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Honorable Sandy Praeger
President
National Association of Insurance Commissioners
Kansas Insurance Department
420 S.W. 9th St.
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Re: Market Conduct Annual Statement Data

Dear Commissioner Praeger:

I am writing at the request of the American Council of Life Insurers to provide more detail about an important legal issue described in a June 17 letter to you from six major insurance trade associations¹ regarding the recommendation of the NAIC Market Regulation and Consumer Affairs (D) Committee on the centralized collection of market conduct information. The D Committee approved a proposal on April 17, 2008, now pending before the NAIC Executive (EX) Committee, that each state “[c]ollect the current Market Conduct Annual Statement Data through a supplemental filing to the Annual Statement.”²

Market conduct information is currently reported on the Market Conduct Annual Statement (MCAS), pursuant to a program worked out jointly between the insurance industry and the NAIC, and is considered confidential. If the same information were to be reported on the Annual Statement Blank—heretofore used only for financial data—the confidentiality of the market conduct information would be compromised. Thus the D Committee proposal appears to be an attempt to circumvent the confidentiality protection accorded market conduct information in the market conduct surveillance laws enacted by the great majority of states simply by changing the manner in which such data is reported.

When legislation relating to market conduct surveillance (often based closely on the NAIC and NCOIL Model Laws) was presented to legislatures around the country, those legislatures were told that the proposed legislation was needed because existing laws did not appropriately authorize market conduct related regulatory

¹ 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 and Property Casualty Insurers Association of America.

² Meeting Summary and Action Items, June 1, 2008 at p. 1.

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activities. They were also told that protecting the confidentiality of data obtained (except for information made public in a commissioner's final report following a full market conduct examination) was a crucial element of the legislative proposal. The legislatures enacted the new laws within the framework of existing insurance law, including settled understandings of the existing powers of insurance commissioners. No legislature was told that market conduct information could alternatively be required under existing statutes used to compel financial reports. Nor was any legislature advised that the carefully crafted confidentiality provisions of the market conduct surveillance laws could be discarded at the discretion of the insurance commissioner.

If the NAIC adopts the D Committee proposal, compliance will require most state regulators to violate state laws by ignoring applicable confidentiality provisions under the well-settled doctrine that statutes are construed *in pari materia* (i.e. in conjunction with each other so as to make sense of the overall scheme). If individual insurance commissioners adhered to the NAIC action, we anticipate that courts around the country would uphold the confidentiality requirements of state market conduct surveillance laws and reject any breach of those laws based on a change in the NAIC reporting arrangements. The purpose of this letter is to explain the basis for that conclusion.

Courts Will Read Market Conduct Surveillance Laws *In Pari Materia* to Preclude Disclosure of MCAS Data

Because the NAIC is not a governmental entity it cannot enact laws. Rather, it produces model acts that are only effective after enactment by state legislatures. Questions about whether reporting MCAS data on the public Annual Statement blank would violate the confidentiality provisions of state market conduct surveillance laws, then, will have to be determined by state courts, under state law, state by state.

The NAIC has developed a model Market Conduct Surveillance Act that specifically protects the confidentiality of market conduct information submitted to state insurance regulatory agencies by insurance companies. By far the majority of states have adopted laws that track the confidentiality provisions of the model act, whether those laws were based on the NAIC model, the similar NCOIL model act,

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or written prior to or independently of the models.³ Only a handful of states do not have laws protecting the confidentiality of market conduct information.⁴

Established canons of statutory construction require that related statutes setting forth the authority of regulatory agencies be read *in pari materia*. In doing so, courts endeavor to give effect to the intent of the legislature. Courts around the country have held that all insurance regulatory statutes must be construed “as a whole to give reasonable effect to the legislative intent evidenced by the entire statutory scheme.” *Alias Smith & Jones, Inc. v. Barnes*, 695 P.2d 302, 305 (Colo. Ct. App. 1984).⁵

Here, the D Committee proposal asks state insurance commissioners to shift the legislative foundation for the reporting of market conduct information from the specific and relatively recent state market conduct surveillance laws to the much older and more general laws authorizing collection of financial data on the Annual Statement Blank. Such a relocation of regulatory authority would purportedly eliminate confidentiality protections specifically enacted by the legislature under the market conduct surveillance laws. Courts are likely to reject an insurance commissioner’s attempt to implement an NAIC policy that contravenes established legislative intent.

