



## **National Association of Professional Insurance Agents**

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The National Association of Professional Insurance Agents (PIA National) represents more than 10,000 Main Street independent insurance agencies, with members in all 50 states and Puerto Rico.

*“The regulatory structure for financial institutions in the United States has served us well over the course of our history. Much of the basic regulatory structure associated with financial institutions was established decades ago. While there have been important changes over time in the way financial institutions have been regulated, the Treasury Department believes that it is important to continue to evaluate our regulatory structure and consider ways to improve efficiency, reduce overlap, strengthen consumer and investor protection, and ensure that financial institutions have the ability to adapt to evolving market dynamics, including the increasingly global nature of financial markets. The Treasury Department’s review of regulatory structure will focus on all types of financial institutions: commercial banks and other insured depository institutions; insurance companies; securities firms; futures firms; and other types of financial intermediaries.” – Excerpt from Federal Register Notice*

### **PA National Goals for Insurance Oversight System:**

PIA National fully agrees with this excerpted portion of the Notice’s statement from the Treasury. PIA National supports and each year works in The Several States and federally to achieve an improved, modernized, successful and effective insurance regulatory oversight system. Much progress has been made, but more is needed.

PIA National believes that a successful insurance oversight system should be:

1. State-based and functional at the state level;
2. Highly coordinated and complementary between and among states;
3. Consistent and complementary with the dynamic nature of insurance common law and in accord with all relevant court decisions;
4. Flexible enough to respond to unique and necessary state differences;
5. Able to interface completely with existing federal law related to insurance while coordinating with and complimenting state law;

6. Legally understood and fully considered when coordination and complementary action between and among other financial services sectors is required;
7. Able to work with Congress, as The Several States determine when and where such efforts are needed to support state modernization goals;
8. Able to provide an open, competitive insurance marketplace that supports a variety of competitors, products, and pricing options;
9. Fair, balanced and equitable in its treatment of competitors and classes of competitors, so that all have equal access to the insurance marketplace;
10. Provide for effective enforcement and policing to assure a financially sound, fair, competitive market for policyholders;
11. Able to assess market conditions and practices as they both affect insurance policyholders, but also as insurance affects the obligations of policyholders to the public; and
12. Funded adequately to attract and train effective regulators and perform oversight functions.

PIA National has always understood that because of the McCarran-Ferguson Act, Congress has a responsibility to periodically review the insurance state-based system to ascertain its proper function and progress. In doing so, Congress rightly expects state insurance authorities and industry members to report and demonstrate the improved workings and effectiveness of recent changes; present an outline of planned “next-steps;” be advised of challenges to these goals; and receive recommendations from the states as to how the federal government might be able to help or get out of their way. Last, this very active interest and regular review by Congress is itself an incentive to state authorities to keep the progress going and find ways to work out the challenges.

**More Federal Knowledge of Insurance Law:**

*However, PIA National believes that there is something missing from this state-federal process. It is that Congress and the federal government do not know or understand even the very fundamentals of insurance law and the extraordinary import of insurance law to the form and substance of insurance oversight systems.*

A simple example to illustrate our point can be found in the Gramm-Leach-Bliley Act. The term “Home State” is used in referring to the state in which the financial institution is domiciled. This term is adapted directly from banking law, and found in both state and federal banking law *with consistent meaning*.

However, insurance law has a number of terms that may be used in determining an entity’s site that are dependent upon circumstances. Prior to GLBA, “HOME STATE,” as a term of legal art, did not exist in insurance law. Insurance oversight officials and industry competitors still must struggle to “convert” all the

previous insurance law terms used, to accommodate this term, “HOME STATE,” that in insurance law still lacks clear definition. The result is at best muddled, and there is still no adjudicated validation of this banking term in insurance common law where the usual and customary insurance law terms and references are used and required.

PIA National believes that Congress adopted McCarran-Ferguson Act because at that time Congress understood the extraordinary legal challenges that would occur if oversight were brought to the federal level. Members of Congress saw that insurance, compared to almost any other form of commerce, has the broadest, deepest, and most detailed body of insurance common law. This insurance common law is the principals-base from which insurance oversight systems are formed, to which insurance competitors comply and conform their insurance policies and practices, and which is totally integrated with all other bodies of state law, common and otherwise.

Today, the three major principals upon which McCarran was based in 1945 are still evident. The insurance business operates across all state lines and, today, globally. However, the business of insurance still *functions and effectuates* on a state-by-state, consumer-by-consumer, policyholder-by-policyholder basis. Insurance oversight systems are a subset inside of the greater body of insurance common law that is dynamic.

