

RECAP

*Legal Counsel*  
WORKING GROUP



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 Working Group Chair Andy Impastato, VP, Insurance Counsel, Director of Industry Affairs for BXS Insurance and was attended by over 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.

## PARTICIPATING FIRMS

Over 50 participants from the following member firms were in attendance:

All Risks, Ltd.	Gehring Group, Inc.	OneGroup NY, Inc.
AmWINS	The Graham Company	Pacific Prime
AssuredPartners, Inc.	Heffernan Group	Patriot Growth Ins. Services
BB&T Insurance Holdings	HUB International Ltd.	PayneWest Insurance, Inc.
Borislow Insurance	Hylant	RCM&D
Brown & Brown	IMA Financial Group	Ryan Specialty Group
BXS Insurance	Keenan	Thompson Flanagan
CBIZ	Lockton Companies, LLC	TrueNorth Companies
Clements Worldwide	M3 Insurance Solutions, Inc.	USI Insurance Services
Conner Strong & Buckelew	McPhillips Insurance	Willis Towers Watson
Cottingham & Butler, Inc.	Marsh & McLennan Cos., Inc.	Wright National Flood Ins.
FCA Insurance Brokers	Moreton & Company	Co.
Frenkel	Murray Securus	Woodruff-Sawyer & Co.
	NFP Corporation	

## MAIN TOPICS

### Political Update

With all eyes on November, the Working Group heard from Wood, Kopperud, and Bartlett, on an array of political issues, including current polling on the Democratic candidates challenging President Trump, prognostications about the future of Medicare-for-All and other universal health care proposals, and predictions on the composition of the House and Senate after November.

The trio also provided insight on several issues of key importance to Council members. Notably, at the close of 2019, House and Senate appropriators agreed to a tremendous \$1.4 trillion spending package that includes major implications for Council member firms, including:

- Reauthorizing the Terrorism Risk Insurance Program through December 31, 2027;
- Reauthorizing the National Flood Insurance Program through September 30, 2020;
- Reauthorizing the Ex/Im Bank and securing the Reinsurance Program through December 31, 2027; and
- Repealing the Cadillac Tax.

As Wood, Kopperud, and Bartlett explained, these were significant wins in advance of a presidential election year, which is likely to be unproductive and limited in its opportunity for policymaking. That said, they noted that there may be potential legislative opportunities on cannabis, prescription drug pricing, surprise billing, and other issues raised during the 2020 election. Congress will be attempting to act within the confines of a limited congressional schedule while trying to fund the government for the 2021 fiscal year.

### **CEBE Joint Meeting**

During the Legislative Summit, the Working Group convened a joint session with The Council of Employee Benefits Executives Advisory Committee (CEBE) to discuss surprise billing, data interoperability, single payer proposals, and ICHRAs.

Regarding surprise billing, the groups noted that arbitration seems to be the preferred model for dispute resolution. Recognizing that The Council and its members prefer a benchmark model, the discussion concerned whether, if Congress adopts a benchmark model, there are details that would matter to Council members that would make a difference in how the dispute resolution system works. This included conversations surrounding:

- Whether there are ways to make an arbitration model more palatable to the self-insured market;
- Whether more transparency in the process would be beneficial;
- Whether the timeliness/schedules of the arbitration model make a difference; and
- Whether many of these concerns can be addressed via contractual amendments.

The two groups then did an interactive polling activity with respect to single payer proposals and ICHRAs. Specifically, on ICHRAs:

- The vast majority (83%) of CEBE/Working Group participants thought that ICHRAs and qualified small employer health reimbursement arrangements (QSEHRAs) are “insignificant” and “will not have a material impact/gain market share.”
- Concerning why predictions of market share for ICHRAs have failed, 40% of participants noted the lack of attractive individual options and 25% highlighted that employers value their role.
- As to whether The Council should have a stance on defined contribution account-based solutions in employer-sponsored insurance, 40% suggested that The Council remain neutral; 45% advised The Council to support such solutions; and the remaining 15% advocated for opposing such solutions.

On single payer proposals, participants were asked if there is a public option proposal that has been introduced/is being considered by Congress that would be “the least disruptive” given the way the commercial insurance market functions today. The majority (60%) pointed to the Keeping Health Insurance Affordable Act (i.e., a public option offered on the exchanges alongside private plans), while 14% said that there is no proposal that would not be disruptive. In the end, most participants (almost 80%) suggested that The Council oppose the creation of a public option.

