

Market Conduct Regulation for a Competitive Environment*

**This is the second in a series of NAMIC Public Policy Papers on reforming the state-based system of insurance regulation. The first paper, "Accepting the Challenge: Redefining State Regulation Now," prescribed a process for reforming state regulation and specifically identified nine regulatory practices that needed to be redefined through enactment of uniform insurance regulatory standards in every state.*

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Preface

In the spring of 2000, the National Association of Mutual Insurance Companies (NAMIC) released a report which noted that a critical mass of activity is pushing policymakers in the direction of creating more uniform insurance regulatory procedures and greater consistency of state standards.

While uniformity remains important, getting products to consumers as quickly and economically as possible is the pressure point for insurers. Prior approval is time-consuming, costly and denies consumers the advantages of new and improved risk-sharing vehicles. It also compromises the ability of insurers to compete with other segments of the financial services industry that are regulated differently.

Some advocate a federal solution to overcome the inefficiencies inherent in state government approval of pricing and services. NAMIC still believes that open competition can be accomplished in the existing state model of insurance regulation. NAMIC member companies believe that competition is the answer, preferably within the state regulatory framework.

Allowing rates and forms to be determined by the marketplace will transform the industry and should eliminate many concerns of those who favor federal regulation. But the regulation of rates and forms through the competitive marketplace is a daunting prospect to the regulatory community and consumer advocates. They equate industry's call to a request for no regulation at all.

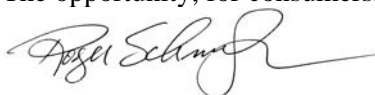
Such reform would surely allow companies the opportunity to enter more markets with fewer impediments. It would also protect consumers by ensuring fair market prices, creating more choices and allowing regulators more resources to enforce proper conduct in the marketplace. We think these are worthy public policy goals that should be fully explored with an open mind by all interested parties.

Regulators working through the NAIC have emphasized reform of the "process" of regulation that is, the approval of licenses, rates and forms. The National Conference of State Legislatures (NCSL) and the National Council of Insurance Legislators (NCOIL) are also taking up the issue of rate and form regulation. Discussion of the "enforcement" side of the debate must continue to move forward to build confidence in a new approach to market conduct. Such confidence is essential to the achievement of a competitive regulatory environment.

With this paper, NAMIC begins to suggest answers to genuine concerns about consumer protection in a purely competitive pricing and service system. Our proposal is based on a set of principles that should provide a framework for this deliberation: an emphasis on efficiency, remediation and better service to consumers.

If realized, in tandem with the achievement of open competition in insurance markets, all stakeholders in insurance will benefit. To reach for anything less than fundamental public policy reform when the pressure for change is at its highest would at least be a miscalculation of the possibilities for change. For certain, it would be insufficient to discourage efforts to secure federal regulation of the insurance industry.

The opportunity, for consumers, regulators and industry, is simply too great to ignore.



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Summary

In the wake of financial services modernization, one insurance regulatory process begs for reform: the method and manner in which state insurance regulators conduct market examinations. Without changes to this process, it is unlikely that policymakers and consumers will be persuaded to accept a regulatory environment where insurance rates and forms are determined in a competitive marketplace rather than by the prior approval of state regulators.

Unfortunately, too much of what has been proposed through the collective efforts of the NAIC represents an incremental approach to reform of the market conduct examination process.

Lawmakers, insurers, and consumers are looking for something more.

Comparing the consumer protections afforded by the regulatory models in insurance, banking, and securities should suggest to policymakers and consumer groups that an effective market conduct system would take advantage of the existing strengths of state regulation while implementing workable uniform standards and greater coordination among regulators. The very positive result would be that increased efficiency and coordination would help reallocate regulatory resources and bring the market conduct examination process in line with an increasingly global financial services industry.

The objective of this paper is to examine the different consumer protection regulatory models used in financial services, and to make recommendations for improvements in market conduct regulation for the insurance sector.

Reform of the market conduct process should have two fundamental goals – to increase regulatory efficiency and to implement a remediation program.

Using its model of working with member companies to make association policy recommendations that represent good public policy, NAMIC considered the social, political and economic realities of the insurance regulatory debate in developing this new approach to market conduct regulation.

