

November 6 – 7 | Washington, DC

EXECUTIVE SUMMARY

The final 2019 meeting of The Council of Insurance Agents & Brokers' Legal Counsel Working Group was attended by over 40 of the insurance brokerage industry's top legal counsels.

The meeting was held in Washington, D.C., and was chaired by Working Group Chair Heather Steinmiller, Senior Vice President and General Counsel for Conner Strong & Buckelew. 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 40 participants from the following member firms were in attendance:

Acrisure	Conner Strong & Buckelew	Marsh & McLennan Cos.
AEGIS Ins. Servs., Inc.	Frenkel & Company	Moreton & Company
Alera Group, Inc.	Gehring Group, Inc.	NFP Corporation
All Risks, Ltd.	The Graham Company	OneDigital
AmWINS Group, Inc.	Hub International Ltd.	RCM&D, Inc
BB&T Insurance Holdings	Hylant	Ryan Specialty Group
Brown & Brown, Inc	IMA Financial Group	TrueNorth Companies
BXS Insurance	Keenan	USI Insurance Services
Burns & Wilcox	Lockton Companies, LLC	Willis Towers Watson
CBIZ Ben. & Ins. Svs. Div.	M3 Ins. Solutions, Inc.	Woodruff-Sawyer & Co.
Cottingham & Butler, Inc.	McGriff Insurance Servs.	

MAIN TOPICS

Political Update

A year out from the 2020 election, the Working Group heard from Wood, Kopperud, and Bartlett, on an array of political issues, including current polling on the Democratic candidates preparing to challenge President Trump, practical implications for the slate of Republican elected officials that have announced retirement, and the anticipated impact of the pending impeachment vote.

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; the potential for bipartisan support on legislation to combat rising

drug prices; ongoing efforts to tackle surprise billing; 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, Congress will be addressing these issues while it tries to tackle other major legislative efforts, including funding the government for the 2020 fiscal year.

Health Care Reform

The Trump Administration is continuing to push forward with its efforts in connection with the nation's health insurance market. Having finalized rules governing association health plans and short-term limited duration insurance, the Departments of Treasury, Labor, and Health and Human Services recently released the final two actions to address the Administration's directive attempting to increase flexibility and affordability via expanding the use of/access to health reimbursement arrangements (HRA):

- A final rule that would allow integration of employer-sponsored HRAs with individual health insurance coverage purchased on or off the exchanges to satisfy ACA coverage requirements; and
- A proposed rule that governs how this new structure interacts with the employer mandate's affordability determinations and certain nondiscrimination provisions.

Though the agencies are still collecting comments on the proposed rule through **December 30, 2019**, they are allowing companies to rely on the proposed rule as of January 1, 2020. During the course of both the Employee Benefits Subgroup meeting and the broader Legal Counsel Working Group meeting, members discussed potential concerns with the proposed rules, including:

- The lack of a safe harbor related to age;
- More general administrative burdens associated with determining the individual cost of coverage;
- The utility of the proposed safe harbors and whether other safe harbors would be helpful; and
- The likelihood of adoption by employers and vendors.

For more information on the final and proposed rule, please see the [memorandum](#) put together by Steptoe & Johnson.

The Council will be submitting comments on the proposed rule on December 30. If you have comments before that date, please send them to John Fielding (john.fielding@ciab.com) or Tish Carden (tish.carden@ciab.com).

Beyond these issues, the Working Group also discussed congressional activity on other priorities (e.g., surprise billing, 40-hour work week, employer reporting requirements, independent contractor classifications, etc.); the future of Medicare-for-All and other universal health care/single-payer proposals; the Trump Administration's pending action

on prescription drug importation; the outstanding litigation concerning the constitutionality of the ACA; and employer mandate-related enforcement/penalty letters. The Group also discussed the “226-J letters” that some Council members’ employer clients have been receiving from the IRS notifying them that they may be liable for an Employee Shared Responsibility Payment under the ACA. The Council has been in communication with other stakeholders, as well as the IRS on this issue, and is seeking additional information from employers who have received such letters, particularly employers in Montana, Nevada, and South Carolina. If you have any information that might be helpful, please contact The Council’s Blaire Bartlett (blaire.bartlett@ciab.com).

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. For more information on the Council’s health care activities, as well as the legislative trackers, please click here <https://www.ciab.com/market-intel/healthcare/>.

Flood Insurance and Terrorism Risk Insurance

The authorization for the National Flood Insurance Program (NFIP) lapsed on September 30, 2017. Since then, it has been the subject of short-term extensions 14 times. The current short-term extension is set to expire on December 20, 2019.

Though initially hopeful that lawmakers would be able to craft an agreement to reform the NFIP and reauthorize the program, The Council and other interested groups remain skeptical that members of Congress will come to agreement on a long-term reauthorization before that date given the other items on the congressional agenda. Nonetheless, The Council’s priorities remain: (1) a long-term extension; (2) expansion of the private market and clarity around surplus lines access; (3) preservation of write-your-owns; and (4) increased take up and renewal rates.

