



February 11 – 12 | Washington, DC

## 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 Vice Chairman Andy Impastato, Vice President and Insurance Counsel & Director of Industry Affairs at 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:

AEGIS Insurance Services, Inc.	FCA Insurance Brokers	McGriff Insurance Services
All Risks	G.J. Sullivan Co. Reinsurance	Marsh & McLennan Companies, Inc.
Ames & Gough, Inc.	Gehring Group, Inc.	Moreton & Company
AssuredPartners, Inc.	The Graham Company	Murray Securus
BB&T Insurance Holdings	Hagerty	NFP Corporation
Borislow Insurance	HUB International Ltd.	PayneWest Insurance, Inc.
Brown & Brown	Hylant	Ryan Specialty Group
BXS Insurance	IMA Financial Group	USI Insurance Services
CBIZ	Keenan	Willis Towers Watson
Clements Worldwide	Lockton Companies, LLC	Woodruff-Sawyer & Co.
Cottingham & Butler, Inc.	M&T Insurance Agency, Inc.	
Exude, Inc.	M3 Insurance Solutions, Inc.	

## MAIN TOPICS

### Political Update

With the 116th Congress underway, the Working Group heard from Wood, Kopperud, and Bartlett, on an array of political issues, including the practical implications of the Democratic stronghold in the House, the impact of party polarization on the congressional agenda, and the growing field for the 2020 elections (for both the presidency and the Senate).

The trio also provided insight on several issues of key importance to Council members. At the forefront of these discussions were prognostications about the future of universal health care proposals; ongoing efforts to reform the Affordable Care Act (ACA); the potential for bipartisan

support on legislation to combat rising drug prices; and the reauthorization of the Terrorism Risk Insurance Act (TRIA) and the National Flood Insurance Program (NFIP) before their approaching deadlines, among others.

As Wood, Kopperud, and Bartlett explained, however, Congress will be addressing these issues while it tries to tackle other major legislative efforts, including the debt ceiling and funding the government for the 2020 fiscal year.

## **Health Care Reform**

With Democrats retaking control of the House, wholesale repeal of the ACA is effectively off the table. That said, Congress could take up other health care-related issues this session, including bipartisan legislation to curb rising drug prices. Congress has introduced several proposals that could address this issue—from facilitating drug importation, to imposing transparency obligations on pharmacy benefit managers (PBMs) and others in the drug supply chain, to incentivizing companies to manufacture generics. While it is clear that there is interest on both sides of the aisle to tackle this issue, whether (and where) the points of agreement will be remains to be seen.

The Administration, on the other hand, has already started taking steps in this space. On January 31, the Department of Health and Human Services (HHS) and the Office of the Inspector General issued a proposed rule to tighten the reigns on drug manufacturer rebates and fees paid to PBMs under the Medicare/Medicaid anti-kickback statute. Specifically, the proposed rule would:

- Amend the regulatory discount safe harbor to exclude certain remuneration paid by drug manufacturers to Medicare and Medicaid plan sponsors (or their PBMs);
- Add a new safe harbor to protect certain price reductions offered by manufacturers that are reflected at the point of sale for the beneficiary; and
- Add a new safe harbor for service fees paid by drug manufacturers to PBMs if certain criteria are met.

Although the proposed rule is limited in scope to federal health care programs, the Working Group discussed the merits of the proposal and whether it would be beneficial to transport such restrictions to the private market.

Beyond prescription drug costs, the Working Group also discussed the potential for smaller-scale ACA reforms to stabilize the individual market by restoring cost-sharing reduction payments, resurrecting the individual mandate, and rethinking the health care law's single risk pool; the future of Medicare-for-All and other universal health care/single-payer proposals; reference-based drug pricing; and how reimbursement for imported drugs is treated under the Employee Retirement Income Security Act (ERISA).

The Council is actively tracking developments in these areas via its ACA reform legislation tracker, federal single payer tracker, and federal drug pricing transparency tracker. We are also tracking the developments of these issues at the state level.

## **Flood Insurance**

While Congress has been slow to act on reforming the NFIP, regulators have been active in this space. For example, the banking agencies have made strides to facilitate private sector involvement. On February 12, 2019, five agencies—the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Farm Credit Administration, and the National Credit Union Administration—issued [final regulations](#) that will require regulated lending institutions to accept private flood insurance in lieu of flood insurance

issued under the NFIP when flood insurance is required, provided that the private policy meets certain qualifications (e.g., the policy satisfies the statutory definition for private flood insurance under the Biggert-Waters Act).

