

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
NCOIL – NAIC DIALOGUE COMMITTEE
NEWPORT BEACH, CALIFORNIA
JULY 12, 2019
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) NCOIL – NAIC Dialogue Committee met at The Marriott Newport Beach Hotel on Friday, July 12, 2019 at 11:30 a.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)	Sen. Vickie Sawyer (NC)
Rep. Martin Carbaugh (IN)	Rep. George Keiser (ND)
Rep. Joe Fischer (KY)	Sen. Jerry Klein (ND)
Sen. Dan “Blade” Morrish (LA)	Sen. Bob Hackett (OH)
Rep. Michael Webber (MI)	Rep. Tom Oliverson, M.D. (TX)
Sen. Paul Utke (MN)	

Other legislators present were:

Rep. Colleen Burton (FL)	Asw. Ellen Spiegel (NV)
Rep. Richard Smith (GA)	Asm. Kevin Cahill (NY)
Rep. Kevin Ford (MS)	Rep. Wendi Thomas (PA)
Asw. Maggie Carlton (NV)	Del. Steve Westfall (WV)

Also in attendance were:

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

MINUTES

After a motion was made by Rep. George Keiser (ND) and seconded by Sen. Jerry Klein (ND) to waive the quorum requirement, the Committee unanimously approved the minutes of its March 15, 2019 meeting in Nashville, TN upon a Motion made by Asw. Maggie Carlton (NV) and seconded by Rep. Martin Carbaugh (IN).

DISCUSSION ON AMENDMENTS TO NAIC CREDIT FOR REINSURANCE MODEL LAW AND REGULATION

Rep. Matt Lehman (IN), NCOIL Vice President and Chair of the Committee, asked for an update and timeline relating to the NAIC’s recent amendments to its Credit for Reinsurance Model Law and Regulation (Models), and what legislators should expect in their upcoming sessions. The Honorable Eric Cioppa, Superintendent of the Maine Bureau of Insurance and NAIC President, thanked NCOIL for the Resolution passed yesterday in continued support of the Models, and noted that just last month on June 25,

the NAIC adopted amendments to the Models. The clock is ticking as the U.S. – EU Covered Agreement was signed by the USTR and EU in September 2017 and it gives the U.S. five years to conform to the Covered Agreement of face possible preemption. There is a lot of work to do in the remaining three years with state legislatures.

Supt. Cioppa stated that the fundamental thing that the Covered Agreement did was eliminate reinsurance collateral for EU reinsurers if they meet certain criteria relating to the amount of surplus they have (\$250 million dollars), and a capital-solvency ratio of 1.0 under Solvency II. If they meet those standards, they will be entitled to the elimination of collateral in the U.S. One of the things heard from other interested parties such as Switzerland, Japan, and Bermuda is that they want a level playing field and therefore an elimination of collateral as well.

Supt. Cioppa stated that the NAIC did not want more Covered Agreements being entered into by the USTR and instead wanted to take matters into their own hands by amending its Models to bring before state legislators. Accordingly, the NAIC developed what is called a “reciprocal jurisdiction” whereby other countries can qualify for elimination of reinsurance collateral if certain standards are met in addition to requiring the EU and UK to recognize the NAIC Group Supervision and Group Capital Models. The NAIC does not want U.S. insurers subject to either Solvency II or the IAIIAS capital ratios – such insurers should be subject to U.S. capital ratios and group supervision scheme. Supt. Cioppa stated that has been clarified through a letter from Treasury that such recognition is required by the EU and UK and it is also being hardwired into the Models. If countries want to be termed a reciprocal jurisdiction, part of the price they are going to have to pay is to affirmatively recognize the U.S. system of group supervision and group capital.

Supt. Cioppa noted that amending the Models was an arduous process that involved multiple rounds of revisions and reviewing comments from interested parties in order to make sure everything was correct and would not have to be revisited. A lot of work with state legislators remains but the NAIC feels good about what was adopted and about the process moving forward.

