

RECAP

Legal Counsel

WORKING GROUP | FEBRUARY 5 – 6, 2018



LEGISLATIVE &
WORKING GROUPS
SUMMIT

EXECUTIVE SUMMARY

The Council of Insurance Agents & Brokers' Legal Counsel Working Group met in Washington in conjunction with The Council's Legislative & Working Groups Summit. The broader conference enabled members to participate in the full slate of Summit activities, including a joint session with the other Council Working Groups; a Day on the Hill featuring briefings from several Members of Congress, as well as individual congressional meetings; and a congressional reception.

The Working Group was chaired by Peter Prinsen, vice president and General Counsel of The Graham Co., and was attended by more than 50 of the insurance brokerage industry's top legal counsels. 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.

PARTICIPANTS

Click [here](#) for the roster.

MAIN TOPICS

Political Update

Kicking off the second 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, who provided background on several issues of key importance to Council members, including future reforms to the Affordable Care Act (ACA), potential regulatory action on the Foreign Accounting Tax Compliance Act (FATCA), and reauthorization of the National Flood Insurance Program (NFIP). Though many of these issues remain a priority for administration and congressional officials alike, the biggest issue in Washington at the time of the meeting was whether the government would remain funded.

A day after the Working Group met, Congress passed a continuing resolution (CR) to fund the government—the fifth CR of the fiscal year which began October 1. Included within the CR was a bipartisan budget deal that would increase budget caps and raise the debt limit, but the agreement notably did not include an immigration fix, which had been a Democratic priority. As Wood and Kopperud explained, funding the government remains the central priority. With the current CR set

to expire March 23, this leaves Congress a little over a month to pass an omnibus bill that would put an end to the temporary funding measures.

Tax Reform

Following the passage of the Tax Cuts and Jobs Act in December, the next big question is how it will be interpreted and implemented. The Council is especially concerned about the bill's pass-through provisions. Specifically, the bill created a new section of the tax code, allowing a 20 percent deduction on "qualified business income" for owners and shareholders of certain pass-through entities (i.e., S-corporations and Limited Liability Companies). Income from a "specified trade or business" (including income from consulting and/or brokerage), however, is not "qualified business income" eligible for the 20 percent deduction. It is The Council's contention that insurance agencies and brokerages are not "specified service trades or businesses" as defined in statute because Congress expressly chose not to include "insurance" in the definition of "specified service trades or businesses."

As such, **under The Council's interpretation**, pass-through entities engaged in the insurance business should be eligible for the 20 percent deduction under the tax bill. The Council would nevertheless like Treasury to clarify this point (i.e., what activities qualify as "insurance" for the purposes of receiving the deduction).

The Council plans to meet with Treasury officials to express its view that activities of Council members should be interpreted to fall within the scope of the term "insurance" and therefore constitute a "qualified trade or business." Should these requests for administrative guidance fail, however, The Council intends to lobby Congress to amend the tax code and provide clarification that the term "insurance" includes insurance production, distribution, and management.

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.

The Council has been working with the Department of Treasury to remedy this. In fact, in its October 2017 report recommending actions to eliminate or mitigate burdens imposed by eight specific tax regulations, Treasury indicated that it is considering possible reforms to FATCA. The Council's staff has met with Treasury's international tax team and discussed next steps in the FATCA fix. According to Treasury, its timeline is to have this solved in the summer of 2018 as part of a larger regulatory relief package.

Beyond the immediate regulatory efforts, The Council is continuing to work with congressional leaders to hold Treasury accountable and offer an alternative solution should one be necessary. In

particular, Senator Tim Scott (R–S.C.) has frequently raised the FATCA issue with Treasury officials in hearings before the Senate Banking Committee. On the House side, Representatives Jason Smith (R–Mo.), John Larson (D–Conn.), and Ed Royce (R-Calif.) have introduced legislation (H.R. 871) that would exempt non–financial insurance premiums from FATCA requirements. Should Treasury’s efforts stall, passage of H.R. 871 will remain a priority for The Council.

Healthcare Reform

Since congressional Republicans were unable to achieve wholesale repeal of the ACA, both the Trump Administration and members of Congress have adopted a more piecemeal approach to undercut the healthcare law.