### **Cyber**

Following the Working Group's special session in November 2019 to discuss the New York Department of Financial Services' (DFS) cybersecurity standard with the American Property Casualty Insurance Association (APCIA), The Council convened a conference call with APCIA to discuss next steps, specifically focusing on the rule's third-party service provider (TPSP) requirements. Throughout the course of the conference call, the Working Group sought to emphasize the urgency in developing voluntary industry best practices for assessments and monitoring of TPSPs' cyber risk and cybersecurity programs. As proposed, this would include:

- Developing standardized compliance approaches based on TPSPs' general level of risk to the upstream insurance entity, including:
  - State-regulated TPSPs (**Tier One**),
  - TPSPs that fully comply with a state's cybersecurity regulations (**Tier Two**),
  - TPSPs that comply with some subset of a state's cybersecurity regulations (**Tier Three**), and
  - TPSPs that are not independently subject to a state's cybersecurity regulations (**Tier Four**);
- Developing a common form/questionnaire for the initial cyber assessment of TPSPs for Tier Two and Three TPSPs;
- Developing a standardized ongoing verification/assessment protocol for Tier Two and Three TPSPs; and
- Creating a voluntary standard/establishing best practices for assessments and ongoing oversight of Tier 4 TPSPs.

The Council will continue this dialogue with APCIA to see if the brokers and carriers can establish some common ground.

Beyond the TPSP issue, members also raised concerns about enactment of the National Association of Insurance Commissioners' (NAIC) cybersecurity model law and responses to individuals who have made requests under the California Consumer Privacy Act.

## **International Issues**

Led by The Council's Vlad Gololobov, the Working Group discussed several international issues, including:

- The implementation of the EU's General Data Protection Regulation (GDPR);
- The role of the European Insurance and Occupational Pensions Authority (EIOPA) in regulating cybersecurity; and
- The bilateral agreement between the United States and China and its implications for the insurance industry.

With respect to GDPR, and by way of background, businesses holding personal information of European citizens (and European residents) are required to comply with GDPR, which lays out a set of data protection rules that give consumers control over their data. Adopted in April 2016, there was a two-year grace period during which organizations were to update their systems to ensure compliance with the GDPR. The regulation went into effect on May 25, 2018, and now non-compliant organizations could face heavy fines. A report is expected in March 2020 on GDPR's implementation.

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](mailto:vladimir.gololobov@ciab.com).

## **Producer Licensing**

During the course of the meeting, the Working Group discussed several state-specific issues, including:

- Oklahoma’s shift from requiring just-in-time appointments to requiring just-in-case appointments and the Oklahoma Insurance Department’s [subsequent clarification](#) interpreting this provision;
- California’s guidance differentiating between agents and brokers under state law; and
- The surplus lines licensing dispute between Florida and New York.

The Working Group also continued its discussion about the two top licensing pain points for the industry: appointment and affiliation requirements. The Working Group reviewed a draft of a briefing paper compiled by Diana Ivey (Marsh & McLennan Cos.), which advocates for modernizing producer appointment and affiliation requirements and provides specific recommendations for reform. Moving forward, The Council hopes to gather input on this document with the hope of using it to educate state regulators. Please provide any feedback to John Fielding at [john.fielding@ciab.com](mailto:john.fielding@ciab.com).

### **Surplus Lines**

The Working Group discussed a number of state-specific issues, primarily concerning compensation structures and tax obligations associated with surplus lines policies. Specifically, it discussed Minnesota’s [Revenue Notice](#)—withdrawing its prior guidance—regarding its tax on broker fee arrangements and offering three methods to determine what amount of a broker fee is included in gross premiums:

- Include the entire broker fee in taxable gross premiums;
- Calculate the “average percentage commission” by averaging the percentage commission earned on all commission-paying, non-admitted policies placed during the prior calendar year, then multiply that average percentage commission by the premiums paid for the fee-only policies placed under the broker agreements and include the amount in taxable gross premiums; or
- Take the industry average commission rate and multiply it by premiums paid for the fee-only policies placed under the broker agreement(s), and include the amount in taxable gross premiums.

Beyond reviewing this state action, the Working Group also raised several routine pain-points that occur with respect to Lloyd’s placements in New York.

### **Rebating**

Both the National Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators (NCOIL) (which represents the state legislators who work on insurance issues in their states) have taken up the issue of rebating this year. In both cases, the policymakers appear to be opening the door to some reform of the archaic rebating prohibitions that have been on state statute books since the late 1800s. The Council has testified before both organizations and submitted written letters advocating for our position that rebating prohibitions should be repealed in the commercial insurance space.

In addition to the action at NAIC and NCOIL, several states have enacted legislative language or adopted regulatory guidance to address and interpret how the states’ anti-rebating laws apply to certain “value-added services,” including a recent [Connecticut bulletin](#).

It is a long-standing policy of the Council Board that rebating prohibitions in the commercial space do nothing to protect sophisticated commercial consumers, and violate producers’ and consumers’ right

to freedom of contract. It is unclear at this point where NAIC and NCOIL will end up in their reform efforts, but the Council is continuing to press for real action on the issue.

The Council's 50-state survey of rebating rules and regulations is available on the Council's website [here](#). Please let us know as you see laws enacted, regulations finalized, bulletins issued, or enforcement actions undertaken to help us keep the survey as up-to-date as possible.

