

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
LIFE INSURANCE & FINANCIAL PLANNING COMMITTEE
NASHVILLE, TENNESSEE
MARCH 16, 2019
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Life Insurance & Financial Planning Committee met at The Sheraton Grand Nashville Downtown Hotel in Nashville, Tennessee on Saturday, March 16, 2019 at 9:00 a.m.

Representative Joseph Fischer of Kentucky, Chair of the Committee, presided.

Other members of the Committees present were:

Rep. Deborah Ferguson (AR)	Sen. Jerry Klein (ND)
Sen. Jason Rapert (AR)	Asw. Pam Hunter (NY)
Asm. Ken Cooley (CA)	Sen. Bob Hackett (OH)
Rep. Matt Lehman (IN)	Rep. Lewis Moore (OK)
Sen. Dan "Blade" Morrish (LA)	Rep. Tom Oliverson, M.D. (TX)
Rep. George Keiser (ND)	

Other legislators present were:

Sen. Mark Johnson (AR)	Rep. Daire Rendon (MI)
Rep. Roy Takumi (HI)	Sen. Paul Wieland (MO)
Rep. Deanna Frazier (KY)	Rep. Tracy Boe (ND)
Rep. Mark Abraham (LA)	Sen. Vickie Sawyer (NC)

Also in attendance were:

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

MINUTES

After a motion was made by Sen. Jerry Klein (ND) and seconded by Rep. George Keiser (ND) to waive the quorum requirement, the Committee unanimously approved the minutes of its December 6, 2018 meeting in Oklahoma City, OK upon a Motion made by Sen. Jason Rapert (AR), NCOIL Immediate Past President, and seconded by Sen. Klein.

UPDATE ON SEC BEST INTEREST STANDARD PROPOSAL/STATE FIDUCIARY LAWS

Bill Mandia, Esq., Partner at Stradley Ronon, stated that in 2018 there were two big issues at the federal level, the first being what was going to happen with the Department of Labor's (DOL) Fiduciary Rule since the Trump Administration's view of the Rule differed from the Obama Administration's view, and the Rule was subject to litigation challenges. The Rule was vacated and nullified in total in May of 2018. The focus then shifted to the second big issue which was the Security and Exchange Commissions' (SEC) Regulation Best Interest (Reg BI) which was proposed in April of 2018. Reg BI

did not adopt a fiduciary standard but rather set forth a best interest standard that would require broker-dealers and registered representatives to act in the “best interest” of a “retail customer” at the time a “recommendation” of a securities transaction or investment strategy involving securities is made to a customer, without placing the financial or other interest of the broker-dealer or associated person ahead of the interest of the customer. However, Reg BI did not clearly define the term “best interest” which is one of the main subjects of debate surrounding the proposal. The SEC also proposed a new requirement for both broker-dealers and investment advisers to provide a brief relationship summary to retail investors, and it published for comment a proposed interpretation of the standard of conduct for investment advisers.

Mr. Mandia stated that the SEC has received thousands upon thousands of comments on the proposal from an array of interested parties. The general consensus of the comments was that folks support what the SEC is trying to do by creating a standard for broker-dealers that is different from the current suitability standard. However, there is a lot of concern about the proposal regarding its vagueness and certain industry groups have stated that the proposal goes too far in terms of where current broker-dealers currently are and where it would take them. Many commenters hoped the final rules would show significant improvements over the proposals. Mr. Mandia noted that there were actually hearings on the proposal this past week in Congress and there was a lot of concern expressed, particularly by consumer advocates, as to whether the proposal is sufficiently clear and defined. Concern was also expressed regarding how a fiduciary standard would be better than a best interest standard. The expectation is that the SEC will issue its final rule at some point in the Summer or Fall of this year.

