NATIONAL COUNCIL OF INSURANCE LEGISLATORS
LIFE INSURANCE & FINANCIAL PLANNING COMMITTEE
NCOIL SUMMER MEETING - SALT LAKE CITY, UTAH
JULY 12, 2018
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Life Insurance & Financial Planning Committee met at the Little America Hotel in Salt Lake City, Utah on Thursday, July 12, 2018 at 11:45 a.m.

Representative Deborah Ferguson of Arkansas, Chair of the Committee, presided.

Other members of the Committee present were:

Sen. Jason Rapert (AR)
Rep. David Livingston (AZ)
Asm. Ken Cooley (CA)
Rep. Richard Smith (GA)
Rep. Matt Lehman (IN)
Rep. Joseph Fischer (KY)
Rep. Jim Gooch (KY)
Rep. Edmond Jordan (LA)
Sen. Dan "Blade" Morrish (LA)
Rep. Michael Webber (MI)
Rep. Joe Hoppe (MN)
Rep. Lois Delmore (ND)
Rep. George Keiser (ND)
Asw. Pamela Hunter (NY)
Rep. Jim Dunnigan (UT)

Other legislators present were:

Rep. Paul Mosley (AZ)
Rep. Bryon Short (DE)
Rep. Martin Carbaugh (IN)
Sen. Brian Feldman (MD)
Sen. Paul Utke (MN)
Asw. Maggie Carlton (NV)
Asw. Ellen Spiegel (NV)
Sen. Neil Breslin (NY)
Sen. Jay Hottinger (OH)
Rep. Glen Mulready (OK)
Rep. Rodney Anderson (TX)
Rep. Tom Oliverson, M.D. (TX)
Rep. Joe Schmick (WA)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its March 3, 2018 meeting in Atlanta, GA.

THE DOL FIDUCIARY RULE – NOT ALL QUIET ON THE STATE FRONT

Francine Semaya, Esq., stated that this past March, the 5th Circuit Court of Appeals issued a 2-1 decision that vacated the DOL Fiduciary Rule. Essentially, the Court ruled that the DOL did not have the authority to adopt the Rule and found that the DOL had acted arbitrarily and capriciously. The DOL had 45 days from entry of the judgment to request that all the 5th Circuit judges re-hear the case (i.e. an *en banc* session). The

DOL also had an option to go to the U.S. Supreme Court for permission to appeal the 5th Circuit's decision, but the DOL did neither. California, New York, and Oregon had also filed motions to intervene in the 5th Circuit and asked for an *en banc* session. All motions were denied twice. Accordingly, last month, the Rule "died."

Ms. Semaya stated that while the current Administration let the Rule "die", the SEC, and a number of states, have worked to propose their own Fiduciary or best interest standard rules and laws. Additionally, the NAIC Annuity Suitability Working Group has been working on amending the NAIC Suitability in Annuity Transactions Model Regulation. Ms. Semaya also stated that many firms had taken steps necessary to be in compliance with the Rule so that advisors had to give conflict-free advice on retirement accounts thereby putting the client's needs ahead of any potential compensation. Both supporters and opponents of the Rule were widespread.

In April, the SEC released its proposed best interest rule for brokers which increased the SEC's requirements for conflict of interest for brokers, but it came very short of the more restrictive DOL Rule. Eleven (11) states have contacted the SEC asking it to make its proposal more like the DOL Rule. The SEC's proposal applies to both non-retirement and retirement accounts, unlike the DOL Rule which only applied to retirement accounts. There is a 90-day comment period on the SEC's proposal.

Ms. Semaya stated that Connecticut passed legislation that requires administrators of certain retirement plans to disclose conflicts of interest which went into effect on October 1, 2017. The law applies to any person that enters into a contract or agreement with a 403B plan not regulated under ERISA to provide services and reasonably expects to receive $1,000 or more in direct or indirect compensation. In Illinois, a bill is pending in the House titled "The Investment Advisors Disclosure Act." A bill was also introduced in the Maryland Senate that would have extended the fiduciary rules applicable to investment advisors to broker-dealers, agents, and financial advisors. On March 19, the Maryland Senate approved a financial reform bill titled the "Financial Consumer Protection Act of 2018" which included instructions to the Maryland Consumer Financial Protection Committee to study the outcome of Federal efforts on fiduciary duties and then determine whether or not Maryland should enact its own fiduciary law.

