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NATIONAL COUNCIL OF INSURANCE LEGISLATORS (NCOIL)

MARKET CONDUCT SURVEILLANCE MODEL LAW

**Adopted by the NCOIL Executive Committee on November 11, 2006. Readopted by the NCOIL Executive Committee on November 20, 2011 and November 20, 2016.*

**To be discussed during the Joint State-Federal Relations and International Insurance Issues Committee on July 11th, 2019*

**Proposed amendments submitted for discussion by the National Association of Mutual Insurance Companies (NAMIC)*

Table of Contents

Section 1	Short Title
Section 2	Purpose/Legislative Intent
Section 3	Definitions
Section 4	Domestic Responsibility and Deference to Other States
Section 5	Market Analysis Procedures
Section 6	Protocols for Market Conduct Actions
Section 7	Protocols for Targeted Market Conduct Examinations
Section 8	Confidentiality Requirements
Section 9	Market Conduct Surveillance Personnel
Section 10	Immunity for Market Conduct Surveillance Personnel
Section 11	Fines and Penalties
Section 12	Data Collection and Participation in National Market Conduct Databases
Section 13	Coordination with Other States through the NAIC
Section 14	Additional Duties of the Commissioner
Section 15	Effective Date

Section 1. Short Title

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

Section 2. Purpose/Legislative Intent

The purpose of this act is to establish a framework for Insurance Department market conduct ~~activities~~ operations, including:

- Processes and systems for identifying, assessing and prioritizing market conduct ~~problems~~ issues and allegations that may have a substantial adverse impact on consumers, policyholders and claimants;
- To ensure that substantive and robust analysis is exhibited by the state regulator to assure all parties that the least intrusive and most cost-effective use of public funds or reimbursements from industry have been utilized to effectuate their statutory authority which benefits all consumers.
- Market conduct actions by a commissioner to substantiate or alleviate such market conduct ~~concerns~~ ~~problems~~ and a means to remedy significant and material market conduct that rises to a level of material violations of state law or regulations and harms consumers ~~problems~~; and
- Procedures to communicate and coordinate market conduct actions among states to foster the most efficient and effective use of resources and knowledge.
- Notwithstanding any provisions in this code to the contrary, nothing in this act shall authorize a market conduct examination of the insurer's cybersecurity protection measures which is otherwise provided for in domiciliary state financial examinations consistent with the NAIC's coordinated approach to examinations.

Drafting Note 1: States should take into consideration the fact that this Act may contain language that could conflict with its existing laws and should address and modify statutes accordingly.

Drafting Note 2: For those states that require proposed legislation to contain a "Scope" section, the following language is suggested: "All market analysis, market conduct actions, and market conduct examinations in this State shall be undertaken as provided in this Act."

Drafting Note 3: States should treat responses to data calls and other requests for information as part of a market conduct action as well as explicitly protect the confidentiality of such materials.

Section 3. Definitions

(a) "Commissioner" means the chief insurance regulatory official of the state, or his or her designee. Drafting Note: Where the word "commissioner" appears in the Model Act, 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 to the Insurance Department primarily expressing a grievance, meaning an expression of dissatisfaction.

For health companies, a grievance is a written complaint submitted by or on behalf of a covered person.

(c) “Comprehensive Market Conduct Examination” means a review of one or more lines of business of an insurer domiciled in this state that is not conducted for cause. The term includes a review of rating, tier classification, underwriting, policyholder service, claims, marketing and sales, producer licensing, complaint handling practices, or compliance procedures and policies.

(d) “Insurance Compliance Audit” means a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing noncompliance with, or promoting compliance with laws, regulations, orders, or industry or professional standards, which is conducted by or on behalf of a company licensed or regulated under this Code, or which involves an activity regulated under this Code.

(e) “Insurance Compliance Self-Evaluative Audit Document” means documents prepared as a result of or in connection with an insurance compliance audit. An insurance compliance self evaluative audit document may include a written response to the findings of an insurance compliance audit. An insurance compliance self-evaluative audit document may include, but is not limited to, as applicable, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer generated or electronically recorded information, phone records, maps, charts, graphs, and surveys, provided this supporting information is collected or developed for the primary purpose and in the course of an insurance compliance audit.

