

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
EXECUTIVE COMMITTEE INTERIM COMMITTEE CONFERENCE CALL MEETING  
JULY 1, 2020  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Executive Committee held an interim meeting via conference call on Wednesday, July 1, 2020 at 11:30 a.m.

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

Other members of the Committees present were:

Rep. Deborah Ferguson (AR)	Sen. Vickie Sawyer (NC)
Sen. Jason Rapert (AR)	Rep. George Keiser (ND)
Sen. David Livingston (AZ)	Asw. Ellen Spiegel (NV)
Asm. Ken Cooley (CA)	Sen. Neil Breslin (NY)
Rep. Richard Smith (GA)	Asm. Kevin Cahill (NY)
Rep. Martin Carbaugh (IN)	Asm. Andrew Garbarino (NY)
Sen. Travis Holdman (IN)	Asw. Pam Hunter (NY)
Rep. Joe Fischer (KY)	Sen. Jim Seward (NY)
Rep. Bart Rowland (KY)	Sen. Bob Hackett (OH)
Rep. Edmond Jordan (LA)	Rep. Tom Oliverson, M.D. (TX)
Sen. Paul Utke (MN)	Rep. Jim Dunnigan (UT)
Sen. Paul Wieland (MO)	

Other legislators present were:

Rep. Deanna Frazier (KY)  
Rep. Michael Webber (MI)  
Rep. Rick Gundrum (WI)

Also in attendance were:

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

#### INTRODUCTORY REMARKS

Rep. Matt Lehman (IN), NCOIL President and Chair of the Committee, thanked everyone for joining the call and noted that there are a lot of issues to discuss during the call's 90-minute schedule. Rep. Lehman noted that because of that reality, if necessary, he will need to stop some speakers short if they take up too much time so that everyone can be heard. Rep. Lehman noted that the format for all issues discussed during the call will be such that legislators will be provided the opportunity to comment or ask questions, followed by interested parties. Rep. Lehman then asked The Hon. Tom Considine, NCOIL CEO, to explain the details on the recently re-scheduled NCOIL Summer Meeting.

## DISCUSSION ON 2020 NCOIL SUMMER MEETING (SEPTEMBER 24-26; HILTON ALEXANDRIA OLD TOWN; ALEXANDRIA, VA)

Cmsr. Considine thanked everyone for participating today and thanked the NCOIL Officers for all of their time the past several weeks discussing NCOIL's Summer Meeting. The Officers first determined that they did not want to do a three-day virtual meeting. There was some discussion about doing a legislator-only in-person meeting and having everyone else participate remotely, but that was ultimately decided against. Cmsr. Considine stated that it was ultimately decided to have an in-person meeting in Alexandria, VA, but with a streaming option via Zoom for those who cannot attend or feel uncomfortable doing so. Full participation will be available via the Zoom option. Cmsr. Considine noted that the Zoom option will be available only for this meeting and for any other meetings that would be similarly impacted by a national emergency. NCOIL is not going to go down the road of having virtual attendance as an option as that is a disincentive to in-person attendance and participation.

Cmsr. Considine stated that the Summer Meeting will run in conjunction with the fifth Annual D.C. Educational Fly-in (Sep. 22-23) so that saves those legislators participating in the fly-in from making two trips. The Summer Meeting will be somewhat shorter than typical meetings as it will begin on Thursday, Sep. 24 around 3:00 p.m. and end around 2:00 p.m. on Saturday, Sep. 26. The room will be large enough such that everyone will be socially distant. It is not finalized as to whether masks will be required but the feedback from the hotel thus far has been that they will be required. Registration for legislators will open this upcoming Monday, July 6.

The Meeting will be subject to capacity constraints so the first week of registration will be open only to legislators so there will be a sense of how many legislators will attend. One week later, registration will open for everyone. The room will be limited to about 150 total attendees consisting of legislators at the "U" and others in the general audience. There will be overflow rooms if necessary where there will be screens set up so that people can watch the meetings if there are capacity issues. Those rooms will also be set up to meet social distancing requirements. There will also be a lounge room available for meetings to foster interaction between legislators and interested parties. There will not be an organized micro-meetings session, although staff would be happy to facilitate a specific meeting with a legislator if requested.

Rep. Lehman thanked Cmsr. Considine and stated that if anyone has any comments or suggestions regarding the Summer Meeting to please reach out to NCOIL staff.

Rep. George Keiser (ND) asked if there is an idea as to how many states are not funding out-of-state travel. Rep. Lehman stated that he does not know but noted that in Indiana, travel funding restrictions have been implemented until August 1. Rep. Keiser stated that is something that should be monitored particularly given what is going on in the country right now. Rep. Keiser stated that North Dakota will not fund travel to the meeting so there will need to be another option available for participation, at least at this point in time. Rep. Lehman thanked Rep. Keiser for raising that issue and stated to NCOIL staff that it would be good to research that issue.

