

MARKET CONDUCT SURVEILLANCE MODEL LAW

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Section 1. Short Title

This Act shall be known and may be cited as the Market Conduct Surveillance Law.

Section 2. Purpose and Legislative Intent

The purpose of this Act is to establish a framework for Insurance Department market conduct actions, including:

- A. Processes and systems for identifying, assessing and prioritizing market conduct problems that have a substantial adverse impact on consumers, policyholders and claimants;
- B. Market conduct actions by a commissioner to substantiate such market conduct problems and a means to remedy significant market conduct problems; and
- C. Procedures to communicate and coordinate market conduct actions among states to foster the most efficient and effective use of resources.

Section 3. Definitions

- A. “Commissioner” means the chief insurance regulatory official of the state.

Drafting Note: Where the word “commissioner” appears, the appropriate designation for the chief insurance regulatory official of the state, if different, should be substituted.

- B. “Complaint” means a written or documented oral communication primarily expressing a grievance, meaning an expression of dissatisfaction.
- C. “Market analysis” means a process whereby market conduct surveillance personnel collect and analyze information from filed schedules, surveys, required reports and other sources in order to develop a baseline understanding of the marketplace and to identify patterns or practices of insurers that deviate significantly from the norm or that may pose a potential risk to the insurance consumer.
- D. “Market conduct action” means any of the full range of activities that the commissioner may initiate to assess and address the market practices of insurers, beginning with market analysis and extending to targeted examinations. The commissioner’s activities to resolve an individual consumer complaint or other report of a specific instance of misconduct are not market conduct actions for purposes of this Act.
- E. “Market conduct surveillance personnel” means those individuals employed or contracted by the commissioner to collect, analyze, review or act on information on the insurance marketplace that identifies patterns or practices of insurers.

- F. “National Association of Insurance Commissioners” (NAIC) means the organization of insurance regulators from the fifty (50) states, the District of Columbia and the four (4) U.S. territories.

Drafting Note: If statutory drafting conventions require further description, the following language should be used: “Its mission is to assist insurance regulators in protecting the public interest, promoting competitive markets, facilitating the fair and equitable treatment of insurance consumers, promoting the reliability, solvency and financial solidity of insurance institutions, and supporting and improving state regulation of insurance.”

- G. “NAIC *Market Analysis Handbook*” means the outline of the elements and objectives of market analysis developed and adopted by the NAIC, and the process by which states can establish and implement market analysis programs.
- H. “NAIC *Market Conduct Examiner’s Handbook*” means the set of guidelines developed and adopted by the NAIC that documents established practices to be used by market conduct surveillance personnel in developing and executing an examination.
- I. “NAIC *Market Conduct Uniform Examination Procedures*” means the set of guidelines developed and adopted by the NAIC designed to be used by market conduct surveillance personnel in conducting an examination.
- J. “NAIC Standard Data Request” means the set of field names and descriptions developed and adopted by the NAIC for use by market conduct surveillance personnel in an examination.
- K. “Qualified contract examiner” means a person under contract to the commissioner, who is qualified by education, experience and, where applicable, professional designations, to perform market conduct actions.
- L. “Targeted examination” means a focused exam, based on the results of market analysis indicating the need to review either a specific line of business or specific business practices, including but not limited to underwriting and rating, marketing and sales, complaint handling operations/management, advertising materials, licensing, policyholder services, nonforfeitures, claims handling, or policy forms and filings. A targeted examination may be conducted by desk examination or by an on-site examination.
- (1) “Desk examination” means a targeted examination that is conducted by an examiner at a location other than the insurer’s premises. A desk examination is usually performed at the Insurance Department’s offices with the insurer providing requested documents by hard copy, microfiche, discs or other electronic media, for review.
- (2) “On-site examination” means a targeted examination conducted at the insurer’s home office or the location where the records under review are stored.
- M. “Third party model or product” means a model or product provided by an entity separate from and not under direct or indirect corporate control of the insurer using the model or product.