On February 7, Massachusetts proposed a regulation that would require investment advisors that are registered with the Massachusetts Securities Division to create a fee table for advisory clients. The fee table would be required to be updated annually and presented annually to their current advisory clients. Massachusetts also went after Scottrade in February for holding contests which was not only in violation of the DOL Rule, which was in partial effect at the time, but also in violation of Scottrade's internal rules. Such action prompted an interesting question: can states enforce a federal rule that has been incorporated into the internal policies of a company when the federal agency fails to do so?

Nevada was the first state to adopt something related to the DOL Rule back in 2017. The legislation is not applicable to insurance unless it is accompanied by investment advice. Regulations are starting to be promulgated to enforce that law. Two bills were introduced in New Jersey this past January – SB 735 would require financial advisors to disclose fiduciary status to investors. The bill makes a very clear distinction between non-fiduciary investment advisors and those subject to a fiduciary duty. Non-fiduciary advisors must advise clients orally and in writing that they do not have any duty to act in the client's best interests. Fiduciary advisors would have to advise clients that they are subject to a fiduciary duty. Both types of advisors must give the proper disclosure, or they are subject to a $5,000 fine.

In New York, the initial proposal to amend its suitability regulation was issued on Dec. 27, 2017 and the comment period ended in February. In May, the NY DFS amended its proposal to require insurance companies to establish standards and procedures for recommendations to consumers for insurance products delivered or issued for delivery in NY. The updated proposal not only applies to standard life insurance and annuity contracts, but also in-force transactions. The proposal applies to all producers in the transaction who receive compensation regardless of the level of contact with the consumer. The proposal also prohibits stating or implying that a recommendation to enter into a sales transaction or in-force transaction is financial planning, comprehensive financial advice, investment management, or related services, unless such advisor has a certification or professional designation and is properly licensed.

Insurance companies will now be required to establish, maintain and audit a system of supervision to achieve compliance with the regulations. The best-interest standard will now be applicable to all sales of life insurance and annuity products. The proposal requires that the sales transaction be suitable, that there is a reasonable basis for believing the consumer has been reasonably informed of all features of the product whether favorable or unfavorable, and insurers must establish and maintain procedures designed to prevent financial exploitation. The comment period ended on June 15.

Ms. Semaya closed by stating that court rulings in CA, MO, SC and SD have imposed different types of fiduciary duties, and the next step is to see what the NAIC Annuity Suitability Working Group will do regarding amendments to its Model.

Dean Cameron, Director of the Idaho Department of Insurance, and Chair of the NAIC Annuity Suitability Working Group (Working Group), stated that it speaks volumes that he was chosen to Chair the Working Group as he has years of experience as a licensed agent selling annuities and life and health insurance. He has had the privilege of sitting down with folks to help them plan for their retirement and the NAIC recognizes that state regulators, as well as federal regulators, have an appropriate role in this marketplace. State regulators have the role of administration and enforcement of the standards of retirement plans and products within their jurisdiction. State insurance regulators are responsible for regulating the insurance companies and agents who sell products. The SEC and FINRA have the responsibility of joint jurisdiction with states over variable annuities, variable products, and they regulate brokers and dealers. The DOL has the responsibility to regulate ERISA plans and they overstepped their bounds with trying to issue the Fiduciary Rule.

Dir. Cameron stated that the DOL did not anticipate a withdrawal of agents and carriers willing to participate in the annuity marketplace and noted that it is interesting to note that even after the 5th Circuit's ruling, some employees within the DOL have indicated that they are not finished with their work. As noted, the SEC has also proposed its rule package and the NAIC has met with them to discuss certain issues. Dir. Cameron stated that the industry has encouraged the NAIC to try and have as much consistency and compatibility between its proposal and the SEC's proposal.