#### **Optional Federal Charter Not Workable:**

PIA National believes that the fundamental public purpose and obligation of all regulation is the safety and protection of the people. This includes supporting a sound and competitive marketplace, but it also requires oversight and enforcement of commercial participants so that the law is complied with for the benefit of the public. It is the public, i.e. the floor of the marketplace, where the function and effects of any commercial operation occur.

Optional Federal Charter (OFC) in insurance is not a new concept. In modern times, Senator Edward Brooke (R-MA) first introduced it in 1970. From the perspective of an insurance practitioner wanting to launch marketing efforts across the U.S., OFC is great.

But it is the obligation of government authorities to assess the concept in terms of its functionality in the business and law of insurance, i.e. “at the floor of the marketplace.” And since insurance law is overwhelmingly state-based and state functioning, the assessment of state authorities would seem to be extraordinarily critical to Congress (and in the case of this submission, Treasury) in their deliberations.

For example, state treasurers might be asked as to their states’ reliance on insurance premium taxes as sources of general revenue – and maintaining their current formula of being paid on a gross sales receipts basis. You’d find that

insurance premium taxes for all 55 U.S. insurance jurisdictions are in the top three general revenue income producers.

State courts might be asked about what potential conflicts could they see arising between, for example, federal OFC regulations and already established state insurance law. . State legislatures would need to address what impacts and implications this might have on their ability to make or change their own state's laws and what the potential direct adverse market impacts could befall their states' insurance marketplace.

State insurance regulators could provide current examples where federally imposed law over and on the insurance system, for instance ERISA, has caused countless issues, and how Congress does not seem able to muster the will to remedies these.

Commercial competitors in all markets always want easy entry, to do things their way as much as possible. However, designing a regulatory scheme to address the needs of competitors in one section of the marketplace, which creates disadvantages for competitors in other market segments, is counterproductive, in that it discourages competitiveness rather than enhances it. In turn this defeats the regulatory goal of supporting a competitive marketplace for consumer's benefit.

Because of the risk of such a significant unintended consequence, PIA counsels caution, great care and deliberate consideration. However, we do not see an OFC form being functional or legally sound. .

### **Resolving Current Legal Conflicts Would Help:**

Rather than heading off in a new national, federal, global direction for insurance oversight, all can learn and improve much by attending to the conflicts already created.

For example, there is a portion of our PIA membership that works with banks on many insurance programs, or is the sub/affiliated independent insurance agency operation of such institutions.

In these instances, there are a number of bank-related obligations that require certain operational practices. Banks are requiring these PIA agencies to conform to these procedures. . However, these agencies find that there is a growing number of these bank-driven directives that are in direct conflict with insurance law, leaving the agency potentially exposed to regulatory liability and tort action. . For example, OFAC has bank regulations as to verifying customer identification. However, OFAC has yet to issue specific regulations for the insurance industry. Also, banks must make clear to customers what products of theirs are or are not FDIC insured. These are obligations on banks, but the banks either transfer or extend these compliance requirements to the agencies. The banks send their

customer verification procedures and FDIC-notice forms to these PIA agencies, requiring them to use these in their customer interactions.

The PIA agencies' challenges are threefold:

- Under many aspects of insurance law across the states we are already prohibited from asking for such ID, as well as may not deny insurance services on this basis.
- Insurance agencies sign (and insurance law requires and presumes) agreements with insurers. The "principal" that decides this nature of business practice – and the obligated principal party under these federal laws and some of Treasury's other regulations in this area is the insurer, not the agency – and most definitely not the bank.
- The bank's form most times is not filed and approved by the state department of insurance, so therefore it is deemed "unauthorized," and agencies may not issue "unauthorized forms or notices."

PIA National has met with Treasury officials several times on these integrated financial services compliance conflicts. But bank regulators have been unmoved, and our PIA agencies are still in a quagmire.

#### **Principals-Based Regulation:**

Over the last six months and increasing, the concept of "principals-based" regulation has entered the insurance oversight discussions. However, it is doing so from the many different disciplines and perspectives within the insurance business. Each brings their "take" on the meaning and function of their view of this concept. The accountants have their view, New York Insurance Department has theirs, alien insurers and EU II suggest their definitions and so on. We have included our earlier letter to the Secretary as further illustration.

PIA National believes that insurance law, and therefore its oversight systems, has always, is, and will always be principals-based. Those principals are the deep body of insurance common law developed over almost 300-years. And these are the major reference points for all insurance competitors and authorities in terms of crafting rules and practices based upon these principals. PIA has included our issue sheet on insurance law and compliance for insurance producers that is highly illustrative of our point.

