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Legal Update

Fall 2020 NAIC Meeting: Preview of Hot Topics

The National Association of Insurance Commissioners (the "**NAIC**") will be holding its fall meeting from December 3 through December 9, 2020 (the "**Fall 2020 NAIC Meeting**"). As a result of the ongoing COVID-19 pandemic, the Fall 2020 NAIC Meeting will be held virtually. Unlike previous years, the agenda for the Fall 2020 NAIC Meeting is highly abbreviated, reflecting the fact that many groups within the NAIC have been conducting interim virtual meetings throughout the year.

Here is a preview of some of the hot topics our Mayer Brown team will be following. Please contact any of the attorneys listed below if you would like to discuss these topics before or after the NAIC Meeting.

I. Long-Term Care Insurance (EX) Task Force

FRIDAY, 12/4/2020 – 11:00 A.M. - 12:30 P.M. EST

At the NAIC meeting this past summer (the "**Summer 2020 NAIC Meeting**"), the Long-Term Care Insurance (EX) Task Force (the "**LTCI Task Force**") consolidated the six work streams originally organized to address long-term care insurance ("**LTCI**") issues into three subgroups: (i) the LTCI Multistate Rate Review (EX) Subgroup; (ii) the LTCI Reduced Benefit Options (EX) Subgroup; and (iii) the LTCI Financial Solvency (EX) Subgroup. Concurrently, the LTCI Task Force adopted 2020 charges for each of the subgroups. Of the three subgroups, two will be reporting on key initiatives at the Fall 2020 NAIC Meeting.

First, the LTCI Multistate Rate Review (EX) Subgroup has been conducting a pilot project to perform multistate rate reviews, for which it expects to finalize the work product by year-end 2020. The goal of the project is to develop a consistent state-based approach for reviewing LTCI rate increase filings that will result in an actuarially justified rate increase process that will be timely and will eliminate cross-state rate subsidization. The original intention of the subgroup was to engage industry and interested parties in the discussions around the pilot project prior to year-end 2020. The subgroup's report will likely be primarily focused on the results of its pilot program and may include the exposure of work product for comment, though such work product may initially only be released confidentially to insurance regulatory authorities.

Second, the LTCI Reduced Benefit Options (EX) Subgroup has been reviewing comments received on a principles document that was previously prepared by the LTCI Task Force to provide guidance to insurance regulatory authorities when evaluating reduced benefit option ("**RBO**") offerings by insurers. The document under review provides guidance around the following principles: (i) fairness and equity for policyholders that elect an RBO; (ii) fairness and equity for policyholders that choose to accept rate increases and continue LTCI coverage at their current benefit level; (iii) clarity of communication with policyholders eligible for an RBO; (iv) consideration of encouragement or requirement for a company to offer certain RBOs; and (v) exploration of innovation, particularly where an outcome of improved health and lower claim costs are possible.

The subgroup's report will likely include a discussion of comments received on the RBO principles document, and may include a revised version of that document for exposure. In addition, at the Summer 2020 NAIC Meeting, the subgroup said it would begin to prepare a related principles document with respect to consumer notices, which it may provide a draft of or otherwise discuss at the Fall 2020 NAIC Meeting.

II. Innovation and Technology (EX) Task Force

FRIDAY, 12/4/2020 – 2:00 P.M. - 3:30 P.M. EST

Like many other NAIC task forces and committees, at the Fall 2020 NAIC Meeting, the Innovation and Technology (EX) Task Force (the "**I&T Task Force**") will hear reports and updates from the various working groups that operate under its aegis. However, the I&T Task Force will also discuss comments received on two key initiatives that are being managed at the Task Force level.

