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Insurance Agent Licensing: Overview and Background on Federal "NARAB" Legislation

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Summary

The individual states have been the primary regulators of insurance in this country for the past 150 years. Congress specifically authorized the states' role in the 1945 McCarran-Ferguson Act (15 U.S.C. §§1011-1015), and state primacy in insurance regulation has been recognized in more recent laws shaping the financial regulatory system, such as the 1999 Gramm-Leach-Bliley Act (GLBA; P.L. 106-102) and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203). The system of multiple state regulators, however, has faced criticism over the years, with frequent focus on the efficiency of the system. One particular aspect of regulation that has been criticized by some as overly burdensome and inefficient is the licensure of insurance agents and brokers, known collectively as insurance "producers." Every state requires specific licenses, sometimes with differing criteria, and insurance producers have identified the need to have multiple licenses as a significant expense for their operations.

Organizations such as the National Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators (NCOIL) create model laws and undertake other steps to harmonize insurance regulation and laws across the country, including the promulgation by the NAIC of models for insurance producer licensing. The individual states, however, are sovereign entities, and any models suggested by the NAIC or NCOIL must first be enacted by state legislatures. The state authorities may amend models or may completely reject suggestions from outside groups. Often this is done with the argument that laws and regulations need to be adapted to particular local circumstances or risks, such as hurricane risks along coastal areas.

Federal proposals addressing multiple state insurance producer licensing requirements through the creation of a National Association of Registered Agents and Brokers (NARAB) appeared as far back as the 102nd Congress, and a version of NARAB was included in the Gramm-Leach-Bliley Act. These GLBA provisions, known generally as "NARAB I," were *conditional*, and would not come into effect if a majority of states passed laws providing for uniformity or reciprocity in insurance producer licensing. Although a sufficient number of states met the GLBA requirements and thereby prevented the creation of NARAB, insurance producers continued to identify issues in the state licensing system. As a consequence, "NARAB II" legislation, *mandating* the creation of a NARAB organization, was introduced in every Congress since the 110th. It was passed by the House in the 110th Congress and the 111th Congress, but was not considered by the Senate.

In the 113th Congress, the National Association of Registered Agents and Brokers Act of 2013 was introduced in both the Senate (S. 534) and the House (H.R. 1155). Under this legislation, membership in the NARAB organization to be created would permit insurance producers to operate in multiple states without obtaining specific licenses from these states. To become a NARAB member, an insurance producer would be required to have a license from at least one state, pass a criminal background check, and meet other requirements to be set by the association. The legislation would require that these additional requirements be not "less protective to the public" than the NAIC model law on insurance producer licensing. The association would be governed by a 13-member board made up of 8 current or former state insurance commissioners and 5 insurance industry experts. The President would appoint the board, with advice and consent of the Senate, and retain the ability to remove the board and override the NARAB organization's rules or actions. S. 534 was amended and ordered favorably reported by the Senate Committee on Banking, Housing, and Urban Affairs on June 6, 2013. On September 10, 2013, the full House of Representatives passed H.R. 1155 on a vote of 397-6.

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Insurance Regulation and Federal Legislation

The individual states have been the primary regulators of insurance in this country for the past 150 years. The 1945 McCarran-Ferguson Act[1] specifically authorized the states' role, and Congress has recognized state primacy in insurance regulation in more recent laws shaping the financial regulatory system, such as 1999's Gramm-Leach-Bliley Act[2] (GLBA) and 2010's Dodd-Frank Wall Street Reform and Consumer Protection Act[3] (the Dodd-Frank Act). Although Congress may have generally reaffirmed the state-based system in such laws, congressional interest in the operation of the insurance regulatory system has continued.