Dir. Cameron noted that the current NAIC Annuity Suitability Model is doing a great job – 98% of the cases regulators see are handled through that Model. Unfortunately, the DOL and others staked out the moral high ground and labeled their efforts as acting in the consumer's "best interest." Dir. Cameron stated that, from his perspective, the majority of agents and carriers already act in the consumer's best interest. Because the DOL has staked out the moral high ground on "best interest," the NAIC has moved away from trying to define "best interest" and instead has focused on developing on a "standard of care" – how does the agent justify their recommendation to the consumer?

A lot of the discussion in the NAIC has been focused on what level of disclosure should be required. The DOL Rule required complete disclosure of commissions and there is almost a feeling that "commission" is a dirty word; but we all know that commissions are what encourage agents to sit down with consumers and help them determine what products are available. The NAIC believes that if there are disclosures, it should be the same for commissions and fees and there should be an appropriate level of justification. There is a debate over whether the disclosure should be just how the agent is compensated, or how much they are compensated. Dir. Cameron noted that, as an agent, he never knew what the commission was when he recommended a product; his interest was doing right by the consumer because if he did so, the consumer would recommend him to friends and family. Most agents operate under that theory.

Dir. Cameron stated that another issue under debate is over the disclosure of non-cash compensation – does an agent have to disclose that he/she may qualify for a trip if they sell a certain amount of annuities? The problem is that most agents would not know until they are right on the cusp of qualifying, and most of the time that has no bearing on the product being recommended. Dir. Cameron stated that the NAIC understands that there is a retirement crisis in this country and it does not want to do anything that inhibits people from planning for their retirement. It is certainly not the NAIC's goal to mimic what the DOL was proposing. Rather, the NAIC's goal is to review the Model and to see if there are ways to collaborate and have consistency in the industry. Agents should be able to be informed as to what their requirements are in a straightforward manner, and carriers should have that ability as well. Dir. Cameron closed by stating that the NAIC welcomes NCOIL's input and collaboration on the Working Group's activities.

Rep. Matt Lehman (IN), NCOIL Treasurer, asked whether the NAIC sees the NY DFS developments as the start of perhaps seeing similar requirements in the P&C industry. Dir. Cameron replied no and stated that the NAIC has shut down such proposals before. Dir. Cameron also stated that the NAIC is a long way away from seeing any amendments to the Model being adopted given its longstanding methodical way of working, and that the NAIC certainly wants to avoid acquiescing the field to the DOL or SEC, as the NAIC firmly believes in state-based insurance regulation. Dir. Cameron stated that the NAIC is also concerned about having a patchwork of state laws on these issues.

Sen. Jason Rapert (AR), NCOIL President, asked Ms. Semaya and Dir. Cameron for the list of states that are pursuing laws or regulations similar to the DOL Rule. Ms. Semaya stated that New York's proposal is perhaps even more stringent than the DOL Rule, and referenced New Jersey, Maryland, Connecticut, Illinois, and Nevada. Dir. Cameron noted that despite passing legislation two years ago, Nevada has not been able to promulgate a rule on the legislation yet, and it is noteworthy that the legislation was brought forth by certain legislators, not the Nevada Dep't of Insurance. Dir. Cameron also noted that CA is pursuing legislation as well. Sen. Rapert noted that NCOIL passed a Resolution that he sponsored that opposed the DOL Rule in November 2016.

Sen. Rapert stated that he is interested in watching the aforementioned state activities because he still maintains his Series 7 license and having a number of different state requirements can be a compliance nightmare for advisors and companies. Sen. Rapert urged the Committee to monitor those activities and the NAIC's activities. Sen. Rapert closed by stating that many of these state activities, including the DOL Rule, are under the guise of helping the consumer but in reality, it disincentivizes agents from sitting down in the first place with those consumers.

Rep. Martin Carbaugh (IN) stated that he is an insurance agent and financial planner and it would be odd for everyone involved if certain products must be in the client's "best interest," while others have to be "suitable." What is in the "best interest" of a client can be very hard to determine, particularly when dealing with universal vs. whole life insurance distinctions. Rep. Carbaugh asked Dir. Cameron if there have been any discussions of statute of limitations in the NAIC's efforts.

