

## Draft Pending Adoption

Draft: 12/14/22

Senior Issues (B) Task Force  
Tampa, Florida  
December 13, 2022

The Senior Issues (B) Task Force met in Tampa, FL, Dec. 13, 2022. The following Task Force members participated: Jon Pike (UT), Vice Chair; Lori K. Wing-Heier represented by Sarah Bailey (AK); Ricardo Lara represented by Tyler McKinney (CA); Michael Conway represented by Peg Brown (CO); Andrew N. Mais represented by Paul Lombardo (CT); Trinidad Navarro represented by Sally Frechette (DE); David Altmaier represented by Chris Struk (FL); Colin M. Hayashida represented by Kathleen Nakasone (HI); Doug Ommen represented by Andria Seip (IA); Dean L. Cameron represented by Shannon Hohl (ID); Vicki Schmidt (KS); Sharon P. Clark represented by Shawn Boggs (KY); James J. Donelon represented by Ron Henderson (LA); Gary D. Anderson represented by Kevin Beagan (MA); Kathleen A. Birrane represented by Mary Kwei (MD); Timothy N. Schott represented by Marti Hooper (ME); Anita G. Fox represented by Renee Campbell (MI); Grace Arnold represented by Julia Drier (MN); Chlora Lindley-Myers represented by Carrie Couch (MO); Mike Causey represented by Ted Hamby (NC); Jon Godfread represented by John Arnold (ND); Eric Dunning represented by Martin Swanson (NE); Judith L. French represented by Laura Miller (OH); Andrew R. Stolfi represented by Tricia Goldsmith (OR); Michael Humphreys (PA); Larry D. Deiter represented by Jill Kruger (SD); Carter Lawrence represented by Brian Hoffmeister (TN); Scott A. White represented by Julie Blauvelt (VA); Tregenza A. Roach represented by Cheryl Charleswell (VI); Kevin Gaffney represented by Pat Murray (VT); Mike Kreidler represented by Todd Dixon (WA); Nathan Houdek represented by Jennifer Stegall (WI); and Allan L. McVey represented by Ellen Potter (WV).

### 1. Adopted its Oct. 17 and Summer National Meeting Minutes

The Task Force met Oct. 17. During this meeting, the Task Force took the following action: 1) adopted its proposed 2023 charges; and 2) discussed the conflict between Medicare and the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) rules.

Swanson made a motion, seconded by Kruger, to adopt the Task Force's Oct. 17 (Attachment One) and Aug. 11 (see *NAIC Proceedings – Summer 2022, Senior Issues (B) Task Force*) minutes. The motion passed unanimously.

### 2. Considered Adoption of Letters to the U.S. Congress and to the U.S. DOL

Commissioner Pike asked the Task Force if there is any discussion about the two letters regarding the conflict between Medicare and COBRA rules that has led to some confusion about which system and which set of rules govern eligibility for coverage, and how the responsibility for payment of health care benefits for eligible individuals is determined.

Bonnie Burns (California Health Advocates—CHA) said the letters are not enough and encouraged the Task Force to reconsider editing the *Coordination of Benefits Model Regulation* (#120). She said the exception pertaining to people who are eligible or who could be eligible for Medicare benefits is unfairly discriminatory and makes no sense. She said no one has been able to tell her where this language came from or why it was put into the model.

Burns said the NAIC should delete the exception for Medicare Part B in Model #120, as there is no rationale for this exception in the NAIC historical record, and it unfairly penalizes and discriminates against Medicare beneficiaries. She said the action specified in the exception “is or could have been covered,” produces a result that is expressly prohibited in the same subsection for any other form of health benefits. She recommended changes to parts of Section 5D of Model #120.

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Commissioner Pike said this is a tough issue. He said that in his discussions with other state insurance regulators, he gets the sense that the percentage of people affected is small and that the bulk of those people would fall under the federal Employee Retirement Income Security Act of 1974 (ERISA), which would not be under the NAIC's purview. He said the feeling is should the U.S. Congress and/or the U.S. Department of Labor (DOL) make changes, then editing the model would make more sense.

Burns said the current language in the model gives insurers a free hand to discriminate. Commissioner Pike asked if there is a motion to adopt the letters. None was heard. Lombardo said the Task Force should hold further discussions on this issue. Seip raised a case in Iowa of a person under age 65 but getting End-Stage Renal Disease (ESRD) treatment although not diagnosed with ESRD, and the carrier, presuming the person was diagnosed, denied payments.

The Task Force decided not to act on the letters and to discuss further during a future meeting.

