



SPONSOR: Sen. Still;
Reps. Hocker, D. Short

DELAWARE STATE SENATE
144th GENERAL ASSEMBLY

SENATE BILL NO. 124

AN ACT TO AMEND TITLE 18 OF THE DELAWARE CODE RELATING TO THE INSURANCE DEPARTMENT
AND MARKET CONDUCT SURVEILLANCE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members
elected to each house thereof concurring therein):

1 Section 1. Amend Title 18 of the Delaware Code by inserting a new Chapter as follows:

2 "Chapter 61. Market Conduct Surveillance

3 §6101. Short Title

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

5 §6102. Purpose and Legislative Intent

6 The purpose of this Chapter is to establish a framework for Insurance Department market conduct actions,
7 including:

8 (1) Processes and systems for identifying, assessing and prioritizing market conduct problems that have a
9 substantial adverse impact on consumers, policyholders and claimants;

10 (2) Market conduct actions by the Commissioner to substantiate such market conduct problems and a
11 means to remedy significant market conduct problems; and

12 (3) Procedures to communicate and coordinate market conduct actions among states to foster the most
13 efficient and effective use of resources.

14 §6103. Definitions

15 (a) 'Commissioner' means the Insurance Commissioner of this State.

16 (b) 'Complaint' means a written or documented oral communication primarily expressing a grievance, meaning
17 an expression of dissatisfaction.

18 (c) 'Market analysis' means a process whereby market conduct surveillance personnel collect and analyze
19 information from filed schedules, surveys, required reports and other sources in order to develop a baseline understanding
20 of the marketplace and to identify patterns or practices of insurers that deviate significantly from the norm or that may pose
21 a potential risk to the insurance consumer.

22 (d) ‘Market conduct action’ means any of the full range of activities that the Commissioner may initiate to assess
23 and address the market practices of insurers, beginning with market analysis and extending to targeted examinations. The
24 Commissioner’s activities to resolve an individual consumer complaint or other report of a specific instance of misconduct
25 are not market conduct actions for purposes of this Chapter.

26 (e) ‘Market conduct surveillance personnel’ means those individuals employed or contracted by the
27 Commissioner to collect, analyze, review or act on information on the insurance marketplace that identifies patterns or
28 practices of insurers.

29 (f) ‘National Association of Insurance Commissioners’ or ‘NAIC’ means the organization of insurance regulators
30 from the fifty states, the District of Columbia and the four U.S. territories.

31 (g) ‘NAIC *Market Analysis Handbook*’ means the outline of the elements and objective of market analysis
32 developed and adopted by the NAIC, and the process by which states can establish and implement market analysis
33 programs.

34 (h) ‘NAIC *Market Conduct Examiner’s Handbook*’ means the set of guidelines developed and adopted by the
35 NAIC that documents established practices to be used by market conduct surveillance personnel in developing and
36 executing an examination.

37 (i) ‘NAIC *Market Conduct Uniform Examination Procedures*’ means the set of guidelines developed and adopted
38 by the NAIC designed to be used by market conduct surveillance personnel in conducting an examination.

39 (j) ‘NAIC Standard Data Request’ means the set of field names and descriptions developed and adopted by the
40 NAIC for use by market conduct surveillance personnel in an examination.

41 (k) ‘Qualified contract examiner’ means a person under contract to the Commissioner, who is qualified by
42 education, experience and, where applicable, professional designations, to perform market conduct actions.

43 (l) ‘Targeted examination’ means a focused exam, based on the results of market analysis indicating the need to
44 review either a specific line of business or specific business practices, including but not limited to underwriting and rating,
45 marketing and sales, complaint handling operations/management, advertising materials, licensing, policyholder services,
46 nonforfeitures, claims handling, or policy forms and filings. A targeted examination may be conducted by desk
47 examination or by an on-site examination.