The Working Group also heard from Tony Hake, Director of the Product Delivery Division of the Federal Insurance Directorate at the Federal Emergency Management Agency (FEMA), who described several operational and technical updates to the program that are underway. Specifically, Hake outlined several significant changes, including:

- Re-rating the entire country (i.e., “Risk Rating 2.0”), beginning with single-family homes and then moving on to other structures;
- Modernizing NFIP forms;
- Changing the way the agency communicates about the NFIP, consumers’ risks, and consumers’ perceptions of such risks;
- Updating how the agency processes claims; and
- Looking at mapping and risk hazards differently.

Despite these efforts, authorization for the NFIP is set to expire on May 31, 2019, having been (once again) decoupled from government funding. Given Congress’ list of to-dos and other assorted priorities, it is unlikely that either chamber will take up a wholesale reform package or a continuous coverage fix will be approved before the deadline. Thus, Congress is likely to offer a stop-gap solution, extending the program as is for a short period of time, before (potentially) contemplating larger modifications.

## **Cyber**

The Working Group continued its ongoing conversation regarding the ever-growing patchwork of state laws imposing cybersecurity obligations on agents, brokers, and others in the insurance community. Specifically, with respect to the seemingly constant updates to the New York Department of Financial Services’ (DFS) cybersecurity standard, the Working Group discussed:

- What entities qualify as third-party service providers;
- The potential duplicative and onerous requirements imposed on entities that qualify as both covered entities and third-party service providers; and
- Audit obligations and the potential for development of an industry best practice related to the influx of questionnaires on access to information systems and non-public information (e.g., an annual audit, a certification that procedures have not changed, sample questionnaires, etc.).

Going forward, the Council will initiate discussions among our members and the carriers (through their trade association) to develop a streamlined and efficient compliance mechanism for the third-party service provider requirement.

Beyond the DFS rule, members also raised concerns about inconsistent definitions across the states considering the National Association of Insurance Commissioners’ (NAIC) cybersecurity model law and the potential for a federal solution (and what such a solution might look like).

## **Tax**

The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) released their [final regulations](#) on the Qualified Business Income Deduction for pass-through entities under the Tax Cuts and Jobs Act. These are critically important rules for the estimated two-thirds of Council member

firms that are organized as pass-throughs. The regulations continue to include insurance agents and brokers—as well as real estate brokers—as beneficiaries of the five-year lower tax rate, whereas other professions (such as doctors, lawyers, accountants, and securities brokers) are excluded.

Additionally, Treasury issued [proposed regulations](#) on December 13, 2018, excluding non-cash value property/casualty insurance premiums from regulations implementing the Foreign Account Tax Compliance Act (FACTA). This announcement is retroactive and applies to all open tax years. The move is the result of ongoing advocacy efforts in Congress and with the IRS. The Council has long argued that non-cash value insurance premiums had no relevance to tax evasion regulations.

### **Producer Licensing / NARAB**

Although Treasury appeared enthusiastic about getting the NARAB board up and running last year, NARAB continues to take a backseat to other issues facing the Administration. Despite the Treasury soliciting nominees from both the public and private sectors over the past several months, nomination and approval of the NARAB Board remains stalled.

Separately, The Council is continuing to consider a strategy to push for the abolition of appointment requirements in the states. The Council has met some resistance to abolition of the requirement, even in more conservative states. The common refrain from regulators is that appointments are critically necessary for revenue and consumer protection.

### **Surplus Lines**

The Working Group discussed a number of state-specific issues, primarily concerning tax obligations associated with surplus lines policies. Specifically, it discussed a [November 2018 bulletin](#) issued by the Pennsylvania Surplus Lines Association, which clarified whether the surplus lines premium tax was due in connection with an insured with a principal place of business in Pennsylvania, but where 100% of the insured risk is located outside of the United States. Per the bulletin, “[i]t is the position of the Pennsylvania Department of Revenue that Pennsylvania is the insured’s ‘home state’ under that scenario, and the full 3% surplus lines premium tax is due to the Commonwealth.”

On a related issue, the Working Group discussed the premium tax allocation legislation pending in four states—Florida, Hawaii, New Hampshire, and Vermont. The Council is working with WSIA for enactment of legislation abolishing the allocation calculation requirements in these states. Progress in Florida and Vermont has slowed down, but action in Hawaii and New Hampshire looks promising.