First, the I&T Task Force has recently been considering certain amendments to Section 4(H) of **the NAIC Model Unfair Trade Practices Act (Model #880)** dealing with rebates (the "**Proposed Anti-Rebating Amendments**"). Among other things, the Proposed Anti-Rebating Amendments address the permissibility of offering to potential consumers: (a) value-added products or services; (b) non-cash promotional or advertising items and meals; and (c) charitable donations to be made on their behalf. The I&T Task Force held an interim meeting on November 4, 2020, a primary purpose of which was to discuss comments received on the proposed amendments. Following the November 4 meeting, the I&T Task Force circulated a revised draft of the Proposed Anti-Rebating Amendments for additional comments. While the I&T Task Force had previously expressed a hope to have the Proposed Anti-Rebating Amendments in a form ready for adoption by the Fall 2020 NAIC Meeting, it is unclear if this will be the case. The comments discussed at the November 4, 2020 meeting and received since that meeting reflect significant concern by several trade associations with the language of the Proposed Anti-Rebating Amendments as currently worded, which may indicate that further revision of these amendments will be necessary.

Second, the I&T Task Force generally requested comments relating to regulatory relief or accommodation measures pertaining to innovation and technology that have been granted by insurance regulatory authorities in response to the COVID-19 pandemic. While a wide range of comments were received by the I&T Task Force, many commenters requested that the task force promote the following measures: (i) the uniform acceptance of electronic signatures wherever a wet signature is required; (ii) the electronic delivery and posting of notices, policy documents and related documents; (iii) the elimination of in-person notarization requirements and the uniform acceptance of remote notarizations; (iv) the removal of telehealth restrictions, limitations and mandates to allow plans, providers and patients to make the ultimate decision regarding appropriate care; and (v) the acceptance of electronic versions of regulatory filings (with one commenter noting that "[m]any a tree has suffered unnecessarily at the hands of state insurance regulatory filings"). In its discussion of these comments at the Fall 2020 NAIC Meeting, the I&T Task Force may decide that such comments should form the basis for a recommendation to insurance regulatory authorities to adopt the measures listed above or otherwise harmonize their efforts in this space.

III. Climate and Resiliency (EX) Task Force

FRIDAY, 12/4/2020 – 4:30 P.M. - 6:00 P.M. EST

The Climate and Resiliency (EX) Task Force (the "**C&R Task Force**") will hear several updates and presentations during the Fall 2020 NAIC Meeting, including with respect to international and federal climate and resiliency efforts. In addition, at the Summer 2020 NAIC Meeting the C&R Task Force identified five workstreams integral to its work, one or more of which may also be reported on at the Fall 2020 NAIC Meeting. The foci of these workstreams are: (i) matters of solvency; (ii) consideration of enhancements to the climate risk disclosure and alignment with climate-related financial disclosures; (iii) pre-disaster mitigation; (iv) innovation (including products brought to market to respond to climate risk); and (v) technology used to understand and identify climate-related risk.

We will also be monitoring the meeting for any discussion of the New York Department of Financial Services October 29, 2020 **industry letter** on "Climate Change and Financial Risks."

IV. Special Committee (EX) on Race and Insurance

MONDAY, 12/7/2020 – 12:30 P.M. - 2:00 P.M. EST

In late July 2020, the NAIC announced the formation of a special committee dedicated to the topic of race and insurance. In addition to evaluating the state of diversity within the insurance industry, the committee intends to develop steps that insurance regulatory authorities and industry members can take to increase diversity and inclusion in the industry and to address practices that potentially disadvantage minorities. In addition, this committee will work with the NAIC's existing committees, task forces and working groups to support efforts to increase diversity and inclusion within the insurance industry. At the Fall 2020 NAIC Meeting, this committee will likely report on its initial findings and may expose for comment proposed steps that can be taken to increase diversity and inclusion in the insurance industry.

V. Life Insurance and Annuities (A) Committee

MONDAY, 12/7/2020 – 2:30 P.M. - 3:30 P.M. EST

The Life Insurance and Annuities (A) Committee will hear reports from the working groups and task forces that assist it in carrying out its functions at the Fall 2020 NAIC Meeting. Two reports will likely be of particular interest at this time.