Section 4. Market Analysis Procedures

- A. (1) The commissioner shall gather information from data currently available to the Insurance Department, as well as surveys and required reporting requirements, information collected by the NAIC and a variety of other sources in both the public and private sectors, and information from within and outside the insurance industry.
- (2) The information shall be analyzed in order to develop a baseline understanding of the marketplace and to identify for further review insurers or practices that deviate significantly from the norm or that may pose a potential risk to the insurance consumer. The commissioner shall use the NAIC *Market Analysis Handbook* as one resource in performing this analysis. [Additional language will be necessary to conform with the options chosen in Section 5D, which addresses changes to the NAIC work products.]

- B. (1) If the commissioner determines, as a result of market analysis, that further inquiry into a particular insurer or practice is needed, the following continuum of market conduct actions may be considered prior to conducting a targeted, on-site market conduct examination. The action selected shall be made known to the insurer in writing if the action involves insurer participation or response. These actions may include, but are not limited to:
- (a) Correspondence with the insurer;
 - (b) Insurer interviews;
 - (c) Information gathering;
 - (d) Policy and procedure reviews;
 - (e) Interrogatories;
 - (f) Review of insurer self-evaluation (if not subject to a privilege of confidentiality) and compliance programs, including membership in a best practices organization; and

Drafting Note: A best practices organization has as its central mission the promotion of high ethical standards in the marketplace.

- (g) Desk examinations.
- (2) The commissioner shall select a market conduct action that is cost effective for the Insurance Department and the insurer, while still protecting the insurance consumer.
- C. The commissioner shall take those steps reasonably necessary to eliminate duplicative inquiries and coordinate market conduct actions and findings with other states.

Section 5. Protocols for Market Conduct Actions

- A. Market conduct actions taken as a result of a market analysis shall focus on the general business practices and compliance activities of insurers rather than identifying infrequent or unintentional random errors that do not cause significant consumer harm.
- B. (1) The commissioner is authorized to determine the frequency and timing of such market conduct actions. The timing shall depend upon the specific market conduct action to be initiated, unless extraordinary circumstances indicating a risk to consumers require immediate action.
- (2) If the commissioner has information that more than one insurer is engaged in common practices that may violate statute or regulations, the commissioner may schedule and coordinate multiple examinations simultaneously.
- C. The insurer may be given an opportunity to resolve matters that arise as a result of a market analysis to the satisfaction of the commissioner before any additional market conduct actions are taken against the insurer.
- D. For any change made to an NAIC work product referenced in this Act that [states shall select one of the following three provisions]

Option One

[materially changes the way in which market conduct actions are conducted, the Commissioner shall give notice and provide parties with an opportunity for a public hearing pursuant to [cite appropriate state administrative procedures act]. If no hearing is held, the commissioner shall use the versions of the work products most recently developed and adopted by the NAIC.]

Option Two

[materially changes the way in which market conduct actions are conducted, the Commissioner shall give notice and provide parties with an opportunity for a public hearing pursuant to [cite appropriate state administrative procedures act]. If a hearing is requested and not held, the commissioner shall use the versions of the work products most recently developed and adopted by the NAIC. For the purpose of this subsection, “material change” means any change that would require a statutory or rule change.]

Option Three

[changes the way in which market conduct actions are conducted, the Commissioner shall give notice and provide parties with an opportunity for a public hearing pursuant to [cite appropriate state administrative procedures act] in the following circumstances:

- (1) Any change that would necessitate a change in statute, regulation or rule; or
 - (2) If a commissioner deviates from the most recently adopted NAIC work product.]
- E. Except as otherwise provided by law, every insurer or person from whom information is sought, its officers, directors and agents shall provide the commissioner convenient and free access to all books, records, accounts, papers, documents and any or all computer or other recordings relating to the property, assets, business and affairs of the insurer. The officers, directors, employees, insurance producers and agents of the insurer or person shall facilitate market conduct actions and aid in market conduct actions so far as it is in their power to do so.

