



Lisa Tate

Vice President, Litigation & Associate General Counsel

January 23, 2009

Keri A. Kish
Antifraud Counsel
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108

Subject: Comments on Draft Model Antifraud Plan Guideline

Dear Ms. Kish:

On behalf of our member companies, the American Council of Life Insurers submits comments on a draft Model Antifraud Plan Guideline. ACLI represents 353 member companies operating in the United States that nationally account for 93 percent of total assets, 94 percent of the life insurance premiums, and 94 percent of annuity considerations. ACLI strongly supports effective and cost-efficient efforts to prevent and detect insurance fraud, and we welcome the opportunity to provide input on the draft Guideline.

We have provided detailed comments on the attached copy of the draft as well as formatting suggestions to facilitate incorporation of certain of our proposed revisions. We highlight briefly below some of the primary concerns addressed in the attachment:

- As the draft currently appears to be more of a regulation than guidance and beyond the 2009 charge of the Antifraud Liaison Working Group, it is inappropriate for further deliberation to continue as a “guideline” and ongoing consideration by NAIC should be consistent with NAIC’s Procedures for Model Law Development; that is, as an amendment to the Insurance Fraud Prevention Model Act or as a model regulation thereto.
- The draft contemplates two annual fraud-related filings: an antifraud plan and an annual fraud report, the latter with information to be submitted that exceeds much of what is currently required to be reported to states. In order to reduce reporting costs without impairing antifraud efforts, we propose that there be a one-time filing of any antifraud plan (the existence of which is currently discretionary under the Act) and that subsequent material changes to the plan (implemented or anticipated) be reported in the annual fraud report. Further, it would be helpful if the annual filing date for the report were April 1st of each year to allow for blue book data collection.
- We strongly urge the inclusion of an immunity provision for insurers complying with the guideline. One of the most probable and foreseeable responses to an insurer’s suspected fraud filing is a defamation claim made by the target of the filing. An immunity provision lays the groundwork for a frank and constructive antifraud partnership between the industry, regulators, and law

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enforcement and provides a legitimate defense to such claims against an insurer who has complied with a state's regulation and filed a mandatory report.

- We recommend that the draft clarify that special investigations unit can be within the same holding company or at a third party servicer/administrator. Not every insurer can or should be required to maintain an in-house special investigations unit, and holding companies that have multiple insurers would, under the language proposed, be required to maintain one special investigations unit for each insurer, a process that is neither efficient or effective.

As a general matter, some of our member life insurance companies have observed that annual fraud reports may impose significant resource and logistical demands for life insurers. For example, required filings in all jurisdictions irrespective of fraud statistics and investigations would increase burdens on life insurers and insurance departments alike. Uniformity of report content, format, and procedures among the states are valuable goals that can reduce inefficiencies and redundancies. Additionally, some of our members have emphasized that the information furnished in the report should be given confidential treatment. It is important, therefore, to consider these worthwhile issues as the draft evolves through the approval process. We will endeavor to provide constructive suggestions to address the resource burdens and confidentiality matters.

Again, ACLI appreciates the opportunity to submit comments on the draft Model Antifraud Guideline. Please let me know if you have any questions or need additional information.

Sincerely,

A handwritten signature in black ink that reads "Lisa Tate". The signature is written in a cursive, slightly slanted style.

Attachment

MODEL ANTIFRAUD PLAN GUIDELINE

Comment [T1]: Title does not reflect new and significant mandatory provisions regarding Special Investigative Units, warnings, Antifraud Plans, and reporting.

Table of Contents

- Section 1. Application
- Section 2. Definitions
- Section 3. Fraud Warning Notice
- Section 4. Role of Special Investigations Units (SIU)
- Section 5. Antifraud Plan
- Section 6. Reporting
- Section 7. Immunity from Liability
- Section 8. Severability

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Deleted: Special Investigations Unit (SIU) Requirement

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Section 1. Application

These Guidelines relate to the detection and prevention of insurance fraud through insurers' implementation of fraud warning notices, SIUs, Antifraud Plans, and reporting requirements. The Guidelines adopt a risk-based approach and emphasize the development of strategies to manage and mitigate the risks of fraud in a manner prioritized by the relative severity of the risks and the resources available to address the risks. There is no single model of prevention and detection or of current and evolving risks. In this respect, the Guidelines are neither mandatory nor prescriptive. However, the Guidelines set forth certain policies and procedures, certain of which are addressed in the Model Insurance Fraud Prevention Act, that States and insurance companies may consider as being effective in combating acts of insurance fraud and in allowing states and insurance companies to focus on those areas that potentially pose the greatest risk of fraud.