## DISCUSSION AND CONSIDERATION OF PROPOSED AMENDMENTS TO NCOIL ARTICLES OF ORGANIZATION & BYLAWS

Rep. Lehman stated that the NCOIL Articles of Organization & Bylaws Revision Committee (Committee) met last month via conference call to discuss proposed amendments to the NCOIL Articles of Organization and Bylaws. The amendments were adopted unanimously among those voting and accordingly await review and affirmation by the Executive Committee. In conversations leading up to that call with Senator Livingston and Assemblywoman Spiegel - Chair and Vice Chair of the Committee - Commissioner Considine, and NCOIL staff, everyone agreed that it was wise for NCOIL to take some time to reflect on whether any changes to its normal method of conducting business should be altered to allow NCOIL to continue to conduct business now as well as to account for any future emergencies.

Accordingly, after several discussions, amendments were crafted, the main purpose of which are to ensure that a large, national organization such as NCOIL is not unnecessarily constrained when operating during current and future emergencies. Other amendments concern clerical changes and formalizing certain practices which NCOIL Committees have been operating under for years but did not have express authorization in the governing documents. Rep. Lehman then reviewed the amendments as a reminder of what they are and their intent.

On page 1, the Preamble was amended to align it with Membership provisions which recognizes the territories of the United States, the District of Columbia, and Commonwealth of Puerto Rico as members of NCOIL.

On page 4, a new Section was added titled "Reasonable Departure from the Articles of Organization" – the same language was also added to the Bylaws on page 9: "In the event of any emergency resulting from a military or terrorist attack, widespread pandemic, or similar disaster resulting in the declaration of a state of emergency (or similar declaration) by Federal or State officials, reasonable departure from these Articles of Organization shall be permitted upon the Officers and Executive Committee declaring that such action is warranted." The amendment is intended to ensure that NCOIL can continue to operate as needed during an emergency. Importantly, the decision to reasonably depart from the Articles or Bylaws cannot be made by just the President – there is a strong level of checks and balances as Declarations of an Emergency are required by the federal or state government as well as the Officers and the Executive Committee.

Rep. Lehman noted that there were some concerns raised regarding this amendment as to how it might allow an NCOIL President or staff to operate without transparency, but Rep. Lehman stated he strongly disagrees with those concerns and noted the checks and balances built into the amendment. The amendment was crafted because there was nothing in the NCOIL Articles or Bylaws that allowed the organization to pivot.

On page 4, Section 2 was split into subsections A and B, with the language in subsection A explicitly allowing for votes via conference call and lowering the threshold needed for a roll call vote. Subsection B titled "Written Consent in Lieu of Meeting" is proposed to deal with situations like that which occurred with the Rebate Reform Model Law at the Spring Meeting in Charlotte this past March during which the Financial Services & Multi-Lines Issues Committee voted to adopt the Model with amendments that were extensively discussed by the Committee and interested parties. In those type of scenarios, staff makes those changes upon arriving home and sends the Model via e-

mail to the members of the Committee. In such instances, there is no need for the committee to meet formally again because the committee was so clear in its direction.

Rep. Lehman stated that the remainder of the amendments were technical in nature such as fixing some internal citations, re-numbering sections, and improving readability. Rep. Lehman further stated that he has been involved with NCOIL since 2009 and the things that he tells people as to what he really likes about NCOIL is that it is not a political organization; it is transparent; and all views on issues will be heard. Rep. Lehman stated that the amendments discussed will not in any way, shape or form, impact the way that NCOIL has conducted its business in terms of providing ample notice and opportunity for everyone to be heard. If NCOIL wants to remain active and vibrant long into the future, these changes are necessary to operate virtually in an open and transparent manner.

Sen. Livingston thanked Rep. Lehman for his remarks and stated that he did a great job summarizing everything. Asw. Spiegel agreed with Sen. Livingston and thanked everyone for all their work throughout this process.

Asm. Ken Cooley (CA), NCOIL Vice President and Vice Chair of the Committee, stated that it is the nature of NCOIL that it is an organization that seeks to serve as a clearinghouse of information to advance important insurance dialogue across the country. The amendments are not a way to step away from that organizational characteristic, which some might worry about. Rather, the amendments enhance NCOIL's ability to act in that manner despite unforeseeable circumstances. NCOIL also has a practice of getting a record of votes out and that is something that NCOIL will continue to do whether there is a virtual or in-person meeting as NCOIL will continue to operate in a transparent manner. The amendments support NCOIL's clearinghouse function which in turn support state legislature efforts. Sen. Livingston stated that he fully agreed with Asm. Cooley's comments.

