

**WRITTEN STATEMENT OF THE  
NATIONAL CONFERENCE OF INSURANCE LEGISLATORS (NCOIL)**

**BEFORE THE SUBCOMMITTEE ON  
INSURANCE, HOUSING AND COMMUNITY OPPORTUNITY,  
COMMITTEE ON FINANCIAL SERVICES,  
U.S. HOUSE OF REPRESENTATIVES**

**HEARING ON  
“INSURANCE OVERSIGHT: POLICY IMPLICATIONS FOR  
U.S. CONSUMERS, BUSINESSES AND JOBS”**

---

**JULY 28, 2011**

---

**THE HONORABLE GREG WREN  
ALABAMA HOUSE OF REPRESENTATIVES  
NCOIL TREASURER  
IMMEDIATE PAST CHAIR, NCOIL STATE-FEDERAL  
RELATIONS COMMITTEE**

Good afternoon Chairman Biggert, Ranking Member Gutierrez, and Members of the Subcommittee. Thank you for inviting me to testify before the Subcommittee on behalf of the National Conference of Insurance Legislators (NCOIL) on the very important subject of insurance oversight. My name is Greg Wren. I am an Alabama State Representative and I serve as Treasurer of NCOIL.

I am pleased to be here today to discuss with you our shared concern—that of the proper oversight of the insurance market in the best interest of all involved. Like you, NCOIL wants to make sure that the insurance marketplace works effectively and efficiently to promote better products, satisfied consumers, and healthy and thriving businesses.

NCOIL supports and has worked for modernization and uniformity in the states where and when it is needed. We—as state legislators with a sole focus on sound insurance public policy—believe that the states have the tools to promote and facilitate that modernization.

NCOIL appreciates that the Committee has acknowledged the many assets of state regulation and has not sought to preempt our authority to regulate our unique state markets and to protect our insurance consumers. We are optimistic that the newly created Federal Insurance Office and other recently formed agencies will also respect the authority and strength of the state system—strength that was evidenced during the recent financial crisis.

We also believe that proposals such as an optional or mandatory federal charter would only serve to undercut the successful state system now in place.

NCOIL is working—and will continue to work—with our state regulators, consumer advocates and industry to strengthen and enhance regulation in key areas that are in need of reform. NCOIL collaborated with NAIC and NCSL to develop the successful Interstate Insurance Product Regulation Compact (IIPRC)—a speed-to-market vehicle for life insurance products now in force in 41 jurisdictions. NCOIL has worked closely with the NAIC to simplify agent licensing and make it easier for a licensed agent to do business in another state. NCOIL continues to work for better market conduct regulation and has pushed our regulator colleagues to modernize exam procedures to free companies from duplicative and costly exams by regulators.

I would like to discuss in more depth NCOIL's most recent modernization effort—to streamline surplus lines insurance taxation and regulation consistent with your intent under the Dodd Frank Act. Today NCOIL is releasing to you a report entitled *Implementing the Dodd-Frank Act: State Activity and SLIMPACT, an NCOIL Response*.

Dodd-Frank gave states a very short window of opportunity to comply with NRRRA provisions, leaving state legislatures, depending on their session schedules, from as little as 40 days to only six months to pass legislation. Following enactment of Dodd-Frank, NCOIL, CSG, and NCSL to no avail called upon Congress to extend the effective date of NRRRA surplus lines provisions by at least one year to give states additional time to join SLIMPACT.

For the last year, states have been trying to figure out how to best protect their current surplus lines tax monies in a time when every state budget dollar counts. Because states have never needed to collect data on home-stated versus multi-state risk, they have no current information to rely upon. As a result, states have reacted in various ways, such as:

- enacting SLIMPACT
- passing legislation to tax 100 percent of premium on home-stated multi-state risks
- authorizing insurance regulators and/or governors to enter into compacts or agreements
- signing an NAIC-backed *Nonadmitted Insurance Multi-State Agreement (NIMA)*
- passing no legislation at all and taking a wait-and-see attitude—or avoiding any tax allocation mechanism

NCOIL, together with CSG and NCSL, has endorsed SLIMPACT as the only policy solution that fully responds to the NRRRA, as it would:

- ease the burdensome current system of surplus lines taxation
- provide the uniformity Congress asked for in the NRRRA
- and ensure that states receive their fair shares of premium tax dollars on multi-state insurance transactions.

