Model # 693

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National Association of Insurance Commissioners

Market Conduct Surveillance Model Law

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Market Conduct Surveillance Model Law

Model # 693

National Association of Insurance Commissioners

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Printed in the United States of America

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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.

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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.

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(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.

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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

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(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;

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(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.

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(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

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(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

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(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.

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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

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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].

Legislative History (all references are to the Proceedings of the NAIC).

2004 Proc. 3rd Quarter (adopted).

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The date in parentheses is the effective date of the legislation or regulation, with the latest amendments.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama	NO ACTION TO DATE	
Alaska	NO ACTION TO DATE	
Arizona	NO ACTION TO DATE	
Arkansas	NO ACTION TO DATE	
California	NO ACTION TO DATE	
Colorado	NO ACTION TO DATE	
Connecticut	NO ACTION TO DATE	
Delaware	NO ACTION TO DATE	
District of Columbia	NO ACTION TO DATE	
Florida	NO ACTION TO DATE	
Georgia	NO ACTION TO DATE	
Guam	NO ACTION TO DATE	
Hawaii	NO ACTION TO DATE	
Idaho	NO ACTION TO DATE	
Illinois	NO ACTION TO DATE	
Indiana	NO ACTION TO DATE	
Iowa	NO ACTION TO DATE	
Kansas	NO ACTION TO DATE	
Kentucky	NO ACTION TO DATE	
Louisiana	NO ACTION TO DATE	
Maine	NO ACTION TO DATE	

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NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Maryland	NO ACTION TO DATE	
Massachusetts	NO ACTION TO DATE	
Michigan	NO ACTION TO DATE	
Minnesota	NO ACTION TO DATE	
Mississippi	NO ACTION TO DATE	
Missouri	NO ACTION TO DATE	
Montana	NO ACTION TO DATE	
Nebraska	NO ACTION TO DATE	
Nevada	NO ACTION TO DATE	
New Hampshire	NO ACTION TO DATE	
New Jersey	NO ACTION TO DATE	
New Mexico	NO ACTION TO DATE	
New York	NO ACTION TO DATE	
North Carolina	NO ACTION TO DATE	
North Dakota	NO ACTION TO DATE	
Northern Marianas	NO ACTION TO DATE	
Ohio	NO ACTION TO DATE	
Oklahoma	NO ACTION TO DATE	
Oregon	NO ACTION TO DATE	
Pennsylvania	NO ACTION TO DATE	
Puerto Rico	NO ACTION TO DATE	
Rhode Island	NO ACTION TO DATE	
South Carolina	NO ACTION TO DATE	

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NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
South Dakota	NO ACTION TO DATE	
Tennessee	NO ACTION TO DATE	
Texas	TEX. CODE ANN. INS. Sec. 751.001 to 751.351 (2005).	
Utah	NO ACTION TO DATE	
Vermont	NO ACTION TO DATE	
Virgin Islands	NO ACTION TO DATE	
Virginia	NO ACTION TO DATE	
Washington	NO ACTION TO DATE	
West Virginia	NO ACTION TO DATE	
Wisconsin	NO ACTION TO DATE	
Wyoming	NO ACTION TO DATE	

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Legislative History

Cited to the Proceedings of the NAIC

The National Conference of Insurance Legislators (NCOIL) adopted a model law governing market conduct surveillance. The model was forwarded to the NAIC with a suggestion that the association also adopt the model. The chair of the Market Regulation and Consumer Affairs Committee said that committee had expressed some concerns about the model and asked for three months time to review the document and make technical amendments. He said that some regulators expressed concern that the model might prevent states from doing examinations. Another commissioner expressed concern about the pressures on state insurance regulation and suggesting taking action immediately. The NAIC president said it would be helpful to testify before Congress that the NAIC had adopted the model. The membership voted to send the model to the Market Regulation and Consumer Affairs committee for review. **2004 Proc. 1st Quarter.**

Immediately after the Spring National Meeting, the market regulation committee began discussion of the model to determine whether the NAIC should adopt the NCOIL model act as an NAIC model. The group focused on each section of the model to determine what, if any, changes needed to be made prior to the NAIC considering the adoption of the NCOIL model. **2004 Proc. 2nd Quarter.**

