Issues related to LTC wellness benefits

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Background:

Stand-alone long-term care insurance is a unique industry, in that higher-than-expected claims’ costs have resulted in substantial rate increases for consumers and financial losses and in some cases solvency concerns for insurance companies.

Technology firms are developing approaches that could be used by insurance companies to potentially prevent or lower the severity of LTC claims and improve health outcomes in a space called “LTC wellness”. Examples of these early interventions include:

* Fall prevention programs;
* Home modification consultations, analysis and implementation to facilitate aging in place;
* Caregiver support programs for both formal and informal caregivers;
* Next generation care coordination services;
* Technological solutions aimed at improvements in cognitive impairment prevention and early diagnosis.

In light of systemic, LTC-related financial challenges, insurance companies, insurance regulators, and tech firms are interested in working together to explore some of these claim cost-reducing innovations. Here are some potential barriers to increased adoption of these new approaches and how those barriers could potentially be addressed, with details provided below the list:

1. Analysis of effectiveness

2. Unfair discrimination

3. Consumer confusion

4. Rebating

5. Tax considerations

6. Regulatory role in approving or evaluating LTC wellness approaches

7. Actuarial considerations

8. Data privacy

9. Other considerations

Details:

1. **Analysis of effectiveness**
   1. Issue: in light of the lag time between policyholder age during LTC wellness efforts and policyholder age when claim incidence becomes more common, what issues arise from insurers' lack of knowledge of effectiveness of LTC wellness programs in reducing claim costs, and how can those issues be addressed?
      1. The cost of innovation efforts, with no guarantee of any returns, may dissuade some insurance companies from pursuing these programs.
         1. Expenses are typically upfront and significant.
         2. The financial impact on claims cost is typically unknown and down the road.
      2. Designing pilot programs is difficult because there is such a variety of programs available, and each block of LTC insurance policies has unique characteristics that might influence the effectiveness of a given program.
      3. Some companies are concerned about regulatory reaction to these changes.
   2. Current observations
      1. Industry representatives described some current or likely upcoming LTC wellness efforts at the May 4, 2021 NAIC Reduced Benefit Option Subgroup meeting. A theme was that there is great supply and demand for LTC wellness innovation efforts.
      2. Some insurance companies are exploring or implementing pilot programs. Very early signs on the effectiveness of interventions on impact on policyholder health and claim costs are promising, but data development is slow and it is difficult to implement control trials.
         1. Insurance companies are eager for data and for ways to effectively share data within the legal and regulatory framework so that the industry can effectively respond to positive policyholder experiences and discontinue any programs that fail to make an impact.
      3. Because there is little competition in the stand-alone LTC insurance market, due to the financial losses accumulated and many insurance companies exiting the actively selling market, sharing of ideas between companies on management of active policies may be possible, although care should be taken regarding anti-trust issues.
   3. Addressing of Issues
      1. Lack of data: With most LTC wellness programs being under-developed or being implemented recently, data is lacking on the extent to which resulting claim cost decreases offset the costs of the programs.
      2. How to measure health impact: Whether an LTC wellness program effectively reduces claim costs or not, will there be approaches established to measure health benefits to policyholders?
      3. Data sharing: Facilitating the sharing of data, between vendors and insurance companies, and perhaps involving public programs such as Medicaid, is a key element of analyzing effectiveness.
   4. Next steps
      1. Regulators engage with insurance companies to learn of recent developments.
      2. Research public programs’ data on effectiveness of LTC wellness programs to see if Medicare Advantage, Med Supp, or Medicaid / PACE data is available, relevant, and used.
      3. Determine an approach to monitor success of programs. For example, if 3 to 4 companies are applying 3 to 4 pilot programs and finding success, it would be good news regarding broader, future efforts.
         1. Facilitate the sharing of general results (i.e., not individual policyholder data) among those insurance companies in a way that is within the legal and regulatory boundaries.
      4. Regulators ensure capital supporting LTC liabilities is adequate under a range of scenarios, including one where claims costs continue to increase.
2. **Prevention of unfair discrimination related to extra-contractual benefits and costs**
   1. Issue:how does an insurer offer a wellness initiative that is not unfairly discriminatory to discrete populations within the broader group of policyholders?
   2. Current observations
      1. There may be state anti-discrimination and bias-related legal issues to address if certain policyholders are targeted, including through Big Data, to receive extra benefits.
         1. For instance, if older policyholders have less of an online footprint than younger policyholders, how would this impact the accuracy of the targeting of LTC wellness benefits or otherwise introduce bias?
         2. [Birny Birnbaum May 4 comment]: If wellness or other efforts to address specific conditions are based on age or the health of the policyholder, this seems like normal value-added products and services for loss prevention and not an example of unfair discrimination.
            1. Issues to address are likely related to creating a clear framework for compliance related to the use of data analytics and artificial intelligence.
   3. Addressing of issues
      1. Equality: How policyholders are offered wellness initiatives could be unfairly discriminatory.
         1. Policyholders of “the same class and of essentially the same hazard” must be treated equally. *See* NAIC Model Unfair Trade Practices Act (#880) (“Model Law”).
         2. How may an insurer “classify” policyholders post underwriting?
            1. What is fair? The insurers will need to provide justification.

