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EXPECTFOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

SPRING PLANTING

SOWING CHANGE IN OUR FIELD

CARLTON FIELDS

EXPECTFOCUS®

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Continued SEC/FINRA “Complex” Product Concerns

Will Good Regulatory Harvest Arrive?

BY ANN FURMAN

Like farmers uncertain about what crop to plant, the SEC and FINRA continue to cast about for ways to enhance their regulatory framework for “complex” products, particularly with regard to retail investor understanding. The regulators have been hampered by, among other things, the lack of any clear and consistent definition of what products should be regarded as “complex” for purposes of any such regulatory initiative.

In October 2021, the SEC approved rule changes by Cboe BZX Exchange Inc. to list and trade two complex exchange-traded products (ETPs). The next week, SEC Chair Gary Gensler issued a statement on complex ETPs in which he called for additional rulemaking to strengthen the investor protections around those products.

For their part, SEC Commissioners Allison Herren Lee and Caroline Crenshaw issued a joint statement about the approval of the complex ETPs, noting, “[W]e want to be clear that the Commission is not expressing a view as to these products’ suitability, either as a general matter or with respect to any specific investor.”

As the SEC staff studies ways to enhance regulation of ETPs, FINRA has solicited comment on ways to enhance regulation of complex products and options. On March 8, 2022, FINRA issued Regulatory Notice 22-08 soliciting comment on:

- Effective practices that firms have developed for complex products and options; and
- Whether the current regulatory framework is sufficient to address current concerns raised by complex products and options.

Ten years ago, FINRA issued guidance on heightened supervision of complex products and identified examples of complex products, including certain asset-backed securities, products with an embedded derivative component, leveraged and inverse ETFs, and certain structured notes, among others. Variable insurance products were not mentioned in the 2012 guidance.

FINRA expands the examples of complex products in Regulatory Notice 22-08 to include defined outcome ETFs, mutual funds and ETFs that offer strategies employing cryptocurrency futures, and interval funds that provide limited liquidity to investors, among others. Variable insurance products are not included as examples.

But in its release adopting Regulation Best Interest, the SEC gave examples of complex products that included variable insurance products and leveraged and inverse ETFs. And in 2004, when the NASD (now FINRA) sought to impose sales practice standards and supervisory requirements on variable annuity transactions, the NASD referred to variable annuities as “complex investment instruments.”

In its March 8 solicitation of comments on effective complex product regulation, FINRA addresses its product-specific rules relating to variable insurance products as examples of how FINRA rules deal with specific products, particularly variable product rules identifying factors to consider when making recommendations, restrictions on non-cash compensation, and content standards for variable product communications. Query whether FINRA will adopt a similar regulatory approach for ETPs and other identified complex products. The comment period ends on May 9, 2022.

Flowers Sprout in the Consumer Data Regulation Garden

BY ANN BLACK, JAMIE BIGAYER, AND JORDAN LUCZAJ

With spring's arrival, a bouquet of differing NAIC groups and states is popping up to consider the use of big data and algorithms by insurers, including algorithms based on machine learning. Many are focusing on life insurance underwriting and seeking to ensure that any unfair bias is rooted out of the data and algorithms used by insurers. The NAIC's 2022 activity will be cultivated by the newly formed Innovation, Cybersecurity, and Technology (H) Committee (H Committee). States are also blooming with activity, and Colorado planted its bulbs early in 2022 by holding two stakeholder meetings as required by Senate Bill 21-169 (as codified in Colorado Statutes section 10-3-1104.9).

NAIC

The new H Committee is facilitating all the NAIC groups and addressing innovation and technology issues so that information and insights can be cross-pollinated among all regulators and interested persons. The goals of the H Committee are to:

- Identify issues with the use of innovation and technology;
- Understand how the use of innovation and technology is affecting the insurance market;
- Understand how insurers are innovating and using technology; and
- Understand how such insurers' use of innovation and technology can be regulated.

To further pollinate collaboration and to ensure no unfair bias takes root, one of the H Committee's first projects is a collaboration forum that will (i) address algorithmic biases by identifying and addressing foundational issues and (ii) develop a common framework that can inform the specific workstreams in each NAIC group. This will bring together the work of the:

- NAIC Accelerated Underwriting Working Group (AU WG)
- NAIC Big Data and Artificial Intelligence Working Group (Big Data & AI WG)

These WGs also reported their activities at the NAIC Spring 2022 National Meeting.

The AU WG's educational report fully bloomed, as it was adopted by the AU WG during the Spring National Meeting. The educational report provides a broad overview of life insurers' use of big data and accelerated underwriting, grading the ground for regulators and interested parties. The educational report reviews the differences between accelerated underwriting, traditional underwriting, and simplified underwriting, as well as the current prevalence of these practices and expected trends for the future. It also reviews the use of various types of consumer data, including traditional data, non-traditional data, Fair Credit Reporting Act data, and the issue of using biased data.

Some consumer representatives criticized the educational report's lack of concrete guidance for states and reliance on current unfair trade practices laws. However, the AU WG chair noted that the next work product of the AU WG would be to create a regulator guide that builds on the educational report and provides specific guidance for regulators.

Within the Big Data & AI WG, several workstreams are sprouting.

- Workstream One – Initially, the Big Data & AI WG sought to grow regulatory understanding of the use of artificial intelligence and machine learning in private passenger auto insurance; now, the workstream is branching out to conduct similar surveys for homeowners and life insurance.
- Workstream Two – Is seeking to grow tools to assist regulator review of accelerated underwriting models and help regulators determine whether bias is "baked into" the data or models being used.
- Workstream Three – Is studying the industry's reliance on third-party vendors of data and algorithms and how to "best regulate these entities," including through revised examination standards.
- Workstream Four – Seeks to germinate a white paper on a regulatory framework that brings together all the informational clippings from the other workstreams.

States

Oklahoma sprouted House Bill 3186 and Rhode Island sprouted House Bill 7230, which are substantially similar to Colorado Senate Bill 21-169. As we previously reported, Colorado prohibits insurers from using external consumer data, information sources, algorithms, or predictive models based on such data, in a way that unfairly discriminates based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression. Colorado has held two stakeholder meetings focusing on life insurance underwriting practices at which the key terms "external consumer data and information sources" and "traditional underwriting practices" and the required testing process were discussed.

