

REPORT OF THE NARAB WORKING GROUP

**CONTINUING COMPLIANCE WITH RECIPROCITY REQUIREMENTS
OF THE GRAMM-LEACH-BLILEY ACT**

ADOPTED _____

The purpose of this report is to present to the NAIC membership an updated framework for determining the continuing compliance of the states with the producer licensing reciprocity requirements of the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6751 et seq. This report is also intended to meet the following charge to the NARAB Working Group:

Finalize the evaluation of the reciprocity standard developed by the NAIC's 2002 NARAB (EX) Working Group and make final recommendations by the 2009 Summer National Meeting for revisions or additions to the standard to address the issues identified in the Producer Licensing Assessment Aggregate Report of Findings including the various state requirements that are imposed upon non-residents but may not have been specifically addressed in the 2002 reciprocity standard.

As detailed herein, the Working Group reviewed several subjects relevant to non-resident producer licensing to determine their conformity with the 2002 standard. Our conclusions are stated below. In order to have all relevant guidance in one document, we have reproduced, and thereby reaffirmed, certain conclusions from the 2002 reciprocity standard. To achieve consistency and clarity, much of the information in this report is re-produced from previous materials.

The Working Group makes no finding concerning continuing compliance of any state with the 2002 standard, as updated and supplemented today. This report will provide the basis for initiating a formal reassessment of state compliance with the reciprocity framework.

EXECUTIVE SUMMARY

The specific analysis related to individual topics is detailed below, but the Working Group has determined the following requirements imposed on non-resident producers or applicants are inconsistent with GLBA reciprocity:

- Fingerprint requirements;
- Requiring a surplus lines producer not required to perform or not performing the diligent search of the admitted market to obtain an underlying general lines license;
- Surplus lines bonds;
- Requiring the designated responsible producer to be appointed prior to the issuance of a non-resident business entity license;
- Requiring the business entity to submit articles of incorporation;
- Requiring an underlying life license prior to the issuance of a variable life license;
- Requiring individuals seeking a fraternal license to have a fraternal certificate from a company;
- Requiring the submission of additional information to verify an applicant's age;
- Offering inconsistent terms of licensure for residents and non-residents; and

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- Requiring trust accounts as a condition to licensure or applying trust account requirements against non-residents in a discriminatory manner;

The Working Group does not believe the following requirements are inconsistent with GLBA reciprocity:

- Performing background checks or other due diligence without requiring additional submissions by the applicant;
- Requiring a surplus lines producer required to perform or performing the diligent search of the admitted market to obtain an underlying general lines license;
- Appointments not required during the licensing process;
- Requiring the designated responsible producer to be licensed prior to the issuance of a non-resident business entity license, provided the applications are accepted concurrently;
- Requiring a business entity to register to do business in the state;
- Requesting proof of Secretary of State registration as a prerequisite for business entity licensure;
- Not adopting the major lines of authority definitions of the Producer Licensing Model Act;
- Verifying legal work authorization for non-U.S. citizen applicants;
- Enforcing minimum age requirements;
- Non-discriminatory trust account requirements of general application if not tied to licensure or applied discriminatorily against non-residents;
- Verifying an applicant for license renewal has paid all undisputed taxes and unemployment insurance contributions;
- Continuing education requirements based on federal mandates; and
- Not offering reciprocal licensing treatment to viatical settlement brokers.

The above lists are, by no means, exhaustive of the licensing and regulatory issues that may impact reciprocity. These are, however, the issues upon which the NARAB Working Group has opined. As new issues are brought to our attention, we will analyze such issues under the reciprocity standard described in this report.

BACKGROUND

Following passage of GLBA in 1999, the NAIC established the NARAB Working Group in order to interpret and apply the producer licensing reciprocity requirements of GLBA, determine which states were compliant therewith, and make a report with recommendations to that effect. The details of the NARAB provisions of GLBA are stated in the next section of this report.

On August 8, 2002, the NARAB Working Group adopted the *Report of the NARAB Working Group: Certification of States for Producer Licensing Reciprocity* (“2002 Report”), which established a reciprocity framework and recommended that 35 states be certified as reciprocal jurisdictions. Since the adoption of the 2002 Report, 12 additional jurisdictions have been certified as reciprocal, raising the total number of reciprocal jurisdictions to 47. The NARAB Working Group was disbanded in September 2002, and the Producer Licensing Working Group (PLWG) became the focal point for uniformity efforts in producer licensing.

In 2007, the NAIC commenced a producer licensing assessment process intended to review continuing GLBA reciprocity and compliance with the NAIC’s Uniform Resident Licensing standards. The assessment process included a comprehensive and searching analysis of state

producer licensing procedures involving an initial self-assessment, peer review, and direct Commissioner or senior insurance department staff engagement. This state-by-state review culminated in the *NAIC Producer Licensing Assessment Aggregate Report of Findings* (“Producer Licensing Assessment Report”), which was issued on February 19, 2008. With respect to reciprocity, the Producer Licensing Assessment Report determined that all states previously certified as GLBA-compliant remained compliant with the standard established in the 2002 Report. The Producer Licensing Assessment Report also identified various requirements imposed upon non-residents that were not specifically addressed within the 2002 Report. The NAIC re-constituted the NARAB (EX) Working Group in order to determine whether these requirements impacted reciprocity. The Working Group, in turn, engaged the NAIC Legal Division to provide legal analysis of these issues.

On May 23, 2008, the NAIC Legal Division provided the NARAB Working Group with memorandum on “Additional Issues Identified in Producer Licensing Assessment Report” (“May 2008 Memorandum”). The May 2008 Memorandum provided recommendations to the NARAB Working Group as to whether the issues noted in the Producer Licensing Assessment Report impacted reciprocity. By conference call on June 26, 2008, the NARAB Working Group adopted the recommendations contained within the memorandum. The May 2008 Memorandum noted that the NARAB Working Group received written comments from regulators and interested parties identifying additional possible reciprocity issues not addressed in the Producer Licensing Assessment Report. In a legal memorandum dated November 19, 2008 on “Additional Potential Reciprocity Issues Raised in Written Comments” (“November 2008 Memorandum”) the NAIC Legal Division analyzed the possible reciprocity impact of these additional items. In some areas, the November 2008 Memorandum provided a recommendation; in other areas, additional information and study was required. The Working Group’s determination of the impact of these latter matters upon reciprocity is stated within this report.