Rep. Lehman noted that the bottom lines seems to be that we need to act quickly. Supt. Cioppa agreed and added that the final work product works for the U.S. insurance and reinsurance industries and most importantly for U.S. consumers

DISCUSSION ON CREATION OF NAIC LONG TERM CARE INSURANCE TASK FORCE

Rep. Lehman stated that long term care (LTC) insurance is a tense issue and one that is being dealt with in almost every state. Rep. Lehman asked for an update on the NAIC’s LTC Insurance Task Force and what its goals and timeline are. Supt. Cioppa stated that LTC is one of the most vexing problems in the industry today. The NAIC went through a process in which it laid out its strategic priorities for 2019 and LTC insurance was first on the list. The closed block issue is a huge issue and the task force is trying to specifically deal with that by developing several work streams. It is recognized that there is not a more vulnerable population than the elderly that purchased LTC insurance thinking it was a level-premium product and then 20 to 30 years later experienced tremendous rate increases. Supt. Cioppa noted that, having said that, he has not seen a LTC insurance policy that does not allow for those rate increases and regulators are very aware of Penn

Treaty. Penn Treaty was a \$3 billion dollar insolvency that was largely the result of LTC inadequacy in pricing and reserving. Accordingly, a balance needs to be struck and it is a very difficult problem.

Supt. Cioppa stated that one of the issues encountered when dealing with the closed block issue is the multi state rate review process. Frankly, there has been a lot of frustration among states in an effort to get more consistency to make sure each state is looking at and reviewing LTC insurance rate increase filings in a consistent and equitable manner. That is one of the most important workstreams for the task force because you cannot have one state looking at the same data coming up with substantially and significantly different results in terms of rate increases.

Supt. Cioppa stated that another workstream for the task force is to explore possible alternatives to protecting policyholders from guaranty funds. That is less defined but in effect if a policy does go into insolvency, the task force will examine whether there are other avenues to look at. The guaranty fund is the worst possible outcome because a consumer may have a policy that is worth \$600,000 - \$700,000 and most states have limits on guaranty funds (i.e. Maine's is \$300,000). It is the job of regulators to keep companies out of the guaranty funds but unfortunately at some level that does include rate increases

Supt. Cioppa stated that the next workstream the task force will examine is reducing benefit options in consumer notices. Consumers need to be given options rather than just being forced to accept a rate increase. Another workstream to be explored is the valuation of reserves. LTC insurance is still a relatively new product so it is important to make sure carriers are reserving adequately and regulators need to know the magnitude, if any, of under-reserving. Last year, the General Electric reinsurer had a \$14 billion dollar reserve adjustment for LTC. Supt. Cioppa stated that the task force is looking at something called "AG 51" to look at the reserving of each carrier at a granular level, and the financial analysis working group is looking at the domiciliary state regulator to make sure the carriers are properly reserving for LTC.

Supt. Cioppa also noted that the task force will engage in a workstream to identify an actuarial firm to help analyze the data regarding rate reserves and rate increases. The main takeaway that legislators should be aware of regarding the task force is that LTC insurance is a big problem and the NAIC is devoting a significant amount of resources to get its arms around the magnitude of the problem and develop procedures to protect consumers. Some of those procedures may involve rate increases but it is also important that the carriers not be able to walk away. They sold the product and if they lose money, so be it, but that needs to be balanced with making sure they are financially viable.

Rep. George Keiser (ND) stated that eight to ten years ago the NAIC with the life insurance industry created the LTC Partnership program which Congress passed. It was designed to enhance portability of LTC insurance. Rep. Keiser stated that he believes it has been a failure and has not achieved the objective for which it was designed but the unfortunate thing is that many states, including North Dakota, has twice passed innovate legislation that was designed to dramatically and positively effect the enrollment in LTC insurance among younger people. However, each time the legislation passed it went to CMS and the waiver request was rejected because of the Partnership program. Rep. Keiser stated that he has heard no discussions from the NAIC as to

whether the program has failed, but it certainly has succeeded in stopping states from developing innovative strategies to address LTC insurance solvency.

