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The primary source of global captive insurance news and analysis

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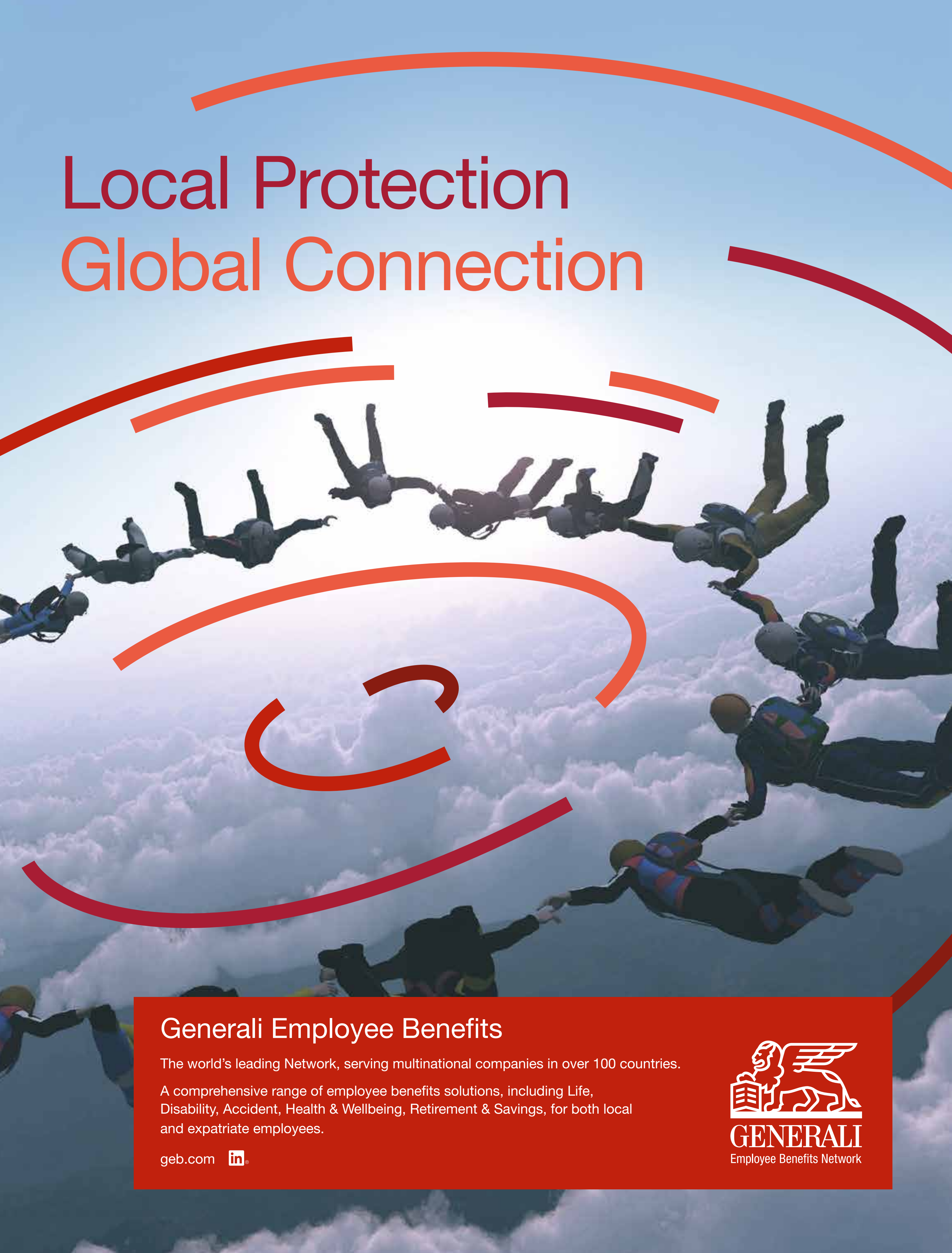
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Gibraltar guaranteed post-Brexit access to UK markets

The UK government has guaranteed Gibraltar-based financial services firms continued access to UK markets until 2020, regardless of the Brexit deal.

The decision will allow insurers domiciled in Gibraltar to continue to write business in the UK market post-Brexit.

Work is underway between the two governments on a replacement framework to endure beyond 2020.

The new framework will build on the current deal to provide shared, high standards of regulation, underpinned by modern arrangements for information-sharing, transparency, and regulatory co-operation.

Robin Walker, minister at the department for exiting the EU, said he was delighted with the agreement.

He explained: “Today we have agreed a positive package deal on issues surrounding our exit from the EU, once again demonstrating that we stand shoulder to shoulder with Gibraltarians in our unwavering commitment to the UK-Gibraltar relationship.”

The economic secretary to the Treasury, John Glen, commented: “We are ensuring that Gibraltar’s access to UK markets will continue unchanged until 2020, even in the unlikely event of no deal being reached.”

“This will give us the time we need to work with the government of Gibraltar to design a new, modernised agreement, based on similar, high standards of regulation and enforcement.

According to Fabian Picardo, chief minister of Gibraltar, the guarantee indicated the strengthening of the bilateral relationship.

Picardo said: “The terms for it to endure are further cemented as we realise the commitment to maintain and enhance market access for Gibraltar service providers into the UK post-Brexit.”

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Kansas passes new captive bill

SB 410, which was approved by Kansas governor Jeff Colyer on 12 April 2018, amends and creates law relating to captives by establishing the Captive Insurance Act under the Insurance Code. The act creates two new types of captives, branch and special purpose, and specifies the regulatory structure for each. Amongst other legislative changes, it also introduces amendments to the law relating to companies subject to premium taxes, specifying the tax rate for direct and assumed reinsurance premiums, the maximum tax annually, and requiring tax to be calculated annually unless allocated for multi-year policies or contracts.

