

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
NCOIL – NAIC DIALOGUE COMMITTEE
NASHVILLE, TENNESSEE
MARCH 15, 2019
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) NCOIL – NAIC Dialogue Committee met at The Sheraton Grand Nashville Downtown Hotel in Nashville, Tennessee on Friday, March 15, 2019 at 4:15 p.m.

Representative Matt Lehman of Indiana, NCOIL Vice President and Chair of the Committee, presided.

Other members of the Committees present were:

Asm. Ken Cooley (CA)	Rep. George Keiser (ND)
Rep. Joseph Fischer (KY)	Sen. Jerry Klein (ND)
Sen. Dan “Blade” Morrish (LA)	Sen. Bob Hackett (OH)

Other legislators present were:

Sen. Mark Johnson (AR)	Sen. Vickie Sawyer (NC)
Rep. David Santiago (FL)	Rep. Tracy Boe (ND)
Rep. Daire Rendon (MI)	

Also in attendance were:

Commissioner Tom Considine, NCOL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, NCOIL General Counsel

MINUTES

Upon a Motion made by Rep. George Keiser (ND), and seconded by Sen. Jerry Klein (ND), the committee waived the quorum requirement. Upon a motion made by Rep. Keiser and seconded by Sen. Klein, the Committee approved the minutes from its December 7, 2018 meeting in Oklahoma City, OK. The motions carried without objection by way of a voice vote.

UPDATE ON NAIC ANNUITY SUITABILITY WORKING GROUP

Rep. Lehman first asked for an update on the NAIC Annuity Suitability Working Group (WG), including what the most contentious issues are and when the WG expects to be finished with the amendments to the NAIC’s Suitability in Annuity Transactions Model Regulation (Suitability Model). The Honorable James Donelon, Commissioner of the Louisiana Department of Insurance, stated that the Suitability Model has been around for 15 years since its original adoption in 2003. Nearly every state has adopted some version of the Suitability Model as it was amended in 2006 and 2010. 39 states have adopted the most recent version. The WG was appointed in 2017 to review and revise the Model to promote greater uniformity across member jurisdictions. Renewed interest in the Suitability Model was prompted in part by work being done by the Department of

Labor (DOL). The DOL's final Fiduciary Rule was published in 2016 and was then vacated in its entirety in March of 2018 by the U.S. Court of Appeals for the 5th Circuit. The DOL declined to challenge the 5th Circuit's ruling and is considering regulatory options in light of the ruling. The DOL is expected to revisit the Fiduciary Rule by September 2019.

Cmsr. Donelon stated that, separately, the U.S. Securities and Exchange Commission (SEC) released a proposed rule package in April of 2018 which included "regulation best interest" (reg BI). The National Association of Insurance Commissioners (NAIC) submitted comments to the SEC in order to coordinate efforts so that their respective regulatory developments could be compatible, clear, and as efficient as possible. The SEC has also announced that it hopes to finalize its advice standard package by September 2019. Cmsr. Donelon stated that the NAIC believes first and foremost in the state's authority to regulate insurance products and that state based regulation better protects consumers. While acknowledging the SEC's and DOL's role, the NAIC believes that consumers are better protected when, to the extent possible, there is harmonization of the regulations enforced by the states, the SEC, and the DOL. Insurance carriers and agents need clear, understandable, and uniform requirements. Just as importantly, regulators need clarity. Broad principles have public relations appeal but inconsistent interpretations of vague requirements will be inefficient and ineffective. Consumers are more likely to be protected when carriers and agents have a clear understanding of conduct rules.

Cmsr. Donelon stated that the WG completed a draft of proposed revisions to the Suitability Model and presented them to the NAIC Life Insurance & Annuities (A) Committee (Committee) for its consideration. The Committee decided that it wanted to receive comments from a wide range of stakeholders and establish a public comment period ending February 5, 2019. While the work is not yet complete the Committee agreed that it would be helpful to receive input from a broader group of the NAIC membership with the goal of creating an NAIC draft containing placeholders for the SEC issues. The NAIC hopes to share that draft with the SEC to assist them with their process as it will allow the SEC to benefit from the NAIC's work so that Reg BI and the NAIC's Model regulation can provide consistency for consumers, industry, and regulators.