Much of the congressional focus on the insurance regulatory system since 1999 has been on the efficiency of the state-based system. Organizations such as the National Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators (NCOIL) create model laws and undertake other steps to harmonize insurance regulation and laws across the country. To be legally binding, however, any models suggested by the NAIC or NCOIL must first be adopted in a state. The states may amend models to fit local circumstances or may completely reject suggestions from outside groups. Various federal proposals have been advanced to change the workings of the state-based regulatory system, ranging from creation of a broad federal charter that might replace much of the state-based system to narrower concepts using federal powers to preempt some state laws while leaving the state-based regulatory system largely in place.

In the 113th Congress, issues around licensing for insurance agents and brokers (known generally as "insurance producers") have come to the fore in the form of legislation—the National Association of Registered Agents and Brokers Act of 2013, introduced and acted on in both the Senate (S. 534) and the House (H.R. 1155). This legislation, which would *mandate* the creation of a National Association of Registered Agents and Brokers (NARAB), is generally referred to as "NARAB II" legislation. "NARAB I" generally refers to provisions included in the Gramm-Leach-Bliley Act,[4] which *conditionally* allowed for the creation of a NARAB, but never took effect. Legislative language creating some version of a NARAB predated GLBA and appeared as part of broader legislation in the House during the 102nd and 103rd Congresses; this legislation was referred to committee and subcommittee hearings were held, but it did not advance further in the legislative process.

Insurance Producer Licensing

Licensing of insurance agents and brokers (known generally as "insurance producers") has long been an integral part of the insurance regulatory system. Individual states typically require insurance producers operating within their borders to obtain a license from that state with different licenses required often for different lines of insurance. Such licensure provides a

[1] 15 U.S.C. §§1011-1015.

[2] P.L. 106-102.

[3] P.L. 111-203.

[4] Specifically, P.L. 106-102, Title III, Subtitle C.

mechanism for insurance regulators to enforce standards of conduct, particularly with regard to consumer protections, as well as provides a revenue source to help defray the cost of the insurance regulatory system. Aspects of insurance producer licensing include specific education or knowledge requirements, such as passage of a written exam prior to licensing and continuing education afterwards and, in some states, criminal background checks.

The NAIC has adopted model laws regarding licensure and a model insurance producer license form, but individual states are free to modify such models, or not adopt them at all, resulting in variability in licensing requirements across the country. The number of insurance producers potentially affected by the variability of state licensing laws appears relatively large; in one survey, 83% of producers reported having licenses in at least 2 and up to 10 states. Larger insurance agencies tend to hold a larger number of licenses, with 47% of the firms of more than 500 financial advisors having licenses in 21 or more states.[5] Insurance producers who operate in multiple states have long sought increased uniformity and reciprocity across states to reduce their costs resulting from the multiplicity of license requirements. Insurance producers report, for example, that, on average, 3% of agency operating expenses are spent on "licensing compliance efforts," with higher figures (4.3%) at the smallest agencies.[6] Although insurance producers consider the multiplicity of licenses to be a burden, the requirements for local licenses and knowledge of specific local risks or legal requirements are considered important consumer protections by others. One consumer representative has argued, for example, "[Property and casualty] insurance varies too much state to state as respects law and risk to not maintain local control of licensure."[7]

The Gramm-Leach-Bliley Act attempted to address the multiplicity of different requirements among states for insurance producer licensing. Although many states satisfied the GLBA statutory requirements for reciprocity by 2002, insurance producers continued to identify inefficiencies and costs of the state licensing system in the years following. In 2008 testimony before a House subcommittee, for example, an insurance agent representative indicated that states continued to "impose additional conditions and requirements"[8] on non-resident agents despite the reciprocity called for in law. In 2009, the Government Accountability Office (GAO) cited issues regarding fingerprinting and background checks as particular barriers to uniformity or reciprocity in producer licensing and as potentially creating uneven insurance consumer protection in states where full-background checks were not able to be performed. GAO also found differences in licensing requirements and insurance line definitions as potentially creating inefficiencies that "could result in higher costs for insurers, which in turn could be passed on to consumer[s]."[9] In

[5] Survey statistics provided to CRS by the Insured Retirement Institute.