The bill, which was first introduced to the Senate in February 2018 and was sponsored by the Senate Financial Institutions and Insurance Committee, would also permit the state's insurance commissioner to adopt rules and regulations establishing standards for pure captives.

Changes will also be made to capital requirements for captives, altering the requirements for maintaining capital and surplus from $100,000 to $250,000 for pure captives and from $200,000 to $500,000 for association captives. There will be a small additional cost to regulate an increased level of captive activity in the Sunflower State, a cost which will eventually be offset by fees charged to register and maintain the captive.

Captive insurance companies that were not in existence on 1 January 2018 will be required to pay a nonrefundable fee of $10,000, with a yearly renewal fee set at $10,000. Captives already in existence on 1 January 2018 will pay an annual renewal fee of $110 until 1 January 2028, after which that fee will increase to $10,000.

Bill to assist 'crumbling foundations' homeowners rejected

A bill proposing additional assistance for homeowners impacted by the 'crumbling foundations' issue in Connecticut has been rejected by the state's judiciary committee.

SB 518, which would have meant insurance companies were required to cover 'the peril of collapse' for homes affected by the 'crumbling foundations' issue, failed in a vote of 16 Yeas and 24 Nays on 4 April.

The bill also proposed adding a $20 surcharge to all homeowner insurance premiums in order to create a fund for those affected by the structural issue.

Commercial insurance companies have generally refused to cover the 'crumbling foundations' issue, which was caused by concrete of a stone aggregate mined from a quarry containing pyrrhotite and has resulted in cracks forming decades after the foundations were constructed.

According to the Connecticut Mirror, around 5000 homes have been affected and with the cost of re-pouring a complete foundation estimated at between $150,000 and $200,000 the overall exposure to loss could be billions of dollars.

The Connecticut state government has developed a potential solution utilising a non-profit captive insurer, Connecticut Foundation Solutions Indemnity Company, to administer the Crumbling Foundations Assistance Fund, which was set up to distribute the remediation funds to homeowners across the state–with $100 million available in state bonding over the next five years.

In October 2017, the Connecticut state government passed SB 1502, which authorised the formation of the non-profit captive, and in February this year the state bond commission approved the $350,000 necessary to set it up.

Programme manager of captive insurance at the Connecticut department of insurance, Janet Grace, said that the failure of SB 518 would have no impact on the assistance that the non-profit captive would be able to provide.

Grace explained: "While homeowners are anxious for repairs to begin, the funding and process by which they can happen is underway based on the 2017 legislation."

"The Crumbling Foundations Assistance Fund and captive insurer established in the 2017 legislation is designed to create a source of funds and fair adjudication process for homeowners and the establishment of that company is well underway."

The Connecticut state government predicts the fund will be accessible through the captive in July 2018.

Insurance Committee co-chair Senator Tim Larson, announced on 9 April that he planned to introduce a new amendment to create revenue for the Crumbling Foundations Assistance Fund by placing fees on new or renewed homeowners insurance policies and mortgages, similar to the surcharge proposed in SB 518.

Larson said: "This legislation provides a new source of revenue, which is a $10 surcharge on new home mortgages, insurance companies who are writing insurance properties in the state of Connecticut and individual policyholders."

He added: "This proposal renews my continued commitment to help out eastern Connecticut homeowners who are still struggling through this horrific ordeal."

Georgia captive legislation delayed

New captive insurance legislation has been delayed in Georgia, after a bill was dropped by the state's senate due to time constraints.

HB 214, proposes amendments to Chapter 41 of Title 33, relating to captive insurance, and, more specifically, to sponsored captive insurance companies.

First introduced to the Georgia House of Representatives in February 2017, the bill passed its first and second Senate readings during the 2017 legislative session.

The bill passed its third Senate reading on 29 March 2018 but, as it was late in the legislative session, the bill was dropped.

The 2018 legislative session in Georgia began on 8 January and closed on 31 March.

A statement from the Georgia Department of Insurance said: "There was no opposition to the bill, but unfortunately due to time restraints it was dropped late in the legislative session."

It added: "The Insurance Department plans to propose the bill again during the 2019 legislative session."

Number of captives covering terrorism risk increases in 2017

The number of captive insurance companies insuring terrorism risk rose in 2017, according to a report from Marsh.

The 2018 Terrorism Risk Insurance Report revealed that last year, 166 Marsh-managed captives were actively underwriting one or more insurance programmes that access the Terrorism Risk Insurance Programme Reauthorisation Act of 2015 (TRIPRA), a 44 percent increase from 115 captives in 2016.

TRIPRA is a federal programme created by the US Treasury that allows for a transparent system of shared public and private compensation for certain insured losses resulting from a certified act of terrorism.

The report also noted that captives can prove a more cost-effective solution to implementing terrorism insurance than commercial insurers, and are sometimes the only viable option—such as when attempting to secure significant limits for nuclear, biological, chemical and radioactive (NCBR) coverage.

According to the report, NBCR coverage is not widely available in the traditional insurance marketplace due to the lack of a TRIPRA mandate, but captives can offer the coverage and gain access to the reinsurance protection afforded by TRIPRA.

Tarique Nageer, terrorism placement advisory leader at Marsh, said: "By using a captive to access TRIPRA coverage or to supplement coverage purchased from commercial insurers, organisations can cost-effectively manage their net retained terrorism risk."

He added: "Businesses often conclude that using a captive to write cyber terrorism risk is a cost-effective and relatively easy way to reduce net retained risk, especially for companies that already own captives."

SOBC Sandell forms Vermont captive manager

SOBC Sandell has formed a Vermont captive manager, SOBC Services Company Limited (SOBC SCL).

The new captive manager, which has received regulatory approval from the Vermont Department of Financial Regulation (DFR), will focus on managing Vermont captives that are in run-off.

SOBC SCL will begin by working with the company's recent acquisition in the state, American Safety Captive Insurance Company.