Concerns exist with other approaches that do not fully address Dodd-Frank's intent, such as NIMA, which has and will continue to face constitutional challenges about its improper and unconstitutional delegation of authority to a regulator, who by statute is limited to enforcing laws, not making public policy.

In addition to the legislative groups' endorsement, SLIMPACT is also supported by many of the very folks who asked for the NRRRA, including insurance industry and producer organizations, such as:

- American Association of Managing General Agents
- American Bankers Insurance Association
- Council of Insurance Agents and Brokers
- Excess Line Association of New York
- National Association of Professional Surplus Lines Offices
- and Property Casualty Insurers Association of America

SLIMPACT was developed over several years with input from insurance regulators, tax officials, legislators, stamping offices, brokers and trade associations. Modeled after the successful life compact, the SLIMPACT Commission will serve the compacting states and is authorized to create rules agreed-upon by its members. The Commission will establish a national clearinghouse for tax purposes. Responding to the intent of the NRRRA, the Commission will create rules for uniform foreign insurer eligibility and a uniform policyholder notice.

Though SLIMPACT becomes fully operational when there are ten compacting or contracting states, Commission representatives from its nine member states have been meeting over the last few months and have developed bylaws and initial rules for rulemaking. SLIMPACT is now honing in on an allocation formula that we are optimistic will—in response to the NRRRA—be based upon readily available data with simplicity and uniformity for the surplus lines licensee—not one that will impose new burdens on the industry.

We are also optimistic that states can, as they have for over 135 years, adapt to changes in an increasingly global marketplace and protect their consumers and insurers. Our achievements stand out against the failures of other financial services sectors and show that states can do the job. NCOIL believes that reform can work if it's based on coordination, transparency and disclosure, and accountability—and if it embraces the state system.

Thank you again for the opportunity to address this Subcommittee.

**Representative Greg Wren** is serving his fourth term as a Republican Member of the Alabama House of Representatives. He is Chairman of the House Local Legislation Committee, Chairman of the Joint Legislative Energy Committee, Vice-Chairman of the House Insurance Committee, Member of the House Ways and Means General Fund Committee, and a Member of the Montgomery County Delegation.

Representative Wren serves as Treasurer of the National Conference of Insurance Legislators (NCOIL), Vice-Chairman of the Commerce, Financial Services, and Communications Committee of the National Conference of State Legislatures (NCSL), Chairman of NCSL's Health Reform Implementation Task Force, member of the American Legislative Exchange Council's (ALEC) Commerce, Insurance and Economic Development Task Force, and a member of The Energy Council.

He holds a B.A. in Public Administration from the University of Alabama and currently owns Wren and Associates with areas of expertise including advocacy efforts in areas such as insurance and financial services, health care, tax and fiscal policy, and military issues. He is also a Chartered Financial Consultant (ChFC) and Chartered Life Underwriter (CLU), and has been a Financial Representative with Northwestern Mutual Financial Network more than 30 years.

From 1977-1981, Representative Wren served as a Legislative Analyst for the Legislative Fiscal Office, Staff Assistant to the United State Senate, and served as Governmental Affairs Director for the Alabama Association of REALTORS.

Representative Wren is a member of the Montgomery YMCA Metro Board of Directors, Auburn Montgomery Advisory Board of Directors, Alabama YMCA Youth Legislature Board of Directors, Family Guidance Center Board of Directors, YMCA Tri-Hi-Y Club Advisor, YMCA Camp Chandler Board of Directors, First Baptist Church Disaster Relief and Resource Center Team, Former Chairman of Deacons and Sunday School Teacher for over 25 years, and was recognized as the Montgomery YMCA Man of the Year for 2005.

NCOIL/2011/2007399D

**IMPLEMENTING THE DODD-FRANK ACT:  
STATE ACTIVITY AND SLIMPACT, AN  
NCOIL RESPONSE**

**REPORT OF THE  
NATIONAL CONFERENCE OF INSURANCE LEGISLATORS (NCOIL)  
TO THE  
U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES  
U.S. HOUSE COMMITTEE ON THE JUDICIARY  
U.S. SENATE COMMITTEE ON  
BANKING, HOUSING, AND URBAN AFFAIRS**

***Initially Presented by NCOIL Treasurer Rep. Greg Wren (AL) before  
the U.S. House Financial Services Subcommittee on  
Insurance, Housing and Community Opportunity***