### 3. Heard a Review of a Summary Prepared to Illustrate the Work of the Now-Disbanded Long-Term Care Insurance Model Update (B) Subgroup

Commissioner Pike asked David Torian (NAIC) to present a review of the summary of the work of the now-disbanded Long-Term Care Insurance Model Update (B) Subgroup. Torian said the summary of can be found under the Documents tab of the Task Force's web page. He said one of the charges of the Task Force is to review the existing long-term care insurance (LTCI) models to determine their flexibility to remain compatible with the evolving delivery of long-term care (LTC) services and remain compatible with the evolving LTCI marketplace. He said the Long-Term Care Insurance Model Update (B) Subgroup was established to determine whether the *Long-Term Care Insurance Model Act* (#640) and the *Long-Term Care Insurance Model Regulation* (#641) needed to be updated to remain flexible and compatible with the LTCI marketplace. He said the purpose of the Subgroup was simply to determine if language in the models no longer met the current LTCI marketplace and not to edit the models.

Torian said after completing the cursory review of Model #640 and Model #641 through Section 19, the the Subgroup chair had left the New Jersey Department of Banking and Insurance. No new chair was able to be found and during the eight months in search of a new chair, there were no inquiries or questions regarding the status of the Subgroup. Torian said the Task Force moved to disband the Subgroup at the Summer National Meeting with the understanding that if it needed to be reinstated, the Task Force can do so. He said Tomasz Serbinowski (UT), a member of the Subgroup, suggested at the Summer National Meeting that a summary of its completed work be drafted for future consideration if necessary.

Serbinowski said the summary is important because much work was completed, and he asked for the summary to be considered and used on any future work to Model #640 and Model #641. Burns said it was disappointing the Subgroup was disbanded as there are products in the current marketplace that models do not address. She said the majority of products in the marketplace are now life and annuity plans with an LTC component attached. She said these products are complicated and confusing to consumers and agents. She said there has to be better disclosures and information about these products.

### 4. Heard a Federal Legislative Update on SHIP Funding

Commissioner Pike asked Torian to provide a federal legislative update. Torian said the State Health Insurance Assistance Program (SHIP) funding is still operating under a Continuing Resolution that is keeping the federal government open. He said SHIP is currently funded at its fiscal year (FY) 2022 level of \$53,115,000. He said the U.S. House Labor, Health and Human Services, Education Appropriations Subcommittee proposed SHIP funding for FY 2023 at \$58,115,000, and the U.S. Senate Labor, Health and Human Services, Education Committee

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proposed no increase and keeping SHIP at the FY 2022 level of \$53,115,000. He said the NAIC will remain committed to its strong support for SHIP and will continue to express that support to the House and Senate leadership and to the House and Senate Appropriations chairs and ranking members.

### 5. Heard an Update on Improper Marketing Practices

Swanson said the improper marketing of Medicare and Medicare Advantage has gotten worse. He said there is an influx of scammers being based offshore, outside the reach of not only the states but also the Centers for Medicare & Medicaid Services (CMS). He said he experienced such a call to his wife and spent 25 minutes trying to get a manager or supervisor and then was cut off. He also said there are websites that appear to be approved by the CMS but are not. These websites are generated offshore. He also pointed out that the rerouting of calls and numbers has increased and is becoming more prolific.

Commissioner Schmidt said she experienced these calls personally where the number appears to be coming from Kansas government because it shows the Kansas government telephone prefix. She said she tries to keep them on the line to waste their time and also to prevent them from making calls to a vulnerable senior. Burns said there must be a way to slow down these scammers.

Burns suggested the Task Force use the Senior Medicare Patrol (SMP), which is in every state. She said the SMP was created to empower and assist Medicare beneficiaries, their families, and caregivers to prevent, detect, and report health care fraud, errors, and abuse through outreach, counseling, and education. Harry Ting (Health Consumer Advocate) said he has seen an increase of people being switched to Medicare Advantage plans without the beneficiaries being aware, and he encouraged state insurance regulators to also inform and work with SHIP offices in their state.

### 6. Discussed Other Matters

Dixon updated the Task Force about his state's WA Cares Fund program, which is an LTCI benefit established by Washington state law in 2019. He said the WA Cares Fund has been postponed due to the number of complaints but is slated to restart on July 1, 2023. He said the state's insurance department is not part of the legislation that created the program or is part of the program. He said, however, that data and information from the state's insurance department is being used. He said one aspect of the program is an opt-out provision from the program, and one method of exemption is that the person must attest that they have other LTCI. However, there is no requirement that the person must prove they have a policy.

