

Date: 3/17/17

Market Conduct Examination Standards (D) Working Group
Conference Call
March 3, 2017

The Market Conduct Examination Standards (D) Working Group of the Market Regulation and Consumer Affairs (D) Committee met via conference call March 3, 2017. The following Working Group members participated: Bruce R. Ramage, Chair, and Martin Swanson (NE); Jim Mealer, Vice Chair (MO); Damion Hughes (CO); Kurt Swan (CT); Debra Peirce (GA); Kim Cross and Johanna Nagel (IA); Melissa Nelson (KY); Paul Hanson (MN); Tracy Biehn (NC); Win Pugsley (NH); Cliff Day (NJ); Peggy Willard-Ross (NV); Robert McLaughlin (NY); Rodney Beetch and Angela Dingus (OH); Joel Sander (OK); Constance Arnold (PA); Will Felvey (VA); Jeanette Plitt (WA); Sue Ezalarab, John Kitslaar and Jo LeDuc (WI); and Mark Hooker (WV). Also participating was Pam O'Connell (CA).

1. Discussed 2017 Tasks

Director Ramage said that the Working Group task for 2017 is to develop updated market conduct examination-related standards for inclusion in the *Market Regulation Handbook*. Director Ramage said that the Working Group in 2017 plans to update the *Market Regulation Handbook* to correspond with recently updated National Association of Insurance Commissioners (NAIC) models unrelated to the federal Affordable Care Act (ACA) to include the new Insurance Data Security Model Law, which is currently being developed by the Cybersecurity (EX) Task Force.

Director Ramage said that in 2017, the Working Group also will plan to: 1) update NAIC standardized data requests for inclusion in the reference documents of the *Market Regulation Handbook*; 2) update Chapter 13—Standardized Data Requests of the *Market Regulation Handbook* to correspond with changes to the standardized data requests; 3) update various chapters of the *Market Regulation Handbook* with regard to recommendations received in 2016 from the Market Information Systems Research and Development (D) Working Group; 4) discuss new content pertaining to closing continuum actions for inclusion in the *Market Regulation Handbook*; 5) discuss updating the currently suggested regulated entity business practice tolerance thresholds found in the *Market Regulation Handbook* of 7% (claims practices) and 10% (other than claims practices); and 6) discuss the merits of including content in the *Market Regulation Handbook* regarding process review methodology as an optional approach to conventional market conduct examination methodology.

Director Ramage asked for volunteers to review the changes made to recently adopted NAIC non-ACA-related models and to report to the Working Group at the next call as to whether corresponding updates to applicable *Market Regulation Handbook* market conduct examination standards should be made. Mr. Mealer and Ms. Plitt volunteered to review the *Advertisements of Life Insurance and Annuities Model Regulation* (#570), and Mr. Mealer also volunteered to review the *Life Insurance and Annuities Replacement Model Regulation* (#613). Mr. McLaughlin volunteered to review the *Long-Term Care Insurance Model Act* (#640) and *Long-Term Care Insurance Model Regulation* (#641). Director Ramage volunteered Martin Swanson (NE) to review the *Model Regulation to Implement the NAIC Medicare Supplement Insurance Minimum Standards Model Act* (#651), and Ms. Cross volunteered to review the new *Term and Universal Life Insurance Reserve Financing Model Regulation* (#787) for any applicable annual reporting requirements.

Director Ramage said the Working Group will wait to review and update the *Market Regulation Handbook* with regard to recent revisions to the *Annuity Disclosure Model Regulation* (#245) and the *Suitability in Annuity Transactions Model Regulation* (#275), as both models are scheduled to be reopened in 2017 for further review, update and comment. Director Ramage asked Petra Wallace (NAIC) to provide redlines of the models to the regulator volunteers.

Director Ramage said that the Working Group will not proceed further with drafting ACA-related examination standards until such time that definitive information is available in regard to the federal administration's forthcoming changes to the ACA.

2. Discussed Proposed New Content Regarding Closing Continuum Actions, March 1, 2017 Draft, for Inclusion in the *Market Regulation Handbook*

Mr. Mealer said that the exposure draft was developed and initially reviewed in 2016 by the Working Group in response to an informal review of the sampling chapter, where it was determined that limited guidance for regulators is available regarding how to close continuum actions. Mr. Mealer said that the guidance in the draft may not necessarily be considered a stand-alone chapter for inclusion in the *Market Regulation Handbook*; the guidance also could be incorporated as a reference document.

Ms. O’Connell presented her comments dated Dec. 29, 2016, stating that there is potential duplication of content in the draft with existing content in Chapter 2 and Chapter 7 of the *Market Regulation Handbook*. Ms. O’Connell said that redundant content in this publication could, therefore, allow for inconsistencies between existing chapters and the proposed new content. Ms. O’Connell suggested that the Working Group instead edit, reorganize and enhance the existing Chapter 2 and Chapter 7 with the guidance provided in the draft. Ms. Connell added that enforcement actions are final outcomes of continuum actions, rather than continuum actions in themselves (as described in the draft). Birny Birnbaum (Center for Economic Justice—CEJ) said it may not be an issue to repeat information in the *Market Regulation Handbook*—as long as the information is not contradictory—since the publication is available electronically and, therefore, can be readily searched.

Ms. O’Connell suggested that regardless of whether the Working Group decides to add the draft as a new chapter or as edits to existing Chapter 2 and Chapter 7, the information included in proposed section “B. The Violation Analysis Phase” should not be included in the *Market Regulation Handbook*, as this section goes beyond what has historically been the purpose of the *Market Regulation Handbook*—to develop uniform guidance for states to use in developing state-specific market regulation processes and procedures.

Ms. Cross said that the guidance provided to regulators in the draft regarding closing continuum actions may infringe upon the application of a state’s laws and how those state laws are interpreted, e.g., laws requiring intent, laws without intent language, how to calculate frequency-based violations, etc. Ms. Cross added that a reference to how market analysis fits into the process should be included. Ms. Plitt said that in some states, such as Washington, the state insurance department is charged with market regulation oversight, which is comprised of a market analysis division and a market conduct division that are separate but work closely together. Ms. Plitt suggested that since market conduct relies heavily on the pre-work done by market analysis, market analysis should play a bigger role in the closing continuum actions guidance.

Director Ramage said that language should be included in the beginning of the draft that specifies that while the draft provides guidance to regulators on how some states handle closing continuum actions, state laws and administrative practices have precedence over the process of closing of continuum actions. Ms. Cross said that she would submit revised language to address this issue, as well as submit other edits to the draft. Director Ramage said the guidance in the draft may be better suited as a reference document to the *Market Regulation Handbook*, not as a chapter, and redundancy with other chapters of the *Market Regulation Handbook* would be acceptable. Director Ramage asked Ms. O’Connell to look at whether the draft conflicts with the guidance found in Chapter 2 and Chapter 7 of the *Market Regulation Handbook*. Director Ramage asked that comments be submitted on the draft by March 16 to Ms. Wallace.

3. Discussed Proposed *Market Regulation Handbook* Substantive Revisions Received from the Market Information Systems Research and Development (D) Working Group

Director Ramage said recommendations regarding proposed revisions to various chapters of the *Market Regulation Handbook* were received from the Market Information Systems Research and Development (D) Working Group in 2016. Director Ramage said that the Working Group had adopted technical edits recommended by the Market Information Systems Research and Development (D) Working Group in November 2016, and the substantive edits were identified as an agenda item to carry over as a task for the Working Group in 2017. Mr. Hooker said that he will submit comments/a proposal to the Working Group regarding which of the recommendations to accept. Director Ramage asked that comments be submitted on the draft by March 16 to Ms. Wallace.