Supt. Cioppa stated that it is important to note that the market went from over 100 carriers selling LTC insurance to less than 15. The NAIC also tried to come up with some innovative products that would help the LTC market and provide meaningful benefits and a list of 10 recommendations was created, a lot of which involved tax restructuring at the federal level. Supt. Cioppa stated that he spoke to Senator Susan Collins of Maine regarding those recommendations and she is interested. Hopefully if Congress starts looking at this issue it can also look at the Partnership because if that can function in conjunction with new and innovative products it would be a win for the states. Rep. Keiser noted that the solutions developed in North Dakota were not related to taxes and that it is a big problem for states to be denied waivers when trying to develop such solutions. The Partnership was created to solve problems related to LTC insurance but it has not done that and it needs to be addressed.

UPDATE ON NAIC PHARMACY BENEFIT MANAGER WORKING GROUP

Rep. Lehman asked for an update on the activities of the NAIC's Pharmacy Benefit Manager (PBM) Working Group (Working Group) and what work product might be developed. The Honorable Glen Mulready, Commissioner of the Oklahoma Insurance Department, first stated that under Supt. Cioppa's leadership a commitment has been made for the NAIC to be very regular participants at NCOIL. Accordingly, Cmsr. Mulready stated that at least he or The Honorable Dean Cameron, Director of the Idaho Department of Insurance and NAIC Secretary-Treasurer, will be attending future NCOIL meetings in an effort to build bridges and work more closely together.

With regard to the Working Group, Cmsr. Mulready stated that last year there was a consensus reached at the NAIC to move forward and potentially develop a new model on PBM regulation. The PBM Regulatory Issues Subgroup was created under the Health Insurance (B) Committee and has met via conference call both in regulator-to-regulator and open session format. A 2019 charge has been adopted to develop a new NAIC model that would establish a licensing and registration process for PBMs, as well as to consider including in the model provisions on prescription drug pricing and cost transparency. A workplan has been developed to guide them which will be voted on at the upcoming NAIC Summer Meeting during the B Committee's meeting. The Working Group will survey all state insurance regulators.

Cmsr. Mulready thanked Senator Jason Rapert (AR), NCOIL Immediate Past President, for his leadership on PBM issues and stated that it is the NAIC's hope that as it moves forward it can take advantage of the leg work already done at NCOIL and also have someone from NCOIL present to the Working Group on the work it has done. Cmsr. Mulready stated that the Working Group still has a lot of work to do and looks forward to using the work that NCOIL has already done to further its efforts.

Rep. Lehman stated that during efforts to try and pass PBM legislation in Indiana there was a lot of pushback as to who the regulator should be such as the department of insurance, attorney general, or pharmacy board. Cmsr. Mulready stated that he is not certain but believes that most states have designated the insurance department as the regulator. Cmsr. Mulready also noted that Oklahoma passed PBM legislation as did several other states. Sen. Dan "Blade" Morrish (LA), NCOIL President, noted that LA's

PBM legislation designed both the insurance department and pharmacy board as the regulator. Rep. Lehman stated that in Indiana there was some push to designate the pharmacy board as the regulator but concerns were raised.

UPDATE ON NAIC ANNUITY SUITABILITY WORKING GROUP/SEC REGULATION BEST INTEREST

Rep. Lehman asked for an update and timeline on the NAIC's Annuity Suitability Working Group (Working Group), and for comments on how the SEC's recently adopted Regulation Best Interest affects the Working Group. Dir. Cameron stated that it is first important to acknowledge that the Annuity Suitability Model Regulation (Model) has worked over time. Consumers are being protected and for the most part consumers are able to choose the product that best fits them. It should also be acknowledged that most agents and carriers want to do what is in the best interest of the customer as they do not stay in business very long doing otherwise. The NAIC believes that the consumer is best protected when there is a level playing field where the agent and carrier know the rules in which they have to operate under.