[6] Statement of Jon Jensen on Behalf of The Independent Insurance Agents & Brokers of America, before U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Securities, Insurance, and Investment, *Streamlining Regulation, Improving Consumer Protection and Increasing Competition in Insurance Markets,* Hearing on S. 534, 113th Cong., 1st sess., March 19, 2013, p. 2, available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=446f26f8-226d-436f-9894-8fe387828128.

[7] J. Robert Hunter, Insurance Director, Consumer Federation of America, quoted in NCOILLETTER, Issue 3, 2013, p.3, available at http://www.ncoil.org/news/2013_newsletters/Vol32013.pdf.

[8] Statement of Tom Minkler on behalf of the Independent Insurance Agents & Brokers Of America, before U.S. Congress, House Committee Financial Services, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, *Examining Proposals on Insurance Regulatory Reform*, 110th Cong., 2nd sess., April 16, 2008, p. 6, available at http://archives.financialservices.house.gov/hearing110/minkler041608.pdf.

[9] U.S. Government Accountability Office, *Insurance Reciprocity and Uniformity*, GAO-09-372, April 6, 2009, p. 21, available at http://www.gao.gov/products/GAO-09-372.

addition to concerns about the substance of the reciprocity in place, reciprocity laws have not been adopted by every state. The NAIC ultimately certified 47 states as reciprocal, but the 3 states not certified were California, Florida, and Washington, which together represented nearly 20% of the nation's population.

In addition to the costs that might result from the specific aspects of the insurance licensing system, any professional licensing regime acts as a barrier to entry for those who might be interested in providing services that require a license. Economic theory suggests that such barriers increase consumer costs to some degree and have the potential to be used as a protectionist measure to prevent competition, allowing license-holders to extract economic rents from consumers. Whether the public benefits resulting from licensure outweigh the costs is determined by policymakers on a case-by-case basis. Some form of licensure for those in the financial services industry has been generally accepted and is required in federal law for people involved in securities transactions with the public, for example.

Legislation in the 113th Congress

The National Association of Registered Agents and Brokers Reform Act of 2013 (S. 534 and H.R. 1155)

The National Association of Registered Agents and Brokers Reform Act of 2013, S. 534, was introduced in the Senate by Senator Jon Tester on March 13, 2013, and referred to the Senate Committee on Banking, Housing, and Urban Affairs. The committee's Subcommittee on Securities, Insurance, and Investment held a hearing on the bill on March 19, 2013,[10] and the full committee marked up S. 534 and ordered the amended bill be favorably reported on June 6, 2013.

Representative Randy Neugebauer introduced an identical bill as H.R. 1155 on March 14, 2013, and it was referred to the House Committee on Financial Services.[11]

S. 534 and H.R. 1155 as introduced would establish a National Association of Registered Agents and Brokers. Key features of this association include the following:

- The association would be a private, nonprofit corporation.
- To gain membership, insurance producers would be required to be licensed as an insurance producer in their home state, pass a criminal background check, and meet other criteria determined by the association, which shall not be "less protective of the public than that contained in the NAIC Producer Licensing Model Act."[12]

[10] U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Securities, Insurance, and Investment, *Streamlining Regulation, Improving Consumer Protection and Increasing Competition in Insurance Markets,* Hearing on S. 534, 113th Cong., 1st sess., March 19, 2013. Hearing webcast and statements can be found at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=72d49be4-ff44-4d01-862a-4654e13b2589.

[11] A previous version of this bill was introduced by Representative Neugebauer as H.R. 1064, but H.R. 1155 is the legislation that has been acted on by the House and, thus, the focus of this report.

[12] §323(d)(2) of S. 534 as introduced in the 113th Congress.