(f) “Market Conduct Action” means any of the full range of activities that the Commissioner may initiate to assess the market and practices of individual insurers, beginning with market analysis and extending to targeted examinations. The Commissioner’s activities to resolve an individual consumer complaint or other reports of a specific instance of misconduct are not market conduct actions for purposes of this Act.

(g) “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 and to identify patterns or practices of insurers licensed to do business in this state that deviate materially from state law and significantly from the norm or regulations and that ~~may~~ pose a demonstrated material risk to the insurance consumer.

(h) “Market Conduct Examination” means the examination of the insurance operations of an insurer licensed to do business in this state in order to evaluate compliance with the applicable laws and regulations of this state. A market conduct examination may be either a comprehensive examination or a targeted examination. A market conduct examination is separate and distinct from a financial examination of an insurer performed pursuant to [cite section], but may be conducted at the same time.

(i) “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, which identifies patterns or practices of insurers.

(j) “National Association of Insurance Commissioners” (NAIC) means the organization of insurance regulators from the 50 states, the District of Columbia, and the four 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.”

(1) “NAIC Market Regulation Handbook” means a handbook, developed and adopted by the NAIC, or successor product, which:

(A) outlines elements and objectives of market analysis and the process by which states can establish and implement market analysis programs, and

(B) sets up guidelines that document established practices to be used by market conduct surveillance personnel in developing and executing an examination.

(2) “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.

(3) “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 conducted for material cause, 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, non-forfeitures, 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. Domestic Responsibility and Deference to Other States

(a) The Commissioner is responsible for conducting market conduct examinations for [insert state] policyholder protection, which shall be accomplished by comprehensive or targeted examinations of domestic insurers and targeted examinations of foreign insurers as deemed necessary by the Commissioner, based on the results of market analysis. The Commissioner may ~~delegate responsibility for conducting~~ accept findings of an examination of a domestic insurer, foreign insurer, or an affiliate of an insurer to the from an Insurance Commissioner of another state in lieu of conducting their own examination. ~~if that Insurance Commissioner agrees to accept the delegated responsibility for the examination.~~

(b) The Commissioner may ~~delegate such responsibility~~ accept such examination findings from ~~to~~ a Commissioner of a state in which the domestic insurer, foreign insurer, or affiliate has a significant number of policies or significant premium volume.

Drafting Note: States may want to consider including definitions of “significant number of policies” and “significant premium volume.”

~~(c) If the Commissioner elects to delegate responsibility for examining an insurer, the Commissioner shall accept a report of the examination prepared by the Commissioner to whom the responsibility has been delegated.~~

~~(c)~~ In lieu of conducting a market conduct examination of an insurer, the Commissioner shall accept a report of a market conduct examination on such insurer prepared by the Insurance Commissioner of the insurer’s state of domicile or another state, provided:

(1) The laws of that state applicable to the subject of the examination are deemed by the Commissioner to be substantially similar to those of this state;

(2) The examining state has a market conduct surveillance system that the Commissioner deems comparable to the market conduct surveillance system required under this Act; and;

(3) The examination from the other state's Commissioner has been conducted within the past three years.

~~(d)~~ If the Insurance Commissioner to whom the examination responsibility was ~~delegated~~accepted pursuant to paragraph (a) of this Section or the report of a market conduct examination prepared by the Insurance Commissioner of another state pursuant to paragraph ~~(c)~~ of this Section, did not evaluate the specific area or issue of concern to the Commissioner or a specific requirement of [insert state] law, the Commissioner may pursue a targeted examination or market analysis of the unexamined area pursuant to this statute.

~~(e)~~ The Commissioner's determination under Subsection ~~(c)~~ is discretionary with the Commissioner and is not subject to appeal.

