

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
NCOIL – NAIC DIALOGUE COMMITTEE
AUSTIN, TEXAS
DECEMBER 11, 2019
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) NCOIL – NAIC Dialogue Committee met at the JW Marriott Hotel in Austin, Texas on Wednesday, December 11, 2019 at 11:00 a.m.

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

Other members of the Committees present were:

Sen. Jason Rapert (AR)	Rep. George Keiser (ND)
Asm. Ken Cooley (CA)	Sen. Jerry Klein (ND)
Rep. Martin Carbaugh (IN)	Sen. Shawn Vedaa (ND)
Rep. Joe Fischer (KY)	Asw. Ellen Spiegel (NV)
Sen. Dan “Blade” Morrish (LA)	Sen. Neil Breslin (NY)
Sen. Paul Utke (MN)	Sen. Roger Picard (RI)
Rep. Tracy Boe (ND)	Rep. Tom Oliverson, M.D. (TX)

Other legislators present were:

Rep. Deborah Ferguson (AR)	Sen. Paul Wieland (MO)
Rep. Doug Gutwein (IN)	Rep. Bruce Grubbs (MT)
Rep. Peggy Mayfield (IN)	Asw. Maggie Carlton (NV)
Rep. Edmond Jordan (LA)	Asm. Kevin Cahill (NY)
Del. Mike Rogers (MD)	Del. Steve Westfall (WV)
Sen. Gary Dhams (MN)	
Rep. Donna Pfautsch (MO)	

Also in attendance were:

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

QUORUM

Upon a motion made by Asw. Ellen Spiegel (NV) and seconded by Sen. Jerry Klein (ND) the Committee waived the quorum requirement without objection by way of a voice vote.

MINUTES

Upon a motion made by Rep. George Keiser (ND) and seconded by Rep. Martin Carbaugh (IN), the Committee approved the minutes of its July 12, 2019 meeting in Newport Beach, CA without objection by way of a voice vote.

UPDATE ON STATE ADOPTION/INTRODUCTION OF AMENDED NAIC CREDIT FOR REINSURANCE MODELS

Rep. Matt Lehman (IN), NCOIL Vice President and Chair of the Committee, stated that at the Committee's last meeting in July, the Committee discussed what the amendments to the NAIC's Credit for Reinsurance Model Law and Regulation (Models) aim to do and what legislators should expect in sessions when bills seeking to implement the amendments are introduced. Rep. Lehman stated that to NCOIL's knowledge, no state legislation has officially been introduced or pre-filed for 2020 sessions, but states are actively working on such legislation. Rep. Lehman asked for an update on the Models and how the NAIC is working with state legislatures to introduce this legislation.

The Honorable Glen Mulready, Commissioner of the Oklahoma Insurance Department, stated that U.S. states must adopt the revisions to the Models prior to October 1, 2022 or face potential federal preemption by the Federal Insurance Office (FIO). Cmsr. Mulready stated that it is very important for NCOIL and NAIC to work together on this to make sure there is no federal preemption. In December of last year, a second Covered Agreement was signed between the U.S. and UK which mirrors the language from the U.S.-EU Covered Agreement.

In June of 2019, the NAIC adopted revisions to its Reinsurance Models which are intended to implement the reinsurance provisions of the Covered Agreements. The revisions eliminate the reinsurance collateral requirements for reinsurers that have their head office or are domiciled in any reciprocal jurisdictions. For reinsurers that are domiciled in those qualified jurisdictions to obtain similar treatment as those jurisdictions subject to the Covered Agreements, they must provide to the states the same treatment and recognition afforded by the EU countries pursuant to the Covered Agreement. Therefore, the revisions to the Models include the requirement that the qualified jurisdiction must agree to recognize the state's approach to group supervision including group capital. The NAIC greatly appreciated NCOIL's support of the amended Models and strongly believes that continued state action on the Models is the best defense against federal preemption. It appears that there are about 15 states, including Oklahoma, that currently plan to introduce the Models during the next legislative session.

