

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
NCOIL -NAIC DIALOGUE COMMITTEE  
CHARLOTTE, NORTH CAROLINA  
MARCH 6, 2020  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) NCOIL – NAIC Dialogue Committee met at the Charlotte Marriott City Center Hotel in Charlotte, North Carolina on Friday, March 6, 2020 at 1:15 p.m.

Assemblyman Ken Cooley of California, NCOIL Vice President and Chair of the Committee, presided.

Other members of the Committees present were:

Rep. Martin Carbaugh (IN)	Sen. Jerry Klein (ND)
Rep. Matt Lehman (IN)	Sen. Bob Hackett (OH)
Rep. Michael Webber (MI)	Rep. Tom Oliverson, M.D. (TX)
Sen. Paul Utke (MN)	

Other legislators present were:

Rep. Joe Cloud (AR)	Asw. Connie Munk (NV)
Rep. Deborah Ferguson (AR)	Asm. Kevin Cahill (NY)
Sen. Paul Wieland (MO)	Sen. Bob Peterson (OH)
Sen. Paul Lowe (NC)	Sen. Roger Picard (RI)
Rep. Garland Pierce (NC)	
Rep. Stephen Ross (NC)	

Also in attendance were:

Commissioner Tom Considine, NCOL CEO  
Will Melofchik, NCOIL General Counsel  
Cara Zimmermann, Assistant Director of Administration, NCOIL Support Services, LLC

## QUORUM

Upon a motion made by Rep. Matt Lehman (IN), NCOIL President, and seconded by Rep. Michael Webber (MI), the Committee waived the quorum requirement without objection by way of a voice vote.

## MINUTES

Upon a motion made by Rep. Webber and seconded by Rep. Lehman, the Committee approved the minutes of its December 11, 2019 meeting in Austin, TX without objection by way of a voice vote.

UPDATE ON NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC)  
SUITABILITY IN ANNUITY TRANSACTIONS MODEL REGULATION

The Honorable Ray Farmer, Director of the South Carolina Department of Insurance and NAIC President, stated that it is the job of regulators and legislators to protect consumers and citizens. The NAIC's Suitability in Annuity Transactions Model Regulation (Model) does that. The NAIC first adopted the Model in 2003 and it has been updated a number of times as needed. Last month, the NAIC adopted significant revisions to the Model following extensive deliberations. The NAIC heard from regulators, consumer representatives, industry, and attorneys. The revisions incorporate a best interest standard that requires all recommendations by agents and carriers to be in the best interest of the consumer. The consumer's interest must be put above the agent's or the carriers. That is normally done anyway but the revisions allow for more specific rules to ensure that is being done.

The regulation requires producers and insurers to satisfy the requirements outlined in the care obligation, a disclosure obligation, a conflict of interest obligation, and documentation obligations. The NAIC believes the revisions are in harmony with federal rules as well. The Model codifies as a requirement the good business practice of carefully and clearly explaining to the consumer the basis for a recommendation. The agents are to disclose and answer questions about their role in the transaction, their compensation, and any material conflicts of interest. The revisions are a good piece of consumer protection regulation and from this point forward, you will begin to see states adopt it as part of their regulatory framework as the revisions were just recently finalized.

Asm. Cooley asked if there was any consideration given to the issues this Committee raised when it discussed this Model during its last meeting in December. Dir. Farmer stated that after that meeting, the suitability working group continued to meet primarily by conference call and all of the information that was discussed during both NCOIL's and the NAIC's Austin meeting was combined together and the revisions were adopted by the relevant NAIC committee in late December. The NAIC Executive Committee later adopted the revisions and now it is up to each state to adopt the revisions. NCOIL's input was valuable and part of the NAIC's process.

Asm. Cooley asked how the NAIC envisions the Model being implemented – will states use the Unfair Trade Practices Act (UTPA) as enabling legislation or will states pass a law with specific authority to adopt this regulation? Asm. Cooley noted that California had actually adopted the prior version of the Model as a freestanding statute. Dir. Farmer stated that in his state the Model will be adopted as a regulation, but the process is such that the regulations go through the legislative process as well in terms of hearings, and subcommittees approval. It will be up to each state to do what their statutes and regulations provide for. Dir. Farmer stated that as most Directors, Commissioners, and Superintendents do when interpreting statutes and regulations, a common sense method will prevail. This is not a "gotcha" type of regulation. It is something that protects policyholders and constituents. Everyone did not agree with the revisions in the end but that typically does not happen with anything and it is important to now move forward in the best interest of policyholders and consumers.