Introduction

“Consumer protection” was a mantra often repeated as Congress grappled with financial services modernization during the public debate in the passage of the Gramm-Leach-Bliley Act (GLBA) in November of 1999. During this process Congress reaffirmed the primacy of a state-based system of insurance regulation. However, Congress also imposed new standards of accountability on state regulators. In response, the National Association of Insurance Commissioners (NAIC) adopted a comprehensive “Statement of Intent” addressing specific GLBA requirements and established a plan to implement other regulatory reforms with a goal of achieving more uniform and efficient state insurance regulations. After adopting the Statement, insurance regulators have spent considerable time deliberating how insurers can get their products to market more quickly and how to create a national charter mechanism that addresses other regulatory issues, such as company licensing. One overriding regulatory process that begs for reform in a post-GLBA environment is the method and manner in which state insurance regulators conduct market examinations. The insurance industry has repeatedly implored the NAIC to streamline the market conduct process and strive for greater uniformity and coordination among the states.

Unfortunately, too much of what has been proposed through the collective efforts of the NAIC represents an incremental approach to regulatory reform of the market conduct examination process. Lawmakers, insurers, and consumers are looking for something more.

This paper compares the consumer protections afforded by the regulatory models in insurance, banking, and in securities. The exercise lends significant insight into how to achieve a regulatory reform of the market conduct examination process that takes advantages of the existing strengths of state regulation and also implements workable uniform standards and greater coordination among regulators. Increasing efficiency and coordination will help reallocate scarce regulatory resources and bring the market conduct examination process in line with an increasingly global financial services industry.

Reform of the market conduct process should have two fundamental goals:

- To increase regulatory efficiency through a model patterned after the current financial examination system where the state of domicile assumes responsibility for coordinating market conduct examinations (MCEs) conducted on its domestic insurers leading to reduced costs to insurers; and
- To implement a remediation program to ensure that insurers are fixing problems and altering untoward practices for the benefit of consumers and where regulators impose uniform enforcement sanctions only as a last resort.

Consumer Regulation in Banking: Overview

If one measures only the quantity of consumer protection laws and regulation, banking law would easily win over its counterparts. As with insurance regulation, the focus of banking regulation is safety and soundness. However, there are other consumer protection themes, such as those governing deposit and lending relationships. While generally thought of as “banking laws,” many laws and regulations cover all entities that extend consumer credit.

Although federal regulation dominates the banking industry, states also enact and administer banking consumer protections. Some regulations are unique to state-chartered banks; other requirements extend to all types of lenders.

The dual banking system presents a unique regulatory model. National banks operate under federal laws, regardless of location. State-chartered banks operate under state laws, but are regulated by the Federal Deposit Insurance Corporation.

The national and state systems compete for charters by the extent of powers they grant to licensees, the extent or application of consumer protections, the effectiveness and responsiveness of the regulator, and institutional costs – mainly, examination fees. Since institutions would switch charters if either system offered significant advantages, the federal-state rivalry has the potential to result in greater bank powers and weaker consumer protections.

The possible became the actual in the years prior to the savings-and-loan crisis when state-chartered savings associations were given risky real estate investment powers. Congress reacted by giving the FDIC veto power over state-granted powers that pose a risk to the deposit insurance funds. In addition, most federal consumer protection laws preempt state laws that provide less protection to consumers.

Thus, federal law creates the floor; state laws that provide greater consumer protections are preserved. With these checks and balances, the dual banking system promotes uniformity and ensures the integrity of each system.

Consumer Regulation in Securities: Overview

Securities regulation is primarily a federal system that works to protect consumers by requiring accurate and timely disclosure of information. The federal security regulator, the Securities and Exchange Commission (SEC) protects consumers of securities (investors), by requiring issuers of securities to disclose all information material to an investment decision. However, the SEC does not determine whether the security is a good or bad investment. The SEC also protects investors by regulating the relationship between investors and broker-dealers and by maintaining the integrity of the securities markets. Much of the enforcement of securities laws is carried out through private rights of actions, unlike enforcement of banking and insurance laws. Perhaps the greater emphasis on disclosure and the reliance on civil litigation reflects the differences among the consumers of each industry's products. Historically, securities investors would be more likely than individual borrowers or policyholders to be in a financial position that would permit them to protect their rights instead of relying on a regulator. As more Americans participate in the stock market directly or through mutual funds and self-directed pension plans, securities regulation will likely adjust accordingly.