In meeting our charge to “make final recommendations by the 2009 Summer National Meeting for revisions or additions to the [2002 reciprocity] standard,” the NARAB Working Group has utilized the 2002 Report, the Producer Licensing Assessment Report, the May 2008 Memorandum, the November 2008 Memorandum, regulator and interested party comments, and other additional research. Our intent is not to establish a new reciprocity standard. Rather, in adopting this report, we restate and reaffirm the basic analytical framework within the 2002 Report and supplement that reciprocity standard by applying it to issues not considered by our predecessor working group. The Working Group intends this report to provide greater clarity to the NAIC’s reciprocity standard. Upon NAIC adoption of this report, the NARAB Working Group will initiate a formal re-evaluation of state compliance with GLBA reciprocity utilizing the findings of this report in doing so.

NARAB PROVISIONS OF GLBA

GLBA requires that at least 29 jurisdictions meet the uniformity or reciprocity requirements of 15 U.S.C. § 6751 by November 12, 2002, in order to avoid the preemption of certain state producer licensing laws and the establishment of the National Association of Registered Agents and Brokers. The NAIC elected to pursue the reciprocity option with uniformity remaining the long-term goal for non-resident (and resident) producer licensing. Thus, pursuant to 15 U.S.C. § 6751(a)(2), a minimum of 29 jurisdictions must have enacted “reciprocity laws and regulations governing the licensure of nonresident individuals and entities authorized to sell and solicit insurance within those States” by November 12, 2002.

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According to the reciprocity standard developed by the 2002 NARAB Working Group and included in the 2002 Report, a state must satisfy the following four conditions in order to be considered reciprocal for non-resident producer licensing under 15 U.S.C. § 6751(c) of GLBA:

- (1) Permit a producer with a resident license for selling and soliciting insurance in its home state to receive a license to sell or solicit the purchase of insurance as a non-resident to the same extent that the producer is permitted to sell or solicit insurance in its home state, if the home state also licenses reciprocally, without satisfying any additional requirements other than submitting (A) a request for licensure; (B) the application for licensure submitted to the home state; (C) proof of licensure and good standing in home state; and (D) payment of any requisite fee;
- (2) Acceptance of a producer's satisfaction of its home state's continuing education requirements as satisfying that state's continuing education requirements, provided that the home state recognizes continuing education satisfaction on a reciprocal basis;
- (3) No requirements are imposed upon any producer to be licensed or otherwise qualified to do business as a non-resident that have the effect of limiting or conditioning that producer's activities because of its residence or place of operations (excepting countersignature requirements); and
- (4) Each state meeting (1), (2) and (3) grants reciprocity to residents of all other states that satisfy (1), (2) and (3).

Additionally, the savings provision of Section 15 U.S.C. § 6751(f) provides that state laws or regulations purporting to regulate insurance producers (including laws on unfair trade practices, consumer protections, and countersignatures) need not be altered or amended for purposes of satisfying the reciprocity criteria unless that law or regulation is inconsistent with a specific requirement noted above and only to the extent of the inconsistency. While unfair trade practices and consumer protection laws are specifically mentioned, these types of laws are afforded no heightened protection and also are subject to the requirement of consistency with 15 U.S.C. § 6751(c). The savings provision should be construed in such a way as to allow state laws regulating producers generally to be saved while still achieving the Congressional intent to streamline licensing procedures and prevent discrimination against non-resident producers.

Under 15 U.S.C. § 6751(d)(1), the NAIC was required to determine whether the requisite number of states achieved reciprocity. As stated, the earlier NARAB Working Group was assigned the task of interpreting and applying the reciprocity requirements under GLBA, determining which states were compliant therewith, and making its report along with recommendations to its parent committee.

The expertise of the state insurance regulators in determining whether states meet reciprocity is recognized under 15 U.S.C. § 6751(d)(2). In the event of a legal challenge to the NAIC's conclusion, 15 U.S.C. § 6751(d)(2) provides that the reviewing court shall apply the standards set forth in the Administrative Procedure Act. In relevant part, this statute states that a determination will not be overturned unless it found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Furthermore, case law indicates that a reviewing court will consider three factors in examining a determination: scope of authority, whether the determination was arbitrary and capricious, and whether the decision-making process was procedurally valid. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402

(1971), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). The Working Group believes that its process for considering reciprocity issues in 2002 and today meets the criteria established for affording deference to the NAIC's reciprocity standard and determinations of state compliance therewith.

GLBA ANALYSIS OF SPECIFIC ISSUES

In 2002 and today, the NARAB Working Group has analyzed whether states may impose certain requirements on non-residents and remain compliant with GLBA reciprocity. The Working Group recognizes that many of these requirements are imposed in good faith as part of a state's consumer protection regime. Where such requirements appear to go beyond the letter of 15 U.S.C. § 6751(c), the Working Group has considered whether the requirements may be maintained as consistent with GLBA. In 2002 and today, the Working Group has utilized the expertise of state producer licensing directors, other interested regulators, the NAIC Legal Division and interested parties in developing a recommendation about the consistency of these requirements with reciprocity.

Following this introductory section is an issue-by-issue analysis of certain specific issues within the context of GLBA reciprocity. In some cases, we have re-produced in substantial part the recommendations of our predecessor NARAB Working Group. In doing so, we intend to reaffirm those findings by incorporating them directly within the report we adopt today.

A. Fingerprints and Background Checks

The following is re-produced, in substantial part, from the 2002 Report:

The Working Group addressed the issue of the due diligence states may perform in reviewing the qualifications of a non-resident applicant, including whether states may require fingerprints of non-resident applicants. With respect to state review of application materials, the Working Group determined that GLBA affords states the opportunity to determine that an applicant meets a particular state's qualifications for licensure, provided such due diligence required no additional submissions beyond the items permitted by 15 U.S.C. § 6751(c)(1). Therefore, the Working Group believes that states may perform background checks or other due diligence without being inconsistent with reciprocity.

