

Comments of the Center for Economic Justice  
NCOIL Proposed Market Conduct Annual Statement Model Act  
March 5, 2010

CEJ supports much of the proposed MCAS model and strongly support the use of statistical agent infrastructure for the collection and compilation of data reported by insurers to the Commissioner. We provide some suggestions in redline to the most recent draft, but preface the specific comments with some general comments.

**Market analysis and the MCAS are not a market conduct examination of an individual company and, consequently, MCAS data are not examination work papers.** Market analysis is the regulator's review of insurance markets, including market structure and market performance. The purpose of market analysis is to help the regulator understand and analyze the insurance markets for various lines of insurance to identify problems in the market – problems which can be industry-wide or specific to certain market participants. As the definition of market analysis in the proposed model states, market analysis “does not represent standards for market behavior and does not establish compliance or non-compliance.”

The role of market analysis is to inform public policy and make market regulation more efficient by replacing routine comprehensive market conduct examinations with focused examinations of identified market problems and participants. One result of market analysis might be proposed legislation or regulation to address a market failure. Another result of market analysis might be hold informational meetings with insurers to better understand a statute or regulation. Another result might be focused questions about an individual insurer's claims settlement practices.

The bottom line is that market analysis is not a market conduct examination and the MCAS – the raw material for market analysis – are not the work papers of a market conduct examination. MCAS is no more a market conduct examination of an insurer than the statutory financial statement is a financial examination of insurers. Consequently, the MCAS should not be treated like examination work papers, including confidentiality.

**Insurer trade secrets should be protected, but blanket confidentiality of MCAS is inappropriate. A balanced approach protects insurers' trade secrets – using existing state public information law exceptions – while requiring regulators to publish insurer-specific market performance information to empower consumers in the marketplace.**

**Consumer complaints are a very limited measure of insurer market performance.**

Conditioning reporting of MCAS data on consumer complaints -- even if complaints were meaningful indicators of market performance -- would undermine the purpose and performance of market analysis. The use of complaints is particularly ill-advised because the complaint data available to regulators is unreliable for market analysis purposes and is not a reliable indicator of the market problems or, more importantly, the absence of market problems. The use of complaint thresholds to condition reporting of MCAS turns market analysis on its head by conditioning collection of data to evaluate markets on an unreliable indicator of market performance.

## CEJ Suggested Edits to Draft MCAS Model

### 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:

### Section 4. Definitions

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

D. “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.

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

A. The Commissioner shall require reporting of MCAS data as frequently as necessary to perform market analysis. The Commissioner shall provide insurers with sufficient notice of data to be reported and changes in data to be reported to allow insurers reasonable opportunity to develop or modify data reporting systems to comply with the Commissioner’s request. In determining how long a period of notice prior to reporting of data, the Commissioner shall consider the nature of the data to be reported, whether insurers currently collect or maintain the data in existing systems and any other relevant factors.~~Commissioner may annually gather MCAS information. In order to allow insurers time to prepare to submit the data required, the Commissioner, or his or her statistical agent, shall provide advance notice to insurers. For data the insurer presently has, the Commissioner, or his or her 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 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 writing the designated lines of insurance shall annually file with the Commissioner the MCAS in the format and time frames specified by, ~~or the Commissioner’s designated statistical agent, MCAS information for each line of business for which it writes more than \$100,000 in direct written premium in this state.~~

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

A. The Commissioner shall~~may~~ review MCAS data~~information~~ for the purpose of market analysis.

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

~~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. The MCAS information submitted by an insurer to the Commissioner or the Commissioner's designee in accordance with this Act, 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]. 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.~~

Remainder of Section 8 deleted.

## **Section 9. Sharing MCAS Data and Analysis**

In accordance with the purpose of this Act, as set forth in Section 2 above, the Commissioner or the Commissioner's designee, with the express consent of the Commissioner, may:

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:

1. State, federal, and international regulatory agencies and law enforcement authorities; provided that the recipient has a compelling need to review the information, 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.
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.

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.

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.