

#MoSummit2016



DIFP
Department of Insurance,
Financial Institutions &
Professional Registration

Confidentiality and Regulatory Information Sharing



**2016 Director's
Regulatory Summit**

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Panelists

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Legal Framework for Regulatory Information Collection and Sharing

- Identify statute that authorizes the collection of confidential information (CI) and provides for its confidentiality when in possession of collecting regulator
 - Examination and holding company laws often utilized
 - Laws provide range of entities with which CI may be shared
- Identify other parties (often regulators) with which the collecting regulator intends to share CI
- Ensure agreements are in place that commit the receiving entities to maintain the confidentiality of CI, including possible restrictions on sharing with third parties
- Provide for procedures under which CI is requested and allow for providing party to respond appropriately



NAIC Confidentiality Template

- NAIC model confidentiality template declares certain information to be:
 - Confidential by law
 - Privileged
 - Not subject to FOIA/public records laws
 - Not subject to subpoena
 - Not subject to discovery or admissibility in a private civil action



Recent NAIC Model Law Adoptions

- Insurance Holding Company Systems Regulatory Act (#440) – enterprise risk reports
- Risk Management and Own Risk and Solvency Assessment Model Act (#505) – incorporates proprietary information, trade secret protection for ORSA information
- Corporate Governance Annual Disclosure Model Act (#305)



Enhanced Confidentiality Protections

- Model holding company act (2010 amendments)
 - Additional information considered statutorily confidential
 - Explicit authorization to share with members of supervisory college
 - Form F may only be shared with states having confidentiality language substantially similar to that state's version of Section 8A of model law
 - Written agreements with NAIC must include certain provisions
 - Declaration that sharing of CI does not constitute a delegation of regulatory authority
- RMORSA model act (2012)
 - Recognition that ORSA Summary Report is proprietary and contains trade secrets
 - Removes certain authority for commissioner to publish CI when in interest of policyholders, public, shareholders
 - Narrows sharing to other “financial regulatory” agencies
 - Adds additional provisions to be included in an agreement with NAIC and applies similar provisions to third-party consultants



Recent NAIC Model Law Adoptions

- Issues in legislative adoptions
- States seeking to enact MHCA amendments and ORSA have had pushback from certain groups
- Protections from subpoena, discovery, admissibility have been challenged – some states have had to compromise or get creative
- Concern that absence of particular words negates completely the relevant protection



Information Sharing Among States

- Derivative confidentiality
 - Relates to the ability of one state to treat information from another state as confidential if the information is treated as confidential in the providing state
 - Provides foundation for information among state insurance departments
 - Master information sharing agreement



International Issues in Information Sharing

- Clarifying relationship between state freedom of information/public records laws and confidentiality provisions/exceptions
- Understanding expectations with respect to “professional secrecy”
- Addressing issues about and circumstances under which confidential information may (or may not) be passed along to a third party
- Understanding how, and the extent to which, national and international standards are transposed into law
- Ensuring that the legal framework and confidence exist for regulators to enter into agreements that provide the basis for sharing confidential information



Role of the NAIC

- NAIC is not a party to master agreement
- The same state laws that authorize sharing among regulators often also authorize sharing with NAIC
- NAIC role helps facilitate information among, and on behalf of, state regulators
- Some resistance to role of NAIC from federal and international regulators
- Role of NAIC varies depending on the nature of the information



Role of the NAIC – Data Calls

- NAIC assistance is requested sometimes for multistate data calls
 - Disaster reporting
 - Terrorism risk information
- Lead state is utilized as the point of collection
 - Provides a nexus between the data and a state law that protects the information as confidential
 - Authorizes sharing of that data with NAIC
- NAIC and lead state enter into a confidentiality agreement
 - Stipulates the role of the NAIC in relation to the data
 - NAIC often aggregates and analyzes data, performs quality checks, and prepares reports for regulator use



Areas to Watch

- Confidentiality permeates most areas of insurance regulation
 - Accreditation
 - Model law implementation and development
 - MOUs with federal bodies
 - FSOC MOU
 - IAIS MMoU
 - Information sharing, reporting, and protection
 - Use of contractors and consultants
 - Data calls



Amy Hoyt, DIFP



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Missouri General Confidentiality

- Records Requests
- Missouri Sunshine Law
- Consumer Complaints
- Form and Rate Filings



“Show Me” Confidentiality - True or False?

