

Insurance M&A: Bermuda's change of control requirements

Briefing Summary: This article, the first in a multi-part series on M&A in insurance, considers the change of control regime under the Bermuda Insurance Act 1978 (the "**Insurance Act**") as it applies to shareholder controllers of Bermuda insurers.

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In the complex landscape of mergers and acquisitions ("M&A"), regulatory challenges play a critical role in the success of transactions. For firms considering undertaking a M&A transaction involving a Bermuda (re)insurance company, the need to obtain the prior approval of the Bermuda Monetary Authority (the "BMA") is a hurdle that, at best, can delay completion and, at worst, can derail a transaction completely if consent to the change of ownership is withheld. It is therefore of critical importance that firms understand the Bermuda insurance regulatory landscape and identify early on whether an acquisition affects a Bermuda (re)insurer.

Acquiring control

The BMA maintains supervision over the controllers of all registered insurers in Bermuda, including shareholder controllers. The definition of "shareholder controller" in the Insurance Act generally refers to the holder of 10% or more of the voting shares in a Bermuda insurer, or where the holder is entitled to exercise or control 10% or more of the voting power of the insurer, or where the person has significant influence over the management of the Bermuda insurer.

Generally, an approval or notification obligation is required where a person decides to become, or ceases to be, a shareholder controller of a Bermuda insurer. It is also required where a proposed change in a person's shares or voting rights would mean that they cross certain thresholds of control over an insurer. The control bands applicable to insurers under the Insurance Act are: 10% or more but less than 20%; 20% or more but less than 33%; 33% or more but less than 50%; and 50% or more. An existing shareholder controller will not need to notify the BMA if it increases its voting power but remains within the same control band.

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The concept of control can raise complexities for buyers as well as existing controllers whose holding(s) may be affected by the acquisition. Accordingly, potential incoming shareholder controllers should consider carefully which persons or entities within the group will need to submit change of control notification forms.

BMA consent requirements differ depending on whether the shares of the registered insurer or the shares of its parent are traded on a recognised stock exchange.

Private companies

In circumstances where neither the shares of the registered insurer nor the shares of its parent company are traded on a recognised stock exchange, the Insurance Act prohibits a person from becoming a 10%, 20%, 33%, or 50% shareholder controller of an insurer unless such person has first served on the BMA notice in writing stating that such person intends to become such controller. The BMA has 45 days following the date of service of the notification to object to the application, although it can interrupt the assessment period to ask the buyer to provide any further information it considers necessary to complete its assessment. If the 45-day period elapses without the BMA serving an objection, the change in control can proceed.

Given these timing requirements, any share purchase agreement should include a pre-completion obligation regarding obtaining the relevant change of control approval.

Public companies

If the shares of the registered insurer or the shares of its parent company are traded on a recognised stock exchange, a person may become a 10%, 20%, 33% or 50% shareholder controller of the insurer without obtaining prior consent. However, the person must, within 45 days of completion of the transaction, notify the BMA in writing stating that he has become such a controller.

It is important to note that new or increased control by a shareholder or prospective shareholder can take place at any level of ownership in the insurer; that is, direct, intermediate or ultimate level of shareholding.

Disposing of control

A person who decides to cease control over certain classes of Bermuda insurers or reduce its control to a lower control band (i.e., reduce its holdings from 51% to 33%) must notify the BMA. The precise requirement will depend on the insurer's classification under the Insurance Act and whether the shares of the registered insurer or the shares of its parent company are traded on a recognised stock exchange.

Regulator objections

The BMA can object to new or increased control of a Bermuda insurer in certain circumstances, including where the BMA is not satisfied that:

- the acquiror is a fit and proper person to become a shareholder controller of the insurer;
- the interests of clients or potential clients of the insurer would not be threatened by that person becoming a shareholder controller of the insurer; and
- the person's likely influence on the insurer is such that the minimum criteria of registration under the Insurance Act would continue to be fulfilled.