Hearing no other comments or questions from legislators or interested persons, upon a Motion made by Sen. Jason Rapert (AR), NCOIL Immediate Past President, and seconded by Asm. Kevin Cahill (NY), NCOIL Treasurer, the Committee voted to adopt the amendments via voice vote without any opposition among those voting.

#### RATIFICATION OF PRIOR NCOIL ACTIONS

Rep. Lehman stated that now that the amendments to the Articles and Bylaws have been officially adopted and they explicitly allow for telephonic votes, in an abundance of caution, he discussed with staff the need to ratify all prior NCOIL actions – notably those that have taken place without the express authorization of the prior versions of the governing documents, typically via interim committee meeting conference calls.

Hearing no comments or questions from legislators or interested persons, upon a Motion made by Sen. Travis Holdman (IN), NCOIL Immediate Past President, and seconded by Asm. Cahill, the Committee voted to ratify all prior NCOIL actions via voice vote without any opposition among those voting.

#### DISCUSSION AND CONSIDERATION OF NCOIL RESOLUTION URGING THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS TO REFRAIN FROM INTRUDING ON THE CONSTITUTIONAL ROLE OF STATE LEGISLATORS

Asm. Cooley, sponsor of the NCOIL Resolution Urging the National Association of Insurance Commissioners (NAIC) to Refrain from Intruding on the Constitutional Role of State Legislators (Resolution), thanked everyone for participating and noted that many present today attended NCOIL's Spring Meeting this past March, during which the Property & Casualty Insurance Committee had an initial discussion on the work of the NAIC's Casualty Actuarial and Statistical Task Force (CASTF). That is a part of the NAIC that routinely provides analysis of issues to the NAIC and collaborates with industry. Specifically, the discussion in March was on CASTF's work towards developing a white paper to identify best practices for the regulatory review of predictive models and analytics filed by insurers to justify rates, and provide state guidance for review of rate filings based on predictive models.

Asm. Cooley stated that, on its face, the white paper sounds harmless and perhaps beneficial as support to regulators but when you dig deeper, it starts getting into the role of law as guiding the business of insurance. Asm. Cooley stated that prior to becoming a legislator he was counsel to the California State Assembly's Insurance and Banking Committee which is during the time when NAIC accreditation arose – the idea that the NAIC would promulgate model laws that states should adopt and then they would rate and evaluate insurance departments based on the accreditation system. When you get to that initiative, it highlights a couple of things such as the fact that the NAIC only operates on a delegation of legislative authority. They do not have inherent authority as they are not a government entity and they conduct their work in express reliance on the legislature to enact authorizing statutes and thereby enable their work.

Asm. Cooley stated that he feels that some of the work contained in the white paper has actually gone beyond that approach as to how policy is enacted, acting as if the NAIC is able to grant authority and methodologies for rating evaluations that regulators can then run with, with no reference whatsoever to the underlying law. We are a nation of laws and the regulator has no authority besides what is in the state statutes. So, the white paper is veering into an area of independent authority which is a problem. Those issues were raised at the March meeting during a panel discussion which included Missouri Insurance Director and NAIC Secretary-Treasurer, Chlora Lindley-Myers, NAIC staff, and former Illinois Director of Insurance Nat Shapo who had collaborated with the National Association of Mutual Insurance Companies (NAMIC) to write an issue analysis paper that highlights the perceived problems with the white paper. The topic was also discussed again during the NCOIL-NAIC Dialogue.

Despite those conversations, changes were not made to the white paper to address those concerns and in some cases, it has become worse. The main problems with the white paper, and which are addressed in the Resolution, are that it starts telling regulators how to regulate rates without reference to the underlying law. It starts introducing a mode of analysis that is not necessarily called for in the underlying statutes. Asm. Cooley stated that at that point, he feels that the NAIC is veering towards a different direction than the accreditation model which involved them going to the legislature when they wanted to break new ground. Here, they are breaking new ground but not going to the legislature and presuming that the regulator can do it unilaterally which is not the system of laws we have. That can be viewed on how they presume to vary the basis of rating to get into requiring regulated insurers to go beyond demonstrating correlation and submit a rational explanation of how a rating variable connects to the risk of insurance loss.

The definition of rational explanation in the white paper is problematic and is essentially a causation requirement disguised in other words and phrases. By including the qualifier that a rational explanation does not require strict proof of causality in the definition of rational explanation, the white paper inherently imposes some level of a causality requirement in rate filings, which is a departure from settled law. That opens up a lot of ground for argument which is not to say that you cannot benefit and gain clarity from argument, but if a state wants to get into those arguments, they should do so by statute. In California, one of the oldest insurance statutes dates to the 1870s which states that the insurance commissioner has the obligation to enforce all the laws regulating the business of insurance in the code and other codes. So, basically, the regulator is tasked with being an administrator under the statutes of the state. That is the job and he or she cannot expand that unilaterally by introducing a new idea unless it is anchored in the law.