Almost all state legislatures have enacted provisions imposing express confidentiality provisions on the collection and analysis of market conduct data.⁶ The insurance departments sought specific legislation governing the process of

³ “Summary of State Statutory Prohibitions on Disclosure of Market Conduct Materials in Market Conduct Surveillance Statutes,” Attachment A to letter sent by six trade groups to you, May 27, 2008.

⁴ *Id.*

⁵ See also, *Brokenbaugh v. New Jersey Mfrs. Ins. Co.*, 386 A.2d 433, 158 N.J. Super. 424 (N.J. Super. Ct. App. Div. 1978) (construing two sections of the insurance code *in pari materia* because they had the same overall purpose); *Ins. Co. of N. Amr. v. Hall County*, 198 N.W.2d 490, 188 Neb. 609 (1972) (recognizing that “[t]he fundamental principle of statutory interpretation is to determine the intent of the Legislature” and “the Legislature, when enacting [the more recent] amendment, is presumed to have known the existing law” thereby favoring the more recent enactment over the older statute).

⁶ The exceptions are Florida and New York. In Alabama, the confidentiality protection is afforded by regulation rather than by statute. The New York Legislature is currently considering adopting the confidentiality provisions contained in the NAIC model law.

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collecting market conduct information, including confidentiality protection, and relied on those statutes in requiring MCAS reporting. That commitment to protect confidentiality was a critical factor in garnering support for the market conduct Model Laws at the NAIC and NCOIL and in seeking passage of those laws in individual state legislatures. To now shift the asserted source of authority for the MCAS reporting requirement to the more general and far older laws authorizing collection of financial Annual Statements breaches the compromise struck with the legislatures that granted authority to the insurance departments to collect and analyze market conduct data provided that it would be kept confidential.

Nothing in the language or history of the Annual Statement statutes—including the NAIC specifications for Annual Statements—remotely suggests that they are intended to regulate anything other than financial reporting. Many of the statutes under which the financially-related Annual Statements are required date to the late 19th and early 20th Centuries.⁷ Furthermore, caselaw stretching back many decades gives no indication that such statutes have ever been interpreted to regulate anything more than financial reporting.⁸

The U.S. Supreme Court has given decisive effect to the common sense principle that courts must read statutory provisions in the context of the overall statutory scheme, including other statutes, “particularly where Congress has spoken subsequently and more specifically to the topic at hand.” The most prominent decision based on this rule of statutory construction is *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). In *Brown & Williamson*, the Court

⁷ See, e.g. 215 Ill. Comp. Stat. 5/136 (2007) (having historical roots dating back to 1869 Ill. Laws ch. 181 §§ 24, 25); R.I. Gen. Laws §21-12-1 (2007) (the modern iteration of 1896 R.I. Gen. Laws ch. 181 §§24, 25); N.J. Stat. Ann. §17:23-1 (dating to 1902 N.J. Laws ch. 134, §70 p. 434); Ariz. Rev. Stat. Ann §20-223 (2007) (origins of statute traced to at least 1954 Ariz. Laws, ch. 64, art. 3, §23).

⁸ See, e.g., *Witkowski v. Fidelity & Cas. Co. of New York*, 187 N.W. 267, 218 Mich. 21 (1922) (discussing the annual statement financial disclosure requirements); *Bankers Life & Cas. Co. v. Cravey*, 69 S.E.2d 87, 208 Ga. 682 (1952) (noting that the annual statement lists an insurer’s “receipts and disbursements for the preceding year and much other data revealing its financial structure and qualification for doing an insurance business.”); *Howell v. Bakers’ Mut. Ins. Co. of New York*, 139 A.2d 335, 49 N.J. Super. 114 (N.J. Super. 1958) (upholding fine against insurer for late filing of annual financial statement); *Nat’l Life and Cas. Ins. Co. v. Hammel*, 399 P.2d 446, 81 Nev. 125 (1965) (construing authority of insurance commissioner regarding annual statement filings in Arizona, Utah, and Nevada and holding that insurer disclosing partially complete bulk transfer did not make a false statement).