Section 6. Targeted On-Site Market Conduct Examinations

- A. When the commissioner determines that other market conduct actions identified in Section 4B are not appropriate, the commissioner has the discretion to conduct targeted, on-site market conduct examinations in accordance with the NAIC *Market Conduct Uniform Examination Procedures* and the *Market Conduct Examiners Handbook*. [Additional language will be necessary to conform with the options chosen in Section 5D, which addresses changes to the NAIC work products.]
- B. Concomitant with the notification requirements established in Subsection E of this section, the commissioner shall post notification on the NAIC *Examination Tracking System*, or successor NAIC product as determined by the commissioner, that a market conduct examination has been scheduled.
- C. In lieu of an examination of a foreign or alien insurer licensed in this state under this Act, the commissioner may accept an examination report of another state provided that the state has a market surveillance system the commissioner deems comparable to the market surveillance system set forth in this law.

Drafting Note: It is anticipated that as states adopt this model law or similar statutes, the practice of “domestic deference,” and other appropriate forms of interstate collaboration, whereby states rely on market conduct examinations performed by other states, will reduce and eventually eliminate unnecessary duplication of effort in the area of market conduct regulation.

- D. (1) Prior to commencement of a targeted on-site market conduct examination, market conduct surveillance personnel shall prepare a work plan consisting of the following:
 - (a) The name and address of the insurer being examined;
 - (b) The name and contact information of the examiner-in-charge;
 - (c) The justification for the targeted, on-site examination;
 - (d) The scope of the targeted, on-site examination;
 - (e) The date the on-site examination is scheduled to begin;
 - (f) Notice of any non-insurance department personnel who will assist in the examination;

- (g) A time estimate for the targeted, on-site examination;
 - (h) A budget for the targeted, on-site examination if the cost of the examination is billed to the insurer; and
 - (i) An identification of factors that will be included in the billing if the cost of the examination is billed to the insurer.
- (2) Market conduct examinations shall, to the extent feasible, utilize desk examinations and data requests prior to a targeted on-site examination.
- (3) Market conduct examinations shall be conducted in accordance with the provisions set forth in the NAIC *Market Conduct Examiners Handbook* and the NAIC *Market Conduct Uniform Examinations Procedures* [Additional language will be necessary to conform with the options chosen in Section 5D, which addresses changes to the NAIC work products.]
- (4) The department shall use the NAIC Standard Data Request, (or successor product adopted by regulation that is substantially similar to the foregoing NAIC product).
- E. Announcement of the examination shall be sent to the insurer and posted on the NAIC's *Examination Tracking System* (or successor NAIC product, as determined by the commissioner) as soon as possible but in no case later than sixty (60) days before the estimated commencement of the on-site examination, except where the exam is conducted in response to extraordinary circumstances as described in Section 5B(1). The announcement sent to the insurer shall contain the examination work plan and a request for the insurer to name its examination coordinator.
- F. The commissioner shall conduct a pre-examination conference with the insurer examination coordinator and key personnel to clarify expectations thirty (30) days prior to commencement of the examination.
- G. Prior to the conclusion of a targeted on-site market conduct examination, the individual among the market conduct surveillance personnel who is designated as the examiner-in-charge shall schedule an exit conference with the insurer.
- H. (1) The commissioner shall adhere to the following timeline, unless a mutual agreement is reached with the insurer to modify the timeline:
- (a) The commissioner shall deliver the draft report to the insurer within sixty (60) days of the completion of the examination. Completion of the examination shall be defined as the date the commissioner confirms in writing that the examination is completed.
 - (b) The insurer shall respond with written comments within thirty (30) days of receipt of the draft report.
 - (c) The department shall make a good faith effort to resolve issues informally and prepare a final report within thirty (30) days of receipt of the insurer's written comments, unless a mutual agreement is reached to extend the deadline. The commissioner may make corrections and other changes, as appropriate.
 - (d) The insurer shall, within thirty (30) days, accept the final report, accept the findings of the report or request a hearing. An additional thirty (30) days shall be allowed if agreed to by the commissioner and the insurer. Any such hearing request shall be made in writing and shall follow [insert reference to appropriate administrative procedure act].
- (2) States shall include the insurer's response in the final report. The response may be included as an appendix or in the text of the examination report. The insurer is not obligated to submit a response. Individuals involved in the examination should not be named in either the report or the response except to acknowledge their involvement.