- NARAB members would be able to operate in any other state subject only to payment of the licensing fee in that state, rather than having to obtain a separate license in the additional states, as is often the case now.
- Members would still be subject to each state's consumer protection and market conduct regulation, but individual state laws that treat out-of-state insurance producers differently from in-state producers would be preempted.
- The association would be overseen by a board made up of eight appointees who are current or former state insurance commissioners and five appointees representing the insurance industry. The appointments would be made by the President with advice and consent by the Senate.
- The President could dissolve the board as a whole or suspend the implementation of any rule or action taken by the association.
- The association would submit annual reports to the President and the National Association of Insurance Commissioners.

Senate Committee Consideration

The Senate Committee on Banking, Housing, and Urban Affairs marked up S. 534 on June 6, 2013. The committee began with an amendment in the nature of a substitute offered by Senators Jon Tester and Mike Johanns. Although largely similar to the original legislation, this amendment made changes to the bill, including

- adding the Department of the Treasury as a conduit of information from NARAB to the President;
- requiring that copies of the NARAB bylaws, standards, and annual report be publically available on the NARAB website; and
- requiring the annual report be made to the President and the "States (including the State insurance regulators)" rather than the President and the NAIC (the NAIC was also removed from some, but not all, of the other reporting requirements in the bill).

In addition to the substitute, four amendments were offered in the markup. An amendment by Senator Tom Coburn to provide states the ability to opt out of participation in, and the effect of, NARAB was not adopted on a vote of 18-4. An amendment regarding the National Flood Insurance Program was offered by Senator David Vitter, but was withdrawn prior to a vote. Two amendments were adopted by voice vote. These amendments changed the following:

- The board of directors would have five appointees with "demonstrated expertise and experience" in various parts of the insurance industry, rather than being "representatives of" various parts of the industry following an amendment by Senator Elizabeth Warren.
- The NARAB organization would be specifically forbidden from receiving federal funds following an amendment by Senator Tom Coburn.

The amended version of S. 534 was then ordered to be favorably reported by voice vote and the bill was reported on July 29, 2013.

House of Representatives Floor Consideration

On September 10, 2013, Representative Neugebauer made a motion to suspend the rules and pass an amended version of H.R. 1155. The language of the amended version of H.R. 1155 closely followed the language of S. 534 as reported by the Senate Committee on Banking, Housing, and Urban Affairs, including the amendments by Senators Warren and Coburn that were adopted in the committee markup. The two bills differed slightly in the language relating to background checks, with the House bill requiring that fingerprints be submitted to the Federal Bureau of Investigation in the course of the search of criminal history records, whereas the Senate bill does not specifically mention fingerprints. In addition, the penalties for improper disclosure of background check information in the House bill were set at $50,000 per violation compared with the possibility of monetary fine plus two years imprisonment under the Senate bill. H.R. 1155 as amended passed the House of Representatives on a vote of 397-6.

Past NARAB Legislation

NARAB II

Legislation to *mandate* the creation of a NARAB organization, similar to S. 534 and H.R. 1155/H.R. 1064, was first introduced into the House of Representatives in the 110th Congress (H.R. 5611), with similar legislation introduced in the 111th Congress (H.R. 2554). The House passed these bills in the respective Congresses by voice vote, and the legislation was referred to committee when received by the Senate. NARAB II legislation was introduced in the 112th Congress (H.R. 1112 and S. 2342), but, unlike the previous Congresses, the House did not bring NARAB legislation to the floor in the 112th Congress.

The general outlines of the various NARAB II bills have remained similar. The various bills would amend the NARAB sections to create a NARAB organization regardless of state actions on reciprocity and uniformity. NARAB II legislation would create an organization similar to that originally envisioned in GLBA. It would be a nonprofit, private body, whose members would be required to be state-licensed insurance producers, but who could operate across states without having licenses from the individual states. The specifics of the NARAB II bills have, however, differed to some degree, particularly in the makeup of the board of directors and how the board would be appointed. The initial NARAB II legislation (H.R. 5611, 110th Congress) included a nine-person board of directors, four to be appointed by the NAIC and five to be appointed by the insurance industry. This was changed to an 11-person (6 insurance commissioners/5 insurance industry representatives) board to be appointed by the President with Senate confirmation in H.R. 2554 (111th Congress) and H.R. 1112 (112th Congress). The NARAB board was then changed to be a 13-person (8 insurance commissioners/5 insurance industry representatives) presidentially appointed and Senate-confirmed board in S. 2342 (112th Congress) and the current legislation. In addition, H.R. 5611 required a report by the NARAB association to the President, Congress, and the NAIC, while subsequent legislation required the report be made solely to the President and the NAIC.[13]

