NATIONAL COUNCIL OF INSURANCE LEGISLATORS
JOINT STATE-FEDERAL RELATIONS AND INTERNATIONAL INSURANCE ISSUES COMMITTEE
CHARLOTTE, NORTH CAROLINA
MARCH 6, 2020
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Joint State-Federal Relations & International Insurance Issues Committee met at the Charlotte Marriott City Center Hotel in Charlotte, North Carolina on Friday, March 6, 2020 at 5:00 p.m.

Senator Bob Hackett of Ohio, Chair of the Committee, presided.

Other members of the Committees present were:

Rep. Deborah Ferguson (AR)
Asm. Ken Cooley (CA)
Sen. Travis Holdman (IN)
Rep. Matt Lehman (IN)
Sen. Jerry Klein (ND)
Asw. Connie Munk (NV)
Asm. Kevin Cahill (NY)
Asm. Andrew Garbarino (NY)
Sen. Roger Picard (RI)
Rep. Tom Oliverson, M.D. (TX)

Other legislators present were:

Rep. Kevin Coleman (MI)
Rep. Brenda Carter (MI)
Sen. Paul Utke (MN)
Rep. Garland Pierce (NC)
Rep. Stephen Ross (NC)
Sen. Shawn Vedaa (ND)
Asw. Pam Hunter (NY)
Sen. Bob Peterson (OH)

Also in attendance were:

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

QUORUM

Upon a motion made by Asm. Kevin Cahill (NY), NCOIL Treasurer, 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. Lehman (IN), NCOIL President, and seconded by Rep. Tom Oliverson, M.D. (TX) the Committee approved the minutes of its December 12, 2019 meeting in Austin, TX without objection by way of a voice vote.

CONSIDERATION OF NCOIL INSURANCE BUSINESS TRANSFER (IBT) MODEL ACT

Asm. Andrew Garbarino (NY), Sponsor of the NCOIL IBT Model Act (Model), thanked everyone who has worked and commented on the Model thus far. The Committee has actually been discussing the issue of insurance business transfers since December of

2018; and has been discussing this Model since March of last year. Asm. Garbarino then discussed the changes that have been made to the Model since the Committee's last meeting in December. In Section 6D., the language has been changed to require the insurance commissioner to promulgate rules, rather than only granting the insurance commissioner the authority to do so. Also, another change to that section is that the language was changed from "The Commissioner shall promulgate rules that are not inconsistent with the provisions of the Insurance Business Transfer Act" to "The Commissioner shall promulgate rules that are consistent with the provisions of the Insurance Business Transfer Act." Asm. Garbarino noted that he wanted to make that change because sometimes when the phrasing "not inconsistent with" is used, some departments view that as having authority to essentially promulgate any regulation provided it doesn't directly conflict with the statute.

Asm. Garbarino noted that he decided to make another change since the issuance of the 30 day materials: include language which states that "It is the intent of this Model that Insurance Business Transfer plans should not be approved in a State unless and until the Commissioner has promulgated rules that are not inconsistent with the Model." Asm. Garbarino noted that such language appears currently as a drafting note but stated that he would prefer that language be converted to bill language. Asm. Garbarino stated that he believes the changes are fairly self-explanatory – he wanted to make clear that regulations need to be promulgated and that insurance business transfers should not be approved until such time. These are complex transactions and making sure the appropriate regulations are promulgated first before an IBT is approved in an important step to ensuring both businesses and consumers are properly protected.

Asm. Garbarino then commented on the issue of guaranty association coverage and noted that several interested parties have weighed in on that issue and have requested that more language be included in the Model. Asm. Garbarino stated that the issue is indeed a very important one, and noted that he thinks the Model adequately addresses it. Section 6.A.4. of the Model states that "The Commissioner shall authorize the submission of the Plan to the court unless he or she finds that the Insurance Business Transfer would have a material adverse impact on the interests of policyholders or claimants that are part of the subject business." As part of the Plan submitted to the insurance commissioner, language was included requiring that there must be a description of how the transferring and assuming insurers will be licensed for guaranty association coverage purposes. Further, guaranty association coverage was specifically included in the topics of regulations to be promulgated so that this issue would be further addressed by the Commissioner. Accordingly, as currently drafted, a Commissioner cannot approve an IBT plan if there is not appropriate guaranty coverage; approving such a plan would have a material adverse impact on the interests of policyholders or claimants.

