



LEGAL COUNSEL

Working Group

November 13 - 14 • Washington, DC

RECAP

EXECUTIVE SUMMARY

The final 2017 meeting of The Council of Insurance Agents & Brokers' Legal Counsel Working Group was attended by more than 40 of the insurance brokerage industry's top legal counsels. The meeting was held at The Council's headquarters in Washington, D.C., and was chaired by Working Group Chairman Peter Prinsen, Vice President and General Counsel of The Graham Co. The working group was staffed by The Council's General Counsel John Fielding, Chief Legal Officer Scott Sinder, Senior Vice President of Government Affairs Joel Wood, Vice President of Government Affairs Joel Kopperud, and Director of Government Affairs Blaire Bartlett.

PARTICIPATING FIRMS

More than 40 participants from the following member firms were in attendance:

Acrisure, LLC	HUB
AEGIS Insurance Services, Inc.	Hylant
AHT Insurance	The IMA Financial Group, Inc.
AmWINS	JLT Specialty USA
Arthur J. Gallagher & Co.	Lockton
Ascension Insurance	Keenan
AssuredPartners, Inc.	M3 Insurance
BB&T Insurance Holdings	Marsh
Brown & Brown, Inc.	Murray Securus
Brown & Riding Insurance Services, Inc.	NFP
BXSI	Ryan Specialty Group
CBIZ Benefits & Insurance Services Division	USI Insurance Services
Conner Strong & Buckelew	Wells Fargo Insurance Services
Cottingham & Butler, Inc.	Willis Towers Watson
Gehring Group	Woodruff-Sawyer & Co
The Graham Company	
The Hays Group, Inc.	

MAIN TOPICS

Political Update

Well into the first year of the Trump presidency, the Working Group continued to analyze the actions of the new Administration and the Republican-controlled Congress. The group heard from Senior Vice President of Government Affairs Joel Wood and Vice President of Government Affairs Joel Kopperud, as well as Blaire Bartlett, who recently joined The Council as Director of Government Affairs. The group provided background on several issues of key importance to Council members. At the forefront of

these discussions were the tax reform efforts underway in both chambers of Congress, though the pair also provided insight into future Affordable Care Act (ACA) reforms, the potential amendment to the Foreign Accounting Tax Compliance Act (FATCA), and reauthorization of the National Flood Insurance Program (NFIP). As Wood and Kopperud explained, all eyes are on the congressional tax reform effort for the moment, but Congress still has significant work to do in the coming weeks, including avoiding a government shutdown on December 9.

Tax Reform

Tax reform is taking center stage in Washington right now. For congressional Republicans passing tax reform is arguably more important than repealing and replacing the ACA because failing to do so would threaten the Republican brand.

With respect to content, the biggest takeaway for Council members is that employer-sponsored benefits are not taxed in either bill for the moment. Apart from that, the bills are markedly different with respect to the following provisions:

- Pass-throughs would be subject to strange rules (a point of contention for Senator Ron Johnson (R-Wisconsin), who has temporarily withdrawn support for the Senate bill based on these provisions), though the contours of those rules and their corresponding requirements are different;
- The deduction for state and local taxes would be handled differently (the Senate would eliminate it whereas the House would not);
- Taxation of foreign payments;
- Repeal of the individual mandate (the Senate does this as a revenue raiser, the House does not); and
- Cut the corporate tax rate to 20%, though when that would happen varies (the House would implement the reduction immediately, the Senate would do so a year later).

The Council has voiced its concerns on some of the above issues, particularly the pass-through rules, by sending a [letter](#) to the Senate Finance Committee.

As far as timing goes, the House adopted its bill on November 16, two days after the Working Group met, and the Senate plans to take its bill to the floor possibly as soon as this week. If both bills pass their respective chambers, a conference is likely to result in the House having to cede to the Senate's measures to ensure that the Senate can still pass the conference report with the required 51 votes.

Finally, though not addressed in the tax reform legislation, the health insurance tax, medical device tax, and Cadillac tax, are ripe for consideration post-tax reform.

