



August 5, 2008

Vermont Delegation of NCOIL
Senator Ann E. Cummings
Representative Kathleen C. Keenan
Representative Warren Kitzmiller
Representative Virginia Milkey
State of Vermont
General Assembly 115 State Street
Montpelier, VT 05633-5301

RE: Your Letter of June 27, 2008
Medical Professional Liability Closed Claim Reporting Model Law

Dear Senator Cummings and Representatives Keenan, Kitzmiller and Milkey:

Thank you for your letter of June 27, 2008 expressing your concerns over the substance and process used by the NAIC in connection with development of the Medical Professional Liability Closed Claim Reporting Model Law (Model Law). I apologize for the delay in responding as we have been attempting to review all correspondence related to this matter in the hopes of reaching a consensus.

First, we would like to correct some misinformation contained in your letter. You state that "the Model Law has been precipitously placed on the agenda of the Executive Committee and the Plenary Committee for a vote and adoption on a telephone conference call on July 8, 2008." This action is not precipitous in any way. It was not done abruptly or ill-considered. In fact, it was announced at the open Plenary meeting in San Francisco (June 2, 2008) that an accommodation would be made to allow the State of Vermont some extra time to comment on a very specific concern of Commissioner Thabault. For your convenience, the text of the minutes of that portion of the Plenary follows:

"Commissioner McCarty reported on the Medical Professional Liability Closed Claim Reporting Law (Attachment Four). Herb Olson (VT) requested additional time to review the model and provide a comment letter. Commissioner McCarty agreed to provide a 21-day comment period on the very narrow issue of the model's treatment of captive insurers. After the C Committee reviews these comments, a Joint Executive (EX) Committee/Plenary conference call will be scheduled prior to the NAIC Fall National Meeting to consider the model for adoption."

The Model Law was drafted to meet a specific criticism of the current regulatory process that was set forth in a June 2003 report by the Government Accountability Office (GAO) that lack of access to information about the medical professional liability markets was hindering the ability of public policymakers to answer important questions about market performance. Specifically, the GAO said in its report, "While this explanation accounts for observed events in the market for medical malpractice insurance, it does not provide answers to other important questions about the market for medical malpractice insurance, including an explanation of the causes of rising losses over time. The data currently collected do not permit many of the analyses that would provide answers to these questions."

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This lack of data is due, in part, to the nature of NAIC's and states' regulatory reporting requirements for all lines of insurance, which focus primarily on the information needed to evaluate a company's solvency. Most insurance regulators do not collect the data that would allow analyses of the severity and frequency of medical malpractice claims for individual insurer operations within specific states. Moreover, insurers are generally not required to submit to NAIC or state regulators data that would show how insurers' losses are divided between settlements and trial verdicts or between economic and noneconomic damages. Finally, the increasing use of insurance or self-insurance mechanisms that are not subject to state or NAIC reporting requirements further complicates a complete analysis. While more complete insurance data would help provide better answers to questions about how the medical malpractice insurance market is working, other data would be equally important for analyzing the underlying causes of rising malpractice losses and associated costs. These data relate to factors outside the insurance industry, such as policies, practices, and outcomes in both the medical and legal arenas."

The Model Law requires reporting of claims from first dollar loss payees; that might include captives, but not if the captive is operating purely as a reinsurer, which we are given to understand is not uncommon. This is consistent with the Florida model already in place as well which also receives reports from risk retention groups, captives and self-insureds. There are currently 23 states that have some form of closed-claim reporting requirements for medical malpractice claims. Of the 23 states, ten (44%) mentioned specifically that either captives or risk retention groups or both are required to report this information. Thus asking captives and risk retention groups to report this information is not new and is not something that captives and risk retention groups have refused to do in the past. In fact, there are Vermont domiciled risk retention groups that report medical liability closed-claims information to Florida today.

