U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 1, 2008

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

The Department of Justice (DOJ) has reviewed H.R. 5611, the "National Association of Registered Agents and Brokers Reform Act of 2008," as passed by the House. The bill would, among other things, amend the Gramm-Leach-Bliley Act to reestablish the National Association of Registered Agents and Brokers as a nonprofit corporation, whose purpose is to provide a mechanism through which licensing, continuing education, and other insurance producer qualification requirements and conditions can be adopted and applied on a multi-state basis, while preserving the right of states to: (1) license, supervise, and discipline insurance producers; and (2) prescribe and enforce laws and regulations regarding insurance-related consumer protection and unfair trade practices. Although we do not oppose the bill, DOJ has serious concerns with this legislation in its current form.

Constitutional Concerns

The Department has the following constitutional concerns on the bill.

Appointments Clause issues

H.R. 5611 would make revisions to the statutory provisions that establish and govern the National Association of Registered Agents and Brokers ("NARAB"). The existing legislation that established NARAB was the subject of a presidential signing statement which noted that "members of the NARAB board would exercise significant Federal governmental authority" and therefore "must be appointed as Officers pursuant to the Appointments Clause of the Constitution." Statement by the President During Bill Signing (Nov. 12, 1999). The President's statement further noted that the bill impermissibly restricted his power of appointment by limiting candidates to those recommended by the National Association of Insurance Commissioners ("NAIC"), and accordingly, that he would "regard any such lists of recommended candidates as advisory only." *Id.*

This bill would perpetuate these constitutional deficiencies in the appointment of members of the NARAB board. Although the bill would establish NARAB as a "nonprofit

corporation" that is "not an agent or instrumentality of the United States Government," it would delegate to NARAB some measure of sovereign authority to regulate and license individuals and entities in the insurance industry. *See, e.g.*, proposed sec. 323(a)-(e) (authorizing NARAB to promulgate regulations concerning eligibility and to establish membership criteria; providing that membership in NARAB authorizes insurance producers to conduct business in any state); proposed sec. 326(b) (authorizing NARAB to conduct disciplinary proceedings to determine whether membership should be denied, suspended, revoked, etc.); *see generally* Memorandum Opinion for the General Counsels of the Executive Branch, from Steven G. Bradbury, Acting Assistant Attorney General/Office of Legal Counsel, *Officers of the United States Within the Meaning of the Appointments Clause* at 12-14 (Apr. 16, 2007) (counting as "delegated sovereign authority" the "authority over the granting of governmental licenses") ("*Appointments Clause Opinion*"). The bill (in proposed sec. 333(c)) would also delegate to NARAB the executive authority to enforce certain prohibitions against state licensing activities by seeking injunctive relief from a court. *See Appointments Clause Opinion* at 11-12 ("enforcement of the public law" is delegated sovereign authority). These activities of NARAB must be carried out by properly appointed constitutional officers, regardless of whether the legislation labels NARAB a government or non-government entity. *See id.* at 40; *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

The appointment mechanisms for NARAB board members provided in the bill do not satisfy the Appointments Clause. Proposed section 324(c) provides for the appointment of three board members by NAIC – a consortium of state insurance commissioners – election of one board member by the three NAIC-appointed members, and the appointment of the remaining five board members by certain insurance trade associations. The NARAB board members would likely be principal, rather than inferior officers, because the association's activities would be subject only to presidential supervision: the bill gives only the President the authority to remove NARAB board members, or to suspend any rule or prohibit any action by NARAB, *see* proposed sec. 330. *See Edmond v. United States*, 520 U.S. 651, 662-63 (1997) (inferior officers are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"). Therefore, they should be appointed by the President, with the advice and consent of the Senate. *See* U.S. Const. art. II, § 2, cl. 2. Alternatively, the bill could be revised to provide for sufficiently pervasive supervision and control of the board by PAS officers such that board members would be considered inferior officers (in which case the legislation could provide for appointment by the President, with the advice and consent of the Senate, by the head of a department, or by the President acting alone), or such that NARAB would not exercise any independent sovereign authority, placing its board members outside the scope of the Appointments Clause altogether. *See Constitutional Limits on "Contracting Out" Department of Justice Functions under OMB Circular A-76*, 14 Op. O.L.C. 94, 101 (1990) (noting the "close supervision" of private attorneys engaged in debt collection for the United States that is "necessary to meet constitutional concerns").