Dir. Cameron stated that to the extent possible, the desire of the NAIC and the Working Group is to provide some uniformity between the amendments to the Model and the SEC's regulation, and potentially what the Department of Labor (DOL) may propose. The DOL's initial regulations were rejected but there have been indications that they will return. Dir. Cameron stated that with a lot of pain and effort, the Working Group drafted some changes that, in the Working Group's opinion are very reasonable, but stop short of calling it a "best interest." For lack of a better term the Working Group called it a "consumer first" approach whereby agents are required to disclose certain material facts, conflicts of interest and compensation. Agents also must document how they came about making the recommendation to the client and how the client chose the product. However, that is not what the SEC passed. The good news is that the SEC passed a best interest standard and they did not define what that meant. The NAIC had shied away from that term because it was undefinable and difficult to determine whether in a scenario of a consumer choosing a product with the best interest rate but also paying the agent the most commission if that would be in the consumer's best interest. Similarly, if the consumer chose a product with the longest surrender penalty over one with the shortest penalty, it would be difficult to determine whether or not that was in the consumer's best interest.

Dir. Cameron stated that it is paramount to the Working Group that there be appropriate documentation and noted that the Working Group is starting to work towards defining "best interest." Dir. Cameron stated that he is not sure anyone loves the term but it is in fact the term that is out there and unfortunately perception becomes reality and the perception of the "consumer first" approach was that it was a lighter standard than "best interest." Since the SEC revealed its Rule, the Working Group has had one in-person meeting and two more are scheduled before the NAIC Summer Meeting. At the Summer Meeting, the Working Group hopes to move rapidly into making adjustments to the Model. Dir. Cameron stated that part of that discussion will be how to define "best interest" and he welcomed NCOIL's participation. Hopefully it will look a lot like what the Working Group had previously defined. If an agent is operating in a manner that is putting the consumer first, they are operating in the consumer's best interest. If the agent documents that the product was suitable in addition to the other products that they

are offering and whether there are any conflicts of interest and how they are going to be compensated, hopefully that will be deemed to meet a best interest definition.

Dir. Cameron stated that the Working Group has to determine specifically what a material conflict of interest is and how much of it has to be disclosed. There is a big difference between the Working Group and the SEC on non-cash compensation. Many members of the Working Group believe that non-cash compensation should be disclosed so that will have to be worked through. The SEC does not include non-cash compensation in its Rule because they don't allow non-cash compensation such as trips and compensation to help finance an office computer system. There is also a very contentious discussion regarding whether the Model will affect only new sales or impact current customers such as someone with a periodic deposit into their IRA. Dir. Cameron stated that he believes the majority of the Working Group members believe that it should not apply to current customers and that is the direction the SEC went, but Dir. Cameron noted that as a former agent, anytime someone brought additional funds to him he reviewed whether or not their current investments were suitable and which direction they should go in with their future investments. Dir. Cameron stated that immediately after the NAIC Summer Meeting, the form of the amendments will hopefully be finalized and the hope is that by the NAIC Fall or Winter meeting the amendments will be adopted.

Rep. Lehman stated that when Dodd-Frank was passed there was a condition that if states adopted the NAIC Model then that type of regulation would rest with the states, but now the SEC has adopted its Rule. Accordingly, Rep. Lehman asked if this is setting up to be similar to what we saw with the DOL Fiduciary Rule in terms of contentious legal battles concerning state v. federal authority. Dir. Cameron stated that the hope is no and that the SEC has its role to regulate certain registered representatives but in some cases they are regulating the same representatives that the states do. The DOL is regulating ERISA plans and retirement plans so they have a regulatory arm that overlaps with the states. Dir. Cameron stated that while some may disagree, he felt that DOL overstepped with its Fiduciary Rule. The SEC's Rule is a little more reasonable as it is helpful to consumers if dealing with an agent vs. a registered representative/agent vs. something else that they know they are being treated essentially the same. It is also helpful to the industry that there not be one set of rules for one side of the line and another set for the other side.

