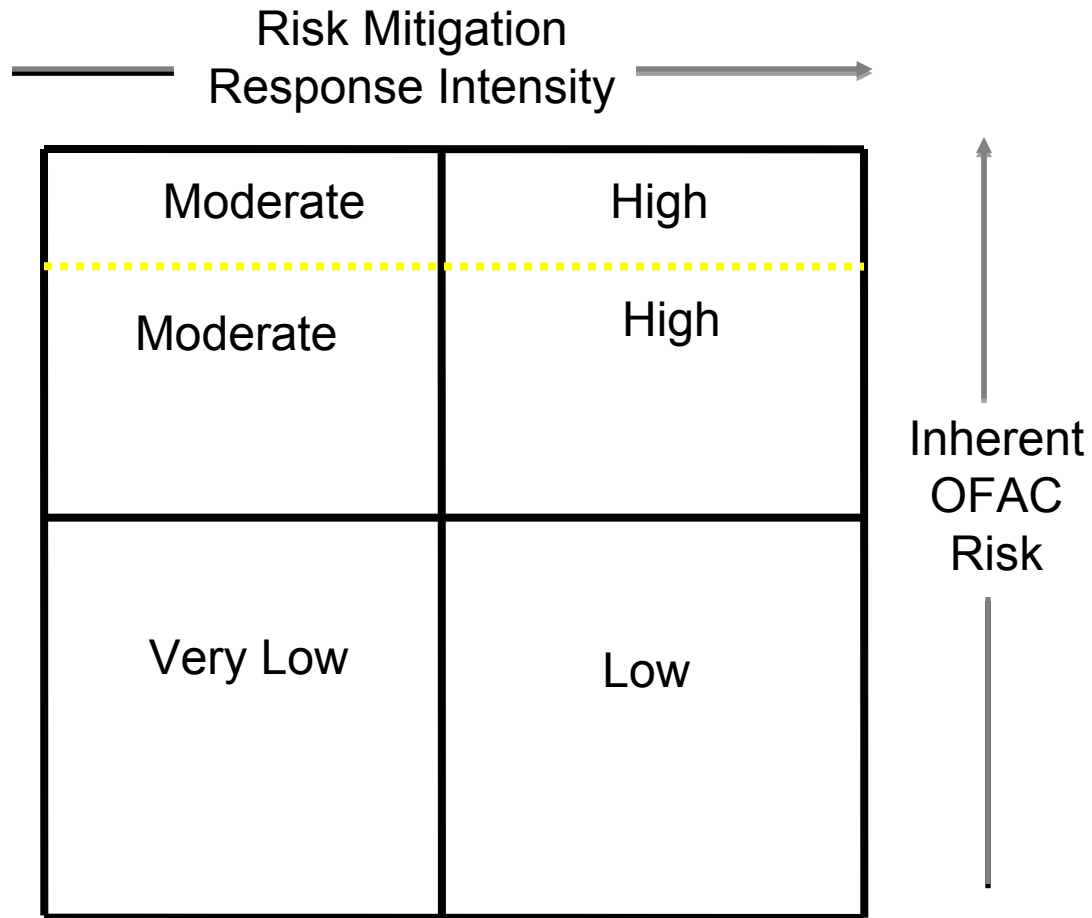
Cuba	13	Burma	2
Iran	5	Libya2	2
All	4	Somalia	2
SDNT	3	North Korea	1
SDNTK	2		
Total		36	

Presentation Outline

- OFAC Overview
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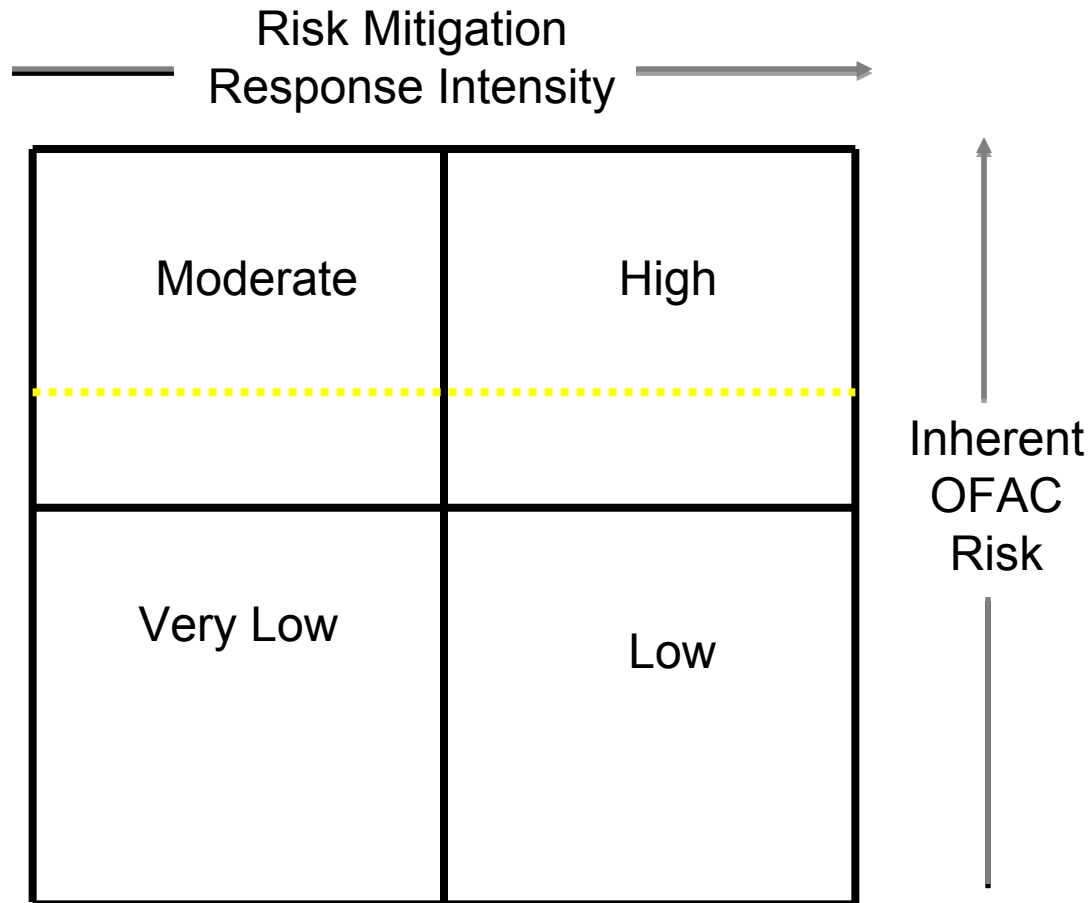
Insurance

Relative Risk-Based Compliance



Reinsurance

Relative Risk-Based Compliance



Inherent OFAC Risk – Country Programs

- Underlying Coverages – Quota Share
 - Marine
 - Aviation
 - Energy
 - Political risk
- Cedent Risk Structures
 - Lloyd's syndicates
 - P&I club
 - Aviation pool
 - Reinsurer (retrocession)

Inherent OFAC Risks – List Based Programs

- Narcotics Programs
- WMD Program
 - Islamic Revolutionary Guard Corps
 - ❖ IRISL
 - ❖ Tidewater
 - China Great Wall Industry Corporation
- Entity Designations – Country Affiliated
 - Libya / Syria / Burma Government Organizations
 - Other (North Korea)

Compliance Strategies for Inherent OFAC Risks

- Avoid Sanctions Contact
 - Decline Sanctioned-Related Risks
 - Policy Exclusion
 - Interdiction Software
- Obtain License

OFAC Reinsurance Compliance



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