

GOVERNMENT RELATIONS (EX) LEADERSHIP COUNCIL

Government Relations (EX) Leadership Council Dec. 7, 2009 Minutes

Government Relations (EX) Leadership Council
San Francisco, CA
December 7, 2009

The Government Relations (EX) Leadership Council met in San Francisco, CA, Dec. 7, 2009. The following Leadership Council members participated: Roger A. Sevigny, Chair (NH); Jane L. Cline, Vice Chair (WV); Christina Urias (AZ); Thomas R. Sullivan (CT); Kevin M. McCarty (FL); Susan E. Voss (IA); Michael T. McRaith (IL); Sandy Praeger (KS); Ralph S. Tyler, III (MD); Mary Jo Hudson (OH); Teresa Miller (OR); Joel Ario (PA); Scott H. Richardson (SC); Leslie A. Newman (TN); and Mike Kreidler (WA). Also participating was: Manny Munson-Regala (MN).

1. Update on Federal Activities Regarding Financial Regulatory Reform

Moira Champion (NAIC) reported that much of the NAIC's work in Washington, DC, this fall has been about showing legislators and regulators that one size does not, in fact, fit all. Ms. Champion said that NAIC members and staff have been working with Congressional members (and their staff) on carve-outs, exceptions and exemptions within the various pieces of financial regulatory reform legislation in order to protect state-based regulation of the business of insurance.

Ms. Champion said that the U.S. House Financial Services Committee has passed three major pieces of legislation that could impact state-based insurance regulation.

The first bill was the Consumer Financial Protection Agency Act of 2009, which was proposed to consolidate a number of the federal consumer protection responsibilities that are currently scattered across multiple regulatory agencies. Ms. Champion said that the House Financial Services Committee legislation originally proposed to bring consumer protection aspects of the credit, mortgage and title lines of insurance under the jurisdiction of the Consumer Financial Protection Agency (CFPA). The NAIC worked with the offices of U.S. Reps. Gwen Moore (D-WI) and Erik Paulsen (R-MN) on a successful committee amendment that carved all "business of insurance" out of the CFPA's jurisdiction.

Ms. Champion reported that the second bill was the Financial Services Improvement Act of 2009 (FSIA). FSIA creates a Financial Services Oversight Council to help the Federal Reserve Board and the U.S. Treasury Department determine which companies and corporate behaviors pose a systemic risk to the health of the nation's economy. The FSIA also contains a mechanism for dissolving large failing financial companies without bringing an adverse impact to taxpayers or the U.S. economy.

Ms. Champion said that the NAIC worked with U.S. Reps. Gwen Moore (D-WI) and Jackie Speier (D-CA) on a successful committee amendment to the FSIA that protects the receivership authority that state insurance regulators currently have over failing insurance companies. Ms. Champion also noted that, while a state insurance regulator is given a seat on the Financial Services Oversight Council created by the FSIA, that regulator is not given a vote on the council.

Ms. Champion reported that the final major bill impacting insurance to pass out of the House Financial Services Committee during the fall of 2009 sparked perhaps the most intense negotiations by the NAIC. The Federal Insurance Office Act of 2009 was passed out of committee Dec. 3.

Ms. Champion said that the NAIC understands the need for the federal government to have better knowledge and information on the insurance sector as a critical component of the U.S. economy. The NAIC also acknowledges the Constitutional limitations of the states in entering into binding agreements with international bodies. Ms. Champion reminded the Leadership Council that the NAIC had endorsed the creation of a federal office to address these needs earlier in 2009, but that the Federal Insurance Office Act, as originally proposed, went far beyond what the NAIC had been willing to endorse.

Ms. Champion reported that in October, NAIC CEO Terri Vaughn notified the House Financial Services Committee that the NAIC would oppose the Federal Insurance Office Act of 2009 unless the following changes were made to the proposal:

- To narrow the scope of international agreements negotiated by the FIO to “recognition” agreements, only for levels of supervision comparable to what the U.S. has in place.
- To limit any possible preemption to only those areas where non-U.S. insurers are treated less favorably than U.S. insurers, to level the playing field.
- To further limit preemption by including a specific savings clause for state solvency and capital requirements (in addition to the savings clause for rates, premiums, coverage requirements and unfair claims practices).
- To significantly improve the consultation with states and the Congress before entering into any agreements.
- To leverage the existing trade structure, and all of its requirements and protections, for any agreement that strays into trade issues. (The NAIC participates on the Intergovernmental Policy Advisory Committee of the Office of the U.S. Trade Representative (USTR) along with state legislators, the National League of Cities, the National Association of Attorneys General and the Council of State Governments.

After the House Financial Services Committee agreed to make the changes requested by the NAIC, the NAIC endorsed the amended version of the Federal Insurance Office Act. Ms. Champion explained that the impact of this legislation is arguably narrower than the earlier Office of Insurance Information Act, which was endorsed by the NAIC in 2008.

Ms. Champion said that the three pieces of legislation were combined into the Wall Street Reform and Consumer Protection Act of 2009, which was scheduled for debate on the floor of the House of Representatives during the week of Dec. 7.