- All records of the Missouri Department of Insurance are exempt from public disclosure under the Missouri Sunshine Law.
- The contents of consumer complaints made to the Department of Insurance are open records and subject to public disclosure.
- The contents of insurance rate and form filings are never open to the public.
- **All are FALSE**



Let's Talk About Records



- Consumer Complaints
- Rate and Form Filings
- Licensing information for Producers
- Market Conduct Actions
- Financial Examinations



Publicly Available Information

The screenshot shows the Missouri Department of Insurance website in Internet Explorer. The browser address bar displays <http://insurance.mo.gov/>. The website header includes the Missouri Department of Insurance logo, navigation links for MO.gov, Governor Jay Nixon, Find an Agency, and Online Services, along with a search bar and social media icons for YouTube, Twitter, and Facebook. The main navigation menu features links for Home, Consumers, Agents, Other Licensees, Companies, Reports, and Laws & Bulletins. The 'Consumers', 'Companies', and 'Reports' links are circled in red. Below the navigation menu is a large banner for the '2016 Director's Regulatory Summit' with a video player. To the right, a 'How do I...' section lists services such as 'Verify and Print my License', 'File a Complaint', and 'Find Laws & Regulations'. Below this is a section for 'About Director John M. Huff' and a 'Get News' section with a megaphone icon. The 'Headlines' section is divided into categories: Consumers, Seniors, Small Business, Insurers, and Agents. The 'Consumers' category lists topics like Auto, CLAIM - free Medicare help, Consumer Complaint Index, Earthquake, Health, Homeowners, Long-Term Care, Renters, and Severe Weather. The 'Online Services' section lists 'File a Complaint', 'Find an Agent/Agency', 'Find an Insurance Company', 'Life Policy Locator', 'Publications', and 'Public Access to Insurance Company'. On the right side, there is a 'REFLECTIONS In' 2015 Annual Report graphic with the DIFP logo.



Records Requests

- Sources of requests vary, from reporters to legislators, to individual consumers
- Each request is analyzed individually
 - Do we have the information?
 - Can we release the information?



Missouri Sunshine Law

- §610.011: “It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.”
- §610.022 – “Public records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter.”



Access to Records Under the Sunshine Law

- §610.023 - Public Governmental Body must act on a request for records “as soon as possible, but in no event later than the end of the third business day” following receipt of the records request.



Exceptions to Open Records

- §610.021 Provides a list of types of records that may be closed:
 - Personnel Records
 - Communications with Attorney or Auditor
 - Sealed Bids
 - Records protected from disclosure by law



Department Policy Regarding Release of Information

- §610.028 Requires public governmental bodies to have a written policy regarding the release of information.
- DIFP: 20 CSR 10-2 is the Department's Policy
 - Specific to the Department's work
 - Records protected from disclosure by law.



Consumer Complaints

- § 374.071: Certain records are NOT public records, including...
- “Any document or other material in any consumer complaint file maintained under section 374.085, including medical records, repair estimates, adjuster notes, insurance policy provisions, recordings or transcripts of witness interviews, and any other records regarding coverage, settlement, payment, or denial of claim asserted under an insurance policy.”



A Note About HIPAA

- Health Insurance is the leading driver for Consumer Complaints received by DIFP
- Other insurance complaints also receive PHI
- In the course of investigating the complaint, the Department receives information that would be considered Protected Health Information under HIPAA
- “Health Oversight Agency”



Consumer Complaint Data

- Consumer Complaint Report – aggregate data available.
- Consumer Complaint Index – measures the number of complaints the Department receives for a 3 year period, related to the amount of product-specific premium experienced by the company in that same period.
- The higher the index number, the worse the complaint record.