The white paper's causality requirement is also linked to instructions for the regulator to ensure that the variable in question is not obscure, irrelevant, or arbitrary. Each of those words attracts a high level of subjectivity for the reviewing regulator to apply. Asm. Cooley queried as to if it is not in the underlying law, how do you conjure it up and use it as a guide for regulators? We are a system of laws and one cannot pull things out of thin air. No one is a king. Asm. Cooley noted that some may argue over whether there should be a movement away from correlation towards causation, but the conversations need to be anchored in law. Arguments may be encountered which state that the misuse of rating creates fairness issues, but in all states, issues of fairness and rating and non-discrimination are well anchored in statutory systems.

It is not as if there is a "blank" in state codes regarding discrimination in insurance. It is a long-established concept in the law and has long been a topic of legislative conversation and NAIC-conversation over decades. So, it is not as if there is a hole in the law. The basic principles are pretty clear, and it is always right to look at how we can improve justice in our system of law. Still, there is a conversation needed between the NAIC and lawmakers to make sure we have it right and then bring any changes to the legislature. It is not something for a white paper to do to break new ground.

Asm. Cooley stated that the Resolution is meant to stand up for the prerogative of lawmakers under their state constitutions to superintend the evolution of law in their states to ensure that members of the executive branch act in accordance with law and that their conduct is guided by the constitution and statutes of their own state. In that sense, it harkens back to the evolution of accreditation whereby the NAIC acquired some specific new authority because they partnered with the legislature. It is a reminder that is how things should proceed when an organization operates not with their own power, but with a delegation of legislative power.

Asm. Cahill stated that in this particular instance, some concerns have been raised about a multitude of issues that were perceived in the way that the Resolution was drafted and how certain terminology is used in the Resolution. Part of those concerns are derived from the complexity of the Resolution. Asm. Cahill stated that he identified two or three issues that are identified in the Resolution and each one deserves its own distinct consideration. Whether we should adhere to national as opposed to federal standards is an ongoing discussion. New York was one of the last states to sign on to principle-based reserving (PBR) and the state has still not signed on to the interstate compact. New York understands the primacy of the state regulatory scheme when it

comes to insurance. That being said, there are places where it is important to be informed by a national standard, not a federal standard.

Asm. Cahill stated that another issue is the substantive issue that underlies the white paper and that is whether a correlative methodology or an algorithmic explanation is more appropriate to determine risk and premium levels. Another issue relates to ensuring that legislatures, not the executive branch, make the rules when it comes to insurance. The powers that insurance departments have are derived from legislative mandates. Those three issues warrant three discussions. There is relative unanimity regarding legislative primacy and a high level of support for the concept that while we accept national standards we do not want the insurance industry to be federalized.

But the underlying actuarial issues are subject to further examination for a couple of reasons. One is that we have become a more aware society and the implications of our actions, whether they are intended are not. The other is that we have access to massive amounts of data that we never have before and you can essentially make a statistic say whatever you want it to say because there is that kind of computing power out there.

Asm. Cahill noted that he had commented to a colleague earlier that 100% of the time when he washes his car it rains within 24 hours but that does not mean that washing the car caused it to rain. Accordingly, Asm. Cahill stated that he believes we need to step back and asked for consideration that the Resolution move forward as separate components so that the goal and purpose is clear without succumbing to criticism which has already been levied, some of which is extremely unjust, but nonetheless warrants taking a pause.

Asm. Cooley stated that he believes NCOIL is up against the clock due to the NAIC's timeline with the white paper. The Resolution is appropriate and the gravamen of it is the focus upon that the NAIC cannot operate independently of the legislature and cannot give guidance to regulators without reference to that. Asm. Cooley stated that he is not a technical expert in the field of actuarial science or the use of big data but noted that he does not feel he needs to be as the main point is that on behalf of lawmakers generally who oversee the insurance industry, the white paper is a canary in a coal mine. The NAIC is poised to adopt something which runs afoul of legislative authority and they want to bring it through their adoption process to start providing guidance to regulators which is the wrong way the NAIC should proceed.

As a practical matter, we know the NAIC is reliant upon legislatures. The NAIC exists entirely on the grant of legislative authority and it was much clearer earlier in the organization's history that they knew they needed to work with legislatures. The Resolution is an important message to send and it will hopefully lead to conversations at the NAIC. Asm. Cooley stated that he believes it is important to move forward but with a posture of saying that NCOIL is making a statement but wants to talk about the relationship the NAIC has with legislatures. Asm. Cooley stated that he hesitates to pull back and send a signal to the NAIC that is wholly incompatible with his view of the legislature.

