



Faist Government Affairs Group, LLC

CIB MEETINGS & LOBBYING ON DRAFT BROKER COMPENSATION DISCLOSURE REG.

On February 25-26, 2009, a select group of CIB's Officers and Board members met in Albany with key lawmakers and policymakers to discuss the Association's misgivings with the Draft Regulation on Producer Compensation Transparency, recently exposed for comment by the NYS Insurance Department:

http://www.ins.state.ny.us/r_emergy/pdf/prodtrans090129.pdf

The CIB team was spearheaded by President **Anthony Aquilino**, Immediate Past President **Peter Resnick**, Legislative Chair **Anthony Calafiore** and Board member **Al Caputo**, and guided by Legislative Counsel **Tom Faist**.

The first meeting was with Senator **James Seward** (R-Otsego), the Ranking Minority Member of the Senate Insurance Committee and current President of the National Conference of Insurance Legislators (NCOIL). Sen. Seward understood the issue well, and expressed the fact that he didn't think any regulation or legislation was necessary to require mandatory disclosure of insurance producer's compensation.

Sen. Seward indicated that he thought that this Draft Reg. was simply a carryover from the settlement agreements with then Attorney General Eliot Spitzer and the mega brokers, Marsh, Aon, Willis, etc., which ended the fraudulent quotes, illegal bid-rigging and steering kickback practices engaged in by such mega brokers. Seward said that any attempts to "level the playing field" between the mega brokers and Main Street independent brokers by regulation in the name of consumer protection, were misguided.

Sen. Seward said that he was headed to the NCOIL Spring Meeting in Washington, D.C., and that he would express his concerns with the Draft Reg. directly with Insurance Superintendent **Eric Dinallo**, who would also be attending the NCOIL meeting. Seward pledged to enlist the aid of his Insurance Committee colleagues: Senate Insurance Committee Chair **Neil Breslin**, Assembly Insurance Committee Chair, **Joseph Morelle** (D-Monroe), and Assembly Insurance Committee Ranker **Will Barclay** (R-Oswego).

Next, the team met with **Michael Kink**, Director of the Senate Majority Counsel & Program Group and **Daniel Ranellon**, Assistant Counsel. While both Messrs. Kink and Ranellon admitted that they weren't expert in the insurance area, they listened closely to CIB's viewpoints, took notes and asked intelligent questions. The CIB team left them

with copies of the Draft Reg. and also CIB's letter to the Superintendent of Insurance **Eric Dinallo** that outlines the Association's major concerns with the Reg. President Aquilino outlined major concerns over broker disclosure requirements at the time of renewal of an existing policy, since the carrier mails renewal certificates directly to the policyholder, bypassing the broker altogether.

The team then met with **Gaurav Vasisht**, Assistant Counsel to the Governor for Financial Services, **Jeffrey Mans**, Deputy Secretary to the Governor for Labor & Financial Regulation and **Brian Quiara**, Assistant Secretary to the Governor for Labor & Financial Regulation. Mr. Vasisht started the meeting by insisting that the Draft Reg. was only meant to "level the playing field" by requiring all brokers to divulge their means of compensation to the consumer, similar to the "assurances of discontinuances" contained in the mega brokers settlement agreements. Vasisht asked about contingent contracts and overrides. Mr. Calafiore explained that such agreements were generally not tied to premium volume, but are geared to retention of business and less than 50% loss ratios. Calafiore estimated that these agreements account for less than 5% points on the back end of placement of a policy with a given carrier.

Other than the argument that compensation disclosure would lead to illegal rebating of premium to policyholders, Vasisht asked why not disclose compensation? The CIB team members stated that rates are filed with the insurance department, including commission rates, and that the consumer would not benefit from such disclosures, since the total premium paid would not change from broker to broker, despite internal variances in compensation paid to different brokers. It was also explained that a broker could be acting in different capacities, depending upon the carrier with which coverage was ultimately placed. The bottom line is that in a very competitive insurance marketplace, a broker will strive to find the right combination of price and coverage for each insured. This is in the broker's self-interest, both to establish a long-term business relationship with the client and to avoid E&O claims in litigation down the road for improper coverages.