Drafting Note: States should rely upon the NAIC *Market Conduct Examiners Handbook* to establish specific standards for examination reports.

- I. (1) Upon adoption of the examination report pursuant to Subsection H, the commissioner shall continue to hold the content of the examination report as private and confidential for a period of thirty (30) days, except to the extent provided for in Paragraph (2) of this subsection. Thereafter, the commissioner shall open the report for public inspection, provided no court of competent jurisdiction has stayed its publication.
- (2) Nothing contained in this Act shall prevent or be construed as preventing the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the Insurance Department of this or any other state or agency of the federal government at any time, provided the agency or office receiving the report or matters relating thereto agrees to hold it confidential and in a manner consistent with this Act.
- J. (1) Where the reasonable and necessary costs of a market conduct examination are to be assessed against the insurer under examination, the fees shall be consistent with that otherwise authorized by law. The fees shall be itemized and bills shall be provided to the insurer on a monthly basis for review prior to submission for payment.
- (2) The commissioner shall maintain active management and oversight of examination costs, including costs associated with the commissioner's own examiners and with retaining qualified contract examiners necessary to perform an on-site examination. To the extent the commissioner retains outside assistance, the commissioner shall have in writing protocols that:
 - (a) Clearly identify the types of functions to be subject to outsourcing;
 - (b) Provide specific timelines for completion of the outsourced review;
 - (c) Require disclosure of contract examiners' recommendations;
 - (d) Establish and utilize a dispute resolution or arbitration mechanism to resolve conflicts with insurers regarding examination fees; and
 - (e) Require disclosure of the terms of the contracts with the outside consultants that will be used, specifically the fees and/or hourly rates that can be charged.
- (3) The commissioner shall review and affirmatively endorse detailed billings from the qualified contract examiner before the detailed billings are sent to the insurer.

Section 7. Confidentiality Requirements

- A. Except as otherwise provided by law, market conduct surveillance personnel shall have free and full access to all books and records, employees, officers and directors, as practicable, of the insurer during regular business hours. An insurer utilizing a third-party model or product for any of the activities under examination shall cause, upon the request of market conduct surveillance personnel, the details of such models or products to be made available to such personnel. All documents, including but not limited to working papers, third party models or products, complaint logs, and copies thereof, created, produced or obtained by or disclosed to the commissioner or any other person in the course of any market conduct actions made pursuant to this Act, or in the course of market analysis by the commissioner of the market conditions of an insurer, or obtained by the NAIC as a result of any of the provisions of this Act, shall be confidential by law and privileged, shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action.

Drafting Note: If the state has enacted an insurer self-evaluative privilege law, the provisions of Section 7A may need to be revised to be consistent and that law.

- B. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section.

- C. Market conduct surveillance personnel shall be vested with the power to issue subpoenas and examine insurance company personnel under oath when the action is ordered by the commissioner pursuant to [cite the appropriate state authority].
- D. Notwithstanding the provisions of Subsection A of this section, in order to assist in the performance of the commissioner's duties, the commissioner may:
 - (1) Share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection A, with other state, federal and international regulatory agencies and law enforcement authorities and the NAIC and its affiliates and subsidiaries, provided that the recipient agrees to and has the legal authority to maintain the confidentiality and privileged status of the document, material, communication or other information;
 - (2) Receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the NAIC and its affiliates or subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and
 - (3) Enter into agreements governing the sharing and use of information consistent with this subsection.

Drafting Note: States may consider enacting an insurer self-evaluation privilege law, which some believe encourages insurers' to identify and remedy insurance and other compliance problems. Such laws typically provide for a limited expansion of the protection against disclosure.

Section 8. Market Conduct Surveillance Personnel

- A. Market conduct surveillance personnel shall be qualified by education, experience and, where applicable, professional designations. The commissioner may supplement the in-house market conduct surveillance staff with qualified outside professional assistance if the commissioner determines that the assistance is necessary.
- B. Market conduct surveillance personnel have a conflict of interest, either directly or indirectly, if they are affiliated with the management, have been employed by, or own a pecuniary interest in the insurer subject to any examination under this Act. This section shall not be construed to automatically preclude an individual from being:
 - (1) A policyholder or claimant under an insurance policy;
 - (2) A grantee of a mortgage or similar instrument on the individual's residence from a regulated entity if done under customary terms and in the ordinary course of business;
 - (3) An investment owner in shares of regulated diversified investment companies; or
 - (4) A settlor or beneficiary of a "blind trust" into which any otherwise permissible holdings have been placed.