States also regulate the securities industry, particularly in the enforcement area. States frequently take action against individual broker-dealers operating without a license or otherwise in violation of state securities laws. State regulators also are often the first to learn of and act against investor scams. This division of enforcement labor allows the SEC to concentrate on market regulation and problems more national in scope.

Consumer Regulation in Insurance: Overview

It is undisputed that the primary focus of insurance regulation is safety and soundness – the fundamental consumer protection.¹ However, insurance regulation includes other consumer protections that govern many aspects of the relationship among policyholders and their insurers and producers. Because insurance is so important to maintaining the financial security and well being of millions of Americans, individual state legislatures and insurance departments have enacted numerous consumer protection laws and regulations. The themes of those protections – disclosure, fairness, and competitive equity – are similar to the consumer protections themes of banking and securities regulation. However, the insurance industry is primarily regulated at the state level, while the banking and securities industries are subject primarily to federal regulation.

Insurance regulation is a matter of state law. Insurance companies are formed under and primarily regulated by the laws of their states of domicile. However, they must also comply with the law of every state in which they operate. While there are great similarities among the states in terms of the substance and scope of state insurance laws, there are also significant variations in the application of consumer protection and market conduct examination processes. Over time, states eventually tend to adopt the same types of laws, especially when responding to national or regional problems. These procedural and technical differences do not greatly increase consumer protections, but they do greatly increase compliance costs for insurers doing business regionally or nationally.

If one undertakes to review the specific consumer protection laws in any one state, each law provides for greater consumer protection. However, when comparing and contrasting these laws among the states, the increased benefit in any one state is slight and is exceeded by the insurers' compliance costs in doing business in multiple states with differing requirements.

While each state's law may be defended on the basis of the "customized" consumer protections it affords residents, the cost of that customized protection is borne by residents of all states.

¹ For purposes of this paper, "insurance" generally refers to property/casualty insurance, unless otherwise noted.

Currently, no national charter or licensing process is available to insurers, nor is a uniform standard of law or regulation. Consequently, there has little if any motive for the states to attempt to coordinate or adopt the best version of each state law, because insurance companies have no choice, short of the extreme measure of redomesticating to another state. However, this parochial approach simply cannot continue in a post-GBLA environment nor remain consistent with implementation of the aspirational reforms outlined in the NAIC's "Statement of Intent."

Under the current regulatory paradigm, consumers in a state with strong regulatory protections benefit from those protections, while insurance consumers nationwide absorb some of the industry's compliance costs without enjoying any marginal benefit. It is undisputed that both companies and consumers would benefit from greater uniformity in insurance regulation. A reformed system of market conduct oversight emphasizing remediation and service to consumers is the key to achieving fundamental and meaningful reform.

Clearly, state regulation of insurance benefits consumers. The insurance regulator is accessible, accountable, and knowledgeable about the needs of residents. Uniform regulation across state lines would not require sacrificing these benefits. Industry observers and service providers would agree that the *financial* regulation of insurance has achieved a level of uniformity and consistency in keeping with one of the original goals of the NAIC when formed in the late 1800s. Regulation of the market conduct of the insurance industry remains uneven.

Comparing the Systems

State regulators play an important consumer protection role in each industry. They are more accessible to consumers than are federal regulators, both geographically and politically. In addition, because state regulators monitor local events, they are more likely to first become aware of allegations of company misconduct. Banking and securities regulation by the states is built on a floor of uniform consumer protection required by federal regulation. Because insurance is not subject to federal regulation, consumer protections vary by state, increasing the cost of doing business and failing to maximize the efficiency of the current market conduct regulatory system.

The following description of selected consumer protections demonstrates the nature of consumer protections in the three industries and the differences in the regulatory models. After reviewing and summarizing the three models, a proposal for structural changes in the present system of insurance market conduct oversight based upon the insights gleaned from this comparative analysis is set forth.

Insurance

Insurance regulation historically has been the province of the states. The states' authority to regulate insurance was upheld in the 1869 case of *Paul v. Virginia*, in which the Supreme Court held that state insurance regulatory statutes were constitutional since insurance policies were contracts and not articles of commerce, and so not subject to the commerce clause. However, the Supreme Court later reversed *Paul* in the 1944 case of *U.S. v. Southeastern Underwriters Association*, holding that insurance was interstate commerce subject to federal regulation. Congress responded by passing the McCarran-Ferguson Act, which dictates the relationship between the states and the federal government with respect to the regulation of insurance. Generally, a state law is protected from federal preemption if it: (i) was enacted for the purpose of regulating the business of insurance; and (ii) the federal law in question does not specifically relate to the business of insurance. Each of the 50 states and the District of Columbia have acted pursuant to the McCarran-Ferguson Act to regulate the business of insurance on a state-by-state basis. Diversity, accessibility, and experimentation are the strengths of the state regulatory system.

