

**JUNE 11, 2010 DRAFT**

*This draft reflects 2010 interested-party markup proposals and changes made during May 19 and June 8 conference calls. As directed by the Committee on the calls, a complaint ratio approach has been deleted in favor of basing insurer participation on a nationwide \$100,000 premium threshold. Also, Section 7 has been reordered and a drafting note was added regarding existing state law and approving/hiring designees.*

*Interested-party markups are signified throughout the text by the following:*

**AHIP:** America's Health Insurance Plans

**CEJ:** Center for Economic Justice

**P-C:** American Insurance Association (AIA), Allstate, Property-Casualty Insurers Association of America (PCI), National Association of Mutual Insurance Companies (NAMIC)

**SEWARD:** Friendly amendments by Sen. Seward for the 2009 NCOIL Summer Meeting.

**STAFF NOTE:** Staff notes identify alternative approaches, deleted provisions, or amendments that one group may have submitted elsewhere in the markup.

**NATIONAL CONFERENCE OF INSURANCE LEGISLATORS  
Proposed Market Conduct Annual Statement Model Act**

*To be considered by the NCOIL State-Federal Relations Committee on July 9, 2010.*

**Sponsored by Sen. James Seward (NY)**

**Section 1. Short Title**

This Act shall be known as the *Market Conduct Annual Statement Act*.

This [Act/Bill] shall be known as the *Market Conduct Annual Statement Data Sharing [Act/Bill]*. (AHIP)

**Section 2. Purpose**

The purpose of this Act is to enable the Commissioner to collect and analyze Market Conduct Annual Statement ("MCAS") data. The procedures set forth under this statute shall be the exclusive method for collecting, analyzing and sharing MCAS information.

The purpose of this [Act/Bill] is to ~~enable the Commissioner to collect and analyze~~ ensure the confidentiality of Market Conduct Annual Statement ("MCAS") ~~data. The procedures set forth under this statute shall be the exclusive method for collecting, analyzing and sharing MCAS information~~ Data the Commissioner shares with other persons and entities. (AHIP)

--OR--

The purpose of this Act is to enable the Commissioner to collect and analyze Market Conduct Annual Statement ("MCAS") data and documents on a confidential basis and to preserve the examination confidentiality of such data or documents whether it is obtained from an insurer or third party when using a state's designee. The procedures set forth under this statute shall be the exclusive method for collecting, analyzing and sharing MCAS information.

*(Drafting Note: Each state shall determine whether participating in the Market Conduct Annual Statement and providing such information under this Act is a condition precedent to accreditation by the National Association of Insurance Commissioners.) (P-C)*

### Section 3. Scope

This Act applies to admitted insurers that write more than \$100,000 in direct written premium ~~in this jurisdiction~~ in any of the following lines of business:

This Act applies to admitted insurers ~~that write more than \$100,000 in~~ with direct written premium exceeding \$100,000 in any of the following lines of business subject to NAIC MCAS. (AHIP)

- (a) Life and annuity for individual life cash value products, individual life non-cash value products, group life products (cash and non-cash value), individual fixed annuities, individual variable annuities;
- (b) Property and casualty for private passenger automobile;
- (c) Homeowners, including renters; and
- (d) Other lines of insurance the Commissioner determines, in accordance with applicable procedures, should be examined in order to protect individual insurance consumers.

### Section 4. Definitions

For purposes of this Act, these defined words have the following meaning:

- A. "Commissioner" means [insert the title of the chief insurance regulatory official of the state]. (AHIP)
- B. "Designee" means a statistical agent the Commissioner designates under Subsection 5(C) and a qualified professional organization or person outside his or her department under Subsection 6(B).

B. "Designee" means either a statistical agent ~~the Commissioner designates under Subsection 5(C) and a qualified professional organization or person outside his or~~

~~her department under Subsection 6(B)-a market analyst designated by the Commissioner pursuant to this [Act/Bill]. (AHIP)~~

~~--OR--~~

- B. "Designee" means an entity that meets the requirements under this Act serving as an MCAS statistical agent the Commissioner designates under Subsection 5(C) and or a qualified professional organization or person outside his or her department under Subsection 6(B). The designee shall be the agent for the Commissioner and not for an insurer. (P-C)

- B. "Insurer" means an admitted insurance company subject to the scope of this Act and required by Subsection 5(B) of this Act to file a MCAS in this jurisdiction.

