

**“BORROWED WISDOM”  
FOSTERING A PARTICIPATORY REGULATORY ENVIRONMENT BY  
MAXIMIZING USE OF THE ADVISORY BODY CONCEPT**

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*Introduction*

In the midst of the recurring debate over state versus federal insurance regulation, recently intensified by the Gramm-Leach-Bliley Act (“GLB”), a frequently heard complaint which is common to *both* regulatory levels is the absence of meaningful industry input into the regulatory process.<sup>2</sup> This criticism is undoubtedly justified in many instances. There will always be occasions when regulatory officials, either by design or sheer workflow burden, undertake to establish and enforce regulatory policy without regard to a thorough consideration of the practical, financial, or operational impacts upon the entities being regulated. However, it is a fair question to ask whether, in many other instances, regulators would gladly entertain industry input but the insurance industry itself bears substantial responsibility for the regulatory “neglect” about which it complains.

So the reader will not be in doubt, the thesis of this article is that the insurance industry should – and *can* – have a more prominent “voice” in the day-to-day development and implementation of regulatory policy. Given the shifting dynamics introduced by GLB, this is a particularly opportune time for industry representatives to become proactive in the informal dialogues which will shape the regulatory playing field of the twenty-first century. A particularly attractive and flexible means of fostering such an inflow of industry views is the advisory body concept.

However, as in any participatory process, careful planning and senior management support must be committed to the formulation of the industry voice and the precise positions to be articulated. The level of enthusiasm for direct industry participation cannot be viewed solely from the negative perspectives of diversion of corporate management resources or concerns about negative impacts on government-relations budgets. Above all, such participation should not be made vulnerable to failure and frustration as a consequence of fatalistic predictions that “it won’t make any difference.” The only approach that will virtually assure such a futile result is a government affairs strategy built upon silence, passivity, and non-participation.

The overarching purpose of an aggressive advisory body approach to regulatory issues is the ability to invest regulatory personnel with the “borrowed wisdom” which can be funneled through an advisory body. An impressive array of experience, knowledge, and talent can be assembled by industry and trade association representatives and packaged for consideration by regulatory personnel, most of whom will readily concede that they are overworked and understaffed and, thus, not always able to fully absorb – or even know about – relevant industry analyses, impact studies, research reports, etc.

Some might question the utility of involvement in advisory bodies because, as their name implies, they are “advisory” only and have no substantive or decretal power. This hesitation could be applied with equal force to membership in trade organizations or the engaging of lobbyists, etc. Simply because the local Commissioner has the “last word” ought not to diminish the perception of value which attaches to the advisory body concept. Many times the “last word” turns out to be something quite different from what the Commissioner first envisioned because he/she was willing, and had a vehicle in place, to hear the views of insurance industry representatives. Even where the Commissioner is not generally accessible for this purpose, the opportunity to appear before senior staff representatives can have the same ultimate beneficial effect.

As any seasoned government-relations person or regulatory attorney can attest, meaningful shaping of regulatory policy can, and often does, occur outside the formal processes of legislative and regulatory enactments. It is the critical dialogue which occurs beyond the rigid, formalistic confines of those processes that is being advocated here. If the concept of advisory body participation has merit, its utility does not end with only those bodies which already exist. A prudent proactive industry approach should involve efforts to seek the creation of new, additional advisory bodies designed to meet specific regulatory developments as they emerge. Whether the advisory body in question is itself formally established or the result of an informal suggestion for ad hoc collaboration, the pivotal goal to be pursued is

to capture the ear of the regulators in a nonadversarial setting at a time before regulatory policy has been firmly established.