According to SOBC Sandell CEO Stephanie Mocatta, the company are "delighted to have worked with the Vermont DFR to gain regulatory approval as a captive manager".

Mocatta added: "This enables us to provide both more cost-effective and better services specifically focused on a successful run-off."

Rick Ecklord, director of Sandell Re, said: "We are particularly pleased with this expansion of SOBC Sandell into Vermont."

He continued: "We believe this will be a significant market for us in terms of both potential acquisitions of captives in run-off as well as outsourced specialist run-off management of captives. We look forward to expanding our presence in Vermont."

Ratings of Accredited S&C affirmed

Accredited Surety and Casualty, Randall and Quilter Group's property and casualty insurer, has had its financial strength rating of A- (excellent) affirmed by A.M. Best.

The Florida-based insurer is licensed to write business in all 50 US states.

Accredited's ratings reflect the company's balance sheet strength, categorised by A.M. Best as very strong, as well as its adequate operating performance, limited business profile and appropriate enterprise risk management.

According to the ratings agency, the outlook of Accredited's ratings are stable as it expects "operating results will continue to be profitable". Earlier in the year, Accredited had its A-group rating raised from VI to VII due to its increase capital base and surplus.

SIIA launches future leaders initiative

The Self-Insurance Institute of America (SIIA) has launched the SIIA Future Leaders (SFL) initiative, a programme aimed at encouraging talented young professionals to get involved with the association and the self-insurance industry.

SIIA has set up a SFL committee, comprised of younger managers and executives from leading member companies, to help guide the implementation of the initiative.

The committee has already identified multiple engagement ideas that are currently under consideration for implementation.

The first phase of the initiative will be to promote participation of young professionals at its National Conference and Expo in Austin in September.

The conference will include a number of educational sessions and networking opportunities targeted at younger professionals (defined by SIIA as under 40s), along with a discounted registration fee.

SIIA, a member-based association, which includes self-insurance entities, captive managers, third party administrators, stop-loss carriers and other service providers, is devoted to the promoting and protecting the self-insurance and alternative risk transfer industry.

According to SIIA president and CEO, Mike Ferguson, the association is pleased to be able to implement the initiative as it has been in the planning stage for some time.

Ferguson added: "The need for such an initiative has become increasingly clear

given the evolving demographics of our membership and now our association is properly focused to be successful in creating pathways for the next generation of industry leaders."

Georgia passes insurance separation legislation

A new bill has been passed by the Georgia State Senate allowing insurers domiciled in the state to divide into multiple parts in order to separate themselves from unwanted exposures.

HB 754, passed on 15 March 2018, amends Title 33 of the Official Code of Georgia Annotated to allow for the division of domestic insurers and is similar to HB 7025 signed in Connecticut last year.

Dividing can allow insurers to separate exposures onto individual balance sheets. However, they may have to reassume their original obligation should one of the resulting insurers be found to be in breach of that original obligation.

According to Andrew Rothseid, principal at RunOff Re.Solve, the separation process appears user-friendly and the only significant hurdle is regulatory approval.

He explained: "The commissioner must approve a plan of division unless the interest of any policyholder or shareholder will not be adequately protected or the proposed division constitutes a fraudulent transfer."

Rothseid suggested that the bill could, with respect to any legacy liabilities that may be on a Georgia-domiciled balance sheet, "pave the way to redomestication of that problematic portfolio to another jurisdiction (Rhode Island) where accelerated closure has been proven to be successful".

He added that the bill is "a further sign of the increasing regulatory flexibility in this area".

"However, there are ambiguities in the language of HB 754 and the resulting impact—indeed, the wording of the new legislation is as interesting for what it doesn't say as what it does."

France and Luxembourg sign BEPs driven double tax treaty

France and Luxembourg have signed a new double tax treaty which incorporates provisions of the OECD's base Taxation and Profit Transfer (BEPS) guidelines.

The treaty, signed during a Luxembourg state visit to France on 20 March, replaces the previous tax convention signed between the two countries on 1 April 1958.

The modernised tax treaty incorporates the new international standards in tax matters and is based on the OECD's latest model tax convention.

It implements the new approaches to international tax developed in the OECD BEPS project and reflected in the Multilateral Convention to Implement Tax Treaty Related Measures, which both countries signed in 2017.

The BEPS project aims to counteract the exploitation of gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations, where there is little or no economic activity.

Additionally, the new agreement contributes to improved legal certainty for the benefit of tax authorities and the taxpayer.

According to a statement from the Luxembourg ministry of finance: "it can be emphasised that the new agreement reduces the degree of participation required to benefit from the exemption from withholding tax on dividends."

Luxembourg's minister of finance Pierre Gramegna said the new treaty showed the excellent relations between the two countries.

He added: "The new convention is basically modernising the current text dating from 1958 and is an innovative instrument that benefits both citizens and businesses on both sides of the border."

BMA sees reinsurance spike

The Bermuda Monetary Authority (BMA) has experienced a spike in reinsurance registrations in early 2018.

According to BMA statistics, there has been 11 reinsurance registrations in the first two months of the year, an increase on the five new reinsurance registrations recorded for the same period last year.

The new registrations included three class E long-term life commercial reinsurers, one general business class four general business commercial reinsurer and one intermediary.

BMA managing director of supervision (insurance), Craig Swan, commented: "The BMA is pleased to see these increased reinsurance registrations, despite challenging market conditions."

Swan added: "This increased reinsurance activity follows on the heels of the third anniversary of Bermuda being placed on the National Association of Insurance Commissioners' Qualified Jurisdiction list (effective 1 January 2015), as well as the second anniversary of Bermuda achieving full equivalence under all three Articles of Solvency II (effective 24 March 2016)."

Hanover Stone launches strategic planning consulting practice

Hanover Stone Solutions has launched a new strategic planning consulting practice aimed at assisting senior insurance company executives in designing and implementing strategic planning processes.