Rep. Lehman stated that there is a time factor involved with this. NCOIL goes through an ebb and flow with the NAIC in terms of each organization pushing back on the other. The Resolution is not so much as a shot at the NAIC but rather a call to continue a discussion because the people Rep. Lehman has spoken to at the NAIC have been very receptive to NCOIL engaging. At the same time, the NAIC will move forward whether

NCOIL wants to be involved or not. Accordingly, the Resolution simply says that when the NAIC goes down the path of potentially making serious changes to rate review law, those changes must be done by the legislature. The Resolution is well-written and precise as to what the white paper itself addresses and NCOIL's concerns with it. Rep. Lehman stated that he understands Asm. Cahill's concerns and stated that the Resolution keeps the conversation moving forward.

Sen. Rapert stated that upon reviewing all the material, including comment letters, and listening to the concerns, he supports the Resolution as it sends the right message at the right time.

Sen. Holdman stated that he agrees with Sen. Rapert and noted that the issue of incorporation by reference (IBR) is always hanging over everyone's head as a reminder of the NAIC's developments that seek to move forward without legislative approval. The Resolution is well-written and he agreed with the comments said thus far in support of it.

Asm. Cooley stated that one of the difficulties here as lawmakers is that they are very talented but are generalists and it works better that way as law is not that technical. It has been said that the white paper is very technical and involves technicians which Asm. Cooley agrees with. The business of insurance does rely upon careful analysis and those types of things, but it is not a free floating entity and it must be anchored in the law. Asm. Cooley stated that he feels that going back several years, NCOIL has been trying to re-frame what the relationship is between state legislators and the NAIC, what the NAIC's source of authority is, and how they work with NCOIL. The white paper is a moment where attention as to what is the source of their authority starts to veer away.

Legislators do not need to presume to be the technical experts, but they are the defenders of the people's power inherent in the constitution to set the law and set the boundaries on what the technicians do. That is what the Resolution is really focused on and represents a necessary dialogue. There is also nothing in an NCOIL Resolution that will alter how individual state laws operate with respect to rating, fairness, and justice in the marketplace. All of those things are fair topics for legislation but an NCOIL Resolution cannot vary the state law, just as an NAIC white paper cannot. Accordingly, the Resolution is sticking up for the people of the various states operating through their legislature and those who support it are not compromising themselves on other issues because they are not touching law.

Rep. Lehman stated that at the March meeting it was stated that the white paper would be further discussed but then the NAIC stated that its intent is to adopt it at its Summer Meeting later this month so that moved the timeline such that the Resolution was drafted and this conference call meeting was scheduled. Asm. Cooley agreed.

Asm. Cahill stated that he continues to urge that the Committee not confuse this matter because there are parts of the Resolution he wholeheartedly supports and parts which he believes warrant further consideration. While it is important NCOIL continue to assert the primacy of the legislative authority over insurance regulation in the various states, Asm. Cahill stated that he does not see how the white paper threatens that, and noted that there is still a third branch of government – the judicial branch. If it is determined that insurance commissioners have overstepped their boundaries, that would be a ripe subject for judicial intervention and consideration. Asm. Cahill stated that he does not see the urgency in advising another agency of state officials of opposition to their



substantive argument when in fact the central purpose is to discuss the relative power and authority of the branches of government.

Rep. Edmond Jordan (LA) agreed with Asm. Cahill and stated that he understands that NCOIL is supposed to operate as an exchange of information but it seems as if the Resolution makes NCOIL an arbiter of what the NAIC says. Rep. Jordan noted the last provision of the Resolution which states that “a copy of this Resolution shall be sent to state legislative leaders and members of the committees with jurisdiction over insurance public policy, as well as to all state insurance regulators and the NAIC.” Rep. Jordan stated that if the Resolution was only being sent to the NAIC that might be ok, but when sending it to the other people listed, that is different. Rep. Jordan noted that like Asm. Cahill, there are parts of the Resolution that he agrees with, and parts that he has serious concerns with.

Birny Birnbaum, Executive Director of the Center for Economic Justice (CEJ), thanked the Committee for the opportunity to comment on these issues and noted that CEJ submitted written comments beforehand. Mr. Birnbaum stated that NCOIL has before it a resolution, which would be sent to every state legislature, every commissioner and the NAIC denouncing the NAIC for usurping state legislative authority. NCOIL has rolled out the nuclear option to get rid of an ant. The NAIC CASTF is a technical working group of actuaries whose work is reviewed by at least two parent committees. Had NCOIL simply sent a letter to CASTF noting concern with the term “rational explanation” and asked how this phrase fits into the regulatory framework, NCOIL would have gotten a dialogue and the ability to educate and be educated by regulators. NCOIL would have learned that the farthest thing from the actuaries’ intent is to usurp legislative authority.