Mr. Mandia stated that there has been a lot of activity during the past 12 to 18 months at the state level regarding fiduciary regulation and legislation. The most substantial regulation has come from New York. In 2018 the NY Department of Financial Services (NY DFS) issued its final Suitability and Best Interests in Life Insurance and Annuity Transactions regulation. The regulation was a significant broadening of the scope of prior regulations in a number of ways, the first being the number of products that were brought within the regulation’s scope. In addition to annuities, more conventional life insurance products such as term life insurance were included. Unlike the SEC’s proposal, the NY regulation tried to more clearly define what it covers and what the expectations are. The regulation lists criteria that a producer must consider whenever he or she is selling a life insurance or annuity product in an effort to try and be more transparent in terms of what factors should be considered in determining whether or not the recommendation is actually in the best interest of the consumer.

The regulation has a number of other elements to it in terms of disclosure requirements and compliance obligations such as training and record maintenance. The regulation is to take effect on August 1, 2019 for annuity contracts and February 1, 2020 for life insurance policies. New York also has a pending disclosure bill in the state legislature, the Investment Transparency Act, which would require brokers and other non-fiduciary financial advisers to disclose to their clients that they are not fiduciaries and that they may recommend investments that provide for higher fees even if those investments do not have the best combination of fees, risks and expected returns for a client. A prior attempt to pass this legislation in 2018 was unsuccessful so it remains to be seen how the pending bill will proceed.

Mr. Mandia further stated that the Maryland Financial Consumer Protection Act of 2019 is currently pending in the Maryland state legislature. Similar to NY's regulation, the MD bill broadens the scope of who is covered since it would apply to broker-dealers, broker-dealer agents and insurance producers. The bill states that they all would be fiduciaries and would be required "to act in the best interests of the customer without regard to the financial or other interest of the person or firm providing the advice." The bill delegates a lot of responsibility to the Commissioner of Financial Regulation to "adopt regulations to carry out the fiduciary duty required," including regulations that (1) define, require, prohibit, or exclude an act, practice, or course of business of a person subject to the statute; and (2) prevent a person from engaging in acts, practices, and courses of business in violation of the statute. The bill would also heighten the duty that investment advisers owe under Maryland law.

Mr. Mandia noted that a similar bill was introduced in Maryland in 2018 but was unsuccessful. However, that legislation directed the Maryland Financial Consumer Protection Commission to study whether Maryland should adopt a fiduciary standard and posed the question of whether existing standards in MD for investment-advisors needed to be heightened as well. The Commission made the recommendation that you see now in the current bill. The MD legislature is still in session until early April. There were hearings on the bill last week and it remains to be seen whether it will pass.

Mr. Mandia also noted that New Jersey Bureau of Securities announced in October 2018 that it would solicit comments on whether it should issue a regulation requiring broker-dealers and investment advisers to be fiduciaries without providing any proposal. Hearings occurred in November 2018 and the comment period closed in December 2018. There is an expectation that a proposed regulation will be introduced at some point in 2019 but it is hard to say what it will look like although Governor Murphy's statements in and around the release of this said that he wanted to see NJ at the forefront of providing maximum investor protection. Accordingly, it is possible that what is introduced in NJ is very similar to what was proposed in MD and NY. Mr. Mandia also stated that New Jersey also has a pending bill that would create disclosure obligations for non-fiduciary investment advisers similar to the legislation pending in New York.

Mr. Mandia further stated that Nevada passed legislation effective July 1, 2017 providing that a "financial planner" has "a duty of a fiduciary toward a client." The legislation also imposes a fiduciary duty on broker-dealers, sales representatives and investment advisers who for compensation advise other persons concerning the investment of money. However, the legislation does not apply to sales of insurance unless the sale is accompanied by investment advice. Mr. Mandia noted that the implementation of the legislation was dependent on the adoption of regulations and that has taken quite some time. On January 18, 2019 Nevada released draft regulations and the comment period ended on March 1, 2019. It is expected that the final regulation will be issued at some point in 2019.

Mr. Mandia noted that Arizona has also had a recent development as there was legislation introduced last month regarding annuity sales. That legislation is primarily focused on disclosure obligations and places certain requirements on the types of indices that can be used in the illustrations that are given when selling an annuity product. The legislation also contains record retention requirements relating to what is presented to someone when they purchase an annuity in terms of the illustrations and marketing materials and things of that nature.

