

**AMERICA'S HEALTH INSURANCE PLANS
AMERICAN COUNCIL OF LIFE INSURERS
AMERICAN INSURANCE ASSOCIATION
BLUE CROSS AND BLUE SHIELD ASSOCIATION
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA**

June 18, 2008

The Honorable Sandy Praeger, President
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108

Re: *Proposed Alternatives to the NAIC D Committee Proposal For the Centralized
Collection of Market Conduct Data*

Dear Commissioner Praeger:

This is a follow up to our letter dated May 27, 2008, expressing our concern about the proposal of the National Association of Insurance Commissioners' (NAIC) Market Regulation and Consumer Affairs (D) Committee to have the NAIC collect Market Conduct Annual Statement (MCAS) data on the Annual Statement Blank. We appreciate your decision to defer the planned Executive (EX) Committee vote on the proposal at the San Francisco Summer National Meeting. There are, as you noted, too many complicated and unresolved legal and policy issues to be addressed before requiring that what has hitherto been considered confidential information be reported on a document that has traditionally been public.

We understand, however, that the Executive Committee intends to hold a conference call before the end of this month at which a vote is planned on the D Committee proposal. The issues raised in our earlier letter still remain unaddressed, and adopting the D Committee proposal as it now stands will inevitably lead to an unnecessary and potentially costly legal dispute. We write to propose ways to avoid that confrontation, and to maintain the spirit of industry-regulator cooperation that led initially to the collection of market conduct data on the MCAS.

The issue has arisen because the Ohio Insurance Department, which until last year provided the databases used by companies to report market conduct information to the states, was no longer willing to perform that task. To ensure that the MCAS program would continue, the NAIC stepped in to take over responsibility for servicing those databases. We propose that the NAIC maintain its present responsibilities, making it

possible for information to continue to be provided on the MCAS or, alternatively, assign those responsibilities to another state. Ohio, as you know, had no access to the data that was provided on the MCAS and neither should the NAIC. Like Ohio previously, the NAIC today supports the capability that allows states that have joined the MCAS system to receive market conduct information in an electronic format. The MCAS system, which was worked out between regulators and the industry, is functioning well and continues to expand as new states join.

Allowing the MCAS system to continue to function as intended avoids the kinds of legal issues that the D Committee proposal raises. We think that before the NAIC moves beyond the platform coordination role and toward the collection and analysis of the data, the legal and policy issues need to be addressed in discussions among the NAIC and all interested parties over what kinds of information are currently protected by state law and should continue to be protected and what information could reasonably be made public. We see no pressing problem that would warrant having the NAIC scrap the current system or proceed on an urgent basis to require the reporting of market conduct data on the Annual Statement Blank.

Background

States that participate in the MCAS project—more than 20 currently and as many as 30 by the end of this year—agree to collect market conduct data in a uniform format. Ohio designed the databases and the reporting template that participating states use, although Ohio did not collect or have access to the data submitted on the MCAS form. Nor had the information ever been transmitted to or made available to the NAIC. Each state collects and maintains the MCAS data in accordance with its own state market conduct confidentiality laws (many of which are based on the NAIC or National Conference of Insurance Legislators (NCOIL) model laws, or contain language substantially similar to those models). Citing a lack of resources, Ohio indicated that it could no longer play its role in the MCAS project.

The NAIC promptly assumed the responsibility for handling updates to the MCAS template for participating states. This has allowed for the seamless continuation of the program, without creating new reporting complications for the industry or disruptions to state insurance department staffs. That role, however, is different from collecting and analyzing market conduct data.

The D Committee proposal, which is now before the Executive Committee, would have the NAIC collect the MCAS data in the form of a supplemental filing on the financially-oriented Annual Statement Blank. Under that proposal the NAIC would have access to this data, which it does not have now, and which it intends to aggregate and analyze. This creates many practical as well as legal difficulties.

Accuracy of the data is one major problem. We are concerned that the data in its current form will not allow for useful aggregation and analysis. Work needs to be done first on the definitions and instructions to ensure uniform interpretation of the data elements.

Moreover, since the Annual Statement Blank is considered public information, the D Committee plan would have the market conduct data currently submitted on the MCAS be made available to all, including the general public and commercial competitors. It is this last aspect to which the industry particularly objects.