[Click here for the house Tax Bill, Senate Bill, Politico Pro Article, and Comparison Analysis](#)

FATCA

Under FATCA, U.S. brokers remitting premium payments to non-U.S. carriers are required to prove that the carriers are in compliance with U.S. tax laws by either (1) collecting a W-8BEN-E form from each carrier holding a share of the policy or (2) withholding 30 percent of the premium payment. The Council has long argued that non-cash value property/casualty insurance premium payments made to overseas insurers cannot be used for the purposes of tax evasion (which is one of the stated purposes behind FATCA). Including property/casualty insurance under FATCA is a clear example of regulatory overreach and unnecessarily subjects certain insurance market participants to cumbersome and expensive certification and documentation requirements.

Beyond the immediate tax reform effort, Representatives Jason Smith (R-Missouri), John Larson (D-Connecticut), and Ed Royce (R-California) introduced legislation (H.R. 871) on February 6, 2017, that would exempt non-financial insurance premiums from FATCA requirements. Should the tax reform efforts stall, passage of H.R. 871 will remain a priority for The Council.

Health Care Reform

Since the start of the 115th Congress, Republicans in both chambers have made passage of legislation repealing, replacing, or otherwise reforming the ACA their number one priority. While the House was able to pass their ACA replacement bill, the Senate was unsuccessful and ultimately failed to pass legislation under the expedited reconciliation process by the September 30 deadline. Since then, both the Trump Administration and members of Congress have adopted a more piecemeal approach to undercut the health care law.

On the legislative-side, several bills have been introduced to achieve smaller goals with respect to reforming the ACA, including:

- The dueling proposals to stabilize the individual market and ensure the Administration continues to make cost-sharing reduction (CSR) payments—Alexander-Murray and its more conservative counterpart, Hatch-Brady;
- The Hatch-Crapo discussion draft that would give states more flexibility with 1332 waivers;
- The Commonsense Reporting Act, which would address the burdensome reporting requirements for employers; and
- The provision in the Senate tax reform bill that would repeal the individual mandate.

The Administration similarly appears poised to do what it can to implement its own health care reforms, including its recent decision to stop making the CSR payments, and the issuance of Trump's most recent Executive Order directing a trio of agencies to do what they can to, among other things, facilitate the sale of insurance across state lines.

Beyond these reforms, there has also been a rise in legislation introduced at the state and federal level proposing a single-payer model. Such legislation is unlikely to move in the current political climate and may just be posturing (particularly for the 2018 Senate races), but it warrants tracking because employer-sponsored coverage is a natural payment method for such legislation.

[Click here for the Proposed Rule on ACA Benefit and Payment Parameters](#)

Flood Insurance

The NFIP is set to expire on December 8, 2017. By all accounts, a short-term extension is likely given that Capitol Hill appears to be strictly focused on tax reform for the time being. On November 14, the House passed its reauthorization measure—the 21st Century Flood Reform Act (H.R. 2874)—by a vote of 237-189. Among other things, the bill:

- Reauthorizes the program for five years;
- Implements reforms to grow the private insurance market;
- Allows for data-sharing with private insurers;
- Eliminates the mandatory purchase requirement for commercial properties as of 2019; and
- Reforms the Write Your Own program.

Though this bill passed the House, it is unclear what will be in the package that goes to the president (or if a short-term/two-year reauthorization is contemplated instead), particularly given the fact that the Senate has been unable to come to agreement on its final flood package.

[Click here for House NFIP Legislation and Reauthorization Comparison Chart](#)

Fiduciary Rule

On June 9, the Department of Labor's (DOL) fiduciary rule defining who is an investment advice fiduciary went into effect. The DOL, however, has stated it will not begin enforcing the rule against any advisor who, in good faith, seeks to comply with its requirements until January 1, 2018.

Between now and the first of next year, the DOL appears to be working with the Securities and Exchange Commission to review the rule in its entirety and evaluate next steps. Given the uncertainty surrounding the fiduciary rule's future at DOL, the big question is how the two agencies may choose to regulate in this space going forward.

International Issues

The Council's Vlad Gololobov briefed the Working Group on the central international regulatory issues that are under discussion with The Council's International Working Group. Such issues include the future of the North American Free Trade Agreement; the specific barriers that the Canadian government imposes on U.S. brokers seeking to do business in Canada (i.e., taxation on non-admitted brokers); the increase in participation in the Indian insurance market; and the constant regulatory changes in London and the EU (i.e., grappling with Brexit and dealing with smaller issues).