The practice will guide insurance executives through a collaborative process to identify, evaluate and capitalise on their company's key opportunities for growth and sustainability in a dynamic and competitive business environment.

Hanover Stone senior advisors, Donna Galer and Joanne Stone Morrisey, will lead the programme.

A typical strategy engagement is predicted to take six to eight weeks, including a one to two day strategy workshop.

The South Carolina-based advisory firm's approach is specifically tailored to the unique needs of individual clients, which benefits insurers by providing them with strategic thinking through core aspects of their business and from having documented decisions about where the company is going and how it is going to get there.

Galer commented: "Today, small and large insurers need a well-designed strategic plan to stay relevant and focused on specific issues and initiatives that really matter to their company's success."

"A fundamental element of enterprise risk management involves identifying and addressing risks to strategy, and a key aspect of strategic planning is to understand critical risks and develop a strategy that takes them into consideration."

Nebraska-based Holmes Murphy expands captive insurer

Holmes Murphy has expanded their captive insurance subsidiary Main Street, to include businesses with 10 to 50 employees.

Main Street allows businesses to collaborate and form a healthy risk pool with rates that are lower than elsewhere in the market, which creates improved buying power for businesses.

Created in 2014 to help small- and medium-sized businesses to find a manageable solution to their health insurance, the captive insurer was initially only available to businesses with more than 50 employees.

The expansion will allow Main Street to provide small businesses with a way to alleviate the risk and cost of a self-insured plan.

Main Street has helped 14 Nebraska-based businesses develop insurance solutions and hopes to continue this trend with the new expansion.

Beau Reid, senior vice president of employee benefits at Holmes Murphy, explained that the move allowed the company to support smaller businesses.

He said: "With some uncertainty surrounding the current state of our healthcare system and what the future holds, businesses are looking to take matters into their own hands by joining captives."

"Especially, those in small town, main street America that are put into community rates which limit their options or they fall into a size category where they don't receive any utilisation data."

"Due to this, employee benefits providers must adjust and offer more solutions to allow companies the best options to manage their health."

Reid concluded: "I'm excited for the expansion of Main Street to include businesses with 10 to 50 employees. This allows even more small businesses greater control over their health insurance costs."

Delaware welcomes 117 new captives in 2017

The Delaware Department of Insurance licensed 117 new captive insurance companies last year, according to its year-end figures.

Of the 117 new captives licensed, 53 were captive insurance companies, 63 were series captive insurance companies and one was a cell captive.

In 2017, Delaware dissolved 47 captives and 90 series captives, totaling 137 captives, meaning as of 31 December 2017, there were 1004 active captives domiciled in the state.

Steve Kinion, director of the bureau of captive and financial insurance products at the Delaware Department of Insurance, said: "It was a good year, maybe not as many applications as we've had in the past but on a comparative basis to other domiciles we had a good number of applications."

According to Kinion, a vital part of the domicile's continued success is the close relationship between the department of insurance and the Delaware Captive Insurance Association (DCIA).

He explained: "If you don't understand the industry then you can't effectively regulate it and that's why it is exceptionally important to have a collaborative relationship with the captive insurance industry, primarily through the DCIA."

"They understand our needs but it works both ways, if you're regulated then you must understand regulation as well."

He added: "We are going to continue in what we are doing in terms of improving captive law and we'll continue our advocacy on behalf of the industry—it has been a recipe for success in the past and there is no reason to change."

Kinion also praised Insurance Commissioner Trinidad Navarro for his assistance to the domicile's captive industry.

He said: "He has been very supportive of the captive insurance programme and is one of the reasons we have been so successful."

The Cannabis Industry: An opportunity for growth

As cannabis legalisation continues to spread, so the market grows and with commercial insurance failing to properly serve the industry there is an opportunity for captives to thrive

Ned Holmes Reports

The legalisation of cannabis continues to sweep across the United States, with recreational use legalised in nine states (plus Puerto Rico, Guam and Washington, DC) and medical use legalised in 30 (plus Puerto Rico, Guam and Washington, DC).

A larger market has led to legal cannabis sales reaching an estimated $9.7 billion in 2017, a number that is expected to grow further as legalisation continues to spread. In fact, a report from Brightfield Group, predicts the international market will grow to $31.4 billion by 2021.

Despite the size of the market, the cannabis industry remains underserved by commercial insurance. There is a lack of capacity in the commercial market, and where there is coverage it is often very expensive with policies that involve exclusions which limit the value of cover or restrict how much can be recovered under the policy. This is perhaps unsurprising due to the new and unique set of risks in the industry and the many unknowns that are involved (such as the ever developing law of product liability). Not least are the legal obstacles that impede cannabis businesses, centred on the fact that the drug remains illegal according to federal law.

The industry appears to be perfectly suited to captive insurance and with the market about to catch fire and attitudes changing, could now be the perfect opportunity for a joint venture between captives and cannabis?

Perfect for the roll

Amye King, national sales director at Emerald Risk Solutions, suggests that captive insurance represents "a great business solution" for the cannabis industry.

King expands: "It's tailored to assist with the business's insurance expenses and can cover gaps or exclusions in current insurance policies."

According to King, captives can offer coverage solutions from "seed to sale."

"From growers seeking outdoor crop protection from weather related issues like fire, to stock in transit risks for the drivers, the product and the money to cyber related risks of being hacked at a retail shop or dispensary."

"There are unique and sometimes unprotected risks facing the industry. Things like outdoor crop insurance, cyber-attacks on retail operations, a business interruption caused with a product recall or the ongoing fear of a regulatory audit/investigation. These risks and more can be potentially covered with captive insurance."

"Generally speaking, a captive programme just might be the answer the cannabis industry has been waiting for."

