

NARAB II â THE DEVIL'S IN THE DETAILS â THE PRACTICAL EFFECTS OF HB 2554 ON INSURANCE REGULATORS AND THE INDUSTRY

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Eleven years after the passage of the Gramm-Leach-Bliley Act (15 U.S.C. 6751 *et seq.*), as states struggle to achieve full reciprocity and uniformity in producer licensing, the U.S. House of Representatives passed the National Association of Registered Agents and Brokers Reform Act of 2010. HR 2554 would amend the Gramm-Leach-Bliley Act (GLBA) and establish the National Association of Registered Agents and Brokers (NARAB) to serve as a clearinghouse for producers who wish to do business in multiple states. Since the threat of the original NARAB proposed in the GLBA still exists, HR 2554's version is sometimes referred to as "NARAB II." (In this article, references to NARAB mean the association that would be created under HR 2554.) HR 2554 attempts to preserve the consumer protection and enforcement powers of states while simplifying multistate licensing for producers. This article explores the practical effects of the bill.

How it Will Work

HR 2554 applies to all lines of insurance (other than title insurance) that are defined or regulated by state insurance regulators. If created pursuant to HR 2554, NARAB would be a non-governmental association with the power to adopt and apply non-resident insurance producer qualification requirements on a multistate basis. NARAB would be managed by a board of directors consisting of six state insurance commissioners and five representatives of the insurance industry. NARAB would have the power to adopt bylaws, rules and establish membership criteria. Membership in NARAB would permit producers to bypass states' nonresident licensing procedures but states' ability to regulate resident producers would not be affected.

Section 322, the purpose clause, expresses a clear intent to preserve the rights of states to "license, supervise, discipline" and establish fees for producers and to prescribe and enforce consumer protection and unfair trade practices laws. Section 322 also expressly provides that NARAB's activities are not intended to have any effect on state laws for resident producers or to produce a net loss of revenues. State laws and actions that are inconsistent with the bill would be subject to preemption under Section 331.

Under HR 2554, once a producer is licensed in the producer's home state, the producer could become a member of NARAB subject to certain eligibility requirements that include a national criminal background check and no recent revocation of a state insurance license. NARAB may establish additional membership criteria so long as the criteria do not unfairly limit access or discriminate against smaller producers or agencies. NARAB will also have the power to deny, suspend, not renew or revoke a producer's membership and to place members on probation.

Any producer who operates in multiple states is likely to want to be a member of NARAB as Section 323(e)(B) states that NARAB membership shall "be the equivalent of a nonresident insurance producer license issued in any State in which the producer pays the licensing fee." Membership in NARAB will authorize a producer to sell, solicit, negotiate, effect, procure, deliver, renew, continue, or bind insurance and exercise "all such incidental powers" as shall be necessary to carry out such activities. Incidental powers include claim adjustment and settlement, risk management, employee benefits advice, retirement planning and "any other insurance-related consulting activities." (Section 323(e)). States will *not* issue nonresident licenses to NARAB members. To avoid a detrimental effect on state revenues, NARAB members will, however, be required to pay state nonresident license fees.

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HR 2554 contemplates information sharing among NARAB, state insurance regulators, and the National Association of Insurance Commissioners (NAIC), perhaps through systems already established by the National Insurance Producer Registry (NIPR). In fact, the bill requires NARAB to notify the National Association of Insurance Commissioners (or its designee, presumably NIPR) when a producer becomes a NARAB member and to provide ongoing updates about the states in which NARAB members are entitled to operate. Nonresident license fees will be payable to NARAB which will distribute them to the respective states. For life insurance agents, NARAB would be required to coordinate its activities with the Financial Industry Regulatory Authority (FINRA).

Preemption of State Laws

Obviously, for NARAB to be effective there must be preemption of state laws that would interfere with the objective of the legislation and the rights of NARAB members. Section 331 prohibits states from impeding the activities of or applying any law arbitrarily or discriminatorily to a producer who is a NARAB member or who plans to become a NARAB member. States may not impose different fees upon NARAB members than those imposed on nonmembers.

All nonresident licensing laws except those imposing licensing fees are likely to be preempted. Licensing requirements for nonresident business entities are preempted. It is also conceivable that appointment requirements may be preempted.

The states of California and Florida have not been reciprocal under the GLBA largely due to long-standing practices of requiring fingerprints and criminal background checks for nonresident producers. Those requirements would be preempted with respect to NARAB members. Section 331(b)(2)(C) specifically prohibits states, other than a NARAB member's home state, from requiring a NARAB member to submit to a criminal background check as a condition of doing business.

The Devil is in the Details

On the face of it, HR 2554 streamlines and eliminates many headaches from the current nonresident producer licensing process. It purports to maintain the rights of states to regulate the conduct of producers, discipline those who do not follow the rules and preserve state revenues. However, as the title of this article implies, the devil is in the details. Revenues may not be preserved and the ability of states to discipline a producer who does not have a license may be limited.

The first erosion of state power will be the inability of states to deny a nonresident NARAB member the ability to do business on the same grounds on which a state might deny a license to a nonresident who is not a NARAB member. Section 12 of the NAIC Producer Licensing Model Act (PLMA), adopted by almost all states, provides various grounds for which a state may deny a license to a nonresident producer even if the producer is licensed in the home state. For example, Section 12 permits a state to deny a nonresident license to a convicted felon. But, under HR 2554, if a felon is a member of NARAB, he or she would have the right to engage in the business of insurance in any state pursuant to Section 331(b)(2)(A). If a producer meets NARAB's standards, a nonresident state will not be able to prohibit the producer from doing business in that state, at least initially.