4. Discussed Other Matters

Director Ramage said that the Working Group is not planning to meet in 2017 at the NAIC national meetings. He said that the Working Group will accomplish its tasks via regularly scheduled conference calls and that NAIC staff will provide advance email notice of the next Working Group call.

Having no further business, the Market Conduct Examination Standards (D) Working Group adjourned.

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TO: Director Bruce Ramage, Chair
Market Conduct Examination Standards (D) Working Group

FROM: Brent Kabler, Chair
Market Information Systems Research and Development (D) Working Group

DATE: 7/12/16

SUBJECT: Market Regulation Handbook Proposed Changes and Recommendations

Earlier this year the Market Information Systems Research and Development (D) Working Group (MIS R&D) reviewed the *Market Regulation Handbook* for potential changes to reflect the retirement of the Examination Tracking System (ETS) and Market Initiative Tracking System (MITS) and the introduction of the Market Action Tracking System (MATS). During this review other, unrelated changes were also proposed. These are described in detail below. Included with some proposed changes are comments from Working Group members.

The section below contains other non-technical changes that are being referred for consideration.

I would be happy to answer any questions. Thank you for your consideration.

Chapter 1 – Introduction

Proposed Change 1.1

Location: D. The Players and Their Tools / Core Competencies

From:

Core competencies were developed by regulators to meet expectations from consumers, the insurance industry and all interested parties for effective state-based regulatory oversight of the insurance marketplace. Core competency standards are uniform standards that measure an individual state insurance department's overall ability to effectively and efficiently regulate the insurance marketplace. The four broad categories of core competency are set forth below. The currently adopted core competency standards are contained within Appendix D of this handbook.

- Resources—Standards regarding a state's regulatory authority, staff and training, and standards relating to a state's utilization of contract examiners;
- Market Analysis—Standards regarding market analysis, data collection, the role and responsibilities of a state insurance department Market Analysis Chief (MAC) and required skills and knowledge of a market analyst;
- Continuum—Standards regarding the use of [continuum](#) options, market conduct examinations, investigations and consumer complaints; and
- Interstate Collaboration—Standards regarding the NAIC Collaborative Actions Guide document and the role and responsibilities of a state insurance department Collaborative Action Designee (CAD).

To:

Core competencies were developed by regulators to meet expectations from consumers, the insurance industry and all interested parties for effective state-based regulatory oversight of the insurance marketplace. Core competency standards are uniform standards that measure an individual state insurance department's overall ability to effectively and efficiently regulate the insurance marketplace. The four broad categories of core competency are set forth below. The currently adopted core competency standards are contained within Appendix D of this handbook.

- Resources—Standards regarding a state's regulatory authority, staff and training, and standards relating to a state's utilization of contract examiners;
- Market Analysis—Standards regarding market analysis, data collection, the role and responsibilities of a state insurance department Market Analysis Chief (MAC) and required skills and knowledge of a market analyst;
- Continuum—Standards regarding the use of [Market Action Tracking System](#) options, market conduct examinations, investigations and consumer complaints; and
- Interstate Collaboration—Standards regarding the NAIC Collaborative Actions Guide document and the role and responsibilities of a state insurance department Collaborative Action Designee (CAD).

Comment: The change from continuum options to MATS doesn't make sense in this instance. Suggest removing reference to MATS and replace with language similar to the following:

Continuum Options - Standards regarding the use of focused inquiries, non-exam regulatory interventions, market conduct examinations, investigations and consumer complaints; and ...

Proposed Change 1.2

Location: D. The Players and Their Tools / NAIC Staff/Research Resources

From:

The NAIC offers financial, actuarial, legal, computer, research, market conduct and economic expertise. The NAIC Market Regulation Department supports state insurance regulators in fulfilling the state insurance departments' responsibility of protecting the interests of insurance consumers by helping coordinate state market regulatory functions, such as consumer complaints, market analysis, producer licensing and regulatory [interventions](#).

To:

The NAIC [staff](#) offers financial, actuarial, legal, computer, research, market conduct and economic expertise. The NAIC Market Regulation Department supports state insurance regulators in fulfilling the state insurance departments' responsibility of protecting the interests of insurance consumers by helping coordinate state market regulatory functions, such as consumer complaints, market analysis, producer licensing and regulatory [actions](#).

[Chapter 2 – Continuum of Regulatory Response](#)

Proposed Change 2.1

Location: First paragraph

From:

Insurance regulators can access a broad continuum of regulatory responses when determining the appropriate regulatory response to an identified issue or concern. The continuum can be used to guide the decision-making process when regulators move from analysis to a regulatory response. This chapter will provide considerations for selecting regulatory responses to specific situations, as well as providing lists and descriptions of the categories of continuum actions.

“Insurance regulators can access a broad continuum of regulatory responses when determining the appropriate regulatory response to an identified issue or concern.

To:

Insurance regulators can access a broad continuum [or choice](#) of regulatory responses when determining the appropriate regulatory response to an identified issue or concern. The continuum can be used to guide the decision-making process when regulators move from analysis to a regulatory response. This chapter will provide considerations for selecting regulatory responses to specific situations, as well as providing lists and descriptions of the categories of continuum actions.

“Insurance regulators can access a broad continuum of regulatory responses when determining the appropriate regulatory response to an identified issue or concern.

Comment: The addition of the word “choice” is awkward. I’d recommend retaining the original phrase, or substitute something like “range of regulatory responses.”

Proposed Change 2.2

Location: A. Considerations / 1. Questions to Evaluate

From:

Consumers

- How immediate is the concern? What is the likelihood or severity of any potential consumer harm?
- What is the nature and potential scope of the harm to consumers?
- How extensive is the issue? Does the concern involve one regulated entity or multiple regulated entities?

To:

Consumers

- How immediate is the concern? What is the likelihood or severity of any potential consumer harm?
- What is the nature and potential scope of the harm to consumers?
- How extensive is the issue? Does the concern involve one regulated entity or multiple regulated entities?
- Is it confined to one state, one region, or is it nationwide?

Proposed Change 2.3

Location: B. Regulatory Responses

From:

The continuum of regulatory responses can be roughly divided into four categories: Contact, Examination, Enforcement and Market Actions (D) Working Group. The continuum is not a “ladder,” whereby one step must be taken prior to advancing to the next. Rather, it should be viewed as a range of decision-making options.

A brief discussion of each category follows. Examples are provided only for clarity and should not be considered the sole use for each type of response. Note: The principles outlined in Section D Confidentiality in Chapter 8—Examination Introduction of this handbook can also be applied to the continuum of regulatory responses.

To:

The continuum or choice of regulatory responses can be roughly divided into four categories: Contact, Examination, Enforcement and Market Actions (D) Working Group. The continuum is NOT a “ladder,” whereby one step must be taken prior to advancing to the next. Rather, it should be viewed as a range of decision-making options.

A brief discussion of each category follows. Examples are provided only for clarity and should NOT be considered the sole use for each type of response. Note: The principles outlined in Section D Confidentiality in Chapter 8—Examination Introduction of this handbook can also be applied to the continuum of regulatory responses.

Comment: The addition of the word “choice” is awkward. I’d recommend retaining the original phrase, or substitute something like “range of regulatory responses.”