During the course of its discussions, the Working Group considered whether fingerprints may be required as a means of performing an effective review of the applicant's qualifications. Within the context of reciprocity, the principal argument favoring a fingerprint requirement was that GLBA protected this requirement as an important consumer protection through application of the savings clause of 15 U.S.C. § 6751(f), and that fingerprints provide the most effective means of performing a background check. Arguments against fingerprints as a permissible requirement also focused on the savings provision and questioned whether such a requirement is "consistent" with the provisions of 15 U.S.C. § 6751(c).

After careful review, analysis, and extensive debate, the Working Group adopted the position that a fingerprint requirement for non-resident producer applicants is inconsistent with the reciprocity requirements under GLBA. 15 U.S.C. § 6751(c)(1) provides that non-resident producers be permitted to receive a license "without satisfying any additional requirements other than submitting" a request for licensure, the home state application or Uniform Application, proof of licensure and good standing in the home state, and the payment of required fees. After considering several alternatives for allowing fingerprints within the GLBA reciprocity formula,

the Working Group determined that pre-licensing fingerprint requirements for non-resident producers constituted an “additional requirement” which is inconsistent with reciprocity under 15 U.S.C. § 6751(c)(1).

B. Surplus Lines Issues

1. Underlying Licensing Requirements for Surplus Lines Producers

In response to comments from interested parties, the Working Group evaluated whether states requiring non-residents to obtain non-resident general lines producer licenses – namely, property and casualty licenses – as a prerequisite to surplus lines licensure is inconsistent with GLBA reciprocity. This issue was addressed in the 2002 Report, which concluded that requiring a general lines license relates to regulation of the surplus lines market and was not an additional administrative requirement being imposed on non-residents. This conclusion was based on the following analysis:

As part of its analysis, the Working Group recognized the unique nature of the surplus lines market, relative to general lines of authority such as life and property. Surplus lines brokering is a specialized insurance producer function whereby producers secure insurance coverage generally unavailable from carriers licensed in that jurisdiction

Almost all States require resident surplus lines producers to first obtain a license to act as a general lines producer. **Generally, surplus lines producers must first search the admitted market as a prerequisite to searching the non-admitted market. Thus, both general lines and surplus lines authority are required in order to operate as a surplus lines producer.** In many cases, the rationale for the admitted market prerequisite is generally one of consumer protection. The surplus lines insurer, being a non-admitted carrier, is not subject to the jurisdiction of insurance regulatory authorities in that State. Further, there is typically no guaranty fund coverage for risks insured in the non-admitted market. Many States require that insureds be notified of these facts.

In the non-resident licensing context, the question is whether a State requirement that non-residents obtain both general lines and surplus lines authority is an administrative or regulatory requirement. The Working Group concluded that requiring a general lines license relates to regulation of the surplus lines market and is not an additional administrative requirement being imposed on non-residents. **The general lines license gives the non-resident producer the authority, otherwise lacking, to search for coverage within the admitted market.** Generally speaking, without this authority, a surplus lines producer would be unable to fulfill his or her duty to first attempt to place business in the admitted market. Thus, the general lines license gives effect to the surplus lines license. Many States issue these two licenses in tandem. (Emphasis added.)

Interested parties recently commented that the factual premise upon which the NARAB Working Group reached this conclusion was flawed. In 2002, the Working Group appeared to have assumed that all surplus lines producers would be required to conduct diligent searches of the admitted market. Accordingly, the Working Group adopted an approach that states could require surplus lines producers to obtain an underlying general lines producer license as a condition to licensure as a non-resident surplus lines producer. Because it appears that all surplus lines

producers are not required in all states and in all situations to conduct the diligent search, we have considered whether states may impose underlying general lines license requirements upon those non-resident surplus lines producers not conducting the diligent search.

In urging our re-consideration of the factual premise supporting the 2002 Report, the National Association of Professional Surplus Lines Offices, Ltd. (NAPSLO) pointed to the example of the wholesale business model by which many surplus lines transactions are accommodated. In this model, surplus lines producers are generally brought into the transaction *after* a general lines producer has already made a diligent search of the admitted market and has been unable to obtain traditional admitted insurance. NAPSLO further argued that the surplus lines producer often is not specifically required under state law to conduct its own search, such that a general lines license would not be necessary.

The potential reciprocity issue presented by the requirement that a surplus lines producer hold an underlying non-resident general lines license as a prerequisite to qualify for non-resident surplus lines licensure arises when the non-resident surplus lines applicant is not required to and does not perform the diligent search of the admitted market in the non-resident state. In this example, the general lines license requirement could result in the applicant being forced to qualify for a line of authority not sought – and not needed - from the non-resident state.

In providing a legal analysis of this issue in November 2008, the NAIC Legal Division noted that state laws and practices varied with respect to diligent search requirements. While many states appeared to permit the general lines producer to conduct or certify the diligent search, there were some states that required the surplus lines producer to perform the diligent search.

The Working Group recently surveyed state producer licensing directors and general counsels in order to determine which states required an underlying general lines license as a condition to licensure as a surplus lines producer and upon whom states imposed the requirement to conduct the diligent search. The results of this survey indicated a variance among state laws and practices, such that states appeared to fall into the following broad categories:

- (1) States that do not require a non-resident surplus lines producer to obtain an underlying general lines license;
- (2) States that require a non-resident surplus lines producer to obtain an underlying general lines license and specifically require the surplus lines producer to conduct the diligent search of the admitted market; and
- (3) States that require a non-resident surplus lines producer to obtain an underlying general lines license but impose the diligent search requirement upon the underlying producer in the transaction or upon the “producing broker.”