Mr. Mandia also noted that the National Association of Insurance Commissioners (NAIC) released draft amendments to its Suitability in Annuity Transactions Model Regulation on November 19, 2018. The amendments do not set forth a fiduciary standard but rather requires insurers to act in the consumer's best interest without placing its financial interest ahead of consumers. There are also certain provisions relating to required disclosures and the expectation is that the amendments will be completed at some point in 2019.

Mr. Mandia stated that it is important to watch what will happen litigation-wise with regard to the abovementioned state efforts. A lawsuit by the National Association of Insurance and Financial Advisors for New York State challenging the best interest regulation has been filed which asserts that the regulation conflicts with existing NY statutory law, among other things. Mr. Mandia noted that regulations, while quicker to enact compared to statutory law, are more susceptible to challenges. Additionally, there is a lot of debate as to whether there may be potential federal preemption or other challenges to state legislation. One issue being talked about is whether the SEC's Reg BI could preempt state law which is a very thorny question.

Mr. Mandia also noted some industry reaction to all of the abovementioned legislation and regulation regarding its potential impact on the marketplace for customers. Morgan Stanley's response to the proposed Nevada regulation was that "absent substantial changes to the proposal, Morgan Stanley will be unable to provide brokerage services to the residents of the state of Nevada." The concern is that if there is an approach taken among the SEC, NAIC, and state laws that would promote uniformity, compliance and costs will be more manageable. But if there is a patchwork of legislation and regulation it will raise compliance and costs significantly, which is something that has been reiterated in comments submitted by both industry and consumer advocates to the SEC, NAIC and the states. Mr. Mandia closed by stating that he believes other states are waiting to see what will happen at the SEC and NAIC before considering any fiduciary or best interest proposals.

The Honorable Ray Farmer, South Carolina Insurance Commissioner and NAIC President-Elect, stated that there are certainly a lot of different opinions and very little agreement on these issues. The NAIC's Annuity Suitability Working Group (WG) has been working on the issue for over a year in the form of amending the NAIC's Suitability in Annuity Transactions Model Regulation that has been in effect for 15 years. That work has been handed off to the NAIC's Life Insurance Committee and the Committee recently received last month more comments on the proposed amendments. Cmsr. Farmer stated that the NAIC has sent comments to the SEC and the NAIC is waiting on the SEC's proposal to be published. The NAIC will do its best to harmonize its proposed amendments with the SEC's rule. This is a tough, thorny issue with no clear definition of "best interest." The NAIC has attempted to put the consumer first and will continue to do so.

Rep. Fischer asked Cmsr. Farmer what type of enforcement mechanism the NAIC envisions being set forth in the model – would it be a regulatory fine or an individual cause of action? Cmsr. Farmer stated that every state has administrative rules which enable them to take action against producers and agents and those would not change. Cmsr. Farmer stated that he is not sure whether any other cause of action would exist. Rep. Fischer stated that if NY adopted a standard that would apply to the sale of term

life insurance and somebody asserted that the sale of term life insurance was not in their best interest, how is that enforced? Mr. Mandia stated that the regulation itself has enforcement mechanisms and penalties in it. With respect to private litigation, the NY regulation does not create a private cause of action but from his perspective, consumer advocates will try to argue that it creates a common law duty that needs to be followed. Rep. Fischer asked if the NY regulation excludes a private cause of action. Mr. Mandia replied, no.

Sen. Rapert stated that the Committee has spent a significant amount of time discussing these issues and spoke put against the DOL Fiduciary Rule in the form of a Resolution in opposition to the Rule. Sen. Rapert asked who is really pushing a lot of the new state legislation and regulation in this arena because he is curious if all of the state efforts mentioned today are simply the vacated DOL Rule with new titles. Mr. Mandia stated that from his perspective 2018 was going to be a significant year given the Trump Administration's position on the DOL Rule and the real risk that the Rule would be struck down by the 5th Circuit Court of Appeals. Therefore, states that tend to be more Democratic in nature started to step in since they saw the writing on the wall. Sen. Rapert then asked who specifically is pushing the legislation. Mr. Mandia stated that it varies from state to state but above all it is legislators who are pushing it. Sen. Rapert stated that it is clear that it is not just state legislators who are pushing the legislation and we saw that certain states were getting into the retirement business with these types of laws, led by the AARP. Mr. Mandia noted that there are consumer advocacy groups that are lobbying for this type of legislation.