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Section 2. Definitions

- A. "Business of insurance" means the writing of insurance or the reinsuring of risks by an insurer, including acts necessary or incidental to writing insurance or reinsuring risks and the activities of persons who act as or are officers, directors, agents or employees of insurers, or who are other persons authorized to act on their behalf.
- B. "Commissioner" means the commissioner of insurance, the commissioner's designees or the department of insurance.

Deleted: *[the following definitions are contained in the NAIC Insurance Fraud Prevention Model Act]*

Drafting Note: Use the title of the chief insurance regulatory official wherever the term "commissioner" appears.

- C. “Fraudulent insurance act” means an act or omission committed by a person who, knowingly and with intent to defraud, commits, or conceals any material information concerning, one or more of the following:
- (1) Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by an insurer, a reinsurer, broker or its agent, false information as part of, in support of or concerning a fact material to one or more of the following:
 - (a) An application for the issuance or renewal of an insurance policy or reinsurance contract;
 - (b) The rating of an insurance policy or reinsurance contract;
 - (c) A claim for payment or benefit pursuant to an insurance policy or reinsurance contract;
 - (d) Premiums paid on an insurance policy or reinsurance contract;
 - (e) Payments made in accordance with the terms of an insurance policy or reinsurance contract;
 - (f) A document filed with the commissioner or the chief insurance regulatory official of another jurisdiction;
 - (g) The financial condition of an insurer or reinsurer;
 - (h) The formation, acquisition, merger, reconsolidation, dissolution or withdrawal from one or more lines of insurance or reinsurance in all or part of this state by an insurer or reinsurer;
 - (i) The issuance of written evidence of insurance; or
 - (j) The reinstatement of an insurance policy;
 - (2) Solicitation or acceptance of new or renewal insurance risks on behalf of an insurer reinsurer or other person engaged in the business of insurance by a person who knows or should know that the insurer or other person responsible for the risk is insolvent at the time of the transaction;
 - (3) Removal, concealment, alteration or destruction of the assets or records of an insurer, reinsurer or other person engaged in the business of insurance;

- (4) Willful embezzlement, abstracting, purloining or conversion of monies, funds, premiums, credits or other property of an insurer, reinsurer or person engaged in the business of insurance;
- (5) Transaction of the business of insurance in violation of laws requiring a license, certificate of authority or other legal authority for the transaction of the business of insurance; or
- (6) Attempt to commit, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.

D. "Insurance" means a contract or arrangement in which one undertakes to:

- (1) Pay or indemnify another as to loss from certain contingencies called "risks," including through reinsurance;
- (2) Pay or grant a specified amount or determinable benefit to another in connection with ascertainable risk contingencies;
- (3) Pay an annuity to another; or
- (4) Act as surety.

E. "Insurer" means a person entering into arrangements or contracts of insurance or reinsurance and who agrees to perform any of the acts set forth in Subsection D of this section. A person is an insurer regardless of whether the person is acting in violation of laws requiring a certificate of authority or regardless of whether the person denies being an insurer.

Drafting Note: A state may include other persons, such as fraternal benefit societies, medical and hospital service corporations, health maintenance organizations, certain types of self insurers, "county mutuals" or other types of insurance entities in the definition of insurer. In some cases, it may be necessary to amend other laws to bring these entities within the Act since the portions of state law applicable to these entities may provide that no other portion of the insurance code applies to these entities without a specific reference to the other provision.

F. "NAIC" means the National Association of Insurance Commissioners.

G. "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, or any similar entity or any combination of the foregoing.

H. "Policy" means an individual or group policy, group certificate, contract or arrangement of insurance or reinsurance affecting the rights of a resident of this state or bearing a reasonable relation to this state, regardless of whether delivered or issued for delivery in this state.

- I. “Reinsurance” means a contract, binder of coverage (including placement slip) or arrangement under which an insurer procures insurance for itself in another insurer as to all or part of an insurance risk of the originating insurer.