The Honorable Dean Cameron, Director of the Idaho Department of Insurance and NAIC Secretary-Treasurer, noted that the Covered Agreements were not something instituted by the NAIC. The NAIC had some concerns with the Covered Agreements but the reality is that they were signed and now states must take action to avoid federal preemption. At the end of the day, protecting consumers is vital and that is inherent in the state-based system of insurance regulation. Consumers would be harmed if there was to be federal preemption in this area. Rep. Lehman agreed and stated that since he began coming to NCOIL meetings several years ago, there always seems to be common ground between NCOIL and NAIC in preserving the state-based system of insurance regulation.

UPDATE ON NAIC ANNUITY SUITABILITY WORKING GROUP

Rep. Lehman asked for an update on the status of the proposed amendments to the NAIC's Suitability in Annuity Transactions Model Regulation (Model) and noted that some NCOIL member legislators have raised concerns about the "rearview mirror" issue where producers are held liable by a standard other than the circumstances that existed

at the time of the recommendation. Dir. Cameron first thanked NCOIL for its input throughout this process and noted that the process is almost complete. The process of amending the Model started with the U.S. Department of Labor (DOL) issuing regulations that were later found to be overreaching and egregious that would have required a fiduciary standard of anybody selling an annuity product. In addition to that being an overreach of authority, that would have had a chilling effect on average citizens being able to access annuity products and being able to plan for their retirement.

The NAIC pushed back on those regulations and the end result was that it was decided it would be best to update the Model. Dir. Cameron stated that he Chaired that NAIC Working Group initially but was not able to push the amendments across the finish line. The term "best interest" was avoided because it was highly politicized and was ill-defined and it would make it difficult for regulators to be able to regulate and determine whether someone acted in another's best interest. Since that time, the Securities and Exchange Commission (SEC) came out with their Regulation Best Interest so the landscape changed. The Insurance Commissioners then felt that they did not want an inferior standard so the amendments to the Model needed to be a best interest standard; but the NAIC needed to do a better job of defining what that meant and providing safe harbor provisions.

Dir. Cameron stated that under the current version of the Model, which will likely be finalized on December 19th and then handed back to the A Committee to be finalized again, there is a standard of care required of every producer. The NAIC believes that most agents already act in the best interest of the consumer as that is how they stay in business. The Model has certain disclosure requirements as well as conflict of interest and documentation provisions. Dir. Cameron noted that many of the provisions are what we would term as best practices, such as the agent documenting the recommendation they made and why they made it and why the consumer chose the recommendation they did. The NAIC has listened to industry and interested parties intently and by and large a lot of the comments submitted found their way into the Model, including the rearview mirror issue. Dir. Cameron stated that there is also an increased obligation by the carrier to monitor what their agents are doing. The ultimate goal is to protect is the consumer.

Rep. Lehman asked Dir. Cameron to touch upon the intended use of the product section; the documentation section; and whether the changes to the Model have risen to the level of a change in public policy that legislative action is required as opposed to regulatory action. Dir. Cameron stated that he believes there will be some need to change statutory language and not just changes in regulations. The agent community is going to want the safe harbor in statute. Dir. Cameron stated that provisions in the Model were included whereby the consumer can check certain boxes stating that they do not wish to disclose certain things or they can state what their plan is for the product which happens more often than one might think, particularly in rural communities. Dir. Cameron also stressed that the Model is not finished yet and any further input on it is welcomed. Dir. Cameron stated that notes are great, but it is in the agent's best interest to use the forms contemplated by the Model. Dir. Cameron stated that he believes the forms may be adopted by rule and not put into code so that is something that legislators may want to work with their Insurance Commissioners on.

Sen. Jason Rapert (AR), NCOIL Immediate President, stated that a couple of years ago NCOIL formally opposed the DOL fiduciary rule by means of adopting a Resolution. At

that time, it was not certain whether NCOIL would be successful in taking that position, but success was in fact reached. Sen. Rapert asked for the NAIC's thoughts on how its process relating to the Suitability Model might be affected by the news that the DOL will release new fiduciary regulations. Dir. Cameron stated that the NAIC has been working very diligently to try and have collaboration between the SEC and DOL. The DOL has made it clear of its plans to release new regulations and Dir. Cameron stated that was an impetus for the NAIC to stay out in front of them. The NAIC believes that consumers are best protected if you have a more homogenous or reasonably homogenous rule so that agents know what the rules are, and they don't have to play by different sets of rules. The NAIC has been told that the DOL is waiting patiently to see what the NAIC's work product will look like.