Section 9. Immunity for Market Conduct Surveillance Personnel

- A. No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives or an examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this Act.
- B. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative or examiner pursuant to an examination made under this Act, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.

- C. A person identified in Subsection A shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this Act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.
- D. This section does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified Subsection A.

Section 10. Fines and Penalties

- A. Fines and penalties levied as a result of a market conduct action or other provisions of the state Insurance Law shall be consistent, reasonable and justified.
- B. The commissioner shall take into consideration actions taken by insurers to maintain membership in, and comply with the standards of, best-practices organizations that promote high ethical standards of conduct in the marketplace, and the extent to which insurers maintain regulatory compliance programs to self assess, self-report and remediate problems detected and may include those considerations in determining the appropriate fines levied in accordance with Subsection A.

Drafting Note: It is anticipated that best practices organizations such as the Insurance Marketplace Standards Association (IMSA) in the life insurance industry, and the National Committee for Quality Assurance (NCQA) and URAC in the health insurance industry, will play an important role in market conduct by expanding the frequency of voluntary insurer compliance programs. To the extent that these or similar organizations, through their compliance qualification process and procedures, can foster a culture of compliance, their contribution to market conduct surveillance should be recognized. The NAIC Best Practices Organization White Paper discusses the operational and performance standards for a best practices organization that seeks regulatory recognition for the entities the best practice organization accredits.

Section 11. Participation in National Market Conduct Databases

- A. The commissioner shall collect and report market data to the NAIC's market information systems, including the Complaint Database System, the Examination Tracking System, and the Regulatory Information Retrieval System, or other successor NAIC products as determined by the commissioner.
- B. Information collected and maintained by the Insurance Department shall be compiled in a manner that meets the requirements of the NAIC.

Section 12. Coordination with Other States Through the NAIC

The commissioner shall share information and coordinate the Insurance Department's market analysis and examination efforts with other states through the NAIC.

Drafting Note: The NAIC Market Analysis Working Group is the national, confidential forum established by the NAIC to provide regulators with opportunities to share and coordinate the results of their market analysis programs and market conduct actions. States participating in the working group are expected to conduct their market analysis programs in a manner consistent with guidelines adopted by the NAIC. Adoption of this (or a similar) law, coupled with expanded participation in the working group by states, will help foster the goal of domestic deference and other appropriate forms of interstate collaboration, thereby helping to fulfill the goal of making market conduct surveillance a national system of regulation that is more standard and uniform.

Section 13. Additional Duties of the Commissioner

- A. At least once per year, or more frequently if deemed necessary, the commissioner shall provide in an appropriate manner to insurers and other entities subject to the scope of [cite Insurance Code citation] information on new laws and regulations, enforcement actions and other information the commissioner deems pertinent to ensure compliance with market conduct requirements. The failure of the commissioner to provide information shall not be a defense for an insurer that fails to comply with any insurance law of this state.
- B. The commissioner shall designate a specific person or persons within the Insurance Department whose responsibilities shall include the receipt of information from employees of insurers and licensed entities concerning violations of laws, rules or regulations by employers, as defined in this section. These persons shall be provided with proper training on the handling of such information, which shall be deemed a confidential communication for the purposes of this section.

Drafting Note: The provisions of Subsection B relating to the designation by the commissioner of an employee to receive “whistleblower” type complaints may be added to an existing whistleblower statute, added as drafted above or omitted.

Drafting Note: States that choose to impose additional duties or responsibilities on their own insurance commissioners may insert additional subsections to this section.

Section 14. Effective Date

This Act shall take effect [insert effective date].

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

2004 Proc. 2nd Quarter 1007, 1008-1019 (adopted by parent committee)

2004 Proc. 3rd Quarter 55-56 (adopted by Plenary).