Asm. Cooley stated that going back to the adoption of Dodd-Frank, buried in that was a provision that basically said the NAIC in its adoption of a suitability standard establishes a type of regulation that was exempt from Dodd-Frank. So, this was a case with Congress saying that we are regulating a lot of things but insofar as this is concerned and adopted by the NAIC as amended from time to time, that steps out of the Dodd-Frank framework. Accordingly, there is a recognition in the Dodd-Frank Act that the

NAIC would be in this general area. An underlying question with any NAIC regulation, is what is the underlying statutory authority in a state to adopt a regulation as regulations have to be founded upon statutes. Asm. Cooley again noted that the underlying authority could vary from state to state such as the UTPA, or in California's case, the annuity statute itself.

#### FOLLOW-UP DISCUSSION ON NAIC CASUALTY ACTUARIAL AND STATISTICAL TASK FORCE (CASTF) INITIATIVES

The Honorable Chlora Lindley-Myers, Director of the Missouri Department of Insurance and NAIC Secretary-Treasurer, stated that the CASTF white paper started being developed in 2018. There have been numerous chances for people to offer opinions and at the upcoming NAIC Spring National Meeting and going forward, the paper will be exposed before there is another set of review. The objective of the paper is to identify best practices to serve as guidance to state insurance departments and insurers in their review of complex models underlying the rating claims. The focus this time is on the private passenger and homeowner insurance rate filings. Unlike the suitability model regulation, the paper is not a model regulation; it is a guidance paper that an individual state or territory can decide to use or not. It is totally up to them as to what they use and how they use it. The paper can help them ask questions of those submitting the rate filings that hopefully will help them understand the rate scheme they are looking at, making sure that at least in their minds whatever questions that have come up that they feel the rate is not excessive or discriminatory and meets statutory standards. Unlike the suitability regulation, that is something the states can decide to implement as a regulation or a statute. In Missouri, that is something that would be sent to the general assembly for consideration. That is considerably different from the CASTF white paper. Dir. Lindley-Myers stated that she looks forward to hearing further comments on the white paper as its development is an open and transparent process.

Rep. Lehman stated that just as the white paper is focused on establishing somewhat of a bright line between what is acceptable for rating factors, legislators are concerned with establishing a bright line between what should be done through regulation, a white paper, and legislation. Rep. Lehman stated that he does not necessarily agree with what the white paper is asking but there is a fear on the carrier side and the legislator side as to where this will end. Rep. Lehman asked if a document could be provided to him that clearly outlines the goals and plans of CASTF. Dir. Lindley-Myers stated that in terms of Missouri, she wants to know what's in the rate filings and if she asks a company why they are doing certain things and why certain rating factors are being used and they give a satisfactory answer, then it is over. No additional regulation is needed. It is just an instance of ensuring that the reason or rationale for using the factors is provided satisfactorily and that is no different than what has been done before but now more data may be used.

One of the things to be careful of is to make sure that insurers don't utilize something that is corrupt by putting a bunch of different information and data in there. But, if they are able to differentiate and substantiate the reasons behind a rating factor, then that is fine and that is what the current process is. Dir. Lindley-Myers noted that with the life and health industry, it was found that at one point they were excluding classes of certain people because they carry a particular gene. Accordingly, if a company is submitting rates on that, she wants to be able to ask them certain questions. Dir. Lindley-Myers noted that she has the ability to do that now whether or not she looks at the white paper.

If a satisfactory explanation is provided to the questions from the regulator now, then there is no discrimination and that is the end of it.

Rep. Lehman stated that he has some concerns with predictive modeling but if the models are working and they are not unfairly discriminatory and rates are decreasing, then it is difficult to argue against them. Rep. Lehman stated he looks forward to discussing this issue further. Dir. Lindley-Myers stated that regulators want the models to work as well but not on the backs of certain consumers.