From this analysis, it is apparent that state underlying license and diligent search requirements are not as clear or as uniform as may have been understood in 2002. In adopting an approach to be utilized as part of an updated and ongoing reciprocity framework, the Working Group returns to the premise of its 2002 Report; that is, if a non-resident surplus lines producer is conducting the diligent search of the admitted market, the producer is performing both the surplus lines and general lines functions. It is not inconsistent with GLBA reciprocity to require the producer to secure authority to act as a general lines producer prior to performing this function. Provided the general lines producer license was also issued consistently with reciprocity requirements, the Working Group does not believe such an approach would be inconsistent with GLBA.

Returning to the categories listed above, the Working Group sees no reciprocity issues for states within categories (1) and (2). Where the state imposes no general lines producer licensing requirement, this issue is not present. Where states require the surplus lines producer to conduct the diligent search, the Working Group believes that state is justified in imposing an underlying general lines producer license requirement and that such requirement is not inconsistent with GLBA reciprocity for reasons stated in the 2002 Report.

For states falling within category (3), the Working Group is concerned about imposing underlying license requirements upon surplus lines producers who are not required by law or practice to conduct the diligent search. If the surplus lines producer is not conducting the diligent search, there does not appear to be another justifiable reason for imposing such requirement consistent with GLBA reciprocity.

The Working Group is mindful that some states may have adopted underlying license requirements for non-resident surplus lines producers in reliance on the 2002 Report, but we believe this clarification is necessary to preserve a reciprocity framework consistent with GLBA. For these states, the Working Group notes that we believe it would be consistent with reciprocity to continue to require underlying licenses for those surplus lines producers actually conducting the diligent search. For those surplus lines producers not performing the diligent search, we urge states to examine their statutes for provisions similar to Sections 8D and 16A of the Producer Licensing Model Act (PLMA) for authority to waive or otherwise remove any underlying license requirements. Section 8D of the PLMA provides that “[n]otwithstanding any other provision of this Act, a person licensed as a surplus lines producer in his or her home state shall receive a nonresident surplus lines producer license [by satisfying the four requirements listed in Section 8A of the PLMA].” Section 16A of the PLMA states that “[t]he insurance commissioner shall waive any requirements for a nonresident license applicant with a valid license from his or her home state, except the requirements imposed by Section 8 of this Act, if the applicant’s home state awards nonresident licenses to residents of this state on the same basis.” Further, the Working Group is willing to assist in developing a model bulletin for use by states in explaining any changes in interpretation or application of laws or procedures necessary to accommodate reciprocity requirements.

We note our opinion is limited to the issue of underlying license requirements for non-resident surplus lines producers. It should not be construed to raise questions about a state’s regulation of its surplus lines market through non-discriminatory application of general regulatory requirements, such as the filing of certifications or attestations about surplus lines transactions and premium tax reporting.

2. Surplus Lines Bonds

The following is re-produced, in substantial part, from the 2002 Report:

The Working Group examined the use of surplus lines bonds as both a pre- and post-licensing non-resident requirement. As a pre-licensing requirement, the Working Group determined that a surplus lines bond is inconsistent with reciprocity under GLBA. A consumer protection justification was not found to be available within the context of reciprocity. The savings provision is not a broad exemption for laws based upon a valid consumer protection justification. Rather, 15 U.S.C. § 6751(f) saves laws generally — including those related to consumer protection — provided they do not violate a specific requirement of the reciprocity provisions of 15 U.S.C. § 6751(c). The Working Group determined that a pre-licensing surplus lines bond is inconsistent with 15 U.S.C. § 6751(c), i.e., a pre-licensing surplus lines bond is an “additional requirement”

and, therefore, states imposing such a requirement do not satisfy reciprocity under 15 U.S.C. § 6751(c)(1).

Likewise, with respect to post-licensing surplus lines bonds, the Working Group determined that these post-licensing requirements, which condition the use of the license on having such a bond in place, are inconsistent with GLBA reciprocity. The Working Group found that such a bond would be a *de facto* licensing requirement due to the inability of the producer to use the license without first posting a bond.

C. Appointments

1. Appointments and “Agent-Only” States

The following is re-produced, in substantial part, from the 2002 Report:

The Working Group identified states that do not recognize brokering activities in the sense that all producers/“agents” are agents of the insurer and thus require that producers/“agents” be appointed by an insurer even though such a requirement ordinarily may not exist for “brokers.” As a general rule, the Working Group believes that appointments are permissible under GLBA as long as they are not required as part of the licensing process. The “agent-only” states do not require an appointment as a pre-licensing requirement, thereby avoiding the imposition of an additional requirement to licensure. Furthermore, appointment requirements are imposed upon companies, rather than producers, thus removing the burden from the producer seeking licensure. Accordingly, the Working Group did not find the imposition of such an appointment requirement to be inconsistent with reciprocity.

2. Requiring the Designated Responsible Producer (DRP) to be Licensed or Appointed Prior to the Issuance of a Non-Resident Business Entity License

The Working Group believes that requiring the DRP to be appointed prior to the issuance of a non-resident business entity license is inconsistent with GLBA reciprocity requirements.

GLBA does not distinguish between individuals and business entities with respect to the requirements that a reciprocal state may impose. The general reciprocity framework has been accepted to apply to business entity licensing as well as individual producer licensing. Therefore, to the extent a state conditions the acceptance of a non-resident business entity application on an additional submission as to the licensure status of the business entity’s DRP, this practice would be inconsistent with GLBA reciprocity requirements.

The designation of a licensed producer responsible for the business entity’s compliance with a state’s insurance laws, rules and regulations stems from Section 6B(2) of the PLMA. This provision requires the commissioner to find the DRP has been designated “before approving the [business entity’s] application.” The DRP requirement serves to attach responsibility for regulatory enforcement issues to the individual DRP in addition to the associated business entity. Potential inconsistency with GLBA reciprocity arises if states inadvertently create a *de facto* additional submission requirement by barring the concurrent submission of business entity and DRP applications for licensure. In other words, the practice of requiring the DRP’s individual application to be submitted and approved separately prior to the business entity’s application creates the appearance of an impermissible additional submission requirement for the business entity application.