~~(f)~~ Subject to a determination under Subsection ~~(c)~~, if a market conduct examination conducted by another state results in a finding that an insurer should modify a specific practice or procedure, the Commissioner shall accept documentation that the insurer has made a similar modification in this state, in lieu of initiating a market conduct action or examination related to that practice or procedure. The Commissioner may require other or additional practice or procedure modifications as are necessary to achieve compliance with specific state laws or regulations, which differ substantially from those of the state that conducted the examination. It is acceptable for the Commissioner and the target of an examination analysis or inquiry to enter into a corrective action plan and close further analysis, examination, or any further action against the entity being reviewed.

Section 5. Market Analysis Procedures

(a) (1) The Commissioner shall gather information from data currently available to the Insurance Department, as well as verified and validated surveys and required reporting requirements, information collected by the NAIC and a variety of other sources in both the public and private sectors that demonstrate credibility, and information from within and outside the insurance industry from objective sources, information from websites for insurers, agents and other organizations and information from other reliable and credible sources, provided the sources are published at least annually in a bulletin or circular, prior to use.

(2) Such information shall be analyzed in order to develop a baseline understanding of the marketplace and to identify for further review insurers and/or practices that deviate materially from state law or significantly from the norm or regulations and that may pose a potential material and demonstrated risk to the insurance consumer. The Commissioner shall use the NAIC Market Analysis Handbook as one resource in performing this analysis (or procedures, adopted by regulation, that are substantially similar to the foregoing NAIC product).

(3) The Commissioner shall use the following policies and procedures in performing the analysis required under this section:

(A) Identify key lines of business for systematic review;

(B) Identify companies for further analysis based on available information.

(C) Consider review of company's self-evaluation or assessment and accept in lieu of any further analysis or other action taken. Any review of the same shall be considered analysis workpapers and kept confidential and privileged and otherwise protected as referenced in Section 8 and subject to [insert state code citation].

(b) If the analysis compels the Commissioner to inquire further into a particular insurer or practice, the following continuum of market conduct actions ~~may~~shall be considered prior to conducting a targeted, on-site market conduct examination. The action selected shall be made known to the insurer in writing. These actions may include, but are not limited to:

(1) Correspondence with Insurer

(2) Insurer Interviews

(3) Information Gathering

(4) Policy and Procedure Reviews

(5) Interrogatories

(6) Review of Insurer Self-Evaluation (if not subject to a privilege of confidentiality) and compliance programs, including membership in a best-practice organization

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

(c) 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. Analysis should include a weighing of direct actual harm to consumers or others as opposed to *de minimus* non-material violations. The Commissioner shall ensure that there is adequate oversight and no practices in place that incentivize third-party vendors or others to elongate examinations solely to incur additional remuneration for their services.

(d) The Commissioner shall take those steps reasonably necessary to eliminate requests for duplicate information provided as part of an insurer's annual financial statement, the

annual market conduct statement of the National Association of Insurance Commissioners, or other required schedules, surveys, or reports that are regularly submitted to the Commissioner, or with data requests made by other states if that information is available to the Commissioner, unless the information is state specific, and coordinate market conduct actions and findings with other states.

(e) Causes or conditions, if identified through market analysis, that may trigger a targeted examination, are:

(1) Credible information obtained from a market conduct annual statement, market survey or report of financial examination indicating potential fraud, that the insurer is conducting the business of insurance without a license or is engaged in a potential pattern of material unfair trade practice in violation of [cite statutory reference for the Unfair Trade and Claims Practices Acts].

(2) A number of material and confirmed complaints against the insurer or a confirmed complaint ratio sufficient to indicate potential fraud, conducting the business of insurance without a license, or a potential pattern of unfair trade practice in violation of [cite statutory reference for the Unfair Trade and Claims Practices Acts]. For the purposes of this section, a confirmed complaint ratio shall be determined for each line of business.

(3) Information obtained from other objective sources, such as credible published advertising materials indicating potential fraud, conducting the business of insurance without a license, or evidencing a potential pattern of unfair trade practice in violation of [cite appropriate statutory reference for the state's Unfair Trade and Claims Practices Acts].

(4) Patterns of material violations of Insurance [Code/Law] and administrative regulations promulgated thereunder that cause consumer harm. Drafting note: It is contemplated that Section 5 (e)(4) would encompass items such as rate filings, form filings and termination requirements.