Asm. Cooley stated that he looks at this issue through the lens of the relationship of state legislatures, state regulation of insurance, the adoption of the accreditation system which is actually a form of delegation and the basis of delegation is deferring to someone's expertise in a specific area. So, if you step away from the insurance regulation example, and refer to concussions as they affect high school sports, the legislature might defer some of its policy choices to the American Academy of Pediatrics or another medical group focused on sports medicine. Such examples are commonplace and that is similar to what underscores the mission of the NAIC with the expertise. The delegation to the NAIC was founded upon an expectancy with respect to solvency protection in the larger framework. Accreditation itself was an outgrowth of a concern about solvency. The things that are now running up against each other is that if CASTF changes things that make their way into NAIC handbooks, those changes can be incorporated by reference into state law without anyone ever looking at them. Asm. Cooley stated that he feels this particular process is opening up big questions about the basis of rating and that historically, individual carriers are innovative with rates and the CASTF could be putting the brakes on that. It is also difficult to determine how the work of CASTF would mesh with different state rating laws in terms of some being file and use and some being prior approval. Asm. Cooley asked if there were any comments on that issue.

Dir. Farmer stated that each state is indeed different and South Carolina is a file and use state. Even though SC is a file and use state, if a company has something that is different that they want to be approved, they will come in first to discuss that which is encouraged. Also, even though SC is a file and use state, the department looks at every filing that is made and a concentrated effort is made to turn them around as quick as possible. The SC department has gone from 60 days to 20 days. Accordingly, the company is not held up on the speed to market issues. Dir. Farmer stated that his job at the SC department is to make the company's job easier to help customers. Dir. Farmer noted that when the legislature grants him permission, he is going to implement private flood insurance legislation that will call for use and file as an experiment to see that if the companies that have asked for relaxed standards are serious about it. Therefore, each state has its own rating statute but even those that are file and use like SC can closely and quickly review each filing.

Dir. Lindley-Myers stated that if you have file and use, use and file, or prior approval, it is not the NAIC but rather the people in those individual states that are looking at that and making the determinations and looking at what is going into it. One important issue to consider is that if you let company #1 do something and then company #2 does not really tell the regulator what they are doing and they say they thought they could because company #1 is permitted, there should not be any unevenness in the marketplace where one company can do something but it is so far buried that the regulator does not even know it is there and the other company does not know that they

can do something to lower their rates. Dir Lindley-Myers stated that it is up to each state's determination but noted that if she thought something was particularly helpful she would not hesitate to discuss with the legislature putting certain things in statute.

Sen. Hackett stated that he realizes different states have different rating laws but couldn't a scenario be created where you have one company having certain rating models approved in only certain states. Dir. Lindley-Myers stated that possibility already exists as some things are prohibited in some states that are permitted in others. Sen. Hackett stated that he agreed with that but noted that this could make it more uneven that it currently is which inevitably results in more costs to the insurers resulting in higher rates. Dir. Lindley-Myers stated that companies will make a determination as to which states they want to operate in.

Asm. Cooley stated that in his career he has seen instances of individual states and individual regulators and the NAIC feeling under the gun of Congress and Europe on certain things relating to the state based system of insurance regulation. Accordingly, the way to defend the state based system of insurance regulation is to move forward with a common understanding as to what it is and why we support it. There is very much a question on this particular issue as to whether the right process is being followed and whether the material could find its way into handbooks and rating laws. Because the issues go to the rating laws and something as fundamental of how rates get set, the issue of a systematic risk should be discussed. It is one thing to deal with an individual company's filing but another to start injecting a new standard across all rates. If you have a blunder in a big way, the causes risk in a systemic way which is something that no one wants. It would be a sad day if something that came out of the NAIC caused others to re-think the state based system of insurance regulation. Throughout 2008-2010, there were discussions about whether insurance regulation was a problem and it was determined that there was no problem with the state based system. It is important to not lose sight of these fundamental issues. This is a very productive dialogue because the entire system of the NAIC is founded upon delegation from state legislatures and moving forward together is ultimately in defense of said system.