Dir. Cameron stated that Rep. Carbaugh's example is a good illustration of why the NAIC is moving away from a "best interest" standard, and the current draft of the Model has a provision that precludes "looking back in hindsight." Dir. Cameron stated that the NAIC is moving towards a "standard of care" which focuses on the responsibility of the agent. The agent's responsibility is to disclose all pertinent information. If they recommend a particular product, they should document how they arrived at that recommendation; and they should document why the consumer chose the product. If an agent operates in that manner, they should be deemed to be acting in a certain standard of care or deemed to be acting in the best interest of the consumer. Dir. Cameron also stated that there is a debate about disclosing conflicts of interest, but noted that most consumers know that if they go to State Farm, they will most likely be buying State Farm products. If such requirements are imposed on agents, they must be reasonable.

Rep. Deborah Ferguson (AR), Chair of the Committee, asked Dir. Cameron when he believes the Working Group will be finished with its drafting efforts. Dir. Cameron stated that he believes the goal is to have a draft finished by the NAIC Fall Meeting.

Rep. Jim Gooch (KY) stated that is seeing a movement to vilify annuities and everyone needs to be sure moving forward that the very positive features of annuities are broadcasted appropriately. Dir. Cameron stated that he completely agrees with Rep. Gooch and that if the retirement crisis is to be addressed, it will be through consumers sitting down with advisors discussing available products, including annuities.

Rep. George Keiser (ND) stated that he was surprised to hear from Ms. Semaya and Dir. Cameron that such a high number of states were pursuing their own fiduciary laws or regulations. Given that there is so much concern and interest out there on these issues, Rep. Keiser asked if the NAIC has considered hiring an independent party to do an analysis on what the problems are in the marketplace, if any. Rep. Keiser stated that the NAIC needs to be sure that there really is a problem out there before developing a Model.

Dir. Cameron stated that Rep. Keiser's question is one that everyone at NAIC asked before starting efforts to amend the Model. The reality is that the Model, which a majority of states have passed, has done a phenomenal job. If anything, the NAIC has done a poor job of telling everyone how well the Model has performed. The difference in this specific situation is that the DOL's activities caused everyone to believe that the DOL Rule was going to be enacted. The NAIC was asked to do an informal study on these issues, and the NAIC asked states to report certain data. The NAIC learned that there were some instances where agents could be accused of acting in their interest, not necessarily in the consumer's interest. Accordingly, that led to proposed amendments to the Model. Dir. Cameron stated that if a third party is needed to conduct a study as Rep. Keiser suggested, he believes the NAIC would be willing to do it, but Dir. Cameron believes that is not necessary at this point in time.

PRESENTATION ON INDUSTRY TRENDS IN RETIREMENT PLANNING: SOLUTIONS TO HELP PLAN FOR THE FUTURE

John Mangan of the American Council of Life Insurers (ACLI) stated that the first step in addressing the retirement crisis in the country is to promote awareness and that ACLI would like to serve as a resource for NCOIL and its member-legislators. ACLI has a lot of resources and ideas to tap into. ACLI has a state fact-sheet that shows the impact of the retirement and life insurance industry in each state. The fact-sheet shows that in Utah in 2016, life insurers paid $3 billion in annuity related benefits to Utah citizens – second only to the social security administration. Most states have a similar number. People in Utah also have $300 billion worth of life insurance in force which in many cases serve as a source of retirement planning for spouses and families. That is something to consider when looking at policy – encouraging life insurance is a way of encouraging retirement security.

Mr. Mangan stated that on ACLI's website, you can access a new study called "Assessing American's Financial and Retirement Security" which outlines some of the good habits that create financial security which includes things such as creating a financial plan and having an emergency fund. One of the biggest obstacles to retirement planning is that only 1/3 of Americans have $500 or more in an emergency fund. The use of debt is also another major obstacle. The study also makes certain recommendations for state legislators to consider when developing retirement planning legislation.