The "alternate" appointment mechanisms provided by the bill also present an Appointments Clause problem. In the event NAIC or the trade associations fail to make the appointments described above, or fail to appoint board members within specified time periods, proposed section 324(c) would require the President to make appointments, with advice and consent of the Senate, of board members from lists of candidates provided by NAIC or the insurance trade associations, unless NAIC or the trade associations fail to provide such lists. As noted in the President's statement upon signing the existing legislation, the placement of such restrictions on the President's nominating and appointment discretion is inconsistent with the Appointments Clause. *See* Statement by the President During Bill Signing (Nov. 12, 1999); *Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280 (1996) (Congress's authority "is limited by the necessity of leaving scope for the judgment and will of the person . . . in whom the Constitution vests the power of appointment." (quoting *Civil Service Commission*, 13 Op. Att'y Gen. 516, 520 (1871)). Therefore, we recommend that the list requirements be stricken from the bill or made advisory only, consistent with the President's earlier signing statement.

Removal authority

Proposed section 330 would authorize the President to remove the entire board of NARAB if he certifies to certain members of Congress that NARAB is acting in a manner contrary to the purposes of the legislation or has failed to perform its statutory duties. *See* proposed sec. 330(a). In light of the executive functions delegated by the bill to NARAB (see Appointments Clause issues above), we note that we would construe proposed section 330, if enacted, as providing the non-exclusive means of removing board members, in order to avoid any unconstitutional restriction on the President's power to remove officials performing executive functions. *See, e.g.*, *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 169-70 (1996) (describing spectrum of conclusions about limitations on the President's power to remove officers, including conclusion that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role (quoting *Morrison v. Olson*, 487 U.S. 654, 690 (1988)); *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977) (objecting to requirement that President notify both Houses of Congress of reasons for removal of Inspectors General).

Separation of powers

The bill would also call for inappropriate congressional involvement in executive functions. Proposed section 330(b) would require the President to "certif[y]" to certain members of Congress that NARAB had acted contrary to its statutory purposes before suspending the effectiveness of a rule or prohibiting any action of NARAB. To the extent this would require the President to do more than simply notify the relevant members of Congress of his intended actions, the provision would violate the constitutional separation of powers principles by

injecting congressional officials into the operations and functioning of the Executive Branch. *See Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly--by passing new legislation."); *see also INS v. Chadha*, 462 U.S. 919, 958 (1983). Therefore, if it is enacted, we would construe section 330(b) as imposing only a notice requirement.

The bill would also require NARAB to submit "to the President, the Congress, and the NAIC" any proposed bylaw or rule (proposed section 326(a)(1)), as well as an annual report on the business of NARAB (proposed section 328(a)). Concurrent reporting requirements run afoul of general separation of powers principles, because they "clearly weaken the President's control over the executive branch and by doing so increase congressional leverage on the President and other officials of the executive branch." *The Constitutional Separation of Powers*, 20 Op. O.L.C. 124, 174-75 (1996); *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 633 (1982) (the President's constitutional power over the Executive Branch includes the "right to supervise and review the work of . . . subordinate officials, including reports issued either to the public or to Congress."). Although the Executive Branch would likely construe these sections to permit the President to review any bylaw, rule, or reports before transmission to Congress, we recommend that the bill make this interpretation explicit.

Constitutional question involving jurisdiction

Section 333 states that "[s]uits brought in State court involving [NARAB] shall be deemed to have arisen under Federal law and therefore be subject to jurisdiction in, and removal to, the appropriate United States district court." Insofar as this provision purports to authorize suits to be heard in federal district court even if the parties are non-diverse and even if there is no federal cause of action, it is suspectible of constitutional challenge on the basis that the provision exceeds the limits of Article III jurisdiction. A statute may not authorize broader federal court jurisdiction than the Constitution allows. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). For non-diverse parties, the Constitution permits federal courts to hear cases "arising under" federal law. U.S. Const. art. III, § 2, cl. 1. Early on, the Court stated that a case arises under federal law for Article III purposes if a federal question "forms an ingredient of the original cause" -- that is, if "the title or right set up by the party, may be defeated by one construction of the constitution or laws of the United States, and sustained by the opposite construction." *Osborn v. Bank of the United States*, 22 (9 Wheat.) 738, 822 (1824). Subsequently, however, the Court has cast doubt on whether *Osborn* should be read broadly to allow federal jurisdiction over cases involving only a "remote possibility" of a federal question. *See Verlinden*, 461 U.S. at 492. In *Mesa v. California*, 489 U.S. 121 (1989), for example, the Court construed the statute allowing removal of cases involving federal officers or agencies, 28 U.S.C. 1442(a), to require, at a minimum, the presentation of a federal