Unfortunately, diversity and experimentation are weaknesses of the state regulatory system as well. Insurers that operate in more than one state must be licensed in, and comply with, the laws and regulations of each state. Those laws and regulations vary widely, especially in the area of consumer protection provisions and in the manner in which these provisions are enforced through varying market conduct examination processes. Insurers that operate nationwide must maintain an elaborate and unnecessarily complicated compliance program for their licenses, policies, rates, underwriting practices, advertising, disclosures, and complaint mechanisms. Unlike the consumer protections in banking law, there is no standard or floor. Insurers do not even have the option of complying with the strictest of all state laws.

Moreover, consumer protection provisions of insurance law are arguably more comprehensive than in banking law, if not as voluminous. For example, insurers must file policy forms that

comply with the law of each state, while state-chartered banks are not required to file their standard loan documents for review and approval in each state. Bank regulators do not review interest rates or fees to the same degree that insurance regulators review insurance rates.

State insurance regulators created the National Association of Insurance Commissioners in 1871 to address the need to coordinate regulation of insurers doing business in multiple states. The NAIC's initial purpose was to develop uniform financial reporting by insurance companies. It is now generally accepted that solvency regulation in insurance is basically uniform among the states. Financial reporting standards and financial examination standards do not suffer from the inconsistencies and vagaries common among the states in consumer protection and market conduct provisions. In more recent years, the NAIC's mission has evolved to promote greater coordination and uniformity in aspects of insurance regulation beyond financial reporting and solvency. However, if state regulation is to survive in a post-GLBA environment, it will require swift and decisive action on the part of all interested stakeholders. Parochial regulatory approaches must be refocused towards a uniform system consistent with consolidation of the financial services industry with the insurance industry.

Today, the NAIC's primary instruments of public policy are the model laws, regulations and guidelines it promulgates as a deliberative body. The states are free to adopt the NAIC's models intact, modify them to meet their perceived needs and conditions, or even ignore them entirely. While the NAIC has substantially increased uniformity in solvency regulation, it remains the exception more than the rule in market conduct regulation. State legislatures and regulators may use an NAIC model as the starting point, but much tinkering takes place thereafter. In fact, state lawmakers are often frustrated by a perception that the NAIC's process usurps state legislative authority, further complicating the ability to create more uniform standards across state lines absent the use of reciprocal agreements among the states – especially in areas involving administration of regulatory processes.

While consumers and the industry alike would benefit from more uniformity, substantive and procedural, the strength of the diverse state system in the enforcement area cannot be denied. Much of the property/casualty insurance business remains local. The perils faced by homeowners in California differ greatly from those in Kansas. A state regulator can respond better and more quickly to constituent complaints, changes in the market, consumer needs, and local and regional trends than a federal regulator can. This is not to imply that the differing needs of diverse

geographic settings for risk exposures in insurance should preclude a uniform operational standard in market conduct regulation. In fact, state specific consumer protection provisions that may arise from Florida's windstorm exposures, California's

earthquake exposures, or flooding exposures along the Mississippi River basin all fit within common market conduct examination standard topics, including (i) claim administration, (ii) underwriting and rating practices, and (iii) policyholder services. Consistent use by regulators of the NAIC's Market Conduct Examiner's Handbook would allow for common standards of conduct exist across state lines regardless of the specific application in a given jurisdiction. Diversity of risk exposures across the United States should not be significant impediment to the application of uniform market conduct standards in marketing and sales, policyholder services, underwriting and rating, and claim administration.

