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AGENTS FOR CHANGE: COMPETITIVE REFORMS FOR PRODUCER LICENSING

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INTRODUCTION

More than a quarter of the U.S. workforce currently is subject to some form of state occupational licensing requirement, a figure that compares with just 5 percent in the early 1950s.

As numerous studies have demonstrated, there is little evidence this growing mountain of red tape has actually helped to protect the public, but significant research finding it has meant diminished opportunities for workers and entrepreneurs and mounting costs for consumers. A 2015 study by the Heritage Foundation put the annual cost to consumers of occupational-licensing regimes at $127 billion,[1] while a 2011 paper from the W.E. Upjohn Institute for Employment Research put the figure as high as $203 billion.[2]

Even the Obama administration agrees there's a problem. A July 2015 joint report of the U.S. Treasury Department, the U.S. Labor Department and the White House Council of Economic Advisers reviewed a cohort of studies on the effects of occupational licensing, finding that nine of the 11 surveys associated more stringent licensing requirements with "significantly higher prices."[3] The White House estimates licensing laws raise the cost of goods and services by between 3 and 16 percent and finds that unlicensed workers earn 10 to 15 less than comparable licensed workers.

While there are now more than 1,100 job descriptions for which at least one state requires an occupational license, the Treasury report finds that fewer than 60 jobs are required to be licensed in all 50 states. One of those occupations is that of insurance producer, the term used in most state codes for agents and brokers licensed to market and, in some cases, bind insurance policies.

Though this ubiquity might be seen as prima facie evidence of the need to restrict insurance sale to licensed producers, it bears noting that analysis by the Reason Foundation finds a number of "outrageous" licensing requirements are similarly common. For example, all 50 states require licenses for barbers and cosmetologists and for hearing aid fitters and dispensers; most states require licenses for athletic trainers and dieticians; and several states require licenses for professions as mundane as auctioneers, casket sellers, hair braiders, interior designers and sanitarians.[4]

As a 2013 report from the Congressional Research Service describes the current insurance licensing landscape:

> In addition to the costs that might result from the specific aspects of the insurance licensing system,

1. Salim Furth, "Costly Mistakes: How Bad Policies Raise the Cost of Living," Heritage Foundation, Nov. 23, 2015. http://www.heritage.org/research/reports/2015/11/costly-mistakes-how-bad-policies-raise-the-cost-of-living

2. Morris M. Kleiner, "Occupational Licensing: Protecting the Public Interest or Protectionism?," W.E. Upjohn Institute for Employment Research, 2011. http://research.upjohn.org/cgi/viewcontent.cgi?article=1008&context=up_policypapers

3. Department of the Treasury Office of Economic Policy, the Council of Economic Advisers and the Department of Labor, "OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS," White House, July 2015. https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf

4. Adam B. Summers, "Occupational Licensing: Ranking the States and Exploring Alternatives," Reason Foundation, August 2007. http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf

> any professional licensing regime acts as a barrier to entry for those who might be interested in providing services that require a license. Economic theory suggests that such barriers increase consumer costs to some degree and have the potential to be used as a protectionist measure to prevent competition, allowing license-holders to extract economic rents from consumers. Whether or not the public benefits resulting from licensure outweigh the costs is a decision to be evaluated on a case-by-case basis by public policymakers.[5]

Determining the merits of abolishing insurance producer licensing altogether would require thorough analysis of the relative costs and benefits of licensing regimes, which is beyond the scope of this paper. However, there have over the years been a variety of proposals to loosen licensing requirements and to liberalize rules governing sales practices in ways that unquestionably would promote greater competition. This paper offers a brief review and summary of some of the more notable ideas for reform.

Historically, such proposals have faced opposition from insurance producers and their trade associations, who have been able to exert outsized influence with lawmakers and regulators. But recent shifts in the marketplace and in the law may change how such debates will play out in the future. Among those shifts is simply that the market share enjoyed by agents and brokers has been shrinking over time – a reality that likely will eventually have consequences for the community's relative influence on policy. According to a 2016 Harris Poll, 22 percent of respondents prefer to purchase insurance online; another 38 percent say they currently compare prices online before purchasing through an agent, a practice known as "showrooming."[6]

Whereas the independent agency channel accounted for the overwhelming majority of auto and home insurance sales a half-century ago, direct writers today account for 73 percent and 69 percent, respectively.[7] Even in the area of life insurance, where most consumers still prefer to buy face-to-face from a financial professional, a 2011 survey by the life insurance marketing agency LIMRA found the number preferring to buy from an agent has fallen to 64 percent, from 80 percent in 1996, with 26 percent of consumers saying they now prefer to purchase life insurance by phone or over the internet.[8]

Also noteworthy has been the general support seen from the agent community in recent years for two pieces of federal legislation which served to loosen licensing rules significantly. In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress passed the Nonadmitted and Reinsurance Reform Act, which sought to resolve conflicting state laws around the placement of multistate surplus lines risks. The measure was passed with strong support from the Council of Insurance Agents & Brokers[9] and the National Association of Professional Surplus Lines Offices.[10]

Perhaps even more significant was the 2015 legislation to create the National Association of Registered Agents and Brokers, intended to create reciprocity across state lines in producer licensing. The Independent Insurance Agents & Brokers of America, which had resisted a similar proposal in the 1990s, was now unequivocal in their support, praising the measure on grounds that it would "help policyholders by permitting greater competition among agents and brokers ... promote greater consistency in agent and agency licensing, ease the burden that many agents face in doing business across state lines, and increase consumer choice."[11]

More recently, new entrants to the market have challenged longstanding anticompetitive rules like state regulations that prohibit agents and brokers from offering rebates to their customers. Though the final disposition of these disputes is not yet known, they highlight an opportunity for policymakers to reconsider past proposals to loosen licensing requirements and foster more competitive markets that better serve consumers.

