

A Man of Letters

Who says the art of letter writing is dead? In this age of smart phones, instant messaging, initials in place of sentences, and the general demise of the printed word, it is quite refreshing to see at least one regulator that seems to relish the written word and the artful turn of a phrase. That regulator is New

York's own Superintendent of Financial Services, Benjamin Lawsky, who has developed a strategic voice in letter format. found his voice and his syntax, Mr. Lawsky learned to translate his own aggressive approach to regulation into his letters as well. And it does not matter that the recipients do not often agree or react favorably to the message: the sport is in the letters themselves.

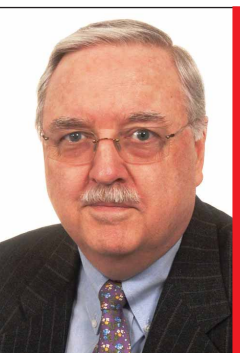
The transformation in style is epitomized in the aggressive and pointed August 12, 2014 letter to the NAIC on the topic of captives. Timed to circulate just before the NAIC's Summer National Meeting, the letter takes the NAIC to task for backing away from recommendations to rein in the use of captives by life insurers to move liabilities off balance sheet. Particular aim was taken at a revised report by the NAIC's consultant that Lawsky considered "a now-toothless" proposal that "bent over backwards to assuage the life industry's worries and, in the process, essentially defanged" the consultant's earlier report. The letter also showers its disdain on small state regulators by alleging that the proposal "keeps in place the existing fragmented system that encourages a race to the bottom amongst a small minority of states that 'compete' with one another about who can be more lenient in exercising supposed regulatory oversight over these structures." Most certainly, faced with these truths the NAIC members would have no choice but to confess the error of their ways and accede to Superintendent Lawsky's persuasive guidance and leadership. Alas, that is not the case, as the NAIC has largely ignored the rhetoric and moved toward acceptance of the revised report.

Superintendent Lawsky, of course, is not the only commissioner that has taken aim at his or her fellow commissioners in letters. He is the one, however, who has taken the art form to the next level, particularly given his relatively short tenure in the field. Also, his letter-writing prowess is not limited to the NAIC.

Superintendent Lawsky's epistles have also been directed toward the Feds, most recently through his ironic July 30, 2014 letter to the Secretary of the Treasury, Jacob Lew, as head of the Financial Services Oversight Committee (FSOC) arguing against the designation of Met Life as a systematically important financial institution, or SIFI. What makes the letter ironic? The obvious irony is that while attacking state regulators' abject failure to effectively control abusive industry practices, and copying Secretary Lew and other Federal representatives on his letter, he is concurrently expressing strong support for state regulation of major institutions like Met Life. In other words, while arguing in support of state regulation, he is providing a road map to the Feds on why they should assume more control over the regulation of the business of insurance.

But there is another, closer-to-home irony in the letter to Lew: Lawsky's assertion that the state regulators have the ability and capacity to "ensure an orderly resolution" in the event of the financial failure of a major life insurer such as Met Life. Given his own record with the failed Executive Life Insurance Company of New York (ELNY), Lawsky's support for the states' ability to effectively resolve insolvent estates is stunning. Consider, for example, the following remarkable excerpt from the letter, apparently meant to be serious:

"Because the life insurance business is based on contractual liabilities that develop over time, life insurance failures are relatively slow moving. Regulators can generally intervene early when significant assets are still available, and commence a receivership that runs off the liabil-



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Of particular note are Superintendent Lawsky's pointed, acerbic and richly critical epistles to the NAIC taking his brethren commissioners to task for not following his lead in such matters as eliminating abusive force-placed insurance, reversing course on principles-based reserving, and the use of captives by life insurers to move liabilities off balance sheet. It does not matter that the targets of his barbs have shown a remarkable propensity to ignore his dire warnings. Superintendent Lawsky has created a personal art form that transcends the actual issues. In fact, these missives are so important that they have their own category on the Department of Financial Services website – Superintendent's Letters – right up there with press releases, regulations and opinions. Oh, wait. I forgot. NY does not issue opinions anymore.

If one reads these letters in more or less chronological order, the evolution of the form is quite apparent. His early letters on topics like principles-based reserving and force-placed insurance were more or less routine position statements. As he

mized in the aggressive and pointed August 12, 2014 letter to the NAIC on the topic of captives. Timed to circulate just before the NAIC's Summer National Meeting, the letter takes the NAIC to task for backing away from recommendations to rein in the use of captives by life insurers to move liabilities off balance sheet. Particular aim was taken at a revised report by the NAIC's consultant that Lawsky considered "a now-toothless" proposal that "bent over backwards to assuage the life industry's worries and, in the process, essentially defanged" the consultant's earlier report. The letter also showers its disdain on small state regulators by alleging that the proposal "keeps in place the existing fragmented system that encourages a race to the bottom amongst a small minority of states that 'compete' with one another about who can be more lenient in exercising supposed regulatory oversight over these structures." Most certainly, faced with these truths the NAIC members would have no choice but to confess the error of their ways and accede to Superintendent Lawsky's persuasive guidance and leadership. Alas, that is not the case, as the NAIC has largely ignored the rhetoric and moved toward acceptance of the revised report.

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ities against the assets as they mature. And all the while, policyholders benefit from a guaranty fund system that keeps their losses, if any, to a minimum.”

For those who may have forgotten the ELNY saga – or who have deliberately chosen to do so – ELNY was a solvent company when taken into “rehabilitation” by

the New York regulators to “protect it” from its insolvent parent, Executive Life of California. After twenty years of glaring mismanagement by the NY Liquidation Bureau, ELNY was finally liquidated last year at a point where it was insolvent to the tune of close to \$2 billion (yes, billion). Roughly half of this \$2 billion hole – created under the watchful eyes of a long string of superintendents – was filled by state guaranty funds while the other half, or close to \$1 billion, was foisted primarily

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on a small segment of ELNY policyholders – structured settlement annuity holders – who could least afford the loss. Incredibly, no attempt has ever been made by the receiver to hold accountable those responsible for the mismanagement. Instead the last receiver, Superintendent Lawsky, sought and obtained broad judicial immunity for everyone associated with the rehabilitation, and sought and obtained a citation of contempt against counsel for a number of the affected annuitants for independently seeking accountability.

The ELNY debacle also uncovered some serious flaws in coverage and consistency in the state guaranty fund system. Even the December 2013 Report of the Federal Insurance Office (FIO) on modernizing the regulation of insurance recognized some of these problems. If ELNY, which was a mere fraction the size and complexity of a company like Met Life, effectively exposes serious deficiencies in state oversight of liquidations and the state guaranty fund system, the insolvency of a company like Met Life would magnify those weaknesses exponentially. In other words, Lawsky’s support of the states’ ability to resolve estates of large insolvent insurers – particularly life companies that write volatile annuity business – is grossly overstated.

There are a number of lessons to be learned from Superintendent Lawsky’s reliance on an acerbic letter writing style, but the one that jumps out the most is the following: when firing a cannon, be careful not to use more powder than necessary or it may blow up in your face. [A]