

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
NCOIL – NAIC DIALOGUE
NEW ORLEANS, LOUISIANA
MARCH 3, 2017
DRAFT MINUTES

The National Conference of Insurance Legislators (NCOIL) NCOIL – NAIC Dialogue Committee met at the New Orleans Downtown Marriott on Friday, March 3, 2017 at 3:45 p.m.

NCOIL Vice President, Senator Jason Rapert of Arkansas, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Sam Kito, AK	Rep. George Keiser, ND
Asm. Ken Cooley, CA	Sen. James Seward, NY
Sen. Travis Holdman, IN	Sen. Bob Hackett, OH
Rep. Matt Lehman, IN	

Other legislators present were:

Rep. Deborah Ferguson, AR	Sen. Nellie Pou, NJ
Rep. Steve Riggs, KY	Rep. Marguerite Quinn, PA
Rep. Justin Hill, MO	

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its November 17, 2016 meeting in Las Vegas, Nevada.

NAIC INCORPORATION BY REFERENCE (IBR)

NCOIL Vice President, Senator Jason Rapert (AR), began by asking for feedback on the presentation made during the Welcome Breakfast from Rutgers Constitutional Law Professor Robert F. Williams, and asked if the presentation accurately outlined the constitutional limits on IBR. James Donelon, Louisiana Insurance Commissioner, stated that he thought the presentation was great but that he respectfully disagreed with it.

NAIC thinks its IBR process is constitutionally sufficient, obviously efficient, and provides for exhaustive opportunity for outsiders/interested parties/legislators to share their concerns. Cmsr. Donelon stated he is not categorially opposed to external review and noted that the issue of whether NAIC is a public or private entity is an ongoing discussion, is his mind at least, inside and outside the NAIC. If NAIC is deemed private, Cmsr. Donelon stated that he thinks NCOIL would be deemed private as well and if we

went down the path of external review of IBR, other entities would have to do the external review.

Cmsr. Donelon also noted that NAIC IBR has never been challenged and that IBR is in the interest of uniformity and the ability to regulate the insurance industry at the State level on a national basis – that necessitates some sort of uniformity in things such as handbooks and manuals. Cmsr. Donelon further stated that NAIC is not aware of any issues that have been involved in the IBR process that would constitute legislating in a substantive manner – everything has been technical in nature and everything has been done in a transparent manner. Sen. Rapert asked Cmsr. Donelon to comment on his own (Louisiana’s) proposal regarding oversight of the IBR process. Cmsr. Donelon stated that he remains open to the idea but that it hasn’t gained a lot of traction at NAIC. Cmsr. Donelon said he strongly believes that the NAIC is a public entity and should act in all regards like it is one. Sen. Rapert noted that the greatest threat to the state-based regulation of insurance and the transparency of such is on the federal level and thinks that NCOIL and NAIC can work together to reach a solution on this issue.

Jim Ridling, Alabama Insurance Commissioner, stated that as Chair of the NAIC Governance Review Task Force, one thing that needs to be discussed is how open the NAIC is in every deliberation – the only time doors are closed is when the commissioners are educated by NAIC staff on an issue. Mike Chaney, Mississippi Insurance Commissioner, agreed and said NAIC is a public entity and they vet everything they do extensively. Cmsr. Ridling noted that Alabama issues regulations for IBR-related changes, such as changes to a handbook or manual – there is no hiding it. Cmsr. Chaney also stated that if States were to eliminate IBR statutes and regulations it would result in destabilizing the insurance market which is a market where predictability and stability is essential in order to regulate properly. Additionally, Cmsr. Chaney stated that he is concerned that if an outside oversight process is set up for IBR, special interest groups would end up “running the show.”

Sen. Travis Holdman (IN) stated that organizations like NCSL, CSG, ALEC, etc. do not hold the power that NAIC does – its highly organized, asset-rich, and regulates its respective industry in a way like no other. Sen. Holdman also stated that he was concerned that NCOIL’s proposal to serve as an outside overseer/clearinghouse for IBR changes was dismissed without consideration. Cmsr. Donelon disagreed and said it was put on the agenda and considered during a NAIC Governance Review Task Force conference call meeting. Cmsr. Donelon also stated that he thinks there is tremendous value in the relationship between NCOIL and NAIC but has not seen any examples of NAIC going outside its IBR authority and venturing into substantive lawmaking that would warrant NCOIL serving as a third-party overseer.

Rep. George Keiser (ND) stated that he is glad this discussion is taking place and hopes it’s a starting point for a discussion on what exactly is technical and what is substantive in the realm of the IBR process. Cmsr. Chaney asked what the main problem is with the IBR process. Asm. Ken Cooley (CA) stated that he views this is a constitutional issue. The power to enact laws is given to the legislature; and more so than the issue of a technical change vs. a substantive change is the issue of changes being made to State law without ever being seen by legislators. Asm. Cooley stated that such concerns also apply to the NAIC’s efforts on the international level. Cmsr. Ridling disagreed and stated that the NAIC has not issued anything that would affect State legislators.

NCOIL President, Rep. Steve Riggs (KY) stated that the IBR process changes State law whether its technical or not and that NCOIL could be a great tool in serving as the clearinghouse for such changes. That would protect NAIC and further what the NAIC Governance Review Task Force is trying to do in improving its administrative due process.