48 (1) ‘Desk examination’ means a targeted examination that is conducted by an examiner at a location
49 other than the insurer’s premises. A desk examination is usually performed at the Insurance Department’s offices with the
50 insurer providing requested documents by hard copy, microfiche, discs or other electronic media, for review.

51 (2) ‘On-site examination’ means a targeted examination conducted at the insurer’s home office or the
52 location where the records under review are stored.

53 (m) ‘Third party model or product’ means a model or product provided by an entity separate from and not under
54 direct or indirect corporate control of the insurer using the model or product.

55 §6104. Market Analysis Procedures

56 (a) (1) The Commissioner shall gather information from data currently available to the Insurance
57 Department, as well as surveys and required reporting requirements, information collected by the NAIC and a variety of
58 other sources in both the public and private sectors, and information from within and outside the insurance industry.

59 (2) The information shall be analyzed in order to develop a baseline understanding of the marketplace
60 and to identify for further review insurers or practices that deviate significantly from the norm or that may pose a potential
61 risk to the insurance consumer. The Commissioner shall use the NAIC *Market Analysis Handbook* as one resource in
62 performing this analysis.

63 (b) (1) If the Commissioner determines, as a result of market analysis, that further inquiry into a particular
64 insurer or practice is needed, the following continuum of market conduct actions may be considered prior to conducting a
65 targeted, on-site market conduct examination. The action selected shall be made known to the insurer in writing if the
66 action involves insurer participation or response. These actions may include, but are not limited to:

- 67 a. Correspondence with the insurer;
- 68 b. Insurer interviews;
- 69 c. Information gathering;
- 70 d. Policy and procedure reviews;
- 71 e. interrogatories;
- 72 f. Review of insurer self-evaluation (if not subject to a privilege of confidentiality) and
73 compliance programs, including membership in a best practices organization; and
- 74 g. Desk examinations.

75 (2) The Commissioner shall select a market conduct action that is cost effective for the Insurance
76 Department and the insurer, while still protecting the insurance consumer.

77 (c) The Commissioner shall take those steps reasonably necessary to eliminate duplicative inquiries and
78 coordinate market conduct actions and findings with other states.

79 §6105. Protocols for Market Conduct Actions

80 (a) Market conduct actions taken as a result of a market analysis shall focus on the general business practices and
81 compliance activities of insurers rather than identifying infrequent or unintentional random errors that do not cause
82 significant consumer harm.

83 (b) (1) The Commissioner is authorized to determine the frequency and timing of such market conduct
84 actions. The timing shall depend upon the specific market conduct action to be initiated, unless extraordinary
85 circumstances indicating a risk to consumers require immediate action.

86 (2) If the Commissioner has information that more than one insurer is engaged in common practices that
87 may violate statute or regulations, the Commissioner may schedule and coordinate multiple examinations simultaneously.

88 (c) The insurer may be given an opportunity to resolve matters that arise as a result of a market analysis to the
89 satisfaction of the Commissioner before any additional market conduct actions are taken against the insurer.

90 (d) For any change made to an NAIC work product referenced in this Chapter that materially changes the way in
91 which market conduct actions are conducted, the Commissioner shall give notice and provide parties with an opportunity
92 for a public hearing pursuant to the Administrative Procedures Act. If a hearing is requested and not held, the
93 Commissioner shall use the versions of the work products most recently developed and adopted by the NAIC. For the
94 purpose of this subsection, 'material change' means any change that would require a statutory or rule change.

95 (e) Except as otherwise provided by law, every insurer or person from whom information is sought, its officers,
96 directors and agents shall provide the Commissioner convenient and free access to all books, records, accounts, papers,
97 documents and any or all computer or other recordings relating to the property, assets, business and affairs of the insurer.
98 The officers, directors, employees, insurance producers and agents of the insurer or person shall facilitate market conduct
99 actions and aid in market conduct actions so far as it is in their power to do so.

