



Comments of the Center for Economic Justice
To the NAIC Travel Insurance Working Group
July 24, 2017

CEJ offers the following comments on the first few sections of the NCOIL Travel Insurance Model Act, which is serving as the starting point for the NAIC Travel Insurance Working Group’s drafting effort.

Before we offer our comments on the NCOIL model language, we reference our July 18, 2017 comments in which we urged regulators to collect and publish basic data about travel insurance market participants and consumer market outcomes to provide objective information to inform the working group’s discussion and to improve the ability of non-industry stakeholders to participate in the working group’s discussion.

As a further preliminary comment, we understand the working group will not discuss consumer disclosures in the initial discussions, but we wish to state our disagreement with and opposition to the arguments in the USTIA letter dated July 14, 2017.

USTIA states, “Legal decisions, including U.S. Supreme Court cases make clear that bundling is not deceptive.” USTIA makes a broad, generic statement and (mis)applies it to the specifics of travel insurance. Of course, some bundling can be beneficial and promote competition. Bundling of coverages within a homeowners policy or a personal auto policy is beneficial and promotes competition. But, it is unclear – and dubious – that bundling of insurance and non-insurance products into a travel protection plan is beneficial to consumers, promotes competition or requires unique consumer disclosures or protections. USTIA has made no showing for its claims and the travel industry has refused to provide basic data – available for every other line of insurance – for an empirical analysis of these claims.

In another example of a generic statement about bundling applied to travel protection plans, USTIA states, “Instead, bundling is advantageous to the consumer because it leads to lower costs, improved consumer use of component products, and a better coordinated and consolidated customer service function.” Again, no evidence has been put forth in support of these claims. Our suggested data request to industry would provide evidence to support or refute these claims.

USTIA’s July 14, 2017 letter states:

“Market conditions, moreover, do not warrant additional or earlier disclosures, and there is no legal basis to suggest otherwise. The need for disclosures should be reserved only to circumstances where there is a strong overall impression that the average, reasonable consumer is being deceived, and any disclosure requirements must relate to combating that deception. Based on consumer complaint data, there is no evidence of consumer deception in the travel insurance context.”

Yet, the only “evidence” offered by USTIA is “consumer complaint data,” which are not dispositive of a healthy insurance market, generally, and for travel insurance, in particular. Given that much or most travel insurance is sold by retailers that consumers would generally not recognize as insurance producers, it is likely that the majority of consumer complaints never make it to insurance regulators – the “complaint data” cited by USTIA. As discussed in our July 18, 2017 comments, data on complaints filed with travel producers and insurers, on policy cancellations and on claims denials would provide objective evidence of consumer understanding of travel protection products.

In at least one instance, USTIA’s arguments move beyond generic-without-empirical-support to misleading and deceptive, raising legitimate questions about the veracity of claims of the travel industry regarding its products and services.

In its July 14, 2017 letter, USTIA cites CEJ comment in support of their position. USTIA states that CEJ’s comment was “disclosure is not a panacea,” implying support for their position that no additional disclosures beyond those in the NCOIL model are needed. This is a stunning misrepresentation of our position. CEJ has stated that in certain markets, consumers are so disadvantaged that disclosures cannot overcome the greater market forces of the seller – particularly the case in add-on product markets like some of those in which travel insurance is sold. Our point was that in these non-competitive markets, greater regulatory – not informational – protections are needed for consumers. In addition, in several of our prior comments, we have agreed with the IIABA that, in the absence of the stronger regulatory protections, additional disclosures are needed. If USTIA will misrepresent CEJ’s position on this issue, we have no confidence in their representations about consumer market outcomes.

In its July 14, 2017 letter USTIA, claims that advertising a bundled product is not inherently deceptive. This is, of course a straw man argument. No one has made this argument. The issue is not whether bundling in general is good or bad or whether bundling in general needs certain disclosures, but whether the travel protection bundling sold in specific markets empowers consumers or empowers travel protection producers at the consumer's expense.

In its July 14, 2017 letter, USTIA argues that there is no "legal basis" for "additional" disclosures based on an interpretation of Federal Trade Commission policy statements. There are several problems with this entire discussion by USTIA. First, the working group is developing a model law to serve as the legal basis for the sale of travel insurance. The legal basis for disclosures will be the policy decisions made by regulators crafting the model and by state legislators adopting the model – not on the basis of hypothetical enforcement by the FTC. Second, USTIA – and the FTC policy statement cited by USTIA – place great weight on consumers' ability to easily evaluate the product or service and on frequent purchase by the consumer. Insurance is not like other consumer products because the product is a promise for future benefits if certain events occur. Consumers may purchase the product many times before the consumer attempts to utilize the benefit. Consequently, frequent purchase does not equate to frequent use by an insurance consumer. Third, there is no empirical basis for the USTIA argument since the travel industry has refused to provide the data describing markets and consumer outcomes that are available for every other line of insurance.