Proposed Change 2.4

Location: B. Regulatory Responses / 1. Contact with the Regulated Entity

From:

The continuum begins with the contact category, dealing with various opportunities to connect directly with the regulated entity, such as:

- Correspondence;
- Interrogatories;
- Interviews with the entity;
- Contact with other stakeholders;
- Targeted information gathering;
- Policy and procedure reviews;
- Review of self-audits and self-review documents; and
- Review of voluntary compliance programs.

To:

The choices begin with the contact category, dealing with various opportunities to connect directly with the regulated entity, such as:

- Correspondence;
- Interrogatories;
- Interviews with the entity;
- Contact with other stakeholders;
- Targeted information gathering;
- Policy and procedure reviews;
- Review of self-audits and self-review documents; and
- Review of voluntary compliance programs.

Chapter 6 – Collaborative Actions

Proposed Change 6.1

Location: A. Collaborative Action Guidelines / 3. Assumptions

From:

These guidelines are based on several assumptions defined and agreed upon by the members of the NAIC.

- a. Collaborative actions will be considered when there is an issue or area of concern that impacts multiple jurisdictions. Collaboration would not be appropriate when the issue involves compliance with a state-specific law if other states do not have similar statutes.
- b. Collaborative actions can be conducted for both nationally significant and non-nationally significant regulated entities.
- c. All impacted states will be encouraged to participate in the collaborative regulatory response when possible.
- d. The collaborative action, depending on the severity of the problem and the level of the response taken, can be handled by one designated state who reports to the other states, or by a group of Lead States, where one state is designated as the Managing Lead State, others are designated as additional Lead States and together the “Lead States” work collaboratively while other states may passively participate in the process.
- e. States retain the ability to choose to participate in a collaborative action and may designate another state to review the information on their behalf. However, if a Participating State does designate another state to review information on their behalf, it is the Participating State’s responsibility to outline their interpretation of their own laws they would like included in the review.
- f. Participating states retain their authority to initiate their own regulatory response if a collaborative action does not cover the scope of an area of concern to that state.
- g. The collaborative review will follow the guidelines and standards outlined in this handbook. Lead States should agree on the appropriate standards to be applied during the review.
- h. Each Participating State will determine if state-specific recommendations and actions are needed at the end of the collaborative action process, based on the findings by the Lead States.
- i. Verification that the regulated entity has complied with findings and recommendations of a final report is a separate administrative function that may or may not occur through either a collaborative or individual state follow-up effort, [continuum response](#), examination or re-examination.

To:

These guidelines are based on several assumptions defined and agreed upon by the members of the NAIC.

- a. Collaborative actions will be considered when there is an issue or area of concern that impacts multiple jurisdictions. Collaboration would not be appropriate when the issue involves compliance with a state-specific law if other states do not have similar statutes.
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- f. Participating states retain their authority to initiate their own regulatory response if a collaborative action does not cover the scope of an area of concern to that state.
- g. The collaborative review will follow the guidelines and standards outlined in this handbook. Lead States should agree on the appropriate standards to be applied during the review.
- h. Each Participating State will determine if state-specific recommendations and actions are needed at the end of the collaborative action process, based on the findings by the Lead States.
- i. Verification that the regulated entity has complied with findings and recommendations of a final report is a separate administrative function that may or may not occur through either a collaborative or individual state follow-up effort, [non-examination regulatory intervention](#), examination or re-examination.

Proposed Change 6.2

Location: A. Collaborative Action Guidelines / 4. Determinations / a. Determining Need for Collaboration

From:

4. Are there any entries in the NAIC Market Information Systems or the Market Regulation electronic bulletin boards?

Yes No

If there are, the CAD should contact CADs in states that appear to have common concerns and/or where there is a new, open or called examination status. The CADs can discuss whether there are common issues and the interest of other states to assist with regulatory responses to the area(s) of concern. Note: All new, open or called examinations, Level 1 or Level 2 Market Analysis reviews and [initiatives](#) should be reviewed and the state CAD contacted to consider collaborations, even if the examination is a financial examination or appears to be unrelated to the topic of concern.

To:

4. Are there any entries in the NAIC Market Information Systems or the Market Regulation electronic bulletin boards?

Yes No

If there are, the CAD should contact CADs in states that appear to have common concerns and/or where there is a new, open or called examination status. The CADs can discuss whether there are common issues and the interest of other states to assist with regulatory responses to the area(s) of concern. Note: All new, open or called examinations, Level 1 or Level 2 Market Analysis reviews and [continuums](#) should be reviewed and the state CAD contacted to consider collaborations, even if the examination is a financial examination or appears to be unrelated to the topic of concern.

Proposed Change 6.3

Location: C. Market Actions (D) Working Group (MAWG) / 2. Request for Review (RFR) / MAWG Request for Review Workflow/ Last flow chart object

From:

Lead States conduct exam or [continuum action](#) and propose resolution.

To:

Lead States conduct exam or [non-examination regulatory intervention](#) and propose resolution.

Comment: For consistency's sake, in the last flow chart object, "continuum action" should be changed to "non-examination regulatory intervention;" also continuum action technically includes examinations.

Proposed Change 6.4

Location: D. Multistate Examination Process / 1. Document the Need for an Examination

From:

The state Collaborative Action Designee (CAD) will work with the Market Analysis Chief (MAC) to determine which entities should be the focus of attention for the state. Through internal decision-making processes, the CAD and other state staff should ascertain that [other choices from the continuum of regulatory responses are](#) not adequate or appropriate. At the point of determining the need for an examination, the CAD should take the following steps.

Steps:

- a. Document the need for an examination based upon identified triggers;
- b. Prepare a justification memo; and
- c. Obtain necessary approvals and support from the commissioner and legal department.

Deliverable:

A justification memo, which documents the need for an examination.

To:

The state Collaborative Action Designee (CAD) will work with the Market Analysis Chief (MAC) to determine which entities should be the focus of attention for the state. Through internal decision-making processes, the CAD and other state staff should ascertain that [a non-examination regulatory intervention is](#) not adequate or appropriate. At the point of determining the need for an examination, the CAD should take the following steps.

Steps:

- a. Document the need for an examination based upon identified triggers;
- b. Prepare a justification memo; and
- c. Obtain necessary approvals and support from the commissioner and legal department.

Deliverable:

A justification memo, which documents the need for an examination.

Proposed Change 6.5

Location: D. Multistate Examination Process / 10. Finalize the Examination Report

From:

Examination Report

The state addendum details the state's specific examination findings and recommendations, based on that state's own statutes and regulations.

Steps:

- a. Each Participating State CAD sends the state's final examination report to the company:
 - Receive and evaluate company response; and
 - Include company response as part of the report.
- b. Each state CAD finalizes their state's examination report; and
- c. Each Participating State should record the applicable administrative resolution for their state in the [appropriate NAIC database](#).

To:

Examination Report

The state addendum details the state's specific examination findings and recommendations, based on that state's own statutes and regulations.

Steps:

- a. Each Participating State CAD sends the state's final examination report to the company:
 - Receive and evaluate company response; and
 - Include company response as part of the report.
- b. Each state CAD finalizes their state's examination report; and
- c. Each Participating State should record the applicable administrative resolution for their state in the [Market Action Tracking System](#).

Comment: Is use of MATS appropriate in this instance or should it be RIRS? My understanding is that only the state that entered an action in MATS can make changes to that item. Should there be a comment that the participating state would need to enter a separate MATS item or the lead state could insert a note in the main action on that state's behalf?