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rejected the FDA's attempt to regulate tobacco under the agency's general authority granted in the Food, Drug, and Cosmetic Act ("FDCA") because doing so would be inconsistent with several later-enacted, tobacco-specific acts. *See id.* at 143-59. The Court held that although a statute "may have a range of plausible meanings" at the time it is enacted, "subsequent acts can shape or focus those meanings," especially where the later acts more specifically address the particular issue. *Id.* at 134.⁹

The Supreme Court in *Brown & Williamson* further found the interpretation suggested by the later enactments particularly persuasive where Congress had acted "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco"—a position contrary to the one it was now espousing. 529 U.S. at 144. *See also Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (emphasizing that the Court's decision in *Brown & Williamson* derived in part from the inconsistency of the FDA's prior, long-held interpretation, on which Congress relied when enacting subsequent legislation). Finally, the *Brown &*

⁹Later decisions of the High Court have applied that principle in a wide range of circumstances. *See e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 771 (2008) (rejecting an interpretation of the Securities and Exchange Act of 1934 that would allow for a private right of action against a corporation's vendors and customers, where the Private Securities Litigation Reform Act of 1995 authorized liability for aiders and abettors only in actions brought by the SEC, not by private parties); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) (interpreting the much older False Claims Act in accordance with the Program Fraud Civil Remedies Act of 1986, stating that "it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted"); *see also United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) (holding that the more recent, more specific Tax Lien Act, rather than the older, more general federal priority statute, governed government claims of preference, stating that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it had not been expressly amended."); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (rejecting the FCC's attempt to use its statutory authority to "modify" rate-filing requirements to make rate filing optional for non-dominant carriers, stating that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion – and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements"); *United States v. Fausto*, 484 U.S. 439, 453 (1988) (holding that a later, more specific statute governed over an earlier, more general one, stating that the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

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Williamson Court reasoned that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” 529 U.S. at 160. Thus, in light of the various intervening congressional acts, the long-held former agency interpretation, and magnitude of the potential impact on the regulatory scheme, the Court concluded that Congress could not have intended the interpretation urged by the agency.

More recently, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court recognized that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”¹⁰

Although these principles of administrative law have been most fully articulated by the U.S. Supreme Court in the federal context, state appellate courts have adhered to the same standards.¹¹ Thus, it is well-settled under both state and federal law that courts harmonize statutes *in pari materia* by giving effect to the more specific and more recent articulations of legislative intent.

¹⁰ (quoting *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)). In *Gonzales*, the Court held that the Controlled Substances Act did not implicitly grant the U.S. Attorney General authority to prohibit state-approved drugs used for physician-assisted suicide,

¹¹ The following very recent cases are examples of the numerous decisions applying the same analysis as in the federal cases cited above: *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 109 (Mo. Ct. App. 2008) (“subsequent statutes may be considered in construing previously enacted statutes, in order to ascertain the uniform and consistent purpose of the legislature.”) *Work Connection, Inc. v. Bui*, 749 N.W.2d 63, 75 (Minn. App. Ct. 2008); *Alston v. Commonwealth*, 652 S.E.2d 456, 462 (Va. 2007) reasoning that, in accordance with the doctrine of *in pari materia*, “statutes are not to be considered as isolated fragments of law [but] should be so construed as to harmonize.”); *State v. Mangum*, 150 P.3d 252, 256 (Ariz. App. Ct. 2007) (“Related statutes in *in pari materia* . . . must be read together and harmonized to avoid rendering any word, clause or sentence superfluous.” (internal quotation marks omitted)).

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Applying the *In Pari Materia* Analysis to the D Committee Proposal.

Should a state insurance commissioner attempt to do what the D Committee proposal envisions, these important and settled principles of administrative law will be invoked to halt the initiative. Courts will recognize that the critical confidentiality provisions in the market conduct surveillance statutes were adopted by the legislatures of virtually every state in accordance with an important public policy. Moreover, courts will read the Annual Statement statutes in harmony with these more specific and controlling confidentiality provisions that evidence the clear intent of state legislatures to safeguard Market Conduct Annual Statement data.