REGULATORY CAPTURE AND THE AGENT LOBBY

In 1882, a proposal to force insurance underwriters incorporated in South Carolina to prove they held sufficient deposits was defeated in the state Legislature. In an unsigned front page editorial, the trade newspaper *Weekly Underwriter* patted itself on the back for getting the ball rolling to oppose the

5. Baird Webel, "Insurance Agent Licensing: Overview and Background on Federal 'NARAB' Legislation," Congressional Research Service, Sept. 13, 2013. https://www.fas.org/sgp/crs/misc/R43095.pdf

6. Caitlin Bronson, "Consumers now prefer online insurers – but here's why that could change quickly," Insurance Business, July 25, 2016. http://www.ibamag.com/us/news/breaking-news/consumers-now-prefer-online-insurers--but-heres-why-that-could-change-quickly-35247.aspx

7. Insurance Information Institute, "Buying Insurance: Evolving Distribution Channels," August 2016. http://www.iii.org/issue-update/buying-insurance-evolving-distribution-channels

8. Press release, "Life Insurance Purchasing Habits Changing as One in Four Consumers Now Prefer to Buy Direct," LIMRA and Life and Health Insurance Foundation for Education, July 27, 2011. http://www.prnewswire.com/news-releases/life-insurance-purchasing-habits-changing-as-one-in-four-consumers-now-prefer-to-buy-direct-126244083.html

9. Press release, "THE COUNCIL PRAISES SENATE PASSAGE OF SURPLUS LINES REFORM LEGISLATION," Council of Insurance Agents & Brokers, May 21, 2010. https://www.ciab.com/news.aspx?id=338

10. Susanne Sclafane, "Dodd-Frank Delivers Single-State Tax & Regs for Multi-State Risks," PropertyCasualty360, Oct. 18, 2010. http://www.propertycasualty360.com/2010/10/18/doddfrank-delivers-singlestate-tax--regs-for-multistate-risks

11. Press release, "Big 'I' Thanks Congress for Passage of TRIA & NARAB II Legislation," Independent Insurance Agents & Brokers of America, Jan. 8, 2015. http://www.independentagent.com/News/PressReleases/Pages/2015/GA01082015_TRIAand-NARABII.aspx

bill, but reserved ultimate credit for the legislative influence exerted by a crucial component of the industry:

> The companies were aroused by our timely publication of the bill, they aroused the agents, who in turn defeated the bill. We had rather have the intelligent aid of the insurance agents in a state than any other instrument to rightly influence legislation. They know the members and can reach them with an influence which no paid lobbyist, be he ever so eloquent, can exert.[12]

Flashing forward 40 years, a trade newspaper account described this scene from the 1922 National Association of Life Underwriters convention in Boston:

> Vice President James E. Kavanaugh of the Metropolitan Life said by way of introduction that he was glad to talk to "the most influential people in Boston," namely the life insurance agents, for he declared that they wield the most influence upon the body politic...[13]

Many industry observers would argue that powerful political influence persists to this day. It was manifest most clearly in the failure of any proposals – even in the wake of the 2008 financial crisis – to exert federal regulation on the insurance industry, which independent agents long have strongly opposed. As demonstrated in Table 1, over the past decade, among the industry's dozen largest political action committees, five are associated with agent and broker trade associations.

But the influence of agents and brokers on the world of insurance policymaking is actually more subtle and insidious than can be measured by direct political contributions and lobbying. For one thing, insurance producers have political influence simply because there are so many of them. According to data from the U.S. Bureau of Labor Statistics, there were 466,100 Americans employed as insurance sales agents in 2014,[14] compared to just 103,400 employed as insurance underwriters.[15]

TABLE I:
TOP 12 INSURANCE PACS BY TOTAL RECEIPTS, 2008-2016

RANK	POLITICAL ACTION COMMITTEE	TOTAL ($)
1	New York Life	8,725,200
2	National Association of Insurance & Financial Advisors	8,382,899
3	AFLAC Inc.	7,108,750
4	Independent Insurance Agents & Brokers of America	5,827,725
5	USAA	4,398,847
6	Mass Mutual	3,831,336
7	Council of Insurance Agents & Brokers	3,784,598
8	National Association of Health Underwriters	3,168,050
9	Liberty Mutual	3,149,200
10	MetLife Inc.	2,873,613
11	Property Casualty Insurers Association of America	2,586,836
12	Association for Advanced Life Underwriting	2,530,441

SOURCE: OpenSecrets.org

Insurance agents also have a history of grassroots political activism and public service, with many going on to elective or appointive office. A 2003 analysis by the Consumer Federation of America found that 40 percent of the leadership of the legislative standards-setting group the National Conference of Insurance Legislators had histories working in the insurance industry, including several who served as active insurance agents while also holding elective office.[16] Moreover, reviewing the biographies of the 50 individuals currently serving as state insurance commissioners reveals that nine – the regulators of Alaska, Arkansas, Florida, Idaho, Kansas, Maryland, New Mexico, Oklahoma and Utah – have professional backgrounds as insurance agents and brokers.[17]

This pattern can't merely be blamed on a recent rise of "special interests" creating a revolving door. For most of the history of the insurance industry in the United States, agents and underwriters explicitly colluded to set the rules of the road.