Cmsr. Donelon stated that the WG's goal is to elevate the standard of care for annuity sales so consumers understand the products they purchase, are made aware of any material conflicts of interest, and are assured those making the product recommendation are making that recommendation in the consumer's interest and not placing the producer's financial interest ahead of the consumer's interest. The new regulation would also require that agents and carriers act "with reasonable diligence, care, skill, and prudence."

Rep. Lehman asked Cmsr. Donelon if the NAIC anticipates bringing life insurance products into the scope of the regulation. Cmsr. Donelon stated that issue has been brought to the NAIC's attention and the question with annuities becomes, should the regulation apply to in-force annuity contracts. That question has generated a lot of controversy and the New York Department of Financial Services (NY DFS) has offered language addressing that issue for inclusion in the final version of the regulation. With regard to life insurance products, the Committee will have to consider whether to include them in the regulation and the NY DFS is the main proponent of that.

DISCUSSION ON DEVELOPMENT OF NEW CAPITAL STANDARDS FOR INSURANCE HOLDING COMPANIES

Rep. Lehman stated that on January 9, 2019, Federal Reserve Board (“FRB”) Vice Chairman for Supervision Randal Quarles gave an important speech previewing the next step in the FRB’s multiyear effort to develop capital standards for depository institution holding companies. This effort flows from the Dodd-Frank Act, which gave the FRB regulatory responsibility for insurance holding companies that own full-service, federally insured depository institutions significantly engaged in insurance activities (“insurance holding companies”). Rep. Lehman noted that at the last NCOIL meeting in Oklahoma City, NCOIL passed a Resolution “Asserting McCarran-Ferguson Reverse Preemption over the Supervision of Insurance Companies by the Federal Reserve Board and its Examiners” due to concerns that the Board’s examiners’ exercise of their limited examination powers conflict with the jurisdiction of state insurance regulators over solvency and market conduct regulation or, at best, will be duplicative. Rep. Lehman accordingly asked for an update on the development of the capital standards.

The Honorable Scott White, Virginia Commissioner of Insurance, stated that the International Associations of Insurance Supervisors (IAIS) is continuing its discussions on the International Capital Standards (ICS). U.S. regulators are involved and engaged in those discussions. Domestically, the focus has been the development of the group capital calculation (GCC) for use in solvency monitoring activities. On a separate track, the Federal Reserve is developing their own capital regime requirements for insurance groups under their jurisdiction which includes insurance companies with affiliated financial institutions or banks. Cmsr. White stated that he believes there are 12 companies that fall within that jurisdiction.

The NAIC has been coordinating with the Federal Reserve to ensure that their insurance capital requirements and the GCC are aligned to the greatest extent possible. Unlike the Federal Reserve’s capital regime, it is important to understand that the GCC is not a capital requirement or standard. It is really an analytical tool intended to provide additional information for lead states to use in assessing group risk and capital adequacy. It provides insights to regulators as to the capital adequacy of the group and then regulators will assess what actions, if any, should be taken if the calculation raises concerns about the firm. Such actions may include additional monitoring of the firm or requiring the posting of additional capital. Cmsr. White stated that it is important to understand that the GCC will compliment the current U.S. holding company analysis. The current system involves regulating at the legal entity level which is very different from the approach advocated by European regulators to regulate at the holding company level.

Cmsr. White stated that work on this is currently being led by the NAIC GCC Working Group (WG), Chaired by The Honorable David Altmaier, Florida Insurance Commissioner. Up until October of 2018, the WG was really focused on constructing the calculation and the field-testing template. That has been completed and the focus has shifted to actual testing and the public release of the field-testing template. A revised template and set of instructions was then released addressing comments received. Some of the things the WG is looking at is the scope of the group in terms of including captives and certain industries. One health insurance carrier has concerns that they have raised with the NAIC. Triple “x” reserving is also being looked at as are special

purpose vehicles. There is a lot to resolve but a lot of progress has been made. Cmsr. White stated that the NAIC is developing the GCC for domestic group capital purposes and the ultimate goal is for the calculation to be considered the outcome-equivalent to the ICS currently under development at the IAIS.