Drafting note: It is contemplated that Section 5 (e)(4) would encompass items such as rate filings, form filings and termination requirements.

(5) Patterns of violations shall include such frequency as to connote a general business practice as opposed to non-material violations that do not rise to a business practice. Patterns of violations does not include *de minimus* violations or isolated occurrences or multiple *de minimus* non-material violations in single events or multiple non-confirmed complaints. Non-material violations regarding this section means technical violations of code that do not cause direct harm to consumers or other entities. Commissioners shall perform sufficient analysis and dedicate appropriate resources to ruling out allegations of misconduct before reaching the company contact level.

Section 6. 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 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, he/she may schedule and coordinate multiple examinations simultaneously.
- (c) The insurer shall be notified of any practice or procedure which is to be the subject of a market conduct action and shall be given an opportunity to resolve such 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. If the insurer has modified such practice or procedure as a result of a market conduct action taken by the Commissioner of another state, the Commissioner shall accept appropriate documentation that the insurer has satisfactorily modified the practice or procedure and made similar modification to such practice or procedure in this state.

Section 7. Protocols for Targeted Market Conduct Examinations

- (a) When market analysis identifies a pattern of conduct or practice by an insurer which requires further investigation, and less intrusive market conduct actions identified in section 5 (b) are not appropriate, the Commissioner has the discretion to conduct targeted, market conduct examinations in accordance with the NAIC Market Conduct Uniform Examination Procedures and the Market Regulation Handbook (or procedures, adopted by regulation, that are substantially similar to the foregoing NAIC products).
- (b) If the insurer to be examined is not a domestic insurer, the Commissioner shall communicate with and may coordinate the examination with the insurance Commissioner of the state in which the insurer is organized.
- (c) Concomitant with the notification requirements established in subsection (f) of this section, the commissioner shall post notification on the NAIC Examination Tracking System, or comparable NAIC product as determined by the Commissioner, that a market conduct examination has been scheduled.
- (d) The Commissioner may not conduct a comprehensive market conduct examination more frequently than once every three years. The Commissioner may waive conducting a comprehensive market conduct examination based on market analysis.

Drafting note: It is anticipated that as states adopt this NCOIL model law, or similar statutes, the practice of “domestic deference,” 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.

(e) (1) Prior to commencement of a targeted on-site market conduct examination, market conduct surveillance personnel shall prepare a work plan and proposed budget. Such proposed budget, which shall be reasonable for the scope of the examination, and work plan shall be provided to the company under examination. Additionally, a summary of all actions taken along the continuum of regulatory response shall be documented and provided to the targeted company. Deviations from estimated budgets should rarely occur and only with substantial documentation as to necessity for the same.

(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 Regulation Handbook and the NAIC Market Conduct Uniform Examinations Procedures (or procedures, adopted by regulation, that are substantially similar to the foregoing NAIC products).

(4) Prior to the conclusion of a 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.

(f) Announcement of the examination shall be sent to the insurer and posted on the NAIC’s Examination Tracking System (or comparable NAIC product, as determined by the commissioner) as soon as possible but in no case later than 60 days before the estimated commencement of the examination. Such announcement shall contain:

(1) The name and address of the insurer(s) being examined;

(2) The name and contact information of the examiner-in-charge;

(3) The reason(s) for and the scope of the targeted examination;

(4) The date the examination is scheduled to begin;

(5) Identification of any non-insurance department personnel who will assist in the examination, if known at the time the notice is prepared;

(6) A time estimate for the examination;

(7) A budget and work plan for the examination and identification of reasonable and necessary costs and fees that will be included in the bill, if the cost of the examination is billed to the company; and

(8) A request for the insurer to name its examination coordinator.

(g) If a targeted examination is expanded beyond the reasons provided to the insurer in the notice of the examination required under this section, the Commissioner shall provide written notice to the insurer, explaining the extent of the expansion and the reasons for the expansion. The department shall provide a revised work plan to the insurer before the beginning of any significantly expanded examination, unless extraordinary circumstances indicating a risk to consumers require immediate action.