Those of us who are attorneys cannot properly complain about losing a case if, in the course of advocating our client's position, we fail to include all available arguments for the court to consider or fail to assert them at each opportunity the court provides to us. It is so with any dialogue between insurance regulators and insurers. An insular government-relations approach can often be equated with the failure to file a brief or failure to seek oral argument in a litigated case. It may be a less expensive and less labor-intensive approach in the short term, but may prove to be ill-advised and risky in the long term. To continue the litigation analogy, there is no less an advocacy purpose in advisory body participation. While intellectual integrity and the "rule of reason" always need to be maintained, there remains fertile ground to present focused industry-wide or company-specific viewpoints within advisory body settings.

### *Application of the Concept*

In general terms it can be expected that pursuit of a proactive approach to advisory body participation will yield benefits in addressing and resolving the following kinds of regulatory issues at an early stage: (a) "Who will pay the freight?" and "How much will this cost the industry?" (b) "What time line is realistic and reasonable to impose?" (c) "What position have [other states, NAIC, etc.] adopted on this issue?" (d) "How radical a departure from [other states, NAIC position, etc.] should be tolerated?" (e) "How much protection will this really provide to insurance consumers?" (f) "What is the true likely burden, in terms of cost and commitment of human resources, which regulatory staff can expect from this proposal?" (g) "Who will be 'in charge' and what reporting obligations will be imposed?" And so on, and so on...

Especially in the case of significant regulatory reform programs where insurance department officials are required to promulgate a broad array of regulations, circular letters or bulletins, regulatory staff representatives are often receptive to, and occasionally dependent upon, industry guidance in "filling in the details." This approach deserves special consideration in dealing with those areas of regulatory policy which (a) may be technically intricate or convoluted, (b) expose the industry to risk of substantial capital outlays or operational difficulties, or (c) for any other reason constitute "hot buttons" for the industry at large or for a particular segment of the industry.

Because advisory bodies are typically operated in an informal fashion, there are numerous opportunities to be creative in the course of shaping their goals and activities and maximizing opportunities for effective industry involvement. Both immediate utility and long-term benefits can be derived from participatory techniques such as the following: (a) executive summaries, (b) in-depth position papers, (c) independent research efforts, (d) surveys, (e) slide or computerized presentations, (f) engagement of outside experts, and (g) focused single-issue reports, etc. So long as the creative activity does not require governmental funding, the playing field is wide-open.

There are numerous existing opportunities for industry representatives<sup>3</sup> to have a participatory role through the advisory body process. Many states have created advisory bodies or at least made provision for their creation.<sup>4</sup> Such bodies have been established to function within the contexts of health insurance and health care administration,<sup>5</sup> trade practices and discrimination,<sup>6</sup> producer licensing and enforcement,<sup>7</sup> and workers' compensation coverage.<sup>8</sup> Among their more interesting and practical implementations, advisory bodies have also been employed to counsel regulators and legislators in connection with the drafting and adoption of rules, statutes and regulations.<sup>9</sup>

A particularly useful application of the concept is an advisory committee that is established to perform the watchdog function over the Commissioner and the receiver in insurer insolvency proceedings.<sup>10</sup> It is believed that, to a considerable degree, some of the costs, delays, and disputes that tend to both prolong and complicate insurer insolvencies might be alleviated if each of the significant constituencies (including insurers as major creditors through their funding of the guaranty association network) were afforded a more direct participatory role.

There is precedent for this type of application of the advisory body concept in the existing model legislation and in various state laws. The NAIC Model Liquidation Act provides, at Section 24. A. (3), that the liquidator shall have the power to appoint, with court approval, an "advisory committee" comprised of such creditors as "policyholders, claimants or other creditors such as guaranty funds ...".<sup>11</sup> The Commissioner has "the sole discretion" for appointment of the committee, and the committee serves "at the pleasure of the Commissioner." The committee may not receive

compensation or expense reimbursement. No other committee of any nature may be appointed by the Commissioner “in liquidation proceedings conducted under” the NAIC Model Liquidation Act.<sup>12</sup>

One of the primary virtues of the advisory body concept is that it is transferable to almost any regulatory situation. While the specific parameters of a particular advisory body may change based on the issue at hand, the engine which drives it is always the collaborative attitude of the participants. The concept itself is a blueprint for progressive insurance regulation. It is essentially freed from the chains of the “we’ve never done it that way before” mindset. By definition, advisory bodies are only called upon when there are new bends in the regulatory road. Hence the opportunity and need for advice – the “borrowed wisdom” which the industry can supply.