Rep. Keiser asked how long the NAIC has been working on the calculation. Cmsr. White stated that he believes work started approximately 10 years ago and the work has garnered increased urgency upon the signing of the Covered Agreement in 2017. Rep. Keiser asked when the calculation will be finished. Cmsr. White stated that he believes the NAIC has made significant progress. Field-testing will begin in late Spring and the work has certainly increased in speed and content since the signing of the Covered Agreement and the past year in particular. Cmsr. White is encouraged by the progress made.

Rep. Lehman stated that, with regard to trying to align with the Federal Reserve on this issue, where does that put state legislators when trying to address differences between the Federal Reserve's work and the NAIC's. Cmsr. White stated that it is the regulator's role to work closely with the Federal Reserve, just as regulators are currently doing with the SEC with regard to the best interest regulation. A continued dialogue is paramount between regulators and the Federal Reserve on this issue.

DISCUSSION ON DATA CALL PRINCIPLES

Rep. Lehman stated that data calls are undoubtedly a very important tool for regulators to use to serve important regulatory objectives such as ensuring that rates are not inadequate, excessive or unfairly discriminatory, and ensuring company solvency. However, when used improperly or too often, data calls can impose significant compliance costs on insurers and sometimes the insurer's agents, thus generating costs that may ultimately become reflected in the price of insurance. Rep. Lehman noted that NCOIL adopted a Resolution in November of 2017 Encouraging the Adoption of Voluntary Data Call Principles, and then asked for the NAIC's current position on data calls and what the NAIC envisions happening with such calls going forward.

The Honorable Matt Rosendale, Montana Commissioner of Securities and Insurance, stated that the disaster call template was adopted by the NAIC several years ago and states tried to use that template as a guide for their individual data calls. The NAIC Catastrophe Insurance Working Group (C) (WG) is working on a state disaster handbook and would welcome any feedback on the data call template or the process surrounding those data calls.

Cmsr. Rosendale stated that data calls can be very expensive and can consume a lot of time and resources. It is very important to make sure that the actual, correct data is being requested and sent to conduct the sought out analysis. That takes both flexibility and cooperation between both the requestor and receiver. The specific needs of certain areas must also be taken into consideration. For example, coastal states have different needs than interior states. Objective information is needed that would actually trigger a data call so that there is not some arbitrary need that someone can impose. Flexibility is also needed to only request pertinent data. If very broad guidelines are put in place then you may be forced to request more data than actually needed to accomplish a task. Cmsr. Rosendale stated that regulators try to collaborate with each other on data calls

when they can but that is not always possible depending on individual state needs and state statutes.

Rep. Keiser noted the situation described by The Honorable Tom Considine, NCOIL CEO, during the preceding committee meeting in terms of when sometimes the industry will ask an insurance commissioner to enact or repeal something because it is burdensome and the insurance commissioner will then ask his or her staff to get some information to see if what the industry is saying is true. Cmsr. Considine stated that during his time as Cmsr. of the NJ Dep't of Banking and Insurance he in fact did that but with the thinking that the resulting information would be used once. However, Cmsr. Considine stated that he just recently heard that the information he had requested was still being asked of insurers every single year without purpose. Rep. Keiser then asked the NAIC to comment on how to stop that practice and whether a requirement should be implemented to the requestor of the data call that within 90 days from the point in which the last piece of data is sent to submit a statement as to the purpose of the call and findings.

Cmsr. Rosendale stated that as a former legislator and current Cmsr., he would like to be able to adjust and address data calls in statute with the ability to adjust more specifically through promulgation of regulations relating to triggers and demands for data.

Rep. Lehman stated that a common complaint heard by legislators regarding data calls is that the calls request data that is not relevant. Accordingly, Rep. Lehman asked if the NAIC is working on some type of standard that would narrow the data requested to true, insurance-specific data. Cmsr. Rosendale stated that ties into his point of having the flexibility to address these issues through regulations so a framework can be set forth via statute and then conversations can be had between the regulator and the insurer regarding the specifics of the data calls. Rep. Lehman acknowledged that setting a standard on data calls is a work in progress and looks forward to being a part of that conversation going forward. Cmsr. Rosendale agreed and stated that what will likely happen is that different state agencies will want to broaden, and narrow, data calls depending on that state's specific needs. Cmsr. Donelon stated that he would be happy to discuss any ideas regarding the limitation and transparency of data calls going forward.

