

MEMORANDUM TO CLIENTS

INSURANCE, REINSURANCE AND PENSIONS

March 1st, 2016

On December 15, 2015, significant new regulations involving the insurance and reinsurance markets were published. These new regulations amend the rules for entities regulated by the Brazilian Superintendence of Private Insurance (“SUSEP”) with respect to incorporation, corporate control, elections of directors and officers, requirement of approval for certain corporate acts, as well as rules related to commencement of administrative proceedings and the special liquidation regime for regulated entities.

CNSP Resolution No. 330/2015

CNSP Resolution CNSP No. 330/2015 revoked some of the rules established by CNSP Resolution No. 173/2007, which regulates reinsurance brokers and CNSP Resolution No. 168/2007, which regulates reinsurance and retrocessions.

In addition, CNSP Resolution No. 330/2015 entirely revoked both CNSP Resolution No. 136/2005, which regulated the nomination and election of directors and officers of regulated entities and CNSP Resolution No. 166/2007, which stipulated the requirements and procedures related to incorporation, authorization to operate, registration, suspension and cancellation of registration, changes to corporate control and corporate restructuring of entities regulated by SUSEP.

Amongst other important provisions, CNSP Resolution No. 330/2015 changes the definition of “qualified participation” to include any individual or entity holding, directly or indirectly, no less than (15%) fifteen per cent. of the total corporate share capital of regulated entities.

CNSP Resolution No. 330/2015 also introduces new definitions for “control group”, “financial conglomerate” and “economic group”, which are applicable to matters regulated by CNSP Resolution No. 330/2015 itself, as well as to a number of other matters contained in other regulations issued by SUSEP. Please note that the current definition of “economic group” stipulated by a SUSEP Circular, which regulates the distribution, assignment, underwriting and advertising of capitalization certificates, could lead to future discussion; the definition of “economic group” in that Circular is based on a company exercising “dominant influence” over a group of companies and this term is not defined by CNSP Resolution No. 330/2015.

CNSP Resolution No. 330/2015 introduces new regulations applicable to constitution and authorization to operate and rules related to the corporate structure and corporate reorganization of insurance companies, open private pension companies, capitalization companies and local reinsurance companies (together referred to herein as “Local Entities”), as follows:

- All shareholders, which are part of the same economic group and which may exercise direct or indirect influence on the business, must be properly identified;
- All Local Entities’ investors, as well as their controlling shareholders and the shareholders of qualified participants must demonstrate the origin of the resources used in their investments;
- SUSEP may demand the execution of shareholders’ agreements in order to expressly define the Local Entities’ control group;
- SUSEP will request a technical interview with controlling shareholders as a way to assess the feasibility of the business proposal and will be entitled to deny the request for authorization to operate if it considers that such proposal is not feasible;
- After the approval of the Local Entity’s incorporation proposal, the controlling shareholders will have 180 (one hundred and eighty) days to execute corporate documents and demonstrate the origin of their resources;
- The incorporation of subsidiaries of insurance companies, open private pension companies, capitalization companies and local reinsurance companies domiciled abroad and the ability of such entities to join the direct or indirect control group of Local Entities will depend on the submission of a document demonstrating that their local insurance authority does not oppose the incorporation of a subsidiary/investment;
- The requirement for prior approval by SUSEP regarding changes in the corporate control that do not affect the final controlling shareholders of the Local Entities was expressly removed by CNSP Resolution No. 330/2015, ratifying the position taken by the regulator as to this matter; and
- In the event of transfer of corporate control, SUSEP may demand a technical interview with the new controlling shareholders on the same terms applicable to a request for authorization to operate.

With respect to admitted and occasional reinsurers, CNSP Resolution No. 330/2015 introduces the following rules:

- The powers of attorney granted by admitted or occasional reinsurers must contain a specific provision regarding permission or prohibition as to delegation of powers;
- Attorneys in fact of admitted and occasional reinsurers and representatives of the admitted reinsurer's office ("RepOffice") must submit a declaration authorizing SUSEP, at its discretion, to access information about them through research in all public or private registries, including court and administrative proceedings;
- The attorneys-in-fact must demonstrate prior experience in insurance or reinsurance matters;
- The RepOffice must permanently maintain, together with the representative, a deputy representative;
- For the registration or the renewal of licenses of admitted and occasional reinsurers, the following are required: (i) a note in the certificate issued by the foreign regulator stating that such regulator does not oppose the registration of the reinsurer in Brazil; and: (ii) submission of financial statements by the reinsurer;
- Definition of the RepOffice's corporate documents which must be submitted to SUSEP's approval before registration with the Board of Trade, which ratifies a prior view taken by SUSEP regarding this matter.