Some regulators expressed concern that the model would restrict a state's ability to initiate and take appropriate regulatory actions, but one commissioner stated that he did not believe that was true. He expressed support for the model. **2004 Proc. 2nd Quarter.**

Another regulator said he supported the general framework of the model, but that without additional clarifying language, insurers would seek administrative hearings challenging the commissioner's examination before the commissioner was in any position to prosecute an enforcement action. Because of this, he said the model must make it clear that an insurer may not seek a court order to prevent the commissioner from proceeding with a market conduct examination based on the insurer's assertion that the commissioner improperly applied the criteria under the Act. The model must make it clear that the commissioner retains the discretion to make those decisions. Another regulator pointed out that there were restrictions on many things regulators do, such as the issuance of subpoenas. The chair added that these types of restrictions ensure regulatory accountability and yet eliminate unnecessary litigation. **2004 Proc. 2nd Quarter.**

The chair of the market regulation committee suggested that the NAIC membership take the recommendations of the committee and frame them as a proposal to NCOIL to consider at its next meeting in July. He noted that NCOIL agreed to review the model and consider the changes proposed by the NAIC. After that body acted on the model, the NAIC could consider it again. Another commissioner expressed concern that NCOIL would transform the model back to its earlier state. The market regulation committee chair explained that having two market conduct surveillance models would allow the industry to play one off against the other. He said he did not believe that NCOIL would make more than technical changes to the model proposed by the NAIC. If the NAIC did not like the model as it came back, it could vote it down. **2004 Proc. 2nd Quarter.**

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Legislative History

Cited to the Proceedings of the NAIC

When the model again came before the membership in September 2004, one commissioner said that he recognized that the leadership had worked hard to iron out differences with NCOIL, and he had been reasonably comfortable with the compromise document that the NAIC forwarded to NCOIL in June. However, the document now before the Plenary undermined the ability of regulators to exercise discretion because insurers could interfere at every step of the way. Most troublesome to him was the provision that allowed the company to sue to stop the commissioner from conducting a market conduct examination. The department was required to focus on general business practices and must do desk examinations "if feasible." He predicted states would expend valuable department resources in court arguing over whether the examination was being conducted properly. He said he could not support the model in its current form. **2004 Proc. 3rd Quarter.**

The chair of the market affairs committee that prepared the NAIC version of the draft noted that a letter of support was received from consumer representatives endorsing the model. The model provided for market analysis, and in that sense gave regulators more authority than they currently had. In exchange for that expansion, the department needed a reason for taking action. He also noted a political consideration: NCOIL did not favor the changes and said that if the NAIC failed to adopt the model as adopted by NCOIL in July, that organization would go back to its original model. The industry had indicated it would support the original model, which would create many problems for insurance regulators in the legislatures. **2004 Proc. 3rd Quarter.**

Another commissioner asked if there would be any consequences to a state that did not adopt the model and the chair responded that it was just like any other NAIC model. A state regulator opined that too much would be lost. For example, there would be a significant difference between a desk audit and the ability to go into the company offices. The chair responded that this initiative advanced the regulatory agenda in many ways. Consumer advocates saw this as an advancement. **2004 Proc. 3rd Quarter.**

A commissioner said this model raised concerns because a commissioner could be sued in his individual capacity. He predicted this would have a chilling effect. The chair expressed surprise at this point and said it had not been raised before. The provision was the same as it had been in the April NAIC draft. Another commissioner said this draft was a significant departure from the current position of state regulators. She asked if the choices of the commissioners were "bad" and "worse." If the NAIC endorsed this model, it will be harder for states to fight against its adoption. **2004 Proc. 3rd Quarter.**

Another NAIC member asked if NCOIL set a deadline for the NAIC to vote on this model before they considered going back to their original model. The chair said the deadline was the Fall National Meeting. The vote to adopt the NCOIL Market Surveillance Model Law as an official NAIC model law carried with a margin of 31–20. **2004 Proc. 3rd Quarter.**