Granted that the business and practice of insurance is very much different than other forms of commerce even as compared to other related financial services. But the complexity of insurance rules and compliance practices are in great part because insurance common law requires/expects it of insurance. And insurance common law has been able to rationally and with equity apply these principals in a case-by-case specific and differentiated manner to allow/tolerate a very open

market supporting many different competitors that conduct their insurance business operations in many different ways.

PIA National has sponsored a professional liability (E&O) insurance program for our members since 1941, making us the oldest professional liability affinity group in the country. From the outset, PIA members focused our efforts on both providing E&O insurance **and** insurance agency loss prevention seminars. Their motto was, *“Know the law. Obey the law. Practice according to the law.”* These PIA members were decades ahead of all others,

Consequently, PIA National has the broadest and longest experience with insurance law and practice from the floor of the marketplace up. And we are committed to maintaining a clear understanding and ability to guide members’ suggested practices.

**Areas to Seek Solutions:**

PIA National believes the discussions should be on what improvements to rules and requirements need to be made. In doing so one must ask the question as to whether the challenges in practices are rules-based (i.e. regulatory/administrative law) OR ill-drafted adopted statute-based (i.e. legislature) OR like it or not, established insurance common law?

Given the legal structure of insurance, PIA National is an avid supporter for an **ALL** States Compact for Insurance Regulatory Oversight. We have supported this concept for over 30-years, and were very pleased with the comprehensive discussion provided on Compacts during the most recent National Conference of Insurance Legislators (NCOIL) meeting. We are hopeful that the National Association of Insurance Commissioners (NAIC) will provide equal attention to the subject and vehicle.

Because of the nature of insurance law, most definitely because of the McCarran-Ferguson Act, and that, generally, insurance regulatory actions are practiced by coordinating and cooperating across state lines, we believe that an ALL STATES COMPACT for insurance oversight is very doable, legally sound, and the best form to interact with federal interests. Comparisons to other forms of state failed compacts are not relevant.

The compact would apply to all statutory operations of insurance oversight. We do not believe in developing a separate compact vehicle for sets of insurance products or different lines of insurance and the like. With its states, the compact would harmonize and/or develop common requirements, where possible, across all lines of insurance, and provide specific lines and/or product requirements where needed. . And once the All States Compact has been adopted (at least a 5-year process), the states with their compact may wish to come to Congress to have Congress adopt the compact with other improvements so that existing federal insurance rules and regulations would come in line (not pre-empt or

conflict) with state-based insurance oversight and insurance common law and practice.

The role for federal interests in this matter is to work *with* states in developing and moving forward the ALL STATES COMPACT vehicle.

PIA National is available to provide more details, examples, shared expertise and materials. Please contact Patricia A. Borrows, Senior Vice President, PIA National, [patbo@pianet.org](mailto:patbo@pianet.org); 703-518-1360.

Thank you.  
Patricia A. Borowski  
Senior Vice President  
PIA National

Attachments:  
November 7, 2007

Honorable Henry M. Paulson, Jr.  
Secretary of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

Dear Secretary Paulson:

The National Association of Professional Insurance Agents (PIA) represents more than 10,000 Main Street independent insurance agencies, with members in all 50 states and Puerto Rico, and we support your broadly stated goal of increasing competitiveness in financial institutions. However, we are greatly concerned by your department's Notice of Request for Comments published in the Federal Register on October 17, 2007 as part of your review of the financial regulatory structure of the United States.

PIA will submit formal comments as requested, however the specifics of this published request for comments raise critical concerns about the direction, purpose and intent of the review process itself, concerns we are compelled to address directly to you at this time.

Rather than soliciting comment from interested parties in an objective manner, this Notice poses a series of questions that, based upon how they are framed, appear designed to lead those responding to certain predetermined conclusions, i.e., they are "loaded questions." Of specific concern to us:

- 1) This Notice makes note of countries that have moved toward creating a single financial market regulator, citing examples, then asks what ideas can be gleaned from these structures "that would

improve U.S. capital market competitiveness.” This question is leading, and it seems based on an assumption that current United States capital markets and insurance regulations are defective and non-competitive, and therefore should be restructured in a manner to conform to those of foreign nations in an attempt to assist our nation’s competitiveness in global capital markets.

There is no request or expectation in your Notice, either implied or expressed, that submitted comments address whether any such changes would harm U.S. domestic insurance markets. Nor, indeed, does your request even appear to seek negative lessons learned from countries that have moved to a single financial market regulator.

