The Market Regulation Certification (D) Working Group of the Market Regulation and Consumer Affairs (D) Committee met via conference call Jan. 30, 2020. The following Working Group members participated: John Haworth, Chair (WA); Bill Cole, Vice Chair (WY); Jimmy Harris (AR); Lindsay Bates (IA); Erica Weyhenmeyer (IL); Holly Williams-Lambert (IN); Mary Lou Moran (MA); Jason Decker (MD); Cynthia Amann (MO); Tracy Biehn (NC); Reva Vandevoorde (NE); Edwin Pugsley (NH); Angela Dingus (OH); Landon Hubhart (OK); Scott Martin (OR); Christopher Monahan (PA); Michael Bailes (SC); Tracy Klausmeier (UT); Isabelle Keiser (VT); and Theresa Miller (WV). Also participating were: Pam O’Connell (CA); and October Nickel (ID).

1. **Adopted its Nov. 20, 2019, Minutes**

The Working Group met Nov. 20 to discuss the pilot volunteers’ suggested revisions to the Voluntary Market Regulation Certification Program (Program).

Ms. Dingus made a motion, seconded by Ms. Biehn, to adopt the Working Group’s Nov. 20, 2019, minutes (Attachment 1). The motion passed unanimously.

2. **Discussed Comments Concerning Certification Pilot Volunteers’ Suggestions**

Ms. O’Connell said the reorganization of the Program is an improvement. She said placing the checklist for each requirement with its corresponding requirement and guidelines makes it clearer to understand, but some of the criteria for what constitutes success on some of the standards is still unclear.

Regarding requirement 1, Ms. O’Connell said the guidelines are not clear as to what standards a jurisdiction must meet in order to pass the requirement. She said the fourth paragraph of the guidelines for this requirement only describes one item as something a jurisdiction must have in order to pass, which is the authority to coordinate with other jurisdictions. The paragraph then says a jurisdiction should have the authority to conduct analysis, examinations and enforcement but does not say it must be able to. She said the paragraph then describes a jurisdiction with the “ability” to conduct analysis, examinations and enforcement, but not the ability to perform continuum actions as marginally passing. She said it is not clear whether the word “ability” is really intended to mean “authority.” She said “authority” seems to be the correct word, or else how would a jurisdiction’s “ability” to do continuums be measured?

Ms. O’Connell said it is not clear how a jurisdiction’s authority or ability to conduct analysis, examinations, enforcement and continuum actions relates to whether the jurisdiction has the authority to collaborate with other states, which is the only specified “must have” according to the guidelines. Ms. O’Connell said the guidelines should be precise with respect to what is required for a jurisdiction to pass this aspect of the requirement.

Ms. O’Connell said while the requirement says part of the evaluation pertains to whether the jurisdiction has adopted or is in the process of adopting key consumer protection laws and the guidelines list a series of key laws a jurisdiction should have, the checklist collects no information regarding the reporting jurisdiction’s consumer protection laws. She said it is unclear how it will be determined whether a jurisdiction meets this portion of the requirement.

Ms. O’Connell said if the items in the second paragraph under the guidelines for requirement 2 are required in order for a jurisdiction to pass this requirement, they should be incorporated into the third paragraph, which begins, “To evaluate whether your jurisdiction passes Requirement 2 ...”.

Ms. O’Connell said that because the checklist for requirement 3 has been modified to create one question about staff examiners and a separate question about contract examiners, the second bullet point in the sixth paragraph of the guidelines needs to be revised to account for the new structure and for the new lettering of all of the other questions that follow the current question 3e. She said the original intent of these bullet points, when 3d addressed both staff and contract examiners, was to say if a jurisdiction uses contract examiners for exams and continuums, additional criteria surrounding contractor
hiring practices and oversight must be met in order to pass. She said the second bullet point no longer tracks in this manner due to the changes to lettering.

For checklist item 3c, Ms. O’Connell asked the reasoning behind separating the numbers of companies upon which market analysis is performed during the year between single-state/multistate and L&H/P&C. She said there is not any pass/fail metric tied to the mix of companies analyzed during the review period. She recommended removing the additional layer of detail in order to make the self-reporting for this item less time intensive.