Dir. Cameron noted that the SEC's rule is labeled "best interest" but that term is not defined. The NAIC is hopeful that how it has defined "best interest" makes the most sense and will lead to more regulatory unity. Sen. Rapert stated that he hopes that NCOIL continues to stay active on this issue going forward and that he has spent his entire professional career serving clients. Sen. Rapert has been fully Series 7 licensed and he sees many giving that license up due to the onerous regulations and they move strictly to the investment advisor role. It is important to consider going forward whether regulations may serve to put such a stranglehold on advisors, and they are held responsible so as to guarantee that every investment will realize a gain – that is not reality. There are not a lot of young people coming into the Series 7 arena for that reason and that may affect the annuity side of the insurance arena as well.

Dir. Cameron stated that he too was Series 7 licensed and understands Sen. Rapert's comments. If the DOL fiduciary rule were to have gone into effect, Idaho would have experienced a traumatic increase in the number of agents leaving the market. Most of those agents would have been independent agents whose bread and butter is not selling annuities or retirement products, but rather selling P&C products and they do not need the hassle if a client comes in with a little bit of money to set aside for retirement or put aside in an annuity. Dir. Cameron stated that unfortunately these issues have become politicized so that is a factor as well.

Rep. George Keiser (ND) stated that at a recent meeting an annuity expert stated that over 80% of the annuities sold in the U.S. are sold to households with incomes less than \$200,000. Rep. Keiser stated that surprised him and asked Dir. Cameron if the NAIC has had discussions as to why that market is suitable to annuities and higher markets are not. Dir. Cameron stated that suitability goes to a broader sense than just income but that is a major component. Those with higher incomes may have a higher tendency to invest in other products rather than annuities so they may also have access to other advisors and choices and may be willing to take more risk where those purchasing annuities are typically risk-averse and wanting to be secure in their investment in wanting something close to guaranteed return. Dir. Cameron stated that he is not sure at what income levels you start to see those differences.

UPDATE ON INTERNATIONAL INSURANCE DEVELOPMENTS

Rep. Lehman asked for an update in international insurance developments, specifically the recent developments surrounding international capital standards (ICS) negotiations with the International Association of Insurance Supervisors (IAIS) and the split among Team USA members regarding the new version of the ICS. Dir. Cameron stated that the

story surrounding this was tremendous and that the state legislators present should be very proud of the Insurance Commissioners involved. There was a significant threat to the state-based system of insurance regulation and a significant threat as to how consumers are protected and how carriers are able to operate in today's marketplace. For years the international community has promoted an ICS standard that was egregious and harmful to carriers. There are many carriers active in both the U.S. and EU markets. The standard was so egregious that it would have forced the elimination of long-term products such as annuities and long-term life insurance products.

Dir. Cameron stated that the standard came from a different philosophical stance as much of Europe has a greater government safety net. U.S. carriers were very concerned as to what the standard would look like and how it would apply and impact the U.S. insurance industry. Dir. Cameron stated that he believes Insurance Commissioners did a great job of collaborating with the Federal Reserve and Treasury and all of Team USA. The issue was finally brought to a vote at a recent international meeting. The NAIC and others fully expected to vote "no" at the meeting as there was a great deal of animosity towards Team USA members. However, at the end of the day the international community gave Team USA members everything it wanted including changes to the ICS method that will make it easier for U.S. carriers and allow the U.S. to use its own standard and have it be equivalent to the international standard.

Dir. Cameron stated that when it came to a final vote, unbeknownst to the NAIC, FIO voted "no." It is still unclear as to why FIO voted "no" and some have suggested that because of all of the political pressure that had been placed on them through Congress they felt like they had no choice. Despite there being not a lot of media attention on this issue, the NAIC has received a lot of accolades for standing up for the state-based system of insurance regulation. Dir. Cameron stated that compliments should also be given to Congress who had signed a letter to support Team USA.