#### UPDATE ON NCOIL AND NAIC REBATE REFORM INITIATIVES

Rep. Lehman stated that the issue of rebate reform has received significant attention the past several years, particularly with advancements in technology viewed through the risk-mitigation lens. Rep. Lehman noted that the NCOIL Rebate Reform Model, which he is sponsoring, will hopefully be adopted at the end of this meeting. Rep. Lehman also thanked the NAIC for including NCOIL in its rebate reform model drafting working group. Rep. Lehman stated that he hopes to bring the NCOIL rebate reform model law to the NAIC's upcoming Spring Meeting to offer the legislative perspective on this issue in an effort to work together going forward.

Dir. Lindley-Myers thanked NCOIL for participating in its rebate reform model drafting working group as the NAIC wants to hear from a wide array of different voices when drafting models. At the 2019 NAIC Summer meeting, the task force voted to move forward with the development of a model law request (MLR) to open up the UTPA and amend the language in Section 4(h)(1). The MLR was adopted by the task force in October 2019 and subsequently by the Executive Committee in December of 2019 during the NAIC's Fall national meeting. The task force subsequently established a model drafting group which is led by Rhode Island Superintendent Beth Dwyer. The

NAIC is thrilled to have Rep. Lehman and NCOIL staff be a part of the drafting group. The NAIC is working towards developing language and appreciates all of the information given. The task force has received a tremendous amount of input from stakeholders regarding this topic. The draft group has been able to move forward expeditiously in drafting language and is currently taking comments from the drafting group members on the third draft to amend the UTPA. As the NAIC continues to examine different ideas as to what rebates should and should not be, the NAIC hopes to continue to have productive discussions so that something can be developed that is palatable for both NCOIL and NAIC.

Rep. Lehman stated that when discussing this issue, one thing that continues to arise is whether rebate reform should be done in the form of standalone statutes or in the form of amendments to the UTPA. Rep. Lehman stated that is an important issue to consider moving forward and hopes that the NAIC is mindful of that and related issues such as different penalties that can arise when putting something within the scope of the UTPA.

#### DISCUSSION ON RUTLEDGE V. PCMA AND ERISA PREEMPTION

Asm. Cooley asked if the NAIC representatives had any comments on the ERISA-focused preemption case of Rutledge v PCMA, which NCOIL filed an *amicus* brief in, and/or on ERISA in general and how it impacts regulator's ability to help protect consumers.

The Honorable Glen Mulready, Oklahoma Insurance Commissioner, stated that in January of this year the U.S. Supreme Court decided to take up the Rutledge case which dealt with the preemption of Arkansas's pharmacy benefit manager (PBM) regulation statute (Act 900). Cmsr. Mulready stated that to be clear, Act 900 dealt with maximum allowable cost (MAC) pricing which passed in Arkansas in 2015. Arkansas also passed a separate PBM licensing statute in 2018. Act 900 had three main components: require PBMs to promptly update their MAC cost lists when a drug's prevailing wholesale costs increases by 10% or more; required PBMs to grant appeals and increase reimbursements if a pharmacy was reimbursed below acquisition cost and the pharmacy shows that it couldn't have purchased that from the primary wholesaler; and allowed pharmacies to decline to dispense a drug of the PBM's MAC list resulting in pharmacies or pharmacists being paid less than what they pharmacy paid to get the drug.

The federal district court agreed with PCMA that ACT 900 was preempted by ERISA, this resulting in the appeal to the U.S. Supreme Court. The Oklahoma legislature passed PBM legislation last year and Cmsr. Mulready stated he was then sued by PCMA and that was on its way to federal court but it has been put on hold due to the Rutledge case. Oral arguments will be heard on April 27 and Arkansas' Attorney General Leslie Rutledge just recently filed her brief basically stating that the state regulation of reimbursement rates for generic drugs is preempted and the Supreme Court has long held that ERISA was not meant to preempt rate regulations. The Supreme Court has previously held that there are two tie-ins to that: one is the mentioning of ERISA and the other is the impermissible connection with ERISA-plans. Cmsr. Mulready stated that 45 states and D.C. all filed *amicus* briefs, including Oklahoma.

Cmsr. Mulready stated that the NAIC has always been strongly supportive of state regulation of insurance and is therefore generally opposed to ERISA-preemption of state insurance laws. The NAIC is very aware of the work that NCOIL has done with regulating PBMs and the NAIC looks forward to NCOIL participation in NAIC's process of developing a PBM model act. The NAIC is hopeful that the NCOIL PBM Model will be the foundation of the NAIC's model.

