LEGAL COUNSEL
Working Group

RECAP

June 12 - 13, 2017 • Washington, DC

EXECUTIVE SUMMARY

The Council of Insurance Agents & Brokers' Legal Counsel Working Group met in Washington to discuss an array of issues facing Council members.

The meeting was chaired by Working Group Vice Chair Heather Steinmiller, General Counsel of Connor Strong & Buckelew—standing in for the Working Group's Chair, Pete Prinsen, vice president and General Counsel of The Graham Co.—and was attended by more than 35 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 Government Affairs Associate Tish Carden.

PARTICIPATING FIRMS

Participants from the following member firms were in attendance:

ABD Insurance and Financial Services
Acrisure, LLC
AEGIS Insurance Services, Inc.
AHT Insurance
Aon Consulting, Inc.
Ascension Insurance, Inc.
Assurance Agency, Ltd.
AssuredPartners, Inc.
BancorpSouth Insurance Services, Inc.
BB&T Insurance Services
Brown & Brown, Inc.
Conner Strong & Buckelew
Cottingham & Butler, Inc.
Glatfelter Insurance Group
Hays Companies
HUB International Ltd.
Hylant
JLT Re (North America) Inc.
Keenan
Lockton Companies
M3 Insurance
Marsh & McLennan Companies
MMA Southwest
Thompson Flanagan
TrueNorth Companies
USI Insurance Services
Wells Fargo Insurance Services
Willis Towers Watson
Woodruff-Sawyer & Co.

MAIN TOPICS

Political Update
Just under six months into the Trump Administration, the Working Group's discussion focused on the progress made by the Republican-controlled executive and legislative branches in keeping their campaign promises. The group heard from The Council's Joel Wood and Joel Kopperud, who provided an update on several issues of key importance to Council members. This included insights into efforts in

both chambers to repeal the Affordable Care Act (ACA), the necessity of an amendment to the Foreign Accounting Tax Compliance Act (FATCA) and the importance of the reauthorization of the National Flood Insurance Program (NFIP). As Wood and Kopperud explained, the Senate is moving urgently to pass its ACA replacement bill because there are a series of other political issues that both chambers are ready to take up, including the debt ceiling, the budget process and tax reform.

Healthcare 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. In May, the House passed their ACA replacement bill, the Affordable Health Care Act. Meanwhile, the Senate has been working to craft its own replacement measure. In this climate of increased uncertainty, The Council has been reiterating the importance of protecting the employer market, expanding HSAs and preserving wellness programs. *[Since the Legal Counsel meeting took place in mid-June, there has been a great deal of activity in the Senate on the issue. Please see The Council's Healthcare PULSE and Healthcare in Transition newsletter for the latest.]*

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.

As reported previously, to remedy this problem, Representatives Jason Smith (R-Mo.), John Larson (D-Conn.) and Ed Royce (R-Calif.) introduced legislation (H.R. 871) that would exempt non-financial insurance premiums from FATCA requirements. More recently, The Council has also found a champion in Senator Tim Scott (R-S.C.), who, in the midst of a hearing on tax reform, asked Treasury Secretary Steven Mnuchin about the onerous reporting regulations being imposed on property/casualty insurance companies that are operating internationally. Secretary Mnuchin pledged to follow up with Senator Scott on this issue.

FATCA reform and passage of H.R. 871 remain a priority for The Council this year.

Flood Insurance

The National Flood Insurance Program (NFIP) is set to expire on September 30, 2017. Reauthorization bills have been introduced in the House and Senate, both of which incorporate language similar to that included in the Flood Insurance Market Parity and Modernization Act, which received bipartisan support in both chambers last Congress and passed the House unanimously by a vote of 419-0. The bill, which facilitates more private involvement in the market and clarified that surplus lines insurers are eligible to offer private market solutions, was reintroduced this Congress by Representatives Dennis Ross (R-Fla.) and Kathy Castor (D-Fla.), and serves as a cornerstone of the broader reauthorization bill, which is must-pass legislation because of the impending expiration of the program.

Apart from inclusion of the Ross-Castor language, both of the bills are fairly similar in their goals; they aim to stabilize the program, build up the private market, make coverage more affordable, incentivize

up-front mitigation efforts and update flood maps. There are, however, some granular differences (e.g., the House measure reauthorizes the NFIP for five years, while the Senate measure reauthorizes the NFIP for 10 years).

As the House and Senate begin to consider their respective reauthorization bills, The Council is continuing to work to ensure that the overhaul (1) increases private market involvement, (2) increases flood insurance take-up rates in the mandatory purchase zones, and (3) preserves the Write-Your-Own Program.

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 plans to continue its review of the rule in its entirety.

In addition to the work being done at the DOL, the Securities and Exchange Commission has announced that it intends to issue a preliminary request for comments on whether it should enforce its own fiduciary duty obligations, and, if so, how they should enforce such rules. 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.

The DOL also recently announced that it is withdrawing guidance issued during the Obama Administration that addressed the misclassification of employees as independent contractors, as well as joint employees. The recent DOL statement makes clear that the laws will continue to be enforced.