DISCUSSION ON REGULATORY ISSUES SURROUNDING MARIJUANA LEGALIZATION

Rep. Lehman stated that due to its proximity, Indiana employs a lot of Ohio citizens, and Ohio has legalized both medical and recreational marijuana. If someone is under a medical prescription of marijuana in Ohio and is working in Indiana and is injured on the job, no benefits would be provided under workers' compensation in Indiana. As much as this is an issue for legislators, Rep. Lehman asked how the NAIC is dealing with certain cross-border issues relating to marijuana. The Honorable Lori Wing-Heier, Director of the Alaska Division of Insurance, stated that it is a complicated issue because an employer often requires rigorous safety procedures, including drug testing, but the question that becomes an issue is if an employee has used a recreational drug on his or her own time and is injured on the job, should work comp benefits apply? Dir. Wing-Heier stated that she believes the issue will be played out in the courts over the next few years but noted that work comp has traditionally held that if you are impaired on the job, benefits will not apply to the injury.

The question then becomes where that fine line is of when someone is using the drug for recreational purposes on their own time, but the drug does not entirely leave their system when arriving on the job. Alaska has held that the employers still have the right to drug test and the right to enforce the no alcohol and no drugs policy. If someone were to be caught in a random drug test, then they would go through counselling and

disciplinary actions and possibly be terminated for that offense even though marijuana is legal in Alaska. One of the primary concerns in Alaska is the safety of employees and in some cases that means protecting them from their own use of the drug.

From an insurance industry standpoint, Rep. Lehman noted that another interesting factor is that Ohio is a monopolistic state, so the carriers are not really part of the debate. In Indiana, a Resolution was sent to Washington DC that said marijuana needed to be removed from the Schedule I drug list so that states have more regulatory ability within that realm. Rep. Lehman asked if the NAIC is supportive of more regulation being given to the states in this area because if states have the ability to legalize it then they should have the ability to regulate it as a product. Dir. Wing-Heier replied yes and stated that earlier this year there were two bills in DC relating to marijuana safe harbors for banks and insurers. If you have a cannabis industry and it buys insurance, in theory the insurer cannot sell the product because it is an illegal industry so most of the coverage now is in surplus lines. While those are not bad companies to be with, they are outside of guaranty fund protection and expensive for startups. Accordingly, the NAIC is working to see what it can do to have everyone in the chain in the cannabis industry from the person who owns the building that they rent to the medical professionals who sees patients using marijuana, to others you may not necessarily think of including bankers, be within a safe harbor.

Dir. Wing-Heier stated that there is a lot of risk involved in the cannabis industry. Since it is a cash industry, it is amazing the amount of cash that is being held by the industry and they are unable to bank it as others may be able to. Such businesses cannot take credit cards and if you go into one of the businesses you will see that there is an ATM in case the customer does not have cash. Accordingly, a small business owner may be sitting there with \$40,000 in cash and buying their products in cash. That presents a huge risk not just for the cash itself but for the employers behind the counter holding the cash.

Rep. Lehman noted that during NCOIL's DC Educational Fly-in a few months ago, NCOIL was supportive of the Clarifying the Law Around Insurance of Marijuana (CLAIM) Act which provided those dealing with marijuana in the insurance industry the benefit of a safe harbor. Rep. Lehman stated that it sounds like NCOIL and NAIC are on the same page with this issue. Dir. Wing-Heier agreed and noted that this issue is new. There are 33 states that have legalized marijuana for medical use and 11 states that allow for medical and recreational use. Dir. Wing-Heier stated that this issue is only going to become more prevalent and noted that as states begin to get involved with it, it is like nothing the industry has dealt with because of the way it has been perceived as a schedule I drug and the fact that it cannot be transported across state lines and cannot be on trains, planes or ferries.

Sen. Rapert stated that an article was recently published that noted the Secure and Fair Enforcement (SAFE) Banking Act of 2019 is dead. Sen. Rapert noted that he does not buy the public relations campaign that has been waged to try and normalize drug use in the country. It is a disruption to the nation and a sideshow to the states and is waste of time. In the future you will probably see a federal challenge in federal court to the entire process altogether. The clearest example is that no state that has passed a law prohibiting abortion does in fact prohibit abortion and that is because the federal courts have struck down every such state law. However, when it comes to marijuana it seems the federal courts have turned a blind eye.