For more information on what The Council is doing in the international arena or how to join the International Working Group, please contact Vlad Gololobov at vladimir.gololobov@ciab.com.

[Click here for the New Rules on Personal Data in the EU](#)

Insurtech

The Council's Jenn Urso and Rob Boyce spoke to the Working Group about major trends and developments in the insurance marketplace, with a particular focus on "Insurtech." As defined by Jenn and Rob, Insurtech is technology in and outside the insurance industry that will affect the day-to-day business of those in the industry. Such enabling (as opposed to disrupting) technologies are primarily carrier-focused. But many developers are interested in the broker role, how they can tap into that expertise to shape their products, and future partnerships.

There is currently no regulatory or statutory regime to accommodate those operating in the Insurtech space. In an effort to permit the use of these innovative technologies, some state regulators are utilizing "regulatory sandboxes," which effectively offer the Insurtech companies the opportunity to work hand-in-hand with regulators to develop regulatory models that can accommodate them. This can result in experimental phase or a year-long trial. The regulatory sandbox does not mean that the rules are different for these Insurtech companies.

Though there has been limited legislative activity in this arena (one effort failed in Illinois this session), it is possible that, in lieu of the regulatory sandbox, state legislatures provide a legislative fix on how these Insurtech companies should be regulated in the upcoming legislative sessions.

In the meantime, The Council is working to better understand Insurtech and how it affects the brokerage world. For more information on what The Council is doing in the Insurtech space, please contact Jenn Urso at jennifer.urso@ciab.com or Rob Boyce at robert.boyce@ciab.com.

Marijuana

Scott Sinder led a brief discussion on insuring the marijuana industry. To date, a total of 29 states, the District of Columbia, Guam, and Puerto Rico have legalized marijuana for medical use. Eight of those

states and D.C. have fully legalized marijuana for recreational use. Despite this legalization trend, and as described further in the most recent [Leader's Edge](#), there are several federal barriers that have caused most mainstream carriers and brokerage firms to steer clear of the industry. In particular, under federal law, it is illegal to grow, manufacture, sell, possess or use marijuana. It is equally unlawful to assist in the operation marijuana businesses; entities that engage in such actions can be prosecuted as co-conspirators, or as aiders or abettors.

The Obama Administration implemented several policy changes that made it easier to operate, despite the restrictions in place under federal law (i.e., the Cole Memorandum, the FinCEN guidance); and several efforts are underway in Congress to permit more research and reschedule marijuana. What the Trump Administration's approach will be, however, is unclear. Attorney General Jeff Sessions remains a staunch opponent to legalization efforts, whether medicinal or not. And he has issued a memorandum directing the Task Force on Crime Reduction and Public Safety to undertake a "review of existing policies ... to ensure consistency with the Department's overall strategy on reducing violent crime and with Administration goals and priorities."

Though the landscape remains somewhat uncertain for the insurance industry, this issue is likely to see some significant movement in the coming year, particularly as more states start enacting legislation on the legalization spectrum.

Producer Licensing / NARAB

The NARAB Board remains unfilled after the Senate refused to approve nominees put forward by then-President Obama last year. Given that the Trump Administration still has many appointments and nominations to work through, there is concern that naming members to NARAB will be a low priority, delaying the creation of NARAB for a significant time. Nevertheless, the Department of Treasury has indicated that it plans to solicit nominees for and to help with the establishment of NARAB II. As Treasury begins to undertake this task, The Council hopes to meet with relevant Administration officials to reduce the requirement of "extreme vetting."

Separately, in recent meetings, many Council members expressed concerns regarding state producer appointment requirements. Namely, members noted that the appointment process is costly and burdensome, but states have become very protective of them because appointment fees bring in a great deal of revenue. Based on these concerns, the Advocacy Committee and Board of Directors approved a request directing Council staff to explore options to address this common pain point at the state level. As part of the advocacy campaign, if you have any anecdotes concerning the difficulties presented by the appointments process, please share them with John Fielding.