- 2) A question is posed that asks for comment on a “principles-based” means of regulation versus a “rules-based” approach. The question notes that some have advocated adopting a “principles-based” approach, rather than a “rules-based” approach, and that others have suggested melding the two approaches. But then, the question that is posed asks “could a more principles-based approach improve U.S. competitiveness?”

It is abundantly clear from the way in which this question is presented that it is a leading question designed specifically to elicit comments favorable to a “principles-based” approach. This is especially the case since the question fails to ask those responding whether retention of a “rules-based” approach is, in fact, preferable.

Also implicit in this question is an implication that “rules-based” approaches are somehow not based upon legal principles. In fact, under U.S. law, all rules-based systems must be, and are, based upon the principles expressed in the related body of law, both judicial and statutory.

Of particular concern to PIA are several questions relating to insurance (Section II., 2.2).

- 3) The three questions that specifically relate to insurance all attempt to elicit comments supportive of federal regulation of insurance, as opposed to the continuation of state regulation of insurance. No attempt is made to disguise the clear bias of these questions. Reading them, it is abundantly clear that the Treasury Department thinks that federal regulation of insurance is preferable. The biased nature of these insurance questions may lead people to conclude that comments to the contrary are neither solicited, nor will be seriously considered.

PIA is concerned that the Treasury Department has presented itself and its agenda through this Notice as already prejudiced in favor of federal regulation of insurance in order to artificially force creation of “national” insurance markets, with a single focus on changing the U.S. marketplace in order to accommodate foreign competitors.

PIA believes that regulatory structures and markets, capital or otherwise, should never be designed specifically to enable one specific set of competitors to attain competitive advantages or leverage over other marketplace competitors, a view we hope the Treasury Department will ultimately embrace.

Additionally, we are concerned by the apparent assumption that the best way to successfully compete is to abandon our own regulatory structures and replace them with those adopted by the European Union, or individual foreign nations.

The foreign insurance marketplace and insurers (legally referred to under U.S. insurance law as “alien”) have always been and will always be an important part of a well-functioning and financially sound U.S. insurance economy. Foreign carriers participate successfully today in the U.S. with more benefits, opportunities and profit than are afforded to U.S. insurers in other countries.

In light of this, PIA opposes efforts to compromise our nation’s own standards in order to attract new alien entities who want things to be done their way to make it easier for them, not for the betterment of our U.S. carriers providing insurance domestically in the United States, or for U.S. insureds.

Additionally, as we will detail in our formal response to your Request for Comment, PIA supports state regulation and oversight of insurance, not industry-managed self-regulation under the guise of global competitiveness.

We regret that the substance, tone and underlying assumptions contained in this Notice in the Federal Register lead us to conclude that the Treasury Department may have already made up its mind regarding the recommendations that it will make at the conclusion of this review process, an observation that we do not make lightly. We believe this will ultimately serve to undermine the validity of this review, compromise its effectiveness and detract from, rather than advance, your goal of increasing competitiveness.

Sincerely yours,

Robert P. Page  
President

Leonard C. Brevik  
Executive Vice President & CEO

cc: Executive Committee, National Conference of Insurance Legislators  
Mr. Walter Bell, President, National Association of Insurance  
Commissioners  
Gov. Tim Pawlenty, Chair, National Governors Association  
Mr. Chuck Chamness, President & CEO, National Association of Mutual  
Insurance Companies  
Board of Directors, National Association of Professional Insurance Agents



# ISSUES

## **PIA National Stewardship Code of Conduct Law & Oversight of Insurance Producer Practices**

October 2007

### **Our Position:**

**PIA supports state regulation and oversight of insurance, not industry-managed self-regulation. PIA supports the comprehensive system of insurance statutory and common law that already direct practice standards to foster fair competition and protect consumers.**

- The comprehensive network of laws, regulations and guidelines set by state legislatures and enforced by regulators affirmatively articulates what is the required standards of insurance practice set and expected by those states.
- These work in complement to, with and as an in-set to the larger body of insurance common law. Insurance common law further elaborates as to what is or may be expected of insurance producers' practices given specific circumstances involving insurance transactions and practices.
- Together, expressed insurance statutory/regulatory requirements and the broader scope of insurance common law expectations of insurance practices establish an extra-ordinary detailed, broad-scope of ever-dynamic insurance law guidelines for any person's practices engaged in the business of insurance.
- Insurance law also expects that all consumers are entitled to and will receive professional, prudent, reasonable, usual and customary obligations/treatments from any and all persons in the business of insurance. Insurance law does not apportion classes of insurance producers or their practices upon a cast-system of minimum, fair, good or best obligation/liability. Either the insurance producer did or did not do what they should have done or not done based upon the particular circumstances in the matter.