The potential reciprocity issue is remedied when states accept the business entity's application and the DRP's individual application at the same time. Clearly, the individual application must be processed first to ensure that the DRP is, in fact, licensed. As stated in the Producer Licensing Assessment Report, states should ensure there is a method of concurrent licensure and work to facilitate the licensing of a business entity and DRP at the same time. While requiring the DRP to be licensed prior to the issuance of a non-resident business entity license is a potential violation of the GLBA reciprocity requirements, the NARAB Working Group believes it is easily remedied by attention to the timing with which business entity and DRP applications are accepted for processing. Accepting business entity and DRP applications concurrently would be consistent with GLBA reciprocity.

With regard to requiring a business entity's DRP to be appointed by a carrier prior to the issuance of a non-resident business entity license, the 2002 Report found that, generally, appointments are permitted under GLBA provided they are not required as part of the licensing process. There appears to be no statutory or administrative basis for conditioning a business entity's licensure on the submission of appointment documentation for an individual producer, especially given that companies rather than producers are subject to appointment requirements. Therefore, the Working Group believes that requiring the DRP to be appointed prior to the issuance of a non-resident business entity license is inconsistent with GLBA reciprocity requirements.

D. Non-Resident Business Entity Licensing Issues

1. Requirement for Foreign Corporation to Register with Secretary of State to do Business in Another State

The Working Group believes that requiring a non-resident business entity to register to do business in the state is not inconsistent with GLBA reciprocity requirements. The Working Group further believes that requests for proof of Secretary of State corporate registration as a prerequisite for non-resident business entity licensing is also not inconsistent with GLBA reciprocity requirements.

This issue was addressed in the 2002 Report, which included the following analysis:

Corporate registration requirements are matters of State corporate law, whereby States require all business entities (not just those that are insurance-related) to register with the Secretary of State or an equivalent office. The Working Group believes that such requirements transcend issues of insurance licensing and relate to basic police powers of States to require registration of business entities. Thus, this requirement is not inconsistent with reciprocity.

No new facts or inconsistencies have been presented in the comments which would lead to the determination that the earlier conclusion of the 2002 NARAB Working Group was either incorrect or inappropriate. Absent any new information to consider, the Working Group is not inclined to alter its approach on this issue.

With respect to the practice of requiring proof of foreign corporation registration to do business in another state, we believe that this also relates to the basic police powers of the states and is not inconsistent with reciprocity. Nevertheless, NAIC members, the Working Group and PLWG have encouraged states to develop alternative means to verify this registration to ease the administrative burden on business entity applicants; e.g., direct electronic verification with the Secretary of State. Continued elimination of requests for proof of Secretary of State corporate

registration as a prerequisite for non-resident business entity licensing was identified in the Producer Licensing Assessment Report as an issue that continues to necessitate Commissioner-level attention so that progress can be measured and nationwide elimination of this prerequisite as an insurance department licensing requirement is achieved. Therefore, while this practice is actively being discouraged by NAIC membership, the NARAB Working Group does not believe it is inconsistent with GLBA reciprocity requirements.

2. Requiring a Non-Resident Business Entity to Submit Articles of Incorporation

The Working Group believes that requiring a non-resident business entity to submit articles of incorporation is inconsistent with GLBA reciprocity requirements.

Organizational document requirements typically arise in conjunction with the concept of Secretary of State registration. The NAIC membership has worked actively to address the industry's concerns in this area, as detailed in the Producer Licensing Assessment Report. The 2002 Report discussed the reciprocity implications of the requirement to file proof of Secretary of State registration, concluding such requirements were not inconsistent with reciprocity.

With respect to requirements pertaining to organizational documents required by the insurance regulator independent of Secretary of State registration requirements, the Working Group believes that documentation of a business entity's organizational structure outside of information provided on the NAIC's Uniform Application for Business Entity Insurance Producer Licensing/Registration is an additional submission requirement. An organizational documentation requirement for non-resident entities appears to be aimed at facilitating communication by providing director and officer contact information to the insurance regulator. This is an administrative aid rather than a consumer protection measure, particularly because the applicant's resident state may collect the same information and corporate information is readily available in most, if not all, states through the Secretary of State or equivalent Web site. The requirement also appears to be imposed by administrative practice rather than statute or regulation.

It does not appear that the savings clause of 15 U.S.C. § 6751(f) is available to protect this practice. The savings clause only protects state requirements that are consistent with the GLBA reciprocity framework. As discussed above, this practice is not consistent with the reciprocity requirement limiting the documentation that may accompany non-resident producer license applications; therefore, the practice cannot be preserved pursuant to the savings clause. The Working Group believes that requiring a non-resident business entity to submit articles of incorporation is inconsistent with GLBA reciprocity requirements.

E. Requirements to Obtain Additional Licenses or Qualifications

1. Requiring an Underlying Life License Prior to the Issuance of a Non-Resident Variable Life License

The Working Group believes that requiring an underlying life license prior to the issuance of a non-resident variable life license is inconsistent with GLBA reciprocity requirements.

Variable life is a separate line of authority under Section 7A(5) of PLMA. Unlike other major lines of authority, most states do not have a separate insurance examination for variable life, and applicants must take a life insurance examination in order to be licensed to sell variable life

insurance. As a result, states often require resident applicants to hold both a variable life and life producer license. Because the same examination qualifies applicants for both lines of authority, the common assumption is that applicants seek to obtain both licenses provided other qualifications are met. GLBA reciprocity concerns are raised when a state requires a non-resident variable life applicant to obtain qualifications for a life license or to submit proof of a valid life license, because this appears to be an additional requirement under 15 U.S.C. § 6751(c). Accordingly, the Working Group believes 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.

2. Requiring Individuals Seeking a Fraternal Non-Resident License to Have a Fraternal Certificate from a Company

The Working Group believes that requiring a non-resident applicant to submit a fraternal certificate is inconsistent with GLBA reciprocity requirements.