Commissioner Tom Considine, NCOIL CEO, stated that the technical vs. substantive issue is undoubtedly “blurry” and depends on where you stand and where you sit. However, what leapt off the page was the creation of the law of Corporate Governance in the insurance industry. It was done entirely through IBR and that appears to be substantive in nature. Cmsr. Considine also stated that NCOIL was not married to its clearinghouse proposal. In fact, NCOIL agrees with the method of States issuing regulations for IBR changes that Cmsr. Ridling mentioned. Cmsr. Donelon closed by saying that he hopes to discuss this further at the NAIC Spring Meeting in Denver and that he agreed with Cmsr. Considine’s comment on corporate governance blurring the line between technical vs. substantive.

UPDATE ON NAIC INSURANCE DATA SECURITY MODEL LAW

Cmsr. Ridling questioned whether there has been success in NAIC drafting efforts with this Model and expressed concerns about having industry specific Models for cybersecurity. Sen. Rapert agreed and noted that NCOIL has frequently stated that 70 of the 99 State legislative bodies across the country combine insurance with other financial industries such as banking, commerce, and financial services. Cmsr. Donelon stated that NAIC is happy to hold another NCOIL specific conference call to review the latest draft of the Model. Cmsr. Donelson further stated that during this past year’s drafting efforts on the Model a problem he encountered is that Attorney Generals deem this area to be their turf.

Rep. Keiser complemented the NAIC on its drafting efforts but stated that the Model is terrible. One example is the definition of “data breach” – it does not include the unauthorized acquisition, release or use of encrypted personal information if the encryption, process or key is not also acquired, released or used without authorization. Rep. Keiser stated that under that definition, he can steal it and give it to Rep. Riggs who has the key – under that scenario Rep. Keiser hasn’t violated the Model but Rep. Riggs has. Rep. Keiser encouraged the NAIC to continue its work because the current draft is nowhere near ready for introduction to States. Cmsr. Chaney stated that adoption of the Model is a long way away and stated that he would vote “no” on the current draft.

Rep. Matt Lehman (IN) stated that one thing that has not been determined in this area is, what is a loss? In the world of insurance, you must prove your loss. With Anthem, they lost a lot of money trying to recreate what happened – Anthem’s clients lost nothing. It was discovered that the data was stolen not to access client’s data but rather to access the software Anthem was using. It’s therefore hard to draft cyber insurance policies/cyber models when no one really knows what the exposure is. Cmsr. Ridling stated that in his earlier comments, he did not mean to degrade the drafting process – he just wanted to convey that the Model is a very long way away from being close to an acceptable product and thinks that it might be better to have a communal discussion on these topics rather than trying to draft industry specific Models. Rep. Lehman agreed and stated that if you look at the big breaches that have occurred, they haven’t dealt with insurance companies – we should focus on the big picture. Sen. Rapert stated that the

largest data breaches have dealt with the federal government and agreed that focus should be on gathering all industries to perhaps establish best practices.

DISCUSSION ON THE FUTURE OF THE ACA AND DODD-FRANK

Cmsr. Donleon stated that his biggest criticism of the ACA was that it was rushed out “half-baked” with the expectation it could be fixed on the fly with regulations – that did not happen. A good aspect of the ACA was guaranteed issue which is here to stay. Double digit increases in premiums obviously was not a good aspect. The system is in meltdown, is dysfunctional, and needs to be reformed. High-risk pools and phasing out Medicaid expansion do not seem like effective ideas. Sen. Rapert stated that in Arkansas, high-risk pools were phased out. Cmsr. Donelon stated that Louisiana did the same. Cmsr. Chaney said that Mississippi kept theirs and he thinks that for the States that did not expand Medicaid, they will be issued funds from the federal government to operate high-risk pools for those between 100% and 138% below the poverty line. The States will have the option to go to 100% below the poverty line for Medicaid but he does not think that will happen so there will still be a gap for a lot of people. The issue for regulators is being able to react quickly enough to whatever happens with repeal/reform efforts.

Cmsr. Ridling stated that Alabama recommended to the Trump Administration that high-risk pools need to be created that are funded by premiums from the industry and hopefully reinsured by the federal government. The federal government needs to figure out how to subsidize the high-risk pools so that the industry is competing for healthy people and the un-healthy are taken care of through a subsidized program that gives them the same quality of care. Sen. Rapert stated that Arkansas’ private option is similar. Cmsr. Chaney stated that he doesn’t agree with Cmsrs. Ridling and Donleon and thinks that we need to figure out how to control healthcare costs – health insurance is not the issue. Cmsr. Ridling agreed and stated that when he served on a hospital board he learned that hospitals make their money through procedures which is doctor-driven and substantial change could be effectuated through drug industry reform. Cmsr. Chaney stated that 30% of insurance premiums are caused by the cost of pharmaceutical drugs – they are the driving cost of increased healthcare costs. Regulators can do things to help prevent healthcare costs like prevent balance billing, and adopting the CDC’s recommendations on opioids.

NAIC STANCE ON ELIMINATION OF FIO

Cmsr. Ridling stated that the FIO essentially doesn’t do anything. The Treasury has a role in international negotiations on things affecting insurance – we did not need and do not need the FIO as a part of Treasury to do that. Sen. Rapert stated that timing is everything and that if the FIO is to be abolished or reformed, now is the time to reach out to the Trump Administration and voice concerns.

ADJOURNMENT

There being no further business, the Committee adjourned at 5:00 p.m.