UPDATE ON STATE ADOPTION OF NAIC INSURANCE DATA SECURITY MODEL LAW

Rep. Lehman asked for an update with regard to state adoption of the NAIC Insurance Data Security Model Law (Model). The Honorable Ray Farmer, South Carolina Insurance Commissioner and NAIC-President Elect, stated that the NAIC started to look at a long list of measures in 2014 because of several severe breaches in the health insurance industry. The NAIC's work culminated with development of the Model and it was adopted by the NAIC in October of 2017. South Carolina was the first state to adopt the Model. Cmsr. Farmer stated that he believes the Model is common sense legislation and companies should already be doing the things required by the Model regardless of whether it is adopted. Ohio also passed a similar law. Michigan passed a similar law but it exempted the health insurance industry. Connecticut, New Hampshire, Mississippi, and Nevada have also introduced the Model for their current legislative sessions.

Cmsr. Farmer noted that the U.S. Dep't of Treasury commended the NAIC in 2017 for adopting the Model and also urged prompt action by states to adopt the Model within 5 years or else the administration will ask Congress to preempt the states. Cmsr. Farmer stated that he believes more momentum behind the model will begin to take shape this year and next year. In South Carolina, the time has come to implement the Model as the statute became effective on January 1, 2019. The first piece of the statute, the notification piece, gives companies doing business in South Carolina 72 hours after a breach to report it to the insurance department. The second piece goes into effect on July 1, 2019 which deals with requiring companies to have an incident response plan with regard to breaches.

Cmsr. Farmer stated that he has participated in two roundtable discussions with Treasury and large insurers on this topic and large insurers generally know what to do when a breach occurs as they have forensic specialists on staff. The concern is with smaller, regional companies, and it was found that some had no clue what to do. Cmsr. Farmer stated that he was recently honored to host 13 companies of all sizes, along with Treasury and FBI representatives for a roundtable discussion during which a lot was learned. Some of the companies present stated that they didn't even think about cyber breaches until the legislature had adopted the Model which emphasizes that the Model should be adopted in all of the states and the companies should be held accountable upon adoption.

Rep. Lehman stated that only a very small amount of the breaches that have occurred during the past several years have been insurance related and asked what the NAIC envisions coming from the federal level with regard to data security and breach notification legislation and whether such legislation would complement or preempt state law. Cmsr. Farmer stated that he believes the federal government is monitoring the states and is waiting to see if any federal action is necessary. Training exercises and education will be essential to make sure states know how to react to and prevent breaches so that each state's citizens are protected.

Rep. Keiser stated that North Dakota is currently dealing with several different cybersecurity statutes and bills, and the definition of cybersecurity is different in each. The issue for North Dakota is that data protection and breach notification is a generic issue and not unique to the insurance department. North Dakota is struggling to pass the NAIC Model because it only deals with the insurance industry. Rep. Keiser stated that he believes work needs to be done on a true cyber bill that has a section that refers to the insurance industry.

Sen. Bob Hackett (OH) stated that Ohio has led the way on this issue. Before adopting the NAIC Model, Ohio passed a law that created an affirmative defense in a court of law if a company adhered to one of eight cybersecurity standards, NIST being one of them. Sen. Hackett stated that they had buy-in from the industry with that approach. Rep. Keiser acknowledged that but stated that North Dakota has not had that success and is interested in what the NAIC think on this issue. Cmsr. Farmer stated that the situation described by Rep. Keiser is certainly a dilemma but at the end of the day, whether it is the NAIC Model or another law, it is everyone's responsibility to do everything they can to protect citizens from breaches. Different states are going to have to look at different solutions.

