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February 28, 2012

Honorable Kevin M. McCarty, Florida Insurance Commissioner and NAIC President
Dr. Therese M. Vaughan, NAIC CEO
National Association of Insurance Commissioners
444 North Capitol Street NW, Suite 701
Washington, D.C. 20001

Dear Commissioner McCarty and Dr. Vaughan:

As you may know, I am very interested in advancing positive regulatory reform to effect better insurance regulation for consumers. I have supported various efforts to advance reform for many years and look forward to considering the recommendations for improving and modernizing the existing system that the new Federal Insurance Office is scheduled to provide to Congress in the coming days.

In light of the need to reform the existing system, I read with interest a recent press report regarding the National Association of Insurance Commissioners' "initiative to brand itself as a 'standard-setting organization' rather than a trade group."¹ The article states that, at a recent Treasury Department meeting, NAIC members objected to conference participants' description of your Association as a "trade association."

It has been my understanding that the NAIC is a private, 501(c)(3) corporation. Numerous courts, including the U.S. Supreme Court, have quoted from the legislative history of the McCarran Ferguson Act the categorical statement that "[n]othing in the proposed law would ... authorize any private group or association to regulate in the field of interstate commerce."² By most accounts, the NAIC is an organization with a \$70 million budget not subject to governmental accountability mechanisms such as appropriation oversight and freedom of information act and open meetings laws.

¹ Elizabeth Festa and Arthur D. Postal, "Is the NAIC a Trade Group or Official Standard-Setter?", *National Underwriter*, Dec. 19, 2011.

² *FTC v. Travelers*, 362 U.S. 293 (1960). See also *American General v. F.T.C.*, 359 F.Supp. 887 (D.C. Tex. 1973); *U.S. v. Chicago Title*, 242 F.Supp. 56 (D.C. Ill. 1965) (same).

In fact, when challenged regarding its failure to abide by the sorts of accountability statutes that its members must follow in their individual capacities, the NAIC renounced any formal role in the regulatory system. For instance, when the National Conference of Insurance Legislators (NCOIL) challenged the extent of NAIC's authority and influence, and its lack of traditional accountability mechanisms, NAIC replied:

The NAIC is a 501(c)(3) non-profit corporation. ... As such, the NAIC is not subject to state Open Meetings or 'Sunshine' Laws. ... When individual insurance commissioners gather as members of the NAIC, they are not considered a governmental or public body ... but rather are a private group. As an organization, the NAIC does not have any regulatory authority.³

It appears, when it suits its purposes, the NAIC fends off questions about its accountability and transparency by arguing that it is "a private group" that "does not have any regulatory authority." This position is legally essential since, under controlling law, no "private group or association [may] regulate in the field of interstate commerce."

But it would now appear this "traditional" position is politically inconvenient given its attempts to posture itself in the new Dodd-Frank/FIO regime. Present circumstances call for an opposite spin, emphasizing NAIC's key role in "form[ing] the national system of state-based insurance regulation in the U.S."

The NAIC's about-face on its self-proclaimed status in a period of just ten days last summer may best illustrate what appears to be an untenable position. On July 28, 2011 before the House Financial Services Committee, NAIC president, Susan Voss, stated that the NAIC was not part of "some kind of ... national regulatory system"⁴ in response to a question regarding its perceived status as a regulatory body lacking traditional accountability. Yet, on August 7, 2011, in what appears to be an effort to demonstrate its relevance in the Dodd-Frank/FIO world, the NAIC claimed it was integral to helping "form the national system of state-based insurance regulation in the U.S."⁵ in an attempt to sell the importance of its pronouncement regarding the financial system. These positions seem, at the least, inconsistent.

Given the impending FIO report to Congress on the state of the U.S. regulatory system, understanding precisely what the NAIC is and how it is governed—and reconciling the NAIC's own inherently inconsistent statements about itself—is timely and relevant. Therefore, I ask the following questions.

1. What is NAIC's status? Is it a trade association? Is it a formal part of "the national system of state-based insurance regulation in the U.S."? If so, why did it (a) testify to Congress, when asked specifically about its status, that it does not "hold ourselves out as

³ NAIC president Walter Bell letter to NCOIL president Patrick Kennedy, April 9, 2007.

⁴ Hearing transcript at 19. <http://financialservices.house.gov/UploadedFiles/112-53.pdf>

⁵ NAIC press release of Aug. 7, 2011.

See http://www.naic.org/Releases/2011_docs/naic_response_credit_downgrade.htm.

some kind of ... national regulatory system”; and (b) insist to NCOIL that it is “not considered a ... public body” and “does not have any regulatory authority”?

2. Does NAIC agree that as a self-described “private group,” it may not “regulate in the field of interstate commerce”? Do its activities—including but not limited to the Securities Valuation Office, System for Electronic Rate and Form Filing, Financial Standards and Accreditation Program, Market Analysis Procedures Working Group, and National Insurance Producer Registry—amount to regulating interstate commerce and/or exercising governmental authority under color of law?
3. As a 501(c)(3) non-profit corporation, does the NAIC not file a Form 990, a routine financial statement for non-profits, with the Internal Revenue Service (IRS)? If the NAIC has been formally exempted by the IRS from filling this information, please provide written documentation of this exemption, and explain why the NAIC feels it necessary to keep this disclosure from public scrutiny.

I would appreciate your prompt attention to this matter and a substantive written reply.

Sincerely,



EDWARD R. ROYCE