Insurance underwriting associations go back nearly to the birth of the republic, first appearing in the 1820s. Through a nationwide system of more than 1,000 private associations, companies would license brokers and fix commissions, while

12. The Weekly Underwriter: An Insurance Newspaper, Vol. 26, No. 2, Jan. 14, 1882. https://books.google.com/books?id=jXO678-894IC&printsec=frontcover#v=onepage&q&f=false

13. Charles Donne, "New Plan to Get Get Public Attention," The Insurance Field (Life Edition), March 24, 1922. https://books.google.com/books?id=-sBNAQAAMAAJ&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false

14. Bureau of Labor Statistics, "Occupational Outlook Handbook, 2016-17 Edition, Insurance Sales Agents,"

U.S. Department of Labor, accessed Oct. 9, 2016. http://www.bls.gov/ooh/sales/insurance-sales-agents.htm

15. Bureau of Labor Statistics, "Occupational Outlook Handbook, 2016-17 Edition, Insurance Underwriters,"

U.S. Department of Labor, accessed Oct. 9, 2016. http://www.bls.gov/ooh/business-and-financial/insurance-underwriters.htm

16. Press release, "Many State Legislators Involved with National Insurance Organization Have Close Ties to Insurance Industry," Consumer Federation of America, July 9, 2003. http://consumerfed.org/press_release/many-state-legislators-involved-with-national-insurance-organization-have-close-ties-to-insurance-industry/

17. National Association of Insurance Commissioners, "Members & Regulators," accessed Sept. 1, 2016. http://www.naic.org/index_members.htm

agents formed boards to fix rules for exclusive territory and for who could represent which carriers.[18]

The system didn't really begin to change until after the U.S. Supreme Court's landmark decision in 1944's *United States v. South-Eastern Underwriters Association*, which found the business of insurance to be interstate commerce (overturning the earlier Civil War era decision *Paul v. Virginia*) and subject to the Sherman Antitrust Act.[19] Though Congress acted a year later to pass the McCarran-Ferguson Act, leaving insurance regulation to the states and preserving the industry's limited exemption from federal antitrust law, the decision set in motion a shift toward away from collusive association-driven practices and toward market competition that would transform the industry over the next four decades. As law professor Shauhin Talesh observes:

> Just as associations were being marginalized, so were insurance agents. Vertically integrated insurers became more powerful as large insurers moved into distribution and began directly marketing and selling policies to insureds. Agents became less valued as insurers realized they could expand profits while also cutting costs to insureds ...'Direct writing' eliminated the independent middleman—his commissions and hold over distribution—and subjected risk selection and claims to direct control, translating reduced commissions and claim costs into lower prices and increased market share ... While associations and agents were not eliminated from the field, large insurers' mass marketing abilities reshaped a market that previously consisted of associations, bureau companies, and local insurers.[20]

The 1980s and 1990s would see further changes in the marketplace, as well as significant pushback against some of those changes from the insurance producer community, who by now had begun to flex their muscle through the growing legislative influence of their trade associations. As a 1995 paper in the *Journal of Risk and Uncertainty* demonstrated, direct writers grew the fastest in states that liberalized their rules around underwriting and ratemaking, and held smaller shares in those states that continued to exercise significant regulatory control. However, author Anne Gron concluded it wasn't the rate regulation itself that slowed direct writers' growth – it was the political influence of independent agents that guided how such rules were implemented:

> Including measures of the political influence of insurers using nonexclusive agents and that of their agents on regulators in estimation removes the association between regulation and direct writers' market share. Combined with the different parties' support for regulation, the results indicate that nonexclusive agents used political influence to slow direct writers' growth.[21]

That agents and brokers wield significant regulatory influence is a background fact with which any would-be reformers simply must contend. But insurance producers aren't always and everywhere against the concept of competition. Indeed, over time, many agents groups have become more receptive to competitive reforms.

EXTENDING NARAB'S LICENSING REFORMS

President Barack Obama in early 2015 signed a law to create the National Association of Registered Agents and Brokers, capping an odyssey nearly 20 years in the making. Originally envisioned in the 1990s as a federally administered clearinghouse for interstate insurance licensing – a parallel organization to the National Association of Securities Dealers (now known as FINRA) – the first version of NARAB was included in 1999's Gramm-Leach-Bliley Act, but only after Congress agreed to a number of provisos demanded by independent insurance agents.[22] The first demand was that the association be administered not by the federal government, but by the states, with a board comprised of state insurance commissioners.

Acceding to independent agent pressure, another provision in the final bill preserved state "countersignature" requirements, which required an out-of-state broker to get the signature of at least one licensed in-state producer to conduct business in that state. The resident agent generally would receive a bonus 5 percent of the premium, despite adding no value whatsoever to the transaction (the nation's last remaining countersignature law was struck down by a South Dakota court in 2005).[23]

And most notably, Gramm-Leach-Bliley's version of NARAB offered an "out" that would cancel implementation if at least 29 states were found to have achieved reciprocity in their producer licensing requirements before November 2002.

18. Marc Schneiberg, "Combining New Institutionalisms: Explaining Institutional Change in American Property Insurance," Sociological Forum, Vol. 20, No. 1, March 2005. http://www.reed.edu/sociology/faculty/schneiberg/papers/SocForumSchneiberg_Institutionalisms.pdf

19. U.S. Supreme Court, United States v. South-Eastern Underwriters Association, 322 U.S. 533, June 5, 1944. https://supreme.justia.com/cases/federal/us/322/533/

20. Shauhin Talesh, "A New Institutional Theory of Insurance," UC Irvine Law Review, Vol. 5, Issue 3, August 2015. http://www.law.uci.edu/lawreview/vol5/no3/Talesh.pdf

21. Anne Gron, "Regulation and insurer competition: Did insurers use rate regulation to reduce competition?," Journal of Risk and Uncertainty, Vol. 11, Issue 2, pp. 87–111, September 1995. http://link.springer.com/article/10.1007/BF01067679

22. Steven Brostoff, "Agent Groups Meet On Fed. Bill," National Underwriter, July 30, 1997. http://www.propertycasualty360.com/1997/07/30/agent-groups-meet-on-fed-bill?ref=navbar-next

23. Insurance Journal, "Countersignature Laws Now History in 50 States After S.D. Court Ruling," Nov. 30, 2005. http://www.insurancejournal.com/news/midwest/2005/11/30/62599.htm

Ultimately, 35 states implemented a version of the NAIC's Producer Licensing Model Act before the deadline, forestalling NARAB's creation.[24]