In terms of time – the CASTF is taking comments for another 30 days. Then CASTF has to adopt it and pass it up the Property Casualty Committee for their consideration and then up to the Plenary. So, NCOIL has months for discussion on the white paper. Instead, NCOIL has this nuclear option containing demonstrably wrong information that undermines the message. More important, the real action on this issue is with other groups at the NAIC. These issues were discussed on yesterday’s NAIC Artificial Intelligence WG Call when the regulators – the commissioners, not actuaries – voted some 15-0 with 1 abstention to include a principle for insurers’ use of AI to proactively avoid proxy discrimination against protected classes – and it was adopted despite the very same arguments industry has made to NCOIL for this resolution. If nothing else, that action under the direction of NAIC leadership should prompt NCOIL discussion with the regulators over these issues instead of issuing this Resolution.

The fatal flaw in the NAMIC analysis and the Resolution is the second paragraph, “WHEREAS, established rate filing review is based on correlation, which demonstrates that rating variables are valid so long as they correlate with a loss.” The NAMIC paper, which is sort of the foundation of the Resolution, argues that causation is not required, which is true. But, the absence of a requirement to prove causation does not equal a requirement only for a simple correlation. Mr. Birnbaum stated that he has been reviewing rate filings for 30 years as a regulator and as an expert, and a simple correlation has never been the sole requirement or a sufficient justification for a rating factor.

In fact, the term “correlation” does not appear in either of the NCOIL rating models cited in the Resolution. Nor does “correlation” appear in any of the NAIC property casualty

rating models. Nor does “correlation” appear in the Casualty Actuarial Society’s “Statement of Principles Regarding Property and Casualty Insurance Ratemaking.” Nor does it appear in the American Academy of Actuaries (AAA) “Risk Classification Statement of Principles.” These risk classification principles identify a variety of considerations in developing risk classifications that go way beyond simple correlation. In fact, a simple “correlation” is not the basis for fair discrimination. NAIC models define unfair discrimination to exist if “after allowing for practical limitations, price differentials fail to reflect equitably the differences in expected losses and expenses.” Further, if simple correlation was the basis for assessing fair discrimination, consider this. The NCOIL models don’t define unfair discrimination other than discrimination “on the basis of race, color, creed, or national origin.” Well, what does “on the basis of” mean? If, as claimed in the Resolution that “rate filing review is based on correlation,” then the appropriate test for discriminating “on the basis of race, color, creed, or national origin” would also be a simple correlation between the rating factor and the prohibited classifications. CEJ doubts that is NCOIL’s intent.

Mr. Birnbaum stated that the reason that a simple correlation is not the justification is because there can be correlations between factors for a variety of reasons unrelated to whether one is predicted of the other. The term for that is a “spurious correlation.” For example, there was a 99.3% correlation between the divorce rate in Maine and per capita consumption of margarine from 2000 to 2009. As an example, the Indiana Department of Insurance disapproved a rate filing in which the insurer sought to use per-capita margarine consumption as a risk classification. In the 30 years that he has been reviewing rate filings and risk classifications and the regulatory activity in this arena, Mr. Birnbaum stated that a simple correlation has never been a sufficient justification for a rating factor.

The Resolution’s references to “correlation” seem like a quaint reference to a long-gone – by 50 years – era. The same NAIC CASTF holds monthly “book clubs” in which insurers and experts make presentations on current ratemaking practices. Mr. Birnbaum has been one of the presenters. This past week was an example in which Allstate subsidiary Arity made a presentation on the development of their telematics pricing models for auto insurance. The presentation reviewed the parts of a scoring (pricing) model, including ordinary least squares regression, generalized linear models, generalized linear models with log link functions, decision tree models, neural nets, gradient descent, hyperparameters and extreme gradient boosting. Needless to say, that when a regulator is presented with rating factors based on such a model, it is meaningless to try to look for a simple correlation.

It is this new and massive complexity – actuarial science merged with data science merged with astrophysics – that presents the challenge for regulators to enforce current statutes. CEJ suggests that instead of a Resolution, NCOIL’s efforts would be better spent working with regulators to modernize regulatory authorities and capabilities to deal with the reality of complex models in insurance while remaining true to bedrock cost-based pricing principles. A challenge for insurers and regulators that has always existed and continues to exist is whether a particular relationship – correlation – is real or spurious. The repeated references to “correlation” in the Resolution are an endorsement of proxy discrimination. By declaring that any correlation is sufficient justification – even if that correlation is a proxy for discrimination against a protected class and defending such proxy discrimination on the basis of states’ rights – ignores the

commitment and efforts by industry and regulators to address systemic racism in insurance.