First, the Accelerated Underwriting (A) Working Group (the "**AUWG**") will report on the use of external data and data analytics in accelerated life underwriting. This working group is charged with considering the use of external data and data analytics in this space and, if appropriate, to draft guidance for insurance regulatory authorities on this subject. Accelerated life underwriting programs allow applicants for life insurance to forgo medical examinations if they meet certain pre-determined thresholds. Instead the underwriting programs use various types of data together with algorithmic tools and modeling to assess those applicants' risks. Since its formation in the fall of 2019, the AUWG has sought to carry out its charge in three distinct phases: (i) an initial information gathering phase; (ii) a second phase during which the AUWG will identify key issues and decide on an appropriate work product; and (iii) a final phase dedicated to preparing the final work product. The AUWG has begun to move into its second phase and, in connection with this phase, it has formed two subgroups: (i) an ad hoc liaison group that will coordinate with other NAIC groups, exploring issues related to accelerated underwriting; and (ii) an ad hoc drafting group that will synthesize information received during the information gathering phase and recommend a form of final work product to the AUWG.

The AUWG has stated that it intends to complete this second phase by December 2020, and to prepare a first draft of its work product to expose for comment by the end of December 2020, with the goal of presenting a final work product to the Life Insurance and Annuities (A) Committee by summer 2021. Accordingly, it is likely that the report of the AUWG will preview the key issues it has identified and the work product that it will be preparing over the coming months.

Second, the Annuity Suitability Working Group (the "**ASWG**") previously led the NAIC's multiyear efforts to develop revisions to the **Suitability in Annuity Transactions Model Regulation (Model #275)** (the "**SAT**") to incorporate a requirement for producers to act in the "best interest" of a retail customer when recommending an annuity product. The revised SAT was adopted by the NAIC in February 2020, and since that time several states have begun efforts to adopt the revisions.

Since the SAT's adoption, the ASWG has been developing a frequently asked questions document to facilitate uniformity in state adoption and implementation of the revisions to the SAT. The current draft of this document, which has been exposed for public comment, addresses topics such as general background, the intersection of state insurance regulation and federal securities law regulation, how to satisfy the best interest standard of conduct and insurer supervision and training requirements. The report of the ASWG will likely discuss the comments it has received on this document so far and may indicate when it believes this document will be ready for adoption.

VI. CIPR Fall Program: Pandemic Business Interruption Federal Insurance Mechanism

TUESDAY, 12/8/2020 – 11:00 A.M. - 2:00 P.M. EST

The Center for Insurance Policy and Research ("**CIPR**") will host a program at the Fall 2020 NAIC Meeting titled "*Pandemic Business Interruption Federal Insurance Mechanism – Learning from the Past, Thinking about the Future*." This program will likely focus on possible federal efforts with respect to business interruption insurance for claims pertaining to the COVID-19 pandemic.

Currently, the federal government has not adopted any legislation pertaining to business interruption insurance for claims pertaining to the COVID-19 pandemic. On May 22, 2020, Representative Carolyn Maloney (D- NY) introduced **H.R. 7011, the Pandemic Risk Insurance Act** ("**PRIA**"). The bill, modeled after the Terrorism Risk Insurance Act, would function as a public-private partnership between the federal government and insurance companies. Under the current framework proposed in the PRIA bill, the federal government and insurance companies would share costs associated with pandemic losses. If passed, the legislation would not be retroactive and participation by insurers would be voluntary.

Industry support of the bill is divided. Certain industry groups, including the American Property and Casualty Insurance Association and the National Association of Mutual Insurance Companies, have expressed concerns about PRIA and have taken the position that the full cost of the program should be funded by the federal government, since pandemics differ significantly from acts of terrorism in terms of frequency of occurrence and geographic concentration. On the other hand, the American Academy of Actuaries ("**AAA**") supports a federal reinsurance program and argues that pandemic risk is more similar to the catastrophic risks covered by programs like the Terrorism Risk Insurance Program and the National Flood Insurance Program than to risks normally insured by the commercial insurance market. Accordingly, the view of the AAA is that any federal program seeking to facilitate pandemic risk coverage should reflect that similarity.

