

Interstate Insurance Product Regulation Commission

Governance Assessment Report

Squire Patton Boggs (US) LLP



- Since 2006, best practices in governance have evolved in response to evolution of governance compliance requirements. Our Report addresses many of these key advances as they apply to the ICC
- Through legislation enacted in each state, the ICC was created as a joint public agency, separate from the NAIC, with each Commissioner representing their state in a role akin to a board member, requiring engagement from each Commissioner and designees in ICC matters and issues
- The Colorado Supreme Court's decision in *Amica Life Ins. Co. v. Wertz* brings the issue of federal consent squarely into focus. Our Report addresses how the ICC already has implied federal consent and discusses potential strategies for the ICC to embrace and advance this position
- The ICC has informal federal tax exemption. Our Report provides background on the ICC's tax status, evaluates alternatives and presents a proposed strategy to address next steps with the IRS

- ICC is a unique joint public agency created by action of each member state legislature. Each Member serves in a senior governance role, similar to that of a corporate director, requiring each Member and their designee(s) to be actively engaged in ICC issues and matters.

- These recommendations build upon key governance principles that foster Member engagement and result in effective governance oversight, including:
 - Clear roles and responsibilities;
 - Clear communication and transparency; and
 - Iterative, regular governance review for improvement and to address new circumstances

- Our recommendations include specific examples and suggestions for document templates, process changes, and bylaw amendments. Some of the most significant recommendations include:
 - Annual governance calendars and annual governance effectiveness reviews;
 - Written committee charters;
 - Flexibility in officer elections; and
 - Participation and role of Designees.

- Compacts are an important governance tool for states used for a myriad of multistate cooperative efforts from water use to child custody issues
- Compacts are a contract among states, with the terms enacted by the legislature of each participating state.
 - Compacts do not require federal consent to be effective unless they potentially undermine federal supremacy
 - With federal consent, express or implied, a compact's terms can preempt conflicting state constitutions or laws
- In *Amica Life Ins. Co. v. Wertz*, the Colorado Supreme Court ruled that the Colorado constitution preempted the ICC Uniform Standards on life insurance based on an assumption that the ICC did not have federal consent
 - In their briefs, both Amica and Wertz asserted, without substantiation, that ICC has not received federal consent
 - Not all, but some other ICC Member states have similar constitutional terms
 - To date, ICC has not asserted implied congressional consent exists

- Congressional consent can be provided to compacts through either implied consent or express consent
- ICC received implied congressional consent through enactment of Public Law 109-356, allowing the District of Columbia to join the ICC
- Without ICC recognition of implied congressional consent, the Colorado Supreme Court's logic in *Wertz* erodes the future certainty and uniformity of ICC-filed products
 - Specifically, member states like Colorado with constitutional non-delegation doctrines could inadvertently open ICC filings to additional challenges, invalidating individual sections of, or entire, Uniform Standards
- ICC tools for recognition:
 - Issue clarifying Advisory Opinion then publicize
 - Add issue to future Member training
 - Amend Uniform Standards to require notice of litigation involving validity of Uniform Standards and then consider ICC intervention in appropriate cases

- ICC has tax exempt status based on its status as an “instrumentality of the states”
 - IRS declined to rule on request for a private letter ruling in 2015
 - IRS issued “no change” letters, following examinations of 2008 and 2011-2015 tax returns
- We evaluate prior effort to seek private letter ruling and suggest alternatives to the presentation made to IRS
- Alternative basis for tax-exempt status limited by ICC’s joint public agency status
 - Report outlines and evaluates potential alternatives
 - Most alternatives would require significant legislative efforts
- We outline a proposed strategy for seeking a private letter ruling, if desired

Questions?

Authors and Contacts

Mary Jo Hudson

Office: 614-365-2732

Cell: 614-560-9692

Email:

mj.hudson@squirepb.com

Patricia R. Hatler

Office: 614-365-2728

Cell: 614-332-9159

Email:

patricia.hatler@squirepb.com

James Eklund

President & CEO

Eklund Hanlon LLC

Cell: +1 720.280.1835

Email:

james@eklundhanlon.com

Stacey Grundman

Office: 202-457-6178

Cell: 202-360-3878

Email:

stacey.grundman@squirepb.com

George J. Schutzer

Office: 202-457-5273

Cell: 703-585-6795

Email:

george.schutzer@squirepb.com

Meghna M. Rao

Office: 614-365-2880

Cell: 330-998-2415

Email:

meghna.rao@squirepb.com

Michael Mullaly

Office: 614-365-2793

Cell: 609-577-6951

Email:

michael.mullaly@squirepb.com