Form and Rate Filings

- SERFF is our filing cabinet
- Forms and Rates are publicly accessible via SERFF once they have a final disposition.
- Confidentiality concerns arise more frequently with new products and with rate filings.



Trade Secret Information

- §§417.450-417.467 – Uniform Trade Secrets Law
- 20 CSR 10-2.400 – “Records containing any trade secret under section 417.453(4) are closed records if the trade secret has been reasonably designated as such.”



“A public office with public records”

- § 374.070.1: “The office shall be a public office and the records shall be public records and shall at all times be open to the inspection of the public...”
- “...provided, however...”



“A public office with non-public records”

- § 374.070.1: “...the work product of the director, the director’s employees and agents ... shall not be considered public records except as provided by law.”
- See also: 20 CSR 10-2.400 Records



Duty of the Director

- § 374.040.1: “It shall be the duty of the director of the department ... to perform those duties imposed upon him in such a manner as to be in the best interests of and protect the general public, policyholders, insurance companies, and the officers, directors and stockholders thereof.”



Cooperation/Coordination/Consultation

- § 374.185.1: Cooperation, coordination, and consultation is allowed in order “...to effectuate greater uniformity in insurance and financial services regulation among state and federal governments, and self-regulatory organizations.”



Kelly Hopper, DIFP



15-Minute Agenda

- Market Conduct Investigations
- Market Conduct Examinations
- Financial Examinations
- Mergers and Acquisitions
- Administrative Supervision
- Form F and ORSA
- Miscellaneous Solvency Issues



Market Conduct Investigations

- § 374.190 gives the Department authority to conduct investigations.
- § 374.071.1(2) makes non-public any document or other material submitted by an insurer or producer under § 374.190, or any other inquiry, information request, or data call initiated by the Department.



Market Conduct Investigations

- § 374.071.2: “Any record that is not public under ... this section is confidential and is not subject to disclosure, including discovery or subpoena, unless the subpoena is issued by the prosecuting attorney, attorney general, administrative hearing officer, or under the authority of any court...”



Investigations – Information Sharing

- § 374.071.4 allows disclosure to or by the Director in sharing documents with other state/federal regulators, the NAIC, or law enforcement.
- The recipient of shared documents is bound by statutory confidential provisions.



Investigations - Tension

- Director discretion – § 374.071.2: “...The documents or material may, in the discretion of the director, be made public once admitted as evidence in any administrative, civil, or criminal enforcement proceeding.”



Market Conduct Examinations

- § 374.205 gives the Department authority to conduct examinations.
- § 374.205.4: “All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the director or any person in the course of an examination ... shall be given confidential treatment and are not subject to subpoena...”



Financial Examinations

- Financial examinations are also authorized under § 374.205, and must be conducted at least once every five years for Missouri domestic companies.
- Examined companies have an opportunity to respond to and challenge the contents of an examination report prior to its publication, with limited exceptions.



Examinations – Information Sharing

- § 374.205.3(5) allows disclosure of any exam-related matter to other insurance departments or law enforcement, typically pursuant to the Master Information Sharing Agreement.
- § 374.205.4 allows for sharing with the NAIC, as well.



Examinations - Tension

- § 374.205.2(6): “Nothing contained in sections 374.202 to 374.207 shall be construed to limit the director’s authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or company workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the director may, in his or her sole discretion, deem appropriate.”