---

**JULY 28, 2011**

---

Hon. Spencer Bachus  
*Chair*, U.S. House Committee on Financial Services

Hon. Barney Frank  
*Ranking Member*, U.S. House Committee on Financial Services

Hon. Lamar Smith  
*Chair*, U.S. House Committee on the Judiciary

Hon. John Conyers, Jr.  
*Ranking Member*, U.S. House Committee on the Judiciary

Hon. Tim Johnson  
*Chair*, U.S. Senate Committee on Banking, Housing, and Urban Affairs

Hon. Richard Shelby  
*Ranking Member*, U.S. Senate Committee on Banking, Housing, and Urban Affairs

Dear House and Senate Committee Leadership and Committee Members:

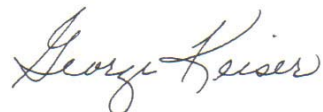
As National Conference of Insurance Legislators (NCOIL) leaders, we write to report on state efforts responding to *Nonadmitted and Reinsurance Reform Act* (NRRRA) surplus lines insurance tax provisions in the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Public Law 111-203). In a few short months, states have succeeded in developing an interstate compact to achieve NRRRA-desired uniformity.

NCOIL, together with The Council of State Governments (CSG) and National Conference of State Legislatures (NCSL), endorse SLIMPACT as the only mechanism that fully responds to NRRRA provisions. The interstate compact—which authorizes development of allocation formulas, uniform payment methods and reporting requirements—also provides for foreign insurer eligibility requirements and a single policyholder notice. As well as being supported by the key organizations of state officials, it enjoys support of major insurance industry and producer stakeholders, including the very folks that urged Congress to incorporate NRRRA provisions into the Dodd-Frank Act.

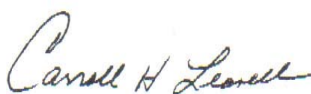
NCOIL legislators—your counterparts in the states—would like to offer a report on state surplus lines activity, as it is legislators who have the power to author state insurance laws. NCOIL recognizes the need for modernization, where appropriate—and has worked hard in the states to respond to NRRRA, as the next several pages will detail.

We look forward to working with you further to modernize surplus lines insurance taxation and regulation.

Sincerely,



Rep. George Keiser (ND)  
NCOIL President



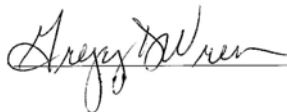
Sen. Carroll Leavell (NM)  
NCOIL President-Elect



Sen. Vi Simpson (IN)  
NCOIL Vice President



Rep. Charles Curtiss (TN)  
NCOIL Secretary



Rep. Greg Wren (AL)  
NCOIL Treasurer



Rep. Robert Damron (KY)  
NCOIL Immediate Past President

## **RESPONSE TO DODD-FRANK NRRRA PROVISIONS**

Because of its short window of opportunity for compliance, Dodd-Frank put states in a veritable pressure cooker—with states scrambling to make sense of the surplus lines requirements and to bring forward legislation. States were given only one year to comply. In actuality, most states had only six months to pass legislation and other states less, as certain state legislatures were confined to their normal 40 to 60-day sessions and others meet every other year.

As a *Surplus Lines Insurance Multi-State Compliance Compact* (SLIMPACT) was being developed, NCOIL, CSG, and NCSL have also called upon Congress to extend the effective date of NRRRA surplus lines provisions by at least one year until 2012 to give states the time to join the compact.

For the last year, states have been—and the majority still are—trying to figure out how to best protect their current surplus lines tax monies in a time when all state revenue is critical. To do this properly, states must assess their home-stated versus multi-state risks, data that in most states has not been collected. States feel there can be winners and losers in this new game, and no one wants to come out a loser.

As a result, states have reacted in various ways, such as:

- enacting SLIMPACT legislation
- passing legislation to tax 100 percent of the premium on multi-state risks
- in legislation, requiring fiscal analyses prior to joining any compact or agreement
- in legislation, authorizing insurance regulators/governors to enter into multi-state compacts or agreements
- signing National Association of Insurance Commissioners (NAIC)-backed *Nonadmitted Insurance Multi-State Agreement* (NIMA)
- passing no legislation at all—or avoiding any tax allocation mechanism in surplus lines legislation—and taking a wait-and-see attitude

### *SLIMPACT*

NCOIL supports SLIMPACT as the appropriate response to the NRRRA. SLIMPACT, as an interstate compact, allows legislatures legally to be part of a single mechanism that will simplify and unify surplus lines tax allocation and collection nationwide, while maintaining authority within the states.