Section 3. Fraud Warning Notice

- A. Claim forms and applications for insurance, regardless of the form of transmission, may contain the following statement or a substantially similar statement:

“Any person who knowingly presents a false or fraudulent claim for payment of a loss or benefit or knowingly presents false information in an application for insurance is guilty of a crime and may be subject to fines and confinement in prison.”

- B. The lack of a statement as required in Subsection A of this section does not constitute a defense in any prosecution for a fraudulent insurance act.

- C. Policies issued by unauthorized insurers [use the term “unlicensed” or “nonadmitted” insurers in accordance with the terminology used in the state insurance code] should contain a statement disclosing the status of the insurer to do business in the state where the policy is delivered or issued for delivery or the state where coverage is in force. The requirement of this subsection may be satisfied by a disclosure specifically required by [insert reference to insurance code provisions. Excess and surplus lines statutes and risk retention and purchasing group statutes are likely to be cited here in nearly every state].

- D. The requirements of this section shall not apply to reinsurance claims forms or reinsurance applications.

Section 4. Special Investigations Unit (SIU) Requirement

Every insurer admitted to do business in this state should maintain a unit or division to investigate possible fraudulent insurance acts. Insurers may comply with this provision by contracting the function with a third-party servicer or administrator. Holding companies with multiple insurance companies maintain a unit/division or third-party servicer/administrator to perform this function on behalf of the insurance companies; each of the holding company’s insurers are not required to have their own SIU.

Comment [T2]: Limitation of SIU role to claims appears to conflict with broad definition of fraudulent insurance acts in Section 2.

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Section 5. Antifraud Plan Requirement

Within _____ days of the effective date of this act, every insurer shall submit to the [Commissioner] [Antifraud Division] a written report detailing the insurer's Antifraud Plan, which shall include at a minimum: 1) antifraud training provided by the insurer to its employees engaged in claims and underwriting functions; 2) internal and external fraud prevention and detection policies and procedures; 3) policies and procedures for reporting fraud to the Commissioner and/or law enforcement for purposes of investigation and possible prosecution; and 4) summary of the qualifications of the insurer's fraud investigators and the training policies for such investigators.

Comment [T3]: This is a new requirement and conflicts with the Model Act which states that an insurer may adopt an antifraud plan. This provision would make a plan mandatory.

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Comment [T4]: Clarification is needed as to the definition of "external" fraud prevention policies and procedures.

Comment [T5]: Once plan has been filed, the description of implemented or planned changes required in the annual report of insurance fraud information should suffice. Two separate reports are neither warranted nor cost-effective.

Section 6. Mandatory Reporting Requirements

[this is a new common requirement]

A. Reporting of Fraudulent Insurance Acts

1. A person engaged in the business of insurance having knowledge or a reasonable belief that a fraudulent insurance act is being, will be or has been committed shall provide to the Commissioner the information required by, and in a manner and time period prescribed by, the Commissioner.
2. Any other person having knowledge or a reasonable belief that a fraudulent insurance act is being, will be or has been committed may provide to the commissioner the information required by, and in a manner and time period prescribed by, the commissioner.

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B. Annual Reporting of Insurance Fraud Information and Plan Changes

Each insurer shall provide to the Commissioner [by _____] an annual report summarizing fraud data, fraud statistics, any implemented or planned changes to the Antifraud Plan, investigations conducted, any other information prescribed by the Commissioner, and any other information the insurer deems appropriate for inclusion in the fraud prevention report.

Comment [T6]: These items significantly exceed what is currently required by most states and should not be needed, if the Antifraud Plan and other reporting requirements are appropriately implemented.

Deleted: the fraud prevention activities conducted during the previous year, including but not limited to: fraud prevention ... [1]

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Section 7. Immunity from Liability

In the absence of fraud or malice, no insurer, or any employee or agent authorized by an insurer to act on behalf of the insurer, and no authorized governmental agency or its respective employees, shall be subject to any civil liability for libel, slander, or any other relevant cause of action by virtue of releasing or receiving any information pursuant to this Act. Nothing in this Section is intended, nor does it in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an insurer, or

Comment [T7]: Clarification is needed as to the difference between ... [2]

any employee or agent authorized by the insurer to act on behalf of the insurer, or of any governmental agency or its respective employees.

Section 8. Severability

If any provision of this Act, or the application of the provision to any person or circumstance shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those to which it is held invalid, shall not be affected.