Section 1. Short Title

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Section 2. Purpose and Legislative Intent

A representative from NCOIL clarified that the model act was intended to address the activities of insurers, not third party vendors or producers. **2004 Proc. 2nd Quarter.**

Section 3. Definitions

B. The NCOIL model included a definition of complaint, which the NAIC recommended be deleted. It caused confusion because, under Section 11 of the Act, complaints referred to complaints made to regulators. When the model referenced insurers' complaint handling and complaint logs, this referred exclusively to complaints made to the insurer. The deletion of the definition eliminated this confusion. **2004 Proc. 2nd Quarter.**

At a later meeting, the NAIC committee recommended that the definition of complaint be added back to the model act to help provide consistency among the states as to what constituted a complaint. Since complaints could involve communications directly between the consumer and company, the phrase "to the insurance department" was deleted. In addition, a sentence regarding health companies was deleted since the concept of a complaint being a grievance was captured in the first sentence of the definition. **2004 Proc. 2nd Quarter.**

C. The committee discussed a revision to this definition to eliminate the concept of a "baseline understanding" and "significant deviation from the norm" since these concepts were not clearly defined and understood. **2004 Proc. 2nd Quarter.**

At a later meeting, the group decided to return to the NCOIL definition with a slight modification to be consistent with Section 4A(2). This language was more consistent with the NAIC's initiatives to develop and identify a baseline understanding of the marketplace and practices of insurers. If a commissioner determined that all insurers fell outside the appropriate baseline or norm, a commissioner would consider that activity to pose a potential risk to the insurance consumer. Several states stressed the need to further define the phrases "baseline understanding of the marketplace" and "deviate significantly from the norm." In response to these concerns, the chair said that the NAIC's *Market Analysis Handbook* provided guidance on these issues and the baseline analysis techniques. **2004 Proc. 2nd Quarter.**

D. The chair suggested that the definition of "market conduct action" be modified to clarify that it did not encompass regulatory actions taken to address a specific consumer complaint or a specific instance of misconduct. **2004 Proc. 2nd Quarter.**

The definition of "market conduct action" was modified at a subsequent meeting to recognize that market conduct actions are designed to both assess and address market practices of insurers. In addition, the last sentence was added to clarify that a commissioner's activities in response to an individual consumer complaint or other report of a specific instance of misconduct were not market conduct actions as defined in the model act. **2004 Proc. 2nd Quarter.**

A regulator said that the definition of "targeted examinations" should address the states' need to conduct statutorily required examinations. Another regulator also expressed concern about the lack of a reference to comprehensive examinations. **2004 Proc. 2nd Quarter.**

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Section 4. Market Analysis Procedures

A. A regulator expressed concern about a requirement in the NCOIL model to adopt procedures by regulation. He said this might be a burdensome and complex effort. An interested party said the purpose of this requirement was to eliminate "desk drawer rules" and to ensure that all individuals received proper notification of what procedures would be used in a state for market conduct actions. **2004 Proc. 2nd Quarter.**

Consistent with the definition of "market analysis," the group decided to accept the language of the NCOIL model act that included the development of a baseline understanding of the marketplace. This language was more consistent with the NAIC's initiatives to develop and identify baseline practices of insurers. This paragraph now provided that market analysis data was analyzed to identify practices that deviated significantly from the norm or that might pose a potential risk to the insurance consumer. **2004 Proc. 2nd Quarter.**

A regulator again expressed concern about the inability to conduct comprehensive examinations and that all examinations were predicated on market analysis. He said many issues could only be identified through data collection and analysis conducted during an examination. The chair responded that this was one of the problems that the model act and a more structured market analysis system were designed to correct. A consumer advocate said that the status quo of conducting examinations without analysis was not the most effective system. Another regulator said he agreed with the market analysis framework but did not want to lose the ability to address problem companies when the problems can only be identified through an examination. Another regulator pointed out that recurrent problems or the ability to identify problems only through examination activity would suffice as the appropriate market analysis that would warrant an on-site examination. **2004 Proc. 2nd Quarter.**