The CIB team then met with **Wendy Burns**, Insurance Team Leader and **David Kelly**, Insurance Policy Analyst at the Governor's Office of Regulatory Reform (GORR), the state agency that oversees promulgation of all state agency regulations. Ms. Burns indicated that she hadn't been aware of the Draft Reg. until CIB Legislative Counsel Tom Faist brought it to her attention. Burns reviewed the Draft Reg. and indicated that the Insurance Department would have to file Regulatory Impact Statements, documenting the justification for the Reg. to GORR, prior to receiving approval to publish the Draft Reg. in the State Register, which would then subject it to review under the State Administrative Procedures Act (SAPA). She said that GORR would give the Reg. its utmost scrutiny, given the concerns raised by CIB.

Burns did indicate that if the Insurance Department declared the Reg. to be promulgated on an emergency basis, it could circumvent GORR's usual notice and hearing procedures and those of SAPA, but only for a short time. However, Burns didn't think that this Draft Reg. rose to the necessity of adoption on an emergency basis.

The CIB team met with **Evan Schneider**, Committee Analyst and **Kate Powers**, Committee Counsel, to Senate Insurance Committee Chair **Neil Breslin** (D-Albany). Mr. Schneider stated at the outset that his feeling is the Draft Reg. goes too far. He then asked CIB to look at both the NAIC and NCOIL Model Producer Licensing Acts regarding disclosure of compensation, to see what CIB could live with. Ms. Powers, who was just recently employed as a counsel in the Life Bureau of the NYS Insurance Department, indicated that it was her understanding that this Draft Reg. was being driven by the Executive floor of the Department and not the underlying Property/Casualty or Consumer Services Bureaus.

The meeting with Assembly Insurance Committee Ranker **Will Barclay** (R-Oswego) went extremely well. Mr. Barclay basically made the same pledge that Sen. Seward had made, that he thought the Draft Reg. was unnecessary, and that he would speak with Superintendent Dinallo about it at the upcoming NCOIL meeting in Washington, D.C.

Finally, the meeting with Assembly Insurance Committee Chair **Joseph Morelle** (D-Monroe) and Committee Director **Justin Wilcox** examined all the whys and wherefores of the Draft Reg. Mr. Morelle indicated that he had already expressed his dismay over the Draft Reg. with Superintendent Dinallo and First Deputy Superintendent **Kermitt Brooks**, and that he would reiterate his misgivings at the NCOIL meeting. Morelle and Wilcox said that they were still trying to ascertain what the Insurance Department was trying to accomplish with the Reg. What is the problem? Wilcox indicated that the Liberty Mutual case clearly stated that contingent compensation arrangements are legal.

Morelle said the Brooks assured him that the Department would not promulgate a Reg. with which the Assemblymember was “not on same page.” Morelle said that this was good, otherwise he might sponsor legislation to supersede such a Reg.

Morelle said that his feeling is that brokers need not disclose specific dollar amounts or percentages of compensation. He did say that he thought that disclosure of the capacity that a producer was operating under might be appropriate (e.g., appointed agent of carrier, independent broker, captive agent, direct writer, etc.). Mr. Resnick indicated that Interboro Insurance actually appoints independent brokers with the power to bind coverage for the carrier, but this doesn’t amount to an appointment as an agent of Interboro.

Messrs Calafiore and Caputo explained the compensation disclosures currently being made by Travelers and Progressive insurance companies in their policies. Morelle and Wilcox both thought that these types of policy disclosures should suffice.

Morelle made the observation that there are always a few bad apples in any industry, citing the Bernie Madoff debacle in the financial security investment industry.

Mr. Resnick and Mr. Faist then represented CIB at the subsequent “All-Industry” meeting on the Draft Reg., hosted by PIANY. The meeting included representatives of CIB,

PIANY, IIABNY, NAHU, NAIFA-NYS, NAILBA, PIWA, LICONY, PCIAA, NYIA, ELANY, NAMIC and State Farm.

Kathy Weinheimer, SVP with IIABNY began the meeting, since IIABNY has met with First Deputy Superintendent of Insurance **Kermitt Brooks**, Deputy Superintendent and General Counsel **Robert Easton** and Special Counsel **Matthew Gaul**. Weinheimer said that Brooks was much more conciliatory in his remarks at their recent meeting, stating that the Draft Reg. was for “exposure only” to generate discussions in the industry. The Department asked was IIABNY could live with, and they responded that they could live with voluntary disclosure upon request by client. IIABNY promised to give the Department suggested language, but not until after the work groups on the Draft Reg. had concluded.

CIB Legislative Counsel **Tom Faist**, provided the group with a synopsis of CIB’s 2-days of meetings with the Insurance Committee Legislators, Legislative Leadership, Governor’s Office and GORR. The bottom line being that everyone, even the Governor’s Office, thinks that the Insurance Department Draft Reg. goes too far in requiring mandatory disclosure of broker compensation, whether in dollars amounts or formula calculations, to no real benefit to consumers, other than to instill illegal rebating of premium.