Asm. Garbarino stated that he understands some interested parties may wish that there was different language, but again noted that he thinks the current language adequately addresses the issue. Furthermore, as is always the case with NCOIL models, states are free to change any provisions as they deem appropriate. Asm. Garbarino stated that he thinks it is important to send this Model to the states now as state interest in IBTs continues to grow. Asm. Garbarino stated that he looks forward to hearing brief comments from the panel, and then asked that a Motion be entertained by the Committee afterwards to adopt the Model with the amendments.

Karen Melchert, Regional VP of State Relations at the American Council of Life Insurers (ACLI), thanked Asm. Garbarino for his willingness to work with ACLI throughout this process. ACLI presented its principles and guidelines on IBTs and corporate division statutes at the NCOIL Summer Meeting in July, in addition to submitting a red-lined version of the Model. ACLI worked with Asm. Garbarino to try and incorporate its principles into the statute. Ms. Melchert noted that ACLI had hoped it could have until July of this year to further work on the Model but understands the sponsor's desire to move forward. When ACLI looked at the Model again in advance of this meeting, it discovered that its principles are not easily translated into statutory language which was previously discussed with Asm. Garbarino. ACLI is working on improving that language. Ms. Melchert noted that in Colorado there is currently a corporate division proposal which ACLI is working on language for that NCOIL may benefit from seeing. ACLI will bring that language to NCOIL going forward. Ms. Melchert stated that as these types of bills are introduced in states and ACLI has finalized its statutory language, ACLI will seek to make changes as it deems necessary.

Paul Martin, VP of State Relations at the Reinsurance Association of America (RAA), stated that RAA often gets questions as to what the genesis is of RAA's concerns with the Model. Mr. Martin pointed the Committee to Section 2 of the Model which states that "[T]hese purposes are accomplished by providing a basis and procedures for the transfer and statutory novation of policies from a transferring insurer to an assuming insurer by way of an Insurance Business Transfer without the affirmative consent of policyholders or reinsureds." Mr. Martin stated that if your homeowners or auto company were to send you a notice that simply says "we are setting up a new insurance company that you have never done business with before; we are transferring your policy to that company and you do not get a say in that transaction", he suspects that some may have some questions about that. RAA understands that there are some situations where there is a public policy benefit to having this sort of analysis and the overall concerns are ensuring that there are adequate protections for all parties involved, particularly reinsurers. Mr. Martin stated that RAA has some minor suggestions to include in the Model such as simply adding "and reinsurers" to existing provisions where it says "policyholders and claimants." RAA is working with ACLI on the aforementioned Colorado bill, sponsored by Sen. Angela Williams, to make sure the guardrails are in place so that when there is a division or an IBT, everyone is made aware and all the parties are put on notice and there is a fair and transparent process by which these transactions take place.

Bob Ridgeway, Senior Gov't Relations Counsel at America's Health Insurance Plans (AHIP), stated that the big picture is that a contract is being changed without the policyholder's permission. That is the bottom line and it is rare. From AHIP's position, we cannot be too careful. Mr. Ridgeway thanked Asm. Garbarino for the changes to the Model referenced earlier, particularly the regulatory language. Mr. Ridgeway noted that another important issue to be addressed is that of guaranty association coverage. AHIP is looking at that issue of you cannot have the language too tight because the consumer's interests are in play. Instead of saying, in Section 6A.4., "The Commissioner shall authorize the submission of the Plan to the court unless he or she finds…" AHIP proposes saying "The Commissioner shall not authorize the submission of the Plan unless he or she finds that the existing guaranty fund coverage of policyholders will not be jeopardized or adversely impacted by the transaction, and policyholder's eligibility and coverage will be the same after the transaction as before."

Mr. Ridgeway stated that the point there is that if you are reading subsection 4 as currently written, you are probably wondering what is a circumstance where the Commissioner might find that there wasn't an adverse impact when potentially there was. Mr. Ridgeway stated that he has a lot of faith in regulators and legislators but sometimes they might not read something as carefully as they should or sometimes they might just miss something. Mr. Ridgeway stated that a scenario might arise with a transaction where the Commissioner might determine that there might be some issues with guaranty coverage, but after analyzing each insurer, he or she thinks that they will be ok for purposes of guaranty association coverage and the only insurance where such coverage will be needed is very remote so the transaction will be approved. The current language would allow that transaction to be approved but AHIP's proposed language would accommodate that risk, however small it may be. The point raised may be small, but is a point nonetheless, particularly when viewed from the views of the policyholder who gets a notice in the mail saying they are now insured by a company they never heard of and they did not get a chance to say no or opt out.