100 §6106. Targeted On-Site Market Conduct Examinations

101 (a) When the Commissioner determines that other market conduct actions identified in §6104(b) of this Chapter
102 are not appropriate, the Commissioner has the discretion to conduct targeted, on-site market conduct examinations in
103 accordance with the NAIC *Market Conduct Uniform Examination Procedures* and the *Market Conduct Examiners*
104 *Handbook*.

105 (b) Concomitant with the notification requirements established in subsection (e) of this section, the Commissioner
106 shall post notification on the NAIC *Examination Tracking System* (or successor NAIC product as determined by the
107 Commissioner) that a market conduct examination has been scheduled.

108 (c) In lieu of an examination of a foreign or alien insurer licensed in this State, the Commissioner may accept an
109 examination report of another state provided that the state has a market surveillance system the Commissioner deems
110 comparable to the market surveillance system set forth in this Chapter.

111 (d) (1) Prior to commencement of a targeted on-site market conduct examination, market conduct
112 surveillance personnel shall prepare a work plan consisting of the following:

- 113 a. The name and address of the insurer being examined;
- 114 b. The name and contact information of the examiner-in-charge;
- 115 c. The justification for the targeted, on-site examination;
- 116 d. The scope of the targeted, on-site examination;
- 117 e. The date the on-site examination is scheduled to begin;
- 118 f. Notice of any non-insurance department personnel who will assist in the examination;
- 119 g. A time estimate for the targeted, on-site examination;
- 120 h. A budget for the targeted, on-site examination if the cost of the examination is billed to the

121 insurer; and

- 122 i. An identification of factors that will be included in the billing if the cost of the examination is
123 billed to the insurer.

124 (2) Market conduct examinations shall, to the extent feasible, utilize desk examinations and data requests
125 prior to a targeted on-site examination.

126 (3) Market conduct examinations shall be conducted in accordance with the provisions set forth in the
127 NAIC *Market Conduct Examiners Handbook* and the NAIC *Market Conduct Uniform Examinations Procedures*.

128 (4) The department shall use the NAIC Standard Data Request (or successor product adopted by
129 regulation that is substantially similar to the foregoing NAIC product).

130 (e) Announcement of the examination shall be sent to the insurer and posted on the NAIC's *Examination Tracing*
131 *System* (or successor NAIC product, as determined by the Commissioner) as soon as possible but in no case later than sixty
132 days before the estimated commencement of the on-site examination, except where the exam is conducted in response to
133 extraordinary circumstances as described in §6105(b)(1) of this Chapter. The announcement sent to the insurer shall
134 contain the examination work plan and a request for the insurer to name its examination coordinator.

135 (f) The Commissioner shall conduct a pre-examination conference with the insurer examination coordinator and
136 key personnel to clarify expectations thirty days prior to commencement of the examination.

137 (g) Prior to the conclusion of a targeted on-site market conduct examination, the individual among the market
138 conduct surveillance personnel who is designated as the examiner-in charge shall schedule an exit conference with the
139 insurer.

140 (h) (1) The Commissioner shall adhere to the following timeline, unless a mutual agreement is reached with
141 the insurer to modify the timeline:

142 a. The Commissioner shall deliver the draft report to the insurer within sixty days of the
143 completion of the examination. Completion of the examination shall be defined as the date the Commissioner confirms in
144 writing that the examination is completed.

145 b. The insurer shall respond with written comments within thirty days of receipt of the draft
146 report.

147 c. The department shall make a good faith effort to resolve issues informally and prepare a final
148 report within thirty days of receipt of the insurer's written comments, unless a mutual agreement is reached to extend the
149 deadline. The Commissioner may make corrections and other changes, as appropriate.

150 d. The insurer shall, within thirty days of receiving the final report, accept the findings of the
151 report or request a hearing. An additional thirty days shall be allowed if agreed to by the Commissioner and the insurer.
152 Any such hearing request shall be made in writing and shall follow the Administrative Procedures Act.