In summary, we urge the working group to reject USTIA's misapplication of generic and broad statements to travel insurance/protection and quickly proceed with a data request to provide the necessary empirical evidence to inform the working group's deliberations.

Comments on Specific Sections

Section 2 Scope and Purposes

A. The purpose of this Act is to promote the public welfare by creating a comprehensive legal framework within which Travel Insurance and Related Services may be sold in this state ~~through the establishment of clear regulatory obligations for those involved in the development and distribution of Travel Insurance, preserving the unique aspects of Travel Protection Plans, and protecting and benefiting consumers by encouraging fair and effective competition within the market.~~

B. The requirements of this Act shall apply to Travel Insurance and Related Services, ~~whether or not provided as part of a Travel Protection Plan, where policies and certificates are delivered or issued for delivery in this state. It shall not be applicable to Cancellation Fee Waivers and Travel Assistance Services, except as expressly provided herein.~~

Discussion: While it may be reasonable for different oversight of non-insurance travel services than for travel insurance, there is clearly a need for regulatory authority over the entire travel assistance package that includes travel insurance for several reasons. First, there needs to be oversight of what products or services are or are not insurance to prevent regulatory arbitrage of shifting insurance products to the non-insurance portion of the travel protection package. Second, regulatory oversight over travel insurance requires oversight of the sales transaction of travel protection packages that feature travel insurance. Third, regulatory oversight of travel protection package is needed to prevent sham non-insurance products.

Cancellation Fee Waiver

We expand on the last point with discussion of “cancellation fee waivers.” Travel protection bundles include insurance products, non-insurance protection in the form of fee waiver or fee cancellation and travel assistance services. We are greatly concerned about sham fee waiver / fee cancellation products and believe a careful definition is needed for so-called non-insurance fee waiver products.

Insurance involves a transfer of risk from a consumer to an insurance company in which the insurance company agrees to pay an amount if certain events occur. Fee waiver products, in theory, are a contractual relationship between the travel provider and consumer in which the travel provider agrees to waive or cancel a fee if certain events occur. In fact, the vast majority of fee waiver products are backed by a contractual liability insurance policy and administered by an insurance company.

We ask the working group to consider the following scenarios.

Scenario 1: the travel provider sells cancellation fee insurance in which an insurance company agrees to pay a certain amount to the travel provider on behalf of the consumer in the event a consumer has to cancel a trip due to specified events.

Scenario 2: the travel provider sells cancellation fee waiver in which the travel provider agrees to waive the cancellation fee if a consumer has to cancel the trip due to specified events. The travel provider purchases a contractual liability policy to cover any cancellation fees waived and charges the consumer the premium amount plus a mark-up as the waiver fee.

In our view, the travel provider is engaged in a sham waiver transaction that robs consumers of insurance protections and robs states of premium tax. We submit that this discussion of cancellation fee waiver demonstrates the need for the model to provide regulators with oversight of the entire travel protection product and the need for to limit the definition of fee waiver products to only those that do not involve an insurance policy to ensure that any fee waiver products are genuine and not sham..

The edits we suggest to Section 2 reflect our belief that consumer protection requires regulators to have oversight of travel insurance and the related services that are part of a travel protection package.

Comments on Oklahoma Suggestions

We recognize that the suggestions ascribed to Mr. Amini of Oklahoma in the July 12, 2017 Discussion Direction document were preliminary. We appreciate Mr. Amini's extensive efforts on travel insurance and we offer some preliminary comments. We disagree with the proposed sections D and E. Mr. Amini's proposed section D states:

D. The purpose of this Act is to regulate travel insurance as a product incidental to planned travel. It is not the intention of the Legislature to modify practices and procedures, otherwise lawful in the travel industry, but to provide consumer protections necessary for an informed decision to purchase.

We believe the purpose of the model is to provide a comprehensive framework for the oversight of and requirements for sale of travel insurance and related services – not to regulate a product incidental to planned travel. Further, the purpose of the model – and law, if adopted by the state – may well be to modify current practices and to prohibit – make unlawful – certain practices. Finally, the purpose of the model goes far beyond an informed decision to purchase.

Mr. Amini's proposed Section E provides a list of the forms of travel insurance sales. It is unclear what purpose is intended by this list, but we disagree with the proposed taxonomy. If travel insurance sales are categorized in a model law, we suggest that "direct sales" should retain its common meaning in insurance of sales by the insurance company to the consumer without a producer or intermediary. Sales by travel retailers are not direct because the travel retailer is a licensed producer. We reserve further comment until we better understand the purpose of the proposed section.