For the newly number questions 3i and 3j, Ms. O’Connell said it is not clear what they are intended to measure and what is meant by “quantitative and subjective measurements” to ascertain whether the Department of Insurance (DOI) is achieving its staffing policies and procedures. She said the Working Group should define these more specifically so jurisdictions will be clear on the standards to which they may be held in the future.

Ms. O’Connell said the narrative for question 3g seems to say the written premium to be entered into the table should be the combined written premium of all entities examined or subject to an action during the calendar year. She said it is not clear how this will demonstrate that the jurisdiction has enough staff to properly oversee its market. For example, she said if state A has total premium writings of $10 billion in its market overall but only did one exam on an insurer with premium writings of $5 million, comparing the $5 million figure with the number of examiners state A has on staff or under contract would provide no perspective on whether that examiner count is reasonable compared to the overall size of state A’s $10 billion market.

Ms. O’Connell said item 3h’s demand for a list of all examiners either on staff or contracted by name, along with specifics about their educational and work history backgrounds, is not relevant to whether the DOI has a properly sized staff or the ability to hire contractors to meet market regulation needs as stated in requirement 3. She noted that item 3g already asks for counts of examiners. She said 3h should be deleted.

Ms. O’Connell said under the requirement 4 structure proposed for unqualified pass and provisional pass for the various subparts of the guidelines, a jurisdiction whose rules for hiring and establishing conditions of employment are subject to collective bargaining and specific civil service rules could only ever attain a provisional pass. In the note to evaluators, it says that for provisional pass items, progress is recommended and expected during successive reviews. She said it is not clear what progress the Working Group expects to see a jurisdiction, bound by collective bargaining, make from year to year when these items are outside the control of the DOI. She said it also is not clear what the consequence would be if a jurisdiction is not able to demonstrate the desired progress.

Ms. O’Connell said the core competencies section of the NAIC Market Regulation Handbook (Handbook) with which, according to requirement 4, a jurisdiction’s methods of ensuring qualifications of staff should be consistent, lists and describes a number of designations and credentials indicative of a high degree of proficiency in market regulation. She said, however, that it also very specifically says the designations listed are not intended to be exhaustive nor is it intended for designations to be required for qualification. She said California is not in favor of the current structure of the guidelines because they set a higher standard for passing than is called for by the language of the requirement and the Handbook. She recommended simplifying this set of guidelines to eliminate the unqualified pass and provisional pass distinctions and instead establish clear criteria to measure whether jurisdictions have hiring processes allowing them to select applicants with appropriate education, work experience, skills and abilities to perform market regulation work regardless of specific designations, and whether the jurisdictions have programs and procedures to encourage and promote professional development of staff.

Ms. O’Connell noted the first line of the second paragraph of the requirement 6 guidelines incorrectly refers to the Market Actions (D) Working Group as the Market Analysis (D) Working Group.

Ms. O’Connell said for requirements 6, 7 and 8 at the bottom of each checklist, there is an unnumbered item that states, “Have there been any changes to your requirements since last year’s review. If “yes,” provide an explanation.” She said it is unclear what the phrase “your requirements” is in reference to. She said the question should be more specific to clarify what the jurisdiction should be reporting in the way of changes during the interim period.

Ms. O’Connell said the requirement 9 guidelines are not clear with respect to expectations for participation in working groups and task forces beyond the Market Analysis Procedures (D) Working Group and Market Conduct Examination Standards (D) Working Group. She said the fourth paragraph of the guidelines, which begins “To evaluate whether your jurisdiction passes Requirement 9,” lists three things the jurisdiction must be able to do at a minimum to pass—1) answer “yes” to 9a and 9b; 2) document who in the department monitors or participates in the Working Groups; and 3) accurately document a list of any
other market analysis or market conduct related working groups or task forces the jurisdiction participates in or monitors. She said the third element conflicts with the last paragraph of the guidelines that says it is at the jurisdiction’s discretion to participate in or monitor the Market Information Systems (D) Task Force or any other working group or task force that reports to the Market Regulation and Consumer Affairs (D) Committee. She said the Working Group should modify the guidelines to eliminate this conflict by either making participation in or monitoring of these other groups mandatory or discussing them in the guidelines as something the jurisdiction should consider being a best practice.