The variations among the states in the manner in which market conduct examinations are conducted and standards applied are analyzed and described in a report prepared by PricewaterhouseCoopers (PwC) on behalf of the Insurance Legislators Foundation (ILF), the research arm of NCOIL. The PwC report surveyed all 55 domestic insurance jurisdictions to evaluate how they approach the issue of market conduct oversight. It was followed by surveys submitted to individual state chief examiners, examiners-in-charge and to representatives from recently examined insurers. The PwC study summarized its survey findings into eight major observations that were contained in its final report issued in June 2000. The issues and concerns that resonate most strongly from the survey involve the scope of MCEs and state coordination and communication. Additional concerns about regulator-insurer communication, the lack of incentives for insurer self-assessment activities and the application of state enforcement actions are also discussed in the PwC report.

The PwC study clearly describes the benefits of state administration and enforcement of consumer protections provisions under a market conduct examination process. The PwC study also illustrates the myriad inconsistencies, inefficiencies, and costs associated with standards varyingly applied by individual states to national insurers. In fact, some state market conduct examiners even disagree as to whether the focus of a market conduct examination should emphasize a review of general business practices and patterns and inadvertent technical errors unless they have a material an adverse or unfair impact on consumers, policyholders, claimants, or beneficiaries.

An overview of the two general categories of consumer protection laws in the insurance industry follows. These categories are provisions that implement a mechanism for policyholders and claimants to receive monies in the event of an insolvency of a carrier, and rating, underwriting, and policy form regulations.

Guaranty Fund Protection

In addition to market conduct related consumer protections as outlined above, each state has a life and health and a property/casualty insurance guaranty association to pay claims, reimburse unearned premium, and otherwise protect insureds, their beneficiaries, and other claimants against financial losses in the case of insurance company insolvencies.

All licensed insurance companies must be members of the guaranty association. To fund the association, members pay assessments based on the amount of insurance premium received in that state. Many states allow insurers to take a credit against their premium or income tax in the amount of the guaranty fund assessments. Assessments are also made to cover the administrative expenses of guaranty funds.

Rating, Underwriting and Form Regulation

One of the first efforts to regulate rating, underwriting and policy forms practices occurred in 1947 when the NAIC adopted the Unfair Trade Practices Act in response to enactment of the federal Sherman and McCarran-Ferguson Acts. In 1974, the NAIC, responding to a report produced by McKinsey & Company, recommended to the states that a “separate and distinct” program of oversight should be instituted to ensure the fair treatment of policyholders. This system of rating, underwriting, and form regulation including claim administration and policyholder service reviews came to be generally described as market conduct oversight.

Today, thirty-two states have dedicated market conduct units with full-time market conduct examiners. Some states supplement their staff with outside contract examiners, and in three states, only outside contract examiners are used. States without a separate market conduct

unit perform this function by generally making it a part of the triennial financial examination process.

Insurance regulators conduct market conduct regulation through comprehensive and targeted examinations that may arise as function of investigating consumer complaints. A market conduct examination (MCE) is a systematic, comprehensive review of all the facets of an insurer's operation in its business dealings with customers, consumers, and claimants. The purpose of the market conduct examination process is to allow regulators to monitor compliance with state insurance laws and regulations, ensure fair treatment of consumers, provide for consistent application of the insurance laws, educate insurers on the interpretation and application of insurance laws, and deter bad practices.

Comprehensive MCEs generally cover seven areas of investigation, including insurance company operations and management, complaint handling, marketing and sales, producer licensing, policyholder services, underwriting and rating, and claim practices. Moreover, nearly all states have some form of rate regulation addressed in a traditional market conduct examination, although states have increasingly begun to exempt certain defined commercial lines from rate and form regulations. While the standards and procedures differ among insurance products, generally insurance laws dictate that rates cannot be "excessive, inadequate, or unfairly discriminatory." Rates that are too low may threaten a company's solvency; while rates that are too high hurt consumers. Theoretically, consumers can "shop around" and thus protect themselves against excessively high rates. In practice, getting rate quotes is time consuming. In addition, it is difficult for consumers to know whether higher rates promise better coverage and service.

Depending on the state and type of insurance coverage, rates must either be approved by regulators prior to use or filed prior to use, a practice known as "file and use." The rates charged for life and group health insurance must be reasonable in light of the coverage provided. Medicare supplement insurance and credit insurance rates are reviewed to ensure they conform to specified minimum loss ratios.

To differing degrees, states also require insurers to file new products and policy forms prior to or upon use in the state. As part of a market conduct examination process insurance regulators review forms to ensure compliance with state law and the accurate representation of policy terms and conditions.

