To: Richard Marcks, Joint Qualified Actuary (A/B/C) Subgroup

From: Timothy Jost, Sabrina Corlette, Bonnie Burns, Elizabeth Abbott, Karrol Kitt, Marguerite Herman, Barbara Yondorf, Lincoln Nehring, Adam Linker, Birny Birnbaum, Stephen finan

Date:

Re: Joint Qualified Actuary Definition

We are writing to you as NAIC consumer representatives, representing millions of American insurance consumers to comment on your charge. This subgroup has been charged to:

> 1. Recommend a uniform definition of "qualified actuary" for life, health and P&C Appointed Actuaries signing prescribed Statements of Actuarial Opinion, identifying any differences that should remain between lines of business. Recommend a uniform definition of "qualified actuary" for other regulatory areas (e.g. rate filings, hearings). Consistency between uses is preferred, to the extent appropriate.
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> 2. In performance of actuarial work upon which the regulators might rely, recommend a definition of inappropriate or unprofessional actuarial work and recommend a process (which could be an existing process) for regulatory and/or professional organizations' action(s). If needed, recommend a means of implementation through a model act, regulation or other means.

Actuarial professionals frequently play an important role in public policy decisions that affect consumers, yet at the same time are largely free from public accountability. While we are certain most actuaries are honorable professionals, carefully relying on the best available information and data, and abiding by or exceeding their profession's standards, it is worthwhile to consider how to make the profession more transparent and accountable to the public. Unlike most other professions, actuaries are not licensed and are not subject to oversight and discipline by a public agency. They are accountable only to their own self-governing collegiate bodies and to their employers. Actuaries must routinely certify the determinations of insurers by whom they are employed.

Despite this, the certifications and opinions of actuaries are commonly relied upon by public bodies for making determinations that have direct and important effects on consumers. Actuaries have long offered opinions that have been relied on by state insurance departments in rate-setting. In fourteen separate sections, the United States Code specifies that individuals shall be qualified to make important decisions based on their membership in the American Academy of Actuaries; in four based on Society of Actuaries membership, and in one on Casualty Actuarial Society membership. Recently published proposed regulations implementing the Affordable Care Act's essential health benefits, actuarial value, and risk equalization programs specify in eight separate sections

that various determinations and calculations must be made by a member of the American Academy of Actuaries. These include determinations, for example, that benefit substitutions proposed by an insurer are actuarially equivalent to a state's essential health benefits package or that the actuarial value of a plan design does not fit into the actuarial plan calculator. There is no indication in the proposed rules that these actuarial determinations will be required to be subject to independent review, except insofar as claims and statements made to establish eligibility for payments through the exchanges are expressly subject to the federal Civil False Claims Act.

The actuarial profession is currently overseen by the Actuarial Board of Counseling and Discipline (ABCD). That body represents the five primary United States actuarial organizations. Its nine member board is composed entirely of actuaries, most of whom are retired from private practice. The ABCD is responsible for investigating complaints involving actuaries, but it has no independent authority to discipline actuaries other than to make recommendations to the organizations that compose it. All of the proceedings of the ABCD are confidential. According to its 2012 annual report, the ABCD has only taken 29 public disciplinary actions and issued 6 public reprimands over the past 20 years.

~~While it might be desirable to establish state licensure programs for actuaries similar to those in place for other professionals whose opinions and advice are relied upon by the public, such as accountants, attorneys, or insurance brokers and agents, we recognize that this is probably not politically feasible.~~ We ~~do, however,~~ believe that more could be done to increase public accountability.

First, we urge the NAIC to request that the ABCD revise the professional integrity standard of its Code of Professional Conduct to clarify that when an actuary provides an actuarial communication to a public regulatory body (state or federal) that will rely on that communication, the actuary's primary responsibility is to the public. This responsibility should exceed a simple requirement that the actuary not engage in fraud, dishonesty, deceit, or misrepresentation or violate the law. It is to some extent captured in Precept 1 of the Code, which recognizes the responsibility of the actuarial profession to the public, but should be strengthened and recognized as a primary fiduciary duty. Failure to live up to this standard should be recognized as inappropriate or unprofessional conduct.

Second, the NAIC should ask the ABCD to revise its conflict of interest standard to ensure that an actuary or actuarial firm should not both represent an insurer in making undertaking actuarial communications and analysis and a public agency that will evaluate or rely on that analysis and those communications, strengthening Precept 7 of the Code. While it is probably not feasible to make those restrictions absolute and it would be unworkable for them to apply for an indefinite period of time, there should be limitations on actuaries or actuarial firms representing both industry and regulatory bodies, such as within a specified time frame, for inclusion in a specific document, or as part of the adjudication of single issue before a public agency. In addition, the determination of

whether an actuary has a conflict of interest must not be left solely to other members of the actuarial organization

Third, the NAIC should recommend that the ABCD should include on its board representatives of consumer advocacy organizations and of state insurance departments. Consumer representation on professional licensure boards and on accreditation bodies has become very common, and has generally had the salutary effect of increasing the responsiveness of these bodies to public concerns. Consumer and regulator representation would help ensure that actuaries meet the standard of fiduciary responsibility to the public.

Fourth, the NAIC should recommend that the ABCD review its procedures to make them more transparent and accountable. At the very least, the ABCD should involve complainants in the disciplinary process and ensure that complainants are fully informed as to the course of proceedings. Insurance departments should widely publicize the availability of the ABCD to review complaints against actuaries and should not hesitate to file complaints themselves when actuarial communications are improper. Insurance departments should publicize the de-identified quantified data regarding the number of complaints and publish the results of confirmed complaints including sanctions and administrative remedies on their website

Fifth, we urge the NAIC and state insurance departments to continue to monitor the work of actuaries to determine if further public oversight may be necessary and to evaluate the standards of professional conduct to ensure they provide meaningful standards.

Finally, we take no position on the question of whether there should be a uniform definition of qualified actuary. Whether or not the NAIC pursues this course, however, we believe that it is very important that actuaries not engage in work for which they are not professionally qualified. We are concerned, therefore, that it be clear that even if an actuary is designated as a qualified actuary, the actuary must limit his or her practice to areas of practice for which the actuary is qualified by education and experience. We also note that experts who are not members of one of the actuarial organizations have been accepted as experts in rate proceedings and have assisted regulators on rate and risk classification matters on many occasions. Any definition of a qualified actuary must not categorically exclude such experts from state rate matters.