Asm. Cahill then made a Motion to adopt the Model, as amended, which was seconded by Asm. Ken Cooley (CA), NCOIL Vice President.

Sen. Klein stated that he understands that Asm. Garbarino has worked very hard on the Model, and that states can always adjust a Model as they deem necessary, but noted that he is a little uncomfortable with finalizing the Model today as currently drafted. The current draft is a tremendous outline but he believes that some tweaks can be made in order to address concerns that have been raised.

Returning to the Motion made by Asm. Cahill and seconded by Asm. Cooley, the Committee voted to adopt the Model, as amended by way of a voice vote with Sen. Klein being the only Committee member who voted "no."

CONSIDERATION OF PROPOSED AMENDMENTS TO NCOIL MARKET CONDUCT SURVEILLANCE MODEL ACT

Sen. Travis Holdman (IN), NCOIL Immediate Past President and sponsor of the proposed amendments to the NCOIL Market Conduct Surveillance Model Act (Model), thanked everyone who was worked on the Model and noted that the Committee has been discussing the proposed amendments since last March. The Committee has worked hard to get the proposed amendments to a place where Sen. Holdman believes they are ready for consideration. Comparing the current version to what was originally proposed shows the level of diligence displayed throughout this process. Sen. Holdman stated that he thinks everyone here today appreciates the value of market conduct exams and understands that they provide both regulators and consumers the protection and confidence they need in the companies to move forward. However, the impetus for proposing amendments to the existing Model was that there were concerns regarding the vagueness of the triggers for market conduct exams, as well as the timing, frequency and costs of them. Accordingly, the overall theme of the amendments is to clarify that market conduct exams should not be conducted unless there is a demonstration of material violations of state laws or regulations as opposed to mere technical violations or vague terms such as "market conduct problems."

Sen. Holdman then discussed the changes that have been made to the Model since the Committee's last meeting in December. In the first bullet point of Section 2, language was added to clarify that actual violations of laws or regulations should serve as the basis for a market conduct exam. In the last bullet point of Section 2, language was added to clarify that a market conduct examination of the insurer's cybersecurity protection measures can be conducted if a separate cybersecurity market conduct examination is precipitated by a cybersecurity breach. Sen. Holdman stated that he knows that there has been some pushback on this language as regulators don't want their ability to examine these issues curtailed, but noted that he thinks the new language appropriately addresses those concerns. For example, a number of regulators stated that they would need to preserve their authority to examine Anthem in light of its breach; this new language expressly preserves that authority. It's also important to note that the language is seeking to ensure that by virtue of examining cybersecurity among multiple facets across the regulatory structure, a cybersecurity risk is not created in and of itself in the companies as all of that information goes back and forth through different portals.

In Section 5(a)(2), the language there was clarified to again reiterate that material deviations from state laws or regulations should be considered by regulators. In Section 5(e)(1), the word "material" was removed because a pattern of unfair trade practice act violations is by definition material. Section 7(l)(2)(H) was amended to clarify that review of prior market conduct examinations should be limited, not prohibited, to the extent such review will expedite the subsequent examination. Sen. Holdman stated that he also made one change after release of the 30 day materials – in Section 5(e)(5), everything after the first sentence has been deleted. The phrase "de minimus" and accompanying language was vague and in his mind gave too much leeway for those that violate the code multiple times. Sen. Holdman stated that he looks forward to hearing comments from the panel today and then asked that a Motion be entertained afterwards to adopt the proposed amendments discussed today.

Erin Collins, VP of State Affairs at the National Association of Mutual Insurance Companies (NAMIC), stated that NAMIC greatly appreciates the sponsor's work on the Model, both initially and with the latest version which NAMIC believes is responsive to the concerns it has heard in the past. NAMIC believes that the changes to the Model represent a balanced way to try to ensure that there are appropriate communications amongst all parties in the market conduct process and that the process has appropriate definitions as well.

The Honorable Chlora Lindley-Myers, Director of the Missouri Department of Insurance and Secretary-Treasurer of the National Association of Insurance Commissioners (NAIC), thanked the Committee for being able to provide regulatory feedback on the proposed amendments to the Model. Regulators first and foremost believe that there needs to be an appropriate balance between creating an efficient market regulation process for both regulators and companies while also maintaining effective consumer protections. Dir. Lindley-Myers stated that NAIC staff recently had a call with NCOIL staff and shared some initial thoughts about the proposed amendments. The NAIC is glad to see that several of the NAIC's suggestions made it into the draft Model as the NAIC believes they make the intent of the Model clearer and believe that they will prevent unnecessary restrictions being placed on insurance departments.