Sen. Rapert stated that there needs to be some action taken to fix the current system that is disrupting insurance companies, banks, businesses, and employers. Medical marijuana is currently legal in Arkansas and there has been action taken to legalize recreational marijuana which is what the marijuana industry really wants. Sen. Rapert closed by stating that the health of our citizens should be the priority rather than what is convenient. Dir. Wing-Heier stated that the health of our citizens should always be the number one priority and one of the problems that we are running into is that marijuana is being touted as a cure-all for everything from cancer to obesity. There are opinions out there about marijuana, but no true federal studies have been undertaken as would be for any other drug coming into the market.

Rep. Tom Oliverson, M.D. (TX) stated that from a regulatory standpoint in terms of employers protecting the safety of their workers, the medical use of marijuana is much more problematic than recreational use. Marijuana now joins a whole host of other legally prescribable medications that can alter someone's mind and affect their ability to work such as stimulants, narcotics and muscle relaxers. Rep. Oliverson noted that he has seen many patients who have taken narcotics for several years to treat chronic pain and while they may seem totally functional, they would fail a drug test. That is something to be mindful of in the work comp industry. Dir. Wing-Heier stated that she does not disagree with Rep. Oliverson and the question becomes is there a lingering effect to having marijuana in one's system that was the cause of the incident that created the injury; and what do you do with the injured worker? Do you deny them a benefit? A lot of this will be determined in the courts over the next few years. Rep. Oliverson noted that what makes it even more complicated in that situation is that the employee may have been prescribed marijuana from a licensed physician.

Asm. Ken Cooley (CA), NCOIL Treasurer, stated that the whole issue surrounding marijuana legislation is very complicated. California has had medical marijuana since 1996 that was approved by a ballot proposition which promised that the legislature would establish rules for it. Almost 20 years passed without any rules. A key issue that arose in California was trying to keep all of the pieces under one agency and the rationale behind that was so that the legislature could exert more effective oversight as opposed to dealing with health issues in the health committee, the business issues in the business committee, and the tax issues in the taxation committee. If you let this subject matter start moving through your legislature through an array of committees, lawmakers lose effective oversight.

Asm. Cooley stated that it gets so convoluted because of all of the cash involved and people wanting to make money quickly. There can be environmental damage due to people growing the plants where they should not be and taking water out of the system that affects people with downstream water rights, and using pesticides that are running downstream and may be in the product itself that has not been properly tested. From a research standpoint, it is tough to do the research because of the drug being on the Schedule I list. The only official marijuana you could get for a long time was out of the University of Mississippi which is where they grow it and release it for testing. But from a California standpoint, due to individual business needs, what is being grown there is much more potent than anything in Mississippi, so you have product out there that has characteristics never before seen in anything tested on the federal level.

Asm. Cooley recommended that anyone interested in these issues read the research of Igor Grant of the University of California, San Diego. Banking and taxation issues are

also very complicated with marijuana. There is also no effective test for driving under the influence of marijuana as there is for alcohol. Asm. Cooley closed by recommending again that lawmakers try and keep all of these issues within the same committee so that the industry cannot balkanize the overall issue.

Asw. Maggie Carlton (NV) stated that as someone coming from a state that has been heavily involved with marijuana, the one piece of advice she would give is to not let legalization happen through an initiative petition. Don't let constituents and citizens get ahead of legislators. Legalization should happen from a legislative perspective – the industry should not write the petition and then bring it forward for consideration because then lawmakers will lose some of the control they thought they had. A number of unexpected issues have surfaced such as having to clean ATM machines due to the amount of marijuana residue on the cash and having special places for armored cars to park at the state house for cash to be delivered. Asw. Carlton stated that she has seen a big difference in not having marijuana in the black market any longer but there is the other side of the equation to consider as well. The one thing missing is the ability to test the product and that is throwing a wrench into everything. During Nevada's last legislative session, one member addressed the issue of drug use and job applications since marijuana is now legal in Nevada. Asw. Carlton closed by stressing again the importance of the legislature getting ahead of its citizens on this issue in order to maintain control. Cmsr. Mulready agreed with Asw. Carlton and stated that Oklahoma is dealing with the fallout of having medical marijuana legalized through a broad ballot initiative last year.