B. The NAIC committee suggested adding a phrase to clarify that the purpose of market analysis was to identify insurers for further review and to clarify that the insurance commissioner retained the discretion to determine what appropriate action should be initiated. **2004 Proc. 2nd Quarter.**

C. A regulator expressed concern about Subsection C, which stated that the insurance commissioner shall take those steps reasonably necessary to eliminate duplicative inquiries and coordinate market conduct actions and findings with other states. He said this language would provide companies with the ability to challenge the commissioner's substantive actions and findings on the basis that the commissioner did not take reasonable steps to eliminate duplicative inquiries and coordinate market conduct actions and findings with other states. The chair said that the model did not include industry proposed arbitration language, which would have allowed such actions. In response to a regulator's question regarding whether companies believed they should be able to contest a state action because it was not the most cost effective method of intervention, a representative from an insurance trade association said that an insurer should be able to challenge the cost of the examination, but that this should be a rare occurrence. **2004 Proc. 2nd Quarter.**

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Section 5. Protocols for Market Conduct Actions

A. The committee discussed the need to eliminate the phrase "identifying infrequent or unintentional random errors" from Section 5A, since this phrase did not clarify the focus of market conduct actions and had the potential to create ambiguity. An interested party said this phrase was needed to make sure regulators focused on real consumer issues and general business practices. A regulator responded that many times the only way to identify a general business practice was to first identify specific errors. **2004 Proc. 2nd Quarter.**

The NAIC suggesting adding a paragraph to provide for an informational hearing upon request. This paragraph was not included in the final document adopted by NCOIL and the NAIC. **2004 Proc. 2nd Quarter.**

Section 6. Targeted On-Site Market Conduct Examinations

A. Subsection A was modified to recognize that the insurance commissioner retained the discretion to determine what type of regulatory action should be initiated. **2004 Proc. 2nd Quarter.**

A consumer advocate suggested that Subsection A encompass greater accountability standards to require the commissioner to specifically explain the rationale and reason for an on-site examination while prohibiting a company from challenging the reason. **2004 Proc. 2nd Quarter.**

A regulator said his state had some outstanding concerns about the model act and would like to see a zone examination concept, similar to what was used for financial regulation, adopted for market regulation. Another regulator questioned whether targeted examinations would eliminate a state's ability to conduct comprehensive examinations on its domestic companies. The chair said that all examinations would be targeted examinations based upon market analysis and that this model act would supersede any existing state laws that required triennial examinations on domestic companies. **2004 Proc. 2nd Quarter.**

C. The committee agreed to modify this provision to permit a commissioner to accept and rely upon an examination report of any other state, and not just the domestic state. The members agreed that the focus should be on interstate collaboration and avoiding duplication of regulatory efforts rather than on domestic deference. A consumer advocate said that before a state relied on another state's examination report, the state should make sure regulators with a minimum level of competency completed the examination report upon which they were relying. **2004 Proc. 2nd Quarter.**

The committee suggested amending the drafting note to focus on interstate collaboration and coordination instead of domestic deference. **2004 Proc. 2nd Quarter.**

The chair explained that Subsection C was modified to specify that the commissioner should limit the acceptance of an examination report of another state to those instances where the commissioners deemed the other state's market surveillance system comparable to the system set forth in the model act. A consumer advocate said that the commissioner also should demonstrate what he or she did to determine that the other state's market surveillance system was comparable. **2004 Proc. 2nd Quarter.**

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Section 6 (cont.)

D. The committee members agreed that Section 6 should be modified to follow the NAIC's Uniform Examination Procedures and the NAIC Model Law on Examinations. **2004 Proc. 2nd Quarter.**

One regulator commented on the fact that Section 6 only applied to on-site examinations. His state performed much of its examination work off-site and did not want to be put in a situation where the company was able to compel his examiners to be on-site. The chair responded that this section was designed to address concerns and procedures specifically related to on-site examinations, but that a state could voluntarily apply the same procedures to off-site examinations as well. **2004 Proc. 2nd Quarter.**