Another ACLI initiative is called the Alliance for Lifetime Income which is a new group of large retirement and financial companies, many of which are ACLI members, who are trying to get Americans focused on lifetime income. Assuming you are able to save enough for retirement, it is important to make it last considering the increased life expectancy. That information can be viewed at www.allianceforlifetimeincome.org

Mr. Mangan further stated that ACLI also tracks all activity with state-run retirement plans. One promising approach is the Washington marketplace approach for small business - a way to connect small business to existing plans that are in the marketplace. Utah also recently passed an innovative approach – a $500 tax credit for any employer in the state that adopts a new retirement plan for its workers.

Steve Kline of the National Association of Insurance and Financial Advisors (NAIFA) stated that NAIFA believes that some of the sate-run retirement proposals that have been introduced that compete with the private sector plans and require employers to participate are not the answer to the retirement crisis. That is because there is already a vibrant and diverse private sector market that offers affordable options such as 401k's, 403b's, and various IRA's. If a retirement plan is not offered at work, employees have ready-access to low cost options through financial advisors and financial institutions.

When it comes to small businesses, financial advisors are ready willing and able to help them establish a retirement plan for their employees. As an example, one of NAIFA's members has a client in Ohio that is a small plumbing company with 2 owners, 6 employees, and no retirement plan. An advisor got them set up with a simple IRA and years later, the owners and employees have increased their contributions through consistent consultation with the financial advisor and the IRA is very healthy. Another example can be seen in Florida – a NAIFA member had a client who owned an AC installation and repair business with about 15 employees with no retirement plan. A simple IRA plan was set up and years later, the IRA has approximately $1 million in assets. Mr. Kline noted that examples such as those also benefit the business since they are able to attract and retain employees.

Mr. Kline stated that whether a business or certain employee is blue-collar or white-collar, a financial advisor can set up an appropriate plan. Mr. Kline provided examples of banks and civil engineering firms getting set up with a 401k that grew and worked very well for all involved. Mr. Kline also stated that advisors frequently help non-profit institutions such as local churches. Over time, with good management and consistent contributions, retirement plans can work for anyone. Mr. Kline noted that in all of the examples cited, the guidance and assistance of an advisor is almost as important as the plan itself. Contrarily, it is difficult to contact the right person, or anyone for that matter, when dealing with state-run retirement plans.

Mr. Kline also noted that NAIFA members frequently help independent contractors and that, for whatever reason, do not have retirement plans offered through their employment. Mr. Kline stated that a NAIFA member told him he has a nurse for a client that essentially works as a contactor through a staffing agency. She had no retirement plan and worked with an advisor who set her up with an IRA, invested in a low-cost mutual fund, and a tax-deferred variable annuity. She will be able to retire comfortably. Another example: a NAIFA member had an auto body repair shop employee for a client who made a decent income but had no retirement plan. His advisor set him up with a Roth IRA plus a tax-deferred variable annuity and he now has a healthy retirement nest-egg.

Mr. Kline stressed that regardless of your income level or occupation, an advisor can help you plan for retirement. NAIFA members are committed to helping everyone with their retirement. Regarding state-run retirement plans, they seem to address the problems of availability of and access to retirement plans, but Mr. Kline stated that he believes those are not the real problems Americans are facing. Other problems are lack of saving due to a lack of financial education and competing financial needs. Mr. Kline stated that if a state does choose to address these issues, he believes the Washington approach is promising, but consumers are best served with plans offered by carriers combined with advice from an advisor.

Lance Schoening of Principal Financial (Principal) stated that Principal is an insurer and a global retirement asset manager. Among other things, Principal works closely with groups such ACLI and NAIFA to inform members of Congress on retirement policy. Mr. Schoening provided a cautionary tale of referring to certain studies when discussing whether there is a retirement crisis in America. A recent Wall Street Journal article stated that American retirees are in worse financial condition than the prior generation. When you look at the study that formed that opinion, the reporters relied on a government data set – the "current population survey" – which has been proven to underestimate retirement savings income by more than 50%. The U.S. Census Bureau published a survey last year that found the current population survey underestimated retirement savings income going back to 1990.