Ms. O’Connell recommended modifying the requirement 11 guidelines and the criteria for what passes this requirement to mirror the current national analysis program process with the recognition that the process could change in the future, in which case the guidelines will be reevaluated and modified. She said the current structure of the national analysis program calls for: 1) a lead state for each line of business that is responsible for the selection process; 2) individual jurisdictions to perform analysis on selected companies; and 3) a summarizing jurisdiction responsible for compiling the results of all individual state analysis for a single company. She said a state currently gets no credit under the certification program for acting as a summarizing jurisdiction. She said the limited number of lead state spots per year will not allow all 56 jurisdictions to have the opportunity be a lead state every other year as needed to pass the requirement. She recommended restructuring the requirement, guidelines and checklist to allow a state to pass the requirement if it reviews national analysis data on an annual basis and on an every other year basis either acts as a lead state responsible for the selection process or acts as a summarizing jurisdiction.

Finally, Ms. O’Connell said the years identified throughout the Proposal for Implementation need to be updated to reflect the current timeline. She said the Working Group should consider a more generic description, such as “two weeks before the Fall National Meeting of the first year following adoption by the membership” since it is not known when the Market Regulation and Consumer Affairs (D) Committee and the Executive (EX) Committee and Plenary will adopt the program. Mr. Decker agreed with updating the implementation dates.

Ms. Nickel said the word “or” needs to be included in the second sentence of the requirement 1 wording, “Additionally, the jurisdiction has adopted, is in the process of adopting, …” to read, “… or is in the process of adopting ….”

Ms. Nickel said the fourth bullet point under section b of the requirement 4 guidelines references “similar organizations.” She said this needs to be defined to specify whether it includes associate or higher-level designations from the Society of Financial Examiners (SOFE) or the Life Office Management Association (LOMA), which are already a requirement in other NAIC standards. She said Ms. O’Connell’s idea to be more general is the best solution.

Ms. Nickel said section d of the requirement 4 guidelines asks if the market regulation section recognizes the licenses and credentials of cybersecurity and information technology (IT) experts. She said this may be duplicative because the financial examinations section of DOIs uses these experts on targeted examinations of domiciled companies where a cyber event occurs. She said this is part of any financial examinations conducted as scheduled by Idaho and is already required by the NAIC financial accreditation standards. Mr. Haworth noted that non-domestic examinations are often left to the market regulation departments to conduct. Ms. Amann noted that the IT Examination (E) Working Group has a charge to work with the Market Conduct Examination Standards (D) Working Group to assist in the development of regulatory oversight policy with respect to cybersecurity examination issues, as requested by the Innovation and Technology (EX) Task Force. She said the guidance from this work may assist smaller states.

Ms. Nickel said the first paragraph of requirement 8 should be rewritten to be more in line with the objective statement and checklist of requirement 8. She suggested (suggested changes in italics): “The department enters data as information is available for sharing into all NAIC systems, including, but not limited to, the Complaint Database System (CDS) and the Regulatory Information Retrieval System (RIRS). Except for immediate concerns as defined in the Market Regulation Handbook, the department enters data into the Market Action Tracking System (MATS) at least 60 days prior to the start of the on-site examination. Additionally, the department enters continuum activities into MATS as appropriate.”

Ms. Nickel said the reporting of continuum actions should be “as appropriate.” She noted the objective statement of requirement 8 indicates the goal is to ensure other jurisdictions are timely informed of market conduct actions that “have occurred, are ongoing, or that are anticipated.” In the checklist, the entry into MATS for on-site examinations are required 60 days prior, but there is no other requirement for continuum activities entry to be 60 days prior. She said that is correct since it would be impossible to enter continuum activities 60 days prior if they were the result of a Market Analysis Review System (MARS) Level 1 or Level 2 recommendation, a referral from the consumer complaints section, a company self-reporting, or if there was an immediate concern.
Ms. Nickel said the checklist item 8c reference to “appropriate databases” is unclear. She said if there are databases other than MATS, she suggested rewording 8c to say: “Does the department enter continuum actions into the other appropriate NAIC database, such as MATS, as recommended and the resulting applicable final status reports or updates (if applicable) at least quarterly?” However, if 8c is intended to be specific to MATS and continuum activities, and there is no quarterly reporting requirement, she suggested rewording 8c to: “Does the department enter continuum actions into MATS including the resulting applicable final status reports or updates as appropriate (or as recommended/required by the Department)?”