By the standard espoused in the Resolution, a rating factor that was a proxy for being a Black American is legitimate as long as there is a correlation to losses. Never mind that the factor is a proxy for a prohibited class or that that the factor has the effect of discriminating on the basis of a prohibited factor. Again, we gave an actual example in our letter. One is that some data vendors offer a criminal history score that purports to score homeowners insurance on the basis of complaints filed with courts. Based on the Resolution, as long as there was a “correlation,” that would not only be okay, but regulators are prohibited from further inquiry. What would the use of a criminal history score look like in the case of George Floyd, if he lived?

Asm. Cooley stated that legislators are subject to the same laws that the regulators are subject to, so for Mr. Birnbaum to assert that anything in the Resolution opens the door to marketplace conduct is incorrect because it is constrained by the laws of the 50 states. The issue is that both legislators and regulators are subject to the law but the place where the conversation veered off is the NAIC acting as if they can unilaterally guide regulators into developing new rating approaches without confronting the underlying law. Saying that the Resolution opens the door to conduct is incorrect because the law exists in the 50 states. The issue is what is the fundamental methodology if indeed the NAIC at any level wants to engage in conversations which can lead to groundbreaking innovative approaches. Those discussions must run through the 50 state capitals and it cannot be short-circuited by going through regulators.

Mr. Birnbaum stated that he agrees with Asm. Cooley but disagrees with the assertion that the white paper is in fact doing that. Asm. Cooley stated that the charge of CASTF is to give guidance to regulators, without referencing underlying statutes. Asm. Cooley noted that if the NAIC was not seeking to adopt the white paper at its Summer Meeting that would provide the opportunity to discuss the issues with the NAIC and not be forced by the calendar.

Mr. Birnbaum stated that, respectfully, if NCOIL really wants to get at this issue – and it is an issue as when you looks at things like the valuation manual and actuarial guidelines that are adopted by the life actuarial task force that immediately have the force of law. There are some real issues there about the delegation of authority – there is no question about that. But on this particular issue, the concern about usurpation of legislative authority by a technical task force and mis-using the term “rational explanation” is just not there. That term is being used in an attempt to identify a spurious correlation. If someone comes in and says I want to use eye color as a predictor of homeowner’s claims, the regulators will ask what is the basis for that. The company can say the have a correlation but there is no regulator that would ever accept that and they would ask for data for proof that there is a relationship that exists and that there is not a spurious correlation.

Rep. Lehman stated that he believes the issue of timing is important in this instance as the NAIC’s summer meeting is later this month, and asked if other interested parties had any comments.

Erin Collins, VP of State Affairs at NAMIC, stated that in addition to the written comments previously sent to the Committee, she believes that Asm. Cooley is correct in

that the main issue the Resolution addresses is the ability to create new law and policy. The issues described in the white paper are not based in current statute. At the NCOIL meeting in March, and today, it has been asserted that the white paper is a best practices document and not policy, but it is instructing regulators how to regulate and creating new forms of regulation that have not been passed into law so it becomes law in that sense. From NAMIC's perspective, NCOIL is wise to consider the Resolution because changing the law is for legislators and the full legislative process. NAMIC encourages NCOIL to move forward with the Resolution and concurrently agree that discussions should continue with the NAIC on this and other issues.

Dir. Shapo stated that he knows time is running short on this call so there is not enough time to go into a deep dive on the substance of all of these issues. However, the word correlation is used in many actuarial authorities that are cited in the paper he wrote as well as many other legal authorities. It is also important to note that other terms referenced in actuarial authorities are often used interchangeably with correlation such as predictive accuracy and expected outcomes. Those are grounded in correlation and if you went and talked to an actuary, they will tell you that they often use those terms interchangeably and that they would never use the word causation interchangeably with those terms. Dir. Shapo noted that the letter submitted by CEJ did not make an attempt to defend causation and that is the main problem with the white paper – the erosion of the correlation standard and the movement towards a causation standard.

Further, earlier drafts of the white paper addressed insurer practices of grabbing at things that represent true correlation. That is an overstatement of insurer practices as there is a level of professional diligence applied. With regard to the anecdotal examples provided by CEJ noting that the regulator would ask follow-up questions regarding what the data is to support the rating factors, such a scenario is a correlation focused discussion. There is no data on causation. The AAA flatly rejected even a discussion of causation in this context in the past as speculative and stated that no rating factors demonstrate causality.