## **Legal Operations**

The Legal Operations Subgroup continues to address the operational challenges faced by members' legal departments ranging from vetting and hiring outside counsel to involvement with licensing. In particular, the Working Group focused its discussion on the engagement of outside counsel and their corresponding needs, including conversation on:

- How members select outside counsel (e.g., formal request for proposals, use of a network or the Federation of Outside Counsel, reliance on clients' outside counsel, etc.);
- Difficulties justifying bills received from outside counsel and how best to keep outside counsel on a budget;
- Use of electronic billing services; and
- Acceptance of standard engagement letters.

Beyond this, the members exchanged information on the processes undertaken to respond to subpoenas, client involvement in legal processes, and the utility of outsourcing licensing compliance.

## **NAIC**

The Working Group heard from Ethan Sonnichsen, the Managing Director of Government Relations at the NAIC. During his presentation, he laid out the NAIC's focuses for the coming year, the lead up to the 2020 general election, and potential upcoming policy shifts.

Included among the NAIC's priorities for 2019 are:

- Long-term care insurance;
- Climate risks (i.e., previously insurable risks becoming uninsurable);
- Flood insurance and expanding private market options;
- Market stabilization legislation at the federal level and the potential invalidation of the ACA;
- State-run reinsurance programs;
- Balance billing;
- Developments in the cybersecurity and data use/data security space (e.g., adoption of the NAIC's cybersecurity model law);
- Adoption of a best interest standard at the point of sale to mirror the standards developed by the Securities and Exchange Commission and the Financial Industry Regulatory Authority; and
- Rebating with a particular focus on the potential for anti-rebating laws to create a barrier to innovation and new approaches to distribution.

He also provided some insight into the NAIC's approach to an array of other issues—including AHPs, regulatory sandboxes, and the NAIC's approach to cannabis—in response to questions from Working Group members.

## **Cannabis**

During the meeting, the Working Group received a presentation from several individuals that are engaged in the cannabis market or, more broadly, in the cannabis space. On the panel were Tres York

(National Conference of State Legislatures), Beth Medvedev (James River Insurance Company), Mary Burnham (Zurich North America), and Brent Rineck (ABD Insurance and Financial Services).

At the outset, York provided an overview of the current cannabis landscape, including the current federal distinction between marijuana and hemp, state legalization efforts, and a forecast for the 2020 election cycle. The cannabis plant remains subject to a patchwork of federal and state laws. At the moment, marijuana remains illegal as a Schedule I controlled substance, rendering it illegal to manufacture, distribute, or possess it (or service individuals or entities that manufacture, distribute, or possess it). Hemp, on the other hand, has been descheduled as a result of the 2018 Farm Bill. As a result, insurers, agents, and brokers should exercise caution if they choose to service these businesses.

Beyond this overview, Medvedev, Burnham, and Rineck described their roles in servicing cannabis businesses. Of these three panelists, Medvedev and Rineck are actively involved and servicing cannabis businesses and discussed:

- The current state of the market and the lines of coverage offered;
- The difficulties present in the market (e.g., obtaining reinsurance, each product is underwritten individually, payment structures, etc.); and
- The guidelines applicable to the plant and its derivatives.

Burnham noted that while Zurich North America has chosen not to provide services to the industry, it is advocating for changes to federal law that would open up this space.

Though the landscape remains somewhat uncertain for the insurance industry, this issue is likely to see some significant movement at the state level in the coming year, with more states enacting legislation on the legalization spectrum and several states considering related ballot initiatives in November.

## **SUBGROUP SIGN-UP**

Our Subgroups—Employee Benefits, E&O, Licensing, and Small Legal Division Operations—are getting increasingly active. All interested Working Group members are encouraged to participate in any / all of these groups. Please contact John Fielding ([john.fielding@ciab.com](mailto:john.fielding@ciab.com)) or Tish Carden ([tish.carden@ciab.com](mailto:tish.carden@ciab.com)) if you're interested in participating.

## **BASECAMP COMMUNICATIONS PORTAL**

We have created a Working Group communications portal through Basecamp, which enables Working Group members to communicate directly with the group (or indirectly through Council staff) to raise issues, ask questions, and share information. It also allows us to more easily keep you informed about legislative, regulatory, and legal issues that may be of interest. All Working Group members are eligible to sign up—and we encourage you to do so. It's simple and unobtrusive. Basecamp emails participants to let you know when a communication has been posted, and the user can engage with Basecamp either through email or directly on the site. Please email Tish Carden ([tish.carden@ciab.com](mailto:tish.carden@ciab.com)) to receive your registration email.

## **COUNCILPAC**

We are grateful to those of you who contributed and showed your support with a bird on your badge in Washington. The Legal Counsel Working Group, more than any other Council working group, understands the impact of effective lobbying on Capitol Hill—and you all play a key role in educating your peers on the importance of engagement.

Remember this is personal, not corporate money, which is why YOUR individual participation and support is critical to our success. Our goal is to have 100% participation from this group in 2020. To make your donation, click [here](#). For questions, email Gracie Gerlach at [gracie.gerlach@ciab.com](mailto:gracie.gerlach@ciab.com).

### **SEE YOU IN JUNE!**

The next Legal Counsel Working Group will be held June 22-23, 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](mailto:john.fielding@ciab.com) or **202.350.5864**.