NCOIL lawmakers and others believe SLIMPACT is the only policy solution that would:

- ease the burdensome current system of surplus lines tax allocation and collection
- supply the uniformity that Congress asked for in the NRRRA—by providing for important foreign insurer eligibility requirements and the use of a single uniform policyholder notice
- ensure that states receive their fair shares of premium tax dollars on multi-state insurance transactions

NCOIL, along with The Council of State Governments (CSG)—representing all three branches of state government—and the National Conference of State Legislatures (NCSL), have helped develop, and have endorsed, SLIMPACT. SLIMPACT is also supported by The American Association of Managing General Agents (AAMGA), the American Bankers Insurance Association (ABIA), The Council of Insurance Agents and Brokers (CIAB), the Excess Line Association of New York (ELANY), the National Association of Professional Surplus Lines Offices, Ltd. (NAPSLO), and the Property Casualty Insurers Association of America, among others (*See SLIMPACT Overview, Activity, and Background*).

### *100 PERCENT TAX ON HOME-STATED MULTI-STATE RISKS*

Many states because of the time stricture and the fear of losing tax dollars in 2011 enacted legislation that will allow them to tax 100 percent of home-stated multi-state risks. This, while being a short-term goal, does not address the larger concerns addressed in Dodd-Frank NRRRA provisions and could be seen as giving certain larger corporate headquarter states a distinct advantage.

### *FISCAL ANALYSIS*

While the call for a fiscal analysis has been included in certain state legislation—and is certainly warranted in any case, as noted above—states with this language are ignoring, or leap-frogging over, this provision due to time constraints or for other purposes. As of this date, we are unaware of the results of any fiscal analysis, and we understand that any such analysis may be difficult to conclude due to a lack of existing information on multi-state risks.

### *AUTHORIZING REGULATORS*

This approach has raised—and is expected to continue to raise—legal and constitutional challenges. Individual states, industry NRRRA proponents, NCOIL, and CSG consider this approach an unconstitutional delegation of authority to regulators, whose statutory duty is to implement laws that have been enacted by the legislature. CSG Legal Counsel Rick Masters, outside of his January 26 legal analysis, has also expressed a more practical concern—noting that case law has generally struck down state participation in compacts when a state adopts a method of ratifying the compact that differs from the terms of the compact, such as legislation providing general agreement authority.

### *NIMA*

A few states have considered or enacted legislation specifically authorizing the state to enter into a *Nonadmitted Insurance Multi-State Agreement (NIMA)* that has been offered by the National Association of Insurance Commissioners (NAIC) as a bare-bones response to the NRRRA. As state policymakers who write the insurance laws that state regulators are charged with enforcing, NCOIL lawmakers are concerned with the delegation of legislative authority inherent in NIMA.

Mr. Masters, in a January 26 legal memorandum that is attached with his approval, overviewed constitutional and legal concerns with NIMA language. He argues that state constitutions do not permit executive branch officials to legislate, such as deciding on behalf of a state whether to enter into a multi-state agreement, and then selecting a specific agreement.

NCOIL also echoes concerns raised by numerous insurance industry interested parties that NIMA may not provide necessary efficiencies. By implementing a more burdensome tax reporting and information system than exists today, NIMA could actually introduce inefficiencies into the tax payment process, a clear separation from the goals of Congress and other NRRRA advocates.

### **SLIMPACT OVERVIEW**

SLIMPACT is an interstate compact designed to streamline regulatory compliance and tax allocation in connection with multi-state placements of surplus lines insurance. SLIMPACT legislation creates a SLIMPACT Commission as an instrumentality of the compacting states and authorizes it to adopt rules that each compacting state agrees to follow. Each state is represented by one voting member—who is determined via compact state legislation or gubernatorial appointment—on the Commission.

