
NAIC Hosts First Live Meeting Since 2019 in Columbus, Ohio:

Key Priorities, New Groups, and Ongoing Issues To Be Addressed



By Fred E. Karlinsky, Timothy F. Stanfield, and Christian Brito

In March 2020, the National Association of Insurance Commissioners (NAIC) announced the cancellation of its in-person Spring National Meeting, which transitioned to a virtual-only format amid rising concerns about COVID-19. The NAIC's subsequent national meetings continued in a virtual format until the recent 2021 Summer National Meeting, hosted in Columbus, Ohio from August 14-17, 2021 in a hybrid format. While participants were eager to resume in-person meetings, and even with a robust registration list, physical attendance was much smaller than anticipated as a result of the spreading Delta variant. Many opted to attend virtually instead.

There are several priorities and corresponding activities being undertaken by the NAIC, including the creation of a new standing committee (the Innovation, Technology, and Cybersecurity (H) Committee), and the formation of a new working group to address the improper marketing of health plans.

In his opening address to the membership, NAIC President David Altmaier (FL) said the NAIC and commissioners have come together to find solutions for issues facing the industry and the world for many years. The COVID-19 pandemic is only the most recent of significant unanticipated issues which challenged the industry's norms and practices. And yet, over the last year, the industry and the NAIC worked together to test and implement new processes and technologies to better focus their efforts in their mission to maintain strong markets and protect consumers. Despite these challenges, the U.S. insurance industry demonstrated strong solvency positions, and the trend continues due in part to the strong solvency requirements put in place during the last financial crisis.

There are several priorities and corresponding activities being undertaken by the NAIC, including the creation of a new standing committee (the Innovation, Technology, and Cybersecurity (H) Committee), and the formation of a new working group to address the improper marketing of health plans. The proposed Model Law Addressing Licensure or Registration of Pharmacy Benefit Managers (PBMs) and the revised Statement of Statutory Accounting Principles (SSAP) No. 71 — “Policy Acquisition Costs and Commissions” — were two items that sparked a lively debate, and the Special (EX) Committee on Race and Insurance appears to be moving into the next phase of its work.

Two New Important Groups Are Formed

The NAIC adopted Principles on Artificial Intelligence (AI) last year, and the work is continuing through the creation of a new letter “H” committee. The mission of the new committee is to provide a forum for regulators to learn and have discussions regarding innovation, technology and cybersecurity issues, monitor those developments in areas that affect the state insurance regulatory framework, and develop regulatory guidance as appropriate. The Innovation and Technology (EX) Task Force will play an important role in finalizing a draft mission statement and new charges for this committee. Commissioner Jon Godfread (ND) plans to appoint an ad hoc group to begin this work, and there will an opportunity for interested parties to provide input. The charges will require plenary approval and the NAIC Bylaws will need to be amended to officially add this new committee. The goal is to take those actions at the next national meeting in San Diego.

At the beginning of the year, many states and federal agency officials held closed conference calls to discuss the deceptive marketing of health plans and other products that misleads consumers to believe they are purchasing comprehensive health coverage when they are actually purchasing coverage that does not cover all pre-existing conditions or hospital care. This includes the use of lead



generators, unsolicited phone calls, internet solicitation and other marketing methods. As a result, it was identified that there is a need to review and potentially update or create new models to address the aggressive and improper marketing of plans. A new Improper Marketing of Health Plans (D) Working Group was formed under the Antifraud (D) Task Force to focus on these efforts.

Proposed Pharmacy Benefits Management (PBM) Model Law Fails To Pass

By way of background, work on a PBM model law began in 2019 after some NAIC members believed it would be appropriate to develop a model providing state insurance departments direct authority to regulate PBMs rather than indirectly through the insurer. This regulatory approach stems from the expanding role PBMs are playing in the prescription drug supply chain and the resulting impact on consumer access to prescription drugs and their affordability. After several meetings and extensive stakeholder discussions, a draft of the model was finalized in October 2020.

The Health Insurance and Managed Care (B) Committee deferred action on the model law during the Spring National Meeting because questions were raised about its drafting note, which provided statutory citations to state laws regarding various PBM business practices for states to consider and possibly include when enacting the model. This drafting note was included as a compromise between some states wanting the model to only focus on PBM licensure and registration provisions and other states wanting to go further by including substantive provisions addressing certain PBM business practices. There was lack of national consensus regarding the regulation of these PBM business practices, to the point of possible exclusion from the substantive provisions of the model. Concerns were raised about the potential lack of uniformity in adoption by the states, which is a key component of the NAIC model development procedures, if states enacted different provisions within the drafting note.



aceshot1/shutterstock.com

The drafting note was ultimately removed, and the model was adopted by the B Committee in June of 2021. A charge was given to the PBM Regulatory Issues (B) Subgroup to develop a white paper that could examine the current and emerging state laws related to PBM business practices. Specifically, the white paper will explore price transparency and reporting requirements, rebating and spread pricing, and discuss the implications of the *Rutledge v. PCMA* Supreme Court decision.