Dixon said the state is examining the creation of a supplemental LTC program to help reduce the Medicaid numbers in the state. He said Burns has contributed to the task force that is examining the development of this program. Burns said she has been participating and contributing, and she pointed out that California also has been investigating this issue. She said the state established the Long-Term Care Insurance Task Force in the California Department of Insurance (DOI) to explore the feasibility of developing and implementing a culturally competent statewide insurance program for LTC services and supports. She said the recommendation options for establishing a statewide LTCI program is to be submitted to the state legislature at the end of next month.

Having no further business, the Senior Issues (B) Task Force adjourned.

[SharePoint/NAIC Support Staff Hub/Member Meetings/B CMTE/SITF/Fall National 12-13 SITF Minutes.docx](#)

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Attachment One

Draft: 10/26/22

### Senior Issues (B) Task Force Virtual Meeting October 17, 2022

The Senior Issues (B) Task Force met Oct. 17, 2022. The following Task Force members participated: Jon Pike, Vice Chair (UT); Lori K. Wing-Heier represented by Sarah Bailey (AK); Mark Fowler represented by Willard Smith (AL); Evan G. Daniels represented by Jon Savary (AZ); Ricardo Lara represented by Tyler McKinney (CA); Andrew N. Mais represented by Paul Lombardo (CT); Trinidad Navarro represented by Frank Pyle (DE); David Altmaier represented by Chris Struk (FL); John F. King represented by Paula Shamburger (GA); Colin M. Hayashida represented by Lisa Zarko (HI); Dean L. Cameron represented by Shannon Hohl (ID); Vicki Schmidt represented by Craig VanAalst (KS); Sharon P. Clark represented by Stephanie McGaughey-Bowker (KY); James J. Donelon represented by Ron Henderson (LA); Gary D. Anderson represented by Kevin Beagan (MA); Kathleen A. Birrane represented by Jamie Sexton (MD); Timothy N. Schott represented by Marti Hooper (ME); Anita G. Fox represented by Renee Campbell (MI); Chlora Lindley-Myers (MO); Troy Downing represented by Ole Olson (MT); Mike Causey represented by Ted Hamby (NC); Jon Godfread represented by Yuri Venjohn (ND); Eric Dunning represented by Martin Swanson (NE); Barbara D. Richardson represented by Jack Childress (NV); Judith L. French represented by Tynesia Dorsey (OH); Glen Mulready represented by Andrew Schallhorn (OK); Andrew R. Stolfi represented by Lisa M. Beck (OR); Michael Humphreys represented by Shannen Logue (PA); Carter Lawrence represented by Brian Hoffmeister (TN); Cassie Brown represented by Dannette Smith (TX); Scott A. White represented by Julie Blauvelt (VA); Kevin Gaffney represented by Mary Block (VT); Mike Kreidler represented by Ned Gaines (WA); Nathan Houdek represented by Diane Dambach (WI); and Allan L. McVey represented by Joylynn Fix (WV). Also participating were: Eric Anderson (IL); Bogdanka Kurahovic (NM); Martin Wojcik (NY); Patrick Smock (RI); and Tana Howard (WY).

#### Adopted its 2023 Proposed Charges

Director Lindley-Myers made a motion, seconded by Ms. Campbell, to adopt the Task Force's 2023 proposed charges (Attachment One). The motion passed unanimously.

#### Heard a Discussion About Medicare and COBRA

Commissioner Pike asked Bonnie Burns (California Health Advocates—CHA) to summarize her previous presentations on this issue for the Task Force. Ms. Burns said the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) is a federal law giving one the legal right to keep their employer's health benefits that might otherwise end due to job loss, divorce, or death. She said employers of a certain size are required to offer COBRA when one retires or leaves an employer, and this is the same health plan coverage one had while working. Yet, federal health benefit payment rules that apply while one is working and eligible for Medicare are not the same after one stops working and is eligible for COBRA and Medicare at the same time.

Ms. Burns provided as an example a 76-year-old client who left employment and signed up for Medicare Part A at age 65 but did not sign up for Part B as he was still working. She said the employer, a large group health benefits consultant, provided eight months free of COBRA as part of his separation agreement, and he was provided with a lot of verbal instruction. She said the COBRA carrier, a large group health benefits company, paid the COBRA primary benefits, but at six months, the carrier discovered eligibility for Medicare but was not enrolled for benefits. She said the client had large medical expenses, and the carrier sought recovery for \$80,000 of primary COBRA paid benefits.

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Ms. Burns said COBRA is the same primary health benefits as when employed. She said the former employee pays 100% of premium plus an administrative fee. She said with or without Medicare benefits, Medicare Secondary Payer (MSP) rules do not apply. She said COBRA is automatically secondary, and added there is a disconnect between Social Security and Medicare.