The SLIMPACT Commission is required to adopt rules for tax allocation formulas, clearinghouse reporting, and home state obligations—including premium tax payment and reporting requirements, among others. Equally important to the consistency desired in Dodd-Frank NRRRA provisions, SLIMPACT provides for uniform foreign insurer eligibility and a uniform policyholder notice. SLIMPACT empowers the Commission to adopt rules and procedures in connection with financing, administering, and operating the compact, and enforcing compliance with its provisions. SLIMPACT also empowers the Commission to establish Executive and Operations Committees, among others. The Executive Committee, which is made up of Commission members, will manage the Commission, establish and oversee the organizational structure, and appoint and retain an executive director, while the Operations Committee—comprising surplus lines insurance experts—will provide additional technical expertise.

The Commission will establish a single national clearinghouse to receive and disseminate taxes and transaction data. The states will use Commission-approved allocation formulas for the reporting of tax/transaction data to the Clearinghouse, and compacting states could require tax payments, at most quarterly, through state offices, state stamping offices, or through the Commission. The system should serve to protect states' ability to receive premium tax payments on multi-state surplus lines policies.



## **SLIMPACT ACTIVITY**

SLIMPACT was introduced in more than twenty-five percent of the states in the first six months of 2011 and has already been signed into law by governors in nine states:

- Alabama (*June 9*)
- Indiana (*May 9*)
- Kansas (*May 12*)
- Kentucky (*March 16*)
- New Mexico (*April 8*)
- North Dakota (*April 19*)
- Rhode Island (*May 27*)
- Tennessee (*June 10*)
- Vermont (*May 26*)

The New York State Senate, on June 14, approved SLIMPACT legislation that was then referred to the Assembly's Insurance Committee where companion legislation is pending. SLIMPACT is referenced in Georgia, Maryland, and Ohio and is being considered in other states.

SLIMPACT went into effect upon enactment by Kentucky and New Mexico. Its Commission will become fully effective when there are 10 compacting and/or contracting states. A state may contract with SLIMPACT for tax purposes, including the use of the clearinghouse. Alternatively, the Commission may become effective for such purposes when SLIMPACT comprises compacting and contracting states representing greater than forty percent of the nationwide surplus lines premium volume.

The 10-state or 40 percent threshold—which was selected in part to require a critical mass before key decisions could be made—does not prevent the Commission from meeting and developing initial positions. NCOIL, CSG, and NCSL convened three two-hour webinars in late June and early July for such purposes. The series of webinars provided future Commission members, legislators, and interested parties the opportunity to review important start-up procedures, including draft bylaws and an initial draft rule to adopt, amend, and repeal Commission rules. NCOIL also set aside four hours during its July 14-17 Summer Meeting in Newport, Rhode Island, for an inaugural in-person meeting of the Commission to unofficially approve pending proposals, to continue discussion of allocation formulas and methodologies, and to review additional start-up issues and responsibilities.

## **SLIMPACT BACKGROUND**

SLIMPACT was drafted in 2006 and 2007 with input from over 60 insurance professionals representing state regulators, tax officials, legislators, stamping offices, brokers and trade associations. SLIMPACT was envisioned as a national mechanism to streamline surplus lines taxation and regulation.

SLIMPACT was modeled after the successful state speed-to-market modernization effort, the *Interstate Insurance Product Regulation Compact* (IIPRC) that came online for asset-back insurance products, such as life insurance and annuities, in 2006. NCOIL—along with the NAIC and NCSL—was instrumental in the development and adoption of the IIPRC. The IIPRC is celebrating its five-year anniversary in June 2011 and recently announced that a 41<sup>st</sup> jurisdiction had enacted compact legislation.

NCOIL adopted a resolution in support of SLIMPACT on November 17, 2007, and promptly called upon the NAIC to advocate for the enactment of SLIMPACT. NCOIL, at that time, reiterated its strong support for interstate compacts as an effective means to bring efficiency and uniformity to state insurance regulation. Meanwhile, Congress continued to consider NRRRA legislation that would establish home state regulation and taxation of multi-state surplus lines transactions, among other things.

In 2009 and 2010, the NRRRA was incorporated into the Dodd-Frank Act. President Barack Obama signed the Dodd-Frank Act on July 21, 2010. NRRRA provisions were set to take effect upon the expiration of the 12-month period beginning on the date of enactment—even though many state legislatures had already adjourned their 2010 legislative sessions and would not commence new sessions until January 2011.

The NRRRA preempts or otherwise supersedes state surplus lines law in several areas, including subjecting the placement of nonadmitted insurance to the regulatory requirements solely of an insured's home state. The NRRRA also includes provisions to streamline the taxation process. It specifically authorizes the States to enter into a compact or to otherwise establish procedures to allocate premium taxes among the States. The Act further states the intent of Congress that "each State adopt nationwide uniform requirements, forms, and procedures, such as an interstate compact..." for tax purposes.