(h) 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.

(i) The department shall use the NAIC Standard Data Request (or comparable product, adopted by regulation, that is substantially similar to the foregoing NAIC product).

(1) A company responding to a Commissioner's request to produce information shall produce it as it is kept in the usual course of business or shall organize and label it to correspond with the categories in the demand.

(2) If a Commissioner's request does not specify the form or forms for producing electronically stored information, a company responding to the request must produce the information in a form or forms in which the company ordinarily maintains it or in a form or forms that are reasonably usable.

(3) A company responding to an information request need not produce the same electronically stored information in more than one form.

(4) A company responding to an information request need not provide the electronically stored information from sources that the company identifies as not reasonably accessible because of undue burden or cost.

(5) A company, except in the most exigent of circumstances, shall be given a reasonable time to comply to such requests.

Drafting Note: Sections (i) (1)-(4) are based on proposed amendments to the Federal Rules of Civil Procedure relating to discovery of electronic data. Approved by the United States Supreme Court, the amendments will take effect on December 1, 2006, unless Congress enacts modifying legislation.

(j) (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 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. Provided that notwithstanding any provisions in this code to the contrary, any comprehensive market conduct examination, targeted market conduct examination, or other market conduct examination or activity shall be completed in its entirety within three (3) months of calling for, issuing a warrant, and notifying the company of the start of the examination regardless when started. Any extensions of time shall be in writing and agreed to by the insurer unless exigent circumstances are demonstrated that reveal the regulator through no delay or fault created or caused by the regulator needs further time to complete. Extensions should be the exception to the normal procedures and used rarely.

~~(B)~~ The insurer must respond with written comments within 30 days of receipt of the draft report. At the insurer's election, any comments provided shall be privileged and confidential, considered workpapers of the analysis or examination, and protected per the provisions of this article and [insert state code provisions for protection of proprietary and confidential information].

~~(B)~~ The department shall make a good faith effort to resolve issues and prepare a final report within 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.

~~(C)~~ The insurer shall, within 30 days, accept the final report, accept the findings of the report, file written comments, or request a hearing. An additional 30 days shall be allowed if agreed to by the Commissioner and the insurer. Any such hearing request must be made in writing and must follow [insert reference to appropriate administrative procedure act].

(2) The final written and electronic market conduct report shall include the insurer's written response and any agreed-to corrections or changes. The response may be included either as an appendix or in text of the examination report unless requested to be kept privileged and confidential. The company is not obligated to submit a response. References to specific individuals by name shall be limited to an acknowledgement of their involvement in the conduct of the examination.

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

(k) (1) Upon adoption of the examination report pursuant to subsection (j), 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 in paragraph 2 of this subsection. During this time, the report shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private action, provided no court of competent jurisdiction has ordered production. Thereafter, the Commissioner shall open the report for public inspection, provided no court of competent jurisdiction has stayed its publication. This section may not be construed to limit the Commissioner's authority to use any final or preliminary market conduct examination report, and examiner or company work papers or other documents, or any other information discovered or developed during the course of an examination in the furtherance of any legal or regulatory action that the commissioner, in the Commissioner's sole discretion may deem appropriate. Provided that for those Commissioners who publicize or place examinations on their website, any type of market conduct examination or activity that has findings against an insurer and that requires corrective action plans, fines, and penalties or other punitive measures shall be removed no later than three (3) years after the conduct which gave rise to the examination findings has been published. This provision is not intended to prevent responses to Freedom of Information requests or other legal requests for the document.

(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.