On its face, a fraternal certificate requirement for non-resident applicants is inconsistent with the GLBA reciprocity framework. It is documentation required to be submitted in addition to the permitted request for licensure, application, proof of licensure in good standing and applicable fee. It does not appear that the savings clause of 15 U.S.C. § 6751(f) is available to protect this practice because it creates an additional submission requirement inconsistent with the GLBA reciprocity framework. States with this requirement should consider whether the requirement can be waived as to non-resident applicants under Section 16A of the PLMA. The Working Group believes that requiring a non-resident applicant to submit a fraternal certificate is inconsistent with GLBA reciprocity requirements.

F. States Not Adopting the Major Lines of Authority Definitions of the PLMA

GLBA does not impose any requirement that states adopt uniform line of authority definitions. The specific requirement concerning the scope of license authority is that states “permit a producer that has a resident license for selling or soliciting the purchase of insurance in its home state to receive a license to sell or solicit the purchase of insurance [in other reciprocal states] as a nonresident *to the same extent* that such producer is permitted to sell or solicit the purchase of insurance in its State.” 15 U.S.C. § 6751(c)(1) (emphasis added). Therefore, GLBA requires not definitional uniformity but that non-resident producer have the ability to sell or solicit “to the same extent” as permitted in the home state. Presumably, states have the flexibility to determine how to provide “to the same extent” authority to non-residents. Through the PLWG, states have established the goal of consistent scopes of authority by developing uniform definitions.

The Working Group believes uniform adoption of line of authority (LOA) definitions in Section 7A of the PLMA is the preferred approach to LOA consistency. In fact, it is important to note that adoption of the PLMA definitions of major LOAs, as well as definitions of the core limited LOAs, is part of the Uniform Resident Licensing standards. A state’s compliance status with any specific resident licensing uniform standard, however, does not necessarily translate into a reciprocity issue. Non-resident licensing reciprocity can be affected by how a state implements the uniform standards.

Inconsistent LOA definitions from state to state could possibly implicate the anti-discrimination element of GLBA reciprocity: whether any requirement is imposed upon any otherwise qualified non-resident producer that has the effect of limiting or conditioning the producer’s activities because of the producer’s residence or place of operations. If a difference in scope of authority between two states results in a producer being required to satisfy additional conditions in a non-

resident state beyond those permitted under the GLBA reciprocity framework, then the LOA definitions, as applied in practice, may result in a barrier to entry based on the producer's residence or place of operations.

The Working Group is not aware of specific examples of how LOA definitions have created, in practice, an obstacle to non-resident licensing. While a lack of definitional uniformity can lead to some difficulty in administering and tracking the qualifications of producers, the Working Group does not believe that inconvenience necessarily translates into a violation of reciprocity. To be sure, the potential exists for non-compliance with reciprocity. To avoid such a result, the Working Group urges states to enact the LOA definitions in Section 7A of the PLMA. For states that have not done so, the Working Group encourages such states to maintain department procedures to ensure non-residents can, in fact, sell or solicit "to the same extent" as permitted in the home state. The state assessment reviews indicate that practices are in place to accommodate minor wording differences in LOA definitions. Likewise, the PLWG has devoted considerable time to mapping and coordinating state LOAs to avoid any difficulties in practical application. These efforts have been carried through to NIPR business rules, which also serve to minimize LOA differences. Accordingly, the Working Group does not believe that lack of LOA definitional uniformity, standing alone, necessarily translates into inconsistency with GLBA reciprocity.

G. Verifying Legal Work Authorization for Non-U.S. Citizens Non-Resident Applicants

The Working Group believes that verifying the legal work authorization for non-resident applicants who are non-U.S. citizens is not inconsistent with GLBA reciprocity requirements.

The NAIC Legal Division previously noted that several states that may require non-resident producer license applicants to provide evidence of a legal work authorization if the non-resident applicant is not a citizen of the U.S. Most states implemented this practice because of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Welfare Reform Act"), 8 U.S.C. § 1601 et seq., which restricts the eligibility of non-U.S. citizens to receive state and local benefits. Specifically, Section 1621(c)(1)(A) provides that state or local public benefits are broadly defined to include any "professional license . . . provided by an agency of a State or local government." This has been generally interpreted to include insurance producer licenses.

The Welfare Reform Act does not address the issue of resident and non-resident license applicants, but simply requires the states to verify work status prior to issuing a license. While some have argued that checking a non-resident producer application for verification of legal work authority would be an "additional requirement" under GLBA, the Welfare Reform Act directs states to carry out this requirement. The rules of statutory construction provide that an implied repeal will only be found where the provisions in the two statutes are in irreconcilable conflict. In the absence of specific authority providing that GLBA is in conflict with the Welfare Reform Act, it may be inappropriate for the non-resident state insurance regulator to delegate this responsibility to the non-resident applicant's state of residence. Therefore, the Working Group believes that verifying the legal work authorization for non-resident applicants who are non-U.S. citizens is not inconsistent with GLBA reciprocity requirements.

H. Enforcing/Verifying Minimum Age Requirements for Non-Resident Applicants

The Working Group believes that it is not inconsistent with GLBA reciprocity requirements for states to enforce minimum age requirements for non-resident applicants; however, the Working

Group believes it is inconsistent with GLBA reciprocity for states to verify the age of a non-resident applicant through the submission of additional documentation.

The 2002 Report found that minimum requirements respecting the age of contracting parties in an insurance transaction do not contravene the spirit or letter of producer licensing reciprocity: “Minimum age requirements are grounded in state contract law, which allows minors to contract in very limited circumstances.” Age requirements can therefore be characterized as consumer protection laws, which are specifically mentioned under the savings provisions of 15 U.S.C. § 6751(f). Therefore, a state can enforce a minimum age requirement as to a non-resident applicant who is properly licensed and of minimum age in the applicant’s home state. For example, a state with a minimum age of 21 may decline to issue a license to a non-resident applicant who is 19 years old, even though the applicant is properly licensed in a home state where the minimum age is 18.