Comment [T8]: Inclusion of an immunity provision corrects a significant omission from the initial draft. One of the most probably and foreseeable responses to an insurer's suspected fraud filing is a defamation suit made by the target of the filing. An immunity provision provides a good defense to such a claim, or at least greatly increases the burden of proof that must be met in order for a plaintiff to succeed in such a claim against an insurer who has complied with a state's regulation and filed a mandatory report.

Suggested text is from the California Insurance Code, see Sections 1872.5, 1873.2, and 1879.5

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Deleted: Section 4. Fraud Plan Model¶

¶ Within _____ days of the effective date of this act, and during each annual report filed with the Department of Insurance there after, every insurer shall submit to the [Commissioner] [Antifraud Division] a written report detailing the insurer's Antifraud Plan, which shall include at a minimum: 1) educational initiatives;; 2) in ... [3]

Deleted: Section 5. Fraud Warning Required¶

[taken from NAIC Insurance Fraud Prevention Model Act]¶

¶ A. Claim forms and applications for insurance, regardless of th ... [4]

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Deleted: Section 6. Mandatory Reporting of Fraudulent Insurance Acts¶

[taken from NAIC Insurance Fraud Prevention Model Act] ¶

¶ A. A person engaged in the ... [5]

Comment [T9]: Limitation of SIU role to claims appears to conflict with broad definition of fraudulent insurance acts in Section 2.

Deleted: Section 7. Special Investigations Unit (SIU) Requirement¶

¶ Every insurer admitted to do business in this state shall maintain a unit or division to investiga ... [6]

Deleted: Section 8. Severability¶

¶ If any provision of this Act, or the application of the provision to any person or circumstance shall be held invalid, the remainder of the Act, and the application of the pro ... [7]

Chronological Summary of Actions (all references are to the Proceedings of the NAIC)

the fraud prevention activities conducted during the previous year, including but not limited to: fraud prevention measures; fraud investigation procedures; fraud prevention personnel and organization

Clarification is needed as to the difference between fraud “data” and “statistics.”

Section 4. Fraud Plan Model

Within _____ days of the effective date of this act, and during each annual report filed with the Department of Insurance there after, every insurer shall submit to the [Commissioner] [Antifraud Division] a written report detailing the insurer’s Antifraud Plan, which shall include at a minimum: 1) educational initiatives,; 2) internal and external fraud prevention and detection policies and procedures; 3) policies and procedures for reporting fraud to law enforcement for purposes of investigation and possible prosecution; and 4) summary of hiring practices of qualified fraud investigators.

Section 5. Fraud Warning Required

[taken from NAIC Insurance Fraud Prevention Model Act]

- A. Claim forms and applications for insurance, regardless of the form of transmission, shall contain the following statement or a substantially similar statement:

“Any person who knowingly presents a false or fraudulent claim for payment of a loss or benefit or knowingly presents false information in an application for insurance is guilty of a crime and may be subject to fines and confinement in prison.”

- B. The lack of a statement as required in Subsection A of this section does not constitute a defense in any prosecution for a fraudulent insurance act.
- C. Policies issued by unauthorized insurers [use the term “unlicensed” or “nonadmitted” insurers in accordance with the terminology used in the state insurance code] shall contain a statement disclosing the status of the insurer to do business in the state where the policy is delivered or issued for delivery or the state where coverage is in force. The requirement of this subsection may be satisfied by a disclosure specifically required

by [insert reference to insurance code provisions. Excess and surplus lines statutes and risk retention and purchasing group statutes are likely to be cited here in nearly every state].

- D. The requirements of this section shall not apply to reinsurance claims forms or reinsurance applications.

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Section 6. Mandatory Reporting of Fraudulent Insurance Acts
[taken from NAIC Insurance Fraud Prevention Model Act]

- A. A person engaged in the business of insurance having knowledge or a reasonable belief that a fraudulent insurance act is being, will be or has been committed shall provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.
- B. Any other person having knowledge or a reasonable belief that a fraudulent insurance act is being, will be or has been committed may provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.

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Section 7 Special Investigations Unit (SIU) Requirement

Every insurer admitted to do business in this state shall maintain a unit or division to investigate possible fraudulent claims by insureds or by persons making claims for services or repairs against policies held by insureds^(T1).

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Section 8. Severability

If any provision of this Act, or the application of the provision to any person or circumstance shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those to which it is held invalid, shall not be affected.