[Chapter 7 – Market Regulation Investigation Guidelines](#)

Proposed Change 7.1

Location: B. Guidelines for Conducting Market Regulation Investigations / Enforcement Options

From:

There are several enforcement options available to an insurance department. These options include, but are not limited to, the following:

- An administrative complaint may be filed against the licensed entity or individual who is the subject or target of the investigation. As with other administrative complaints, the respondent has 30 days to respond to the allegations and, in most cases, a hearing will then be scheduled.
 - Cease and desist order: In certain circumstances, it may be appropriate to issue a cease and desist order against the subject of an investigation;
 - The insurance department has the authority to enter into settlement agreements and/or issue a consent order with regard to violations of a state's insurance code which are uncovered during an investigation. A settlement agreement may be entered into after or before the filing of an administrative complaint, and the

same is true for a consent order. It is important to remember that it is not necessary to file a formal complaint against the target of an investigation before a settlement agreement or consent order can be entered into to resolve any outstanding issues and violations;

- Suspension or revocation of licenses;
- Corrective action plan;
- Referral to appropriate law enforcement or other regulatory agencies, if warranted and/or required by law;
- Restitution; and
- Information-sharing with other states.

All states should report any significant findings to other affected states, through their Collaborative Action Designee (CAD) and through the Market Actions (D) Working Group. Since an investigation is a separate and distinct process from an examination, the existence of an investigation may not be reported to MATS, nor are the findings of an investigation always reported to RIRS.

- Some entities will request that a department of insurance enter into what may be referred to as a confidential settlement to resolve any violations found during an investigation. Confidential settlements are not allowed under many state public record laws. Fellow regulators expect NAIC databases to maintain accurate information. All violations and monetary payments should be reported to the appropriate NAIC databases unless prohibited by law.

To:

There are several enforcement options available to an insurance department. These options include, but are not limited to, the following:

...

- Information-sharing with other states.
All states should report any significant findings to other affected states, through their Collaborative Action Designee (CAD) and through the Market Actions (D) Working Group. Depending on the confidentiality of the investigation, the results may be entered into the MATS and/or RIRS databases, to demonstrate to other interested jurisdictions the material findings and monetary payments concerning the action.

Comment: Why is this paragraph eliminated?

Chapter 10 – Types of Examinations

Proposed Change 10.1

Location: A. Types of Examinations / Target Examinations

From:

Target Examinations

Target examinations are a focused examination reviewing either a specific line of business or a specific business practice, such as underwriting, marketing or claims. Prompt-pay examinations are another example of a target examination.

Target examinations are specific as to the area of concern and may be called by any jurisdiction at any time, with or without notice to the insurer as circumstances dictate. In the event of a target examination, it is recommended that a review of the company's current complaints, as well as a review of its operations/management area be conducted.

To:

Targeted Examinations

Target examinations are a focused examination reviewing either a specific line of business or a specific business practice, such as underwriting, marketing or claims. Prompt-pay examinations are another example of a target examination.

Target examinations are specific as to the area of concern and may be called by any jurisdiction at any time, with or without notice to the insurer as circumstances dictate. In the event of a target examination, it is recommended that a review of the company's current complaints, as well as a review of its operations/management area be conducted.

Comment: Should the references to Target examinations in the text also be updated?

Proposed Change 10.2

Location: A. Types of Examinations/ Limited-Scope Examinations

From:

Limited-Scope Examinations

Limited-scope examinations usually involve alternative examination methods available other than, or in addition to, the traditional on-site market conduct examination.

Examples of a limited-scope examination are as follows:

- Interrogatories—A compilation of written questions regarding a specific subject, procedure or product submitted to the company in order to obtain information. Verification of the information is accomplished by a review either in-house or during an on-site examination.
- Re-examinations or compliance examinations—These types of examinations confirm compliance with a previously issued order of the director/commissioner or other administrative action and serve to verify that the company has initiated corrective actions for adverse findings detailed in a prior examination report.
- Desk examinations—Used as a means of follow-up on an issue found during an examination that did not rise to the level of a clear violation, but still caused the insurance department some concern.
- Small company examinations (small is defined as county mutual companies, fraternal organizations or a company that has written a predetermined premium volume)—An opportunity to review a small company's practices when the expense and time required for a traditional examination might not be warranted. Because of the potentially smaller field sizes, this is an opportunity to use ACL and other computer programs to conduct portions of the review.

To:

Limited-Scope Examinations

Limited-scope examinations usually involve alternative examination methods available other than, or in addition to, the traditional on-site market conduct examination.

Examples of a limited-scope examination are as follows:

- Small company examinations (small is defined as county mutual companies, fraternal organizations or a company that has written a predetermined premium volume)—An opportunity to review a small company's practices when the expense and time required for a traditional examination might not be warranted. Because of the potentially smaller field sizes, this is an opportunity to use ACL and other computer programs to conduct portions of the review.

Comment: Interrogatories are addressed in continuum chapter; Re-examinations or compliance examinations refer to a sequence; and Desk examinations are addressed in methods.

Proposed Change 10.3

Location: F. Use of Hierarchical Description

Delete:

F. Use of Hierarchical Description

An examination type will be reasonably precise if the user identifies the examination with a descriptive phrase from each of the six areas in this chapter. This creates a hierarchical description of the areas of an examination, describing the types of market conduct examinations that could be conducted by a state.

Selection of Type + Exam Sequence + Specialty Area (LOB) + Scope + Jurisdiction + Method. Some examples of usage of hierarcharical descriptions are noted below:

<u>Type Selection</u>	<u>Routine</u>	<u>Target</u>	<u>Target</u>	<u>Target</u>
<u>Exam Sequence</u>	<u>Subsequent</u>	<u>Initial</u>	<u>Initial</u>	<u>Follow-up</u>
<u>Specialty (LOB)</u>	<u>P&C</u>	<u>Health</u>	<u>Title</u>	<u>Life</u>
<u>Scope</u>	<u>Limited (Undwr)</u>	<u>Limited (Clms)</u>	<u>Comprehensive</u>	<u>Limited (Undwr)</u>
<u>Jurisdiction</u>	<u>Single state</u>	<u>Single state</u>	<u>Single state</u>	<u>Multistate</u>
<u>Method</u>	<u>On-site</u>	<u>Desk</u>	<u>On-site</u>	<u>Combination</u>

Chapter 11 – Automated Examinations Tools and Techniques

Proposed Change 11.1

Location: D. Data Requests and Access / 1. Example of a Data Request for ABC Insurance Company

From:

1. Example of a Data Request for ABC Insurance Company

Please provide the following data files for the examination period of Jan. 1, [2011](#) through Dec. 31, [2011](#). The files will be used on a PC, so please provide the information on a CD. The files should contain fixed length records in the layouts shown. The file format requested, in the order of preference, is delimited (comma or tab) text files or a Microsoft Access database. If a company's computer systems use different field sizes, please submit the company's data files and send revised file layouts with the files.

Complaints—[Please](#) provide a list of all complaints received from [state name] policyholders from the period of Jan. 1, [2011](#) through Dec. 31, [2011](#). Please include both complaints received directly and those forwarded from the [state name] insurance department.

To:

1. Example of a Data Request for ABC Insurance Company

Please provide the following data files for the examination period of Jan. 1, [2016](#) through Dec. 31, [2016](#). The files will be used on a PC, so please provide the information on a CD. The files should contain fixed length records in the layouts shown. The file format requested, in the order of preference, is delimited (comma or tab) text files or a Microsoft Access database. If a company's computer systems use different field sizes, please submit the company's data files and send revised file layouts with the files.