CNSP Resolution No. 330/2015 (which, as mentioned above, revokes CNSP Resolution No. 136/2005), establishes new requirements for the exercise of positions on the management boards of Local Entities, RepOffices and reinsurance brokers (together herein referred to as "Regulated Entities"). Among the innovations in this Resolution, we highlight the following:

- The election or the nomination of directors and officers of Regulated Entities requires SUSEP's prior and express approval, which must be granted within 60 (sixty) days from the filing of the request, subject to implicit approval, in the event of SUSEP's delay in issuing the approval. This requirement will not apply if the director or officer is exercising, or has exercised in the last (6) six months, a position on the management board of a Regulated Entity;
- After SUSEP's approval, or in cases when it is not required, the Regulated Entities will have 60 (sixty) days to: (i) execute a corporate document, which will have to be subsequently submitted to SUSEP; and (ii) vest the elected directors and officers in office;
- The Regulated Entities' directors and officers term in office may be up to 3 (three) years with the possibility of reelection;

- Among the obligations of newly elected directors and officers, CNSP Resolution No. 330/2015 includes the duty to provide a declaration stating that he/she has no impediment or has not been suspended from the exercise of statutory/contractual positions in entities authorized to operate by the Brazilian Central Bank, the National Superintendence of Complementary Pensions, the National Agency of Supplementary Health and other agencies and entities subject to the rules issued by the Brazilian Securities Commission;
- Regulated Entities are obliged to immediately remove each and any director and officer who, at any time, fails to comply with the above mentioned regulatory requirements; and
- Provisions regarding the criteria for overlapping several positions included in different SUSEP rules.

With respect to reinsurance brokers' authorization to operate, CNSP Resolution No. 330/2015 establishes new rules, among which we highlight: (i) the possibility of reinsurance brokerage firms being organized as an individual company with limited liability (*Empresa Individual de Responsabilidade Limitada - EIRELI*), (ii) the obligation of reinsurance brokerage firms to submit a business plan; (iii) the obligation of reinsurance brokers indicate the members of their control group and the holders of qualified participation, and (iv) the obligation that all investors prove the origin of their financial resources.

In addition, CNSP Resolution No. 330/2015 establishes which corporate documents and corporate transactions reinsurance brokers must submit to SUSEP for approval, which must occur before registration with the Board of Trade. This requirement means that certain procedures that were only applicable to Local Entities now apply to reinsurance brokers some (i.e. activities of reinsurance brokers, up until now, only had to be reported to SUSEP). A restrictive provision was also included in CNSP Resolution No. 330/15 in order to establish requirements for an individual or entity to qualify as a shareholder of a reinsurance brokerage firm.

Lastly, CNSP Resolution No. 330/2015 establishes: (i) the possibility of SUSEP denying registration of an admitted or occasional reinsurer, as well as denying direct or indirect shareholding by individuals or entities in Local Entities or reinsurance brokerage companies if reinsurers or shareholders are domiciled in countries to which the Group of Financial Action Task Force on Money Laundering GAFI (*Grupo de Ação Financeira sobre Lavagem de Dinheiro*) proposes the application of countermeasures in the light of their lack of mechanisms to prevent money laundering and funding of terrorism; and (ii) new provisions and cases in which SUSEP may suspend or cancel the authorization of Regulated Entities to operate, including for non-compliance with the provisions stipulated in the business plan.

CNSP Resolution No. 330/2015 comes into full force and effect today and will be applicable to all administrative approval proceedings filed from this date on.

CNSP Resolution No. 331/2015

The most significant amendment introduced by CNSP Resolution No. 331/2015 is to provide for summary administrative proceedings, which apply solely to corporate defendants.

Pursuant to Annex I of CNSP Resolution No. 331/2015, the summary proceedings are only applicable to the verification of certain regulatory violations described in articles 21 to 29, 31, 35-A, 36, 37, 66, 69 and 70 of CNSP Resolution No. 243/2011, known as "objective nature conduct".

Through summary proceedings, only monetary sanctions may be applied, which cannot be substituted by mere recommendations. In addition, regulatory violations which are subject to such proceedings may not be settled pursuant to a Conduct Adjustment Agreement ("*Termos de Ajustamento de Conduta – TAC*").