Given the limited time provided under the Dodd-Frank Act to enact national reform, and because SLIMPACT was already developed and was based on a widely successful existing compact, NCOIL again urged the NAIC—which had announced that it would convene conference calls to determine how to respond to the Dodd-Frank Act—to support SLIMPACT.

On August 26, 2010, NCOIL invited leaders of national organizations comprising state officials to an inaugural *State Leader Summit: Working Session on Financial Modernization*, to take place during the November NCOIL Annual Meeting. NCOIL also worked to amend SLIMPACT to address regulator concerns raised on NAIC conference calls that SLIMPACT authority was written broader than was necessary, or called for by the NRRRA. NCOIL released what was then called SLIMPACT-Lite, to distinguish it from the original SLIMPACT, in advance of its Annual Meeting. SLIMPACT-Lite maintained tax provisions included in SLIMPACT, and authorized a Commission to establish a uniform policyholder notice, and nationwide foreign insurer eligibility requirements—as permitted under the NRRRA. SLIMPACT-Lite deleted a section providing authority to establish optional uniform standards related to licensee banking and bond requirements, among other things.

The State Leader Summit on November 19, 2010, brought together representatives of NCOIL, CSG, the NCSL, the North American Securities Administrators Association (NASAA), and the NAIC. Participants focused on streamlined surplus lines tax collection and allocation, along with annuity suitability and other modernization and uniformity issues. NCOIL, CSG, and NCSL attendees expressed support for SLIMPACT-Lite.

Following the summit, the NCOIL Executive Committee adopted SLIMPACT-Lite on November 21, 2010. A few weeks later, resolutions endorsing SLIMPACT-Lite were adopted by CSG and NCSL, respectively. SLIMPACT-Lite was transmitted to state legislators for their consideration during 2011 legislative sessions. The compact is now known again as SLIMPACT, as it is the only version in circulation. The SLIMPACT-Lite title that was used to distinguish the revised draft as it worked through processes at NCOIL, CSG, and NCSL, is sometimes still used, but the compact text is the same.

**The Council of  
State Governments**

Headquarters Office



**MEMORANDUM**

TO: NCOIL, NCSL, CSG

FROM: Rick Masters, Special Counsel for Interstate Compacts

RE: NIMA and related legislation

DATE: January 26, 2011

*President*  
Governor Brian Schweitzer, MT

*Chair*  
Deputy Speaker  
Bob Godfrey, CT

*Executive Director*  
David Adkins

---

*Headquarters Office*  
P.O. Box 11910  
Lexington, KY 40578-1910  
(859) 244-8000  
FAX (859) 244-8001  
Internet: [www.csg.org](http://www.csg.org)

*Eastern Office*  
P.O. Box 20811  
New York, NY 10009  
(212) 912-0128  
Internet: [www.csgeast.org](http://www.csgeast.org)

*Midwestern Office*  
641 E. Butterfield Road  
Suite 401  
Lombard, IL 60148  
(630) 810-0210  
Internet: [www.csgmidwest.org](http://www.csgmidwest.org)

*Southern Office*  
3355 Lenox Road, Suite 1050  
Atlanta, GA 30326  
(404) 266-1271  
Internet: [www.slcatlanta.org](http://www.slcatlanta.org)

*Western Office*  
1107 9<sup>th</sup> Street  
Suite 650  
Sacramento, CA 95814  
(916) 553-4423  
Internet: [www.csgwest.org](http://www.csgwest.org)

*Washington Office*  
Hall of the States  
444 N. Capitol Street, N.W.  
Suite 401  
Washington, D.C. 20001  
(202) 624-5460  
Internet: [www.csg.org](http://www.csg.org)

As Special Counsel for Interstate Compacts, The Council of State Governments, I am providing this summary of my recent legal analysis with regard to a proposed legislation in the form of a Non-admitted Insurance Multi-state Agreement (NIMA) which has been endorsed by the National Association of Insurance Commissioners as an alternative proposal to the interstate compact known as the Surplus Lines Insurance Multi-State Compliance Compact (SLIMPACT) approved and recommended by the National Conference of State Legislators (NCSL) as well as NCOIL and CSG for consideration and enactment by the states. This is being furnished in response to questions about this proposal from various legislators and staff who are reviewing both alternatives in a number of states.