defense. The Court rejected a contrary interpretation offered by the Government in order to avoid the "grave constitutional problems." *Id.* at 137. The Government had urged the Court to adopt a theory of "protective jurisdiction" -- i.e., a theory of article III jurisdiction as permitting federal courts to hear non-diversity cases in order to protect federal interests from the perceived hostility of state courts -- but the Court declined to adopt that approach. *See id.* at 137-38; *see also Verlinden*, 461 U.S. at 491 n.17. Thus, it is doubtful whether the constitutionality of section 333 could be sustained on the basis of a protective jurisdiction theory. We therefore recommend that section 333 be revised to permit removal to federal district court of cases involving a federal law question or defense (unless jurisdiction is predicated on diversity of the parties). If the bill is enacted as written, the Executive Branch should construe the provision as limited to such cases.

Additional Concerns

The National Crime Prevention and Privacy Compact ("Compact") governs the non-criminal justice uses for which criminal history record information ("CHRI") held in the Interstate Identification Index ("III") may be used and which non-government non-criminal justice entities may receive records. Article IV, section (c)(1) requires that request records "are used only by authorized officials for an authorized purpose." While H.R. 5611 provides that the National Association of Registered Agents and Brokers ("Association") is authorized to receive the records (consistent with section 215 of the National Criminal History Access and Child Protection Act, Pub. L. 105-251, Title II ("Act"), requiring Congress to specifically authorize access by statute) and such receipt is related to determining an individual's eligibility for membership in the Association, because the language does not specify what would be a disqualifying offense, the "authorized purpose" is unclear. We recommend specifying what information in an individual's CHRI would disqualify an individual from being, or continuing as, a member of the Association (would also be possible to permit the Association to make a judgment based upon other criteria, such as time since offence, sentence issued, etc.).

In addition, if CHRI is to be used to determine an individual's eligibility, then that individual needs to have the right to receive a copy of the record used to make the determination, especially if it was a disqualifying determination. We suggest that language should be inserted to ascertain the individual's right as well as provide that the Association will pay to the FBI the costs of the search as well as the costs of providing access to the individual (and any corrective processes).

Although the Association is not to be a federal entity in reference to the Privacy Act of 1974, obligations regarding the maintenance of such personal information could be made to provide appropriate guidance. The Act provides that any disclosure of records from the III should be done consistent with the Privacy Act and the National Crime Prevention and Privacy Compact Act.

Finally, DOJ is concerned about the Criminal background check required under section 323 of the bill. Specifically, section 323(4)(D)(i), sub-titled "Attorney General

Authorization" requires that, in response to a request upon from the NARAB, the Attorney General shall "---search the records of the Criminal Justice Information Services Division of the Federal Bureau of Investigation, *and any other similar database over which the Attorney General has authority and deems appropriate . . . ."* As drafted, this provision could authorize a search of the National Instant Criminal Background System (NICS). The NICS database is a limited access database that may be utilized only to conduct criminal background checks related to the purchase and transfer of firearms and explosives. The Bill could expand access to the NICS database far beyond its intended use. Therefore, DOJ notes that the Attorney General will likely be required to exercise his discretion, pursuant to Section 323(4)(D)(i), to specifically exclude the NICS database from background searches conducted for NARAB.

Thank you for the consideration of our views. If we can be of further assistance in this matter, please do not hesitate to contact this office. The Office of Management and Budget has advised us that there is no objection to the submission of this letter from the perspective of the Administration's program.

Sincerely,

Keith B. Nelson
Principal Assistant Attorney General

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Office of Legislative Affairs

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Washington, D.C. 20530

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The Honorable Harry Reid
Majority Leader
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