PRIA has not been the only legislation introduced at the federal level pertaining to insurance and the COVID-19 pandemic. On April 14, 2020, Representative Michael Thompson (D-CA) introduced **H.R. 6494, the Business Interruption Coverage Act**, which appears to be retroactive in nature and would require insurers who provide business interruption insurance to include losses from pandemics or government-ordered business closure. Another bill, **H.R. 6497, the Never Again Small Business Protection Act**, proposed by Representative Brian Fitzpatrick (R-PA) on April 14, 2020, also requires insurers to cover losses associated with viruses or pandemics, but includes a provision requiring a federal reinsurance backstop.

The NAIC has released several statements regarding the legislation introduced at the federal level pertaining to business interruption insurance. On March 25, 2020, it released a **statement** on Congressional actions related to COVID-19 and the insurance industry, in which it expressed opposition to any proposed legislation that would require insurance companies to retroactively pay for claims arising out of the COVID-19 pandemic losses that were not covered under the original policy. In that statement, the NAIC argued that such actions could create substantial solvency risk and undermine the ability of insurers to pay other types of claims. Further, the NAIC noted that insurance is not an ideal product to cover pandemic losses, due to the widespread nature of disease and the substantial number of policyholders affected simultaneously. Instead, the NAIC recommended direct federal intervention to address economic disruption related to the current COVID-19 pandemic and offered to work with Congress on potential solutions. On May 20, 2020, the NAIC followed this statement with a **letter** submitted to the US House Committee on Small Business where it stated its opposition to any proposals that would require insurers to retroactively pay business interruption insurance claims arising out of the COVID-19 pandemic.

In addition, on November 19, 2020, the Subcommittee on Housing, Community Development and Insurance of the US House of Representatives' Financial Services Committee held a virtual hearing entitled, "Insuring against a Pandemic: Challenges and Solutions for Policyholders and Insurers."

The CIPR presentation will likely cover the federal initiatives described above as well as the NAIC's efforts in relation to such initiatives.

VII. Market Regulation and Consumer Affairs (D) Committee

TUESDAY, 12/8/2020 – 4:00 P.M. - 5:00 P.M. EST

The Market Regulation and Consumer Affairs (D) Committee will hear reports from the working groups and task forces that assist it in carrying out its functions as well as consider several items for adoption. One key item that will be under consideration is a revised version of the **Antifraud Plan Guideline (Model #1690)**, which is being revised in connection with the creation of a single-point online repository for insurers to file their antifraud plans. The focus of the proposed revisions is to reorganize the guideline into a more intuitive order, eliminate repetitive requirements within the existing guideline and add suggestions to better meet existing requirements for nearly all states. The Antifraud Technology (D) Working Group, which reports to the Antifraud (D) Task Force, has received comments on the proposed revised guideline, which it may discuss as part of the adoption process at the Fall 2020 NAIC Meeting.

VIII. Financial Condition (E) Committee

TUESDAY, 12/8/2020 – 5:30 P.M. - 6:30 P.M. EST

The Financial Condition (E) Committee, one of the major committees of the NAIC, will be considering several key projects at the Fall 2020 NAIC meeting, two of which are of particular importance.

First, the Financial Condition (E) Committee will be considering the adoption of the instructions and filing template for a new Group Capital Calculation (the "**GCC**"), as well as accompanying changes to the **Insurance Holding Company Model Act (Model #440)** needed to incorporate the GCC into state law. The GCC adds together the capital resources and capital requirements of all insurers, regulated financial firms (such as banks) and other material affiliates in an insurance group and calculates a capital ratio. Groups will not be required to maintain any specific GCC ratio, but the GCC will be used as an analytical tool by state regulators assessing the operation of insurance groups.

At the Summer 2020 NAIC Meeting, the Group Capital Calculation (E) Working Group (the "**GCC Working Group**") discussed the collective comments received on the draft GCC template and instructions exposed earlier this year. At that time, commenters emphasized concerns regarding the confidentiality of the GCC (including whether lead state regulators will have the ability to share the GCC with other domestic regulators) and the need to clarify within the instructions that the GCC is intended to be used as an analytic tool rather than a standard. In addition, the GCC Working Group previously exposed for comment revisions to the Insurance Holding Company Model Act, which would require that the GCC be filed on an annual basis with an insurance group's lead state. The GCC Working Group had discussed in detail the applicable exemptions to the filing of the GCC, including non-US groups whose group-wide supervisor either accepts the GCC for US groups in their jurisdiction or accepts the GCC as an acceptable insurance capital standard (an "**ICS**"). The GCC Working Group also discussed an additional exemption that would apply, subject to the lead-state regulatory authority's discretion, to groups whose group-wide premium is under the $1 billion threshold in the Risk Management and Own Risk and Solvency Assessment Model Act so long as certain other criteria exist. Finally, the GCC Working Group also discussed proposed modifications related to the reporting of subgroup GCCs.