Pursuant to the summary proceedings, the defendant has 30 (thirty) days to present a defense or to pay the so called "provisional base-penalty", which corresponds to the lowest penalty applicable to the violation in question, or twice this amount, in the case of repeated violations.

The calculation of the provisional base-penalty will not take into consideration the defendant's background or any mitigating or aggravating circumstances. The payment of such penalty will result in: (i) a waiver on the part of the defendant of its right to present the proper defense under the summary administrative proceeding initiated by SUSEP; and (ii) a final judgment (*res judicata*) of the summary administrative proceeding.

CNSP Resolution No. 331/2015 also stipulates rules for discounting the provisional base-penalty payment, as follows: (i) a 40% (forty per cent.) discount if payment is made prior to the expiry of the 30 (thirty) day period for filing a defense; (ii) a 25% (twenty five per cent.) discount if the penalty is paid within the foregoing period, but the defendant has committed more than (3) three repeated offenses; and (iii) a 25% (twenty five per cent.) discount when payment is made within (30) thirty days of the publication of the decision at first instance (*decisão de primeira instancia*).

If the defendant chooses not pay the base-penalty, or makes an incorrect payment, the summary proceedings will then follow the guidelines applicable to the ordinary administrative proceedings stipulated by CNSP Resolution No. 243/2011, including the possibility of appeal to the Private Insurance Board of Appeals (Conselho de Recursos do Sistema Nacional de Seguros Privados - CRNSP)

Besides providing for summary proceedings, CNSP Resolution No. 331/2015 amends CNSP Resolution No. 243/2011 with respect to administrative sanctions and the ordinary administrative proceeding, as follows:

- Penalties stipulated by CNSP Resolution No. 243/2011 are also applicable to insurance agents (representantes de seguros) and capitalization certificate distributors (distribuidores de títulos de capitalização);

- SUSEP may choose not to commence administrative sanctioning proceedings when it verifies that: (i) the consequences of the regulatory violations have been rectified before any damage was caused to consumers; and (ii) the conduct did not violate the objectives of the insurance industry regulations.
- Revocation of a provision which establishes that if willful misconduct or gross negligence is not proven in relation to an individual, only the supervised entity would be deemed liable for the regulatory violation;
- Introduction of a provision establishing a penalty varying from R\$ 10,000.00 (ten thousand reais) to R\$ 100,000.00 (one hundred thousand reais) applicable to corporate entities that execute group policy stipulation agreements (contratos de estipulação de seguro coletivo), insurance agency agreements (contratos de representação de seguros) or brokerage agreements in violation of the law; and
- Introduction of a provision establishing a penalty varying from R\$ 10,000.00 (ten thousand reais) to R\$ 500,000.00 (five hundred thousand reais) applicable to entities that fail to keep, provide, display or share with consumers mandatory information required by law.

SUSEP Instruction No. 76/2015

CNSP Resolution No. 331/2015 also amends the wording of sections 89, 98, 99 e 100 of CNSP Resolution No. 243/2011, which establishes the documents required for the commencement of administrative sanctioning proceedings, namely, notice of violation, complaint and representation.

In view of this, SUSEP published, on December 15, 2015, Instruction No. 76/2015, which revokes SUSEP Instruction No. 69/2013, introducing new forms to be used in administrative proceedings, which reflect the changes introduced by CNSP Resolution No. 331/2015.

Both CNSP Resolution No. 331/2015 and SUSEP Instruction No. 76/2015 are currently enforceable in respect of all ongoing proceedings; the rules involving summary proceedings will only apply to proceedings commenced after December 15, 2015.

CNSP Resolution No. 335/2015

Another regulation also published last December was CNSP Resolution No. 335/2015, which is already in force. This Resolution establishes, in detail, special rules for fiscal management and administrative liquidation applicable to insurance companies, capitalization companies, open private pension entities and local reinsurers. Such rules seek to ensure the strength, stability and operation of the National Insurance, Capitalization, Reinsurance and Open Pension Entity System.

With respect to the special regime for ordinary liquidation, CNSP Resolution No. 335/15 supplements CNSP Resolution No. 234/2011 and establishes: (i) duties of the ordinary liquidator; (ii) cases when ordinary liquidation might be deemed final; and (iii) a specific proceeding to convert the special rules of fiscal management and administrative liquidation into ordinary liquidation, revoking certain articles contemplated in CNSP Resolution No. 234/2011.

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The purpose of this memorandum is to inform our clients about important changes and developments in the area of law. We remain at the reader's disposal for any additional information that may be desired regarding the subject matter herein.

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