### **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](#). 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.

### **Employee Benefits Compliance Subgroup**

The Employee Benefits Subgroup spent time discussing an array of federal and state issues, including:

- Association health plans (AHPs), whether they are gaining traction in any states, and the ongoing litigation;
- The Trump Administration’s proposed rules governing health reimbursement arrangements; and

- Treatment of preventive services (as compared to diagnostic services), as required under the ACA.

The Council's team at Steptoe & Johnson is developing a set of trackers on current state laws governing fully-insured and self-insured MEWAs/AHPs. The aim is to have a complete draft as soon as possible, at which point the survey will be available on [www.ciab.com](http://www.ciab.com).

### **E&O Subgroup**

The Working Group decided to reorient this Subgroup—which had been focused on claims, litigation, and “broker duty of care” issues—to more broadly focus on E&O avoidance (i.e., managing and preventing E&Os, the role of data collection in managing and preventing E&Os, claims and litigation trends, etc.). The Subgroup will continue to review and discuss cases and decisions on issues relevant to brokers, but it will also start to gather information related to practices that may give rise to E&O issues, with a goal towards determining where the risks are and how to avoid those risks.

If you are interested in joining the Subgroup, please reach out to John Fielding at [john.fielding@ciab.com](mailto:john.fielding@ciab.com).

### **Small Legal Department Operations Subgroup**

The Working Group's newest subgroup addresses the operational challenges faced by members that have small (or solo) legal departments in their firms. These challenges include vetting and hiring outside counsel, dealing with compliance issues at the state-level, and keeping track of the various licensing requirements across the country, among other things. In particular, during the subgroup meeting, members discussed how smaller legal departments handle all of the new cybersecurity and data protection requirements that are being imposed and potential methods for streamlining compliance.

If you are interested in joining the Subgroup, please reach out to John Fielding at [john.fielding@ciab.com](mailto:john.fielding@ciab.com).

### **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 impact of the 2018 midterms (particularly as it relates to the new commissioners and the potential for impactful federal legislation during the 116th Congress), and pending leadership changes.

Included among the NAIC's priorities for 2019 are:

- Long-term care insurance and the unrelenting cost of care;
- ACA reforms (i.e., stabilizing markets, reinsurance funding, flexibility at the state level via 1332 waivers, restoration of cost-sharing reduction payments, etc.);
- Air ambulances and balance billing;
- Flood insurance and expanding private market options;
- Developments in the cybersecurity and data security space (e.g., adoption of the NAIC's cybersecurity model law);
- Suitability and best interest standards (particularly as it relates to addressing non-cash compensation); and
- Developments at the federal level (e.g., NARAB appointments, TRIA reauthorization, and overall treatment of marijuana and associated cannabis products).

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

### **Member Information Exchange**

At the close of the meeting, members were provided with an opportunity to address any specific issues that they thought warranted further discussion. Members of the Working Group raised:

- Issues related to the lack of clarity within state laws governing the treatment of fees and commissions, including with respect to the differences between the admitted and surplus lines markets, the appointed-status of the agent, distinctions between wholesalers and managing general agents, varying definitions of the term “fee,” disclosure obligations, etc.; and
- Best practices when implementing the physical safeguards required under the Health Insurance Portability and Accountability Act's Security Rule, particularly when benefits employees are integrated with other employees.

Other topics also included Insurtech and the impact of artificial intelligence.

### **Council PAC**

We are grateful to those of you who made a donation and showed your support with a bird on your badge in Washington. As Nancy Mellard articulated when she spoke to the group, the Legal Counsels, more than any other Council working group, understand the impact of effective lobbying on Capitol Hill—and you all play a key role in educating your peers on the importance of engagement. This year we face the challenge of educating a Congress where 20% of elected officials are serving for the first time. PAC dollars go far in helping us build these relationships and educate these new members. 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 2019. To make your donation, click [here](#). For questions, email Brittany Lindberg at [brittany.lindberg@ciab.com](mailto:brittany.lindberg@ciab.com).

### **Subgroup Sign-Up**

Our Subgroups – Employee Benefits, E&O, 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 ([Patricia.Carden@ciab.com](mailto:Patricia.Carden@ciab.com)) if you're interested in participating.

### **Coming soon – Basecamp for Direct Communications among Working Group Members**

We are in the process of creating a Working Group communications portal through Basecamp. This will enable Working Group members to communicate directly with the group (or indirectly through Council staff) to raise issues, ask questions, and share information. It will also allow us to more easily keep you informed about legislative, regulatory, and legal issues that may be of interest. This should be up and running soon. We will be in touch with more details.

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

The next Legal Counsel Working Group will be held June 17-18, 2019, 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**.