For example, under the Model Law the availability of the value-added product or service must be based on documented objective criteria and offered in a manner that is not unfairly discriminatory.

* + - * 1. May classification be made by jurisdiction? Does that impact the LTC Multi-State Actuarial Rate Review (MSA) program’s overarching goals?
        2. May classification be made by product form?
    1. Selection: How policyholders are selected for wellness initiatives could be unfairly discriminatory.
       1. Wellness initiatives may be costly to the insurer. How can an insurer test it to validate the benefits before rolling it out more broadly?
          1. Under the Model Act, the insurer may provide the product or service in a manner that is not unfairly discriminatory as part of a pilot or testing program for no more than one year.
       2. Would a random selection of policyholders be unfair?
       3. Should policyholders be given the option to participate in a wellness initiative?
          1. Must *all* policyholders be given the option to participate?
       4. How much time/data is needed to prove the initiative is valuable?
       5. Prior to offering a wellness program, an insurer should have a logical hypothesis of what benefits could be derived from the program.
    2. Accessibility: How a wellness initiative operates could be unfairly discriminatory.
       1. Does it limit who can participate based on the medium? For example:
          1. Does it require access to a computer or internet for online participation?
          2. Does it require access to a smart phone, texting minutes, etc., to use an app?
          3. Does it require access to roads, pools, sidewalks?
       2. Does any such limitation require alternatives for those unable to participate in the initiative?
    3. Uniformity: If guidance is issued on wellness initiatives, how would states adopt the guidance, especially if states have different standards for allowing wellness programs in LTC insurance?
       1. Have all states adopted the Model Law? If not, what have hurdles been for states that have not adopted the model? Will states adopt updates to the Model Law?
       2. Standards for unfair discrimination, including in the specific context of wellness initiatives, may vary by state requiring insurers and regulators to be aware of the specific requirements of the jurisdiction in question.
          1. For example, Alaska permits rewards under wellness programs but requires that the reward be available for “all similarly situated individuals.” *See* AK Stat § 21.36.110.
       3. If some states allowed wellness initiatives and not others, would this conflict with other initiatives, such as the MSA?
  1. Dependencies
     1. Unfair discrimination guidance needs to consider other wellness initiative issues that include:
        1. Analyzing Effectiveness
        2. Actuarial Impacts
        3. Rebate Standards and Limitations
        4. Regulatory Evaluation
  2. Next steps
     1. Regulators and interested parties discuss the issues noted above, including whether the use of Big Data to predict risks (of e.g., falls or dementia) and offering benefits and services only to those targeted as high risk would cause concerns regarding discrimination.