Sen. Rapert asked Mr. Mandia to clarify that consumer advocates pushing the legislation and not people who are in the business of helping folks save and invest for their retirement. Mr. Mandia stated that in terms of the states where you are seeing aggressive legislation and regulation, there is recognition from the industry that there needs to be some clarity around the standards and that they would prefer uniformity from the SEC and NAIC rather than a patchwork of state laws. There are also other organizations such as certified financial planners who are putting out their own set of ethical standards and guidelines to try and be very clear about what their obligations are.

Sen. Rapert stated that NCOIL's efforts on many issues including the recent PBM Model Law show that NCOIL cares about consumers. As a series 7 licensed financial advisor who has worked for regional brokerage firms and independent broker-dealers, Sen. Rapert stated that the only industry regulated more was the nuclear industry. You get to a point where a lot of advisors are leaving the business and we are having a problem with new advisors coming into the business. The industry is an aging group of people professionally as the average age of financial advisors is well past 50. One of the reasons is that it has gotten to the point where advisors cannot advise much anymore because they are so burdened with regulation and they simply flee the business to.

Sen. Rapert stated that the pushback against the DOL Rule was a pause to say: we're all about doing the best thing for clients but there is a point you reach where you are not going to that business. That is why people testified that if regulations keep going further and further and further, the cost of all of that advice will increase which is why small investors were those who would have been hurt the worst under the Rule. Sen. Rapert stated that he wants to make sure there is a good standard while avoiding setting forth a barrier to entry for people who want to get involved in the business and prevent businesses from helping the same people who were purported to benefit from the Rule.

Sen. Bob Hackett (OH) stated that he is also a licensed financial advisor and noted that in Ohio, even though the DOL Rule was vacated, most of the broker-dealers kept it for qualified IRA's. It is somewhat of a fight between the Merrill Lynch's and all of the big broker-dealers vs. the insurance industry as variable annuities are being targeted. That is not fair as broker-dealers want everything to moved to brokerage accounts and it is not cheaper for the consumer because every transaction in a brokerage account has a transaction fee. Sen. Hackett stated that with every IRA he has to jump through a lot of hoops before he can even write the business. Broker-dealers were jealous of the money the insurance industry was making but over the long-haul, it was still cheaper than broker-dealer's methods. The insurance industry just wants to protect its book of business. Cmsr. Farmer agreed and stated that the NAIC sees the conflict between broker-dealers and the agent community and the goal is to put the customer first.

DISCUSSION/CONSIDERATION OF RESOLUTION IN SUPPORT OF GOOD SAMARITANS' EFFORTS TO PREVENT LOSS OF LIFE DUE TO OPIOID OVERDOSE

Asw. Pam Hunter (NY) stated that the opioid crisis has claimed the lives of hundreds of thousands of Americans. According to the U.S. Dep't of Health and Human Services, on average, 130 Americans die every day from an opioid-related overdose. No matter where you live in this country, your family or a family that you know has experienced the traumatic effects of an opioid overdose. Fortunately, the use of opioid overdose-reversing drugs such as Naloxone – frequently referred to by its brand name Narcan – have been promoted by many as a vital part of the public health response to combat the opioid crisis, including the U.S. Surgeon General.