153 (2) The insurer's response shall be included in the final report. The response may be included as an
154 appendix or in the text of the examination report. The insurer is not obligated to submit a response. Individuals involved in
155 the examination should not be named in either the report or the response except to acknowledge their involvement.

156 (i) (1) Upon adoption of the examination report pursuant to subsection (h) of this section, the Commissioner
157 shall continue to hold the content of the examination report as private and confidential for a period of thirty days, except to
158 the extent provided for in paragraph (2) of this subsection. Thereafter, the Commissioner shall open the report for public
159 inspection, provided no court of competent jurisdiction has stayed its publication.

160 (2) Nothing contained in this Chapter shall prevent or be construed as preventing the Commissioner from
161 disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to
162 the Insurance Department of this or any other state or agency of the federal government at any time, provided the agency or
163 office receiving the report or matters relating thereto agrees to hold it confidential and in a manner consistent with this
164 Chapter.

165 (j) (1) Where the reasonable and necessary costs of a market conduct examination are to be assessed against
166 the insurer under examination, the fees shall be consistent with that otherwise authorized by law. The fees shall be itemized
167 and bills shall be provided to the insurer on a monthly basis for review prior to submission for payment.

168 (2) The Commissioner shall maintain active management and oversight of examination costs, including
169 costs associated with the Commissioner's own examiners and with retaining qualified contract examiners necessary to
170 perform an on-site examination. To the extent the Commissioner retains outside assistance, the Commissioner shall have in
171 writing protocols that:

- 172 a. Clearly identify the types of functions to be subject to outsourcing;
- 173 b. Provide specific timelines for completion of the outsourced review;
- 174 c. Require disclosure of contract examiners' recommendations;
- 175 d. Establish and utilize a dispute resolution or arbitration mechanism to resolve conflicts with
176 insurers regarding examination fees; and
- 177 e. Require disclosure of the terms of the contracts with the outside consultants that will be used,
178 specifically the fees and/or hourly rates that can be charged.

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

181 §6107. Confidentiality Requirements

182 (a) Except as otherwise provided by law, market conduct surveillance personnel shall have free and full access to
183 all books and records, employees, officers and directors, as practicable, of the insurer during regular business hours. An
184 insurer utilizing a third-party model or product for any of the activities under examination shall cause, upon the request of
185 market conduct surveillance personnel, the details of such models or products to be made available to such personnel. All
186 documents, including but not limited to working papers, third party models or products, complaint logs, and copies thereof,
187 created, produced or obtained by or disclosed to the Commissioner or any other person in the course of any market conduct
188 actions made pursuant to this Chapter, or in the course of market analysis by the Commissioner of the market conditions of
189 an insurer, or obtained by the NAIC as a result of any of the provisions of the Chapter, shall be confidential by law and
190 privileged and shall not be subject to subpoena or discovery or admissible in evidence in any private civil action.

191 (b) No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information
192 shall occur as a result of disclosure to the Commissioner under this section.

193 (c) Market conduct surveillance personnel shall be vested with the power to issue subpoenas and examine
194 insurance company personnel under oath when the action is ordered by the Commissioner.

195 (d) Notwithstanding the provisions of subsection (a) of this section, in order to assist in the performance of the
196 Commissioner's duties, the Commissioner may:

197 (1) Share documents, materials or other information, including the confidential and privileged
198 documents, materials or information subject to subsection (a) of this section, with other state, federal and international
199 regulatory agencies and law enforcement authorities and the NAIC and its affiliates and subsidiaries, provided that the
200 recipient agrees to and has the legal authority to maintain the confidentiality and privileged status of the document,
201 material, communication or other information;

202 (2) Receive documents, materials, communications or information, including otherwise confidential and
203 privileged documents, materials or information, from the NAIC and its affiliates or subsidiaries, and from regulatory and
204 law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any
205 document, material or information received with notice or the understanding that it is confidential or privileged under the
206 laws of the jurisdiction that is the source of the document, material or information; and

207 (3) Enter into agreements governing the sharing and use of information consistent with this subsection.