An interested party expressed concern about the suggestion to delete the requirement that a budget and work plan be submitted. A regulator questioned how the term "work plan" would be defined. Another regulator suggested that the term "work plan" be defined as the items required to be disclosed as part of the examination announcement. NAIC staff agreed to reconcile Subsection D(1), which addressed the development of a time and cost estimate and Subsection E, which addressed the announcement of the examination. In addition, the committee members agreed that the requirement that a cost estimate and the identification of the factors that would be included in the billing for a targeted, on-site examination did not need to be given if the cost of the examination was not billed to the company. Subsection D(1)(d) was added to the model act to ensure the exam announcement also specified the scope of the targeted, on-site examination. **2004 Proc. 2nd Quarter.**

E. The NAIC committee suggested this additional subsection because the NCOIL model did not address the requirement that a company cooperate during a market conduct action. **2004 Proc. 2nd Quarter.**

The term "comparable" was changed to "successor" in Subsection E and other sections of the model act, where appropriate. Subsection E was modified to reflect the commissioner's authority to conduct a "no-knock" examination or take immediate action in response to extraordinary circumstances. **2004 Proc. 2nd Quarter.**

Section 7. Confidentiality Requirements

A. When the NAIC committee reviewed the NCOIL model, the group agreed that this section needed to better balance the availability of public information while protecting the confidentiality of personal, proprietary and other non-public information. A consumer advocate suggesting adding the phrase, "except as otherwise provided by law or otherwise publicly available." **2004 Proc. 2nd Quarter.**

The committee reviewed the drafting note and agreed that it should be modified to be more generic. The reference to the NCOIL Insurance Compliance Self-Evaluative Privilege Model Act should be changed to "an insurer self-evaluative privilege law." **2004 Proc. 2nd Quarter.**

At a later conference call, the committee recommended the deletion of the drafting note, since the NAIC had not reached consensus on the issue. **2004 Proc. 2nd Quarter.**

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Section 8. Market Conduct Surveillance Personnel

B. The committee thought that a conflict of interest provision for an individual should be limited to prior employment with a company and should have a time limit. Having industry experience should not disqualify a person from being a state examiner. **2004 Proc. 2nd Quarter.**

Section 9. Immunity for Market Conduct Surveillance Personnel

Section 10. Fines and Penalties

B. The committee reviewing the NCOIL model thought the drafting note should be revised to be more consistent with the current NAIC position set forth in the NAIC's Best Practices Organizations White Paper. **2004 Proc. 2nd Quarter.**

A regulator said that the model act should not endorse undefined "compliance programs," "self-evaluation privilege," or "best practices organizations," as the most predatory insurers commonly purport that they maintain compliance programs. Because of this, he stressed that the best practices standards should be in compliance with state law or NAIC standards. A consumer advocate also suggested the need to include language that any best practice organization or standard upon which the commissioner relied must be effective. **2004 Proc. 2nd Quarter.**

The committee reviewing the NCOIL model suggested that Subsection B be changed to clarify that the state must consider company self-audits but would retain discretion as to how the contents of a company's self-audit might impact an insurance regulator's final regulatory decision.

Section 11. Participation in National Market Conduct Databases

The committee members agreed that all complaints should be reported to the NAIC's Complaint Database System (CDS) and should be coded to distinguish between confirmed and unconfirmed complaints. This would permit the submission of all complaints, but only confirmed complaints would be used for the calculation of complaint ratios. **2004 Proc. 2nd Quarter.**

Section 12. Coordination with Other States Through the NAIC

The committee favored a modification of the drafting note to this section to address the need for interstate cooperation and coordination as opposed to domestic deference. **2004 Proc. 2nd Quarter.**

Section 13. Additional Duties of the Commissioner

The committee decided to suggest an addition to the NCOIL model to clarify that the failure of the insurance commissioner to inform insurers of changes in statutes and regulations should not be a defense for any insurer that failed to comply with any insurance law. Insurers were still responsible to know what the law was and how to comply with it. **2004 Proc. 2nd Quarter.**

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Section 14. Effective Date

Chronological Summary of Actions

September 2004: Model adopted by NAIC.

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