

November 16, 2011

Commissioner Susan Voss, President, NAIC
All NAIC members

Dear Commissioners:

We are writing as consumer representatives to the NAIC representing millions of American health care consumers to urge you to reject the *Resolution Urging the U.S. Department of Health and Human Services* that will be discussed by the NAIC plenary on a November 22 call.

The Resolution states that it is intended to “Ensure Continued Consumer Access to Professional Health Insurance Producers.” Consumers recognize that producers provide valuable services, particularly to small businesses. We believe that producers will continue to play a key role after health care reform is fully implemented in 2014.

The Resolution, however, is misdirected and inconsistent with the work done by the NAIC’s own committees. It asks Congress and HHS to deprive consumers and small businesses of a valuable and important statutory protection without recognizing the harm that the NAIC’s own study found that a change in the law would cause consumers. It misrepresents and overstates the harm that the current law and regulation cause producers while at the same time seriously understating the benefits of the current law for consumers and businesses. It urges HHS to adopt a remedy – classifying a portion of producer compensation as quality improvement expenses – that is at odds with NAIC’s own work and would set a disturbing precedent. We urge you, therefore, to reject, or to substantially modify, the resolution.

Our specific concerns are:

- The resolution fails to note that the NAIC’s own study concluded that removing producer compensation from the MLR would have reduced rebates to consumers and businesses by \$1.2 billion given 2010 figures. 2011 rebate losses may well be higher.
- The resolution fails to note that there is growing evidence that the MLR requirement is driving down premium increases, even causing premium decreases in some markets. Removing producer compensation from the MLR would reverse this trend.
- The resolution notes that producers testified at the hearing held by the PHIA about adverse effects the MLR rule was having on them. It totally fails to note that consumer representatives also testified at that hearing about the beneficial effects of the MLR rule and the detrimental effects that consumers and employers would suffer if producer compensation were removed from the MLR. Texas consumers and employers alone would have lost \$162 million and Florida consumers and employers \$142 million in rebates.

- The resolution quotes the finding of the B Committee/HATF study that a significant number of companies reduced producer compensation in 2011. It does not quote the next sentence “However, a significant number of companies have not reduced compensation in 2011.”
- The resolution also fails to recognize another finding of the B Committee/HATF study: “The states with higher MLR requirements have not observed any problems with consumer access to insurance or to producers”
- Indeed the resolution fails to cite any evidence that consumers are losing access to producer services because of reduced commissions.
- The resolution quotes from a GAO report that found that almost all of the insurers interviewed were reducing commissions. It fails to note that the GAO interviewed only seven insurers, hardly a representative sample. The resolution also fails to recognize the other findings of the GAO report, which we quote at some length:

“One insurer said they started making reductions to their brokers' commissions in the fourth quarter of 2010 for their individual and small group plans to increase their 2011 PPACA MLRs in these markets and, as a result, premiums were not as high as they otherwise would have been. . . .Another insurer lowered commissions to their brokers in the individual market in the first quarter of 2011, such that premiums were increased less than they otherwise would have been, which they expect to result in an increase in their PPACA MLRs for 2011. In addition, one insurer said they are considering reducing premiums in 2012 partly in response to the PPACA MLR requirements and also in conjunction with a reduction in the number of in-network physicians--the combined strategy would help to lower enrollee premiums and increase their MLRs. A regulator from one state insurance commissioner's office said that some insurers in that state have not applied for premium increases and are making adjustments to lower premiums as a strategy to increase their MLRs, and commented that reducing premiums is the best strategy for insurers to improve value for consumers.”

In other words, the GAO found that the MLR rule is directly benefiting consumers.

- A recent report from the Insurance Information Institute found that employment of agents and brokers increased by 5500 nationally between July 2010 and June 2011.

The resolution asks Congress to consider amending the MLR but it does not say how or to what end. The resolution also asks HHS to take account of producer compensation issues in approving state MLR adjustment requests. In fact, HHS is already doing this. Although one third of the states have requested adjustments, not all of them have raised producer compensation as an issue, and none have provided actual proof that consumers are losing access to producer services. Furthermore, the resolution asks HHS to put a hold on the implementation of the MLR requirements “relative to independent agent and broker compensation.” Since there are no current requirements “relative to independent agent and broker compensation” (other than the MLR state adjustments), this effectively

asks HHS to put a hold on the implementation of the MLR, effectively depriving consumers and small businesses of as much as \$2 billion in rebates and driving up premiums.

Finally, the resolution asks HHS to consider some share of producer compensation as a “health care quality expense.” This would set a terrible precedent and open a Pandora’s box for reclassifying other expenses that have long been considered administrative as quality improvement. Under no credible interpretation of the law or the NAIC’s own work, adopted in the HHS rule, can producer services be regarded as “activities that improve health care quality.” The NAIC, after a long and thoughtful process, properly concluded that section 2717 of the PHSA, as added by the Affordable Care Act, establishes a statutory framework for the defining of quality improvement activities. The NAIC further established that in order to be considered a quality improvement activity, it must be designed to: “(i) Improve health quality. (ii) Increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements. (iii) Be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees. (iv) Be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.” To suggest that producer services can meet these requirements undermines the past and future work of the NAIC to further delineate the types of expenses that should appropriately qualify as quality improvement.

Over the years, the NAIC has rightfully earned the respect of Congress and many others for its thoughtful, transparent, evidence-based, and consumer-oriented approach to issues. It was for these reasons that Congress entrusted the NAIC with developing the MLR methodology and for aiding in the implementation of many other aspects of the health reform law. We respectfully urge the NAIC to uphold its reputation by opposing this resolution that is based, at best, on mixed and inconclusive evidence.

Sincerely,

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