DISCUSSION ON LIFE INSURANCE UNDERWRITING DEVELOPMENTS

Rep. Lehman asked for an update on the NAIC's position regarding carriers beginning to use more and more non-traditional tools for underwriting. The Honorable Beth Dwyer, Rhode Island Superintendent of Insurance, stated that big data is certainly here and it is amazing the amount of data that is out there and the ability of insurers and other industries to use it. The NAIC has had a working group (WG) on big data for 4 years and Supt. Dwyer has been Vice Chair of it for 3 years. The WG started with the property & casualty lines and that is still going on. There are phenomenal things going on with life insurance right now that can benefit insurers but we have to make sure that there are also consumer protections in place.

Supt. Dwyer stated that those who are the same age as her remember what was required when getting a life insurance policy such as multiple unpleasant doctor visits. Life insurers are now using big data to substitute for that experience. From a consumer perspective that appears great at first glance but do consumers really understand what life insurers are looking at such as social media, drug prescriptions and other information. Accordingly, the WG really started looking at life insurance last year, while still maintaining a focus on P&C issues.

Supt. Dwyer stated that the NY DFS issued a circular letter last month relating to insurers use of social media in underwriting and the industry has raised some concerns with it. The WG is examining that letter which states things like if an insurer hires a vendor, the insurer needs to understand what data the vendor is using. That measure is obviously for consumer protection but also for protection of the insurer – if the insurer does not understand how its premiums are set there could be major financial solvency concerns. Supt. Dwyer stated that the Life Insurance Marketing and Research Association (LIMRA) recently made a presentation to the WG, in addition to market conduct exam experts, in an effort to determine if any tweaks need to be made to exams in the big data world. The WG will also look at whether additional regulatory tools are needed to look into big data issues related to life insurance.

Supt. Dwyer noted that at the upcoming NAIC Spring Meeting the WG will hear more on this. The WG has asked for the NAIC's staff resources to look at setting some parameters that states could consider adopting. Ultimately, the WG is trying to look at how life insurers are using big data, and what are the benefits and detriments to consumers. For example, how can a consumer challenge whether or not the information used by the insurer is correct since the consumer did not affirmatively give them the information.

Rep. Lehman asked if an insurer could adjust an existing life insurance premium based on risky behavior it views on a policyholder's social media. Supt. Dwyer stated that she does not believe so and hopes that a responsible insurer would go to social media before issuing the policy and not after. Supt. Dwyer noted that there have been some "glitches" with regard to insurers looking at applicant's drug prescriptions and making assumptions, which is what happened to some people with the drug Narcan. Most insurers are not making those knee-jerk reactions and the expectation should be that if something like a Narcan prescription is discovered, the insurer should follow-up with the applicant to make sure they are not making an assumption. Consumer's ability to challenge some of these issues like that is very important.

DISCUSSION ON REBATE REFORM INITIATIVES

Rep. Lehman asked for the NAIC's thoughts on NCOIL's interest in starting to develop model legislation regarding rebate reform, particularly as more and more carriers start to issue value-added services. Cmsr. Donelon stated that is something that the NAIC should be looking at and part of his legislative package was to address LA's anti-rebate statute. Supt. Dwyer stated that the NAIC's Innovation and Technology Task Force has a small working group that is looking at coordinating state efforts regarding rebate reforms in an effort to share information so there is a more consistent interpretation of rebate statutes. Cmsr. Donelon stated that he would welcome a more global perspective with the caveat that some bigger jurisdictions have no anti-rebate laws at all. Cmsr. Rosendale stated that it is important to be careful when defining what a rebate is because the term also has huge ramifications in the drug supply chain, particularly with pharmacy benefit managers.

Rep. Lehman closed by asking what the NAIC's position is regarding the new federal rules that govern lending institution's acceptance of private flood insurance policies. Supt. Dwyer stated that she is Chair of the NAIC's P&C Committee, and Cmsr. White is Vice Chair. That issue will certainly be a strong point of discussion in either that committee or in the catastrophe insurance working group.

Cmsr. Donelon closed by stating that he views the relationship between NCOIL and NAIC to be extremely valuable and he hopes that it will continue to remain strong and vibrant as new leaders begin to emerge in both organizations.

ADJOURNMENT

There being no further business, the Committee adjourned at 5:15 p.m.