But while reciprocity might have been achieved, more or less, in most of the country, that's a far cry from uniformity. The states of California, Florida and Washington – which combine for nearly 20 percent of the nation's population – never adopted reciprocity laws. A 2009 report from the U.S. Government Accountability Office also noted that "licensing standards, including how state regulators define lines of insurance, also vary across states, further hindering efforts to create reciprocity in agent licensing," adding that these differences "may result in inefficiencies that raise costs for insurers and consumers."[25]

Another hurdle highlighted in the GAO report was that 17 states required fingerprint background checks for insurance producers, and refused to extend reciprocity to states without similar requirements. This is notable in insurance, as in other fields, as the FBI criminal history database catalogs arrests, not convictions. Roughly half the records in the database do not include information on a case's final disposition, even though roughly a third of felony arrests do not lead to a conviction, and a third of those that do are for a different offense than was originally charged. As the National Employment Law Project has noted:

> When a faulty FBI record stands between the worker and the government agency that is responsible for certifying suitability for employment, job seekers are frequently unable to navigate the complex maze to correct the record and therefore lose out on job opportunities through no fault of their own.[26]

It is therefore both noteworthy and encouraging that, by January 2015, when Congress enacted the National Association of Registered Agents and Brokers Reform Act, the Independent Insurance Agents and Brokers of America had moved far beyond their 1999 stance of grudging acceptance of NARAB to full-throated support. In March 2013 testimony before the Senate Banking Committee, IIABA representative Jon Jensen complained that state licensing laws force "most producers today to comply with inconsistent standards and duplicative licensing processes."

> These requirements are costly, burdensome and time consuming, and they hinder the ability of insurance agents and brokers to effectively address the needs of consumers. In fact, the current licensing system is so complex and confusing for our members that many are forced to retain expensive consultants or vendors or hire staff people dedicated to achieving compliance with the requirements of the states in which they operate.[27]

Passage of NARAB constitutes a major step forward in reducing the burden of occupational licensing laws in the insurance industry and its implementation and performance over the coming years will be a matter that bears close scrutiny. But the association could do even more to promote healthy, competitive markets if:

1. It was transformed from a regulatory compact of the states to a private, self-regulatory organization (SRO); and
2. Its purview was shifted from occupational licensing to one of professional certification.

The White House report on occupational licensing reform recommends certification, otherwise known as "right-to-title," as one of several potential alternative regimes that could "represent a less restrictive means of providing consumers with information regarding provider quality."[28] NARAB members who pass the appropriate tests, keep up with continuing education, abide the law and uphold the organization's consumer protection standards could, for instance, be granted the exclusive right to market themselves as "insurance agents" and/or "insurance brokers."

The title would confer to consumers that these professionals have passed the highest industry standards, but it would not bar insurance underwriters from exploring alternative marketing and distribution platforms to deliver some insurance products to consumers without the use of an agent or broker.

There actually is precedent within the insurance industry for a similar self-regulatory organization, albeit on a much smaller scale. In the late 1980s and early 1990s, deceptive and sometimes abusive sales practices known as "twisting" and "churning" – in which life insurance agents encouraged customers to exchange older policies for new ones that offered no additional benefit, simply to produce new commissions – came under scrutiny by consumer advocates

24. Foundation for Agency Management Excellence, "Insurance Producer Licensing from NARAB to Now: The Promise, Progress and Failures," January 2014. https://www.ciab.com/WorkArea/DownloadAsset.aspx?id=4654

25. U.S. Government Accountability Office, "INSURANCE RECIPROCITY AND UNIFORMITY: NAIC and State Regulators Have Made Progress in Producer Licensing, Product Approval, and Market Conduct Regulation, but Challenges Remain," April 2009. http://www.gao.gov/assets/290/288231.pdf

26. Madeline Neighly and Maurice Emsellem, "WANTED: Accurate FBI Background Checks for Employment," National Employment Law Project, July 2013. http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf

27. U.S. Senate Subcommittee on Securities, Insurance and Investments, "STATEMENT OF JON JENSEN ON BEHALF OF THE INDEPENDENT INSURANCE AGENTS & BROKERS OF AMERICA," March 19, 2013. http://www.banking.senate.gov/public/_cache/files/446f26f8-226d-436f-9894-8fe387828128/33A699FF535D59925B69836A6E068FD0.jensentestimony31913.pdf

28. Department of the Treasury Office of Economic Policy, 2015.

and regulators. That controversy prompted the creation in 1996 of the Insurance Marketplace Standards Association.[29] IMSA, which remained in operation until it was superseded by the Compliance & Ethics Forum for Life Insurers in 2010, promulgated best practices standards for its life insurer members to ensure that companies and agents would only market products to consumers for whom they were suitable.

BANKING ON COMPETITION

Among the new sales channels most resisted by the insurance agent community has been the introduction in recent decades of banks to the insurance business. Banks commonly sold insurance policies in the earliest days of the U.S. industry, but that practice was brought to a halt by Section 92 of the 1916 National Bank Act, which prohibited the practice except in towns of less than 5,000 inhabitants.[30]

In the 1980s, as the Reagan administration explored bank deregulation, proposals were on the table for federal legislation that would allow depository institutions to sell securities, real estate and insurance. But as economic historian Charles R. Geisst notes, the administration was waved off that plan by Sen. William Proxmire, D-Wis., who otherwise supported deregulation, but feared the backlash from insurance agents.