I have reviewed the NIMA proposal and related legislation currently being circulated by NAIC and have previously participated in many teleconferences and other meetings to review numerous versions and proposed amendments to that proposal and have determined that NIMA and related legislation is not an interstate compact and suffers from some serious deficiencies which raise significant doubts as to the legality of the proposal or the ability to enforce its provisions as well as its constitutionality.

My experience in the field of interstate compact law is substantial. As a former General Counsel to CSG, and current Special Counsel to CSG's National Center for Interstate Compacts, I have had the opportunity to provide legal guidance and drafting assistance concerning a wide variety of interstate compacts including several compacts which have been enacted by all fifty (50) states and U.S. territories. I also provide on-going legal advice to several national interstate compact commissions and have also served as litigation counsel in a significant number of state and federal litigation matters pertaining to interstate compacts including both rulemaking and enforcement. A recent example is the favorable decision concerning the validity of the various low-level radioactive waste compacts currently in effect throughout the nation in *Energy Solutions, LLC v. State of Utah et al.*, 625 F.3d 1261 (2010). I have also testified before numerous state legislative committees considering various compacts which I have drafted and have spoken on the subject of interstate compacts to a wide variety of groups of state officials including legislators (including NCSL and NCOIL), judges and assistant attorneys general. I have also written widely on the subject including law review articles and I am a co-author of the legal treatise containing the largest published compilation of legal authorities on interstate compacts entitled "*The Evolving Use and Changing Role of Interstate Compacts: A Practitioner's Guide*" (American Bar Association, March 2007).

Based on my review of the proposed agreement and knowledge and professional experience in the field of compact law I have concluded that NIMA fails to provide any substantial or enforceable mechanism for achieving uniformity because it fails to provide a binding agreement which pre-empts other state laws in conflict with it's requirements. Moreover it

**Memorandum**  
**January 20, 2011**  
**Page Two (2)**

unconstitutionally purports to vest authority in an Executive Branch official (e.g. the Insurance Commissioner) to bind the Legislature of a State which adopts it. NIMA thus usurps Legislative authority because the action which NIMA authorizes to be taken by the Insurance Commissioner contains no limitations or conditions upon which such uniform regulations could be developed or which a state insurance department is otherwise authorized to undertake within its own state. As the U.S. Supreme Court has made clear with regard to the separation of powers; “[W]here one branch has impaired or sought to assume a power central to another branch, the Court has not hesitated to enforce the doctrine.” See *INS v. Chada*, 462 U.S. 919 (1983), at 963 also *Buckley v. Valeo*, 424 U.S. 1 (1976), at 123.

Under the purposed legislation the Commissioner of Insurance is empowered to “participate in a multi-state compact or reciprocal agreement with other states for the purpose of collecting, allocating, and disbursing to reciprocal states any funds collected . . . applicable to other properties, risks, or exposures located or to be performed outside of this state.”

If enacted, this provision vests ultimate control over what form the State’s agreement will be in this regard and the Insurance Commissioner is purportedly empowered to unilaterally determine, on behalf of the State, to enter into either a “multi-state compact or reciprocal agreement.” The Commissioner of Insurance is thus vested with the authority to legislate on behalf of the State. This is clearly an impermissible delegation to an executive branch official of the power to legislate. See *Springer v. Government of Philippine Islands*, 277 U.S. 189 (1928) at 202. (“It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; **the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.**”) While delegation of rulemaking authority to carry out the more general principles and policies of the legislative body is permissible, as the Court has emphasized, “**The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.**” See *Loving v. U.S.*, 517 U.S. 748 (1996) at 759.

Moreover, because it fails to provide a binding agreement which pre-empts other state laws in conflict with its requirements, the proposal fails to meet the required indicia to constitute a valid interstate compact. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). (“As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified actions that typify Compact Clause creations.”) *Id.* at pp. 41-42. Principal among these characteristics is that Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. See *Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). The NIMA proposal does not obligate states to adhere to such limitations in addition to the improper delegation of legislative authority to the state’s Insurance Commissioner to determine the parameters of the agreement.

It would be my pleasure to speak or correspond with legislators or staff who may have further questions about the compact law and related issues pertaining to the above proposed legislation which has been introduced in several states.