Dir. Lindley-Myers stated that she would like to offer some perspective on a few of the remaining amendments to the Model. With regard to the fourth bullet point in Section 2, while the NAIC agrees that the market conduct exams normally should focus on past breaches, the NAIC has some concerns that the language explicitly limiting actions that a Commissioner can take without a breach might curtail some of the instances where Commissioners find it necessary to act. The NAIC is not convinced as we sit here today that it fully comprehends all of the potential data breaches and cybersecurity scenarios that exist that could impact the complicated, intertwined industry. Next, with regard to the second bullet point of Section 2, Section 3(g), Section 5(a)(2), and Section 5(e)(4), the NAIC believes that references to "material" violations of state law might lead to procedural issues and inhibit the resolution of underlying substantive issues which could be detrimental to consumers and potentially increase the regulatory cost to companies. The NAIC believes that striking references to "material" and referencing violations of state law is sufficient.

Next, while insurance departments must remain efficient in how they perform their work through proper budgeting, it is inappropriate to limit upward deviations from estimated budgets to 10% and only with substantial documentation as an arbitrary cap. Ten percent is likely to have an unintended consequence of inflated examination budgets rather than lowering them. Therefore, the NAIC believes that there should be some clarifying language in Section 7(e)(1) regarding budget and costs. The NAIC is concerned that limiting that capacity could inhibit what regulators are able to do. The NAIC looks forward to learning more about the underlying issues to be solved by the suggested revisions and would caution against any inadvertent restrictions of regulatory authority. Dir. Lindley-Myers thanked the Committee for the opportunity to comment.

Sen. Holdman stated that significant changes to the Model have been made when comparing the first version to the current version at the request of the NAIC and NCOIL has been very accommodating. Sen. Holdman stated that he has had problems in the past with market conduct issues and what precipitates them and the cost of them towards the companies. There is no doubt that the cost gets passed on to the consumer. Sen. Holdman stated that he has some firsthand knowledge of some issues that have gone on with market conduct issues and noted that policymakers have an obligation to keep a tight reign on that issue. Sen. Holdman then made a Motion to adopt the proposed amendments to the Model discussed today which was seconded by Sen. Klein.

The Hon. Tom Considine, NCOIL CEO, stated that one of the first things he did as Commissioner of the NJ Dep't of Banking and Insurance was to put a cap on market conduct exams and regular exams. The estimate was the limit and unless the examiners could come forward with finding new things, that is it. During Cmsr. Considine's tenure there, no one went overbudget. There were a couple of times when new things were found and the appropriate steps were taken which Cmsr. Considine stated he believes is envisioned in Sen. Holdman's proposed amendments. Cmsr. Considine stated that there are a lot of instances where people say the exam was supposed to cost $40,000 but it will now cost $400,000.

Returning to Sen. Holdman's motion, the Committee then voted to adopt the proposed amendments discussed today without objection by way of a voice vote.

BRIEFING ON NCOIL COMMENT LETTER ON THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S (HUD) DISPARATE IMPACT RULE

Cmsr. Considine first gave instructions on how to access the comment letter on the NCOIL website and then noted that there has been a back and forth on this issue for a number of years with HUD and its disparate impact rule (rule). Cmsr. Considine stated that NCOIL was planning on submitting a letter to HUD about the rule but then conversations with The Hon. Nat Shapo, Partner at Katten Muchin Rosenmann LLP and former Director of the Illinois Department of Insurance, changed the substance of the letter. The letter is not an instance of asserting intrusion into the state-based system of insurance regulation. Rather, this is an instance where Congress has already taken substantive action to regulate in the area of discrimination – the Robinson-Patman Anti-Discrimination Act.

