National Association of Insurance Commissioners
& The Center for Insurance Policy and Research

January 12, 2012

Hon. Fred Upton
Chairman
House Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Hon. Cliff Stearns
Chairman
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
U.S. House of Representatives
Washington, DC 20515

Hon. Joseph R. Pitts
Chairman
House Committee on Energy and Commerce
Subcommittee on Health
U.S. House of Representatives
Washington, DC 20515

Hon. Michael Burgess
Vice Chairman
House Committee on Energy and Commerce
Subcommittee on Health
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Upton, Chairman Stearns, Chairman Pitts, and Vice Chairman Burgess:

This letter is in response to your letter of December 7, 2011 requesting information regarding communications between the U.S. Department of Health and Human Services (HHS) and state Insurance Commissioners or staff of the National Association of Insurance Commissioners (NAIC).

The NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

As you are aware, the Patient Protection and Affordable Care Act (PPACA) requested that the NAIC establish, subject to the certification of the Secretary of HHS, standardized methodologies for calculating medical loss ratios (MLRs), including definitions of activities that improve health care quality for the purposes of calculating MLRs. As it has done in the past with standards for Medigap insurance coverage, the NAIC developed these recommendations using an open, transparent process. Prior to adoption, all issues were discussed on open conference calls and in-person meetings held by the two working groups of state regulators formed to develop the NAIC's recommendations. Adoption of proposals only occurred during open conference calls or in-person meetings. These calls and meetings were attended by hundreds of participants, including state regulators, insurers, agents and

brokers, consumer advocates, medical societies, business and employer groups, federal regulators, congressional staff, private citizens, and the media—all of whom were free to listen and speak to the issues at hand. All notices of conference calls, updated drafts and written comments received were posted to the NAIC website and distributed via email to interested parties who had requested to join a distribution list for that purpose. The NAIC takes this open and transparent process very seriously and has used it in the past when Congress has required insurance regulatory input. This regulatory expertise and transparent process are key reasons that our organization was chosen to perform this function.

We are providing the following responses to your questions:

1. ***Did HHS officials discuss the MLR regulations with either you or NAIC staff? If so, which HHS officials spoke with you or NAIC staff? If NAIC staff were involved in such discussions, please provide a list of the names of those staff members.***

Because the reporting requirements of the MLR provision of the health reform law took effect for plan years beginning six months after the date of enactment, HHS sought to publish regulations as soon as possible to allow sufficient time for health insurance issuers to incorporate any changes necessary to comply with the provision. State regulators also recognized the need to provide ample time for insurers to implement any changes necessary for compliance with the MLR requirements. For this reason, it was very important that HHS fully understand the NAIC's recommendations and all of the related aspects of state financial regulation of health insurers as quickly as possible in order to allow the Secretary to promptly certify our recommendations and issue regulations.

To facilitate this, we held weekly calls between key state regulators, NAIC staff, and HHS officials to keep them fully informed about the progress we were making and to help them understand the rationale behind the decisions that state regulators had come to. We also discussed the developments of the forms, or "blanks," that the NAIC was developing to collect the data needed to calculate an insurer's MLR. NAIC staff has provided a list of all of these calls, as well as a list of the regular participants to committee staff.

2. ***Did HHS officials engage in any communications with you or NAIC staff, whether oral or written, which indicated that HHS would refuse to certify in whole or in part the model regulations being considered by the NAIC? If so, please provide summaries of such information and any relevant documentation. This request includes any suggestions by HHS officials that certain provisions should be included excluded, or modified in any way.***

PPACA provides the NAIC's recommendations are subject to certification by the Secretary. Throughout the process, the NAIC understood that our recommendations would be certified by the Secretary as long as they were consistent with the law. While there were some instances when HHS officials expressed their interpretations of Congress' intent, particularly with respect to the definition of 'federal taxes' in the MLR calculation, or provided suggestions regarding a starting point for defining 'activities that improve health care quality,' at no time did HHS officials state or imply that they would

refuse to certify our recommendations if we did not follow their interpretation. These conversations are more fully explained in the next two responses.

3. ***Did HHS officials provide you or NAIC staff with legal interpretations of activities that may or may not be included within the definition of "activities that improve health care quality" and "non-claims costs" under Section 2718(a) of the Public Health Service Act (PHSA)? If yes, please provide the relevant documentation provided by HHS to you or NAIC staff.***

At one point, early in the process, HHS officials did suggest that we look at Section 2717 of the PHSA as a starting point for defining these activities. They were not alone in making this suggestion, which was also independently made by some state regulators and consumer representatives. The suggestion was discussed in an open conference call, and the members of the working group decided that, as our overriding concern was to be guided by the statute wherever possible, this approach made the most sense, and was adopted by the working group. Similarly, HHS occasionally provided informal recommendations regarding other issues under discussion by the NAIC. These were debated along with any other comments in the open meeting process prior to decisions being made. HHS officials did not provide any sort of formal interpretation of activities that may or may not be included within the definition of "activities that improve health care quality." The NAIC's recommendations were certified by HHS and included in their final regulation. We are in the process of identifying and compiling relevant documents and communications and will provide them to committee staff as soon as possible.

4. ***Did HHS officials provide you or NAIC staff with legal interpretations of the term "Federal and State taxes and licensing or regulatory fees" contained in Section 2718 of the PHSA? If yes, please provide the relevant documentation provided by HHS to you or NAIC staff.***

While state regulators did request that HHS provide a formal legal interpretation of the term 'Federal taxes,' HHS never provided one. On one conference call, administration officials made available two former staff members from committees that had jurisdiction over PPACA during its congressional consideration. They suggested that they believed Congress' intent was to include only those federal taxes that had been imposed by PPACA under the meaning of this term. An identical argument had been made in a letter sent to the NAIC by Senators Max Baucus, Tom Harkin and Chris Dodd and Representatives Henry Waxman, Sander Levin and George Miller, the chairmen of the committees of jurisdiction over PPACA. As participants remember the call, administration officials qualified this interpretation as not an HHS position, prompting state regulators to ask for a formal interpretation, which we never received. As with the definitions of activities that improve health care quality, the issue was discussed and debated in open conference calls. Ultimately, the NAIC chose a much broader definition of federal taxes that included all federal taxes, except those on investment income. This definition did not prevent HHS from certifying our recommendations, and it was included in HHS' final regulations implementing the MLR provision.

We hope that this response is helpful to the Committee's understanding of how the NAIC arrived at its recommendations and the interactions between the NAIC and HHS during that process. NAIC staff will follow up as quickly as possible to provide any relevant communications and documents. Please let us know if you have any additional questions.

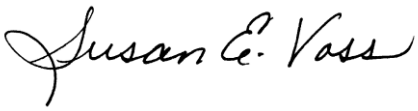
Sincerely,

Kevin M. McCarty
Florida Commissioner of Insurance and
NAIC President

James J. Donelon
Louisiana Commissioner of Insurance and
NAIC President-Elect

Adam Hamm
North Dakota Insurance Commissioner and
NAIC Vice President

Monica J. Lindeen
Montana Commissioner of Securities and
Insurance and
NAIC Secretary-Treasurer



Susan E. Voss
Iowa Commissioner of Insurance and
NAIC Immediate Past President

Sandy Praeger
Kansas Commissioner of Insurance and
Chair, NAIC Health Insurance and Managed
Care (B) Committee

Cc: The Honorable Henry A. Waxman, Ranking Member
Committee on Energy and Commerce

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Frank Pallone, Ranking Member
Subcommittee on Health