Joe Holahan, attorney at Morris, Manning and Martin, said the flexibility of captives make them extremely well suited to the cannabis industry.

Holahan explained: "The cannabis industry fits the profile of an industry that captive really was designed to serve. When you place risks through captive insurance you have the opportunities to shape the coverage the way you want it to be. Cannabis business owners can use the captive for self-insurance and to access international reinsurance markets where there may be a greater appetite to underwrite the risk."

Legal obstacles stirring the pot

The most restraining issue facing the cannabis industry is the continued federal prohibition of the drug. Under the Controlled Substance Act, cannabis is a Schedule I substance, meaning it has a high potential for abuse, no currently accepted medical treatment use in the US, and that there is a lack of accepted safety for use of the drug under medical supervision.

This classification is problematic as it impacts anti-money laundering laws, which have stiff penalties for people who engage in cannabis related businesses or facilitate them. In addition to this there are civil forfeiture laws, allowing the government to seize assets that are derived from cannabis related businesses.

"These are great concerns," said Holahan. "I think this is the primary reason we haven't seen more cannabis captives or commercial carriers willing to write these risks. It is not just the novel nature of the risk, unique risks can be underwritten and you can limit the coverage to handle them, but the federal law really is a considerable obstacle."

Another legal obstacle is the public policy argument. Businesses have often experienced issues where claims or policies are voided as insurers successfully argue to the court that, because the drug is illegal, insuring cannabis related risks is against public policy, despite being fully aware of the types of risks they were insuring.

The tide may have begun to turn against the public policy argument though, as evidenced by the ruling in The Green Earth Wellness Center v. Atain Speciality Insurance case.

In the case, Atain Speciality tried to exclude their coverage of Green Earth on the grounds that it was against public policy to insure cannabis related risks.

The court ruled in favour of Green Earth, on the basis that Atain Speciality had entered into the policy "of its own will, knowingly and intelligently" and therefore was "obligated to comply with its terms or pay damages for having breached it".

Greener pastures ahead

Attitudes to marijuana continue to become more positive and the drug is beginning to enter mainstream culture.

A far cry from dodgy back alley dealings, the industry has developed structures and technology, such as delivery companies like Eaze, to support its more mainstream status.

It appears that the insurance industry may be following suit, and according to Holahan, regulators are becoming to more receptive to alternative solutions for the dealing with cannabis industry's risks.

He said: "More and more, state regulators are starting to entertain proposals to form captives that would write cannabis risks. When I talk to regulators I've noticed a distinct shift over the last year as this becomes more mainstream they're starting consider reasonable proposals."

One of the ways we may see captives enter the market is in combination with commercial insurance, with the captive supplementing the commercial insurer's policies and covering the risks which might otherwise not be covered.

King explained: "We are also hearing from commercial insurance brokers who want to provide a comprehensive package to their clients and they are thrilled that captive insurance can fill in gaps or exclusions."

She added that the potential solution offered by captives had been well received in the cannabis industry.

"It is the best news–every cannabis business operates on such a high level of risk and anyone legally working in the cannabis space is so happy this solution finally exists."

2018 - Captives roll up?

Though the federal stance on cannabis remains a huge obstacle, the changing attitudes and the opportunity presented by untapped markets like California, who legalised recreational use on 1 January this year, means 2018 could see captives flood into the cannabis market.

King indicated that the speed at which cannabis industry professionals can be properly educated about captives will be hugely influential on the speed of the market growth.

"It depends on a few factors," said King. "Primarily the need to educate the advisors working in the cannabis space."

It is difficult to predict what impact we will see this year, while interest on both sides indicates it is likely we will see some movement in the cannabis captive market, the continued issue caused by the federal stance on the drug means it is unlikely we will see a boom in the market this year, but Holahan suggested when there is growth it may cause a domino effect.

He said: "It is hard to predict, I know there are at least two captive applications pending, there are others whom i've spoken with who are working on larger captive programmes but I don't have a crystal ball so I don't know whether 2018 is the year."

"More states are passing these laws but there is a desire not to be the first. Regulators are by nature conservative in their approach, that's their job, but once a few captives are licensed and regulators see that the sky hasn't fallen they will be even more receptive to them. I think we may see a snowball effect."

Quick on the draw

There is some concern that failing to move quickly may mean captives miss a huge opportunity by allowing commercial insurance to catch up, but David Liptz, from Liptz and Associates, suggested that the commercial market will struggle to offer suitable coverage.

Liptz said: "There may be some slight adjustments, but at the end of the day, you are still dealing with a tough risk. Crop insurance has always been a problem, and now the value of loss, loss of income in the same space that used to have lower exposures is a real concern."

"Employee dishonesty and theft have always been tough risks to insure, and the premiums should be fairly similar, which will make it hard for a traditional insurer to capture the market."

According to Liptz, the opportunity is there for captives to make strides in the cannabis sector in the near future.

"The right captive programme can add a new opportunity within the captive space for the right captive manager."

He continued: "The positive is that it can get more individuals and companies with unique business models to view the captive insurance model as a viable option or addition to their existing risk management process."

"To be able to grow surplus for future claims and the development of a business to efficiently pay claims which will allow the insured to remain a going concern."

Whether or not we see captives enter the market in 2018, it does seem that the two industries are too well matched for a spark not to eventually ignite between them. **CIT**

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High time to get involved

Matthew Queen, general counsel at Venture Captive Management, discusses the current state of the cannabis market and why now is the perfect time to get involved

About a year ago, to my surprise, I realised that I wanted to become a felon. Not just any felon, I wanted to be a money launderer. Crime pays. The numbers were undeniable: revenues in the cannabis industry were at historic records. Lloyd's of London exited the cannabis market in 2015 leaving a gaping hole in the market. There was a multibillion dollar industry without any meaningful risk solution. Cannabis was the single biggest opportunity for captive professionals.