> The reason had nothing to do with banking safety or soundness. It was purely a matter of turf. The insurance industry in particular had a very strong lobbying group in Washington and much greater political clout than Wall Street as a result. An official at an insurance trade group summed up the situation well [by] stating "The Reagan administration is taking judicial notice of reality, that there are 220,000 [insurance agents], active in every congressional district in America...they recognize that their theological drive to deregulate at any cost would hit a brick wall."[31]

Nonetheless, in the latter half of the Reagan administration, the Office of the Comptroller of the Currency did begin to interpret Section 92 to allow federally chartered banks to sell insurance to customers outside of small towns.[32] In 1995, the restrictions were further curtailed by the U.S. Supreme Court's ruling in *NationsBank of North Carolina v. Variable Annuity Life Insurance Co.*, which opened the door for bank sales of annuities, holding that they were "financial investment instruments," rather than insurance, as defined in the National Bank Act.[33]

This latter ruling, commonly referred to as the "VALIC decision," sparked intense controversy both across the states and on Capitol Hill, as agents groups pushed back at any attempt to allow banks to compete in the insurance sphere. In June 1995 testimony before the House Commerce Committee, Michael P. Grace of the National Association of Professional Insurance Agents laid out the sector's case:

> We are ... vehemently opposed to any compromise agreement that would ... [allow] banks increased access into insurance markets. Such a compromise would benefit only big business to the detriment of both consumers and independent insurance agents, who are predominantly small business owners. Banks would gain an enormous competitive advantage over insurance producers if allowed to sell insurance. Banks may not face the same regulation and licensing requirements, and they would have a captive audience to which they could market insurance.[34]

In this case, unlike so many others, the agents ultimately lost. The 1999 Gramm-Leach-Bliley Act permitted banks, broker-dealers and insurance companies to access each other's markets, with banks permitted to sell not only annuities, but other life insurance products and property/casualty insurance products, as well.[35]

As demonstrated in Figure 1, U.S. banks now routinely sell more than $1 billion in life insurance premium every year.[36] Banks also are major players in the area of commercial property/casualty insurance, with BB&T Insurance Holdings Inc. ranking as the fifth-largest U.S. insurance broker, with $1.68 billion of 2015 brokerage revenues, and Wells Fargo Insurance Services USA Inc. coming in at No. 7, with $1.32 billion in brokerage revenues.[37]

While banks are now and are likely to remain significant, although not dominant, players in insurance brokerage and

29. Joseph B. Treaster, "SPENDING IT; New Life Insurance Isn't Always the Best Policy," The New York Times, Sept. 22, 1996. http://www.nytimes.com/1996/09/22/business/new-life-insurance-isn-t-always-the-best-policy.html

30. 64th Congress, "The National Bank Act," August 1917. https://fraser.stlouisfed.org/docs/historical/congressional/191708sen_nbact.pdf

31. Charles R. Geisst, "Undue Influence: How the Wall Street Elite Puts the Financial System at Risk," John Wiley & Sons, Nov. 17, 2004. https://books.google.com/books/reader?id=9IXgDwI317UC&printsec=frontcover&output=reader&source=gbs_atb&pg=GBS.PP1

32. Office of the Comptroller of the Currency, "OCC Interpretive Letter No. 366, National Bank May Sell Insurance to Customers Residing outside Small town Where Its Main Office or Branch Is Located," Aug. 18, 1986.

33. U.S. Supreme Court, NationsBank of North Carolina v. Variable Annuity Life Insurance Co., Jan. 18, 1995. https://www.law.cornell.edu/supct/html/93-1612.ZO.html

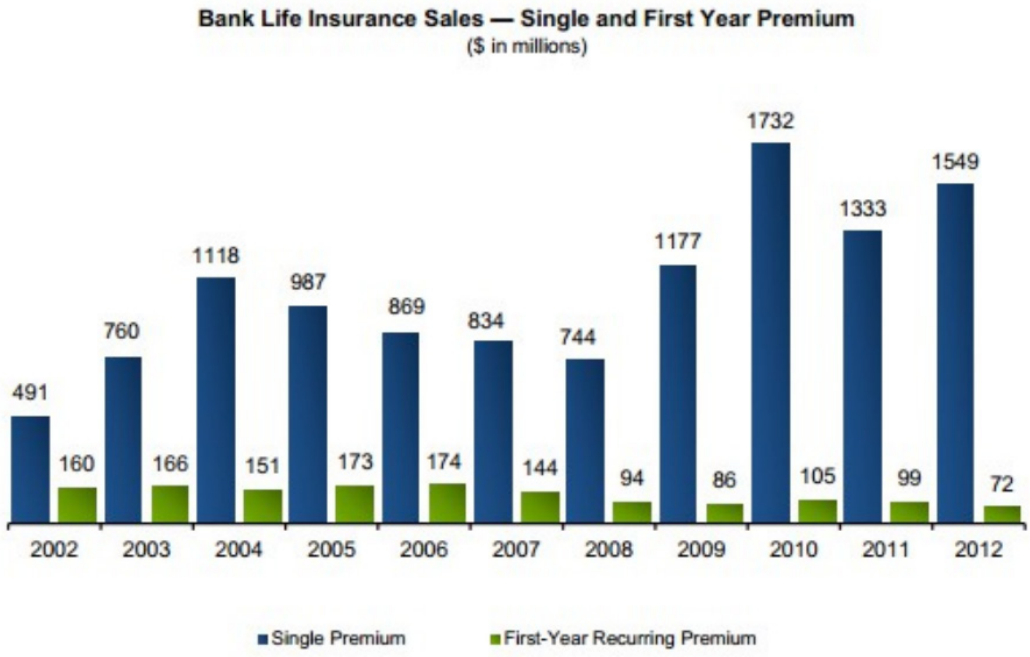
34. U.S. House Subcommittee on Telecommunications and Finance, "PREPARED TESTIMONY OF MICHAEL P. GRACE," June 8, 1995.

35. 106th Congress, "Public Law 106–102, Gramm-Leach-Bliley Act," Nov. 12, 1999. https://www.gpo.gov/fdsys/pkg/PLAW-106publ102/pdf/PLAW-106publ102.pdf

36. BISRA, "2012 Bank Life Sales Close to All Time High," March 18, 2013. http://www.cfgroup.com/wp-content/uploads/2014/11/ClarkeH6_TheClarkeSchool_Ind-News_2012_Bank_Life_Sales_Close_2012.pdf

37. Business Insurance, "100 Largest Brokers of U.S. Business," July 18, 2016. http://www.alliant.com/Alliant-News/Industry%20News/BI_2016_Largest_Brokers.pdf

FIGURE I: U.S. BANK LIFE INSURANCE SALES ($M)



SOURCE: BISRA

life insurance distribution, it remains the case in the overwhelming majority of states that they still must go through the same traditional state-by-state producer-licensing process as any other agents and brokers. There are, however, a few notable exceptions.