Surplus Lines

The surplus lines subgroup discussed a number of state-specific issues, including the following:

- California's passage of a bill that provides more flexibility when determining which coverages to add to the Export List;
- Texas' enactment of an industrial insured definition;
- The confusion surround Georgia's most recent bulletin concerning surplus lines fees; and
- New York's recent guidance on surplus lines and direct procurement.

The Working Group also discussed issues related to surplus lines licensing. Based on this discussion, the Surplus Lines Subgroup and the Licensing Subgroup will work together to determine a consistent interpretation of the obligation (i.e., who must be licensed).

Other issues discussed include (1) surplus line fees charged in addition to commission, (2) calculation of taxes on fees in lieu of commission, and (3) the movement of allocation calculation legislation.

[Click here for Surplus Lines Statutory Updates](#)

[Click here for ELANY Summary](#)

Cyber

Cybersecurity issues continue to be at the forefront of discussions about insurance regulation. The Working Group focused on New York's cybersecurity rule governing financial services and insurance entities, as well as the NAIC's recently-adopted model act. The NAIC model act is generally similar to the New York regulation. In fact, if a licensee is in compliance under the New York regime, it will be deemed to comply with the model act as well.

Action is likely to take place on the model act at the state level beginning in January 2018 (particularly in South Carolina and Rhode Island), though some states may amend the NAIC's language to address concerns raised by carriers regarding some of the provisions. Namely, some carriers have identified problems with certain definitional provisions, some security requirements, and certain third-party service provider issues included in the model act. How states will react to these concerns is unclear, but presumably some of the introduced text will be slightly altered from the NAIC model language.

Concerning New York's regulation, which was promulgated last February, the next procedural step is certification. Covered entities (including Council members) are required to submit the first certification—i.e., noting that the program complies with regulations and certain steps have been taken—to the Department of Financial Services by February 15, 2018. The future application of this rule and its enforcement are still relatively unclear, for continuing guidance refer to the DFS set of [FAQs](#).

Finally, international businesses are now preparing to comply with the EU's General Data Protection Regulation (GDPR), which laid out a set of personal data protection rules. Adopted in April 2016, there has been a two-year grace period during which organizations were to update their systems to ensure compliance with the GDPR. The regulation goes into effect on May 25, 2018, after which organizations in non-compliance will face heavy fines. Should this area be of interest to Council members, please contact John Fielding.

For more information on what The Council is doing in the cybersecurity space, please contact Rob Boyce at robert.boyce@ciab.com.

[Click here for Cyber Regulation Comparison](#)

Rebating

The Council, in conjunction with our team at Steptoe & Johnson, has completed a draft of a 50-state survey of rebating rules and regulations. It is now available on the Council's website [here](#). We ask that you continuously review the document for updates to any statutes, regulations, bulletins, or other guidance documents.

The Working Group specifically spent time reviewing Maine's newest rebating [bulletin](#) and discussing the ongoing Zenefits litigation, with a particular focus on the recent decision from Washington's Administrative Law Judge.

Member Information Exchange

At the close of the meeting, members were provided with an opportunity to raise any specific issues that they thought warranted further discussion. Such topics included:

- The AIG email concerning their enhanced license and appointment validation process, and
- The potential creation of a subgroup devoted to benefits compliance issues.

Additionally, there was a request for information or metrics surrounding in-house legal resources at member companies (e.g., how many lawyers, paralegals, administrative professionals work in the legal department; is compliance included as part of the legal department; does licensing qualify as part of the legal department; etc.). The hope is that such information would allow Council members to build an understanding of how lawyers and law-related services are used in the industry, both in-house and externally. In an effort to obtain this data, The Council will circulate a survey to members of the Working Group. If there are specific questions that members would like included, please send them to John Fielding.

[Click here for the Connecticut State Security Bulletin](#)

[Click here for House Letter on S Corp Taxation](#)

[Click here for Senate Letter on S Corp Taxation](#)

SEE YOU IN 2018!

The next Legal Counsel Working Group will be held February 5-6, 2018, at our annual Legislative & Working Groups Summit in Washington, D.C. If you have any questions or suggestions for future discussion topics, please contact The Council's John Fielding at john.fielding@ciab.com or 202.350.5864.