Cannabis is a challenge. As the newest drug in the field, there are only a handful of actuaries and underwriters who understand cannabis risks. Moreover, there are more unknowns than knowns. Innovative attorneys are developing new theories of liability to throw at dispensaries, manufacturers, and laboratories. Pricing premiums is hard work. Estimating rates in a black box is even harder. Consequently, the insurance options that are available are very expensive.

Coverage, to the extent it is available, is of dubious value. The courts vary wildly in their interpretation of coverage disputes. Several insurance carriers have denied coverage for any property claims related to cannabis facilities–even where the insurance carrier knowingly insured cannabis-related operations. These cases resolve unpredictably. For example, a state court in Arizona ruled that a cannabis insurance policy was invalid because it violates public policy. The judge went further and opined that all cannabis contracts are void for violating public policy (including employment contracts, vendor contracts, etc.). In contrast, several other federal courts have upheld insurance contracts insuring cannabis companies and landlords renting to cannabis companies as valid agreements. There is no consistency and a good attorney can only get you so far.

This poses the question, if we have a multibillion dollar industry with terrible insurance options, why are there not more captive players in the game? For that answer, we have to look to our fearless leaders in Congress.

Stunting growth

The consequences of the 'War on Drugs' echo through the generations. Cannabis is a Schedule I substance under the Controlled Substance Act. This means that cannabis allegedly has a high risk of addiction and no medical value. As a result, cultivating or selling cannabis constitutes a felony. Further, aiding and abetting the commission of a felon is also a felony. The lines around 'aiding and abetting' are fuzzy. Are you aiding and abetting the commission of a felony by running the register at a dispensary? How about if you do the dispensary's taxes? What about if you issue the cannabis company a general liability policy?

Regardless, the threat of incarceration did little to curb cannabis use. Congress upped the ante by passing the Bank Secrecy Act (BSA). The BSA essentially recruited banks to assist in fighting the drug war by requiring banks to monitor customers' transactions and report suspicious activities relating to drugs. If a financial institution conducts business with a drug dealer, then the financial institution would be liable for money laundering. Cannabis companies, even state legal cannabis companies, fall within the authority of the BSA. Further, insurance companies are considered financial institutions under the act.

Here lies the problem. Cannabis companies struggle to find insurance solutions because the insurance companies decline to expose their operations to allegations of money laundering or aiding and abetting the commission of a felony.

This issue is a significant impediment to the growth of the cannabis industry. Regardless of state law, banking and insurance is a necessity to do business in most states. There are some efforts in California and Washington to create state-solutions, but these are band aids on gaping wounds. The only solution to this problem literally requires an act of Congress.

Cynics say: “Don’t hold your breath” on cannabis federal action, but the times are a-changin’. Recently, Mitch McConnell, the Senate Republican majority leader, indicated that he wanted to see hemp products (cannabis’s kissing cousin) decriminalised. Further, Treasury secretary Steven Mnuchin has publicly expressed support of laws permitting some banking and insurance solutions for the cannabis industry in states where the plant is legalised.

Pass the legislation by the left hand side

Cannabis legalisation is spreading across the USA. Over half of the states have legalised cannabis in some form and a number of these states are in deep red parts of the country.

As more research indicates that cannabis has a number of fantastic medical uses, such as treating pediatric seizure cases, the political will to oppose cannabis shrinks. While total legalisation of cannabis at the federal level remains a pipe dream, the scales are tipped far enough in favour of pot that the government will take action very soon.

The smart money is here: if the Democrats take the House of Representatives in the 2018 midterm elections, then expect some sort of change in the banking and insurance front for cannabis. Predictions are hard, especially about the future, but a significant number of Democrats are running on pro-marijuana platforms and the base heavily supports broad legalisation. A simple rule change permitting cannabis companies to use financial services would be an easy bill to sail through the House to please the liberal base and avoid any serious opposition.

Hindsight may be 4/20

If so, so what? Even assuming cannabis is, in fact, the next great thing, what is the captive insurance industry to do? The reality is that the moment financial regulations loosen up around cannabis the major carriers are going to enter the industry. These players will undercut all competitors to grab market share at any cost. That said, the cannabis companies are more likely to do business with people they know.

Now is that time to get to know the industry, learn the risks, and meet potential clients. It is hard to make a cannabis captive in the current regulatory environment. Even if you can get a client of sufficient size and you convince yourself that you are not concerned about prosecution for money laundering, the banking issues will keep you up at night.

But these issues will fade. The cannabis industry is enormous and California is now on track to become the single largest cannabis market on the planet. Congress will not be able to ignore the pressure from the people, and more importantly, the lobbyists, past 2019. The time to enter the cannabis industry is now. The green economy is primed to explode and will transform large segments of the economy, including pharmaceuticals, alcohol, and recreation. **CIT**

> “The time to enter the cannabis industry is now. The green economy is primed to explode.”

Matthew Queen, general counsel, Venture Captive Management

Seeing through the regulatory haze

Joe Holahan, attorney at Morris, Manning and Martin, breaks down the current state of cannabis regulation in the US and highlights the role captives can play in the industry

In 1996, California voters passed Proposition 215, making California the first US jurisdiction to legalise the cultivation and possession of marijuana for medical purposes. Today, 30 states, the District of Columbia, Puerto Rico and Guam have enacted laws legalising medical marijuana. In addition, ten states have legalised adult recreational use of marijuana and its derivatives in one capacity or another.

Yet marijuana—cannabis—remains illegal under US federal law. Marijuana is a Schedule I drug under the Controlled Substances Act (CSA) of 1970. As such, it cannot be legally prescribed for any reason, with the sole exception being used as part of a federally approved research study. In addition, it is a federal crime punishable by imprisonment to knowingly manufacture, distribute or dispense marijuana. Thus, even a state-licensed cannabis business operated in strict compliance with state law is considered a criminal enterprise for purposes of US federal law. Federal law also makes it a crime to engage in certain financial transactions, including transactions involving an insurer, with money known to be derived from the cultivation, distribution or sale of cannabis.