### *Conclusion*

The advisory body concept offers benefits which, among others, could reasonably be expected to include: (a) shortened learning curves, (b) expert advice and experience, (c) enhancement of critical dialogue, (d) avoidance of regulatory disputes and resulting litigated challenges, (e) readily available mediating techniques, and (f) perhaps most important from the standpoint of productive long-term regulator-industry relationships, the building of interpersonal familiarity and the establishment of mutual trust.

Prudent but serious pursuit of participation in the advisory body activities, both those bodies already extant together with new bodies designed to address emerging regulatory issues, can be expected to promote all of the following beneficial goals: creativity, flexibility, efficiency, collaboration, and “peace.” In view of the enhanced attainability of those goals which advisory bodies offer, the alternative approaches of “doing nothing” or “fighting later” pale in their attractiveness.

While certainly not a panacea, the advisory body concept has enormous potential. It can help promote creativity, flexibility, efficiency, and meaningful collaboration among both those parties who regulate and those who are regulated. It would appear that the concept is underutilized, probably even in those jurisdictions where there already exists some authorizing statutory framework. Given the concept’s almost unlimited flexibility, it should receive support from legislative, regulatory, and industry sources.

### *Endnotes*

1. The author is indebted to Kimberly A. Neill, an attorney in his firm’s Insurance Practice Group, for her assistance in the preparation of this article.
2. It is important to distinguish between input into the *procedural* aspects of regulatory law (i.e., opportunity for formal written comments upon regulatory proposals being considered for adoption) from input into the *operational* aspects of the insurance regulatory process. It is industry participation in this latter dimension, the actual on-the-ground implementation of regulatory policy, which is the focus of this article.
3. Such representatives can be drawn directly from the ranks of insurers, from trade associations, or from among outside legal advisors and other consultants who are well versed in the subject at hand and have good relations with the regulatory staffs which are involved.
4. The nomenclature varies. Some statutory and regulatory codes utilize the term advisory “body” (i.e., N.J.S.A. 17:22-6.73 refers to an advisory body intended to assist the board of directors of the New Jersey Surplus Lines Insurance Guaranty Fund) while others rely upon variants such as advisory “commission” (i.e., N.J.S.A. 17:29A-50 establishes the Automobile Insurance Territorial Rating Plan Advisory Commission), advisory “committee” (i.e., Alaska Stat. § 27-21A-31 establishes a three-member HMO advisory council), advisory “organization” (i.e., Tex. Ins. Code Ann. §5.73 permits Texas insurers to subscribe to various advisory organizations) and the like. For purposes of this article, all such variations are viewed as functional equivalents of the term “advisory body” which will be used throughout.
5. Cal. Ins. Code § 12639.90 (establishment of a Health Families Advisory Board); Fla. Stat. ch. 408.061 (permitting consultation with governmental and technical advisory bodies when collecting data to be submitted to the Agency for Health Care Administration); 215 Ill. Comp. Stat. 125/2-2 (creating the Health Maintenance Advisory Board to review and comment on proposed rules and regulations to be promulgated by the Director of the Department of

Health); Mass. Gen. Laws ch. 176M, § 1 (establishing the Non-group Health Insurance Advisory Board intended to advise the Massachusetts Division of Insurance on issues related to non-group and small group insurance reform); Mass. Gen. Laws ch. 118G, § 22 (establishing an advisory council to the Division of Insurance to advise on the overall operation and policy of the Division); N.J.S.A. 26:1A-36.13 (creation of the Health Wellness Promotion Advisory Board to advise and make recommendations to the Legislature in an effort to encourage consumers to engage in healthy lifestyles behavior and to promulgate regulations necessary to effectuate that purpose); N.J.A.C. 8:33-1.1 (referring to local advisory boards located in various health care service areas in connection with certifications on need: application and review process); Pa. Stat. Ann. tit. 40, § 85-70 (establishing the Medical Liability Insurance Catastrophe Loss Fund Advisory Board).