Looking forward, a viable system of state-based insurance regulation for the future must be based on a new regulatory paradigm that adopts an “open competition” approach to rate and policy form regulation. Under such a paradigm, insurers could enter new markets with a minimum of difficulty. “Prior approval” would be eliminated as the standard for rate and policy forms except in only very rare contingencies.

Numerous economists and the experiences of other industries that have become deregulated all have documented evidence to show how a competitive marketplace is the best way to encourage efficiency and innovation within an industry. Governments should have a role in maintaining the “rules of the road,” but governments should be wary of substituting committee or regulatory judgments for those of the marketplace.

A competitive marketplace also means that consumers will have increased responsibility for their insurance choices. Some consumers will make choices that other consumers would not, but the collective wisdom of those choices has proven itself time after time in market after market. Beyond some minimum standards, discretion should be the better part of valor in overruling such choices.

Banking

Over the years, Congress and the states have woven a web of laws to protect the deposit taking and lending relationships between financial institutions and their customers. Federally insured depository institutions play a unique role in our economy. They are, by definition, the only financial institutions that offer the protection of federal deposit insurance. That privilege coupled with the importance of banks and thrifts to our economy have justified the enactment of numerous consumer protection laws. There are laws to regulate the deposit relationship and ensure those deposits are lent to consumers on a fair and nondiscriminatory basis. Because the purchase of a home is the most important and expensive financial transaction for many Americans, Congress enacted laws that require full disclosure of the terms of those loans and other protections for borrowers. Some of these laws apply only to federally insured depository institutions; some apply to all lenders.

The Board of Governors of the Federal Reserve System (the “Board” or the “Federal Reserve”) is instructed to write and interpret the regulations to implement most major consumer protection laws. However, each federal and state banking agency regularly examines the institutions it regulates for compliance with consumer protection and safety and soundness requirements. The examiners review the bank’s policies and procedures for compliance. They pull sample loan files to verify that required disclosures were given in the form and at the times required by the law. Other regulators, such as the Federal Trade Commission (FTC), have similar authority to examine non-depository institutions, such as consumer finance companies.

Most banking consumer protection laws are uniformly enforced by each banking agency under federal legislation. Penalties for violations are spelled out and additional penalties may be established in the consumer protection law. Administrative remedies include cease and desist orders and civil money penalties.

Uniform enforcement penalties and procedures benefit industry and the banking agencies. For example, the outcome of any legal challenges regarding the federal legislation and its procedures or penalties set precedent for each regulator and the industry generally. Each type of financial institution (national bank, state-chartered member bank, bank holding company, for example) is examined by its regulator who is familiar with that institution and the powers and restrictions of its charter. Other federal agencies, such as the U.S. Department of Housing and Urban Development (HUD) and the Federal Trade Commission (FTC), retain examination and enforcement authority for non-depository institutions.²

States enact consumer protection laws for the benefit of their residents. State chartered banks and other types of lenders must comply with the laws of their home state, to the extent federal law does not preempt. As noted earlier, most federal consumer protection laws establish a floor; states can build a consumer protection ceiling by enacting stronger laws.

The disparity between state and federal consumer protection laws has been an issue in the dual banking system. However, the implications of varying state banking laws are not as significant as they are in the insurance area.

² HUD enforces compliance with the Fair Housing Act for all lenders.

- First, national banks, for the most part, are not required to comply with consumer protection laws of the state in which they do business.
- Second, state-chartered banks historically did not cross state lines, so they were not faced with the difficulties of complying with varying state laws.³
- Third, because of the comprehensive nature of federal consumer protections, many states rely on the federal law or adopt similar state laws. This practice promotes uniformity and eases the compliance burden on institutions that operate in many states.
- Fourth, an institution can ease its compliance burden by complying with the state law that is most strict of all states in which it does business.

Next is a summary of the federal consumer protection laws in the banking area.

Deposit Insurance

The primary consumer protection in the banking industry is deposit insurance. Congress created the Federal Deposit Insurance Corporation (FDIC) in 1933 and the Federal Savings and Loan Insurance Corporation (FSLIC) in 1934 to guarantee bank and thrift deposits in the event of bank failures and to promote financial stability by preventing destructive bank runs. Currently all banks and savings associations, whether federal or state chartered must be members of either the Bank Insurance Fund (BIF) or the Savings Association Insurance Fund (SAIF).