> At present, the view concerning the legal status of cannabis in the US is muddy at best. Yet the picture has some bright spots...President Trump recently stated that the administration will not target cannabis businesses operated in compliance with state law.

Hashing it out

In January, US Attorney General Jeff Sessions rescinded what is known as the Cole Memo, which was Department of Justice guidance to federal prosecutors issued during the Obama administration. The Cole Memo advised US attorneys to focus their enforcement of the CSA on certain priority areas such as preventing the distribution of marijuana to minors and the diversion of marijuana from states where it is legal to those where it is not. The Cole Memo implicitly suggested that US attorneys should not prosecute businesses operated in strict compliance with state law, although it left decisions concerning whom to prosecute to the discretion of each prosecutor.

At present, the view concerning the legal status of cannabis in the US is muddy at best. Yet the picture has some bright spots. In response to pressure from states that have legalised cannabis, President Trump recently stated that the administration will not target cannabis businesses operated in compliance with state law. The President also pledged to support efforts to enact federal legislation protecting such businesses. In addition, guidance issued by the US Treasury department for banks and other financial institutions wishing to provide services to cannabis businesses without being subject to penalty remains in effect. Finally, Congress has continued to renew a federal law known as the Rohrabacher-Blumenauer Amendment, which prohibits the Department of Justice from using federally appropriated funds to prevent states from "implementing their own laws that authorise the use, distribution, possession, or cultivation of medical marijuana." Note the limitation to medical marijuana. The Ninth Circuit Court of Appeals has held that this law is a defense to federal prosecution for persons who have "strictly complied with all relevant conditions imposed by state law." The Ninth Circuit includes the Westernmost US states. The Courts of Appeal in other US Circuits, however, have yet to rule on this issue.

What is going on here? Madison surely would understand. The American polity was born in a climate of deep distrust of centralised authority and fear that the states would be deprived of their newly won sovereignty over internal affairs by a tyrannical national authority. Balanced against this sentiment was the practical need for a national government to protect and unify the nation—but only by limited and clearly delineated means. The push and pull between state and federal authority evident at the founding continues to play out.

Blunt enforcement

Under modern Supreme Court jurisprudence, the power of the federal government to regulate interstate commerce is construed to extend even to purely local economic activity if it is deemed to have a 'substantial effect' on interstate commerce. The requisite 'substantial effect' does not have to be great. A case decided by the Supreme Court in 2005, Gonzalez v. Raich, 545 US 1 (2005), illustrates the state of the law very well. Diane Monson and Angel Raich were California residents who suffered from a variety of serious medical conditions and were prescribed marijuana by licensed, board-certified physicians in accordance with California's Compassionate Use Act, which authorises the limited use of marijuana for medicinal purposes. Monson cultivated marijuana for her own use. Raich obtained it from two caregivers, who provided locally grown marijuana to her free of charge.

In 2002, local law enforcement officers and agents from the federal Drug Enforcement Administration (DEA) paid a visit to Monson's home. The local officials concluded her marijuana was entirely lawful under California law and left. In what surely counts as bad manners for guests, the DEA agents then seized her marijuana plants and destroyed them on the ground they were unlawful under the CSA.

Monson and Raich responded by bringing a lawsuit seeking injunctive and declaratory relief against federal enforcement of the CSA to the extent it prohibited them from possessing, obtaining or manufacturing cannabis for their personal medical use in accordance with California law. They argued that the CSA's prohibition on marijuana as applied to their purely intrastate manufacture and use of the drug for medical purposes, which was lawful in California, exceeded Congress's authority under the constitution to regulate interstate commerce.

The Supreme Court disagreed. By a six-to-three majority, the Supreme Court held that Congress's power to regulate interstate commerce includes the power to prohibit the local cultivation and use of marijuana in compliance with California law. Citing a depression-era case involving federal controls on wheat production, the court ruled that even Monson's cultivation of marijuana in her home solely for her own use could be regulated under federal law because this type of activity, if engaged in by many persons, would have a "substantial effect on supply and demand in the national market" for marijuana". Under the holding in Gonzalez v. Raich, there is no question federal law may override state laws legalising cannabis.

High expectations

Which brings us back to present situation. Today, the legal—state legal—cannabis business is booming. In 2017, the industry is estimated to have had sales of nearly $9 billion. It is estimated that legal sales of cannabis will reach $21 billion nationally by 2021.

The federal prohibition on marijuana, however, has placed a drag on the growth of the cannabis industry. Many investors, financial institutions and service providers are reluctant to be involved with the industry due to the latent threat of federal prosecution. Banking services are especially difficult to obtain. Insurance capacity also is lacking, and what insurance is available can be expensive. Crop insurance for outdoor grow reportedly cannot be had at any price. There are also questions about the scope of available coverages and the threat that standard exclusions and common law prohibitions against the insurance of illegal activities could compromise coverage even for businesses operated in compliance with state law.

As this edition of the Captive Insurance Times illustrates, the captive industry can help by providing alternative vehicles for self-insurance and direct access to international reinsurance markets. Those who provide services to cannabis businesses should take steps to mitigate their legal risk. Important steps would include, among other things, following what federal guidance there is in this area, operating in accordance with applicable state laws, conducting reasonable due diligence on clients and separating cannabis-related operations from other operations.

Political hotbox

What is the outlook for the future? An effort is afoot in the Congress to enact legislation protecting cannabis businesses operated in accordance with state law. Nevertheless, it is unclear whether Congress will take meaningful action any time soon. Its inertia has much to do with the political heat cannabis attracts and the general inability of Congress in recent years to reach consensus on difficult issues. Congressional inaction is also a function of concerns within the industry that new legislation could result in cannabis being reclassified under the CSA, giving the Food and Drug Administration authority to regulate it.