Mr. Birnbaum stated that he is not sure why Dir. Shapo is harping on the causation issue because nobody, including CEJ, has said that causation should be a requirement. The problem with Dir. Shapo's analysis is that he equates a lack of requirements for causation with all that is required is a simple correlation. That is nowhere to be found in any statutory language, actuarial principle, or the actual practice that insurance regulators have conducted for decades. The problem with the Resolution is that it puts forward a concept that regulators are going to say "what are you talking about?" NCOIL will not help itself with discussions with the NAIC. Rather, NCOIL will undermine its own position. Dir. Shapo stated that he relies on his previous statements in response to Mr. Birnbaum's remarks.

Asm. Cooley stated that as a practical matter, it is the case that part of the timeliness of moving the Resolution today is the NAIC's timing of its meeting. It would be productive to talk to NAIC leadership on the issue of timing and if there is an alteration to timing that would provide an opportunity to make adjustments to the Resolution. Asm. Cooley stated that he would like to move forward today while also reaching out to the NAIC on process and the issues discussed today to see if either their schedule could be changed or the actual language of the white paper. Thus, if adopted, the Resolution would be held pending discussions with the NAIC and if no adjustments were made by the NAIC then the Resolution would be forwarded to the recipients stated in the Resolution.

Rep. Lehman asked Asm. Cooley if he means to pass the Resolution and then hold it pending discussions with the NAIC. If the NAIC moves forward, then the Resolution stands but if they make adjustments or pause then that would provide NCOIL the opportunity to either make adjustments to the Resolution or reverse it. Asm. Cooley replied yes and stated that is a constructive way to proceed. Rep. Lehman agreed and stated that conversations with the NAIC will indeed occur as he feels that at this point in time NCOIL has a very good relationship with NAIC. Rep. Lehman then asked for a Motion to move forward with that course of action. Asm. Cooley made the Motion which was seconded by Sen. Holdman. The Committee then voted to adopt the Resolution by voice vote. Rep. Jordan, Asw. Spiegel, Asm. Cahill, Asm. Andrew Garbarino (NY), and Asw. Pam Hunter (NY) all voted "no."

#### ANY OTHER BUSINESS

Rep. Lehman stated that the last piece of business is a reminder that NCOIL has started its new dues structure. The dues have increased for the first time since 2002 from \$10,000 to \$20,000. The introduction of legislator stipends into the financial model was made to help underwrite the cost of attending and participating in NCOIL meetings. Of the \$10,000 in additional dues paid by Contributing States, \$6,000 will be allocated to the legislator stipend program. This amount is split between each of the three national meetings for two legislators, one per chamber, to be reimbursed up to \$1,000 for the meeting they attend. There is a formal set of stipend guidelines which can be found on the website and by reaching out to NCOIL staff.

Rep. Lehman stated that for those of on this call whose state has paid its dues or has reached out to NCOIL staff to indicate that they will be paid, we sincerely thank you. For those from states that have not paid yet, by this time in the year your state should have received both initial and reminder invoices. As a reminder, if a state does not pay contributing membership dues, the legislators from that state will not be able to serve on the Executive Committee, run for an Officer position, or serve as Chair or Vice Chair of NCOIL policy committees. Additionally, NCOIL has heard from some states that their fiscal personnel were not aware of the increase, despite the letters NCOIL sent in 2018 and 2019. For this year only, NCOIL is working with those states to allow a lesser dues payment and forfeiture of participation in the stipend program.

Rep. Lehman stated that he knows that during this global health emergency in which we find ourselves, state budgets have been adversely impacted. However, during times like these, the value in being an NCOIL Contributing Member State is tremendously strong. Opportunities to be involved in a national forum to help educate legislators from different states with similar goals by having conversations on how to improve the quality of public policy are more important than ever before. Rep. Lehman thanked everyone again and stated that if there are any questions on this please reach out to NCOIL staff and they will be happy to talk to you.

Cmsr. Considine stated that for those legislators on the call not from NH, OH, OK, KY, ME, MI, MO, NC, PA, or VT, those remaining states have not paid their dues. Cmsr. Considine asked legislators from the remaining states to please reach out to the appropriate person in their state to get NCOIL dues processed. Staff is happy to send another invoice or any other information needed.

Rep. Jim Dunnigan (UT) asked if there is an option for states that only want to send one person to NCOIL meetings. Rep. Lehman stated that as of now, the dues structure does not allow for that but that is a conversation that can be had going forward particularly due to the budget constraints many states are facing. Cmsr. Considine stated that due to the tough economic times and some states that have informed staff that they were not aware of the new financial model, the response has been that paying \$10,000 for this year is fine but participation in the stipend program will not be permitted. The budget committee, executive committee, and officers would then need to have a conversation as to whether that practice should be permanent. Rep. Dunnigan requested that conversation be held, particularly for those states that only want to send one person to NCOIL meetings. Utah has severely restricted state agency travel

#### ADJOURNMENT

There being no further business, the Committee adjourned at 1:00 p.m.