- B. "Insurer" means an admitted insurance company ~~subject to the scope of this Act and~~ required by ~~Subsection 5(B) of this Act the~~ Commissioner to file a MCAS Data and having direct written premium exceeding \$100,000 in the lines of business subject to NAIC MCAS. (AHIP)

~~--OR--~~

- B. "Insurer" means an admitted insurance company subject to the scope of Section 3 of this Act and required by Subsection 5(B) of this Act to file a MCAS in this jurisdiction and to filing submission under Subsection 5(B). (P-C)

- 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 and to identify patterns or practices of insurers licensed to do business in this state pertaining to company operations and management, complaint handling, marketing and sales, producer licensing, policyholder services, underwriting, and claims. Such analysis may include, but is not limited to, practices that may pose a potential risk to the insurance consumer. Market Analysis does not represent standards for market behavior and does not establish compliance or non-compliance.

**STAFF NOTE: AHIP recommends deleting the definition of "Market Analysis."**

- D. "Market Conduct Annual Statement" or "MCAS" means the Market Conduct Annual Statement as adopted by the National Association of Insurance Commissioners ("NAIC") and as amended by the NAIC from time to time in accordance with the established procedures of that organization, provided that the MCAS and any changes thereto have been approved by the Commissioner.

- D. "Market Conduct Annual Statement" or "MCAS" means the Market Conduct Annual Statement as adopted by the National Association of Insurance Commissioners ("NAIC"), and as amended by the NAIC from time to time in

accordance with ~~theits~~ established procedures ~~of that organization, provided that the MCAS and any changes thereto have been approved by the Commissioner.~~  
(AHIP)

--OR--

D. "Market Conduct Annual Statement" or "MCAS" means the Market Conduct Annual Statement as ~~adopted~~ approved by the National Association of Insurance Commissioners ("NAIC") and as amended by the NAIC from time to time in accordance with the established procedures of that organization, provided that the MCAS and any changes thereto have been adopted as law in this state and approved by the Commissioner. (P-C)

E. "Statistical Agent" means an entity or entities that have been designated by the Commissioner to collect statistics from insurers and provide reports developed from these statistics to the Commissioner for the purpose of fulfilling the MCAS reporting obligations of those insurers.

E. "MCAS Statistical Agent" means an entity or entities that have been designated by the Commissioner to collect statistics from insurers and provide reports developed from these statistics to the Commissioner for the purpose of fulfilling the MCAS ~~reporting~~ obligations of those insurers. (P-C)

**STAFF NOTE: AHIP Recommends deleting the definition of "statistical agent."**

X. "MCAS Data" means the data required by MCAS and filed by Insurers pursuant to the Commissioner's examination authority. (AHIP)

--OR--

X. "Information" means all the data and documents submitted by an insurer to the Commissioner pursuant to this Act. (P-C)

## **Section 5. Submission and Collection of MCAS Information**

A. The Commissioner may annually gather MCAS information pursuant to the law of this state. In order to allow insurers time to prepare to submit the data required, the Commissioner, or his or her MCAS statistical agent, shall provide advance notice to insurers. For data the insurer presently has, the Commissioner, or his or her MCAS statistical agent, shall notify insurers before July of the preceding year of the MCAS data to be submitted. For data that the insurer does not presently collect, the Commissioner, or his or her MCAS statistical agent, shall notify insurers before the July two years preceding the year the MCAS data is to be submitted.

- B. If the Commissioner determines that it will gather MCAS information, every insurer shall annually file with the Commissioner, or the Commissioner's designated MCAS statistical agent, MCAS information for each applicable line of business ~~for~~ which it writes more than \$100,000 in direct written premium ~~in this state~~. If the Commissioner determines either that he or she is not using MCAS data or that he or she does not need to review the information each year, he or she may suspend some or all of the filing requirements or reduce the frequency of the filing requirement for a line of business or for insurers meeting a requirement specified by the Commissioner.
  
- C. The Commissioner may approve and designate one or more MCAS statistical agent for the purpose of gathering, compiling, aggregating and reporting to the Commissioner MCAS statistical data. The Commissioner may also direct the Designee to perform statistical activities related to the receipt and presentation of MCAS Data to assist the Commissioner in the review and subsequent analysis of MCAS Data. Not more than one MCAS statistical agent may be designated for each line of business that is subject to MCAS. The designation of an MCAS statistical agent by the Commissioner does not mean that admitted insurers must report to such agent any MCAS statistics other than those statistics required to be reported under this Section.
  