208 §6108. Market Conduct Surveillance Personnel

209 (a) Market conduct surveillance personnel shall be qualified by education, experience and, where applicable,
210 professional designations. The Commissioner may supplement the in-house market conduct surveillance staff with
211 qualified outside professional assistance if the Commissioner determines that the assistance is necessary.

212 (b) Market conduct surveillance personnel have a conflict of interest, either directly or indirectly, if they are
213 affiliated with the management, have been employed by, or own a pecuniary interest in the insurer subject to any
214 examination under this Chapter. This section shall not be construed to automatically preclude an individual from being:

215 (1) A policyholder or claimant under an insurance policy;

216 (2) A grantee of a mortgage or similar instrument on the individual's residence from a regulated entity if
217 done under customary terms and in the ordinary course of business;

218 (3) An investment owner in shares of regulated diversified investment companies; or

219 (4) A settler or beneficiary of a 'blind trust' into which any otherwise permissible holdings have been
220 placed.

221 §6109. Immunity for Market Conduct Surveillance Personnel

222 (a) No cause of action shall arise nor shall any liability be imposed against the Commissioner, the
223 Commissioner's authorized representatives or an examiner appointed by the Commissioner for any statements made or
224 conduct performed in good faith while carrying out the provisions of the Chapter.

225 (b) No cause of action shall arise, nor shall any liability be imposed against any person for the act of
226 communicating or delivering information or data to the Commissioner or the Commissioner's authorized representative or
227 examiner pursuant to an examination made under this Chapter, if the act of communication or delivery was performed in
228 good faith and without fraudulent intent or the intent to deceive.

229 (c) A person identified in subsection (a) of this section shall be entitled to an award of attorney's fees and costs if
230 he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities
231 in carrying out the provisions of this Chapter and the party bringing the action was not substantially justified in doing so.
232 For purposes of this section a proceeding is 'substantially justified' if it had a reasonable basis in law or fact at the time that
233 it was initiated.

234 (d) This section does not abrogate or modify in any way any common law or statutory privilege or immunity
235 heretofore enjoyed by any person identified in subsection (a) of this section.

236 §6110. Fines and Penalties

237 (a) Fines and penalties levied as a result of a market conduct action shall be consistent, reasonable and justified.

238 (b) The Commissioner shall take into consideration actions taken by insurers to maintain membership in, and
239 comply with the standards of, best-practices organizations that promote high ethical standards of conduct in the
240 marketplace, and the extent to which insurers maintain regulatory compliance programs to self assess, self-report and
241 remediate problems detected and may include those considerations in determining the appropriate fines levied in
242 accordance with subsection (a) of this section.

243 §6111. Participation in National Market Conduct Databases

244 (a) The Commissioner shall collect and report market data to the NAIC's market information systems, including
245 the Complaint Database System, the Examination Tracking System, and the Regulatory Information Retrieval System (or
246 other successor NAIC products as determined by the Commissioner).

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

249 §6112. Coordination with Other States Through the NAIC

250 The Commissioner shall share information and coordinate the Insurance Department's market analysis and
251 examination efforts with other states through the NAIC.

252 §6113. Additional Duties of the Commissioner

253 At least once per year, or more frequently if deemed necessary, the Commissioner shall provide in an appropriate
254 manner to insurers and other entities subject to this Title information on new laws and regulations, enforcement actions and
255 other information the Commissioner deems pertinent to ensure compliance with market conduct requirements. The failure
256 of the Commissioner to provide information shall not be a defense for an insurer that fails to comply with any insurance
257 law of this state.”

258 Section 2. Effective Date

259 This Act shall take effect 180 days after its enactment into law.

SYNOPSIS

This Act creates a Market Conduct Surveillance Chapter to identify and correct problems within the insurance industry.

AUTHOR: Sen. Still