Other state activity includes:

- New Jersey Assembly Bill 5651 requires annual reporting by automobile insurers using an automated or predictive underwriting system, to demonstrate that there is no discriminatory outcome in the pricing of insurance, and directs the commissioner of banking and insurance to cultivate rules and regulations.
- A preproposal statement of inquiry was planted by Washington regarding possible rulemaking on insurance underwriting transparency to address its concern that "insurance consumers are not provided with full disclosure and complete transparency from insurers for adverse actions, rate changes, or the factors that insurers consider in determining premiums." The proposal would require insurers "to provide notices to consumers for all factors evaluated in any associated insurer actions, which must include an itemized disclosure of all variables considered in underwriting, as well as the proportionality or weight at which those factors were evaluated."
- Connecticut updated its department notice concerning the "usage of big data and avoidance of discriminatory practices" to remind insurers of their obligation to ensure that their use of big data complies with federal and state anti-discrimination laws, regardless of whether the seeds for their data and algorithms are sourced internally or through a third-party vendor. Insurers are also required to submit an annual data certification to the Connecticut Insurance Department. The notice also asserts the Connecticut Insurance Department's authority to require that insurance carriers and third-party data vendors, model developers, and bureaus provide the department with access to data used to build models or algorithms included in all rates, forms, and underwriting filings.

As spring turns to summer, more varietals are sure to emerge as other regulators begin tending their gardens. We will continue to monitor the activity of the NAIC and the states regarding insurers' use of big data and algorithms.

A Hailstorm for Private Fund Advisers?

SEC Clouds the Horizon

BY TOM LAUERMAN

On January 26, 2022, the SEC proposed amendments to Form PF including:

- Requiring investment advisers to private equity funds and large investment advisers to certain hedge funds to provide current reporting of certain key events (e.g., extraordinary investment losses) that may indicate fund distress or conflicts of interest.
- Decreasing the amount of private equity assets under management that requires advisers to provide certain of Form PF's prescribed information and requiring such large private equity advisers to disclose considerable additional information relating to the operation of their portfolio companies.
- Modifying disclosure requirements for large liquidity fund advisers to make them more consistent with certain proposed reporting requirements for money market funds.

As with a number of other recent SEC actions, the commissioners are split on this. Notably, Commissioner Hester Peirce released a dissenting statement, as she believes the more extensive disclosures required by the proposed amendments are unjustified and doubts that they "would enhance [the Financial Services Oversight Council's] ability to monitor for systemic risk."

For example, as to the proposed enhanced reporting requirement for private equity and certain hedge funds, Peirce pointed out that the mere possibility that isolated reports of fund distress could be indicative of systemwide instability, absent any "hard data-driven analysis," is not enough to justify almost immediate reporting of the funds' localized events. She characterized this as an attempt to "micromanage" the fund advisers and unduly burden them.

Concerning the proposed lowering of the reporting threshold for large private equity funds, Peirce stressed that the SEC needs to come up with a substantive reason that supports the proposal other than a mere desire to collect more data, as the current threshold already captures a substantial amount of data of private equity funds.

This Form PF reporting proposal can properly be viewed as mutually reinforcing with the other recent proposals discussed in "SEC Proposes Sea Change in Private Fund Regulation - Doing Indirectly What It Could Not Do Directly?" on page 10 of this edition. Peirce, the sole Republican on the commission, also dissented from those proposals, and her similar objections to all of these proposals are also mutually reinforcing.

SEC Whistleblower Proposals Continue Reversal of Trump-Era Rules

BY GARY COHEN

The SEC has proposed to amend its whistleblower rules in ways that exacerbate a continuing clash among Democratic and Republican commissioners over rolling back SEC rules adopted under President Donald Trump.

SEC Chair Gary Gensler promoted the latest proposals as helping to "ensure that whistleblowers are both incentivized and appropriately rewarded for their efforts in reporting potential violations of the law to the Commission." Commissioner Hester Peirce, a Republican appointed by Trump, lamented that the proposals are "an imprudent use of our resources."

The first proposal would let the SEC pay whistleblower awards for certain actions that other federal agencies bring in cases where those awards might otherwise be paid under the other entity's whistleblower program. Gensler has explained that this "rule change is designed to ensure that a whistleblower is not disadvantaged by another whistleblower program that would not give them as high an award as the SEC would offer."

The second proposal would let the SEC consider the dollar amount of a potential award for the limited purpose of increasing the award amount and eliminate the SEC's authority to consider the dollar amount of a potential award for the purpose of decreasing the award. Gensler has said that "[t]his would give whistleblowers additional comfort knowing that the SEC could consider the dollar amount of the award only in such cases."

Peirce dissented. As for the proposals per se, she condemned them as "unnecessary and unpersuasive" and "a solution in search of a problem." As for the larger issue of rolling back rules, Peirce warned that "revisiting recently adopted rules subverts the regulatory consistency and certainty essential to well-functioning markets."

Peirce has previously expressed similar views in the context of Gensler's broader rulemaking agenda. Last December, she and then-Commissioner and Republican Elad Roisman publicly objected to announcements that Gensler planned "to undo rulemakings that the Commission only recently completed." They complained that they "have not seen any new information that would warrant opening up any of these rules for further changes at this time."

These rules have involved not only the SEC's whistleblower rules but also rules relating to proxy solicitation and shareholder proposals, the resource extraction payments rule, and the rules pertaining to the accredited investor definition and the private offering exemption integration framework. The rules, orchestrated under Trump-appointed Chair Jay Clayton, drew the ire of Democratic Commissioners Allison Herren Lee and Caroline Crenshaw. Also, in an unusually harsh accusation, the SEC's Investor Advocate reported to Congress that the rule on shareholder proposals was "in contravention" of the Securities Exchange Act and, "at the very least, the spirit of the Administrative Procedure Act."

Roisman, appointed by Trump, resigned from the SEC last January and will be replaced by another Republican. Lee has recently announced that she will not seek reappointment to serve after her term expires in June, although she will continue to serve until her replacement (another Democrat) is confirmed. Peirce's term ends next January.

Shortened Settlement Cycle Sprouts at SEC

(T+1 for T+2)

BY TOM LAUERMAN

Rule changes recently proposed by the SEC would shorten the time within which most securities transactions effected by a broker-dealer must be settled. Specifically, most settlements would be required to occur by the first business day after the trade date (T+1), rather than the currently required second day (T+2).

The shortened settlement cycle would apply to many securities transactions by both retail and institutional investors. For example, transactions in shares of investment companies that are traded on exchanges (e.g., ETFs and closed-end funds), which now are permitted to settle on T+2, would have to settle on T+1. So would transactions in shares of non-exchange-traded mutual funds (although most mutual funds already settle on a T+1 basis, as a matter of business policy).

Also, where the new T+1 requirement applies, the SEC's proposal would make certain new requirements applicable to broker-dealers and investment advisers if the transaction is a "block" transaction as to which the parties follow what the proposal refers to as a "confirmation" and "affirmation" process to facilitate allocation of the block among multiple accounts.

This latest proposal follows similar rule amendments that the SEC adopted in 1993 (shortening the standard cycle from T+5 to T+3) and in 2017 (further shortening it to the current T+2). As with those previous actions, the SEC believes moving to a T+1 cycle would reduce certain credit, market, and liquidity risks, which will also reduce systemic risks for central counterparties and other market participants. For example, mutual funds that already settle purchases and redemptions of their shares on a T+1 basis may be able to more efficiently and precisely manage their cash flows and liquidity requirements, to the extent that the SEC's current proposal would result in fund portfolio transactions settling closer to when fund share purchases and redemptions settle.