- ~~D. In the event that the Commissioner designates more than one MCAS statistical agent, each insurer shall choose one of the MCAS designated statistical agents to report to.~~
  
- D. Such designation shall be made pursuant to written contract, and shall be subject to the provisions of this [Act/Bill]. The written contract which terms shall include the scope of work, including all provisions relating to compensation and costs, shall be a public record of the Commissioner.
  
- E. A Designee may not use the MCAS Data or any related analysis or other information, including any analysis or other information created or produced by the Designee, for any other purpose.

## **Section 6. Review and Analysis of MCAS Data**

- A. The Commissioner may review MCAS data ~~information~~ for the purpose of market analysis.
  
- B. The Commissioner may authorize a qualified professional organization or person outside his or her department to assist in the analysis and reporting of MCAS information subject to the confidentiality and sharing provisions in this Act. Such designated entity or person may not use the information collected for any purpose other than as stated in Section 2 of this Act and as within the scope of this designation.

## Section 7. Selection and Standards for Designees

A. The Commissioner shall designate in accordance with applicable state contracting procedures. ~~It shall require any designee to engage in practices that are cost effective for the Commissioner and the insurer.~~ In no event shall a designee charge more than reasonable and necessary costs and/or fees. The Commissioner or an insurer may request that a designee provide an accounting and/or itemized invoices.

*(Drafting Note: It is recommended that States review their existing contract laws for approving and/or hiring designees. State should consider the following procedures ensuring that such functions are conducted by qualified organizations or persons.)*

B. The Commissioner may only approve and/or hire a designee under Subsection 5(C) and Subsection 6(B) if the Commissioner takes necessary steps to ensure that such functions are conducted by qualified organizations or persons in accordance with the following procedures:

1. To be selected as a designee under this Act an applicant shall:
  - a. Follow the procedure the Commissioner outlines for consideration to serve as a designee, which may include licensing, a written application, or a formal request for such a designation;
  - b. State its qualifications, whether by education, experience, and where appropriate, professional designations, to act in the capacity for which it seeks designation;
  - c. State its record with respect to maintaining compliance, data security, and confidentiality;
  - d. State that it does not have an ongoing conflict of interest resulting from legal actions involving the Commissioner or the insurers or their affiliates who are providing data to the Commissioner;
  - e. Agree in writing to:
    - (i) comply with the all rules, technical advisories and directives issued by the Commissioner;
    - (ii) report statistical data or provide analysis of that data to the Commissioner in a timely manner;

- (iii) submit to an audit or performance review, as required by the Commissioner;
  - (iv) make continuing efforts to resolve data quality and integrity issues, by working with insurance regulators and insurers on consistent definitions, ratios, interpretations, and protocols, as appropriate for the size and scope of the designation;
  - (v) maintain the confidentiality and any applicable privilege of all data;
  - (vi) enter into an confidentiality agreement, consistent with this Act statute, with each insurer; and
  - (vii) implement appropriate measures to establish standards for developing and implementing administrative, technical and physical safeguards to protect the security, confidentiality and integrity of information; and
- f. For selection as an MCAS statistical agent, submit a reporting plan that conforms to the MCAS reporting format approved adopted by the NAIC, and adopted by the laws of this state and approved by the Commissioner.

2. A designee may collect and maintain the MCAS information on behalf of the Commissioner but shall not own such information and shall not make such information available to any other person or entity except in accordance with this Act.

C. Nothing in this Act shall be construed to prevent an organization or person from being selected to serve both as a MCAS statistical agent and as a market analyst, provided the organization or person is qualified for both functions and agrees to the terms and conditions set forth in this section.