(l) (1) Where the reasonable and necessary cost and fees of a market conduct examination are to be assessed against the insurer under examination, such costs and fees shall be consistent with that otherwise authorized by law. Such costs and 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 and fees, including costs and fees associated with the use of department personnel and examiners and with retaining qualified contract examiners necessary to perform an examination. To the extent the Commissioner retains outside assistance, the Commissioner must 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 costs and fees; ~~and~~

(E) Require disclosure of the terms of the contracts with the outside consultants that will be used, specifically the costs and fees and/or hourly rates that can be charged; and

(F) Ascertain and resolve any apparent or known conflicts of interest by the outside vendors with insurers or insurance departments in accordance with Section 9;

(G) Maintain budgetary parameters and measures to require deviations from estimated costs be detailed and substantiated prior to incurrence. Commissioners should endeavor to keep costs in a reasonable range or hold outside vendors accountable for unjustifiable excesses; and

(H) Prohibit market conduct surveillance personnel from performing duplicative work or review of materials submitted in prior market conduct examinations in this state or in other states' examinations.

(3) The Commissioner shall review and affirmatively endorse detailed billings from the qualified contract examiner before the detailed billings are sent to the insurer.

(4) The Commissioner may contract in accordance with applicable state contracting procedures, for such qualified contract actuaries and examiners as the Commissioner deems necessary, provided that the compensation and per diem allowances paid to such contract persons shall not exceed one hundred twenty-five percent (125%) of the compensation and per diem allowances for examiners set forth in the guidelines adopted by the National Association of Insurance Commissioners, unless the Commissioner demonstrates that one hundred twenty-five percent (125%) is inadequate under the circumstances of the examination.

Drafting Note: In states in which alternative dispute resolution (ADR) of examination disputes is not currently available, states may want to include within the Market Conduct Surveillance Law provisions authorizing the use of such ADR procedures to resolve disputes.

Section 8. 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, whether from a third party or an

insurer, 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: In order to prevent potential claims for the unauthorized release of proprietary third party models, insurers may have to amend their contracts with third party vendors to permit such production, when requested by a Commissioner. It is therefore suggested that the requirements of this section, relating to insurer production of third party models, be phased in over a 12 to 18 month period to allow insurers to amend existing contracts with their vendors.

Drafting Note: If the state has enacted the NCOIL Insurance Compliance Self-Evaluative Privilege Model Act, the provisions of Section 8 (a) may need to be revised to be consistent with that model act.

(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 such action is ordered by the Commissioner pursuant to (cite the appropriate state authority).

(d) Notwithstanding the provisions of paragraph (a) of this subsection, 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 paragraph (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.

(4) notwithstanding the provisions of this section, no insurer shall be compelled to disclose an insurance compliance self-evaluative audit document or waive any statutory or common law privilege, but may voluntarily disclose such document to the Commissioner in response to any market analysis, market conduct action or examination as provided in this Act.

Drafting Note: States should enact the NCOIL Insurance Compliance Self-Evaluative Privilege Model Act to encourage insurers' to identify and remedy insurance and other compliance problems. The Model Act provides for a limited expansion of the protection against disclosure.

Section 9. 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 he/she determines that such 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 within the most recent five years prior to the use of the personnel. Market conduct surveillance personnel have a conflict of interest, either directly or indirectly if they have contracted with competitors of the insurer subject to any examination within two years of the start date for the examination. As part of any contract or employment arrangement, the market conduct surveillance personnel must agree not to perform any work for or on behalf of competitors of the insurer facing an existing examination while that examination is pending. Additionally, employment requests from regulators to vendors and vice versa should be disclosed in determining conflicts of interest as well. Sufficient parameters to vendor selection per [state law] should be adhered to and documented as to remove any appearance of favoritism to a particular vendor. 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.

(c) Any market conduct surveillance personnel having the aforementioned conflict of interest must disclose it to the Commissioner prior to the examination and may request a waiver of the conflict of interest. If the waiver is not granted, the market conduct surveillance personnel cannot proceed with an examination of that insurer until the waiver period is cleared. If the waiver is granted, the Commissioner shall notify both the market conduct surveillance personnel and the insurer under examination.

Section 10. 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 11. Fines and Penalties

(a) Fines and penalties levied pursuant to this Act or other provisions of the state Insurance Law shall be consistent, reasonable and justified but not automatic. Appropriate analysis and review of each action taken shall occur and be adequately documented in the workpapers and to the insurer in each insurance of conduct.