1. **Consumer confusion**
   1. Issue: potential consumer confusion concerning LTC wellness programs will be highly variable dependent upon factors such as the nature of the program, the consumers involved, and the complexity of regulatory issues.
   2. Addressing of issues:
      1. Wellness programs with simple to understand direct connections to prevention of common medical issues (e.g., installing a grab bar) will provoke far less confusion than more esoteric programs based on new technological services (e.g., data collection/monitoring of insured activities) with not yet proven results. Simpler programs may also trigger fewer and less complex regulatory/statutory requirements related to privacy, consent, disclosure, etc. resulting in programs that will be more easily understood and documented. Programs with newer technology, more data collection and manipulation, and which are connected to more complex care issues will be more confusing and will trigger more complicated regulatory/statutory requirements.
         1. In these scenarios, there may be a need to first educate consumers on the technology and the data collection/usage and then the program and its potential benefits before disclosure and informed consent can occur. The ability to prevent confusion and achieve adequate education and understanding may be further impacted by the level of technological sophistication and mental acuity of the consumer, factors which often decline with age.
      2. Designing effective communication regarding insurer LTC wellness programs will require in-depth engagement with LTC consumers, policyholders, family members, eldercare subject matter experts, and NAIC consumer representatives. When the vetting group engages with Medicaid programs, PACE, etc. to learn about best practices in wellness programming, the vetting group should take the opportunity to learn about the successes and failures in communication used in implementing these programs, including any relevant focus group data available.
      3. In addition to engaging with Medicaid and PACE, the following organizations may have valuable insights: National Council on Aging (www.ncoa.org), AARP (www.aarp.org), and the National Institute on Aging (www.nia.nih.gov). In addition to engaging with NAIC representatives and these national organizations, the Vermont team would also propose to reach out to Vermont’s sister agencies in state government (The Agency of Disabilities, Aging, and Independent Living (DAIL), and the Agency of Human Services, (AHS)). Lastly, Emily Brown serves on the board of directors for Central Vermont Home Health and Hospice. Engagement with this local group may provide rural eldercare perspectives missing at the national level.
      4. Focus groups designed to elicit feedback on communication style are most helpful when the programming has been determined. In the alternative, guidelines for communication and disclosure designed to minimize confusion and maximize understanding would need to be developed along a spectrum of wellness programs of increasing complexity. The results of vetting group work around rebating, program effectiveness, data privacy, loss of tax-preferred status, and discrimination concerns will determine components of what needs to be tested in focus groups. For instance, if the loss of tax-preferred status is something the vetting group can address at the federal level, it will not need to be considered when determining barriers to effective communication.
      5. Building consensus around terminology and building trust are essential to effective communication. In a Medicaid setting, the PACE program (Programs for All Inclusive Care for the Elderly), wellness efforts include a multidisciplinary team of health professionals coordinating care and no cost share on services. (Source: <https://www.medicaid.gov/medicaid/long-term-services-supports/pace/programs-all-inclusive-care-elderly-benefits/index.html>) . This builds trust through human contact with medical professionals.
         1. This type of communication is vastly different than the communication between an insurer and a long-term care policyholder facing a rate increase, where participation may have some impact on the premium rate increase the consumer must pay. As a result, extra care will need to be taken to ensure policyholders truly understand the offer and the level of participation required and that they do not acquiesce based on confusion or because they feel they have no other choice.
      6. As the wellness vetting subgroup works through the issues (program effectiveness, discrimination, data privacy, and tax considerations), the Vermont team hopes to build on the conversations planned with subject matter experts in eldercare programming. The vetting group should plan to add time at the end of the process to explore and understand the vetted programs with consumers via focus group(s) to best anticipate and mitigate consumer confusion.
2. **Rebating**
   1. Issue: whether some long-term care wellness benefits for policyholders run afoul of the NAIC Model anti-rebating laws or are otherwise prohibited. Those wellness plans may be designed to prevent or lower the severity of LTC insurance claims or to improve health outcomes (“Wellness Initiative”).
   2. Addressing issues:
      1. *NAIC Model Law.* The recently amended version of the NAIC Model Unfair Trade Practices Act (#880) (“Model Law”) explicitly exempts the type of Wellness Initiatives currently being considered from the prohibition on rebates as an unfair trade practice. Specifically, § 4 (H)(2)(e) of the Model Law excludes from “the definition of discrimination or rebates . . . [t]he offer or provision . . . of value-added products or services at no or reduced cost,” even “when such products or services are not specified in the policy of insurance,” if the product or service meets certain requirements. Amongst procedural requirements, the Model Law requires that the product or service (a) relate to the insurance coverage, (b) be “primarily designed to satisfy” one of nine functions, including providing loss mitigation, reducing claim costs, enhancing health, and incentivizing behavioral changes, and (c) cost a reasonable amount in comparison to premiums or coverage. As the Wellness Initiatives in question would be designed to prevent or lower the severity of LTC insurance claims and improve health outcomes, as long as their cost is reasonably related to the premiums or coverage, then they should not be considered rebates under the recently amended Unfair Trade Practice Act.
      2. Variations in State Law.The above cited language from the Unfair Trade Practices Act, § 4 (H)(2)(e), however, is a recent December 2020 addition to the Model Law. As such, most states have yet to specifically address that update and have only enacted a prior version of the Unfair Trade Practices Act. Unfortunately, the old language of the Model Law was less flexible on this point, which led a number of states to carve out exceptions by individual amendments, regulations, bulletins or desk drawer rules. And the Unfair Trade Practices Act is not the only model law with language prohibiting rebates in the business of insurance. As such, it is much less certain whether the Wellness Initiatives at issue would trigger the law’s anti-rebating provision. And the many state initiatives in this area do not permit a uniform analysis of rebating in each adopting jurisdiction as the precise language, interpretation, and application of the law varies by state.
         1. As a result, whether Wellness Initiatives could arguably be considered a rebate remains a question subject to the specifics of each individual state’s rebating law and how each jurisdiction has interpreted and applied that law. To provide a few examples of the variations in state law, even amongst states that have adopted the prior Model Law:
            1. **Alaska**: Statutorily excludes “a reward under a wellness program established under a health care plan that favors an individual” from the definition of rebates so long as seven requirements, including the program being designed to promote health or prevent disease, are met. *See* AK Stat § 21.36.110.
            2. **Maine**: Statutorily permits provision of a value-added service that is related to the coverage provided by an insurance contract, without fee or at a reduced fee, if it is (a) included within the insurance contract, (b) directly related to the servicing of the insurance contract, or (c) offered to provide risk control for the benefit of a client. *See* Me. Stat. tit. 24-A, § 2163-A.
         2. Thus, under the current legal landscape, those seeking to introduce Wellness Initiatives would need to confirm whether such an initiative would be permissible under each relevant jurisdiction’s rebating law and if there are any state specific requirements for offering such an initiative.
      3. Trends in State Law.Notwithstanding the variation in individual state’s laws and if and how they have been amended or interpreted, there does appear to be a general trend that “services are not prohibited if they are directly related to the insurance product sold, are intended to reduce claims, and are provided in a fair and nondiscriminatory manner.” J. Parson, D. Marlett, S. Powell, *Time to Dust Off the Anti-Rebate Laws*, 36 J. Ins. Reg. 7, at 8 (2017). Under this general approach, which aligns with the substantive result of the language in the current Model Law, a Wellness Initiative should not be prohibited as impermissible rebating.
      4. Policy Considerations. The exemptions in the current Model Law and the trend amongst states to permit certain services even if they are not contained within the insurance contract appear to be logical limitations on the scope of anti-rebating statutes. In short, Wellness Initiatives are not the type of conduct that anti-rebating statutes were originally designed to protect consumers against. This is particularly true in the context of LTC insurance where consideration of these initiatives only began significantly after the policies were initially sold, and moreover where the policies have proven to be unprofitable for the insurers. In other words, it is fair to assume that Wellness Initiatives in this context are not being used to either induce the policyholder to enter into the insurance contract, nor to expand the insurer’s share of the LTC insurance market. Rather, they are targeted at improving policyholder health and reducing the frequency and severity of claims.
      5. Conclusion. Given the current legal landscape with respect to rebating, to facilitate the success of Wellness Initiatives jurisdictions could either (a) adopt the recently added rebating exemptions found in the current version of the Model Law, which would explicitly permit such initiatives, or (b) take action to interpret and apply their existing laws in a manner that would allow the provision of products or services that are directly related to the insurance policy in question and designed to reduce claims or improve health. Absent adoption of the current version of the Model Law, however, insurers would need to conduct a state-by-state evaluation of rebating laws in all relevant jurisdictions before implementing a Wellness Initiative.
3. **Tax considerations**