D. The designee shall be the agent for the Commissioner and not for a reporting insurer.

**STAFF NOTE: P-C recommends deleting D because they incorporated it into their definition of “Designee” in Section 4.**

## **Section 8. Confidentiality of MCAS Data, Analysis and Reports**

**ALTERNATIVE APPROACH (AHIP): Contains amendment proposals substantially similar to (A), (B), (E), and F(1) in NCOIL Section 8. Their abbreviated proposal is pasted below. (STAFF NOTE)**

- A. MCAS Data, the work papers and any analysis or other information produced by a Designee, as well as the work papers and any analysis or other information produced by or received from another governmental entity or the NAIC, and the review and analysis of MCAS Data of the Commissioner, is confidential and privileged. It shall be afforded no less protection than materials covered under the Commissioner's examination and investigation authority under [insert cite], and shall not be subject to subpoena or to discovery, shall not be admissible in evidence in a private civil action, and shall be exempt from any applicable freedom of information law, public records law, public records disclosure law, or other similar statute.
- B. No person or entity which receives or has access to MCAS Data, documents, materials, or other related information shall be permitted or required to testify in a private civil action concerning such MCAS Data, documents, materials, or other information.
- C. Within three business days after receipt by a Designee, or any other recipient of MCAS, MCAS Data, or other related information, of a subpoena or request for discovery of MCAS Data, related analysis, or other related information submitted by or pertaining to a specific insurer, the Designee shall notify the Commissioner and the Insurer of such subpoena or request for data. An Insurer shall have the right to intervene and to assert privileges under this [Act/Bill] and any other law, or to commence an action to prevent disclosure of any MCAS Data provided by it unless the disclosure will be made pursuant to a regulatory action to which such information is relevant.

--OR--

**ALTERNATIVE APPROACH (CEJ): Rely on state public record laws with additional protections, if necessary, and require certain data to be made public. Their proposal is pasted below. (STAFF NOTE)**

- A. MCAS data are subject to the state's public records laws. In the event the public record law does not protect individual consumer personal information or insurer trade secrets, if such data are collected in the MCAS, those data are confidential and not subject to public disclosure. Analyses of MCAS data by the Commissioner or her designee are confidential and not subject to public disclosure. The Commissioner is required to produce, at least annually, a report of individual insurer market performance for the lines of insurance included in the MCAS.

- A. The MCAS information, as well as the workpapers and the other data, and the review and analysis of such, submitted by an insurer to the Commissioner or the Commissioner's designee from an insurer, government entity or the NAIC in

connection with the purposes of this Act is confidential and privileged. ~~in accordance with this Act (SEWARD), as well as the work papers and other information received from another governmental entity or the NAIC and the review and analysis of that data, is confidential and privileged.~~ **It shall be afforded no less protection than materials provided under the Commissioner's examination and investigation authority under [insert cite].** (SEWARD) Such information: shall not be subject to subpoena or to discovery; shall not be admissible in evidence in a private civil action; and shall be exempt from any applicable freedom of information law, public records law, public records disclosure law, or other similar statute. (P-C)

*(Drafting Note: Confidentiality requirements found in Section 8 of the NCOIL Model Market Conduct Surveillance Act or a similar confidentiality provision should be adopted. Where such language is not adopted the NCOIL Model and language of Section 8 is recommended. (P-C)*

- B. No person or entity which receives or has access to documents, materials, or other information under this ~~section~~ Act shall be permitted or required to testify in a private civil action concerning such documents, materials, or other materials. (P-C)
- C. No waiver of an applicable privilege or a claim of confidentiality in the documents, materials, or other information shall occur as a result of disclosure to the Commissioner or the Commissioner's designee under this Section or as a result of sharing such documents, materials or other information as provided in this Act. Nothing in this Section shall require an insurer to disclose documents, materials, or other information that is not otherwise required by law to be disclosed. (P-C)
- D. The making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, any information provided to a designee under this Act is prohibited.
- E. Within three business days after receipt by designee of a subpoena or request for discovery of data on a specific insurer, the designee shall notify the Commissioner and the individual insurer from which the data originated, of such subpoena or request for data. The Commissioner and insurer whose data has been subpoenaed or requested shall have the right to intervene and to assert any applicable privileges under this Act and any other laws. (P-C)
- F. An insurer may bring any action, in law or in equity, to:
  - 1. prevent disclosure of any information provided to the Commissioner or to a designee in accordance with this Act to any person or entity not authorized to receive such information, unless

that person or entity is the subject of a legal or regulatory action to which such information is or may be relevant; and

2. recover damages for the disclosure to any person or entity not authorized to receive such information, including costs associated with an unauthorized disclosure or security breach as well as other costs contained in an agreement under Subsection (G) of this section, unless that person or entity is the subject of a legal or regulatory action to which such information is or may be relevant. (P-C)

G. Consistent with Subsection 7(B)(1)(e)(vi) and Section 9, a designee or other third party with whom MCAS information is shared shall enter into an confidentiality agreement with each insurer. Such agreement shall include, but is not limited to, language addressing: (P-C)

1. Protections contained in this Act Section; (P-C)
2. Data security safeguards and liability for damages due to unauthorized release of insurer data; and
3. Prohibition against release of data to any third party, unless the insurer is provided advance written notice of the identity of the third party to whom the information would be released and unless such third party agrees on the same terms outlined in this Subsection.