Confidentiality—under both the letter and the spirit of existing state laws, and for sound public policy reasons—is a second major concern. The great majority of states (although not all) have statutes that require that company-specific market conduct data, developed through examination or otherwise, be kept confidential. In some states that means the information reported on the MCAS cannot be shared with anyone outside the state collecting the data, and that includes the NAIC. Some states have legal authority to publish a final examination report or share information with other states or with the NAIC, but usually with the admonition that the information be shared in accordance with an agreement (often a written agreement) on the part of the receiving entity to honor the confidentiality requirements of the sharing jurisdiction. Calling for the MCAS data to be reported as part of the Annual Statement Blank (which currently is used for financial data) does not make it financial data and hence public. Market conduct information remains market conduct information, and changing its label does not change its nature. It is still subject to state confidentiality laws, and requiring that it be reported to the NAIC on a form that is public should not be used to circumvent the intent of the state legislators who enacted those laws.

There are good reasons why the MCAS data is not currently in the public domain. For one thing, the MCAS data does not track specific state statutory requirements. For example, one data element the MCAS asks for is homeowner cancellations within 60 days, even though some states have a 90-day underwriting period. There are many such inconsistencies in state laws and therefore knotty interpretation issues.

Moreover, making MCAS data available on a nationwide basis will permit commercial competitors to identify a company's business strategy. There is no way currently for one company to obtain national information about the number of policies issued, cancelled and non-renewed by another company for each state and for each year. Under the D Committee proposal, such information would be routinely available.

States and the federal government have laws that govern the submission of business data to the government. Some of these are insurance laws, some are “freedom of information” laws (“FOIA”), and some specifically refer to trade secrets or personally identifiable information. These laws direct public officials to take certain actions and prohibit them from taking other actions with the information they receive. There are penalties provided for disobeying or disregarding those laws, up to and including criminal penalties. States and the federal government, moreover, have sovereign immunity protection against releasing information in response to a subpoena, as provided by law.

The NAIC has no such defined authority. It is a private organization that cannot compel the production of information. Whether it can actually protect that information once it has possession of it is unproven. It is not directly subject to an Administrative

Procedures Act or other due process protections that private persons have against governmental actions. There are no clearly defined penalties for NAIC employees who release confidential information. Indeed, under the laws of some states once information deemed “confidential” is made available to the NAIC, the confidentiality of that information may be waived. The NAIC has no sovereign immunity and cannot refuse to comply with a valid subpoena to provide information in its possession.

In short, once information comes into the hands of the NAIC it lacks the legal protection afforded it under state law. However well-meaning and sincerely the NAIC may promise to fully protect that information, it may not legally be able to do so. Accordingly, in order for the industry to participate comfortably in a proposal for the centralized collection of MCAS data, the D Committee proposal as written should not be approved.

Industry Proposal

The insurance industry would support either of two alternatives to the D Committee proposal. Both would allow the MCAS system to continue to function as it does today. One would be to have the NAIC continue to serve as a facilitator, as Ohio did before. The other would be for another state to serve in that capacity. Since neither of these options would involve the centralized collection or analysis of data, the legal and timing concerns of the D Committee proposal would be avoided.

If the NAIC decides that no solution short of centralized collection of the data is acceptable, then we urge you to consider whether that function could be done through one member state serving as the repository. While any centralized collection process presents legal concerns, there are far fewer problems if a state serves in that role, operating under the authority of its laws—including its laws on the confidentiality of market conduct data—than if the NAIC does.

Thereafter we will be glad to work with the NAIC in a cooperative way to develop a system that might allow for the centralized collection of market conduct data. Such a system must operate in a manner consistent with state law that adequately protects the confidentiality of market conduct data that should not be made public—such as personal data on individual policyholder and individual company trade secrets and business strategy information—as well as assuring the accuracy of information that is made public. We would be willing to work with the NAIC on the development of a model law dealing with these issues, including the requirement that a state would have to adopt the law before it could participate in the centralized data process.

The negotiation of a workable plan for the centralized collection of market conduct data will take time. We think that keeping the current MCAS process in place in the meantime, with another state or the NAIC itself assuming the role that Ohio has previously played, would allow that proven system to continue and even be expanded while the legal and policy issues that are raised by the D Committee proposal are worked through.

Conclusion

For the centralized collection of data to be workable there have to be rules—enforceable rules—governing the kind of information collected, the way it is collected, the way it is stored, the way it is protected, and the way it is used. States and the federal government have statutes that set the rules, not only as to specific kinds of information to be collected but generally as to due process and procedures for enforcement that protect those who provide sensitive data. The NAIC has no such rules, which is why the industry cannot support the D Committee proposal and recommends that it not be adopted by the NAIC.

The industry is prepared to work with the NAIC to develop the necessary protections, but we cannot agree to the centralized collection of market conduct data without those rules in place. States have statutes governing the collection and protection of market conduct information and cannot legally make such information available to the NAIC in the absence of clear and enforceable rules for the protection of that information by the NAIC. We want to make unnecessary the possibility of legal action against states that would provide information to the NAIC in violation of their laws.

Thank you for this further opportunity to provide our comments and suggestions.

Very truly yours,

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