In addition to the NFIP’s reauthorization, The Council is also actively monitoring the work being done to reauthorize the Terrorism Risk Insurance Act (TRIA), which is set to expire in December 2020. Both chambers have introduced relatively similar legislation to reauthorize TRIA for seven years and have taken the initial steps to pass their bills. In the House, lawmakers voted overwhelmingly (385-22) to renew the program; likewise, the Senate companion has moved through the Senate Committee on Banking, Housing, and Urban Affairs. Given the success of these initial steps, The Council is optimistic that Congress will reauthorize TRIA before it expires at the end of next year.

As of the date of this Recap, it looks like NFIP and TRIA will be reauthorized in year-end legislation moving through Congress. [Please see this Council Alert](#) for more information.

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. In the absence of federal action, there is growing

concern that the states will continue to act in this area and that we could end up with increasingly challenging differences state-to-state from a compliance perspective.

The Working Group held a special session to discuss the New York Department of Financial Services' (DFS) cybersecurity standard with the American Property Casualty Insurance Association (APCIA), specifically focusing on the rule's third-party service provider (TPSP) requirements. There is a great deal of uncertainty regarding the requirements, ranging from lack of clarity as to what entities are covered to what sort of certification is acceptable. Specifically, the group discussed the potential for building voluntary industry best practices for assessments and monitoring of TPSPs' cyber risk and cybersecurity programs. This would include:

- Developing standardized compliance approaches based on TPSPs' general level of risk to the upstream insurance entity, including:
 - TPSPs that are partially exempt from a state's rule and satisfy all applicable requirements (**Tier One**),
 - TPSPs that fully comply with a state's cybersecurity regulations (**Tier Two**),
 - TPSPs that fully comply with a state's cybersecurity regulations but pose a special or unique risk for the carrier (**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.

A memo outlining the general framework, as well as a draft of a common form/questionnaire has been posted to the Legal Counsel's Basecamp page and can be found [here](#) and [here](#). Please send any comments to John Fielding (john.fielding@ciab.com) or Tish Carden (tish.carden@ciab.com). The Council will continue this dialogue with APCIA with the hope of getting approval for this approach from our respective Boards at their upcoming meetings.

Cannabis

Cannabis remains subject to a patchwork of federal and state laws. At the moment, marijuana remains illegal at the federal level 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 (e.g., be careful where the premium dollars go) if they choose to service these businesses.

Some relief, however, may be on the horizon. On September 25, 2019, the House of Representatives passed the SAFE Banking Act (H.R. 1959) by a vote 321-103. The bill would provide protections for financial service providers, including those engaged in the business of insurance, who seek to serve “cannabis-related legitimate businesses.”— The bill now heads to the Senate, where it faces an uphill battle before the Senate Committee on Banking, Housing, and Urban Affairs.

Beyond the broader discussion of legalization efforts, the Working Group discussed whether:

- An insured may use HSA funds for a prescription/recommendation for a cannabis-related product;
- An insurer has to cover a worker’s compensation claim for a claimant who tests positive for cannabis; and
- Employers may discriminate against their employees based on a routine drug test that is positive for cannabis.

Although 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 and the federal government starts to get more involved.

Producer Licensing / NARAB

Although Treasury had appeared enthusiastic about getting the NARAB board up and running, NARAB continues to take a backseat to other issues facing the Administration. The Council met with the Federal Insurance Office (FIO) earlier this year and was told that FIO had sent its list to the Administration for approval. The nominees, however, are reportedly being held by the Presidential Personnel Office. Though nomination and approval of the NARAB Board remains stalled, The Council continues to advocate for prioritizing its establishment.

Separately, the Working Group continued its discussion about the two top licensing pain points for the industry: appointment and affiliation requirements. Specifically, the Working Group reviewed a [discussion draft](#) compiled by Diana Ivey (Marsh & McLennan Cos.), which advocates for modernizing producer appointment and affiliation requirements and provides specific recommendations for reform. Once finalized and approved by the Advocacy Committee and Board, the document will be used to educate state regulators on these issues. The Council is seeking input on this document. Please provide any feedback to John Fielding at 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 [Draft Revenue Notice](#) regarding its tax on broker fee arrangements (i.e., offers four methods by which a broker can pay the surplus lines tax);
- A California surplus lines issue related to worker’s compensation;
- Licensing obligations in the surplus lines market (e.g., whether a life and health license should be required to sell life and health products in the surplus lines market);
- Tax treatment of captive insurance; and
- Issues across the states (e.g., some states feel that they are not getting the taxes to which they are entitled and are trying to determine how to see where all of the tax payments are going).

A list of recent [Surplus Lines State Activity](#) was also discussed.

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. (See [ND Rebating Bulletin](#) and [NCOIL Draft Model](#).) 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 broker 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.”

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. In particular, these challenges include:

- The procedural components associated with staffing a law department (e.g., location, function, expertise, etc.);
- Involvement and engagement with clients;

- Internal advising on legal and business issues; and
- Insights into case management and other legal software, among other things.

SUBGROUP SIGN-UP

Our Subgroups—Employee Benefits, E&O, Licensing, and Small Legal Division Operations—are 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) or Tish Carden (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) 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.

SEE YOU IN FEBRUARY!

The next Legal Counsel Working Group will be held February 10-12, 2019, at the Mandarin Oriental in Washington, D.C. as part of The Council's annual Legislative Summit.

Please note that the Legal Counsel meeting starts on **Monday afternoon, February 10**, the day before the official start of the Legislative Summit. 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.