When assessing the application, the BMA will consider the suitability of the incoming controller including, but not limited to, their previous criminal history, previous sanction from other regulatory bodies, and the overall risk to the jurisdiction.

Notification of controller changes

In addition to the requirement on the shareholder controller to notify the BMA of their proposed acquisition or disposal of control, section 30J of the Insurance Act requires that the insurer itself notify the BMA of any changes in controllers of any type. Accordingly, commercial insurers (Class 3A, Class 3B, Class 4, Class C, Class D and Class E insurers) are required to notify the BMA no later than 45 days after becoming aware of any person who has become or has ceased to be a controller of the insurer.

Class 1, Class 2, Class 3, Special Purpose, Class A, and Class B insurers are required to file any changes to their controllers at the same time that they file their annual financial statements.

Failure to comply

It is an offence to acquire or increase control of a Bermuda registered insurer without notifying the BMA and, where necessary, obtaining prior approval for the transaction. Various other offences can be committed by those who do not comply with the change of control regime; for example, a seller who fails to notify the BMA before making a disposition will, in certain circumstances, commit an offence.

Additionally, the BMA can impose restrictions on the shares in a Bermuda insurer if they have been acquired improperly. Restrictions might prohibit the transfer of shares in the insurer, or the exercise of the voting rights with respect to the shares, or state that, except in a liquidation, no payment is to be made out of any sums due from the insurer on the shares, whether in respect of capital or otherwise. The BMA can also apply to the court for the order of a sale of shares.

Exchange control

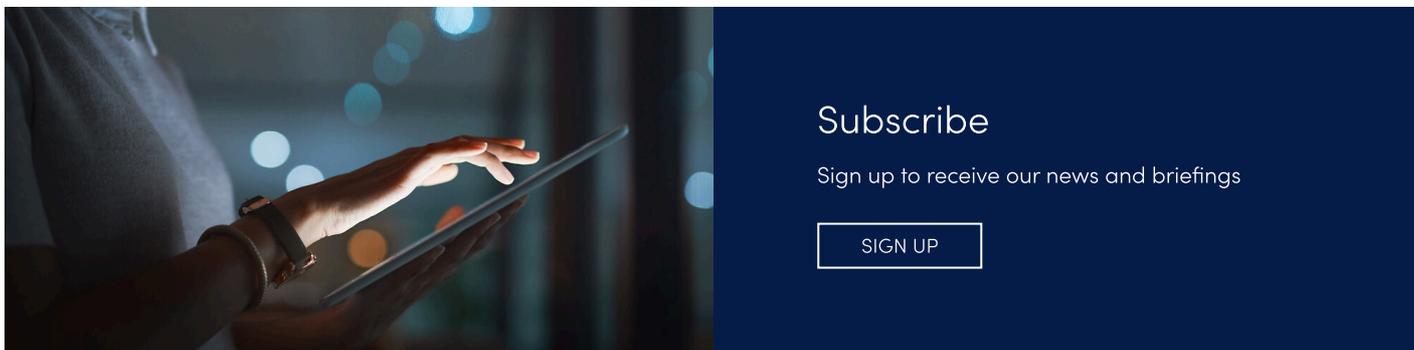
In addition to shareholder controller assessments under the Insurance Act, an M&A transaction involving a Bermuda (re)insurer may also trigger notification and consent requirements under the Exchange Control Act 1972 and related regulations. If an acquisition will involve the direct transfer of shares in a Bermuda (re)insurer, then the prior approval of the BMA, in its capacity as controller of foreign exchange, will generally be required unless the transfer falls within a general permission granted by the BMA in its Notice to the Public dated June 2005.

Conclusion

Obtaining BMA approval is likely to be a requirement of any M&A transaction involving a Bermuda insurer and if approval is withheld, the transaction could collapse entirely. Navigating the rules for changes in control under the Insurance Act can be complex and our team is here to help.

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