Ms. Burns said the *Coordination of Benefits Model Regulation* (#120) exception pertaining to people who are eligible or who could be eligible for Medicare benefits is unfairly discriminatory. She said the NAIC should delete the exception for Medicare Part B in Model #120, as there is no rationale for this exception in the NAIC historical record, and it unfairly penalizes and discriminates against Medicare beneficiaries. She said the action specified in the exception, “is or could have been covered,” produces a result that is expressly prohibited in the same subsection for any other form of health benefits. She recommended changes to parts of Section 5D of Model #120. Silvia Yee (Disability Rights Education and Defense Fund—DREDF) said she supports Ms. Burns’ proposal.

Commissioner Pike asked Ms. Burns about her proposed edits to Section 5D. Ms. Burns said she believes the edits could help eliminate this one exception that allows insurers either not to pay benefits at all or to reduce the benefits. She said she would appreciate comments to understand if the proposal she offered would make a difference as she is not an attorney.

Ms. Hohl asked how this would interact with MSP rules and whether that would create a conflict, as that may be where the real issue comes into play. She asked whether it makes sense to revise the language without looking at the MSP rules. Ms. Burns said the MSP rules only apply when a person is actively working, and they apply to the employer group health plan while working; but once a person is not working, under Internal Revenue Service (IRS) rules, the MSP rules do not apply and do not apply to COBRA because COBRA is something one gets when not working.

Jacqueline Cipa (Centers for Medicare & Medicaid Services—CMS), Deputy Director of Medicare Secondary Payer Operations of the CMS, said she was not really aware of these concerns and all the nuances raised, but she invited Ms. Burns to reach out and speak with her office in more detail. Ms. Burns said she is happy to have this discussion. She also asked the CMS to examine all of the information on Medicare.gov because there is nothing about when a person leaves employment and what happens to them regarding the impact of being eligible for Medicare.

Amber Rivers (U.S. Department of Labor—DOL), Director of the Office of Health Plan Standards and Compliance Assistance of the Employee Benefits Security Administration of the DOL, said this matter came on the DOL’s radar back in 2020 from a congressional letter received, and what the DOL tried to do was better highlight the interaction with Medicare in the context of consumers not only receiving the general notice about COBRA but also the election notice to help inform consumers. She said there are specific statutory requirements under COBRA that deal with the continuation of coverage provisions, and they have tried to make model notice more robust, but they are not required, and she said the DOL is open to further discussion on how to make it better for consumers. Ms. Burns said she appreciates that the notices are more robust, but consumers are still not getting these notices, and nearly all the information a consumer receives is verbal from their human resources (HR) department.

Ms. Blauvelt said the change Ms. Burns proposes may help with a similar issue involving federal Affordable Care Act (ACA) small group plans, not COBRA, but there are parallel similarities as it pertains to Model #120. She said she had inquired about whether other states have guidance or information regarding the coordination of benefits with marketplace consumers of Medicare age who are not enrolled in Medicare for either residency ineligibility (e.g., recently immigrated to the U.S.); insured to pay Part A premium; and/or eligible but not yet enrolled. She said perhaps including a reference to Part A in Ms. Burns’ suggested edits could help.

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Ms. Burns said the issue is different, but the suggested edits to Model #120 could help with Ms. Blauvelt's issue as well. She said Model #120 Sections 5D(1), (2), and (3) tell an insurer they cannot do the things listed in Sections 5D(1), (2), and (3), and the creation of subsection (4) was suggested for clarity, but not including subsection (4) may actually help both issues. She said she would like some clarity from state insurance regulators regarding whether they think her proposals would do what she intends.

William G. Schiffbauer (Schiffbauer Law Office) said he and Guenther Ruch (GHR Consulting LLC) looked at this issue a few years back for Ms. Burns and came up with the suggestion of adding a subsection (4) to be more explicit. Ms. Burns said perhaps to be more explicit, the proposed subsection (4) could either not include the words "Part B" or include the words "Part A and Part B."

Commissioner Pike asked Ms. Burns if she would like to sit down first with the DOL and/or the CMS and then sit down with state insurance regulators so everyone is on the same page. Ms. Burns said she does not see a reason to sit with the DOL first, as the issue of editing the model is separate from the DOL and the CMS, just as the things the DOL should do is separate from the NAIC. Mr. Schiffbauer felt it would be helpful to meet with the DOL and the CMS and see if the proposed additional language works and everyone can be on the same page.

Commissioner Pike said he would appreciate any direction on how to proceed with Model #120, and he will discuss this further with Commissioner Caride and NAIC staff.

Having no further business, the Senior Issues (B) Task Force adjourned.

[SITF Minutes 10-17-22](#)