At an interim meeting held on November 17, 2020, the GCC Working Group adopted the instructions and filing template for the GCC, as well as accompanying changes to the Insurance Holding Company Model Act. Accordingly, the Financial Condition (E) Committee will decide whether or not to adopt this package at the Fall 2020 National Meeting.

Second, the Statutory Accounting Principles (E) Working Group (the "**SAP WG**") will report on a number of matters that it has been overseeing pertaining to a number of statements of statutory accounting principles ("**SSAPs**"). Some of the SSAPs being considered for revision are SSAP No. 25 – *Affiliates and Other Related Parties*, SSAP No. 71 – *Policy Acquisition Costs and Commissions* and SSAP No. 43R – *Loan-Backed and Structured Securities*.

In addition, the SAP WG has recently exposed for comment a general agenda item with respect to a potential new SSAP that would provide guidance for the accounting and reporting of derivatives that effectively hedge the growth in interest credited for fixed indexed products (for example, fixed indexed annuity and indexed universal life products) reported in the general account. The goal of this potential new SSAP is to address a mismatch of accounting provisions when derivatives are used to hedge the growth in interest credited to reserves (liability), which is derived from a lack of clarity as to whether the provisions of SSAP No. 86 – *Derivatives* or SSAP No. 108 – *Derivatives Hedging Variable Annuity Guarantees* should control in this circumstance. The agenda item exposed by the SAP WG considers two alternative approaches to address this mismatch, which would permit effective hedge treatment of derivatives in this situation either in line with SSAP No. 86 or SSAP No. 108. As this agenda item has only been recently exposed, we anticipate that it may become the subject of extensive discussion for the foreseeable future.

IX. International Insurance Relations (G) Committee

WEDNESDAY, 12/9/2020 – 3:00 P.M. - 4:00 P.M. EST

The International Insurance Relations (G) Committee will generally hear updates on the activities of certain international supervisory organizations, including the International Association of Insurance Supervisors (the "**IAIS**"). In connection with these updates, the International Insurance Relations (G) Committee will hear updates on both the holistic framework for systemic risk as well as the insurance capital standard (the "**ICS**").

The holistic framework, which sets out elements for assessing and mitigating systemic risk in the insurance sector, was developed by the IAIS and adopted in November 2019. Implementation of the holistic framework by IAIS members began in 2020. However, in November 2017, the Financial Stability Board (the "**FSB**") in consultation with the IAIS and national authorities announced its decision to not publish a new list of global systemically important insurers ("**G-SIIs**") for 2017, given work being undertaken by the IAIS on its holistic framework, and subsequently once the holistic framework was adopted, the FSB decided to suspend identification of G-SIIs as of the beginning of 2020. The FSB has stated that in November 2022 it will review the need to discontinue or reestablish an annual identification of G-SIIs. Accordingly, the IAIS is undertaking a two-phase process to help inform the FSB's review, consisting of a baseline assessment and a targeted jurisdictional assessment, which may be discussed at the Fall 2020 NAIC Meeting.

In addition, a report on the ICS will be presented at the Fall 2020 NAIC Meeting. The potential effects of the ICS on US insurance markets has become a topic of increasing interest and recently, on October 9, 2020, the Federal Insurance Office issued a **notice** to solicit input to evaluate the potential effects of the ICS on US insurance markets, US consumers and US insurers. The report at the Fall 2020 NAIC Meeting could provide insights as to how the ICS is currently viewed by regulatory authorities and inform the state of deliberations around it.

A link to the agenda for this meeting is attached **here**.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

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