Beginning in the 1980s, New York State clarified the ability of employees of state-chartered savings banks to solicit sales of certain relatively small face value life insurance and annuity contracts, even without a life insurance producer's license.[38] The Empire State's "savings bank life insurance" system was later copied and expanded, first by Connecticut and later by Massachusetts.

No other state ultimately adopted the SBLI system, but given its success in three of the most financially sophisticated states in the union, its further expansion arguably could help better offer products to the underserved "middle market" – that is, those who do not have sufficient assets or income to take advantage of life insurance's more advanced savings and tax-shielding benefits. Another idea that has been floated in the past to expand life insurance's reach to the middle market is to create a new, more limited license covering only very specific lines of coverage.

LIMITED LINES, BIG BENEFITS

In addition to licensing producers to sell major lines of business – such as life, health, property/casualty and title – many states also issue what are called "limited lines licenses" for those who intend to sell just a single product. These can take the form of authorizations allowing travel agents to sell travel insurance, electronics store managers to sell coverage for portable electronics and auto dealerships to sell various kinds of credit insurance to prospective buyers. One common limited line, reflected in the NAIC's Producing Licensing Model Act, allows for the sale of small face value life insurance policies, sometimes called "burial policies" or, as they are referred to in the California state code, "LOLPs" (Life-Limited to the Payment of Funeral and Burial Expenses).[39]

In the mid-2000s, lawmakers in Alabama, Louisiana, Mississippi and Illinois and regulators at the NAIC considered whether to create a new limited line license for sales of term life insurance, the product most commonly purchased by consumers in the middle market. The idea was pushed primarily by former Citigroup subsidiary Primerica Financial Services, which sought to make it easier to license its workforce of more than 100,000 mostly part-time agents. It was opposed by the National Association of Insurance and Financial Advisors.[40]

38. Laura Gross, "New York savings banks are being offered another way around the state ceiling of $30,000 worth of savings bank life insurance per consumer," American Banker, Dec. 6, 1983.

39. California Department of Insurance, "Life-Limited to the Payment of Funeral and Burial Expenses (LOLP)," accessed Oct. 9, 2016. http://www.insurance.ca.gov/0200-industry/0050-renew-license/0200-requirements/funeral-burial/

40. Jim Connolly, "Limited Term License Proposal Gets A Lease on Life," National Underwriter, March 10, 2005. http://www.lifehealthpro.com/2005/03/10/go-top-of-page-10-with-nonqualified-annuities-kick

At the time, in 2005, Primerica noted the cost to earn and maintain a full-service life insurance producer's license was between $140,000 and $225,000.[41] The company suggested those costs contributed to the shrinking pool of full-time life insurance agents, which had dropped about one-third between 1983 and 2003, according to a study by the American Council of Life Insurers' Task Force for the Future. The number of career agents had fallen 30 percent since 1989, according to LIMRA International Inc.[42]

The NAIC ultimately rejected the idea, passing a resolution in December 2005 recommending that states not establish a limited line license for producers to sell term life insurance.[43] But the notion did draw support from some state legislators. Writing in the pages of the insurance trade journal *National Underwriter*, former Louisiana state Rep. Shirley D. Bowler, R-Jefferson Parish, argued that the "distribution system is flawed because there are fewer and fewer salespeople selling term life insurance in neighborhoods where only term insurance is needed."

> The consumer benefits clearly outweigh any perceived detriment, especially those voiced by the insurance regulators or the industry segments that oppose the competition this may bring. Regulators will continue to oversee the product and the market behavior of those who sell it, and the agents and companies who oppose the limited license aren't serving this market segment anyway. In the final analysis, increased term insurance availability means greater financial stability for families coping with the loss of a loved one and thousands of new jobs for able salespeople throughout America.[44]

Though the proposal for a limited term life license may largely have been flushed down the memory hole, the problems in the life insurance distribution system that were identified a decade ago are, if anything, even more acute today. The number of independent life insurance agents fell from 163,400 in 2007 to 149,200 in 2010. It should not be surprising that industrywide life insurance sales are down about 45 percent from the mid-1980s.[45]

Just as FINRA and the Securities and Exchange Commission offer Series 6 licenses to stockbrokers to sell products that are less complex than those that may be sold only with a Series 7, opening up more limited lines licenses would make it easier for fledgling agents to ease their way into the business, learning the features of simple products and moving their way up. Consumers would benefit both from the additional competition and simply from having more sources from whom to learn about the value of insurance products.

GROWING COMPETITION IN CROP INSURANCE

In the early 2000s, a Des Moines, Iowa-based managing general agent known as Crop 1 began to offer farmers discounts of up to 10 percent for all crops insurance through the federal crop insurance program. Underwritten by Converium Insurance North America Inc., the program saved a typical farm about $1,000 for every 1,500 acres of coverage.[46]

The program began with a seven-state trial program in Iowa, Illinois, Indiana, North Dakota, Nebraska, Minnesota and Kansas. In December 2002, the U.S. Department of Agriculture's Federal Crop Insurance Corp. approved the so-called "Premium Discount Program" to be sold over the internet, signaling the potential that other companies could begin offering similar products, as well.