Even though the controversial drafting note was removed, many states were not in support of the proposed PBM model. During the Summer National Meeting, many commissioners viewed it as an ineffective piece of legislation, citing more robust authority through existing laws or regulation enacted in their states. As members are required to vote based on whether they will make efforts to have the model introduced in their respective state legislature, or that the law in their state already meets or exceeds the minimum national standard set by the model law, a majority either abstained from the vote or voted against the measure. With a 20-12 vote and an additional 20 abstaining, the PBM model law failed to gain the 37 votes required for its adoption.

SSAP No. 71 Revisions Adopted After Effective Date Debate

Stemming from an accounting issue related to commission funding agreements, revisions to SSAP No. 71 have garnered a fair amount of debate in the insurance industry. For context, SSAP No. 5 is a basic, core accounting principle which states funds spent or obligated, as far as liabilities, are no longer available to pay policyholder claims, and acquisition costs incurred with the issuance of a new policy must be expensed upfront. The recognition of liabilities occurs with the issuance of an insurance policy, paying full commissions upfront and expensing them at that time. SSAP No. 71 requires the expensing of policy acquisition costs, which includes commission costs.

In 2019, it was discovered that some insurance companies were entering into contracts with third-parties, or “super agents,” to pay the agent commissions on their behalf. As these insurers no longer have to recognize full acquisition costs at the inception of the policy, they are not expensed, and it hinders the comparability of financial statements between entities. These companies’ financials will present as more favorable, appearing there are more available assets than actually do. This arrangement is flawed because it assumes the third-party agreement eliminates the insurer’s obligation which results from the issuance of a policy.

To address the issue, the NAIC developed proposed revisions in August 2019 to clarify the original intent of SSAP No. 71. The revisions emphasized that commissions must be expensed upfront to be treated as a liability and,

if not, the commissions will reflect unrecorded liabilities not reflected in financial statements. In other words, this is called “illusory surplus.”

The concerns raised about the SSAP No. 71 revisions were less about whether it was acceptable from a pure accounting standpoint of not recording the liabilities; rather, they were about delaying the December 31, 2021 effective date to allow companies additional time to phase in the necessary capital infusion. Some believe that the impact is not material, so it should be less of a concern allowing a phase-in over one or two years. On the other hand, there is an argument that these companies have been given an unfair advantage over the rest of the industry, which followed the accounting rules properly, and deferring the effective date would only continue this competitive advantage. There was also a debate about how many companies were involved in these practices.


Despite several robust discussions over the appropriate effective date for the revisions, held at both the Spring National Meeting and the Summer National Meeting, a motion to amend the effective date ultimately failed to pass. The revisions become effective on December 31, 2021.

Special Committee on Race and Insurance Begins Next Phase of Work

The NAIC approved the formation of the Special (EX) Committee on Race and Insurance in July 2020. It comprises five separate workstreams charged with researching and analyzing the level of diversity and inclusion within the NAIC, the state insurance regulator community, the insurance industry and insurance products. Three of the workstreams are to examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in certain lines of business, including property and casualty, life and annuities, and health.

The workstreams’ initial meetings were devoted to researching and developing initial recommendations for the Special Committee’s consideration. The Committee reviewed and incorporated the workstreams’ feedback into revised charges for the remainder of 2021 through 2022. The Committee’s charges were adopted during the Summer National Meeting, enabling the workstreams to move into the next phase of their work.

Some workstreams are taking a deeper review of previously identified issues such as existing gaps in insurance industry-specific diversity data. Many are filling out their respective timelines with concrete deliverables. Notably, one of the Committee’s charges calls for the development of analytical and regulatory tools to assist state insurance regulators in defining, identifying, and addressing unfair discrimination

in property and casualty insurance. Workstream Three is expected to play a key part in defining those terms. Additionally, Workstream Five plans to develop both a data collection best practices document and a network and directory document. 

Greenberg Traurig Shareholder Fred E. Karlinsky is co-chair of the firm’s Insurance Regulatory and Transactions Practice Group. Fred has nearly 30 years of experience representing the interests of insurers, reinsurers and a wide variety of other insurance-related entities on their regulatory, transactional, corporate and governmental affairs matters. Fred is a recognized authority on national insurance regulatory and compliance issues and has taken a leadership position in many insurance trade organizations, has led many industry-driven legislative and regulatory initiatives, and is a sought-after thought leader who has spoken and presented to insurance executives and governmental officials, both nationally and internationally.

Timothy F. Stanfield is of counsel at Greenberg Traurig. Timothy is a member of the firm’s Florida Government Law & Policy Practice and represents a broad array of private and public-sector clients before the Florida legislature, cabinet, and state agencies.

Christian Brito is an associate at Greenberg Traurig. Christian focuses his practice on national insurance transactional, regulatory and compliance matters. Christian represents a wide variety of insurance industry participants, including insurers, reinsurers, captives, managing general agencies, brokers, third-party administrators, claims administrators and others in connection with regulatory, transactional, corporate and governmental affairs matters.