Notwithstanding the lack of a formal solution, as state tax revenues from cannabis grow, the risk of adverse federal action diminishes. The tension between state and federal laws may continue for some time to come, perhaps eventually with new guidance from federal authorities concerning activities that will draw their attention versus those that will be left to the states to regulate.

In the meantime, the industry will need to proceed with caution, watching federal actions closely to evaluate the posture of law enforcement authorities and taking affirmative steps to mitigate its legal risk. **CIT**

> **"The industry will need to proceed with caution, watching federal actions closely to evaluate the posture of law enforcement authorities and taking affirmative steps to mitigate its legal risk"**

Joe Holahan, attorney, Morris, Manning and Martin

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Comings and goings at Conyers Dill and Pearman, Beecher Carlson, QBE and more

Conyers Dill and Pearman has appointed Derek Stenson as partner in its Cayman Islands corporate practice.

Stenson, whose main expertise is in insurance, reinsurance and structured products, leaves his previous role as senior counsel at Walkers after nearly seven years with the practice.

Stenson began his career at William Fry in 2003 and brings with him 15 years of experience in the insurance industry.

Stenson commented: "I'm really looking forward to working with the team and contributing to the ongoing success of the firm, it is highly regarded and has an unrivalled reputation in my areas of focus, so joining forces was an easy decision."

Conyers Dill partner and head of the Cayman Islands office, Kevin Butler, said that the firm was delighted to welcome Stenson aboard.

Butler added: "I have known Derek Stenson personally for some years and his background, particularly in insurance and reinsurance, makes him a custom fit for us. We are very confident that his significant and broad expertise will help us further strengthen our position in Cayman."

Beecher Carlson Insurance, a large account risk management broker, has promoted Joseph Siech to CEO and Scott Davis to COO.

Siech succeeds Steve Denton, who has departed the company to pursue other opportunities.

In his new role, Siech will be responsible for planning and directing the execution of the company's client services and growth initiatives, in addition to guiding the development of financial goals.

He will continue to drive national sales leadership across the Beecher Carlson platform.

Siech commented: "My job is simple: continue to work with our existing leadership team to determine what their teams need to best service their clients and then figure out a way to make that happen."

Davis takes up the newly created COO role and will direct strategic operational development to ensure client satisfaction and future growth with a focus on creating and delivering value-added processes to clients.

Davis, who will also continue as president of casualty and property, said he was excited to work with the leadership team to increase operational efficiencies.

He commented: “We take pride in making every client experience meaningful and will be refocusing our efforts on creating innovation solutions for them.”

Dan Donovan, executive chairman of Beecher Carlson, said that Siech and Davis have been key members of the company’s leadership team for more than 13 years.

Donovan added: “They have long held the respect of their teammates, their clients, and our business partners.”

“Our culture is the crown of our success, and I know our culture will thrive under Joseph Siech and Scott Davis’s leadership.”

QBE Insurance Group has shifted the responsibilities of Phillip Giles, its vice president of sales and marketing.

In his new role, Giles will be responsible for promoting expansion of their medical stop-loss (MSL) captive business segment, as well as strategic initiative planning and formulating national production initiatives.

The 30-year insurance industry veteran will continue to set national strategy for all accident and health business development but will hand over the responsibility of managing QBE’s regional business development representatives and executing the regional business development strategy to the company’s four regional vice presidents.

According to Giles, the success of QBE’s MSL captive business over the past year means it will be his primary focus moving forward.

He explained: “The goal is to free up more of my time in order to increase most of my attention specifically on MSL captives which have really boomed for us over the past two years.”

“Our positioning in the MSL captive market is a bit different than most other carriers. We focus on single-parent captives and tightly-controlled group captives.”

Giles added: “Our concentration is focused on building highly customised coverage structures to more comprehensively support the specific risk and financial objectives of each captive.”

JLT Re has expanded its North American leadership by appointing George Daddario, Peter Chandler and Chip Ott to executive positions.

Daddario, who joined the company in 2014 as part of the acquisition of the reinsurance business of Towers Watson, has been appointed executive chairman of JLT Re (North America).

In this newly created role, he will lead business development units in the US and Canada.

Chandler will take on a new position as deputy CEO of JLT Re (North America). He will be responsible for driving new business opportunities and leading the national global practice area.

Ott, who remains executive vice president, has been appointed to the JLT Re North American Executive Committee.

JLT Re said that the expansion shows its commitment to strengthening its business across the region.

JLT Re (North America) CEO, Ed Hochberg, commented: “As we continue to expand and grow, our business is evolving to best meet the needs of our stakeholders.”

He added: “These appointments further strengthen our ongoing focus on developing market leading solutions for our clients.”

Morris, Manning and Martin (MMM) has appointed Tony Roehl as co-chair of the firm’s insurance and reinsurance practice.

Roehl, who is concurrently a partner at the firm, will share leadership of the group with Robert Myers, managing partner of MMM’s Washington, DC, office.

A 30-year insurance industry veteran, Roehl focuses on corporate and regulatory insurance matters in addition to speaking on innovative topics including insurance aspects of drones, self-driving cars, and other unmanned vehicles.

Roehl, who is based in Atlanta, also serves on the board of the Georgia Captive Insurance Association (GCIA), chairs the GCIA’s legislative committee and serves on the board of the Chapter of the Insurance Industry Charitable Foundation.

Roehl said: “I’ll keep helping the firm do what it does best – solve problems and help our highly innovative and entrepreneurial clients succeed while keeping an eye on new trends that could quickly transform the insurance industry.”

He added: “Captive insurance has huge potential and the firm is getting stronger in this area all the time.”

All moves are subject to Bermuda immigration approval. **CIT**

Do you have an industry appointment we should cover?
Get in touch via:
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