For similar reasons, the SEC and the industry also have been considering the possibility of eventually moving to a "same-day settlement" (i.e., T+0) requirement. And that is one of the many things about which the SEC's proposing release requests comments from interested parties.

The SEC's current proposal would leave in place an order that the SEC issued in 1995 that provides an exemption for most insurance products (including variable annuities, variable life insurance, and certain other insurance products that are registered as securities). Accordingly, transactions in these exempted insurance products would be exempt from the new T+1 requirement in the same way that the 1995 order now exempts them from the current T+2 requirement. This exemption reflects the fact that transactions in insurance products are subject to numerous requirements and considerations (including under state insurance law and SEC regulatory requirements) that make a T+2 or T+1 settlement mandate inapposite and unnecessary. For example, many such transactions remain subject to special pricing and processing requirements under the Investment Company Act of 1940 and/or FINRA rules, and the regulators have shown some flexibility in administering such requirements. That flexibility reflects, as appropriate, the unique character of some transactions in insurance product securities.

Given the possible operational adjustments that the new T+1 requirement may require on the part of certain industry participants, the SEC is proposing that the new requirement not become mandatory until March 21, 2024. The comment period on this proposal expires on April 11, 2022.

SEC Cultivates Shadow Trading Theory

Emerging Species of 10b-5 Violation?

BY NATALIE NAPIERALA

Due to the lack of a detailed governing statute or rule, insider trading law continues to evolve and grow as novel theories are presented to and interpreted by the federal courts. Recently, a new theory emerged: shadow trading liability, i.e., using confidential knowledge about an insider's company to trade profitably in a competitor company's securities. Unlike the traditional insider trading case, shadow trading involves securities that are *not* related to the insider's company or any direct counterparty or merger partner.

SEC v. Panuwat is the first case to address this novel theory of potential liability. There, the Securities and Exchange Commission alleged that, in violation of Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 thereunder, Panuwat — a former investment banker and executive at a midsize biopharmaceutical company — used confidential information about the company's pending merger to buy stock options in another company in the same industry.

In January of this year, a federal district court in the Ninth Circuit denied Panuwat's motion to dismiss and allowed the complaint to proceed on this matter of "first impression." The court opined that confidential information about the pending merger of an insider's company could be material to a company similarly situated, that is, in the same industry but not directly connected. The court found that this theory of liability, though unique, fell "within the contours of the misappropriation theory" under Section 10(b) and Rule 10b-5 and did not offend Panuwat's due process rights because the scienter and materiality elements "provide[d] sufficient guardrails to insider trading liability."

The court noted that Section 10(b) and Rule 10b-5 "cast a wide net, prohibiting insider trading of 'any security' using 'any manipulative or deceptive device.'" The court also found that information may be material to more than one company and that the SEC had sufficiently alleged scienter under either the "actual use" standard (i.e., Panuwat used the information in trading) or the "awareness" standard (i.e., Panuwat was simply aware of the information when trading), noting that district courts within the Ninth Circuit were in disagreement as to which of those standards is applicable.

Here, on a motion to dismiss, the federal district court was required to assume the complaint's allegations as true. Next, this case will proceed to discovery and, perhaps, to trial, wherein the SEC's novel theory of insider trading would again be tested.

Coming Out of Winter Hibernation

BY ANN BLACK AND JORDAN LUCZAJ

The Life Insurance and Annuities (A) Committee sprang into action during the NAIC Spring 2022 National Meeting in April. The A Committee discussed recent activities and 2022 plans for its Life Actuarial Task Force (LATF), its Annuity Suitability Working Group, and its Life Insurance Online Guide Working Group.

LATF

LATF's report included a discussion on the Index-Linked Variable Annuity (ILVA) Subgroup's cultivation of its proposed actuarial guideline to address interim values for ILVAs. If an ILVA is going to be exempt from state standard nonforfeiture law, then the ILVA subgroup is seeking to ensure that the interim values operate similarly to variable annuities — movement in the interim value corresponds to the increases and decreases of the associated index. Comments on the ILVA subgroup's second version of its proposed actuarial guideline are due by May 2, 2022.

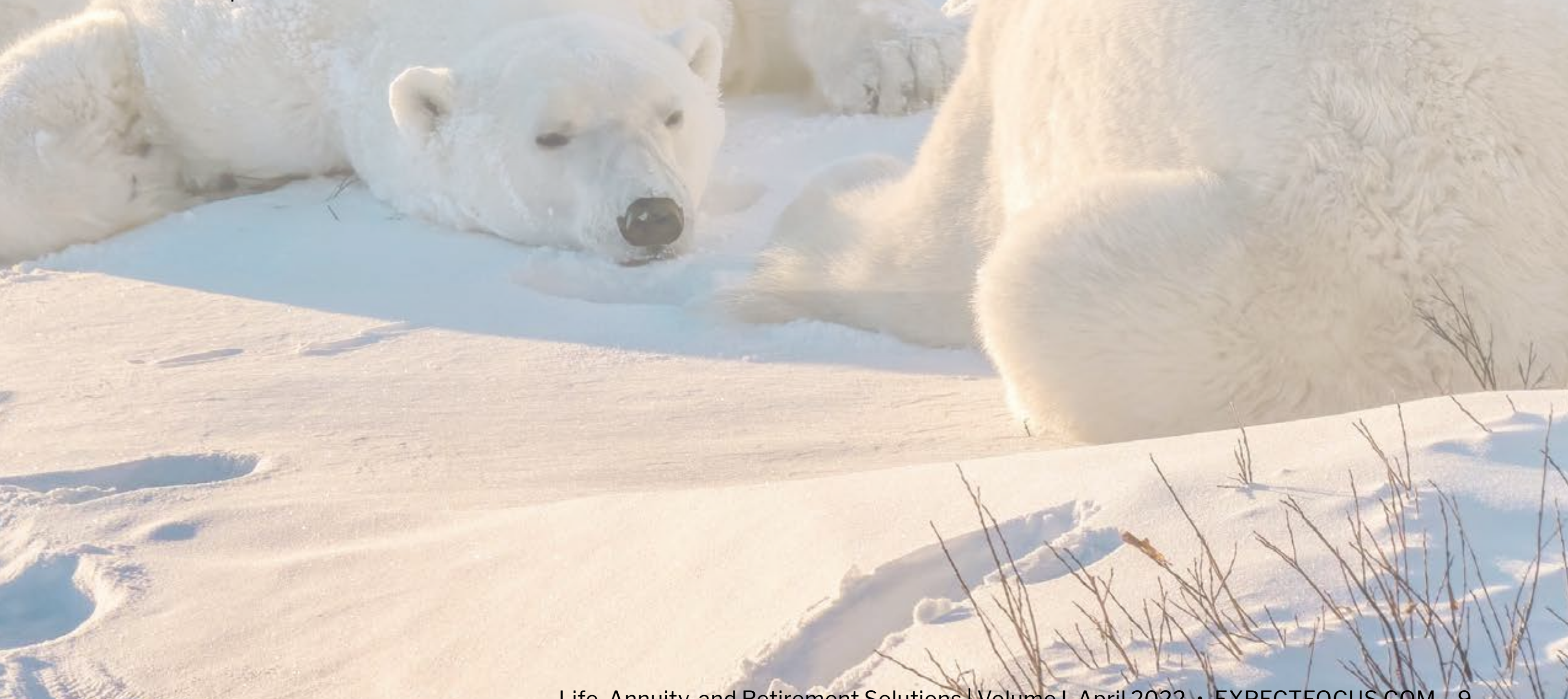
While the LATF report did not specifically address its review of Actuarial Guideline 49-A, consumer representative Birny Birnbaum asked the A Committee to consider re-tilling the ground on life insurance illustration requirements. Birnbaum explained that the use of a single interest rate during the 30 or more year time period for an indexed universal life policy fails to explain to consumers how the values of an indexed universal life policy vary with changes in index values and fails to show the risk of the sequence of returns. Birnbaum also raised issue with the use of the sprouting variety of new indexes.