- As with all persons engaged in the business of insurance, Professional Insurance Agents are already legally required and expected to know what the law requires and/or may expect of them, and to execute and maintain the practices that support their compliance with the law.
- These sets of legally required and expected insurance practices are far more detailed and a fact of insurance law than and as compared to any Code of Ethics in any industry.
- The NAIC Insurance Unfair Trade and Unfair Claims Practices Model Acts serve as one area of ongoing updatable repository listing *the vetted and legally solidified* required practices of all persons engaged in the business of insurance. *NAIC should attend to regularly.* Together with the Producer Information Sections of each state's DOI website (which should be comprehensive and updated by the DOI), these provide PIA members with specific reference and guidance.
- Further, PIA members are encouraged to follow the reporting of FC&S and/or PF&M, publications dedicated to evaluating court decisions, published settlements, and insurance policy language and practice that are constantly changing across the country, insurance sectors, competitors and the like. This adds to the specific instructions and directions PIA members receive from their insurers regarding each insurer's specific insurance practices, rules, and policy meanings.
- In 1987, as a founding member of the Consumer Insurance Interest Group (CIIG), PIA National Board of Directors affirmed the standing right of all insurance consumers to: be informed; insurance protection; be heard; have choice; service; and redress. And that insurance professionals should be up to date, informed, support loss control; maintain & report accurate records; comply with policy provisions and law; and report fraud.
- This is why PIA National's organizational mission and fundamental stewardship responsibility is to provide our members' with what they need for and support their successful and continuing/ongoing development as insurance professionals. We do so with and through PIA affiliates, and a part of these educational/instructional/information are supported by/invested in by the insurers that provide E&O insurance for PIA members/type agencies.
- Further, PIA believes that should there be gaps in this established legal network that practice guidelines will expand to respond to those gaps and/or PIA will suggest and work for new regulations to fill the gaps.
- Last, PIA National is a founding organization (along with others) of CPCU and CLU, as well as CIC organizations and societies. In doing so we provided the Code of Ethics & Conduct for these professional certification groups (v/v achievements in and maintaining professional knowledge), and PIA National continues to support these organizations, very popular among PIA members.

### **Background**

Over time, producers have been subject to an increasing body of statutes, regulations and common law. In the individual states, at the NAIC and NCOIL, PIA has been a partner with regulators and legislators to enact and enforce rigorous standards for producers. PIA worked with the NAIC on the Unfair Trade Practices Act and the Unfair Property/Casualty Claims Settlement Practices Model.

Other professions, such as doctors and lawyers, developed codes of ethics because their businesses are largely self-regulated, and “the regulated” are self-contained business service entities. Their state medical boards and legal bars are sanctioned by the states as quasi-authoritative bodies to set rules and enforce compliant practices. They act most times in lieu of state legislatures and/or state established administrative law appointed agencies and state-employed regulators.

For insurance, we have a special department within the state government whose sole purpose it to regulate the business of insurance. We believe this has been effective and we advocate that this regulatory system continue. From the time a producer takes their pre-licensing education courses to the time they give up the license, the insurance producer is heavily regulated.

### **Current Situation**

Some insurance regulators have suggested that the insurance producer community might benefit from a code of ethics. This is in part a DOI response due to concerns over 2004 misdeeds within the mega-broker community, and the forthcoming NAIC insurance producer CE requirement for 2-3 hours of insurance “ethics.”

PIA points out that the alleged 2004 wrongful acts were (already) against the law in every insurance jurisdiction *and* the law already expected that insurance producers would/should know. Anyone willing to break or ignore of the law for their own gain will not be dissuaded by or more knowing because of a “code of ethics.” Law has “teeth,” while codes have issues.

A code of ethics (as well as SROs) may create extra legal liability for producers; may expose them to increased Errors and Omissions (E&O) insurance claims; and can create legal conflicts of interest & discrimination. Hence, most are expressed as professional aspirations. This is why PIA strongly believes that if there is a voluntary standard that the producer community should be doing then with insurance regulators and legislators, we must develop a requirement, not a voluntary goal.

Last, PIA’s paper clearly points out that persons engaged in the business of insurance must be guided first and foremost by the very complex and detailed body of legal principals, as expressed by insurance common law. These legal principals are the basis and drive the further detail of insurance statutory and regulatory laws. These insurance requirements and rules (based upon the legal principal of insurance law) give more specific instructions as to how the business of insurance is to be practiced under the insurance common and statutory requirements of that state.