[13] The U.S. Department of Justice sent a letter to the Senate leadership following House passage of H.R. 5611 that identified concerns with the bill, including the appointments language in the bill and the requirement for reporting to Congress. See http://www.justice.gov/archive/ola/views-letters/110-2/10-01-08-hr5611-agents-brokers-reform-act.pdf.

NARAB I

Legislative provisions creating a "National Association of Registered Agents and Brokers" appeared as part of broad financial regulatory reform legislation in the 105th Congress[14] and the 106th Congress,[15] ultimately becoming law as part of what is generally known as the Gramm-Leach-Bliley Act in the 106th Congress. GLBA sought to address insurance producer complaints about the variation in state licensing requirements through a sort of provisional federal preemption of state laws. The law called for the creation of a private, nonprofit licensing body, the National Association of Registered Agents and Brokers, whose insurance producer members would have been authorized to operate across state lines without individual licenses from every state. Membership in NARAB I would have been open only to people already holding a state insurance producer license and who fulfilled other criteria. Although established by federal authority, the NARAB to be created by the provisions in GLBA would have been entwined in the system of state regulation. The NAIC would have appointed the seven members of the NARAB I board and had other oversight authorities.

The NARAB I language in GLBA also offered the states the opportunity to avoid creation of the NARAB I organization if a majority of the states created among themselves systems of either uniformity or reciprocity in insurance producer licensing within a three-year window after passage of GLBA. The NAIC was given the authority to determine whether the states met this GLBA standard, with the possibility of federal judicial review of the determination. The individual states and the NAIC reacted relatively quickly to this opportunity with the promulgation of an NAIC model law that would provide for reciprocity. A sufficient number of states adopted laws providing for insurance producer licensing reciprocity that the NAIC determined the GLBA standards to avoid creation of the NARAB I organization were met. As a result, the NARAB I organization was not created.

Original NARAB provisions

The first legislation specifically providing for the creation of a "National Association of Registered Agents and Brokers" that the Congressional Research Service has been able to identify was introduced in the 102nd Congress (Title IV of H.R. 4900).[16] The bill was reintroduced in the 103rd Congress[17] and subcommittee hearings were held that addressed NARAB,[18] but the bill was not acted on further.

The original NARAB provisions were part of legislation that would have created a federal commission for solvency oversight of insurers. The NARAB created by this legislation would have been similar to subsequent versions in that it would have been a nonprofit association whose members would have been state-licensed insurance producers, but the preemption of state law would have been narrower than in subsequent versions. The original version of NARAB would

14 Title IV of H.R. 10 and Title III, Subtitle B of S. 2590.

15 Title IV of H.R. 10 and Title III, Subtitle C of S. 900.

16 The Federal Insurance Solvency Act of 1992 (H.R. 4900), introduced by Rep. John Dingell on May 8, 1992.

17 The Federal Insurance Solvency Act of 1993 (H.R. 1290), introduced by Rep. John Dingell on March 10, 1993.

18 U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Commerce, Consumer Protection, and Competitiveness, *Federal Insurance Solvency*, hearing on H.R. 1290, 103rd Cong., 1st sess., April 28, 1993, 103-40, pp. 385-458.

not have permitted its members to operate with a single state license, but instead would have operated to enforce uniformity though a central clearinghouse and a uniform producer application. The board of directors would have been elected by the membership, and the Federal Solvency Commission to be created by the bill would have had oversight authority over this version of NARAB.

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