On the legislative side, Members of Congress have sought to achieve smaller goals with respect to reforming the ACA. For example, in the Tax Cuts and Jobs Act, congressional Republicans repealed the individual mandate. Most recently, a continuing resolution included a delay of several ACA taxes, including a two-year delay of the so-called Cadillac Tax, on which The Council has continually pressed Congress for action.

The Administration similarly appears poised to do what it can to implement its own healthcare reforms. Most recently, in accordance with President Trump’s recent healthcare executive order, the Department of Labor issued a proposed rule to facilitate the establishment of association health plans (AHPs). The proposed rule would expand the types of AHPs that qualify under the ERISA rules in two fundamental respects. First, the proposal would allow an AHP to be formed specifically to offer a group health plan, so long as a commonality of interest exists between the parties (i.e., eliminating the prior requirement that an association must be created for a purpose other than to offer/maintain an AHP); second, it would allow individuals to participate directly in an AHP without an employer plan sponsor. Because these AHPs would also qualify as MEWAs, the Working Group’s discussion focused primarily on issues associated with MEWAs (i.e., adverse selection, lack of sophistication among participants, Departments of Insurance reluctance to get involved, their impact on the individual market, etc.). **Comments on the proposal are due on March 6.** If you have any comments or anecdotes regarding MEWAs, please send them to John Fielding at [*john.fielding@ciab.com*](mailto:john.fielding@ciab.com).

Beyond these reforms, the Working Group continued its discussion regarding the rise in single-payer legislation and the distinction between such Medicare–For–All and Medicaid–For–All proposals. Although such legislation is unlikely to move in the current political climate and may just be political posturing (particularly for the 2018 Senate candidates and prospective 2020 Democratic presidential candidates), The Council is actively tracking developments in this space and establishing its position on the issue should such legislation gain traction.

Other developments in the healthcare space that were discussed include:

- Developments in the litigation regarding the Equal Employment Opportunity Commission’s (EEOC) wellness rules;
- The recent (and somewhat ambiguous) healthcare initiative announced by Jeff Bezos (Amazon), Jamie Dimon (JPMorgan Chase), and Warren Buffet (Berkshire Hathaway);

- The Council's role (and potential future participation) in the drug pricing transparency debate;
- The ACA's contraceptive coverage mandate exemption;
- Individual market stabilization efforts; and
- The recent letters issued by the Internal Revenue Service informing employers of their potential penalty for failure to comply with the employer mandate during the 2015 calendar year. In addition, the IRS has an online FAQ that might be helpful: <http://bit.ly/2onEabO>

Flood Insurance

Authorization for the NFIP is tied to funding for the federal government, which is now set to expire on March 23. On November 14, 2017, 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.

The House bill was dead on arrival in the Senate. At the moment, given the Senate's inability to agree on a final flood package and the authorization's connection to government funding, it remains unclear whether a reauthorization package will reach the president's desk this year (or even whether a short-term/two-year reauthorization is possible).

Beyond the legislative efforts, the Working Group also discussed (1) the NFIP's expansion of its reinsurance program and (2) FEMA's use of the loan executive program to bolster experience at the agency.

Fiduciary Rule

The Securities and Exchange Commission (SEC) has purportedly started to draft its own fiduciary rules. In fact, since being sworn into office, SEC Chair Jay Clayton has repeatedly said the SEC's fiduciary rule is a high priority for the agency. The expectation is that the SEC's rule—which is expected before the August recess or shortly thereafter—will be an improvement on the DOL rule.

What the DOL does in the meantime remains to be seen. The agency released a final rule delaying the enforcement mechanisms of the fiduciary rule from January 1, 2018 to January 1, 2019, giving the agency more time to reassess the impact of the regulation on the financial industry and consumers. The agency is also still waiting for a decision from the Fifth Circuit regarding DOL's statutory authority to promulgate the fiduciary rule in the first instance, among other legal issues.

International Issues

The Council's Vlad Gololobov updated the Working Group on several international regulatory issues. Such issues include the future of the North American Free Trade Agreement; the increase in participation within the Indian insurance market; and the constant regulatory changes in London and the EU (i.e., grappling with Brexit and dealing with more specific, insurance-related issues).