The question of “verifying,” as opposed to enforcing, minimum age requirements is different. The distinction hinges on whether a state requires the submission of documentation establishing an applicant’s legal age in addition to the date of birth collected on the uniform application. As stated previously, 15 U.S.C. § 6751(c) limits the submission requirements that may be imposed upon non-resident applicants. The savings clause of 15 U.S.C. § 6751(f) would not necessarily operate to protect a state requirement inconsistent with these four permitted steps. Therefore, if a state can confirm from either the application or by other means independent of an additional submission from the applicant that an applicant does not meet the state’s minimum age requirement, it may deny the issuance of a license. Accordingly, the Working Group believes it is inconsistent with GLBA reciprocity requirements to require the submission of additional documentation to verify a non-resident applicant’s age.

I. Requiring Non-Resident Producers to Renew Licensure Annually, while Resident Producers Renew Biennially

The Working Group believes that offering inconsistent terms of licensure for residents and non-residents is inconsistent with GLBA reciprocity requirements.

This requirement does not call for any specific additional submission on the part of the producer, nor is the term of licensure a specified element of the GLBA reciprocity framework. This requirement implicates the third element of GLBA’s reciprocity conditions: whether any requirement is imposed upon any otherwise qualified non-resident producer that has the effect of limiting or conditioning the producer’s activities because of the producer’s residence or place of operations. This element is traditionally cited as prohibiting residency limitations on the placement of certain business, such as state-funded projects or statutory funds. However, the effect of the requirement at issue limits the duration of a producer’s license because of the producer’s place of residence. This would seem to conflict with the anti-discrimination element of the GLBA reciprocity framework, even though no extra documentation is required to be presented with the renewal/continuation application.

It does not appear that the savings clause of 15 U.S.C. § 6751(f) is available to protect this practice because the basis for the practice appears to be inconsistent with the reciprocity framework even if there is consumer protection or other regulatory value inherent to this requirement. Therefore, the Working Group believes that offering inconsistent terms of licensure for residents and non-residents is inconsistent with GLBA reciprocity requirements.

J. Trust Accounts

The Working Group believes it is inconsistent with reciprocity to impose trust account requirements during the licensing process or in a discriminatory manner against non-residents, but does not believe trust account requirements of general application are necessarily inconsistent with reciprocity. The Working Group considered whether specific trust account requirements identified by the Independent Insurance Agents and Brokers of America (IIABA), as applied to non-resident producers, are inconsistent with GLBA reciprocity requirements. In written comments, the IIABA urged further consideration of whether these requirements are consistent with reciprocity: (1) obligating non-resident producers to maintain trust accounts in a financial institution with an office in the non-resident state; and (2) obligating non-resident producers to maintain funds related to business generated within the non-resident state in a separate state-specific trust account. The Producer Licensing Assessment Report and the individual state reports, including the underlying documentation, do not indicate that these requirements exist in any jurisdiction. Anecdotal information indicates that such requirements are not enforced as a prerequisite to licensure or through a licensure action.

The 2002 Report included a brief discussion of trust account requirements, but the Report did not specifically address the requirements raised by IIABA. The 2002 Report indirectly indicated that a requirement as to where a trust account should be maintained could have some bearing on GLBA reciprocity. Hypothetically, the requirements raised by IIABA could be inconsistent with GLBA reciprocity if implemented in a way that establishes submission requirements beyond those permitted by GLBA; e.g., the non-resident producer applicant might be required to submit proof of access to an account at a financial institution with an office in the non-resident state. It does not appear the savings clause of 15 U.S.C. § 6751(f) would protect such practices. Therefore, if trust account requirements specific to non-residents are imposed as a condition to licensure, the Working Group believes such requirements would be inconsistent with reciprocity.

The Working Group, however, does not believe trust account requirements imposed upon non-residents are inconsistent with reciprocity as a general rule. If a state imposes on all producers the general requirement to maintain a trust account, the Working Group believes such requirements would not implicate GLBA reciprocity unless they “limit or condition” the producer’s activities because of the producer’s residence or place of operation. Thus, the Working Group believes it is permissible for a state to require a non-resident producer to maintain a trust account somewhere as a general regulatory requirement unrelated to licensing, but we do not believe it would be consistent with reciprocity to require non-resident producers to maintain specific trust accounts in the non-resident state.

To the extent states impose trust account requirements as a condition to licensure or otherwise limit or condition the non-resident producer’s activities because of residence or place of operations, we encourage states to consider utilizing waiver authority or modifying statutory application to ensure general trust account requirements are applied in a manner consistent with reciprocity.

K. Verifying an Applicant for a Non-Resident License Renewal Has Paid All Undisputed Taxes and Unemployment Insurance Contributions

The Working Group believes that a tax verification requirement applicable to non-residents and implemented in such a way that it does not depend on additional documentation supplied by the applicant is saved under 15 U.S.C. § 6751(f), because it is not inconsistent with GLBA reciprocity requirements.

States' tax clearance practices have been part of the reciprocity analysis since the 2002 Report but a detailed analysis has not been published. State consideration or verification of information derived from sources other than the applicant does not trigger the additional submission requirement element of the GLBA reciprocity framework. While GLBA limits the types of documentation a reciprocal state can require a non-resident applicant to submit, it does not address the information a state may consider or verify through sources other than the applicant.

This reasoning holds true for tax clearance as implemented in certain states as well as many other conditions of licensure such as the possible grounds for license denial, nonrenewal or revocation included in Section 12 of the PLMA. The background questions section of the NAIC Uniform Applications solicits a "yes" or "no" response on most questions and, with regard to tax clearance, asks for the applicable jurisdiction where a delinquency action exists. Thus, the implementation of a tax clearance requirement that does not require submission of proof by the applicant is not inconsistent with GLBA reciprocity. GLBA serves to limit the applicant's documentation responsibilities and discriminatory state requirement practices as applied to non-residents; it does not serve to limit the information a state may consider in issuing or renewing a license.

Accordingly, the Working Group does not believe that a tax verification requirement applicable to non-residents and implemented in such a way that it does not depend on additional documentation supplied by the applicant is inconsistent with GLBA reciprocity requirements.

L. One-Time Training and Continuing Education Requirements

The Working Group believes that continuing education requirements based on federal mandates are not inconsistent with GLBA reciprocity requirements.