For misconduct that occurs after a producer joins NARAB, a nonresident state's disciplinary powers may be limited. At the very least, the interplay between HR 2554 and state insurance and administrative procedure laws raise interesting questions. Presumably states will be able to impose fines against nonresident NARAB members. But because nonresident licenses will not be issued to NARAB members, there will be no license to suspend or revoke in the event of egregious conduct. Yet Section 323(e) states that membership in NARAB subjects producers to "all laws, regulations, provisions or other action of any State *concerning revocation or*

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suspension of a member's ability to engage in any activity within the scope of authority granted under this subsection..." (*emphasis added*). The ability to engage in the business of insurance is granted through membership in NARAB and not by the states. It is unclear what a state would have to do in order to revoke or suspend that "ability." Perhaps a cease and desist order could be issued by a state. It remains to be seen whether such an order would be sufficient for NARAB to revoke a membership, but Section 323(h)(1) does permit NARAB to suspend or revoke membership when a producer has been disciplined pursuant to a final adjudicatory order of a state insurance regulator. NARAB members will be entitled to certain procedural rights before a membership may be revoked. So, in some cases, a producer may have two administrative hearings.

HR 2554 is noticeably silent about appointments, yet most states require appointments and some place severe limits on what a producer can do without an appointment. Under Section 331(b)(1)(D), a state will be prohibited from requiring appointments for a nonresident NARAB member who places commercial property and casualty risks for insureds with multistate risks. That section does not, however, prohibit states from imposing appointment requirements on NARAB members in other circumstances nor does it permit the practice. However, if a state restricts the ability of a nonresident NARAB member to sell, solicit or engage in the business of insurance unless the producer has an appointment, the appointment requirement might be considered an additional and impermissible licensing requirement. Section 322 specifically states that the bill is not intended to affect laws concerning appointments and other matters for *resident* producers, which suggests appointments for nonresident NARAB members might be affected. This is an issue that will require clarification. If states cannot require appointments for nonresident NARAB members, it will mean a significant loss of appointment fee revenue in many states.

State revenues will also take a hit from the loss of business entity licensing and appointment fees. Under section 323(e)(2), states will no longer be permitted to force the licensure of a business entity with which a nonresident producer is affiliated so as long as the individual is a member of NARAB. Nor will states be able to prohibit the payment of compensation to any employer, employee or affiliate of a member for the member's performance of permitted activities. Traditionally, states have insisted that nonresident business entity licensing is necessary for enforcement purposes, and HR 2554 will test that rationale. The elimination of nonresident business entity licensing is likely to result in significant cost savings for agencies that do business in multiple states and for the insurance companies with which they do business.

Potential Areas of Regulatory Confusion and Change

Finally, there are additional issues that may arise if NARAB is created under HR 2554. Since no licenses are being issued to NARAB members, state insurance departments will need to make significant modifications to their systems to track NARAB membership or they will need to designate NARAB members as licensed. The latter practice may cause confusion as there will be some nonresident producers, particularly those in bordering states, who do not join NARAB and who will obtain a nonresident license the old-fashioned way.

Market conduct examiners may be forced to modify testing of producer licenses and appointments. Currently, examiners often compare the insurance department's licensing and appointment records to a list of commission payments or a list of new business. Depending upon how a state identifies NARAB members in its records and whether appointments can be required, these tests may need to be modified or eliminated.

Consumers may be confused, as both NARAB and individual state insurance departments will have the power to receive and investigate complaints. It does not appear NARAB will have any authority to order corrective actions, and it is questionable whether NARAB would be staffed sufficiently to handle consumer complaints. NARAB would be required to forward appropriate complaints to the respective state insurance departments.

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A few states have retained separate broker and producer licenses and have different rules governing the conduct of brokers and producers. It is not clear which set of rules will apply to a nonresident NARAB member.

States will have to deem membership to be the equivalent of a nonresident producer licensing when considering certain laws. For example, most states restrict the payment of commissions to licensed producers - states will have to permit payments to NARAB members who pay the requisite license fees.

The Act includes "insurance-related consulting activities" as one of the activities authorized by membership in NARAB. A few states license consultants separately and the bill may affect those licensing programs.

HR 2554 contains many promising provisions that indicate an intent for NARAB, state insurance regulators and the NAIC to share information readily and perhaps share access to databases. What is less clear is whether states will have the authority to share producer licensing and enforcement information with NARAB. States have information sharing laws that permit them to share confidential information with the NAIC, state and federal regulators and law enforcement agencies. But NARAB will not be a governmental agency that is included within the scope of those information sharing laws. Licensing records include sensitive information such as social security numbers and birthdates. As drafted, HR 2554 does not mandate states to share information with NARAB, and many states may be prohibited from doing so under current state law.

None of these issues seem insurmountable and some are merely technical in nature. They are outweighed by the potential benefits to the insurance industry and especially multistate agents and brokers. State insurance regulators may have to adjust their thinking, processes and systems but they should retain the substantive powers necessary to protect their consumers and insurance markets.