UPDATE ON NAIC RETIREMENT SECURITY WORKING GROUP

Rep. Lehman stated that the statistics we often hear about how Americans do not have enough saved for retirement are downright frightening. To that end, NCOIL applauds the NAIC for forming this retirement security working group. Rep. Lehman asked for an update with what the working group has done thus far and what its plans are. Cmsr. Mulready stated that the Working Group's members include the District of Columbia (Chair), Iowa, Maryland, Minnesota, New York, Rhode Island, Utah, and Washington. The Working Group has met twice thus far and has heard presentations from AARP, Insured Retirement Institute (IRI) and the National Financial Educators Council. The next conference call is scheduled for December 18, 2019. The working group's charge is to explore ways to promote retirement security consistent with the NAIC's continuing retirement security initiative. The working group shall promote retirement security through a work plan consisting of education, investigating the low saving rates, and research and development.

Cmsr. Mulready stated that in Oklahoma there are field representatives who are in the community every day talking to citizens about insurance and retirement planning. The Working Group's work plan also includes exploring whether women and members of the "sandwich generation" may need extra attention in this area as they often have less money saved for retirement due to being out of the work force caring for children and/or parents. The work plan also includes reviewing education/CE requirements for insurance producers to ensure requisite knowledge of suitability requirements as well as prohibitions such as unfair trade/marketing/advertising practices and determine if additional CE requirements are needed. The working group will also seek to develop an education campaign targeting employers to provide retirement plans and assist employees with saving for retirement.

Cmsr. Mulready stated that another key part of the working group is innovation with a goal of holding an Innovation Forum with industry to identify and address areas where current laws/regulations unnecessarily stifle innovation, and examining the compensation structures of insurance products and services and explore other structures and incentives to ensure better inclusiveness (e.g., to ensure that all levels of net worth have access to expert advice). The working group is also interested in exploring how new technologies and big data/analytics can be used to benefit consumers (affordability and accessibility) and the insurance industry, and researching and identifying initiatives that state and federal governments could take to assist individuals and employers to improve and increase retirement options. The final plan of action is to develop and adopt a final issue document that incorporates an education campaign, education curricula, anti-fraud alerts related to insurance and how insurance impacts and can aid with retirement security. The document should include a plan for continued support and promotion of retirement security.

ANY OTHER BUSINESS

In response to an earlier comment from Cmsr. Mulready, Rep. Lehman noted that in 2017 NCOIL adopted an Out-of-Network Balance Billing Transparency Model Act, sponsored by Sen. Jim Seward (NY), and asked if the NAIC has any plan of action in that area. Dir. Wing-Heier stated that the U.S. Senate and House and recently come to an agreement on a piece of balance billing legislation. If the legislation stays as-is, it does address balance billing protections including air ambulance balance billing by means of an independent dispute resolution (IDR) process. The IDR process is a little concerning because it may be difficult to handle on a state level. Dir. Wing-Heier stated that she believes states will get slammed the first year and then it will recede as providers start to realize how the process works. The federal bill provides for transparency including the elimination of gag clauses and provides that rebates must go back to the plan sponsor in lieu of pharmacy benefit managers (PBMs). There is quite a bit of good in the federal bill. The NAIC is hoping that by the end of the year Congress will be able to pass a bill that deals with transparency and balance billing for consumers. The draft bill takes the consumer out of the process so the IDR will be between the provider and the insurer.

Cmsr. Mulready stated that the NAIC has been heavily involved in this conversation and wrote a letter in support of ensuring that air ambulance balance billing protections was included in any federal balance billing legislation. Cmsr. Mulready stated that Oklahoma has been working very hard on this issue and noted that as he understands it, the federal legislation states that providers will be paid the median contracted rate with arbitration available for claims of \$750 or more and the air ambulance threshold is \$25,000 or more. Cmsr. Mulready also noted that the NAIC expects the federal legislation to contain network adequacy provisions but specific language has not been circulated. Lastly, Cmsr. Mulready stated that he believes that state balance billing legislation would not be preempted as the federal legislation would play a role with ERISA-plans.

ADJOURNMENT

There being no further business, the Committee adjourned at 12:15 p.m.