Annuity Suitability WG

This working group noted that while many states have adopted the most recent changes to the Suitability in Annuity Transactions Model 275 (2020), other states have not done their spring-cleaning to start the adoption process. To lay the landscape for more states to adopt, A Committee Chair Judith French intends to contact A Committee member states. The working group plans to meet to determine what further frequently asked questions would be helpful. Working Group Chair Doug Ommen noted that the working group would be working with the Market Regulation and Consumer Affairs (D) Committee to ensure that regulatory review and enforcement of compliance with Model 275 is uniform.

Life Insurance Online WG

The Life Insurance Online WG is exploring ways that the NAIC can be a hotbed for consumers seeking information on life insurance. It has started taking stock of what information is already available and accessible to consumers. French noted that additional meetings will be held before the NAIC Summer 2022 National Meeting.



SEC Proposes Sea Change in Private Fund Regulation

Doing Indirectly What It Could Not Do Directly?

BY EDMUND ZAHAREWICZ

On February 9, 2022, a short-handed SEC voted, 3–1, to propose new rules and amendments under the Investment Advisers Act of 1940 "to enhance the regulation of private fund advisers and to protect private fund investors by increasing transparency, competition, and efficiency in the $18-trillion marketplace."

Among other things, the proposal would require registered private fund advisers to:

- Provide investors standardized quarterly statements detailing private fund performance, fees, and expenses;
- Obtain an annual audit for each private fund and cause the private fund's auditor to notify the SEC upon certain events; and
- Distribute a fairness opinion to investors in connection with an adviser-led secondary transaction, together with a written summary of material business relationships between the adviser and the opinion provider.

The proposal would also prohibit all private fund advisers, including those that are not registered, from:

- Engaging in certain activities and practices deemed contrary to the public interest and the protection of investors (such as seeking indemnification or exculpation from the adviser's own negligence); and
- Providing certain preferential treatment to some investors that has a material negative effect on other investors, as well as certain other preferential treatment unless disclosed to current and prospective investors.

In addition, the proposal would require all registered advisers, including those that do not advise private funds, to document the annual review of their compliance policies and procedures in writing.

Some have interpreted the proposal as responding mainly to unions and public pensions, which have been unable to negotiate lower fees and additional disclosures to the extent they desire from private fund advisers. Until now, however, the underlying premise for allowing the practices of private funds to go largely unregulated has been that the sophisticated and well-heeled clientele of such funds are capable of fending for themselves. As such, they do not need the protections normally afforded retail investors under the federal securities laws.

The proposal turns this once bedrock premise on its head. Recognizing this, Commissioner Hester M. Peirce, the only vote against the proposal, issued a separate statement noting that the proposal "embodies a belief that many sophisticated institutions and high net worth individuals are not competent or assertive enough to obtain and analyze the information they need to make good investment decisions or to structure appropriately their relationships with private funds." She also noted that the proposal "affords retail-like protections to accredited investors" and threatens to divert enforcement resources away from protecting retail investors to protecting "millionaire investors from private fund advisers."

The extent of the SEC's authority to regulate private fund practices through its oversight of private fund advisers also seems questionable. In particular, the proposal relies heavily on the SEC's authority under Section 211(h) of the Advisers Act. This provision, as well as an identical provision under the Securities Exchange Act of 1934, was added as part of Section 913 of the Dodd-Frank Act of 2010. Section 913 mandated that the SEC conduct a study of the standards of care for broker-dealers and investment advisers with respect to the provision of personalized investment advice to retail investors and authorized the SEC to adopt rules addressing those standards "as necessary and appropriate in the public interest and for the protection of retail investors." Thus, Section 211(h) and its sister provision under the Exchange Act appear clearly to have been added by Congress only for the purpose of enabling the SEC, if it so determined, to harmonize or otherwise address gaps in the personalized retail advice standards of care between broker-dealers and investment advisers, and not for the purpose of enabling the SEC to regulate private fund practices writ large.

It is ironic to think that, rather than using Section 211(h) to regulate retail investment advice standards, as Congress seemingly intended, the SEC will use it, in effect, to regulate the business practices of private funds for the protection of investors least in need of regulatory protections. One wonders if Congress ever could have imagined the SEC using Section 211(h) as a cornerstone for such unprecedented regulatory changes. What will be the limits of the SEC's powers over private fund practices under Section 211(h)? And how do these newly claimed powers square with the exemption that private funds have from nearly all regulation under the Investment Company Act of 1940? At a minimum, they appear to blur the line drawn by Congress between regulated and unregulated funds, arguably without a clear congressional mandate.

What becomes of the proposal remains to be seen. As Peirce said in her dissenting statement, the "proposal represents a sea change." If not an understatement, that much is certainly true.

With Spring in the Air, States Renew Their Efforts to Allow Value-Added Products and Services

BY ANN BLACK AND JORDAN LUCZAJ

Following North Dakota, New Mexico, and Washington's actions in 2021, there is a renewed effort by states to freshen up their rebating provisions to allow value-added products and services.