Complaints—[p](#)lease provide a list of all complaints received from [state name] policyholders from the period of Jan. 1, [2016](#) through Dec. 31, [2016](#). Please include both complaints received directly and those forwarded from the [state name] insurance department.

Proposed Change 11.2

Location: I. Marketing and Sales / 2. Unfair Discrimination

Note: Currently the NAIC style guide for NAIC publications prescribes 'homeowners' (no apostrophe). A recommendation to modify that guideline can be made if appropriate.

From:

When performing the tests in the underwriting/rating and claims sections, the examiner should stay alert for potential cases where insureds were treated differently from other insureds. For example, in underwriting and rating, the examiner may discover a [homeowners](#) insurance application that had identical characteristics to a declined application that was located in a ZIP code with a high percentage of minorities, older homes, etc. The use of ACL will help the examiner segregate insureds who have the same characteristics as other insureds, but were treated differently.

To:

When performing the tests in the underwriting/rating and claims sections, the examiner should stay alert for potential cases where insureds were treated differently from other insureds. For example, in underwriting and rating, the examiner may discover a [homeowners'](#) insurance application that had identical characteristics to a declined application that was located in a ZIP code with a high percentage of minorities, older homes, etc. The use of ACL will help the examiner segregate insureds who have the same characteristics as other insureds, but were treated differently.

Proposed Change 11.3

Location: I. Marketing and Sales / 2. Unfair Discrimination

Note: Currently the NAIC style guide for NAIC publications prescribes ‘homeowners’ (no apostrophe). A recommendation to modify that guideline can be made if appropriate.

From:

When performing the tests in the underwriting/rating and claims sections, the examiner should stay alert for potential cases where insureds were treated differently from other insureds. For example, in underwriting and rating, the examiner may discover a [homeowners](#) insurance application that had identical characteristics to a declined application that was located in a ZIP code with a high percentage of minorities, older homes, etc. The use of ACL will help the examiner segregate insureds who have the same characteristics as other insureds, but were treated differently.

To:

When performing the tests in the underwriting/rating and claims sections, the examiner should stay alert for potential cases where insureds were treated differently from other insureds. For example, in underwriting and rating, the examiner may discover a [homeowners'](#) insurance application that had identical characteristics to a declined application that was located in a ZIP code with a high percentage of minorities, older homes, etc. The use of ACL will help the examiner segregate insureds who have the same characteristics as other insureds, but were treated differently.

Proposed Change 11.4

Location: K. Underwriting and Rating / 1. Comparison of Insurance Department/Company Records

From:

Data File Supplied by the Company:

Homeowners New Business Written—List of all new business [homeowners](#) policies issued in this state during the exam period, provided in the following format:

and

ISO protection class codes should be kept in a database format. Both of the ISO protection class codes and the company’s [homeowners](#) new business can be analyzed using Microsoft Access or ACL. By comparing or linking the policies’ City, County, Township/Village (if applicable) and ZIP Code fields to the corresponding ISO City, County, Township/Village (if applicable) and ZIP Code fields, it can be determined if the Protection Class Codes match. A separate list can be generated for the policies where the Class Codes do not match. The company or the examiner can then determine by looking at the policy file if the class code is correct or in error.

and

Data File Supplied by the Company:

Homeowners New Business Written—List of all new business [homeowners](#) policies issued in this state during the examination period, provided in the following format:

To:

Data File Supplied by the Company:

Homeowners New Business Written—List of all new business [homeowners'](#) policies issued in this state during the exam period, provided in the following format:

and

ISO protection class codes should be kept in a database format. Both of the ISO protection class codes and the company’s [homeowners'](#) new business can be analyzed using Microsoft Access or ACL. By comparing or linking the policies’ City, County, Township/Village (if applicable) and ZIP Code fields to the corresponding ISO City, County, Township/Village (if applicable) and ZIP Code fields, it can be determined if the Protection Class Codes match. A separate list can be generated for the policies where the Class Codes do not match. The company or the examiner can then determine by looking at the policy file if the class code is correct or in error.

and

Data File Supplied by the Company:

Homeowners New Business Written—List of all new business [homeowners'](#) policies issued in this state during the examination period, provided in the following format:

Chapter 16 – General Examination Standards

Proposed Change 16.1

Location: A. Operations/Management / 2. Techniques / e. Antifraud Plans

From:

The guidelines set forth in the NAIC *Antifraud Plan Guideline* (#1690), adopted by the NAIC in March 2011, are intended to provide a road map for state fraud bureaus, insurers' Special Investigative Units ([SIUs](#)) or contracted SIU vendors for preparation of an antifraud plan.

To:

The guidelines set forth in the NAIC *Antifraud Plan Guideline* (#1690), adopted by the NAIC in March 2011, are intended to provide a road map for state fraud bureaus, insurers' Special Investigative Units ([SIUs](#)) or contracted SIU vendors for preparation of an antifraud plan.

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March 16, 2017

The Honorable Bruce Ramage, Director
Nebraska Department of Insurance
Chair, Market Conduct Examination Standards (D) Working Group
941 O Street, Suite 400
PO Box 82089
Lincoln, NE 68501-2089

RE: Market Information Research and Development Working Group Memo dated July 12, 2016

Dear Director Ramage,

The following are West Virginia's recommendations pertaining to the July 12, 2016 memo from the Market Information Research and Development (MISRD) working group which contained *suggestions* on possible changes to the Market Conduct Examiners Handbook. As you recall the MISRD group submitted two memos one with technical changes as it pertained to the implementation of the Market Action Tracking System (MATS) -the recommendations of which were adopted on the November 30th call. This second memo submitted contained editorial changes for MCES Group to *consider (emphasis added)* as MCES updates the various chapters in the Market Regulation Handbook. There was not necessarily consensus within the MISRD working group regarding all of the edits and therefore they were not intended as recommendations of the MISRD working group.

Please take the following comments as West Virginias recommendations as a member of the MCES working group.

Proposed Change 1.1

We do not believe that making this change is necessary at this time. The current options for documenting items in the MATS system includes options of targeted examinations, comprehensive examinations, non-examination regulatory interventions and focused inquiries. We do not believe that this change adds any further clarification.

Proposed Change 1.2

We are neutral on this change; the addition of the word staff may or may not add clarification and the change from "intervention" to "action" is contra indicated by the new MATS nomenclature.

Proposed Change 2.1

A "range" of regulatory responses or "tool box" as the CEJ suggested in its 11/21/16 comments may be more descriptive; however, if the "handbook" is to add a new section and retain the chapter using "continuum as the nomenclature perhaps no change is necessary.

Proposed change 2.3

Same comment as in change 2.1 and emphasis could be added to "not".



Proposed Change 2.4

We support the CEJs suggestions in its 11/21/16 comments.

Proposed Change 6.1

It may not be necessary to make this change however, if the group chooses to do so, it should include "focused inquiry" in addition to "non-examination regulatory intervention" as those are current MATS nomenclature.

Proposed Change 6.2

We do not support making the change as presented.

Proposed Change 6.3

We support making this change or at least change the wording to "or other action on the continuum" in the original.

Proposed Change 6.4

We are neutral on this change. If continuum continues to be the nomenclature it could remain as is.

Proposed Change 6.5

We are not sure that a change is necessary as the final administrative action (if formal) may also require a RIRS entry.

Proposed Change 7

We do not support this change.

Proposed Change 10.1

We support the editorial change from "target" to "targeted" throughout this section.

Proposed change 10.2

We support this change for reasons noted in the memo.