The issue is whether it is permissible to obligate non-residents to complete continuing education on a particular subject matter or product in order to obtain or renew a license to sell, solicit or negotiate insurance policies involving the specific subject matter or product. States regularly count specialized subject-matter training toward the total continuing education requirements applicable to resident producers. Assuming a producer maintains the same scope of licensure in both resident and non-resident jurisdictions, the potential reciprocity issue arises if the producer is forced to satisfy continuing education requirements in a non-resident state irrespective of the training completed in the producer's resident state. In 15 U.S.C. § 6751(c)(2), GLBA specifically provides that a reciprocal state must accept a non-resident producer's satisfaction of the home state's continuing education requirements as satisfying the non-resident state's own continuing education requirements.

Continuing education requirements specific to crop insurance and long term care partnership, as well as flood insurance, derive from federal mandates. Similar to the above analysis of the practice of verifying legal work authorization for non-resident applicants in accordance with a federal mandate, in the absence of any federal directive to the contrary, it appears that the specialized continuing education requirements described above must stand regardless of any perceived conflict with the GLBA continuing education element. The federally-mandated training described above is imposed by the federal government rather than the non-resident state, which arguably removes the training from the reciprocity analysis.

Further, some of the federal mandates were enacted post-GLBA: the flood insurance training requirement in 2004 and the long-term care training requirement in 2005. The canon of statutory

construction known as *in pari materia* calls for statutes on the same general subject to be interpreted in harmony with each other whenever possible. The enactment of specific subject-matter training requirements subsequent to the continuing education reciprocity element of GLBA may be read to mean that Congress' intent was to apply the training requirements despite the potential conflict with producer licensing reciprocity.

Therefore, the Working Group does not believe that continuing education requirements based on federal mandates are inconsistent with GLBA reciprocity requirements.

M. Viatical Settlements

The following is re-produced, in substantial part, from the 2002 Report:

Two comment letters were received from an interested party dealing with the issue of whether reciprocal treatment should be afforded viatical settlement brokers. The interested party contended that those states requiring separate licensing for viatical settlement activities could not be considered reciprocal. Because GLBA includes a broad definition of "insurance producer" in 15 U.S.C. § 6766, the interested party argued that the term included persons who advise or facilitate viatical or life settlements, which would thus embrace viatical settlement brokers. Characterizing GLBA as envisioning licensing reciprocity or uniformity for this broad range of "insurance producers," the interested party concluded that states requiring separate viatical settlement licensure are not reciprocal. Additionally, during the Working Group's meeting on June 10, 2002, a representative of the interested party commented that he did not advocate reciprocity for viatical settlement brokers. Rather, it was argued that states failed to achieve reciprocity where producers may perform certain services in some states but require separate licensing to do so in others.

For purposes of the Working Group's task, this issue *is* one of reciprocity. The NAIC Legal Division previously examined the question of which insurance producers were entitled to reciprocity under GLBA. In May 2000, in response to requests from several state insurance regulators, the Legal Division issued a memorandum on this topic. The memorandum noted GLBA's broad definition of "insurance producer," but reviewed particularly the provisions requiring producer licensing reciprocity. The standards for achieving reciprocity provided in 15 U.S.C. § 6751(a) and (c) refer only to producers that sell or solicit the purchase of insurance. Therefore, GLBA only requires that reciprocity be extended to those classes of producers that sell or solicit insurance. Because they do not sell or solicit the purchase of insurance, viatical settlement brokers are not entitled to reciprocity regardless of the broad definition of "insurance producer."

Thus, the Working Group rejected the argument that GLBA entitles viatical settlement brokers to reciprocity in non-resident producer licensing or otherwise requires states to eliminate requirements that those who engage in viatical settlement activities be separately licensed to do so.

N. Limited Lines Issues

Consumer Credit Industry Association (CCIA) and World Access urged for special reciprocity and uniformity treatment for limited lines that are very narrow in scope and resemble service contracts. These issues have been referred to the PLWG for consideration. Because we are not presented with any specific reciprocity-related issues, the NARAB Working Group offers no specific comments on whether certain limited lines should be subject to special treatment. The

Working Group notes that GLBA reciprocity applies to limited lines as well as major lines, but we will leave the present issues with the PLWG for consideration.

NEXT STEPS

GLBA appears to assume some process exists for measuring continuing compliance by states with the reciprocity mandates of 15 U.S.C. § 6751(c). Without mandating a particular process, 15 U.S.C. § 6751(e) states, in relevant part, that “[i]f, at any time, the . . . reciprocity required by subsection[] . . . (c) of this section no longer exists, the provisions of this subchapter shall take effect 2 years after the date on which such . . . reciprocity ceases to exist, unless the . . . reciprocity required by those provisions is satisfied before the expiration of that 2-year period.” The NARAB Working Group understands this provision to mean that, upon a determination by the NAIC that the required level of reciprocity among states no longer exists, the states would have two years to come back into compliance. If the states failed to do so, the NARAB entity would be established as set out in 15 U.S.C. §§ 6752-6765.

In adopting this updated reciprocity standard, the NARAB Working Group makes no specific finding about any individual state’s continuing compliance with GLBA reciprocity requirements. If this updated standard is accepted by the Executive Committee and Plenary, the Working Group will initiate a process for re-evaluating all states for reciprocity compliance, likely incorporating some form of checklist and self-certification as was done with the 2002 Report. Our re-evaluation of state compliance is not intended to raise any issues or concerns about certification of states based on the standards of the 2002 Report. This report is intended to supplement, rather than supersede, the conclusions of the 2002 Report. Because of the state producer licensing assessments and the consideration of additional issues not raised in 2002, more information is available to the Working Group. We intend to utilize this information to implement a reciprocity framework that reinforces and strengthens producer licensing reciprocity.

The Working Group recognizes that some states may need to seek legislative or administrative changes in order to meet an updated reciprocity standard. Additionally, states may wish to evaluate whether continuing compliance may be achieved through waiver or other insurance department action. The Working Group is committed to working with NAIC members and individual states in developing, by the 2009 Fall National Meeting, a detailed process for carrying out a formal reassessment of producer licensing reciprocity under the updated reciprocity standard described in this report.