Kansas came alive first by passing Senate Bill 448, which adopts nearly all of the rebating language from the NAIC's recently updated Unfair Trade Practices Model Law (#880). Other states rejuvenating their rebating provisions include:

Connecticut (House Bill No. 5388)
Georgia (House Bill No. 1059)
Massachusetts (House Bill No. 1141)
Nebraska (Legislative Bill No. 863)
Ohio (Senate Bill No. 256)
Rhode Island (House Bill No. 7752)
Vermont (House Bill No. 515)

While the states are generally following Model 880's language, some state variations include:

- Connecticut – Provides more specificity on the requirements for a pilot program and reflects that the Connecticut Insurance Department will be developing a process in which a pilot would be filed with the department.
- Georgia – Eliminates as types of permitted value-added products and services, those that are primarily designed to enhance health, enhance financial wellness through items such as education or financial planning services, and assist in the administration of the employee or retiree benefit insurance coverage.
- Vermont – Applies the new language only to insurers, eliminates the pilot program language, and requires an insurer offering or providing value-added products or services to submit to the commissioner, within 10 days of first making such offer or provision, a description of the offer or provision and an explanation of how each Vermont criterion for value-added products and services is met.

As the state legislative season reaches an equinox, further legislative activity may slow. However, state insurance departments may expose regulatory provisions adopting the updated Model 880 value-added products and services provisions.

SEC Showers Down Proposed Cybersecurity Rules

Five Steps for Staying Dry

BY JOHN CLABBY, JOSEPH SWANSON, AND PATRICIA CARREIRO

It's rainy season for proposed SEC cybersecurity rules. The first watershed was proposed regulations targeting investment companies' and advisers' cybersecurity preparedness. *See* "SEC Plants New Cybersecurity Regulations; Time Will Tell What Will Bloom." The next torrent arrived on March 9 and threatens to soak public companies. *See* "Four Takeaways From the SEC's Proposed Cyber Rule for Public Companies."

While the proposals differ in many respects, the forecast is clear:

- Increased disclosure obligations regarding cybersecurity preparedness and incidents;
- Additional cybersecurity incident reporting obligations with tight time frames;
- More uniformity in cybersecurity notices/disclosures; and
- A call for greater board of directors' involvement in overseeing cybersecurity policies and procedures.

Here are five steps for staying dry through the downpour:

1. Evaluate cybersecurity incident detection, investigation, and response procedures to help meet the tighter incident reporting time frames. Consider:
   - Solidifying and updating data maps (i.e., where is the company's data?);
   - Revising and testing incident response plans;
   - Developing relationships with key third parties, including law enforcement, forensics, and counsel; and
   - Identifying outside counsel and media relations personnel to assist in drafting disclosures and responding to what is often near-immediate investor, regulator, and other third-party scrutiny.
2. Consider including at least one individual with cybersecurity experience on the board of directors.
3. Have cybersecurity as a standing agenda item at board meetings.
4. Revisit retention and succession planning for key cyber leaders and advisers, as competition for cyber talent tightens.
5. Prepare for increased regulatory scrutiny and class action litigation regarding cybersecurity preparedness and incident response.

With good preparation, a flash flood won't ruin your harvest.

NAIC's New Cybersecurity Working Group Prepares for Planting

BY ANN BLACK AND PATRICIA CARREIRO

More than 200 regulators and interested parties attended the NAIC's Cybersecurity (H) Working Group's first meeting of the year on March 23. The working group, made up of 23 states, co-chaired by Missouri and New York, is planning what crop to plant by refining its draft charges, including:

- Coordinating with the Center for Insurance Policy and Research to create a survey aimed at gathering data on insurers' cybersecurity practices and cybersecurity-related costs; and
- Supporting state insurance departments responding to insurance industry cybersecurity events. Planned work includes:
  - Tracking cyber events and breaches that states can use for visibility into incidents; and
  - Creating resources, and potentially training, for state insurance departments to use in responding to breaches, such as guidance on investigative tools, better leveraging third-party forensic investigation reports, asking questions during investigations, and reasonable timelines and expectations.

While intended to help regulators select areas of focus and better understand the often technical aspects of cybersecurity, these priorities could mean bad weather for insurers, including:

- State insurance regulators desiring to play more of a leadership role in cybersecurity join an already crowded field of other "leaders" scrutinizing insurers' practices;
- The more pressure regulators exert to obtain forensic reports, the more endangered insurers' privilege and work product protections for such reports may become; and
- Regulators' increasing knowledge base may embolden them and skew their expectations of insurers who do not have the same information available to them.

The NAIC is certainly revving the tractors and preparing the soil on cybersecurity.

NAIC's Privacy Protections Working Group Plans Extended Growing Season for Fall 2023 Harvest

BY ANN BLACK AND PATRICIA CARREIRO

The NAIC's Privacy Protections Working Group has updated its work plan, planting two crops for its fall 2023 harvest:

1. Updating NAIC Privacy Models 670 and 672

- The working group's proposed updates to Models 670 and 672 will sprout for comment on a rolling basis. Two to three sections will germinate each month, with each sprouting revision being followed by a roughly three-week comment period. The first seedlings of proposed revisions will sprout on April 13, 2022, with comments for shaping and pruning accepted until May 4, 2022. The next batch will sprout approximately one week later, followed by a three-week comment period, and so on. The complete draft revisions are planned for harvesting at the NAIC's Fall 2023 National Meeting.
- The NAIC has identified a number of "decision points," including the possibility of:
  - Replacing NAIC Model 670 and 672's definitions with the NAIC's Insurance Data Security Act's (Model 668) definitions;
  - Deleting NAIC Model 670's pretext interview provisions;
  - Coordinating NAIC Model 670 and Model 672's notification requirements; and
  - Incorporating the 2015 Fixing America's Surface Transportation (FAST) Act's annual privacy notice mailing exceptions.

Time will tell what other seedlings catch the NAIC's eye.

2. Surveying Interested Parties and Drafting a White Paper

- The working group will use a four-to-six-question survey of interested parties to gain an understanding of interested parties' data collection and disclosure practices, as well as analyze data ownership and use rights.
- Draft survey questions will be sown for comment by May 11, 2022, with comments accepted until June 8, 2022. Working Group members will complete a draft white paper by August 10, 2022, after which regulators will have until October 7, 2022, to submit comments and suggested changes. The draft will not sprout for public comment, however, until December 7, 2022, after which comments will be accepted until March 1, 2023. The working group will spend most of 2023 (through October 5, 2023) winnowing submitted comments and making any necessary amendments to its draft white paper. The draft will be finalized by the end of October 2023 and bloom at the NAIC's Fall 2023 National Meeting.

The above dates, however, are subject to growing conditions.

Action-Packed Spring for NAIC Special Committee on Race and Insurance

BY ERIN VANSICKLE

The NAIC Special Committee on Race and Insurance is moving full steam ahead in 2022, with a packed agenda during the April NAIC Spring 2022 National Meeting in Kansas City.

At the federal level, Chlora Lindley-Myers, co-chair of the special committee and director of the Missouri Department of Commerce and Insurance, indicated that the NAIC is working with the U.S. House Committee on Financial Services Subcommittee on Diversity and Inclusion, which will host a hearing and produce a report on DEI efforts within the insurance industry. The NAIC has met with Rep. Maxine Waters, chair of the U.S. House Committee on Financial Services, and some industry stakeholders have received letters and surveys regarding the subcommittee's efforts.