Rep. Martin Carbaugh (IN), Vice Chair of the Committee, asked whether, with the growing size of the ERISA marketplace, state insurance commissioners feel handcuffed in the ability to regulate. Rep. Carbaugh stated that he has felt challenged trying to legislate in the healthcare arena due to the growing size of said marketplace. Cmsr. Mulready agreed and stated that as a regulator, and former legislator, the number of impacted constituents when developing certain types of healthcare reform is dwindling and it is frustrating.

Asm. Kevin Cahill (NY), NCOIL Treasurer, stated that NCOIL adopted a Resolution last year In Support of Amending ERISA to Enable State Policymakers to Enact More Meaningful State Healthcare Reforms. Asm. Cahill asked if the NAIC would consider supporting such a measure as it is important to come with some type of solution or else there will continue to be constant ERISA-preemption litigation. Cmsr. Mulready stated that he thinks the NAIC would consider that.

#### UPDATE ON NAIC PET INSURANCE WORKING GROUP

The Honorable James Dodrill, West Virginia Insurance Commissioner, stated that the NAIC Property & Casualty Insurance (C) Committee adopted the regulators guide to pet insurance, a white paper, in March of last year. The white paper includes a history of pet insurance, a market overview, a review of regulatory issues relating to coverages, policy forms, marketing strategies, licensing, rating, and claims practices, as well as a summary of regulatory concerns. The committee then formed the pet insurance working group to review the need for the development of a model law or guidelines to establish appropriate regulatory standards for the pet insurance industry that had been highlighted in the white paper.

That working group at last year's NAIC's Summer National meeting submitted a request for model law development to define a regulatory structure related to pet insurance including issues such as producer licensing, policy terms, coverages, claims handling disclosures, arbitration, and pre-existing conditions. The working group has exposed a draft model and is taking comments from regulators and the industry on the first four sections which include the title, scope and purpose, definitions relevant to pet insurance including chronic conditions, pre-existing condition, and veterinary expenses, and disclosures to be included in the pet insurance policy including exclusions, waiting periods, and premium increases based on claims history. Comments will also be received on the remaining sections of the draft model in the near future which include violations, licensing, pre-existing conditions, and reimbursement benefits. The working group is holding bi-weekly conference calls with the expectation of completing and adopting the model by this year's 2020 Summer national Meeting.

The working group is taking steps to collect pet insurance data, including premiums, losses, policy counts, and claims handling data, through the NAIC's annual financial statement and market conduct annual statement. Among the more debated issues are

producer licensing and the definitions generally and weather specific prescribed definitions are needed or if the model should just include language that definitions can be substantially similar but not less favorable, pre-existing conditions, eligible expenses, free look periods and whether such periods are actuarially sound or fair to other policyholders as they would have to absorb the cost, issues over insurers using a brand name that is not the same as the name of the insurer, an appropriate level of filing with the DOI, how group policies are distributed in the property & casualty line of business, whether they are offered as an employee benefiter and whether they are truly group polices, and the appropriate type and amount of data that is needed to be filed with regulators.

#### ANY OTHER BUSINESS

Dir. Farmer then provided a brief update on the status of the NAIC's Life and Health Insurance Guaranty Association Model Act (Model) which was updated a couple of years ago. Specifically, provisions were added addressing the long-term care insurance market. The amendments spread assessments for guaranty association coverage to areas where they have not been before, equally among health insurers and life insurers and also bringing in HMOs into the assessment base. Twenty seven states have adopted the amendments. There are four states where the amendments are pending, including South Carolina which should be finalized in a couple of weeks.

Asm. Cooley stated that is a good way to end this session as when you think about consumers and insurance, the worst thing possible for a consumer is an insurance policy that they bought that they cannot pay the claims on. When looking at the insurance marketplace, there are two things out there to protect consumers from that outcome: on the front end is the setting of rates and on the back end is the guaranty funds.

The Honorable Mike Causey, North Carolina Insurance Commissioner, thanked everyone for attending this meeting and stated that he looks forward to working with the NAIC and NCOIL on these important issues.

#### ADJOURNMENT

There being no further business, the Committee adjourned at 2:30 p.m.