Independent Insurance Agents & Brokers of America, Inc.

June 3, 2009

The Honorable Linda Hall
Chair, NARAB Working Group
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108

Dear Director Hall:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), the largest insurance agent and broker organization in the country, I write to offer our association's comments on the draft NARAB Working Group report entitled *Continuing Compliance with Reciprocity Requirements of the Gramm-Leach-Bliley Act.*

Introductory Comments

IIABA welcomes the working group's focus on non-resident licensing reform and its review of state compliance with the Gramm-Leach-Bliley Act (GLBA) reciprocity standard outlined in 15 U.S.C. 6751(c) and Section 8 of the NAIC's Producer Licensing Model Act (PLMA). Both federal law and the state enactments of the PLMA outline the limits of what may be required – *a non-resident in good standing in his/her home state shall receive a license if the proper application is submitted and the fees are paid* – and essentially no additional conditions or requirements are to be imposed. Agents and brokers operating on a non-resident basis continue to face considerable challenges and seek the implementation of something analogous to a registration system, which might allow non-residents to easily and efficiently operate in multiple states after qualifying for licensure at home. IIABA strongly embraces the standard of true licensing reciprocity articulated in the GLBA and PLMA and hopes this review process will further the implementation of such a system.

As the working group examines whether certain requirements are consistent with the GLBA/NARAB standard and begins to review state compliance, IIABA offers two initial observations:

- The GLBA/NARAB reciprocity standard is very precise about the types of requirements that may be imposed on a non-resident applicant or licensee. The law provides that compliant states must issue or renew non-resident licenses without forcing an applicant to fulfill "any additional requirements other than submitting" the items expressly described in 15 U.S.C. 6751(c)(1). The only manner in which additional requirements may be imposed is if they satisfy the savings provision contained in 15 U.S.C. 6751(f), which is narrow and does not "save" additional requirements that are inconsistent with 15 U.S.C. 6751(c)(1). In practical terms, there is little legal justification for permitting compliant states to impose licensing and market entry requirements that extend beyond those identified in 15 U.S.C. 6751(c)(1).

- The application of the GLBA/NARAB standard is not limited solely to pre-licensing and application requirements. The NAIC has correctly noted in the past and now in the draft report that "post-licensing requirements, which condition the use the license … are not consistent with GLBA reciprocity." The NAIC has accurately referred to such post-licensing mandates as "de facto requirements[s]" because the producer is unable to utilize the issued license until complying with the particular requirement(s).

The comments that follow focus primarily on concerns that we have with the analysis or conclusions included in the draft report, and we appreciate the working group's consideration of our observations and suggestions. It should be noted, however, that there are many areas where we support the findings contained in the report, and we greatly appreciate the time and effort that have obviously gone into its drafting.

Section C – Appointments

The conclusions in this section of the draft report rely, in part, on an assertion that the requirements at issue are not part of the licensing application process. This discussion is inconsistent with the report's broader recognition that the reciprocity standard applies to both pre- and post-licensing requirements. There may be valid reasons why the requirements examined here are not inconsistent with the GLBA/NARAB reciprocity standard, and the report should focus on those alternative arguments.

Section D(1) – Foreign Corporation Registration Requirements

Registration Requirements

IIABA has previously urged the working group to formally examine whether a non-resident state insurance department may require an applicant or licensee to separately register as a foreign corporation. The NAIC has never performed a legal analysis of this question and has instead relied on a three-sentence discussion from 2002 that suggested such requirements are not inconsistent with the GLBA/NARAB reciprocity standard. The 2002 "review" stated that the working group "believes that such requirements transcend issues of insurance licensing and relate to basic police powers of States." The draft report now suggests that "no new facts or inconsistencies have been presented" since 2002 and that the working group is "not inclined to alter its approach on this issue." We respectfully disagree with the assertion that no new information has been brought forward and once again point out the following:

- No formal legal analysis has ever been done on this question. The 2002 report limited its discussion of this important issue to three cursory sentences, and the lack of analysis is a marked departure from the comprehensive reviews conducted in relation to other issues.

- The conclusions reached in the 2002 report rely on the notion that a special standard or analysis applies to state requirements that "transcend issues of insurance licensing and relate to basic police powers," yet neither the reciprocity standard that is outlined with precision in 15 U.S.C. 6751(c)(1) nor the savings clause found at 15 U.S.C. 6751(f) provide for such a framework. GLBA makes no exception for laws that "transcend issues of insurance," and the same legal analysis that is used in other contexts should apply here. At a minimum, the draft report should explain how these registration requirements fit within the framework of 15 U.S.C. 6751.

- Similarly, the references to state police powers found in the 2002 report and included in the new draft are peculiar. A state's police power is the inherent authority of the government to impose restrictions or exercise control over private parties in ways that are reasonably related to promoting and preserving the welfare of the public. This broad power is the very basis by which states impose professional licensing requirements, and it is the source and foundation of nearly all insurance regulation. Nearly every function and responsibility that a state insurance regulator performs is related to the states' basic police powers. It is inappropriate and inaccurate to suggest that states may implement requirements inconsistent with the GLBA/NARAB standard if they relate to a state's police powers because all licensing and marketplace requirements imposed on agents emanate from that source. In essence, the draft report provides for the creation of an exception that swallows the rule and is an outcome not intended or provided for by Congress.