Workstreams One and Two of the Special Committee on Race and Insurance will continue to research and develop ideas to enhance diversity and inclusion efforts across the insurance industry and within state insurance departments. Workstream Three will continue to focus on legal and regulatory approaches to addressing unfair discrimination in the business of insurance to make recommendations for statutory or regulatory changes. Further, this workstream will develop analytical and regulatory tools to assist state insurance regulators in defining, identifying, and addressing possible unfair discrimination.

Leadership from Workstream Three met with the newly formed Innovation, Cybersecurity, and Technology (H) Committee, the Accelerated Underwriting (A) Working Group, and mathematician Cathy O'Neil regarding unintended algorithmic biases and the development of resources for regulators to address the issue. They agreed on a collaborative approach to harness the knowledge of academics, consultants, and others with expertise in artificial intelligence, machine learning, and algorithms. Moving forward, the Innovation, Cybersecurity, and Technology (H) Committee will house a collaboration forum to hear from subject matter experts, which will then allow individual workstreams to apply their knowledge toward specific charges.

The Special Committee's Workstream Four will focus on the marketing and distribution of life insurance products in underserved communities to address issues such as disparate treatment, proxy discrimination, access to products, and claims handling. As a part of this effort, Workstream Four has met with insurance industry stakeholders and the Financial Alliance for Racial Equity (FARE), which aims to increase racial diversity, create greater equity, and foster inclusion within the financial services industry and the communities it serves.

Insurance industry stakeholders should anticipate significant developments from the Special Committee on Race and Insurance and all associated workstreams throughout the remainder of the year, with some reports issued as early as the NAIC Summer 2022 National Meeting in Portland, Oregon.

Life Insurance Lapse Notice Class Actions Fail to Take Root

California Court Denies Certification

BY MICHAEL WOLGIN

California lapse notice litigation has garnered publicity ever since the California Supreme Court in *McHugh v. Protective Life Insurance Co.* held that the new insurance statutes requiring a 60-day grace period and 30-day notice before lapse, applied to all policies in force when the laws went into effect, regardless of when the policies were originally issued. Amid the wave of lapse notice lawsuits, the Northern District of California recently denied plaintiff class certification in *Siino v. Foresters Life Insurance & Annuity Co.*

In *Siino*, the plaintiff sought to certify a class of policyholders whose insurance policies were terminated for nonpayment without first being provided with the enhanced statutory grace period and notice of lapse. The plaintiff first sought certification under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class" to obtain declaratory or injunctive relief. The court, however, denied certification under Rule 23(b)(2) because the plaintiff primarily sought monetary damages, not injunctive relief.

The plaintiff also sought certification under Rule 23(b)(3), which requires that questions of law or fact common to class members predominate over individualized questions to obtain monetary relief. The court denied certification under this section as well, based on its determination that the plaintiff offered no classwide damages model, required by the U.S. Supreme Court in *Comcast Corp. v. Behrend*, for the two forms of monetary damages sought by the plaintiff — contract damages and restitution.

The court found that the plaintiff "offered no mechanism to assess" the value of lost insurance coverage, "even for her own policy." The court rejected the plaintiff's reliance on a California Supreme Court case, *Caminetti v. Pacific Mutual Life Insurance Co.*, which valued certain insurance policies based on the insurer's reserves values. As the court explained, *Caminetti* was not persuasive because the California Supreme Court explicitly confined its holding to the facts of that case, which dealt with disability insurance coverage and valuation upon insurance insolvency. The court also distinguished another California appellate decision that used reserve values to measure damages because it also involved insolvency, and because the plaintiff here "failed to provide expert testimony of the kind considered by" that court and as "required by *Comcast*." The court was not persuaded that a policyholder's share of the reserves is a proper measure of damages incurred when a policy was prematurely canceled.

The court also found that the plaintiff offered no damages model to determine classwide restitution of the diminution of the value of putative class members' policies, which have "different terms, timelines, and benefits." The court rejected the plaintiff's unsupported suggestion that diminution could be valued based on a return of past premiums paid.

Although future plaintiffs' attorneys will attempt to develop a viable classwide damages model for alleged violations of the California lapse laws, *Siino* highlights the difficulties these plaintiffs will face in doing so.

Must ERISA Actuarial Equivalence Be "Reasonable"?

BY TODD FULLER AND BROOKE PATTERSON

The U.S. District Court for the District of Massachusetts recently diverged from other decisions interpreting the term "actuarial equivalent" in an Employee Retirement Income Security Act (ERISA) class action, finding that the term did not contain a reasonableness requirement.

Former Partners Healthcare System Inc. employee Scott Belknap retired early from Partners at age 62 and receives a joint and survivor annuity, which covers both him and his spouse. Under Partners' benefit plan, participants can choose a single-life annuity, which provides a series of monthly payments until the participant's death, or a joint and survivor annuity, which provides continuing benefits to the surviving spouse but at a reduced level. The plan also specifies the assumptions to be used for determining a reduced level that would be "actuarially equivalent" to a single-life annuity.

Under ERISA Section 1054(c)(3), a joint and survivor annuity paid beginning at early retirement must be the "actuarial equivalent" of a single-life annuity paid beginning at normal retirement age. Belknap alleged that Partners reduced the value of his annuity payments by using an outdated 1951 adjusted mortality table and inflated interest rates to calculate payouts, which he alleged was unreasonable and not actuarially equivalent to single-life annuities in violation of ERISA.

Because the plain language of Section 1054(c)(3) does not contain a reasonableness requirement, Belknap argued that the term "actuarial equivalent" either requires or implies a reasonableness standard. The court rejected this argument. The court emphasized that if Congress had intended Section 1054(c)(3) to require reasonableness assumptions or standards, it would have included the language as it had done in several other sections of ERISA. The court also rejected the interpretation of actuarial equivalence found in other regulations, as the regulations did not apply to annuities, and found several other federal decisions involving actuarial equivalence unpersuasive. Further, based on expert testimony in the case, the court determined that the term actuarial equivalence did not imply or require reasonable actuarial assumptions. In fact, both of Belknap's experts testified that if a plan defines actuarial equivalence — like the Partners' plan did — actuaries should use the plan's stated actuarial assumptions to calculate the benefit.

Having determined that there was no requirement that an actuarially equivalent benefit must be based on reasonable actuarial assumptions, the court held that the plan did not violate ERISA and granted summary judgment in favor of Partners.