Dir. Cameron stated that during his time as an agent he sold a lot of annuities and did a lot of retirement planning and there were times that even the suitability standard was a little bit of a pain but the reality was that you always wanted to do what was in the consumer's best interest anyhow. The term has been politicized and is not preferable but in reality, Dir. Cameron stated that he believes agents can adopt it as long as there are reasonable expectations. Everyone expects that the agent will be compensated somehow so disclosing that not to the exact cent is reasonable, as is disclosing conflicts of interest. It is also very reasonable if the agent has to document how they came to the conclusion that the three of four products are the best choice for the consumer and that the consumer chose "x" product for the following reasons. Dir. Cameron stated that if those disclosures were documented, he does not see how a regulator could determine how an agent did not act in a consumer's best interest.

Rep. Carbaugh stated that as an independent agent the issue of best interest to the consumer for all products available makes him uneasy since through brokerage houses he can sell a myriad of companies that he has no idea what all of the contracts out there

are. The litigation involved can be very worrisome, particularly when the families of a deceased consumer come after the agent questioning the agent's decision. Rep. Carbaugh stated that he agrees with Dir. Cameron's statements regarding requiring the explanation he mentioned about certain products but that sounds like "suitability" more than "best interest" and is therefore troubling. It is particularly concerning as an independent agent as opposed to captives as independent agents should not be expected to know every contract available.

Dir. Cameron stated that draft of the NAIC's Model would not require agents to know all products that are available. Agents are not expected to know competitor's products and products for which they are not licensed or appointed to sell. Dir. Cameron stated that first and foremost you are expected to know the products that you are licensed and appointed to sell and you are expected to disclose if you have a material conflict of interest. Most agents, particularly those in the P&C realm, are not willing to walk away from the P&C side of the business in order to market an annuity for which they would make very little compensation and jeopardize their relationship. Dir. Cameron stated that he could see situations where agents could collaborate with other entities. Some consumers will also not care. The important thing is that agents should document why the product was chosen and why the consumer made the choice. An agent may even want to have the consumer sign something stating that "I chose the following product for the following reasons..." Dir. Cameron stated that when he would sit down with customers sometimes there were good companies with great opportunities but he did not have any relationship with that company so he would say to the customer that the company is available but he does not know anything about it. Dir. Cameron stated that he believes that if you disclose that type of information you will be acting in the consumer's best interest. Dir. Cameron stated that he hopes the Model will be that transparent and invited NCOIL's comments.

Sen. Bob Hackett (OH) stated that the DOL Fiduciary Rule really related to variable annuities. Sen. Hackett stated that he does a lot of mutual funds and he saw that broker dealers were pushing him and others to do brokerage accounts as they get a fee on every brokerage account transaction and there is not a fee on every mutual fund transaction other than the initial fee. Sen Hackett stated that he is not sure what the SEC's Rule states regarding variable annuities but asked if there will be a fight involving said annuities over the next five to ten years. Dir. Cameron stated that he does not believe you will see a fight because the SEC's Rule will encompass variable annuities and in some cases the NAIC's Model will as well along with indexed annuities. Dir. Cameron stated that not every regulator regulates variable products and the Model that the NAIC hopes to come forward with will create as much uniformity as possible between the NAIC and the SEC. It remains to be seen what the DOL will come back with.

Rep. Lehman asked Dir Cameron if the NAIC sees any issues with proceeding with a Model Regulation for these issues as opposed to a Model Law. Dir. Cameron stated that he is not certain but believes some statutory changes may be necessary and noted that the industry has done a pretty good job of working these issues. Thousands of pages of comments have been submitted and for the most part everyone is on the same page. There are some that do not like the term "best interest", including Dir. Cameron, but as long as the Working Group can define it as a reasonable standard he can live with it.

Rep. Lehman followed up on Rep. Carbaugh's statement regarding potential litigation from family members of a deceased client and asked if that will be an issue down the road with the Model and the SEC's Rule. Dir. Cameron stated that it is certainly not the Working Group's intention for that to take place. As regulators, if called to look upon a situation like that they would really be looking at whether the agent documented recommendations and whether the recommendation was reasonable. No one is expecting the agent to have a crystal ball and predict what will be the best rate of return down the road. Dir. Cameron stated that he and other agents have had experiences where they sold a product and then the company gets bought and all of sudden they are not as responsive and good to work with – the point being that things change. Dir. Cameron stated that he believes the Working Group has circumvented the issue raised by Rep. Carbaugh and will not be looking at just returns to cause litigation issues.