Further, states have recognized the importance of increasing accessibility of Narcan by issuing "Standing Orders" which permit Narcan to be sold over-the-counter at a pharmacy without an individual prescription to people who meet certain criteria so that they can be in a position to save others, whether it be family members, friends, coworkers, or even strangers. However, instances began to arise where applicants for life insurance were denied coverage for carrying Narcan, even in states with "Standing Orders." Asw. Hunter stated that this issue was brought to her attention which led her to ask Cmsr. Considine to make the appropriate inquiries. At approximately the same time, a Member of Congress reached out to the American Council of Life Insurers (ACLI) and NAIC, asking each organization for information, and if they were aware of this issue. Afterwards, the issue spread quickly across the country.

Asw. Hunter stated that she will let the representatives from the ACLI and NAIC here today speak for themselves, but she is happy to note that each organization has taken steps to research the issue and wholeheartedly agrees that no applicant for life insurance coverage who carries Narcan solely to save others should be denied insurance solely for that reason. Accordingly, this Resolution simply states that while NCOIL understands that applying for and issuing life insurance is a detailed risk-assessment process, of which an applicant's use of prescription drugs is a part, life insurers should review accordingly their current policy application review procedures and guidelines and if necessary make appropriate changes so that no applicants are denied coverage solely for having a prescription for Narcan, and so that life insurers can identify applicants who obtained a supply of Narcan because of their role as medical professionals or first responders or Good Samaritans in a state with a "Standing Order."

Asw. Hunter stated that she believes this is an issue that is important for NCOIL to state what its policy is, and hopes this Committee will support this Resolution.

Karen Melchert, Regional VP of State Relations at ACLI, stated that ACLI supports the Resolution. When the story referenced by Asw. Hunter broke in Massachusetts, ACLI was very quick to respond with a press release setting forth ACLI's position on the issue and it is in-line with the Resolution. Ms. Melchert noted that she distributed to the Committee copies of a bulletin issued by Massachusetts Insurance Commissioner Gary Anderson which provides guidance to insurance companies issuing individual accident and sickness policies, life insurance policies and annuity contracts about certain medications which may be prescribed without any relevance to a potential applicant's health and other medications that are prescribed to prevent certain illnesses or diseases from impacting an individual. Ms. Melchert stated that ACLI supports that bulletin being used by committee members in their respective states as a step towards implementing this Resolution. Ms. Melchert noted that the copy of the bulletin distributed to the Committee contains one suggested change from ACLI which seeks to preserve life insurers' ability to underwrite based on other factors involving prescription drugs.

Lucy Adkins, Director of Pharmacy Practice Initiatives at the Tennessee Pharmacists Association (TPA), and a licensed Tennessee pharmacist, referenced some situations where someone would have Narcan for legitimate reasons. First, Naloxone co-prescribing is increasing in Tennessee which is usually done for patients who have a higher opioid usage than others, but some physicians are co-prescribing it every time they write an opioid prescription, even in instances such as wisdom teeth removal or dealing with the aftermath of childbirth. Additionally, elderly adults who have opioid prescriptions have an increased risk of respiratory depression and as they take opioids their risk of overdose increases. Ms. Adkins encouraged those taking care of elderly adults to have Naloxone on-hand just in case something happens. There have also been a lot of hospital closures, particularly in rural communities, and therefore the access to care is not there as much as it has been in the past. Accordingly, efforts have been made in Tennessee to teach its citizens how to use and administer Naloxone for those who cannot gain access to care.

Ms. Adkins stated that TPA supports the Resolution and believes that everyone, particularly those who know someone or might encounter someone who may experience an opioid overdose, should have Naloxone on hand. Ms. Adkins noted that Naloxone is certainly increasing in popularity, particular among healthcare providers and those who take care of others.

Cmsr. Farmer stated that the NAIC supports the Resolution. Every state and family in this country has been affected by the opioid crisis. South Carolina Governor Henry McMaster recently held an opioid summit during which law enforcement officials throughout the state were recognized as having used Naloxone to save lives. The last thing that should happen is someone being penalized in a life insurance application for having a Naloxone prescription. The NAIC encourages life insurers that look at prescriptions of their insureds or potential insureds to look behind the prescription to get all necessary information.