The WSJ article stated that retirement savings income was flat for the past two decades, but the U.S. Census Bureau actually found that median retiree incomes rose by more than 32% over inflation over the past two decades. At the same time, the Social Security Administration found that real median wages rose by only 11%. Nearly the same differential was shown in low and high-income retirees as well. That is a great example of how policymakers have a moral obligation to ensure they are looking at and using all available data.

Mr. Schoening stated that regardless of whether you agree that there is a retirement crisis in America, nearly everyone can agree that there are significant challenges that need to be addressed. Mr. Schoening stated that a colleague recently told him that retirement planning is not a dinner-table conversation topic for Americans – that struck him as surprising. A recent survey from Morning Consult and Prudential stated that 80% of American workers rank retirement security as the top issue they want to hear from Congressional candidates this Fall.

Mr. Schoening stated that he recently read something in the reddit-sphere that is millennial-focused titled "FIRE" which stands for "financial independence – retiree early." 359,000 millennials are signed up to that network to share ideas on how to live freely and save appropriately to retire early. Accordingly, retirement planning is an issue important to Americans no matter what age.

Congressional action on retirement planning hasn't been taken since the Pension Protection Act in 2006. In that time, so much has been learned about American worker savings behaviors and what appropriate plan designs can do to affect retirement readiness. Chief among the measures introduced by Congress since late last year is the Retirement Enhancement and Savings Act (RESA). In 2016, RESA came out of the Senate Finance Committee unanimously. RESA was introduced in both Chambers this year with over 50 bi-partisan co-sponsors. RESA represents three main retirement policy objectives: a.) improve workplace retirement savings plan coverage of American workers; b.) increase savings rate adequacy; and c.) introduce and provide more lifetime income solutions to workers and defined contributions plans.

Mr. Schoening stated that the most widely reported statistic deals with coverage – about 50% of American workers have access to a work-site retirement savings plan. However, that is a cautionary statistic and should not be looked at in isolation as it is a point-in-time measure and does not necessarily give an indication of a particular worker's ability to access it over a career. The statistic signals a problem in terms of access but when you look at full-time private sector workers, about ¾ of them have access to a work-site savings plan and when they have access, about 80% of them participate. Accordingly, there is a solid foundation, but ways need to be explored to improve access, particularly with small employers. A Pew Charitable Trust survey stated that about 53% small to mid-size employers, those with 250 employees or less, sponsor a plan. A key objective is to close that gap.

A potential solution is something called an "open multiple employer plan." RESA and other objectives would clear the way for such plans. Such plans allow a professional plan administrator fiduciary to design, maintain, and mange a plan and allow unrelated employers to adopt that plan. For small employers, it allows them to lessen the administrative burdens of managing plans, lessens the fiduciary responsibilities and liabilities, and allows small employers to band together to achieve a larger economy of scale. Strong, bi-partisan support exists for this concept.

Mr. Schoneing stated that increasing participation rates when a plan exists, and savings rate adequacy also need to be improved. Automatic plan provisions have been adopted by many large plans. T. Rowe Price just issued a report on their clientele block which is generally large plan sponsors who widely use automatic plan provisions. The report showed the highest contribution rate in 10 years, an average deferral of 8.3%, and plans that used auto enrollment had participation rates 42% higher than plans that do not. Also, employee participation in auto-contribution increases was more than 5x higher in plans where it was an opt-out feature rather than an opt-in feature. That illustrates that participants want nudges from their employers, and participant surveys indicate that as well. However, employer surveys have opposite results so that gap needs to be closed.

Congress can address that gap by incentivizing employers, particularly small employers, to adopt progressive auto-feature plan designs. For example, a plan design that auto-enrolls employees at a 6% rate and increases that rate by 1% per year. Mr. Schoneing stated that those that follow that approach today report extremely low opt-out numbers.

ADJOURNMENT

There being no other business, the Committee adjourned at 1:00 p.m.