This decision stands in contrast to another recent decision from the U.S. District Court for the Northern District of Illinois, which denied dismissal of an actuarial equivalence class action lawsuit against Citgo Petroleum Corp. Similar to the *Partners* case, the plaintiffs in the *Citgo* case asserted violations of ERISA based on the plan's use of outdated mortality assumptions to calculate their benefits, which they claimed was unreasonable and reduced their benefits to less than the actuarial equivalent of their protected benefits expressed as a single-life annuity at their retirement date. In response to the defendant's argument that Section 1054(c) did not contain a reasonableness assumption, the court noted that "it cannot possibly be the case that ERISA's actuarial equivalence requirements allow the use of unreasonable mortality assumptions." The court noted that "[o]nly accurate and reasonable actuarial assumptions can convert benefits from one form to another in a way that results in equal value between the two." The court explained that if it were otherwise, ERISA's actuarial equivalence requirement would be rendered meaningless. Because there was a dispute regarding whether the plan's mortality assumptions were accurate, the court denied Citgo's motion to dismiss.

The *Partners* and *Citgo* cases, while at procedurally different stages, demonstrate a significant unsettled area in ERISA litigation. Carlton Fields is monitoring these ERISA issues and will report on developments in subsequent issues.

When Hidden Truths Become Material Misrepresentations

BY IRMA SOLARES

A 2021 survey by Finder.com reveals that roughly 15% of Americans admit to lying on a life insurance application. While significantly lower than the incidence of lying when procuring other types of insurance (auto, 29% and health insurance, 27%), a material misrepresentation on a life insurance application can have significant consequences for insureds or their beneficiaries.

A smoker might lie about the extent of his or her tobacco use to obtain a better premium, or an applicant may lie about his or her family history of chronic heart disease for fear of having a life insurance application rejected or being placed in a higher risk classification. Whatever the motivation, if the insurer learns of the misrepresentation during the application process and denies coverage, the rejection will also likely be recorded with the Medical Information Bureau (MIB), the clearinghouse used by life insurance companies, and could render the individual uninsurable. Even if the misrepresentation slips through the application process, two recent decisions highlight the risk insureds run if the misrepresentation is discovered within the contestability period.

In *Townsend v. Northwestern Mutual Life Insurance Co.*, Northwestern rescinded two life insurance policies based on material misrepresentations by the plaintiff's deceased husband. Northwestern issued the life policies based on the husband's representations on his medical history questionnaire that he had not used cocaine in the last 10 years. The policy included a contestability clause. The plaintiff's husband died by suicide in April 2019. Following his death, Northwestern reviewed the claim and learned that he was previously involuntarily admitted to a mental health treatment facility for a prior suicide attempt. The facility records reflected that he had used cocaine within the period addressed in the medical questionnaire. Based on that information, Northwestern denied the claim and rescinded the policies. Northwestern stated that if the company had been made aware of the prior drug use, the policies would not have been issued to him in the first place.

Following the rescission and denial of benefits, the plaintiff sued for bad faith and breach of contract. The court granted summary judgment to Northwestern, finding the records containing facts related to the husband's drug use within 10 years of the questionnaire created a reasonable basis for Northwestern to deny coverage. In a separate case, *Campbell v. Hartford Life & Accident Insurance Co.*, the Sixth Circuit Court of Appeals reversed the district court and remanded with instructions to enter judgment in favor of Hartford based on material misrepresentations in the decedent's application for life insurance benefits. Gary Campbell, whose wife was a Hartford employee, answered "no" in response to a supplemental dependent life insurance application question, which asked whether, in the past five years, he had been diagnosed or treated for drug or alcohol abuse. Based on the decedent's application, Hartford issued the policy in November 2015. The certificate of insurance contained an "incontestability clause," which specified that, absent fraud, life insurance benefits could not be contested more than two years from its effective date.

In April 2016, Campbell was diagnosed with cancer. During the investigation following his death, Hartford learned that his oncologists noted a prior history of alcohol abuse and a diagnosis of "alcohol dependence." The medical records revealed that Campbell struggled with alcohol use in the year preceding his application for life insurance coverage. Campbell died in December 2016 and his wife (as beneficiary) sought life insurance benefits under the policy. Hartford denied the benefits and rescinded coverage. The company determined that Campbell's false answer in the application was a material misrepresentation, and the policy would not have been issued had Hartford had access to Campbell's medical records documenting his alcohol abuse. Campbell's wife appealed the decision twice, arguing that alcohol *dependence* and alcohol *abuse* were two separate diagnoses. However, Hartford upheld its decision and Campbell's wife brought suit under the Employee Retirement Income Security Act (ERISA).

The Sixth Circuit concluded that Hartford's decision to rescind the life insurance coverage was not arbitrary and capricious. The court reasoned that based on the ordinary understanding of alcohol abuse and ample record evidence that Campbell was treated for abuse or excessive use of alcohol in the year before applying for life insurance, the plan administrator rationally determined that checking "no" in the application was a material misrepresentation. Likewise, Campbell's wife's argument that there is a difference between alcohol abuse and alcohol dependence (and hence no material misrepresentation by Campbell) was unpersuasive. The court explained that the administrator's reading of "alcohol abuse" was reasonable because the context of the application did not suggest that "alcohol abuse" should be given its technical meaning but rather be understood in its ordinary and everyday meaning.

While many misrepresentations likely go undetected, these cases illustrate the risks insureds run and the possibility that the policy will be rescinded following death, leaving their beneficiaries without the benefit of the insurance proceeds.

DOL Stakes Out New Fiduciary Concept

Plaintiffs Would Uproot It

BY STEPHANIE FICHERA AND KIRSTEN WOLFFORD

The Federation of Americans for Consumer Choice Inc. (FACC), alongside and representing associated members of the FACC, filed a complaint against the U.S. Department of Labor (DOL) and Secretary of Labor Martin J. Walsh on February 2, 2022, challenging the DOL's adoption of a new "prohibited transaction" exemption, No. 2020-02. The complaint alleges that the "revised" exemption issued by the DOL on December 18, 2020, seeks to nullify and replace the DOL's current five-part test for determining investment advice fiduciary status, originally implemented in 1975. Premising key arguments on the 2018 Fifth Circuit decision *Chamber of Commerce of the United States of America v. U.S. Department of Labor*, the complaint argues the revised exemption circumvents the Administrative Procedure Act and oversteps into congressional authority to rewrite the definition of a fiduciary under ERISA and the Internal Revenue Code.

The revised exemption, according to the complaint, would not only result in an extension of the administrative branch's authority but also "radically change" who is deemed a "fiduciary" under ERISA and the Internal Revenue Code. The FACC maintains that the revised exemption would interpret "fiduciary" more broadly and could apply to individuals giving investment advice only once, but with the possibility of giving investment advice to clients again in the future. In other words, investment professionals could run the risk of being deemed a fiduciary, not on the traditional basis of established trust and confidence typical in a fiduciary relationship, but based on the number and nature of times they provide advice. The complaint also hints at an attempt by the DOL to obtain "broad authority" over the IRA market.

The FACC seeks a declaratory judgment deeming the revised exemption arbitrary and capricious and asks that it be set aside. The complaint also seeks to prevent the DOL from enforcing the provision.