Ms. Nickel noted Idaho does not have the resources to continuously update MATS actions quarterly. She said as part of the DOI’s market analysis procedure, MATS actions are entered and updated throughout the course of the continuum activity, which may only be when initially entered and at finalizing the action. She said this may take longer than three months.

Ms. Nickel asked what was necessary to pass certification overall. Do all requirements need to be passed or simply most requirements be passed, or some other number of requirements?

Mr. Decker said he has the same concerns as Ms. O’Connell about needing more objective standards for passing requirement 1. He also noted the same issues with being sure the checklist references are correct for renumbered item numbers.

Mr. Decker asked if any of the pilot program participating states that answered “yes” to requirement 3 checklist items 3i and 3j would share examples of their policies and procedures and the quantitative and subjective measurements that they used in determining if they passed. He said the standards for determining whether a state passed seemed subjective.

For the requirement 8 checklist, Mr. Decker asked if a jurisdiction must be 100% compliant for items 8c and 8e. If not, he suggested incorporating error tolerance rates.

Mr. Decker suggested a metric for measuring success in meeting requirement 9. He said the current measurement is subjective and would be improved by adding a percentage metric similar to the 50% attendance requirement that is used in requirement 10 checklist item 10c.

Mr. Decker said the requirement 10 checklist item 10d does not define how “actively monitor” will be measured. He said a metric should be added for item 10d. He also suggested adding “or their designee” to the individuals who monitor bulletin board discussions.

Lisa Brown (American Property Casualty Insurance Association—APCIA) noted the certification program contains discussion of rating such as “pass,” “unqualified pass,” or “provisional pass” but no discussion on what a “fail” rating would be. She asked if this was because the checklist would only be submitted by jurisdictions that passed each requirement, or because it is intended for each jurisdiction to pass.

Ms. Brown also noted the absence of any requirements to protect insurers, such as requiring states to submit budgets, time frames for review and confidential feedback mechanisms when contract examiners are used.

Ms. Brown said she agrees with Ms. O’Connell regarding requirement 3 checklist item 3j that it is difficult to measure whether a jurisdiction has achieved its policies and procedures for staffing.

Ms. Brown said the use of premium volume of companies examined since it implies jurisdictions will be measured by the premium volume examined. She noted this could skew jurisdictions into examining only large companies rather than companies where potential problems or misconduct exist. Mr. Haworth said it may be more helpful to measurement staffing needs by total market premium rather than the premium of just the examined entities.

Ms. Brown also said requirement 6 asks if a jurisdiction’s policies and procedures are consistent with the Market Actions (D) Working Group’s policies and procedures. She said industry object to a requirement conditioned on a document to which it has no access.

Michael Lovendusky (American Council of Life Insurers—ACLI) said the ACLI agrees with the comments submitted by the APCIA. In addition, he said he would recommend a new bullet point for requirement 5 that would read: “The department shall have the authority and capability to: Comply with cybersecurity requirements equal or more rigorous than those required of
regulated entities.” He said the regulated entities have concerns that government agencies have processes and protections to ensure against cybersecurity breach, especially as they increasingly use contract vendors.

Mr. Lovendusky said the proposal to delete checklist items pertaining to contract examiners would eliminate critical information about the cost of contract examiners, which is often passed on to the regulated entity.

Mr. Lovendusky agreed with the APCIA’s concern that industry has no access to the Market Actions (D) Working Group’s policies and procedures and said it is more critical if the Market Actions (D) Working Group or a member state relies on contract examiners.

Mr. Haworth said he and Mr. Cole would incorporate the recommended changes and circulate the next version of the certification program prior to the next meeting.