India / Foreign Direct Investment

Erick Gustafson from Marsh & McLennan Companies (MMC) outlined efforts to increase India's cap on foreign direct investment (FDI) in the insurance broking sector from 49 to 100 percent. MMC has educated the Indian government on the benefits that increased FDI would provide.Such a shift would improve risk management for Indian companies, comport with Prime Minister Modi's "Made in India" agenda, "upskill" the Indian workforce, and generate an array of services (e.g., high tech manufacturing) to spur economic growth. The next step is for MMC to meet with U.S. government officials to discuss the importance of raising the cap, and continue to emphasize the benefits associated with raising the cap to India's Department of Financial Services (DFS).

If you are interested in joining or submitting comments to the DFS in support of these efforts, please contact Erick Gustafson at **erick.gustafson@mmc.com**.

[Subsequent to the Working Group meeting, The Council sent a letter to Treasury Secretary Mnuchin and Commerce Secretary Ross urging that this issue be on the agenda during Indian Prime Minister Modi's visit to Washington during the last week in June.]

United Kingdom's Insurance Act of 2015 & Enterprise Act of 2016

The United Kingdom's Insurance Act 2015 went into effect in August 2016, marking the largest overhaul of the UK's insurance framework in a century. Among other things, the Act places a "duty of fair presentation" on the insured. This new duty retains the existing obligations of good faith and ensuring accuracy of material information, and it adds two new requirements to ensure that the presentation is fair: (1) the presentation must include information that would be revealed by a reasonable search of information; and (2) the presentation of risk information must be "clear and

accessible." It is unclear what role, if any, brokers play in complying with this duty or if it will increase the obligations placed on brokers.

Additionally, under the prior law, if the insured failed to disclose certain information, the insurer could void the policy. Under the Insurance Act, however, the remedies for the insured have changed. The insurer can only void the contract if (1) it was a deliberate or reckless failure to disclose, or (2) the insurer would not have provided insurance on any terms. If neither of these requirements are met, the insurer will continue with the insurance but may modify the contract to reflect the now-accurate disclosure.

Finally, the Insurance Act creates an ongoing obligation for the insured to alert the insurer of any material information pertaining to a risk. Failure to do so provides a carrier with the right to deny the claim.

Producer Licensing / NARAB

The NARAB Board remains unfilled after the Senate refused to approve nominees put forward by then-President Obama last year. Given the many other appointments and nominations the new Administration must work through, there is concern that naming members to the NARAB Board will be a low priority, particularly in the short-term. This will likely delay the creation of NARAB for a significant time.

On a substantive note, many of our members have expressed concern regarding state producer appointment requirements, and would like to explore options for eliminating the requirements altogether. The appointment process is costly and burdensome, suffers from a lack of uniformity, and places strains on the operations of a variety of players in the insurance space. States, however, have become very protective of them because appointment fees bring in a great deal of revenue. We will be circulating a survey that aims to capture the administrative costs imposed on Council members through the appointments process. In a separate survey, insurers will be polled for their pain points as well.

Other issues raised during the meeting include the requirement that social security numbers be provided on appointments (and other documents, more broadly), and state affiliations requirements.

Surplus Lines

The Working Group discussed a number of state specific issues. Specifically, discussion focused on tax collection and payment in several states, including Pennsylvania and Washington; confusion between direct procurement and surplus lines in Minnesota; and New York's definition of "home state."

Cyber

Cybersecurity issues remained at the forefront of discussions about insurance regulation. The Working Group discussed:

- the businesses that are most susceptible to cyber threats (e.g., law firms);
- China's new cyber law;
- ransomware attacks;
- New York's recently promulgated cybersecurity rule governing financial services and insurance entities; and
- the NAIC's continued work on its data security model act.

Concerning New York's recently promulgated rule, a group of trade associations has arranged a meeting to discuss the new rule and questions regarding implementation. The hope is to approach the NYDFS as a group to try to get some clarification. John Fielding will be participating in the discussion on behalf of The Council.

Finally, with respect to the NAIC's draft of a cybersecurity and data breach notification model act, the NAIC is incorporating comments, revising, and planning to distribute a fifth version on which it will receive public comments. Though the industry remains skeptical given the regulators' past attempts at reaching uniformity, if ultimately adopted, it could provide a path toward uniform cybersecurity standards in the insurance sector. The expectation remains that the NAIC will aim to finalize the model act in time for the state insurance departments to include it in their legislative packages for the 2018 legislative session.

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

Rebating

The Council, in conjunction with our team at Steptoe & Johnson, has completed a 50-state survey of rebating rules and regulations. It will be posted on the website shortly, and we ask that you review the document for any statutes, regulations, bulletins, or other guidance documents that may be absent from the survey. Going forward, the Working Group will be evaluating how best to address issues in rebating, whether to eradicate them altogether, seek enactment of uniform laws, or engage in litigation to eliminate their application to brokers (particularly on the commercial side).

NAIC

The NAIC is currently revising its Creditor-Placed Insurance (CPI) Model Act. Their initial intent was to incorporate real property lender-placed insurance into the current Model Act. In conjunction with other trade associations—including the Consumer Credit Industry Association, the American Insurance Association and the Property Casualty Insurers Association of America—The Council is working to ensure that the two issues remain separated. We have recently been informed that the regulators intend to separate the issues, as we had asked. No schedule for drafting a new model focused on lender-placed issues has been made public.

The next NAIC meeting is August 6-9 in Philadelphia, PA.

SEE YOU IN NOVEMBER!

The next Legal Counsel Working Group will be held November 13-14 at The Council's headquarters in Washington. 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**.