- The 2002 report inaccurately suggests that "all" non-resident business entities must register as foreign corporations. In fact, state corporate registration laws provide a range of exemptions for foreign corporations, several of which apply to typical non-resident licensing activities.

- Not only did Congress specify the requirements and filing mandates that could be applied to non-resident applicants, but it is clear that it did so fully aware of the foreign corporation registration issue. In fact, 15 U.S.C. 6763(b)(3) discusses "corporate qualifications" and would preempt any state law that imposes such a requirement upon a NARAB member that was different than the NARAB membership criteria.

- There is no public policy rationale for imposing foreign corporation registration requirements on non-resident agencies. Insurance producers must already apply for and obtain licenses from state insurance regulators in every jurisdiction in which they operate, and they are subject to strict regulatory oversight and potential punitive action from these functional regulators. In addition, as a condition of obtaining a license, an applicant or producer must designate the non-resident state's insurance commissioner as its agent for service of process. These realties of the current system make the foreign corporation requirement unnecessary and duplicative.

- The NAIC has already taken the position that state insurance departments are to be discouraged from requiring applicants or licensees to register as foreign corporations as a condition or obtaining a license or maintaining a license in good standing.

IIABA believes the facts and circumstances outlined above are sufficient to warrant the formal legal review of this question, regardless of the ultimate analysis and outcome.

Proof of Registration Requirements

The draft report also concludes that it is not inconsistent with the GLBA/NARAB reciprocity standard for insurance regulators to require non-resident entities to submit proof that they have registered as foreign corporations. There is no analysis to support this finding, and the draft report once again relies on the unjustifiable suggestion that GLBA/NARAB reciprocity compliance is achieved when a requirement "relates to the basic police powers of the states and is not inconsistent with reciprocity." Many of the comments offered in the previous section apply to this discussion as well, but we also observe the following:

- Requiring the submission of proof of registration (or delaying the issuance of an insurance license until such information can be independently obtained) conflicts and is inconsistent with the GLBA/NARAB reciprocity standard. This is a clear additional submission requirement.

- In other sections, the draft report correctly observes that GLBA dramatically limits the scope of documents, materials, and other items that a state may require a non-resident applicant or licensed producer to submit. In parallel situations, for example, the report finds that states may not require the submission of fingerprints, tax verification information, articles of incorporation, fraternal certificates, proof of age, or any similar additional documentation. Permitting states to require the submission of proof of corporate registration is inconsistent with these other conclusions, and the draft report fails to justify this disparate treatment.

- Corporate registration requirements are found outside of the insurance code, and state insurance departments are not responsible for their enforcement or interpretation. When regulators demand proof of corporate registration, they exceed their authority and force business entities to register when they may not be required to do so by the corporate code.

In conclusion, the working group should, at a minimum, make clear that state insurance departments may not require proof of corporate registration of non-residents and maintain compliance with the GLBA/NARAB reciprocity standard.

Section D(2) – Articles of Incorporation

While IIABA supports the draft report's conclusion that "requiring a non-resident business entity to submit articles of incorporation is inconsistent with GLBA reciprocity requirements," we have some concerns with the commentary that is included in the discussion. We offer the following observations and suggestions:

- The draft report implies that requirements imposed by statute or regulation are worthy of greater protection and are more likely to be found consistent with the GLBA/NARAB reciprocity standard than those imposed by "administrative practice." GLBA makes no such differentiation or distinction, and the source of potentially inconsistent requirements should be irrelevant to any analysis. Accordingly, we urge the deletion of this particular portion of the discussion.

- The third paragraph of this section includes some discussion about whether such requirements are "administrative aid[s]" or "consumer protection measure[s]." Again, this discussion is irrelevant and likely confusing and misleading to readers. The NAIC has itself recognized that consumer protection laws are "afforded no heightened protection and also are subject to the requirement of consistency" when considering the application of the savings clause of 15 U.S.C. § 6751(f). The fourth paragraph of this section appropriately includes a discussion of whether such submission requirements are consistent with the GLBA/NARAB standard and can be protected by the savings clause, but the earlier commentary has no place in the report.

- The third paragraph also erroneously suggests that an insurance regulator may require a non-resident applicant or licensed producer to submit any documents addressed by the NAIC's Uniform Application. The GLBA/NARAB reciprocity standard does not protect a particular document submission requirement simply because it may be referenced by the uniform applications. Section 15 U.S.C. 6751(c)(1)(B) indicates that states may only require the application submitted by the producer in its resident state, and any additional submission requirements may be inconsistent with the standard.

- IIABA also reiterates its suggestion that the discussion in this section not be limited merely to the submission of articles of incorporation. It should also extend to any similar organizational or corporate-related filing requirement imposed on non-residents, including requests for information related to officers, directors, individual membership interests, etc.

