The Council of State Governments

Headquarters Office

President
Governor Brian Schweitzer, MT

Chair
Deputy Speaker
Bob Godfrey, CT

Executive Director
David Adkins

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

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

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

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

Western Office
1107 9th Street
Suite 650
Sacramento, CA 95814
(916) 553-4423
Internet: www.csgwest.org

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

MEMORANDUM

TO: NCOIL, NCSL, CSG

FROM: Rick Masters, Special Counsel for Interstate Compacts

RE: NIMA and related legislation

DATE: January 26, 2011

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

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

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

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

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

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

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

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

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