   1. Issue: will non-ADL / non-cognitive benefits cause tax issues for policyholders?
   2. Current observations
      1. There may be tax consequences for consumers if benefits outside the federal definition of LTC benefits are provided, but this may depend on whether initial investment in programs is paid for out of general company expenses or from the benefit pool.
   3. Addressing issues: *[section to be drafted]*
   4. Next steps:
      1. Engage with the federal government and insurance industry tax experts to work out potential IRS/tax issues.
4. **Regulatory role in approving or evaluating LTC wellness approaches**
   1. Issue: there is question as to whether LTC wellness approaches need to be approved by regulators or will be implemented by companies and later evaluated by regulators.
   2. Current observations:
      1. There is little regulatory clarity or uniformity regarding LTC wellness programs.
   3. Addressing issues *[section to be drafted]*
   4. Next steps
      1. Analyze flexibility in existing laws that would allow for innovation that could potentially result in better health for policyholders and lower claims costs for insurance companies.
      2. Because LTC insurance is in a desperate situation in some cases regarding solvency and rate increases, explore a regulatory sandbox approach regarding LTC wellness innovations.
      3. Explore whether a company’s commitment towards innovation efforts could be a contingency to receiving a fully actuarially justified rate increase.
5. **Actuarial considerations**
   1. Issue: how are actuarial issues such as valuation, rate increase reviews, and reasonable value of benefits and options impacted by LTC wellness benefits?
   2. Current observations
      1. Although health outcomes can be expected to improve, to some extent, with LTC wellness programs, it is unclear how future claim costs will be impacted in comparison to the investment in the programs.
      2. As data emerges, actuarial issues related to the impact of LTC wellness benefits on future claim incidence and severity, could impact rate increases and reserves.
   3. Addressing of Issues
      1. Valuation: Under moderately adverse conditions, as data emerges, future cash flows associated with LTC wellness programs and potential claim cost reductions resulting from the programs may be incorporated into reserve adequacy testing, including Actuarial Guideline 51 stand-alone long-term care analysis, per actuarial standards of practice.
      2. Rates: As data emerges, future cash flows associated with LTC wellness programs and potential claim cost reductions resulting from the programs may be incorporated into lifetime loss ratio projections associated with rate-increase filings, per actuarial standards of practice.
      3. The NAIC Guidance Manual for Rating Aspect of the Long-Term Care Insurance Model Regulation and NAIC Health Actuarial Task Force-adopted Consolidated, Most Commonly Asked Questions - States' LTC Rate Increase Reviews document suggest that consistency between rate increase assumptions and reserve adequacy assumptions (noting reserve adequacy assumptions may include a margin to account for moderately adverse conditions) may be expected by some regulators.
      4. Reasonable value: The Long-term Care (EX) Task Force has tentatively established guidance that reduced benefit options in lieu of rate increases should provide reasonable value in comparison to the economic value of maintaining benefits and paying the increased premium. To the extent that LTC wellness benefits are tied into reduced benefit options, the holistic concept of reasonable value will likely be a consideration.
   4. Next steps
      1. Determine the NAIC venue to work through LTC wellness actuarial issues.
6. **Data privacy**
   1. Issue: utilization of consumers’ data for wellness initiatives can be used to develop the marketing strategy and a specific wellness initiative, as well as to analyze the impact or effects of a wellness initiative. The use of data to develop the target demographic for new sales, the selection of the existing consumers for wellness initiatives, or to determine the results of the initiative, could result in an insurer or third party data vendor using the data in a way that could be unethical, discriminatory, confusing, or otherwise problematic.
      1. With many of the tech advancements, data on the policyholder would be accessed to, e.g., help identify warning signs of risks such as falls and early-stage dementia.
   2. Current observations
      1. The standards applied by insurance companies and tech firm vendors to ensure certain levels of privacy are generally unknown.
      2. There are lessons from other types of insurance on the types of privacy-related issues that may develop.
      3. There are cases, and perhaps a trend, of programs/interventions being implemented without utilizing significant amounts of policyholder personally identifiable information.
   3. Addressing of issues
      1. Data Use to Identify Wellness Initiatives:
         1. Policyholders considerations:
            1. Confusion about why they are being solicited for the initiative.
            2. Suspicion about the motivation of the insurer.
            3. General lack of awareness that data is being collected, and what data is being collected.
            4. General lack the awareness or understanding on how data is collected and used.
            5. Will they know if their data was used to determine a specific wellness initiative for them versus being selected as part of a class of policyholders?
            6. Will the policyholder know what data is going to be used prior to participation?