Dir. Shapo stated that he was not aware of Robinson-Patman until he was preparing his presentation on McCarran-Ferguson for the 2018 NCOIL Annual Meeting. HUD has put out the rule implementing the Fair Housing Act (FHA) which called for disparate impact liability on whatever entities are scrutinized under the FHA. Such claims have been brought in litigation for years and the rule would be a more formal way of stating that there is disparate impact liability. The U.S. Supreme Court in Inclusive Communities in 2015 stated that the FHA does recognize disparate impact liability. The FHA, unlike state unfair discrimination insurance laws, has language specifically evincing congressional intent that disparate impact be recognized. Disparate impact is what you would call effect rather than intent. The state unfair discrimination laws do not have language and have not been interpreted to have disparate impact cognizable. A claim of disparate impact is when you say this has an impact on a protected class. The states laws say that you cannot discriminate based on a class – that would be intent liability. Examples include, race, national origin, and religion. Under the state laws, if it is not direct, intentional discrimination then it is not cognizable.

Dir. Shapo stated that the FHA has language which the Supreme Court has decided leads to disparate impact being cognizable. HUD's rule would apply to insurers because HUD has taken the position that homeowner's insurance will be subject to disparate impact liability. So what you have here is state laws governing insurer discrimination practices that are only based on intent versus HUD saying that FHA would recognize disparate impact liability for homeowner's insurance. The question is how do you do a preemption/conflict of laws analysis for that? Traditionally, you would use a reverse preemption standard under the McCarran-Ferguson Act. Said Act stated that states shall be preeminent in policymaking in insurance regulation, but it also reserves the ability for Congress to pass a law, like Obamacare or flood insurance, that would apply to insurance. The Act then sets up an unusual reverse preemption standard under which a state law specific to insurance can trump a federal law not specific to insurance. That standard is evaluated under the "impair, supersede, invalidate" provision which has been heavily litigated throughout the years. That is the usual way people consider what the preemption standard is.

However, in this instance, there is a more potent preemption standard that can be used. The theory is that the usual way that preemption comes up is when you have a federal law that is not specific to insurance and a state law that is specific to insurance. Then you do the reverse preemption analysis. However, this instance presents an unusual circumstance because the state unfair discrimination laws did not arise in the normal course of action which is you decide individually, on your own, pursuant to McCarran-Ferguson's structural rule that state regulation is favored, each state would decide on its own what it wants to do in a particular area. The state unfair discrimination laws did not come from independent choices from the states, rather, they came from what is often called the anti-trust exemption in McCarran-Ferguson which is best known for a partial anti-trust exemption from The Sherman Act. Basically, what happened was that with McCarran-Ferguson in 1945 Congress said it was going to suspend the anti-trust laws for three years and states need to occupy the field and if they do then The Sherman Act will not apply to insurance.

That produced the excessive and inadequate standard. The third prong, unfairly discriminatory, came about from Congress' direction in McCarran-Ferguson saying that the Robinson-Patman Act will apply to insurance unless the states occupy the field. States were given three years to pass laws to essentially mimic the Robinson-Patman Act which, among other things, requires cost-based pricing in the selling of commodities. The legislative history is very clear that the purpose in McCarran and the purpose of the states when they decided to pass the model rating laws was that the unfairly discriminatory prong of the state rating laws was passed at Congress' direction for the states to occupy the field and to mimic the Robinson-Patman Act. As a result, the NAIC President said in 1948 that the rationale of the Robinson-Patman Act, the NAIC model bills, and rating laws is generally the same – namely that we are varying prices on the same articles that are quoted to different buyers, the sellers should be able to establish the different variations in price are fair and reasonable: cost-based pricing. The purpose of the state unfair discrimination laws was to follow a federal mandate favoring cost-based pricing in unfair discrimination laws in the states.

Dir. Shapo stated that the state legislators dutifully implemented the federal policy by passing state unfair discrimination laws. The key point is that cost-based pricing is an economic discrimination standard, not a social discrimination standard. It does not include an element of protected, social classes. The point is that federal policy under the McCarran-Ferguson Act specific to insurer discrimination practices was the incentives placed on the states to pass an economic based discrimination standard. The Robinson-Patman Act does not recognize disparate impact. The conflict of laws analysis is such that you have a federal policy of cost-based pricing specific to insurance, the McCarran-Ferguson Act which incorporates by reference the Robinson Patman Act, and you are comparing that to a federal law, the FHA, which recognizes disparate impact liability for social classes. But the FHA is not specific to insurance and the McCarran-Ferguson Act is. Statutory construction states that specific trumps the general. So, with respect to insurance, the theory is that the insurer discrimination standard is cost-based pricing and that is a specific Congressional directive for insurance that trumps the more general social disparate impact liability in the FHA. Dir. Shapo stated that this theory has not been used yet so NCOIL is ahead of the curve.

ADJOURNMENT

There being no further business, the Committee adjourned at 6:00 p.m.