That news was ill-received by the Independent Insurance Agents & Brokers of America, who charged that Crop 1 was able to offer the discounts by slashing the commissions it paid to independent agents and passing those savings on to consumers. While conceding that agents did generally receive lower commissions selling the PDP product, Crop 1 asserted the internet channel allowed those agents to increase their volume significantly by streamlining the process of collecting and distributing information. The IIABA threatened to sue to block the program's expansion.[47]

In the FCIC's view, the discounts were permitted under Section 508(e)(3) of the Federal Crop Insurance Act of 1994. Risk Management Agency Associate Administrator David Hatch reportedly told an April 2005 industry gathering that the agency would implement a rule allowing premium discounting by July 1, 2005, in time for the 2006 Standard Reinsurance Agreement.[48]

Nine of the 16 approved crop insurance providers submitted applications to offer PRPs. Alas, under lobbying pressure

41. Ibid.

42. Eleanor Barrett, "STATE REGULATORS SEEK TO SQUELCH 'LIMITED' LICENSES TO SELL TERM LIFE INSURANCE," BestWire, June 22, 2005.

43. Jim Connolly, "NAIC Acts on Annuities, Limited Term Resolution," National Underwriter, Dec. 12, 2005.

44. Letter to the editor, "Term-Only Insurance Licenses: A Clear and Present Need," National Underwriter, April 28, 2005. http://www.lifehealthpro.com/2005/04/28/termonly-insurance-licenses-a-clear-and-present-ne

45. Kenneth Hittel, "A Modest Proposal to Address the Decline of Individual Life Insurance Sales," Insurance Innovation Reporter, Sept. 4, 2014. http://iireporter.com/a-modest-proposal-to-address-the-decline-of-individual-life-insurance-industry/

46. Farm Industry News, "Business of buying," p. 4, March 1, 2004.

47. Mark E. Ruquet, "Agents May Sue On Crop Insurance Commissions," National Underwriter, April 28, 2003. http://www.propertycasualty360.com/2003/04/23/agents-may-sue-on-crop-insurance-commissions

48. House Agriculture Subcommittee on General Farm Commodities and Risk Management, "Statement of Greg Burger Vice Chairman, American Association of Crop Insurers," May 4, 2005.

from agents groups and some competing crop insurers, Congress included language in the Fiscal Year 2006 Agriculture Appropriation Bill to zero out the PRP program for the 2007 crop reinsurance year, effectively canceling the program.[49]

As Congress prepares to take up a new farm bill in 2017 and 2018, now would be an appropriate time to revisit the possibilities to offer incentives to companies and agents to cut costs and compete more effectively. According to analysis by the Government Accountability Office, while federal crop insurance costs averaged $3.4 billion a year from 2003 through 2007, they were $8.4 billion a year from 2008 through 2012 and are expected to average $8.9 billion a year from 2014 through 2023.[50] Any responsible effort to slow that growth must be explored.

ANTI-REBATING LAWS ARE ANTI-COMPETITION

Among the oldest and most entrenched examples of how regulatory capture diminishes competition in the insurance market are rules prohibiting agents and brokers from offering "rebates" to their insureds. The laws date back to the 19th century, when the terms and conditions of underwriting largely were set by independent agents. The rules initially dealt with what were seen as solvency concerns that could stem from agents too generously sharing the proceeds of their commissions with a client.[51]

Today, such laws are generally used to prevent agents from giving away any but the most inconsequential of trinkets, like pens and key chains, on grounds that more substantial gifts could illegally "induce" a client to do business. The net result, of course, is to tamp down on competition, and various government agencies over the years have recognized that fact.

A 1977 report from the U.S. Justice Department's Task Group on Antitrust Immunities recommended that consumers be allowed to negotiate over agent commissions and other fees.[52] Four years later, Rep. John J. LaFalce, D-N.Y., introduced H.R.4497, the Insurance Sales Deregulation Act of 1981, which proposed to amend the McCarran-Ferguson Act to bar state anti-rebating laws.[53] In testimony at the time, LaFalce estimated the cost of the laws to consumers was $5 billion to $6 billion, the equivalent of $13.3 to $15.9 billion today.

However, it wasn't until June 1986 that any lasting action was taken to peel back anti-rebating laws. In a case brought by Ralph Nader's Public Citizen Litigation Group, the Florida Supreme Court ruled 4-3 that the state's anti-rebating provision violated the Florida Constitution on grounds that it ''unnecessarily limit[s] the bargaining power of the consuming public."[54] California voters also made rebating legal when they passed state Proposition 103, which repealed all portions of the code prohibiting rebates.[55]

But agents pushed back against other states adopting similar rules, which none ever have. They also sought to proscribe how California and Florida's rules could be used, sometimes with the cooperation of regulators.

In the early 1990s, Peter Katt, a Michigan-based life insurance counselor and agent who also was licensed in Florida as a nonresident agent, advertised that he would discount to customers 100 percent of the commissions he would earn on life insurance policies sold in Florida and instead charge only an hourly rate for his time, plus travel expenses. Following complaints from the Independent Insurance Agents of Michigan, the Michigan Association of Professional Insurance Agents and the Michigan State Association of Life Underwriters, Michigan's insurance commissioner deemed that even though the rebates were legal under the laws of Florida, Katt's solicitation of customers in Michigan violated the state code.[56]

Although rebating began to take hold in California among some life insurance agents and brokers, a number of underwriters discouraged the practice.[57] The California Office of Administrative Hearing, in a 1994 decision fought by then Insurance Commissioner John Garamendi, ruled that individual insurance companies could choose to sever

49. 109th Congress, "AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT of 2006, PUBLIC LAW 109–97," Nov. 10, 2005.