            7. Should the policyholder have the option to “opt in/out” of their data being used internally for other initiatives or for external sale or use?
         2. Insurer considerations:
            1. Should insurer communications include why a wellness initiative is being offered; including what data is being used?
            2. Should insurers purchase data regarding their policyholders (e.g. data that shows specific policyholders may have a near term claim - purchasing canes, grab bars, electronic fall detectors, etc.)?
            3. How should wellness initiatives be marketed to a policyholder? Insurers may need to limit what is advertised on the envelope, postcard, etc. due to HIPAA concerns.
            4. Should insurers partner with vendors or service providers to supply specific policyholder data to the wellness company? What data should be sent? How will the data be transferred?
            5. Should insurers focus their data on policyholder specific needs and only offer services relevant to the ongoing needs?
            6. How are opt in/out options, disclosures, etc. being shared with the consumer? Email, letter, text, etc. Is it appropriate to the policyholder’s needs or preferences?
            7. When using third party data providers, what screening or data protection programs are in place?
      2. Data Use During Wellness Initiative Development:
         1. Should insurers purchase policyholder specific information from third party data sources?
            1. Data collected during purchases, search history, television programming, etc.
            2. Should it always be headless, anonymized, or deidentified?
         2. When considering big data, are there unacceptable “correlations”? How will insurers recognize relevant correlations vs irrelevant statistically significant correlations?
         3. Are there data use standards, controls, definitions of personal data, or a data privacy review body in place to ensure the data is used, stored, or shared ethically?
         4. When evaluating the data for wellness initiatives, will it focus on policyholder specific information – for example, will the policyholder’s claims detail or demographic factors determine the type of wellness initiative offered to that policyholder?
         5. Will the risk of a data breach be assessed and protected against by the insurer as well as all vendors or third-party data suppliers?
         6. Does the insurer have procedures in place to notify the policyholders of a potential breach?
      3. Wellness Results Data Use:
         1. Should the results be sold? Aggregate vs specific demographic information?
         2. Should insurers use the results internally for cross marketing other wellness initiatives?
         3. Should the policyholder be notified and have the option to “opt in/out” of letting the insurer use the data?
         4. Should the results be shared with the policyholder, POA, third party notifier? What guardrails should be in place relative to that sharing?
         5. How should the data be shared, if at all, with other vendors or service providers?
         6. How long will the data be retained? Will the data be destroyed or disposed?
   4. Dependencies
      1. Unfair Discrimination
   5. Next steps:
      1. Reach out to experts in the health insurance and Medicare Advantage, Medicare Supplement, or Medicaid / PACE areas to learn from their experiences.
      2. Identify applicable state privacy laws and HIPAA anti-marketing restrictions.
      3. Require insurance companies to provide information on privacy protection matters when claims management processes are established.
      4. Determine if policyholder approval of use of expanded data can be established at certain points in time:
         1. At times of options in lieu of rate increases, can insurance companies get agreement to attain more policyholder data?
      5. Can new contracts be written with evergreen access to some private data?
7. **Other considerations**
   1. Issue: other legal or market and administrative issues may come into play as LTC wellness programs are established.
   2. Current observations
      1. There are dozens or hundreds of cutting-edge technological advancements being developed to help with aspects of LTC claims management.
         1. It is difficult for insurance companies and regulators to determine which tech advancements are most promising in terms of likelihood of success and degree of impact on consumer health and reducing claims cost.
      2. TPAs or reinsurers used by direct-writing insurance companies may be resistant to administering these additional activities or may be concerned about potential legal ramifications that could impact their firms.
      3. Insurers could potentially be subject to requirements if a policyholder, e.g., is identified as having cognitive impairment and therefore be a risk related to driving or finances.
   3. Addressing issues *[section to be drafted]*
   4. Next steps
      1. Determine if there is objection to an insurance company offering an extra-contractual wellness benefit that is not tied to loss ratio / benefits / contracted obligations, i.e., out of expenses?
      2. Determine if benefits offered outside the contract could be considered in a similar category as because a reduced benefit option in lieu of a rate increase, which is essentially a mutually-agreed-to restructuring of the insurance contract.
      3. Either identify or ensure industry members are identifying requirements related to disclosing, e.g., when a policyholder has cognitive impairment and may be a high-risk driver.
      4. Regulatory guidance may help innovators engage in this space.