In your letter you erroneously conclude that this is another example of "hasty action by the NAIC, without adequate effort to notify affected interests, to hear the legitimate concerns of the various parties, and to consult with legislators and NCOIL on a matter of significant interest to the Legislative Branches of the states." The facts are much different. Discussions on the Model Law began on Sept. 11, 2006 in an open meeting of the NAIC's Statistical Information (C) Task Force. Discussions continued over the next quarter by open conference calls held on Oct. 24, 2006 and Nov. 28, 2006. A first draft of the Model Law was circulated before the Nov. 28, 2006 conference call. The Model Law was discussed again at an open meeting held on Dec. 10, 2006 in San Antonio, TX. Comments from several interested parties were reviewed at that time and a presentation was made by the Physician Insurers Association of America on its Data Sharing Project. Discussions continued in 2007 with open conference calls on Feb. 20, 2007, March 20, 2007 and April 17, 2007. The NAIC changes to its model law procedures temporarily slowed work on the Model Law. The new procedures were discussed in an open conference call on May 15, 2007 and the Task Force decided to pursue the Model Law as a model law rather than a guideline. The Statistical Information (C) Task Force drafted the appropriate request for consideration as a model law and submitted the request to its parent—the Property and Casualty Insurance (C) Committee. In a May 23, 2007 open conference call, the Committee adopted the request and tendered it to the NAIC Executive Committee for its consideration. On June 3, 2007 the NAIC Executive Committee adopted the request starting the clock for a one-year deadline for completing work on the model.

The Statistical Information (C) Task Force once again set to work on the Model Law holding open conference calls on June 19, 2007, Sept. 18, 2007, Dec 18, 2007 and Jan. 22, 2008. In an effort to consolidate resources the NAIC leadership decided to combine the Statistical Information (C) Task Force with the Casualty Actuarial (C) Task Force. The resulting Casualty Actuarial and Statistical (C) Task Force held open conference calls on Feb. 13, 2008, Feb. 21, 2008, and March 4, 2008. It was during the March 4, 2008 call that the Model Law was adopted by the Task Force and tendered to the Property and Casualty Insurance Committee for consideration. In an open meeting on March 31, 2008 the Committee adopted the Model Law with a minor amendment related to data confidentiality, not related to the entities required to report information.

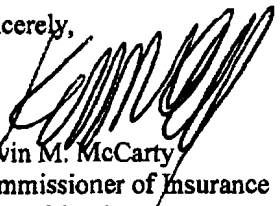
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We believe the record speaks for itself. All of the conference calls and meetings where this Model Law was discussed were open to all interested parties and states. There were no calls or meetings held in regulator-to-regulator closed sessions. If the Vermont delegation of NCOIL or the representatives of the Vermont Department of Banking, Insurance, Securities & Health Care Administration wished to participate in any or all of the discussions, there was ample opportunity for them to do so. In addition, at the request of Commissioner Thabault, we agreed to allow an additional time period for comment. The comments received from Vermont were on a topic that had been considered by the Task Force and discussed at length before the Task Force made an affirmative decision to request the information be reported by captives and risk retention groups. The Task Force was fully aware of the section of federal law (§3902 of the Liability Risk Retention Act) that Vermont mentioned in its letter that risk retention groups might use to inform nondomiciliary regulators that they did not intend to comply with the data request. That is why the Model Law allows the regulator to go directly to policyholders in that case. The Task Force suspected that once the policyholders were solicited directly, the policyholder/owners of the risk retention group would pressure the risk retention group into providing the information. To leave out captives and risk retention groups would be to fall substantially short of the recommendations contained in the GAO study and would leave a significant whole in the data. Further, it would promote a lack of uniformity in an area where greater uniformity is called for.


Even though we are well beyond the twenty-one days afforded for comments, we are scheduling a conference call for all interested parties to voice their concerns in an effort to reach consensus. We had scheduled a conference call for late next week, but at the request of the State of Vermont have rescheduled to accommodate their schedule. The call is now scheduled for Monday, August 25, 2008 at 3:00 p.m. eastern time.

Thank you for this opportunity to set the record straight.

Sincerely,



Kevin M. McCarty
Commissioner of Insurance
State of Florida
Office of Insurance Regulation



Thomas R. Sullivan
Commissioner of Insurance
State of Connecticut
Insurance Department