Rep. Daire Rendon (MI) stated that she supports the Resolution and thanked Asw. Hunter for sponsoring it. Rep. Rendon stated that opioid abuse harms communities and families and the fact that these drugs would be more accessible to family members who

understand the risks would make it a lot easier to deal with some of the harmful effects of opioid overdoses. Rep. Rendon stated that in her community in rural northern Michigan, there have been a lot of situations where law enforcement and EMTs have become lifesavers due to the fact that they show up and simply administer Naloxone.

Sen. Rapert thanked Asw. Hunter for bringing the Resolution and stated that he was surprised to hear that this had been occurring among life insurers and life insurance applicants. Sen. Rapert stated that in Arkansas he passed the Joshua Ashley-Pauley Act in honor of a young man who died 2 blocks from a hospital due to an opioid overdose. The friends he was with did not call 911 or police or take him to the hospital in a timely manner because they were fearful of getting in trouble since they all took opioids. Accordingly, the Act states that you will not be prosecuted if you make a call to authorities to save a life and you have also been using drugs. You might be prosecuted for dealing drugs or other crimes, but not just for using drugs. Sen. Rapert asked the panel if they are seeing other states enact similar laws.

Ms. Adkins stated that in TN there are similar laws in terms of people who reach out to authorities to save a life due to an overdose who are using drugs themselves get a certain number of chances before being prosecuted. Ms. Melchert stated that ACLI does not track legislation on that issue but does track legislation related to the issue that the Resolution addresses. Sen. Rapert asked staff to research that issue.

Rep. Tom Oliverson, M.D. (TX) stated that he supports the Resolution and asked Ms. Adkins if it is her understanding that doctors are routinely prescribing Narcan with all opioid prescriptions, even for tooth removal. Ms. Adkins stated that it is not something that happens on a routine basis and it is more so related to chronic pain patients. TN has guidelines which state that Narcan should be prescribed with chronic pain patients and noted that there has been a lot of changes to TN law recently which has put a lot of TN healthcare providers and physicians on edge because they are not sure what to do in some instances. TN has some of the strictest opioid prescribing laws in the nation that generally limit prescriptions to a 3-day supply in many instances. Ms. Adkins also noted that Narcan is a prescription drug so technically you are supposed to have a prescription filled. However, there are a lot of organizations that distribute Narcan at community events for free so it would never appear on someone's insurance. If you go to a pharmacy to get Narcan, just as you would get an immunization, even though there is a standing order an actual prescription is written.

Rep. Oliverson asked Ms. Adkins if she knew what the wholesale acquisition cost (WAC) was for Narcan in TN. Ms. Adkins stated no but it typically costs about \$150 at a pharmacy. Rep. Oliverson stated that when facing a crisis we typically have a tendency to do "that and then some" and we do not want to be in a situation where something like Narcan is automatically co-prescribed every time an opioid is prescribed because it is probably not necessary and it will massively increase healthcare premiums.

Asw. Hunter thanked everyone for their comments and stated that the conversation might need to expand outside the issues addressed by the Resolution to include where Narcan may need to be distributed. Defibrillators never used to be in schools but now they are and although you would hope that something like Narcan should not have to be in schools, it is a conversation perhaps worth having. Asw. Hunter also noted that in a local community she represents a fire department had a Narcan training session open to everyone. After completing the training, Narcan was distributed and they intentionally

operated in the manner because they were worried about getting a prescription and having trouble with their life insurance. Accordingly, this issue is being discussed across the country in large and small communities.

Upon a Motion made by Rep. Keiser and seconded by Asm. Ken Cooley (CA), NCOIL Treasurer, the Committee voted without opposition to adopt the Resolution by way of a voice vote.

RE-ADOPTION OF MODEL LAWS

Upon a Motion made by Rep. Keiser and seconded by Sen. Klein, the Committee voted without opposition by way of a voice vote to re-adopt the NCOIL Life Settlements Model Act and the NCOIL Model Unclaimed Life Insurance Benefits Act.

ADJOURNMENT

There being no further business, the Committee adjourned at 10:00 a.m.