Proposed Change 10.3

The current hierarchal descriptions are not consistent with the MATS platform.

Proposed Change 11.1

Changing the dates is not really necessary-the thought was if other edits are being conducted-it wouldn't hurt.

Proposed change 11.2-11.4

This change is not necessary nor consistent with current NAIC guidelines on the use of "homeowners".

Proposed Change 16

We support this editorial change.

Sincerely,



Mark A. Hooker, CIE, CPCU, FLMI, FAHM, PIR, CWCP
Chief Market Conduct Examiner
Offices of the Insurance Commissioner
State of West Virginia



Comments of the Center for Economic Justice
to the Market Conduct Examination Standards Working Group regarding
Proposed Market Regulation Handbook Substantive Revisions Received from the Market
Information Systems Research and Development (D) Working Group 7-12-16
March 12, 2017

The Center for Economic Justice offers the following comments on the draft changes:

Proposed Change 1.1

CEJ agrees with the rationale and proposed change 1.1 to “Continuum Options - Standards regarding the use of focused inquiries, non-exam regulatory interventions, market conduct examinations, investigations and consumer complaints; and ...”

Proposed Change 1.2

We agree with the change of interventions to actions. We don’t believe the addition of “staff” is a clarification. Finally, the paragraph mentions the Market Regulation division. While we believe it is relevant and useful to mention the Market Regulation division, would it be relevant and useful to mention that NAIC resources from the Information Systems, Legal, NIPR, CIPR, Research and Actuarial and Technical Services divisions also assist state market regulators?

Proposed Change 2.2

CEJ suggests adding another bullet: "How vulnerable are the consumers?" We suggest this addition because insurance product markets vary considerably in the amount of market power consumers wield and vulnerability of consumers to unfair practices. For example, consumers in credit-related insurance markets, particularly force-placed insurance, have less market power than consumers in, say, private passenger auto markets.

Proposed Change 2.3 (and others)

The proposal is to change "the continuum" to the "the continuum or choice" of regulator responses. We suggest the word "toolbox" or "spectrum" may fit a little better than "choice."

Proposed Change 2.4

We suggest adding a sentence before the text. "The continuum of regulatory responses comprises a set of regulatory tools ranging from least intrusive to most intrusive to the insurer, licensee or market. The least intrusive end of the continuum starts with the contact category.

Question on this section: Doesn't the continuum start with evaluating existing and other public data and information before any contact with the insurer or licensee?

Proposed Change 6.2

The addition of "continuums" doesn't seem to fit. Continuum refers to a set of tools, not a specific tool.

Proposed Change 6.3

We suggest "Lead states conduct continuum actions" since both exams and non-exam activities are included in continuum actions.

Proposed Change 6.4

We suggest, "state staff should determine that continuum actions other than an examination are not adequate or appropriate"

Proposed change 7.1

We strongly disagree with the proposed changes. The existing language is relevant, accurate and clear. The proposed change is ambiguous in content and purpose.

Proposed Change 10.3

We support the inclusion of the table in 10.3 but suggest that the formatting makes the table somewhat confusing. We suggest that use of appropriate borders and selected bold text will help.

Chapter X—Closing Continuum Actions

The process for continuum actions from inception to closing may be divided into four phases: (1) a “Fact Finding Phase” in which insurance department personnel are gathering facts¹ from the regulated entity and other sources²; (2) a “Violation Analysis Phase” in which the insurance department is applying the law to the facts in an effort to determine if any violations of the law have occurred; (3) a “Remedial Phase” in which the insurance department seeks appropriate remedies for any violations of the law; and (4) a “Reporting Phase” in which the insurance department reports the resolution of the continuum action to interested parties.

A. The Fact Finding Phase

Continuum actions involving the gathering of information from regulated entities regarding their activities can be divided into continuum actions that are undertaken pursuant to the insurance department’s investigation authority and those that are undertaken pursuant to the insurance department’s examination authority.

1. Continuum Actions under Investigation Authority

Chapter 2—Continuum of Regulatory Responses of this handbook lists a number of actions in the section titled “Contact with the Regulated Entity” that may be undertaken by an insurance department under its investigation authority³. Continuum actions under the investigation authority may be initiated on an informal basis (e.g., writing a letter to a company requesting information about an activity) or they may be part of a formal market regulation investigation as described in Chapter 7—Market Regulation Investigation Guidelines of this handbook. Regardless of whether the investigation is informal or formal, the end product of the Fact Finding Phase is generally a summary of findings from which a determination may be made in the next phase of the continuum action process. Depending upon the type of continuum action, the summary of findings may be as informal as a verbal discussion with a supervisor or may involve a more formal written memorandum or investigation report.

2. Continuum Actions under Examination Authority

Market conduct examinations are the continuum actions undertaken pursuant to an insurance department’s examination authority. The types of market conduct examinations and the procedures used are discussed in great detail in other chapters of this handbook, so they will not be described in detail here. While variations in the market conduct examination process may occur due to variations in state law, the Fact Finding Phase generally concludes with a draft examination report being filed with the insurance department by the exam team conducting the examination along with a response to the draft examination report being filed by the entity examined.

¹ Facts may be gathered through the entire continuum process beginning with market analysis and extending to examinations.

² Some states may also utilize market regulation continuum actions to investigate entities operating illegally in a state. In such cases, fact finding may also extend to such illegally operating entities.

³ Some states may take the position that all continuum activities from market analysis through examinations are conducted under their examination authority. For such states, the discussion of “Continuum Actions under Investigation Authority” in this chapter is intended to describe any continuum actions that these states may initiate under their examination authority other than actual market conduct examinations.

B. The Violation Analysis Phase

Once the Fact Finding Phase is completed, the results are referred to insurance department personnel with the requisite authority to determine whether violations have occurred⁴, which may vary depending upon the department's organizational structure. These insurance department personnel review the facts and apply the relevant laws to those facts in an effort to analyze whether or not the facts demonstrate a violation of the insurance laws. In performing this analysis, the insurance department personnel must apply the standards imposed by the language of the state's laws.

1. Laws Requiring Intent vs. Laws without Intent Language

In a legal context, "intent" is "[a] state of mind in which a person seeks to accomplish a given result through a course of action." *Black's Law Dictionary, Sixth Edition*, p. 810 (1990). Some laws have as a component of the violation that the prohibited action must be done with some level of intent. Laws that describe the prohibited action as being done "knowingly," "willfully" or "in conscious disregard" are laws that require the facts to demonstrate some intent on the part of the regulated entity in order for the entity's action to be considered a violation. Intent "can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred." *Id.* For example, evidence that behavior contrary to the law had previously been brought to the regulated entity's attention but it had done nothing to change its behavior would be circumstantial evidence that it acted with intent. Where intent is a necessary element of the prohibited conduct in the law, there is no violation if no evidence is found indicating intent on the part of the regulated entity.

By contrast, some laws contain no language indicating a requirement for intent on the part of the violator. In applying such laws to the facts, all that need be shown in order to show a violation of the law is that the regulated entity engaged in the prohibited conduct.

2. Frequency Based Violations vs. Non-Frequency Based Violations

For some insurance laws, the question of whether a violation has occurred is dependent upon whether the regulated entity committed the prohibited conduct with sufficient frequency. Two examples of this type of law are the *Unfair Trade Practices Act* (#880) and the *Unfair Claims Settlement Practices Act* (#900). Both of these model laws indicate that a violation may be found if the regulated entity commits any of the actions defined in the laws "with such frequency to indicate a general business practice to engage in that type of conduct." When conducting compliance testing for activities regulated by these two model laws, states frequently utilize benchmark error rates. The presumption of a business practice violation is created when the ratio of errors to the total number of files tested exceeds these benchmark error rates. States vary in the benchmark error rates they use.

