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Date: September 18, 2007

To: Property and Casualty Insurance (C) Committee

From: Statistical Information (C) Task Force

Re: Confidentiality provisions in the NAIC *Medical Malpractice Closed Claim Reporting Model Law*

Following approval by the Property and Casualty Insurance (C) Committee in May 2007 and the Executive Committee in June 2007, the Statistical Information (C) Task Force continues to work on the development of an NAIC *Medical Malpractice Closed Claim Reporting Model Law*. The Task Force continues to believe that such a model law is necessary and appropriate. During the model law development process, however, the Task Force has encountered one issue on which it would appreciate the guidance of its parent committee: whether the model law should include a provision that ensures that individual closed claim data will be kept confidential by the state insurance department that collects the data required by the model law. Once this issue is resolved, the Task Force believes that it can move fairly quickly to complete the drafting of the model law and submit it to the Committee for approval.

Current state laws on medical malpractice closed claim reporting take a variety of approaches. Several state statutes are silent as to the confidentiality of the individual closed claim data, which presumably makes these data subject to the state's Public Records Act. Under Virginia's law, individual closed claim reports are a matter of public record, except for the date and amount of the initial reserve. In Florida the name and address of the injured person are confidential. Connecticut's statute specifically grants public access to redacted data. (The current draft of the model law, however, does not require the reporting of any data elements that would be kept confidential under current Virginia, Florida, or Connecticut law.) On the other hand, the laws of Ohio, Oklahoma, and Washington provide for the confidentiality of the individual closed claim data. Only the data summaries compiled by the insurance department and included in an annual report are made public.

In comments made to the Task Force over the last several months, the insurance industry and the medical community have strongly supported a confidentiality provision that would be strong enough to prevent disclosure of data at any level that would allow someone to deduce information on any particular claim, insuring entity, provider, or facility. In contrast, representatives of the academic community and consumer organizations have strongly encouraged the Task Force to develop a model law that gives researchers access to individual claim data.

The insurance industry and the medical community argue that, even though the current draft of the model law does not require the reporting of names or license numbers of providers, facilities, or claimants, persons with access to individual claim data could deduce identifying information related to specific providers, facilities, and claims. This may cause undue harm to particular providers and facilities. The industry believes that the best use of the closed claim databases lies within state insurance departments, and that state insurance departments are capable of providing useful aggregate information to policymakers, to the public, and to the research community.

The academic community and consumer representatives believe that studies of closed claim data have significant potential to improve important public policies. They believe, however, that unless academic researchers receive access to states' closed claim databases, the public debate will be skewed. Reports prepared by state insurance departments and other government entities redress this imbalance somewhat, but these reports may be limited in scope or may reflect government officials' political leanings. Academic researchers have published many studies of the closed claim data collected by Florida and Texas, with no demonstrated harm to anyone. They contend that secrecy of individual closed claim data is antithetical to patient safety, and that the risk of misuse of the data does not justify data confidentiality.

As the Property and Casualty Insurance (C) Committee considers this request for guidance, the Task Force suggests that the Committee consider the following thought-provoking questions:

- Would a model law be worthless unless it provides for public access to individual closed claim data?
- If individual closed claim data were accessible to the public, what is the risk of harm to individual providers and facilities? How likely is it that their privacy would be compromised?
- Do state insurance departments have, or can they obtain, the necessary resources and professional staff to produce reports that accurately summarize medical malpractice closed claim data and include valuable, unbiased, statistical analyses of the data?
- Given the strong opposition of the insurance industry and the medical community to public access to individual claim data, how would the lack of a confidentiality provision affect the model law's likelihood of passing in a state?
- What kind of confidentiality provision, if any, would result in the strongest possible support for the model law by the Executive Committee and the NAIC membership as whole?

If you would like to read the more extensive comments of particular people or organizations, they are posted on the Statistical Information Task Force page of the NAIC Web site.

In order to meet the timelines established by the NAIC model law procedures, the Task Force hopes to receive the requested guidance before the 2007 Winter National Meeting. The Task Force thanks you for your thoughtful input.