6. N.J.S.A. 17:33A-8 (establishment and appointment of insurance fraud advisory board to advise the Commissioner as to the implementation of the New Jersey Fraud Prevention Act); Fla. Stat. ch. 626.9541 (prohibiting the issuance or delivery of advisory board contracts as an inducement to the purchase of insurance); *see also* Mass. Gen. Laws ch. 176D, § 3; N.J.S.A. 17B:30-9; N.J.S.A. 17:29B-4; Pa. Stat. Ann. tit. 40, § 20-105; Tex. Ins. Code Ann. § 21.21.
7. Cal. Ins. Code § 1810.7 (referencing the California Advisory Board of Surety Agents as consultants to the statewide professional organizations responsible for providing education for licensure); Fla. Stat. ch. 626.2815 (creating a continuing education advisory board to advise the Department in determining standards by which continuing education requirements and courses may be categorized); Pa. Stat. Ann. tit. 31, § 39.22 (discussing the Continuing Education Advisory Board intended to advise the Commissioner regarding continuing education requirements required by Pennsylvania law); Tex. Ins. Code Ann. §21.01-1 (referring to advisory boards appointed by the Commissioner to make recommendations to the State Board of Insurance with respect to the scope, type, and conduct of examinations conducted thereby); *see also* Tex. Ins. Code Ann. § 21.07-1, § 21.14.
8. 820 Ill. Comp. Stat. 305/4, 305/4a-1, 305/4a-2, 305/4a-4 (creating and discussing the Self-Insurers Advisory Board within the Workers' Compensation Commission for the purpose of providing for the continuation of workers' compensation benefits unpaid or interrupted due to the inability of an insolvent self-insurer); 820 Ill. Comp. Stat. 305/13.1 (creating the Workers' Compensation Advisory Board to aid the Workers' Compensation Commission in formulating policies, discussing problems, setting priorities of expenditures and establishing short and long range administrative goals); 50 Ill. Admin. Code 7030.010 (discussing the role of the Workers' Compensation Advisory Board in arranging voluntary arbitration under section 19(p) of the Workers' Compensation Act); Tex. Lab. Code Ann. § 404.002 (discussing the powers and duties of the Research and Oversight Council on Workers' Compensation as an advisory body to the Workers' Compensation Commission); *see also* 820 Ill. Comp. Stat. 305/19; 820 Ill. Comp. Stat. 310/19.
9. *See* 215 Ill. Comp. Stat. 125/2-2; 820 Ill. Comp. Stat. 305/13.1; N.J.S.A. 26:1A-36.13; Wash. Rev. Code § 34.05.671.
10. The advisory committee in an insolvency context should be distinguished from a creditors' committee. Creditors in an insurer insolvency are not in a better position to develop a plan for the receivership of an insurance company than the Insurance Commissioner and the appointed receiver. Creditors do not have any particular expertise in insurance and/or bankruptcy.
11. Fourteen states already have express "advisory committee" language similar to that used in Section 24. A. (3) of the NAIC Model Act: Colorado, Connecticut, District of Columbia, Georgia, Illinois, Kansas, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Rhode Island, South Dakota, and Tennessee.
12. The viewpoint expressed herein with respect to insurer insolvencies is reflective of the views and conclusions contained in a recent report prepared by a special Task Force of the American Bar Association which was created to undertake a comprehensive study of the current U.S. insurer liquidation process. The author served as a member of the special Task Force.