Section E(1) – Requiring a Life License Prior to the Issuance of a Non-Resident Variable Life License

The draft report concludes that it "would be inconsistent with reciprocity to require a producer to obtain a life license in order to sell variable life insurance in a non-resident state," but the title of section and some of the discussion suggest that it is only inconsistent to impose such a requirement *prior* to licensure. We urge the working to clarify its conclusion and to make clear whether an underlying life license can be required of non-residents on a post-licensure basis.

Section J – Trust Accounts

The discussion of trust accounts is generally enlightening and helpful, but some ambiguity remains. We offer the following comments and suggestions:

- The draft report suggests that the two scenarios outlined by IIABA in its May 2008 letter violate the GLBA/NARAB reciprocity standard, but the report does not state this with complete clarity. For example, IIABA seeks clarification of whether it is permissible to require non-resident producers to maintain trust accounts in a financial institution with an office in the non-resident state. In short, we urge the working group to eliminate any ambiguity concerning these particular scenarios and situations.

- The second paragraph of this section suggests that trust account requirements that apply specifically to non-residents would be inconsistent with reciprocity, but only if they "are imposed as a condition to licensure." We urge the working group to eliminate this reference. The NAIC has noted elsewhere that state requirements are inconsistent with the standard even if they are not imposed as part of the licensing application process. State requirements are inconsistent with the standard even if imposed on a post-licensure basis or if they limit or condition the producer's activities because of the producer's residence or place of operation.

- Similarly, IIABA urges the working group to eliminate the last sentence of the first paragraph found in this section, as it is irrelevant whether such requirements are imposed or enforced as a prerequisite to licensure.

Section L – One-Time Training and Continuing Education Requirements

The draft report concludes that any training or education requirements "based on federal mandates" are not inconsistent with the GLBA/NARAB reciprocity standard. This is a sweeping assertion, and IIABA believes it is unwarranted to suggest that every such requirement with a connection to federal law can be interpreted in a manner that is consistent with the GLBA/NARAB reciprocity standard. We believe that any legal analysis in this area must examine each mandate or topic individually. The key question in such an analysis is whether the federal law in question requires that producers satisfy the requirements in non-resident states irrespective of the training or education completed in the producer's resident state – and no federal law imposes such a mandate. The NAIC's conclusions are premised on the suggestion that there is a conflict between the GLBA/NARAB reciprocity standard and other federal law, but there are no such conflicts to reconcile.

Our comments below explore long-term care and flood insurance training requirements (and the federal laws related to their establishment) in greater detail:

Long-Term Care

Several states require non-residents to complete extensive training and continuing education coursework in order to market and sell partnership policies, and it has been suggested that such requirements are not inconsistent with the GLBA/NARAB reciprocity standard because the training and education requirements are imposed by federal law. However, the Deficit Reduction Act of 2005, the statutory foundation of the partnership program, does not impose such requirements. The statute merely mandates that "*any individual who sells a long-term care insurance policy under the partnership receive training and demonstrate evidence of understanding of such policies and how they relate to other public and private coverage of long-term care.*" Neither the statute nor any other source of law specifies the nature of the training requirements that must be established, and it certainly does not mandate that the requirements be imposed on non-residents. The draft report suggests the existence of an inconsistency between the GLBA and the Deficit Reduction Act where one does not exist, and we urge the working group to recognize (consistent with traditional principles of statutory construction) that these statutes can and should be interpreted consistently.

Additionally, it is our understanding that some states have instituted or are considering requirements that would force non-residents to satisfy such training and education requirements in a classroom environment. Regardless of the working group's ultimate conclusion concerning the application of long-term care training in general terms, it would appear as though forcing a producer to travel to another state to complete training is inconsistent with the letter and spirit of the GLBA/NARAB reciprocity standard.

Flood Insurance

The draft report also suggests that it is not inconsistent with the GLBA/NARAB reciprocity standard for states to require non-residents to complete flood insurance training because the training requirement is rooted in federal law. IIABA disagrees. The Flood Insurance Reform Act of 2004 required the Federal Emergency Management Agency to work with the industry, regulators, and other interested parties to "*establish minimum training and education requirements for all insurance agents who sell flood insurance policies.*" The statute did not require or authorize states to impose training requirements on non-residents, and, again, there is no reason to interpret this statute in a manner that is inconsistent with the Gramm-Leach-Bliley Act. FEMA itself recognized the need to interpret the two statutes consistently and, in 2005, issued a rule urging state insurance departments to establish training rules following the guidance set forth by the National Conference of Insurance Legislators. Specifically, that rule called for the creation of a one-time education requirement that would apply only to *resident* producers.

Conclusion

On behalf of hundreds of thousands of independent insurance agents and brokers nationwide, we thank you for the opportunity to offer these comments and look forward to partnering with the working group on the continued development of the report and on the state compliance assessments that will follow. Please feel free to email me at wes.bissett@iiaba.net if you have any questions about IIABA's perspective on the draft report or any related issue.

Very truly yours,

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