When analyzing the facts for the existence of a business practice, however, the reviewer should be careful not to slavishly rely upon the benchmark error rates. A business practice may be shown by other evidence. For example, a test for claims practices may uncover only one error out of a field of 100. The resulting error rate of 1% may be less than the state's benchmark error rate for claims practices, but a review of the company's claims processing manual shows that all claims of the type that was noted as an error will be processed in this way. Therefore, the combination of the claims processing manual and the single found error demonstrate that it is the company's business practice to incorrectly process all claims of that type in violation of the law despite the test error rate of only 1%.

⁴ Some states will initiate a continuum action where a substantive error occurs even though a statute or regulation does not actually address the conduct. In such cases, the analysis phase may only involve a consideration of what actions, if any, the insurance department may be able to take.

Many other insurance laws are not based upon the frequency of committing the prohibited conduct. For these laws, a single instance of the prohibited conduct would constitute a violation. Such laws are the type of laws with which the average person is most familiar. For example, the laws against exceeding the speed limit do not say that one must exceed the speed limit a certain number of times before the law is violated; you will receive a ticket for a violation each time a policeman catches you speeding.

Similarly, some states have not included the “business practice” language when enacting the *Unfair Trade Practices Act* (#880) and/or the *Unfair Claims Settlement Practices Act* (#900). In these states, a violation occurs each time the regulated entity commits any of the acts prohibited by the statute regardless of whether it occurred once or one hundred times.

3. Violations of Prior Orders or Agreements

Some state laws make it a separate violation to fail to comply with an order or agreement not to behave in a certain way. For example, an insurance company may have entered into a settlement agreement with an insurance department not to process claims in a way that violated insurance law due to a finding of such violations in a market conduct examination. In a subsequent market conduct examination, it was discovered that the insurance company had continued to process claims in this way despite its agreement not to do so. If the state has a law making the company's failure to comply with the settlement agreement a violation, the company in this instance would be guilty of violating both the claims practices law it had previously violated as well as the law against failing to comply with a settlement agreement.

C. The Remedial Phase

The actions taken in this phase of the process are a function of what was determined in the Violation Analysis Phase.

1. No Violations Found

Where no violations are found, there is nothing to remedy, and the continuum action is usually closed without further action. How this occurs is a function of the type of continuum action. Actions under the investigation authority may or may not have prescribed processes under the state's laws, so closing may or may not involve communication of the resolution to the regulated entity. The market conduct examination process is usually more formalized. While the exact process depends upon a state's law, it usually involves something similar to the *Model Law on Examinations* (#390): (1) finalizing the exam report; (2) adoption of the exam report; and (3) forwarding of the adoption order and finalized exam report to the regulated entity examined.

Alternatively, if the regulator conducting the Violation Analysis Phase determines there is insufficient evidence of a violation, but there is reason to believe that it would be appropriate to gather additional facts, he or she could reopen the Fact Finding Phase. The degree of formality with which the Fact Finding Phase is reopened is a function of the state's law and the insurance department's procedures. The *Model Law on Examinations* (#390) specifically provides two options for reopening the Fact Finding Phase for market conduct examinations by authorizing the insurance commissioner to (1) reject the examination report with instructions to the examiners to reopen the examination to gather additional information or (2) call for an investigatory hearing for the same purpose.

2. Violations Found

Actions taken when violations are found depend upon the nature of the violations and the circumstances of the continuum action.

a. Resolution with Instructions to Cure any Violations Found

If violations are found that do not rise to a level requiring disciplinary action, a continuum action may be closed with instructions to the regulated entity to take action to bring itself into compliance with the law. Depending upon a state's laws, this directive to comply for continuum actions under an insurance department's investigation authority could be as informal as a verbal instruction or letter or as formal as a department order. Market conduct examinations usually have more formal procedures that may vary by state. For example, the *Model Law on Examinations* (#390) provides that "the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure the violation" in those states that have enacted it.

b. Voluntary Settlement

The majority of continuum actions where violations are found and disciplinary action is deemed appropriate are resolved through a voluntary settlement. Voluntary settlements allow the insurance department and the regulated entity to avoid the time, trouble and expense of litigation. While state laws may vary as to the process, voluntary settlements usually involve a negotiated settlement agreement and/or appropriate departmental orders, such as consent orders, encompassing one or more of the following remedial measures.

(1) Retrospective Remediation

To address past violations, a voluntary settlement may require the regulated entity to take steps to remedy its past practices, including the payment of restitution where appropriate. For example, a company that had been improperly denying claims may be required to reprocess and pay previously denied claims, including applicable interest, in order to make affected consumers whole.

(2) Prospective Remediation

To ensure that violations do not continue to occur, a voluntary settlement may require the regulated entity to cease and desist from engaging in the prohibited conduct and to develop a plan to ensure future compliance. The voluntary settlement may also require the regulated entity to perform self-audits of its compliance measures.

(3) Monetary Fines

A voluntary settlement may include a requirement for the regulated entity to pay a fine for the violations of law. The calculation of a fine should be based upon the provisions of state law, which may allow for the consideration of various aggravating and mitigating circumstances.

- (a) Intent as an aggravating or mitigating factor: While intent may be an element of determining whether or not a violation has occurred for some laws, other laws may utilize intent as a mechanism to enhance or reduce the fine. In such instances, evidence showing that the regulated entity acted with intent (e.g. "knowingly," "willfully" or "in conscious disregard") would involve the imposition of a higher fine and lack of a showing of intent would lead to a lesser fine.
- (b) Business practice violations: For laws that are not frequency based, the fining provision of state laws usually regard each instance of conduct contrary to the law as being subject to a separate fine. Frequency based business practice laws, however, may vary in how a fine is calculated. Some state laws may regard the business practice as a single violation subject to a single fine. Other state laws may regard the business practice standard as merely a threshold. Once a

business practice is established under this threshold view, each act making up the business practice is considered a separate violation subject to a separate fine.

- (c) Violation of prior agreements or orders as an aggravating factor: As noted above, a regulated entity's failure to comply with a prior agreement or order may be regarded as a separate violation subject to a separate fine under some state's laws. Additionally, this failure to comply may also be regarded as evidence of intent and an aggravating factor leading to increased fines for the underlying conduct that is contrary to the prior agreement or order.
- (d) Behavior of the regulated entity as a mitigating or aggravating factor: Where the insurance department has some discretion to calculate fines within a range, the behavior of the regulated entity both before and during the continuum action may act as either a mitigating or aggravating factor. Cooperation with the continuum action, efforts to identify and correct problems prior to the continuum action being initiated or self-reporting of a violation are examples of behavior that may justify a lower fine within the range. Lack of cooperation, obstruction or evasion by the regulated entity are types of behavior that may justify increases of the fine within the range.
- (e) Level of harm as an aggravating factor: The severity of financial or other harm to affected persons caused by the violations may act as an aggravating factor in calculating a fine, as opposed to technical violations that cause no apparent harm. Some state laws specifically recognize the amount or type of harm as an aggravating factor allowing an enhancement to the amount of fine imposed.

(4) Suspension or Revocation of License

Where violations are particularly egregious, a voluntary settlement may include the suspension or revocation of the regulated entity's license. Some state laws may allow a voluntary settlement to include a period of probation in lieu of a suspension or revocation of the license.