With respect to NAFTA, Gololobov discussed a recent meeting between The Council and Treasury officials regarding the specific barriers that provincial Canadian governments impose on non-admitted insurance (e.g., Alberta imposes a 50 percent tax on non-admitted insurance).

On the EU front, international businesses are now preparing to comply with the 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 non-compliant organizations will face heavy fines. Additionally, the Insurance Distribution Directive (IDD), which levels the playing field for all insurance intermediaries in the EU, is scheduled to take effect on October 1, 2018. Specifically, the IDD sets new criteria for insurance intermediaries to operate within the EU.

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.

Producer Licensing/NARAB

Following approval from the Advocacy Committee and Board of Directors, Council staff—in conjunction with a few carriers—has started to explore options to provide relief from state producer appointment requirements. In particular, the Working Group discussed which states would likely be the initial targets (i.e., Connecticut, Mississippi, Louisiana); whether brokers or carriers should bear the administrative burden of maintaining the necessary data; how to replace the revenue that states would lose if they eliminate appointments; and whether the solution should be limited to the property and casualty context.

Separately, although the NARAB Board remains unfilled, the Department of Treasury has indicated that it plans to solicit nominees for and help with its establishment. The Council has met with relevant Administration officials to discuss the need to ease the burdens associated with the nomination process (i.e., reducing the requirement of “extreme vetting”).

Other issues discussed by the Working Group include (1) affiliations and their connection to appointments, (2) when adjuster and consultant licenses are required, and (3) the continued requirements that social security numbers be included throughout the licensing process.

Surplus Lines

The surplus lines subgroup discussed a number of state-specific issues. Of particular interest were the differing approaches to taxing broker fees in the surplus lines context. For example, Maryland recently issued a bulletin expressly excluding broker fees from the premium tax calculation. Minnesota, on the other hand, affirmatively taxes fees in lieu of commissions. The Working Group sought to determine whether a legislative fix is necessary in those states with adverse tax treatment of broker fees and what such a fix would look like.

Other issues discussed include (1) ELANY’s bulletin regarding New York’s Department of Financial Services’ position on punitive damages coverage, (2) the differing state approaches to accident

and health/disability surplus lines coverage and the NAIC's pending guidance on this area, (3) licensing issues (i.e., who must be licensed), and (4) Puerto Rico's surplus line laws.

Cyber

Cybersecurity issues continue to be at the forefront of discussions about insurance regulation. The Working Group briefly discussed New York's cybersecurity rule and the NAIC's finalized model act. The future application of these rules and their enforcement are still relatively unclear. For continuing guidance refer to the, please see DFS' evergreen FAQs, the ELANY compliance guide, and The Council's comparison of the NAIC model and New York's final rule.

Meanwhile, at the federal level, Representative Blaine Luetkemeyer (R-Mo.), chairman of the House Financial Services Subcommittee on Institutions and Consumer Credit, is drafting a data security and breach notification bill that would establish a federal notification standard, among other things. How the bill would affect the insurance industry (i.e., whether it would preempt state insurance laws), however, is still unclear.

Rebating

The Working Group spent time reviewing recent state actions increasing the cost thresholds for promotional gifts. Specifically, Florida is considering legislation that would increase the threshold from \$25 to \$100 and incorporate language governing charitable contributions. New Jersey's Department of Banking and Insurance promulgated a similar rule in December, increasing the threshold of what qualifies as an inducement from \$25 to \$100.

As a reminder, the final 50-state survey of rebating rules and regulations is now **available on The Council's website**. We ask that you continuously review the document for updates to any statutes, regulations, bulletins, or other guidance documents.

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 waivability of the United Kingdom's 2016 Enterprise Act;
- Firms' current approach to clients becoming "more strident" with respect to NDAs;
- The current regulatory landscape for marijuana, following the rescission of the Cole Memorandum by Attorney General Jeff Sessions;
- When to cancel certificates following a request from a finance company that the carrier cancel for non-pay; and
- The appropriate next steps following lapsed registrations in certain states.

SEE YOU IN JUNE!

The next Legal Counsel Working Group will be held **June 20–21, 2018** at The Council's headquarters 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**.