Having no further business, the Market Regulation Certification (D) Working Group adjourned.
3 February 2020

John Haworth, Chairman
Market Regulation Certification (D) Working Group
NAIC Central Office
1100 Walnut Street, Suite 1500
Kansas City MO 64106-2197
Via rhelder@naic.org

RE: Pilot Recommendation to Market Regulation Certification Program

Dear Chairman Haworth,

This letter memorializes the observations I made during the Working Group teleconference on January 30, when I associated ACLI sensitivities with those of the American Property Casualty Insurance Association. The following comments pertain to the draft Voluntary Market Regulation Certification Program Self-Assessment Guidelines, Checklist Tool and Implementation Plan (10/14/19).

Regarding the discussion which arose pertaining to cybersecurity standards, the ACLI would recommend that Requirement 5, Confidentiality and Information Sharing, include the following:

The department shall have the authority and capability to: Comply with cybersecurity requirements equal or more rigorous than those required of regulated entities.

Comment: Just as regulators are appropriately concerned with regulated entities’ protecting consumer information and having processes in place in circumstances breaches of cybersecurity, so, too, are life insurers concerned that government agencies have processes for and protections against cybersecurity breach. Industry concerns are heightened in this regard to the degree government agencies rely upon contract vendors to provide governmental services.

Regarding the discussion which arose pertaining to Requirement 3, Department Staffing, ACLI understands the current proposal is to delete the elements detailing use of contract examiners (appended). ACLI concerns pertaining to contract examiners are dynamic. ACLI concern is diminished if a state seldom or minimally utilizes contract examiners. However, ACLI concern grows commensurately with the degree of reliance by a state upon contract examiners. The more a state relies upon contract examiners, the more important it will be to obtain precisely the kind of information which would be obtained by the Requirement 3 elements proposed for deletion. Additionally, reliance upon contract examiners can often result in exorbitant costs which are passed along to the regulated entity. In ACLI members’ experience, there seems to be less cost oversight by regulators when contract examiners are engaged. ACLI is concerned that engagement of contract examiners on a daily or hourly basis can incentivize them to be less efficient and cost conscious as a longer examination equals higher compensation – paid for by...
the examined company. To help control these costs and to ensure contract examiners remain focused and efficient in their duties, the ACLI suggests that the companies be allowed to enter into tri-party agreements with contract examiners and that contract examination agreements have a dollar cap. ACLI also recommends that the deleted contract examiner elements be revived in the captioned certification program, perhaps moderated by some threshold of government reliance justifying heightened public information about the use of contract examiners.

Finally, regarding Requirement 6, Collaboration With Other Jurisdictions, the ACLI agrees with the APCIA: as industry has no access to the Market Action Working Group (MAWG) policies and procedures, it is impossible for ACLI to support this Requirement. ACLI concerns are heightened in consideration that a state participant in MAWG or MAWG itself relies upon contract examiners. ACLI is considering appealing to MAWG or NAIC leadership to revise MAWG policies and procedures to provide transparency in its operations.

Thank you for your consideration.

Sincerely,

MICHAEL LOVENDUSKY
Vice President & Associate General Counsel
The American Council of Life Insurers

Appendix – Requirement 3 Proposed Deletions

3a. Does the department have examiners on staff whose responsibility is to examine and/or conduct continuum actions of insurance companies as indicated by the department’s market analysis or as prescribed by state laws?

3b. Does the department utilize contract examiners in lieu of department staff examiners to examine and/or conduct continuum actions of insurance companies as indicated by the department’s market analysis or as prescribed by state laws?

3c. If the department utilizes contract examiners, please describe in a separate attachment the manner and extent of utilization in the department’s recent activities.

3d. Indicate below the number of full-time market examiners, including supervisory personnel on the department’s staff and/or the number of individual contract examiners used compared to the last three years. For contract examiners convert the number of contract hours to a full-time equivalent employee position. Also list your jurisdiction’s premium volume for any and all examinations or actions written in the most recently completed year.

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3e. As a separate attachment, provide a list of market examiners that includes the following: name; professional designation(s); title; years employed by the department (include functional area); type of college degree; and prior regulatory or insurance experience. Also indicate those market conduct examiners that are contractual and whether each is full-time with the department.

<END>