Mark Yavornitzki, EVP & CEO of the NAIFA-NYS, expressed his disbelief that the Department has pulled back from the Draft Reg. Yavornitzki said that the life underwriters are totally opposed to mandatory disclosure of broker compensation.

NAHU member **Peter Andrew** said that health underwriters already are limited in their compensation under group health policies and must make disclosures on Form 5500 under ERISA for self-insured plans.

PIWA’s Legislative Counsel, **Robert Pastel**, said that the wholesale brokers were exempt under the Draft Reg. and thus have no official position, but are supportive of the independent brokers’ opposition to the Reg.

ELANY’s representative expressed the same position as PIWA.

Someone said that CIAB might be advocating in favor of the Draft Reg.

PCIAA Regional Manager & Counsel **Paul Magaril** said that his Association is adamantly opposed to the Draft Reg., was preparing a comment letter to that effect, and would be participating in the Departmental P&C work groups.

NYIA President **Ellen Melchionni** said that her Association would support the independent agents. She said that NYIA might ask that personal lines auto & homeowners’ policies be specifically exempt from the Reg.

IIABNY said that the Department has indicated that the Reg. is meant to include all producer licensees, and is meant to cover captive agents.

PIANY Director of Government Affairs **Matthew Guilbault**, asked if brokers or carriers should send any disclosure notice?

LICONY SVP **Jana Lee Pruitt** said that life insurers currently disclose compensation arrangements in the suitability notices required by Reg. 74.

PIANY Legislative Representative **Allison Lee** said that Senator Breslin is looking at the NAIC & NCOIL Model Acts. She thinks that the industry should come up with proposed language, but not until after the conclusion of the Department's workshops. Yavornitzki said that NAIFA favors Section 18 of the NAIC Model Act, but hasn't taken a position on the NCOIL Model Act. Pruitt said that LICONY also supports Section 18 of the NAIC Model Act. PIANY Senior Research Analyst **Ellen Kiehl** explained that NAIC Model requires mandatory disclosure of actual dollar amounts of compensation, but that the NCOIL Model requires disclosure only if a producer receives both a fee from the client and a commission from the carrier, together with the method of calculation of the compensation.

PIANY Past President **Robert Franzese** said that voluntary broker disclosure and carrier policy notices should solve the problem. Ms. Melchionni said that she didn't think that would be enough to mollify the Department.

IIABNY Legislative Representative **Jill Muratori** asked about the timing of disclosure notices: time of quote v. point of sale. Consensus was that the Department would insist on disclosure before policy is purchased.

PIWA Legislative Counsel Pastel said that the citation that the Draft Reg. was being promulgated under the Unfair Trade Practices Act is problematical. This, coupled with the added insurance fines & penalties proposed in the Executive Budget which remove current caps, would allow the Department added leeway to sanction licensees for violations of Regs.

NAIFA-NYS member **Gordon Zuckerman** said that life brokers' compensation is dictated by Section 4228 of the Insurance Law. He said that statutory disability income insurance commissions couldn't be negotiated. Insurance Law Sec. 4224 prohibits rebating of life or accident & health premiums.

Franzese said that "empowering the consumer" to engage in rebating of premiums, would disrupt the insurance marketplace.

CIB Immediate Past President **Peter Resnick** interjected the problems that would occur upon renewal of policy terms – how is the brokers supposed to handle mandatory disclosure requirements in such instances?

Yavornitzki said that NAIFA-NYS is formally asking the Department in writing to produce evidence of “abuses of the consumer” from its administrative hearing record. To their knowledge, no consumer complaints have been filed with the Department.

Pruitt said that LICONY is producing a white paper for the Department, regarding the adverse impact on the producer community after the UK and Australia enacted their producer disclosure and suitability requirements.

Kiehl said that PIANY was trying to put producer compensation in context with the “capability” of independent agents and brokers to represent the consumer, versus captive agents and direct writers.

Franzese said that mutual funds must disclose total expenses, including advertising, in its fund prospectus to prospective investors.

The meeting concluded with the consensus being that the separate groups and associations would continue to meet separately with the Governor, Legislature, GORR and the Insurance Department, providing consistent messages of opposition to the Draft Reg., and that most would participate in the upcoming workgroups. Consensus language would be developed, if needed, after the workgroups conclude.

Periodic all-industry meetings would continue to be held.

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