401(k) Climate Change and Crypto Considerations

DOL Nurtures the Former but Clips Crypto at the Roots

BY LOWELL WALTERS

Department of Labor notices in 2020 and 2021 lumped "climate change" with other environmental, social, and corporate governance concerns that the DOL initially said should generally not be considered when selecting retirement plan investment offerings (*see* "DOL to Plan Sponsors: 'It's All About the Benjamins!'"), but then clarified should only be considered if they might have an impact on investment returns (*see* "DOL to Plan Sponsors: 'It's Mostly All About the Benjamins!'").

However, the DOL is now considering climate change as a stand-alone issue. The following are a few of the more than 20 questions exclusively concerning the effect of climate change on retirement plan investments from a request for information that the DOL issued on February 14, 2022:

- What should the DOL do to protect retirement plan and pension balances from the threats of climate change?
- What are the most significant climate-related financial risks to retirement savings?
- What data on climate-related financial risk should the DOL consider, and should it collect such information by adding questions to the Form 5500 Annual Return?
- Might guaranteed annuities help mitigate climate-related financial risk?

Responses are requested by May 16, 2022.

While clearly looking to devote more time to climate change concerns, the DOL may have "weeded out" crypto in its compliance assistance release titled "401(k) Plan Investments in 'Cryptocurrencies'" issued on March 10, 2022. Characterizing cryptos as "speculative" investments that most retirement plan participants are ill-prepared to scrutinize properly, and that pose significant complications to retirement plan administration, the DOL expressed "serious concerns about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies."

The release closes with the DOL's intention to locate (and perhaps fumigate) retirement plans allowing crypto investment, even if it is only permitted through a brokerage window, and "take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments."

Foreign Ownership of Florida Insurers

Concern With Country Concentration

BY TOM MORANTE AND ERIN VANSICKLE

Florida wrapped up its 2022 legislative session on March 14 with one proposed bill that did not make it across the finish but is expected to receive continued attention in the 2023 session. The proposal would establish a new definition of "control" and extend the Florida Office of Insurance Regulation's (OIR) authority to conduct background checks on certain individuals if they collectively own or exert control of an insurer.

Under Florida Statutes section 628.051(2)(b), domestic insurance stock and mutual insurance companies applying for authorization to form an insurer to engage in the insurance business in Florida must provide, among other information, the name, residence address, business background, and qualifications of each person associated or to be associated in the formation or financing of the insurer. Each such person with an ownership interest of 10% or more, or who will hold a position as an officer or director, must furnish a sworn biographical statement, fingerprint cards, and authority for the release of information on such person's background.

The proposed bill would amend section 624.413 (Application for Certificate of Authority) to include a new section on background requirements similar to the requirements outlined in section 628.051(2)(b). Under the new section, if the aggregate percentage of ownership by persons maintaining citizenship in, residing in, or domiciled in the same foreign country exceeds 10% of the applicant for a certificate of authority, or if such persons acquire or intend to acquire in the aggregate more than 10% ownership in an existing stock insurer possessing a certificate of authority from OIR, then such persons may be deemed to have control of the applicant. In this situation, the proposed bill would subject each of those individuals to the requirements noted above, consistent with section 628.051(2)(b).

Accordingly, the proposal would provide for OIR to apply the same criteria to the following applications, among others, to determine if a person is deemed to have control:

- A COA to act as insurance administrator under section 626.8805
- A permit to form insurers under section 628.051
- An acquisition under section 628.461
- A specialty acquisition under section 628.4615

The growing focus on the aggregate ownership of foreign individuals seeking authorization to form a Florida insurer reflects OIR's concern with properly investigating who can own a Florida insurer. Stay tuned to the 2023 legislative session.

NEWS & NOTES

Carlton Fields is a sponsor of the IRI Annual Conference on May 18–20, 2022, in Washington, D.C. This broad-ranging conference convenes representatives from the entire supply chain of the insured retirement industry.

The firm is pleased to participate in the NAFA Annuity Leadership Forum on June 13–14, 2022, in Washington, D.C. Shareholder **Stephen Kraus** will be speaking on a panel.

Carlton Fields is a sponsor of the ACLI Compliance & Legal Sections Annual Meeting on July 11–13, 2022, in Fort Lauderdale, Florida. The conference will address topics relevant to compliance and legal executives.

The firm is pleased to announce the release of the 11th annual *Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*. The publication provides an overview of important issues and practices related to class action matters and management. The report's results were compiled from more than 400 interviews with general counsel, chief legal officers, and direct reports to general counsel in more than 25 industries.

For the fifth consecutive year, Carlton Fields is the Top Law Firm for insurance thought leadership, according to *JD Supra*'s 2022 Readers Choice Awards. Only one law firm is eligible to earn the Top Law Firm classification in each of the 28 categories covered by the awards.

Carlton Fields earned a perfect score of 100% on the **Human Rights Campaign Foundation's 2022** *Corporate Equality Index*, designating the firm as a "Best Place to Work for LGBTQ+ Equality" for the 13th year in a row. The rating recognizes the firm's LGBTQ+-friendly policies and practices and its devotion to workplace equality. Carlton Fields is one of only 141 law firms in the country that earned a perfect score.

Corporate counsel named Shareholder **Markham Leventhal** as a "Client Service All-Star" in BTI Consulting Group's 2022 BTI Client Service All-Stars list. All-Stars are identified solely through unprompted client feedback that recognizes them for delivering the absolute best client service. This year's report includes just 565 lawyers, recognized for being practical, savvy, in the know, able to deal with complexity, available, and nimble.

Carlton Fields Senior Government Consultant **Erin VanSickle** was nominated for a Florida Women in Insurance Leadership award. She was recognized at an awards ceremony honoring more than 40 female insurance leaders, representing every facet of the industry, who have made significant contributions to Florida's insurance marketplace.

Carlton Fields welcomes the following attorneys to the firm: Shareholder **Jan Dodd** (mass tort and product liability, Los Angeles), **Robert Friedman** (real estate and commercial finance, Los Angeles), and **Thomas Sjoblom** (securities and derivative litigation, Washington, D.C.); Of Counsel **Amir Kaltgrad** (business litigation, Los Angeles), **Scott Page** (real estate and commercial finance, Los Angeles) **Thomas Scopelitis** (real estate and commercial finance, New York), and **Kim Zeldin** (business litigation, Los Angeles); Senior Counsel **Justin Garratt** (mass tort and product liability, Los Angeles) and **Michael Martelo** (property and casualty insurance, New Jersey); and Associates **Mackenzie Collins** (real estate and commercial finance, Hartford), **Marisa Halm** (real estate and commercial finance, Miami), **Austin Jackson** (securities and derivative litigation, Los Angeles), **Christopher Marple** (real estate and commercial finance, Atlanta), **Shayaan Raja** (real estate and commercial finance, Orlando), and **Miguel Rodriguez** (property and casualty insurance, Orlando).

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