Regarding Senate action on financial regulatory reform, Ms. Champion reported that instead of taking the piecemeal approach to mark-ups espoused by the House Financial Services Committee, the chairman of the Senate Committee on Banking, Housing, and Urban Affairs — U.S. Sen. Christopher Dodd (D-CT) — combined all of his proposals into one package for consideration by the committee. The resulting Restoring American Financial Stability Act includes a systemic risk regulator, an “Office of National Insurance” and a Consumer Financial Protection Agency. The NAIC is negotiating with Senate staff to bring these proposals in line with the final versions approved by the House Financial Services Committee. Ms. Champion reported that the Senate Banking Committee was scheduled to begin consideration of amendments to the financial reform omnibus within the next 10 days.

Commissioner Hudson asked Ethan Sonnichsen (NAIC) about whether the House or Senate financial regulatory reform proposals include suitability requirements. Mr. Sonnichsen replied that the House bill references a pending NAIC model on suitability, while the Senate bill references a standard promulgated by the Financial Industry Regulatory Authority (FINRA). Mr. Sonnichsen added that U.S. Sen. Herb Kohl (D-WI) would be willing to modify that reference to name the NAIC if the NAIC is able to pass an improved suitability model before the Senate completes its work on financial regulatory reform.

2. Update on Federal Health Reform Debate

Josh Goldberg (NAIC) updated the Leadership Council on the latest developments on the health care debate in Washington, DC. Mr. Goldberg reported that the House had narrowly adopted H.R. 3962, the Affordable Health Care for America Act, on Nov. 7. Meanwhile, the Senate began their debate using a different House bill as a vehicle, H.R. 3590, which provides tax credits to veterans and certain other federal employees purchasing homes. Mr. Goldberg said that Senate leadership did not want to force senators to a vote that would have brought the House bill to the Senate floor; furthermore, Senate leadership wished to keep their options open in case they decide to pursue reconciliation at a later date.

Mr. Goldberg reported that the Senate began consideration of amendments to the health care reform bill Nov. 30. Each amendment will require 60 votes to pass, and the entire bill will require 60 votes before the chamber moves to a vote on final passage. Senate leadership hopes to reach a final vote by Dec. 23. If that goal is met, then conference negotiations between the House and the Senate would begin in January, with the aim of having a final bill to present to President Obama for his signature prior to the State of the Union address in late January 2010.

The health care reform bill would set new federal standards for health insurance coverage and implement guaranteed issue and adjusted community ratings in all markets. The legislation creates 1) an individual mandate to purchase insurance; 2) an employer mandate to offer insurance to all employees; and 3) a health insurance exchange through which individuals will be able to purchase insurance. The House version of the bill would expand Medicaid to 150% of the federal poverty level (FPL); the Senate version would expand it to 133% of the FPL.

Mr. Goldberg explained that both the House and Senate versions of health care reform contain general preemption schemes regarding state authority; the House bill relies on the federal Health Insurance Portability and Accountability Act (HIPAA) with concurrent enforcement, and the Senate bill relies on HIPAA alone.

Mr. Goldberg relayed that the House bill creates a new Health Choices Commissioner to head a Health Choices Administration that would administer exchanges and subsidies. The Health Choices Administration would be tasked with crafting minimum standards that would apply inside the exchange, and outside the exchange to the extent specified by the Health Choices Commissioner. The administration standards could include marketing, network adequacy, grievances and appeals, prompt pay, medical loss ratios, coordination of benefits and subrogation, and loss ratios.

Mr. Goldberg relayed that the Senate bill directs the secretary of the U.S. Department of Health and Human Services (HHS) to consult with the NAIC in drafting exchange standards.

Mr. Goldberg then described the House proposal on exchanges. The House bill would create a single national exchange, but the states would be allowed to apply to the Health Choices Commissioner in order to operate the exchange within their respective jurisdictions. Under the Senate proposal, the states would establish exchanges, which the federal government would operate only upon the failure of the state to do so. The exchange would certify plans, provide comparative information, enroll individuals in plans, administer subsidies and apply risk adjustments. Insurance carriers would be required to pool the risk of all plans, whether they are sold through the exchange or in the outside market.

Public Options

Mr. Goldberg then described the various proposals on public plans. In the House bill, this plan would be sold through the exchange and administered by HHS. It would be subject to the same rules as other plans, with provider reimbursements negotiated. The Senate bill's proposal on a public plan did not muster sufficient support for passage. A group of senators are working on an alternative that would get 60 votes. One alternative is a quasi-governmental start-up that U.S. Sen. Tom Carper (D-DE) proposed. This start-up, which would be spun off as a federally chartered nonprofit insurer, was an idea that failed to win support from liberal factions, and now appears to have been abandoned in favor of a trigger based on competitiveness with an opt-in for those states that have competitive markets.

Individual Mandates

On requiring individuals to purchase health insurance, Mr. Goldberg reported that while neither chamber's proposal is strong, the one in the Senate bill is weaker. The House bill comes with a penalty of approximately \$875 for each individual earning \$45,000 per year. The Senate bill's mandate is phased in through 2016, and would ultimately cost \$750 for each non-compliant adult. Mr. Goldberg said that the Senate's smaller penalty is not enough to incentivize the young and healthy to purchase health insurance, leading to adverse selection.