There is nothing to suggest that those legislatures now take a different view. To the contrary, NCOIL has written to you to warn about the danger that the D Committee proposal would attempt “the preemption of existing state market conduct laws.” Letter from NCOIL Leadership to Hon. Sandy Praeger, May 23, 2008. The NCOIL leaders expressed concern about “the distinct possibility that such data collected for regulatory purposes would be made public for non-regulatory purposes.” *Id.* To our knowledge, no legislature has modified or repealed the confidentiality safeguards in the market conduct statutes; in fact, the New York Legislature, one of the few state legislatures that has not enacted such protections for market conduct information, is currently considering adding them.

Changing the Method of Reporting Neither Changes the Character of the Data Being Reported, Nor the Confidentiality Protection of Such Data Under State Laws.

It is interesting to note that the top legal officer of the NAIC, Andrew Beal, has expressed the opinion that a shift in the manner of reporting market conduct information would void the confidentiality protection given such data under state laws.

Mr. Beal stated that besides the examination laws currently used, he is not aware of any laws that would prohibit centralized data collection and storage. He stated that if the data was collected in some manner other than



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by examination laws, the data elements would not be considered confidential.¹²

Mr. Beal used the Insurance Regulatory Information System (IRIS) to illustrate his point, saying (as reported in the minutes of the D Committee meeting), that:

[A]ll states have adopted the Insurance Regulatory Information System (IRIS) Model Act, which allows states to collect data through the annual statement. Mr. Beal stated that the data itself is not considered confidential, but is only treated that way because of the manner in which it is collected.¹³

With all due respect, we think there is no basis in law or fact for Mr. Beal's statement. The IRIS Model Act and analogous state statutes contain significant confidentiality limitations. If it were proper to use those statutes to require submission of market conduct data (which we believe it is not), those confidentiality requirements would be applicable.

As a threshold matter, state insurance commissioners would run afoul of fundamental principles of administrative law were they to shift the legal authority invoked for MCAS reporting from the market conduct surveillance statutes (which the insurance departments have expressly stated are the source of current MCAS reporting requirements) to the IRIS laws or other statutes authorizing reporting on the financial Annual Statements in order to evade the confidentiality provisions central to almost all states' market conduct laws. The authority of state insurance commissioners is clearly circumscribed by the plain intent of their legislatures in enacting the more specific and more recent market conduct surveillance laws.

As we explained above, laws authorizing insurance commissioners to require financial Annual Statements cannot, at this late date, be expansively construed to include MCAS reports. But in fact the IRIS Model Law, and the state statutes based on it, contain strong confidentiality provisions. Section 4(A) of the NAIC IRIS Model Law provides that

¹² Minutes of the meeting of the D Committee in Orlando, FL, March 31, 2008, pp. 2-3.

¹³ *Id.* at 2.

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examination synopses concerning insurance companies that are submitted to the [state insurance] department by the NAIC's Insurance Regulatory Information System... shall be confidential by law and privileged

In proposing that market conduct information be reported on the Annual Statement blank, the D Committee proposal specifically contemplates that the "data should be available via the CIS [Consumer Information Source], by state and company, and as aggregated nationally by the NAIC." If the IRIS laws were a permissible avenue for collecting MCAS data at all, it would then appear that the material the NAIC would compile under the D Committee proposal is covered by the confidentiality provisions of Section 4(A) of the IRIS Model Act.

Indeed, the Montana Supreme Court held in *Belth v. Bennett*, 740 P.2d 638, 227 Mont. 341 (1987), that Montana's version of that provision of the IRIS Model Act precluded public "access to data and analyses ... which relate to insurance companies," even in the face of a broad state constitutional "right to know" provision. *Id. at 639*. The NAIC appeared in that case as *amicus curiae* to urge the state supreme court to preserve the confidentiality of insurer information—noting that disclosure of potentially inaccurate or misleading information would harm insurers.

Conclusion

A broad coalition of the insurance industry has written to you setting out a proposal for a process to develop suitable arrangements regarding consolidating MCAS data. That proposal offers a realistic, lawful route for the NAIC to pursue important public goals regarding the MCAS process. The suggestion that the NAIC and individual commissioners will instead "preempt" the market conduct statutes (to use NCOIL's word) by improbably invoking the statutes authorizing financial Annual Statements in contravention of clear principles of administrative law would be, I am afraid, merely the prelude to litigation and confrontation.



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Sincerely,

Lawrence Mirel

cc: Executive Committee Members
D Committee Members
Other Members of the NAIC
Andrew Beal, Esq.
Trade Association Leaders
NCOL Leaders