(b) The Commissioner shall take into consideration actions taken by insurers that maintain membership in best-practice organizations that exist to promote high ethical standards of conduct in the marketplace, and insurers that self assess, self-report and remediate problems detected to mitigate fines levied pursuant to this Act.

(c) Self-reporting of violations by an insurer shall be considered in levying fines or penalties and shall in no instance be a cause to more severely punish an insurer but shall be utilized to mitigate anticipated regulator response to the issue.

(d) Analysis shall be performed by the department to ascertain whether if in lieu of fines and penalties, demonstrated prospective compliance thresholds will suffice such as in corrective action plans or other memorandums of understanding where permissible.

Drafting Note: It is anticipated that best practice organizations such as the Insurance Marketplace Standards Association (IMSA) in the life insurance industry, and the National Committee for Quality Assurance (NCQA) and the Utilization Review Accreditation Commission (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.

Section 12. Data Collection and Participation in National Market Conduct Databases

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 comparable successor NAIC products as determined by the Commissioner. In addition to complaint data, the accuracy of insurer-specific information reported to the NAIC to be used for market analysis purposes or as the basis for market conduct actions shall be reviewed by appropriate personnel in the Insurance Department and by the insurer.

(a) Information collected and maintained by the Insurance Department shall be compiled in a manner that meets the requirements of the NAIC.

(b) After completion of any level of Market Analysis, prior to further market conduct action, the state shall contact the insurer to review the analysis.

(c) (1) A company responding to a Commissioner's request to produce information shall produce it as it is kept in the usual course of business or shall organize and label it to correspond with the categories in the demand.

(2) If a Commissioner's request does not specify the form or forms for producing electronically stored information, a company responding to the request must produce the information in a form or forms in which the company ordinarily maintains it or in a form or forms that are reasonably usable.

(3) A company responding to an information request need not produce the same electronically stored information in more than one form.

(4) A company responding to an information request need not provide the electronically stored information from sources that the company identifies as not reasonably accessible because of undue burden or cost.

Drafting Note: Sections (d) (1)-(4) are based on proposed amendments to the Federal Rules of Civil Procedure relating to discovery of electronic data. Approved by the United States Supreme Court, the amendments will take effect on December 1, 2006, unless Congress enacts modifying legislation.

Section 13. 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. Provided that Commissioners shall not participate in MAWG or any multi-state coordinated actions that continue in length over a twelve (12) month period unless there is adequate and specific documentation provided as to exigent circumstances for continuation not caused by the insurance department, lead states, or hired vendors working on the project. Insurance Commissioners should encourage prompt resolution of coordinated actions for all stakeholders involved including consumers and insurers. Resolution of disputes with insurers where original motivation for analysis and review of conduct on a multistate basis does not materialize should not result in payments for costs and expenses of the examination by the insurer.

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 MAWG are expected to conduct their market analysis programs in a manner consistent with guidelines adopted by the NAIC. Adoption of this (or a similar) model law, coupled with expanded participation in MAWG by states, will help foster the goal of domestic deference, thereby helping to fulfill the goal of making market conduct surveillance a national system of regulation that is more standard and uniform.

Section 14. Additional Duties of the Commissioner

(a) At least once per year, or more frequently if deemed necessary, the Commissioner shall make available 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.

(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. Such person or 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.

(c) For any change made to a work product referenced in this Act, which materially changes the way in which market analysis, market conduct actions, or market conduct examinations 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].

(d) Commissioners shall endeavor on each examination to discuss with insurers who are the target of the regulatory action, statistical and other methodologies that will be used to extrapolate results and whether there is adequate data to have confidence in the results on a going-forward basis.

(e) Commissioner shall provide to insurers prior to any examination the scope, standards, parameters and other criteria for determining violations thereof.

(f) Questions, queries and other input requested from insurers by insurance departments and/or third-party vendors shall be detailed in writing and provide adequate time period to respond.

Drafting Note 1: 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 2: States that choose to impose additional duties or responsibilities on their own Insurance Commissioners may insert additional subdivisions to this section.

Section 15. Effective Date

This Act shall take effect [insert chosen date].