Asm. Ken Cooley (CA), NCOIL Treasurer, stated that he appreciates the comments regarding the potential for litigation because he believes the term "best interest" is something that anyone sitting in a jury will think they know what it means. At that moment, the operative word will be "best" and when you present a phrase as simple and well understood like that to any person, no matter what hedges you put around it the public will supply their own understanding.

UPDATE ON AFFORDABLE CARE ACT LITIGATION: TEXAS V. U.S.

Rep. Lehman asked for an update on the most recent Affordable Care Act (ACA) litigation, Texas v. U.S., and asked if the NAIC is seeing any states take action regarding preparations for the ACA being dismantled and/or struck down. Supt. Cioppa stated that Maine hardwired some provisions into state law that it felt were appropriate to include in case the ACA went away. A number of states have also done that and others are looking at that as an option. In term of the litigation, the NAIC is following it and will act appropriately but it is not preparing for it to be struck down at this point.

Dir. Cameron stated that, after the ACA passed, states went through and repealed certain provisions of their insurance code. Therefore, perhaps it is wise for states to review what was repealed and consider whether those provisions should be put back in place. For example, if a state had consumer protection provisions that were repealed because they were duplicative of the ACA's, such provision may want to be put back in the code. Or if states had high risk pools or high risk reinsurance pools that were repealed because of the ACA, they may want to be enacted again.

Dir. Cameron stated that the NAIC is waiting like everyone else to see the result of Texas v. U.S. and in the meantime the states are also working very diligently to stabilize their own marketplaces, and encourage companies to participate since the more carriers that participate the better it is for consumers and competition. Not everything that works in one state will work in every other state but states should always have the ability to try different things without necessarily asking the federal government for permission. Idaho will soon be releasing the second round of its state-based plans and some will like them will others will not. Idaho also passed legislation regarding enhanced short term insurance plans and it was wise to place it in the consumer protection chapter of the Idaho code so the plans will have to comply with certain Idaho mandates. Dir. Cameron stated that it is important to foster innovation and the NAIC will continue to advocate for that.

Rep. Lehman stated that in Indiana they put their high risk pool back in place in case the ACA was struck down and noted that Rep. Carbaugh enacted important short term insurance legislation. Rep. Lehman stated that an argument he heard regarding short term insurance plans was that it is a great product for someone like a 62 year old single farmer who wants minimal coverage but is told they must buy a product that has maternity and pediatric dental coverage. That may run contrary to the ACA so it will be interesting to see what happens with the litigation and other state actions.

ANY OTHER BUSINESS

Rep. Lehman stated that he looks forward to working with the NAIC and developing some sort of standard regarding rebate reform especially as agents become licensed in multiple states and they need to know multiple state rebate laws. Rep. Lehman noted he has heard debates over whether a frozen turkey would be considered a rebate, in addition to whether an agent could send flowers to a client's funeral without violating rebate laws. Supt. Cioppa noted that when passing Maine's rebate reform law he told legislators that for egregious actions there are always unfair practices laws that can be used to address those actions and therefore rebate laws are not needed for that purpose. Rep. Lehman noted that rebating laws are really protecting agents from each other because you never hear a consumer complain that they got a better deal.

Dir. Cameron stated that there was a situation in Idaho several years ago during the "universal life craze" when a couple of agents went to prison because they were rebating the entire first year premium. They had a carrier that was paying them more in commission than the entire first year premium and of course they were not paying taxes on anything either. Dir. Cameron stated that he thinks rebate statutes are way out of date and need to be reviewed but it is important to be careful when getting into actually paying for part of the premium of the product that they are selling.

ADJOURNMENT

There being no further business, the Committee adjourned at 12:45 p.m.