Employer Mandates

On requiring employers to provide health insurance, Mr. Goldberg reported that the House bill requires employers to offer acceptable coverage and contribute at least 72.5% of the premium cost for single coverage and 65% of premium cost for family coverage, or pay a penalty based on payroll (valued at up to 8%). The Senate does not have such a mandate, but does impose a penalty on large employers whose employees receive subsidies through the health care exchange.

Grandfathering

Mr. Goldberg said that current health care coverage would be grandfathered under the new system, which could undermine

rating reforms. If low-risk small group plans are allowed to remain in a separate pool under current rating rules, then the new pool, with the new rules, would be full of high-risk groups, resulting in little help for small businesses facing high premiums.

McCarran-Ferguson

Mr. Goldberg reported that the final House bill contains a provision limiting the McCarran-Ferguson antitrust exemption for health and medical liability insurers. However, the following activities would continue to be exempted from federal antitrust law: 1) collecting, compiling, classifying, or disseminating historical loss data; 2) determining a loss development factor applicable to historical loss data; and 3) performing actuarial services if doing so does not involve a restraint of trade. Mr. Goldberg said the McCarran-Ferguson changes would likely do nothing to increase competition or reduce premiums, but would likely result in litigation over the boundaries of the judicially defined “state action doctrine,” which exempts activities that are the subject of active state regulation.

The Senate bill does not include a provision on McCarran-Ferguson, but U.S. Sen. Patrick Leahy (D-VT) will offer an amendment limiting application of the antitrust exemption in cases of price fixing, market allocation and bid rigging. This amendment would provide a safe harbor for same activities as the House provision. Senate Majority Leader Harry Reid (D-NV) has testified in support of this amendment, which could attract enough Republicans to win adoption on the Senate floor.

Interstate Sales

Mr. Goldberg said that both the House and Senate bills permit the states to form interstate compacts that facilitate the purchase of health insurance coverage across state lines. They require the HHS secretary, in consultation with the NAIC, to develop model guidelines for compacts that allow for the sale of coverage to residents of all compacting states subject to the laws and regulations of a primary state. In the House bill, that primary state would be selected by the compacting states. In the Senate bill, the insurer would select its primary state. The legislation preserves the authority of the consumer’s state to enforce laws relating to market conduct; unfair trade practices; network adequacy; consumer protection standards; grievance and appeals; fair claims payment requirements; prompt payments of claims; rate review; and fraud.

Nationwide Plans

Mr. Goldberg said that the Senate bill allows for nationwide plans to choose the set of state benefit mandates that they would like to follow and sell in any state. Each state may disallow the sale of nationwide plans, and insurers selling nationwide plans must make them available in 60% of allowing states.

Long-Term Care

Mr. Goldberg then turned to the Community Living Assistance Services and Supports (CLASS) Act, which is included in the House and the Senate bills. Both bills would establish a national, voluntary long-term care insurance program for purchasing community living assistance services and supports. Following a five-year vesting period, the program would provide a cash benefit of not less than an average of \$50 per day to purchase non-medical services and supports necessary to maintain community residences.

Mr. Goldberg reminded the Leadership Council that none of the health care reforms under consideration by Congress will yield long-term benefits unless health care spending is brought under control. There are pilot programs regarding the bundling of payments, patient-centered medical homes and accountable care organizations that study the way care is delivered, reimbursed and accessed.

Commissioner Tyler asked Mr. Goldberg if either health care proposal includes a formal mechanism in order to address any future problems created by this reform. Mr. Goldberg replied that neither bill includes such a mechanism.

Commissioner Michie asked if either health care bill offers financial assistance in order to help the states set up exchanges. Mr. Goldberg replied that there are grants in the House bill, and the Senate bill allows the exchanges to charge fees to cover costs once the exchanges are up and running.

3. Update from the Reinsurance (E) Task Force

Director Richardson provided the Leadership Council with an update on the activities of the Reinsurance (E) Task Force. The Task Force has been watching activity regarding the Nonadmitted and Reinsurance Reform Act of 2009 (H.R. 2571), which was put into Sen. Dodd's financial regulatory reform bill. Director Richardson reminded the Leadership Council that the NAIC has not supported the reinsurance portion of H.R. 2571.

Director Richardson said that the NAIC-endorsed Reinsurance Regulatory Modernization Act has failed to gain traction on Capitol Hill this fall, largely due to the lack of appetite for this proposal among domestic reinsurers. In addition, the section of the bill regarding points of entry is unpopular with the U.S. Department of the Treasury. Therefore, the Reinsurance (E) Task Force is focusing its attention solely on the credit for reinsurance section of the proposal, which they will circulate to the Leadership Council for a discussion Dec. 14.

Having no further business, the Government Relations (EX) Leadership Council adjourned.

w:\dec09\Cmte\GRLC\Final Minutes\Winter 09 GRLC Final Minutes.pdf