50. Government Accountability Office, "CROP INSURANCE: Considerations in Reducing Federal Premium Subsidies," Report to the Ranking Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate, August 2014. http://www.gao.gov/assets/670/665267.pdf

51. Farlex Financial Dictionary, "Anti-Rebate Law," 2012. http://financial-dictionary.thefreedictionary.com/Anti-Rebate+Laws

52. Task Group on Antitrust Immunities, "The Pricing and Marketing of Insurance," U.S. Department of Justice, January 1977. https://babel.hathitrust.org/cgi/pt?id=pur1.32754081247367;view=1up;seq=5

53. Rep. John J. LaFalce, "H.R.4497 - Insurance Sales Deregulation Act of 1981," 97th Congress, Sept. 18, 1981. https://www.congress.gov/bill/97th-congress/house-bill/4497?q=%7B%22search%22%3A%5B%22H.R.+4497%22%5D%7D&resultIndex=1

54. Lynn Brenner, "Florida Insurance Ruling May Aid Banks," The American Banker, June 6, 1986.

55. Mark Magnier, "INSURERS, CONSUMERS APPLAUD COURT DECISION ON PROPOSITION 103," Journal of Commerce, Dec. 9, 1988.

56. D. A. D'Annunzio, "Declaratory Ruling 91-11498-M: Soliciting insurance by offering to rebate premiums in another state," Michigan Department of Insurance, March 27, 1991. https://www.michigan.gov/documents/91-11498-M_157386_7.pdf

57. Thomas S. Mulligan, "Big Insurers Accused of Trying to Suppress Discounting : Insurance: Prop. 103 freed brokers to rebate commissions, but few are doing so," Los Angeles Times, July 22, 1992. http://articles.latimes.com/1992-07-22/business/fi-4377_1_life-insurance

appointments with independent agents who rebated a portion of their commissions.[58]

In a 1994 piece in the *Los Angeles Times*, columnist Kathy M. Kristof took note of the public arguments from life insurers that rebating could lead some consumers to choose the wrong products, deeming them to be "bunk." Insurers who refused to work with agents that publicly announced their intent to offer rebates, she wrote, would privately acknowledge the real story:

> In reality, most reputable insurers don't object to the rebates; their agents do. After spending three hours in your kitchen hounding you about your life insurance needs, the last thing an agent wants to hear is, "Just how much are you making on this?" If rebates became commonplace -- and common knowledge -- that uncomfortable question will come up more and more often.
>
> Moreover, if California agents could advertise the availability of rebates in other states, savvy insurance consumers everywhere would be dumping their local agents and booking flights to the rebate state. Out-of-state residents can buy policies in California – regardless of their own states' anti-rebating laws – as long as they're in California when they sign the contract.
>
> As a result, agents have kept pressure on companies to pressure agents not to rebate. Many companies, which would rather sell insurance than squabble, have an unwritten "don't ask, don't tell" policy. Agents can rebate as long as they do it quietly enough so competitors don't squawk.[59]

In recent years, some states have moved well beyond just prohibiting actual cash rebates and started cracking down even on brokers who merely try to differentiate themselves with more and better services.

An early example of this trend can be found in a 2008 bulletin from the Texas Department of Insurance, which instructed licensed insurance brokers that they were prohibited from offering "any no cost non-contractual services which are ordinarily the responsibility of the insurance policyholder." Among the examples TDI offered of the kinds of services brokers would not be allowed to provide customers for free were "COBRA administration services, flexible spending account administration services, and various human resource related administration services."[60]

Thankfully, other states – most notably, New York – have moved in a different direction. In 2009, then Insurance Superintendent Eric Dinallo issued "Circular Letter 9," which held that a service provided by an insurance producer to a client would not violate anti-rebating laws provided that it "directly relates to the sale/servicing of the policy or provides general information about insurance risk reduction; and [t]he producer provides the service in a fair and non-discriminatory manner to like customers."[61]

These disparate approaches to anti-rebating law have come to a head most recently in regulatory debates over the online insurance broker Zenefits, whose business model includes providing a web-based human resources platform to employers and the general public for free. The company earns commissions on the insurance benefits it places.

Regulators have split on whether the Zenefits model violates anti-rebating laws. Some, following the example set by New York, have interpreted their statutes to allow services offered on equal terms to the public, with no requirement to buy insurance, as not constituting unlawful inducement. But needless to say, pressure from the agents lobby has contributed to states like Utah deciding to reject the "software-as-a-service" approach. As R Street Senior Fellow Ian Adams put it in a 2015 paper:

> Utah's application of its anti-rebating law fails the first test of regulation: it does not identify any consumer who could feasibly be harmed by the market conduct in question, while many consumers potentially could benefit. As a first step toward reform, states like Utah must ensure that rules theoretically enacted to protect the public do not end up making it illegal to give that same public the products and services they value most.[62]

CONCLUSION

To be sure, insurance agents and brokers remain a powerful political force, capable of exerting significant influence with both lawmakers and regulators. But in insurance, as in nearly every field, it is the consumer who ultimately is king. As consumers come to expect more choice in how they buy

58. Press release, "Garamendi will not accept anti-rebating decision," California Department of Insurance, April 29, 1994.

59. Kathy M. Kristof, "Insurance Commission Rebates at Issue," Los Angeles Times, May 12, 1994. http://articles.latimes.com/1994-05-12/business/fi-56847_1_life-insurance-agents

60. Robert L. Whiddon, "Rebate wrangling: Texas insurance official aims to clear the air on the thorny issue," Employee Benefit Advisor, Aug. 1, 2008.

61. Press release, "THE COUNCIL COMMENDS NEW YORK ON CLARIFICATION OF ANTI-REBATING LAWS," Council of Insurance Agents and Brokers, March 3, 2009. https://www.ciab.com/news.aspx?id=1015

62. Ian Adams, "Anti-rebating laws and the Utah experience," R Street Institute, February 2015. http://www.rstreet.org/wp-content/uploads/2015/02/RSTREETSHORT8.pdf

insurance, the market inevitably will imagine new business models to provide that choice.

NARAB offers a good example of the industry's ability to come around on a proposal. Many agents and brokers might indeed still object to savings bank insurance, limited lines licenses, premium reduction plans and policy rebates, but such objections might also someday fall by the wayside.

To keep up with their customers, agents and brokers will have to adapt. To stay in the good graces of the public they serve, lawmakers and regulators will have to do the same.

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