Mergers and Acquisitions

- The Department reviews and approves mergers with and acquisitions of Missouri domestic insurance companies.
- § 375.355 – acquisition by a Missouri domestic
- § 382.060 – acquisition of a Missouri domestic
- § 382.095 – competitive impact of an acquisition



M&A – Form A

- The most common type of filing is a Form A filing, made pursuant to §§ 382.040-382.060.
- Confidentiality issues that can arise: biographical information, pro forma financial statements, future business plans, publicly-traded companies
- 20 CSR 10-2.400(8) procedure for closing trade secret records, see also §§ 417.450-417.467



M&A – Form E

- Form E filings are made pursuant to § 382.095
- These competitive impact statements are now required with every Form A filing unless exempt due to minimal market share
- Explicit confidentiality protection of information submitted



M&A – Information Sharing

- States often share basic procedural information on multi-state mergers.
- Less need for fact-specific sharing in state M&A review because focus is on state markets and domestic insurance company.



M&A – Tension

- Form A hearing is public; any interested person can appear to present evidence, cross-examine witnesses, etc.
- Five of the six conditions for disapproval require the Director to consider the effect of the merger/acquisition on the public or policyholders



Administrative Supervision

- Companies with a variety of serious issues (e.g. financial, corporate governance, etc.) can be placed in administrative supervision under § 375.1160.
- Discretion to open these proceedings to the public “if the director deems that it is in the best interest of the public or in the best interest of the insurer, its insureds, creditors or the general public.”



Form F – Enterprise Risk Management

- § 382.175 calls for enterprise risk reports, also known as Form F filings, are intended to be a self-evaluation of material risks within an insurance holding company system that could pose enterprise risk to the insurer.
- Strong confidentiality protection.



Supervisory Colleges

- § 382.225 allows the Director to participate in supervisory colleges of insurance holding company systems with international operations.
- Numerous confidentiality agreements governing these colleges.



Holding Company Confidentiality

- § 382.230.1: “...shall be given confidential treatment and privileges; shall not be subject to the provisions of chapter 610; shall not be subject to subpoena; shall not be made public...except to the chief insurance regulatory official of other states; and shall not be subject to discovery or admissible as evidence in any private civil action...”
- “However...”



Holding Company Confidentiality

- May be used in furtherance of any regulatory or legal action brought as a part of the Director's official duties.
- May be published by the Director after notice and hearing if he/she determines that the interests of policyholders/shareholders/public will be served.



ORSA

- The evolution of confidentiality protection continues.
- § 382.500.2: declaration from the general assembly of the confidential and sensitive information in ORSA summary reports.
- § 382.535.1: explicit recognition of ORSA-related documents as containing trade secrets.



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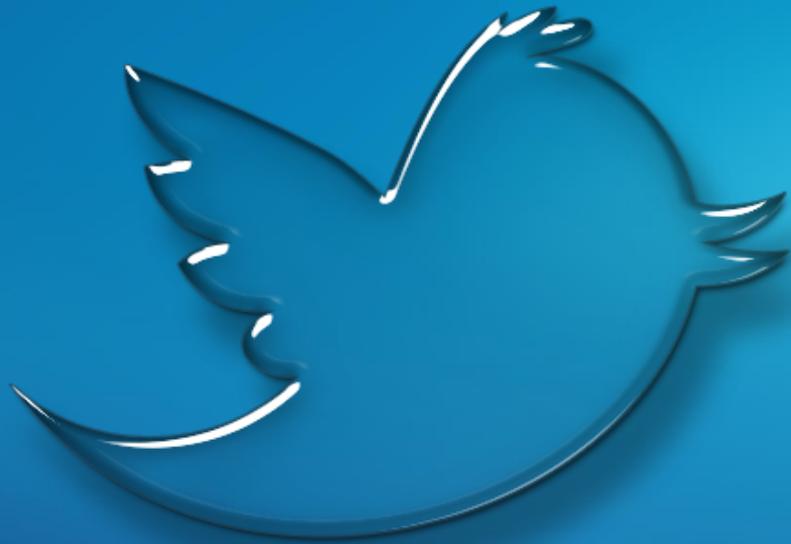
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Any
questions



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