(5) Monitoring and Reporting

A voluntary settlement will likely include a requirement that the regulated entity provide the insurance department with reports on its retrospective and prospective remedial activities. Such reports may be at the completion of the remediation or may be required periodically if the voluntary settlement includes a monitoring period. After remedial measures are completed and any monitoring period has ended, the insurance department may determine that a follow-up investigation or examination is appropriate to audit compliance with the terms of the voluntary settlement.

c. Initiate an Administrative or Court Proceeding

Where the insurance department and the regulated entity cannot resolve a continuum action through a voluntary settlement, the insurance department may decide to initiate a formal proceeding. This may be either an administrative proceeding or a court proceeding depending upon the state's laws. In either case, it is important to realize the Fact Finding Phase starts anew given that either side may seek to do discovery (e.g., depositions, interrogatories or requests for production of documents) and the administrative hearing officer or judge will make his or her own findings of fact based upon the evidence presented at a hearing. After the hearing, the administrative hearing officer or judge will enter an order setting forth findings of fact and conclusions of law as to whether violations exist. This order may also impose some of the same kinds of disciplinary actions discussed above for voluntary settlements if the administrative hearing officer or judge agrees that violations exist, but if the administrative hearing officer or judge does not agree that violations exist, no discipline will be imposed. Either party may appeal the order through the court system if they are not happy with the result. This may lead to a protracted period before the continuum action is resolved unless the parties decide to negotiate a voluntary settlement at some point during the process.

d. Referral to the Market Actions (D) Working Group

If the findings of the continuum action indicate issues affecting multiple states, the insurance department may wish to refer the matter to the Market Actions (D) Working Group for collaborative action. A detailed discussion of this process may be found in Chapter 6—Collaborative Actions.

D. The Reporting Phase

Where appropriate, the results of a continuum action should be reported in accordance with the state's law and in the applicable NAIC database.

1. Publication of the Resolution as Authorized by State Law

The extent to which the resolution of a continuum action becomes a public record under a state's law may be dependent upon the type of continuum action.

a. Continuum Actions under Investigation Authority

Continuum actions under the investigation authority may not be considered public records under many state's laws unless some form of disciplinary action is imposed. Where disciplinary action is imposed, the settlement agreement and/or order for a voluntary settlement or the order entered pursuant to an administrative or court proceeding are frequently considered public documents⁵. Many insurance departments may wish to increase the dissemination of this information by posting the information on its website and issuing press releases.

b. Continuum Actions under Examination Authority

Finalized market conduct examination reports are generally considered public documents under state examination laws regardless of whether any violations were found or any disciplinary action was imposed. The "Continuum Core Competencies" for market conduct examinations in Appendix D of this handbook indicate that the publication of the final examination report should include the regulated entity's response to the examination report where allowed by state law. If disciplinary action is imposed, this will also likely include the settlement agreement and/or order for a voluntary settlement or the order entered pursuant to an administrative or court proceeding. As discussed above, dissemination of the final examination report and related documents to the public may occur through posting the information on the insurance department's website and the issuance of press releases.

2. Report the Resolution in the Market Actions Tracking System

The Market Actions Tracking System (MATS) was developed by the NAIC for tracking and reporting information regarding continuum actions to the other states. The resolution of any continuum action recorded in MATS should be entered into the system to share with other states.

3. Report any Disciplinary Action in the Regulatory Information Retrieval System

The Regulatory Information Retrieval System (RIRS) was developed by the NAIC to document and share information regarding disciplinary actions taken against regulated entities. If a continuum action results in disciplinary action, this information should be recorded in RIRS to share with the other states.

⁵ While settlement agreements and orders may be considered public documents, any other information in the continuum action file (e.g., work papers, information received, communications, etc.) may still be accorded confidential status under the laws of many states. In particular, this is likely to be the case where a state conducts all of its continuum activities under its examination authority.

4. Other Reporting Activities

The section titled “Closure” of Chapter 2—Continuum of Regulatory Responses of this handbook mentions other means of reporting on issues uncovered in a continuum action to interested parties, such as insurance department bulletins, consumer outreach and referrals to other law enforcement agencies. Where appropriate, these may be considered and implemented.

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DRAFT



TERRY E. BRANSTAD
GOVERNOR

DOUG OMMEN
COMMISSIONER OF INSURANCE

KIM REYNOLDS
LT. GOVERNOR

March 16, 2017

Director Bruce Ramage, Chairman
Market Conduct Examination Standards Working Group
c/o Petra Wallace
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

Re: Market Regulation Handbook (MRH)
Proposed New Chapter X - Closing Continuum Actions

Dear Director Ramage:

Thank you for the opportunity to provide additional comment on the above-captioned proposed new chapter. During the working group's conference call on March 3, 2017, Iowa shared its strong opposition to including the current draft of the new chapter in the Market Regulation Handbook.

The proposed chapter oversteps and encroaches into the province of state legislatures by attempting to generally interpret state laws providing for fines and civil penalties. It also wholly fails to reference the laws or examine the statutory contexts. The penal application of business regulations increases the responsibilities of the state under state and federal constitutions. Many states, including Iowa, have added "scienter" requirements to support the imposition of fines and penalties. Attempts within the proposed chapter to define "intent," "frequency based violations," "non-frequency based violations," methodologies to calculate penalties, and types of settlements, invade the sovereignty of states and their laws for fines and penalties. The proposed chapter attempts to legislate by NAIC handbook. The current draft even goes so far as to suggest that another error following a prior compliance agreement could prove "intent." This ignores the plain meaning of "error." The attempt to offer generic Black's Dictionary as law is not only improper; it is misleading to both the regulator and the regulated entity.

Additionally, the proposed chapter attempts to narrowly define a continuum action. This definition, the basis for the balance of the chapter focuses exclusively on (i) investigation, (ii) violation analysis, (iii) remediation, and (iv) reporting. The chapter establishes a template on a state should determine, identify, measure, and calculate financial penalties. There is no acknowledgement that a continuum action could ever be closed without an order and penalty. In fact, the chapter assumes that a continuum action will result in a penalty phase analysis and ignores the importance of market analysis and other continuum actions.

The purpose of the MRH is to assist states in optimizing the use of insurance department resources, eliminating duplicative inquiries and investigations and coordinating efforts with other states. Proposed Chapter X - Closing Continuum Actions is not consistent with the spirit or purpose of the MRH.

We appreciate the time and effort that is so often extended to improve consistencies in market regulation procedures, but this attempt to create model definitions by handbook is misplaced.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink that reads "Kim Cross". The signature is fluid and cursive, with the first letters of "Kim" and "Cross" being capitalized and prominent.

Kimberlee Cross, JD
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Kim.cross@iid.iowa.gov

From: Blitenthal, Ronald [mailto:RBlitenthal@OldRepublicTitle.com]
Sent: Friday, March 03, 2017 12:51 PM
To: Wallace, Petra
Subject: RE: NAIC Notice: Agenda and Materials for Market Conduct Examination Standards (D)
Working Group March 3 Call

Hi Petra:

The Director asked me to send you an email with the question I asked at the end of the call. I was just wondering how the second phase in the process for continuum actions got to be called the "violation analysis phase." It seems a more neutral term would be "compliance analysis phase." Just a small matter, perhaps, but wondered how we got to that language which sort of implies violations are being analyzed, when really the examiner is trying to figure out whether there is compliance with statutes and regulations.

Thank you for your time and efforts.

Take care,
Ron

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