H. Nothing in this Section shall be construed to prohibit an insurer from making information about its operations public.

## Section 9. Sharing MCAS Data and Analysis

In accordance with the purpose/terms of this [Act, as set forth in Section 2 above, /Bill], the Commissioner, or the Commissioner's designee, a Designee with the express consent of the Commissioner, may: (AHIP)

A. Share MCAS information gathered under this statute, as well as any analysis of that information, if the recipient enters into a confidentiality agreement with the insurer consistent with Subsection 8(G), with:

A. Share MCAS information gathered under this statute, as well as any analysis of that information, if the recipient enters into a confidentiality agreement with the insurer consistent with Subsection 8(G), with: Data, analysis and related information, with (AHIP)

--OR--

A. Share MCAS information gathered under this statute, as well as any analysis of that information, ~~with if the following authorized recipients enters into a confidentiality agreement with the insurer consistent with Subsection 8(G), with:~~ **(P-C)**

1. State, federal, and international regulatory agencies and law enforcement authorities; provided that the recipient has, to the satisfaction of the Commissioner, a ~~compelling~~reasonable need to review the ~~information materials,~~ and that the recipient agrees, and has the legal authority, to maintain the confidentiality and privileged status of the documents, materials, or other information, including any analysis of such information: ~~;~~ or with **(AHIP)**
2. The NAIC, provided that the NAIC enters into an agreement, in writing with the insurer, that it will maintain the confidentiality and privileged status of the documents, materials, or other information, including any analysis of information.

2. ~~the NAIC, provided that the NAIC enters into an agreement, in writing with the insurer, agrees that~~ the NAIC, including its members, will maintain the confidentiality and privileged status of the documents, materials, or other information, including any analysis of information: ~~;~~ and,

3. the recipient enters into a confidentiality agreement with the Commissioner consistent with this [Act/Bill]. **(AHIP)**

**--OR--**

2. The NAIC, provided that the NAIC ~~enters into an agreement, in writing with the insurer that~~ it will maintain the confidentiality and privileged status of the documents, materials, or other information, including any analysis of information, as contained in written agreements with both:

(a) The Commissioner, consistent with this Act, including Subsection 7(B)(1)(e); and

(b) The insurer consistent with this Act, including Subsection 8(G), **(P-C)**

B. Receive MCAS documents, materials, or other information, including otherwise confidential and privileged documents, materials, or other information, from the NAIC, from other state and federal and international regulatory agencies, and

from law enforcement authorities and shall maintain as privileged and confidential such material, and may enter into agreements governing the sharing and use of information consistent with this section.

B. Receive MCAS Data and related analysis, documents, materials, or other information, including otherwise confidential and privileged analysis, documents, materials, or other information, from the NAIC, from other state and federal and international regulatory agencies, and from law enforcement authorities and shall maintain as privileged and confidential such ~~material~~analysis, documents, materials, or other information, and may enter into agreements governing the sharing and use of ~~information~~the same, consistent with this ~~section~~[Act/Bill].  
(AHIP)

--OR--

B. Receive MCAS documents, materials, or other information, including otherwise confidential and privileged documents, materials, or other information, from the NAIC, from other state and federal and international regulatory agencies, and from law enforcement authorities related to the purposes of this Act and MCAS. Such information received shall be considered to be privileged and confidential under the laws of this state and shall be maintained as privileged and confidential such material. Commissioners, ~~and~~ may enter into agreements governing the sharing and use of information consistent with this Act section.

C. The Commissioner shall publish insurer-specific market performance reports at least annually. The purpose of these reports are to empower consumers, promote competition and promote accountability of insurance regulation with the public.  
(CEJ)

Additions indicated by underline.  
Deletions indicated by ~~strikethrough~~.