Section 3 Definitions

We offer preliminary comments on some definitions. We expect to offer additional comments on the items below and additional definitions as the working group deliberations unfold. In addition, while we are offering comments based on preliminary decisions by the working group, our comments are not an endorsement of bundled insurance and non-insurance products.

Cancellation Fee Waiver

“Cancellation Fee Waiver” means a contractual agreement between a supplier of travel arrangements or travel services and its customer to waive some or all of the nonrefundable cancellation fee or penalty provisions of the underlying travel contract between the supplier and customer. A Cancellation Fee Waiver is not insurance only if the supplier does not utilize directly or indirectly an insurance policy or policies for reimbursement of fees waived under the contractual agreement with the customer.

Discussion: See discussion in section 2, above.

Eligible Group

The definition of “eligible group” includes a list of different possible groups of individuals but fails to identify or specify the characteristics of the sale or purchase that would distinguish a group policy from an individual policy. For example, item f defines one group as any financial institution or financial institution vendor or parent holding company under which accountholders, debtors, guarantors or purchasers are insured. Since the definition of “group travel insurance” is simply travel insurance sold to an eligible group, by the definition of “eligible group,” for example, a financial institution could purchase a group policy and sell coverage under the group policy in the same way that a travel insurance producer sells individual coverage. The definition of eligible group – or group travel insurance – requires some definition that effectively distinguishes a group policy from individual policies.

In addition, section l is overly broad and vague by authorizing the Commissioner to declare any group of people as an eligible group based on some relationship other than the nature of the sale or purchase. The definition limits the Commissioner’s declaration of a group to situations “not ... contrary to the best interests of the public.” It is unclear what is intended by “best interests of the public” and no guidance is provided.

Travel Administrator

According to the definition of “limited lines travel insurance producer,” a travel administrator is such a limited lines travel insurance producer. The definition of travel administrator sets out a list of activities of a travel insurance producer, including “directly or indirectly underwrites, collects charges, collateral or premiums from, or adjusts or settles claims on residents of this state, in connection with Travel Insurance,” But, the definition of travel insurance administrator then exempts a person engaged in any of five activities from being a travel administrator – including the very activities that define a travel administrator. It is unclear what a travel administrator is or does separate from or in addition to the activities of limited or fully licensed producer or insurer.

Travel Assistance Services

This definition is problematic because it defines activities as non-insurance assistance services that are clearly related providing an insurance benefit. For example, emergency messaging, international legal and medical referrals, medical case monitoring and other items can clearly be related to a travel insurance medical benefit claim.

“Travel Assistance Services” means non-insurance services sold in connection with travel insurance and which are not related to the use of any travel insurance benefit. The Commissioner that may be distributed by Limited Lines Travel Insurance Producers or other entities, and for which there is no indemnification for the Travel Protection Plan customer based on a fortuitous event, nor any transfer or shifting of risk that would constitute the business of insurance. Travel Assistance Services include, but are not limited to: security advisories; destination information; vaccination and immunization information services; travel reservation services; entertainment; activity and event planning; translation assistance; emergency messaging; international legal and medical referrals; medical case monitoring; coordination of transportation arrangements; emergency cash transfer assistance; medical prescription replacement assistance; passport and travel document replacement assistance; lost luggage assistance; concierge services; and any other service that is furnished in connection with planned travel that is not related to the adjudication of a Travel Insurance claim, unless otherwise shall approved all services proposed in a filing as travel assistance by insurance company. by the Commissioner in a Travel Insurance filing. Travel Assistance Services are not insurance for purposes of premium tax calculation. and not related to insurance.

Travel Retailer

We think it may be useful to have a definition of Travel Retailer for sections later in the model dealing with sales practices, disclosures and rates because travel insurance sales by a travel retailer represent significantly different market forces than direct sales by a travel insurer via a web site. However, the NCOIL definition is flawed. A travel retailer that sells travel insurance should do so pursuant to, at least, a limited lines travel insurance producer license – not under the “direction” of a limited lines licensee. The purpose of a limited lines license is to allow reduced training and education requirements compared to a fully-license producer for purposes of limited types of insurance sales. It makes no sense to further dilute consumer protections by having a limited lines licensee direct a non-licensee. The phrase “as a service” is gratuitous and serves no purpose. For purposes of regulatory oversight, it makes no difference why the travel retailer offers its customers travel

“Travel Retailer” means a person or business entity that makes, arranges or offers travel services and ~~may offers and disseminate~~ travel insurance and related services, in a travel protection plan, as a service to its customers pursuant to ~~on behalf of and under the direction of a Limited Lines Travel Insurance Producer~~required producer licensing.