Since the Financial Institutions Reform and Recovery Enforcement Act of 1989 (“FIRREA”), the FDIC administers the BIF and the SAIF. Depository institutions pay assessments into funds based on projected future losses. The FDIC uses a risk-based premium system that assesses higher rates on those institutions that pose greater risks to their respective fund. The FDIC also liquidates or otherwise arranges the resolution of an insolvent depository institution.

³ State chartered banks can now branch across state lines.

Most consumers keep their money in a bank or thrift because they want the protection of deposit insurance. However, since nearly all such institutions carry FDIC protection, consumers must choose a particular bank or thrift. Similarly, qualified borrowers can get a loan from many institutions. There are several laws and rules that mandate uniform disclosure of the terms and conditions of transactions. Some apply only to federally insured depository institutions; others apply to any entity that engages in the regulated activity, such as mortgage lending.

Truth in Lending

Truth in lending requires standardized disclosure of credit terms and uniform methods for computing interest rates and fees to promote the informed use of credit and to allow consumers to easily compare cost and terms of credit. Enforcement authority is granted to the federal depository institution regulators for depository institution creditors and to the FTC for all other types of creditors. Provisions of the Act that establish the content, timing, and format of credit card annual rate disclosure preempt state law. Otherwise, state laws that offer greater disclosure or protection to the consumer generally are preserved.

Truth in Savings

Truth in savings requires clear and uniform disclosure of (i) interest rates paid on deposit accounts; and (ii) the fees assessed against deposit accounts so that consumers can make a meaningful comparison among the terms of deposit accounts offered by depository institutions. Mandated disclosures must be provided to consumers at specified times, including before opening any time account, and in periodic statements. Regulatory authority is granted to the National Credit Union Administration Board for credit unions and to the Federal Reserve for all other depository institutions (Reg. DD). Enforcement authority is granted to the appropriate federal depository institution regulator. Preempts any state law relating to the disclosure of yields or terms for accounts to the extent of any inconsistency, as determined by the Federal Reserve Board.

Real Estate Settlement Procedures Act (RESPA)

The RESPA requires that the nature and costs of real estate settlements be disclosed to borrowers in a uniform manner. Protects borrowers against abusive practices, such as kickbacks. HUD has regulatory authority. Federal depository institution regulators can impose remedies for failure to make mandated disclosures. HUD Secretary, the Attorney General of any state, or the insurance commissioner of any state (if the lender is an insurance company) can bring an action to enjoin violations of the kickback, fee splitting, or unearned fee prohibitions. State laws that give greater protection are preserved, as determined by the HUD Secretary.

Nondiscrimination

Because consumers rely on credit to finance homes, cars, and other purchases, Congress has enacted laws that prohibit discriminatory lending practices.

Equal Credit Opportunity Act (ECOA)

The ECOA requires financial institutions and lenders to make credit equally available to all creditworthy customers without regard to race, color, religion, national origin, sex, marital status, age, participation in public assistance programs, or the exercise of any rights under the Consumer Credit Protection Act. Applicants are entitled to written notice of the specific reasons credit was denied. The Federal Reserve has regulatory authority (Reg. B). Administrative enforcement authority is granted to the appropriate federal depository institution regulator for federally insured depository institutions and to the FTC for other creditors. Federal banking regulators are required to make referrals to the Attorney General whenever the regulator has reason to believe that a federal depository institution has engaged in a pattern or practice of discouraging or denying credit applications in violation of the ECOA. In addition, the Attorney General can independently initiate civil actions for suspected “pattern or practice” violations. Federal banking regulators also are required to refer to HUD suspected violations of the ECOA that may also be violations of Fair Housing Act.

State laws that provide greater protection to credit applicants are preserved. The Board can exempt any class of credit transactions if it determines that state regulation is substantially similar to ECOA or that state law gives greater protection to the applicant, and that the state has adequate enforcement authority and resources.

Community Reinvestment Act (CRA)

The CRA was enacted in 1977 to prevent unfair discrimination and to encourage banks and thrifts to meet the credit needs of their communities, including low- and moderate-income neighborhoods. It requires federal depository institution regulators to regularly assess the record of each bank and thrift in helping to meet the credit needs of its community and to consider that record in evaluating applications for charters or for approval of bank mergers, acquisitions, and branch openings. In addition, to become a Financial Holding Company (FHC), every depository institution subsidiary must have a CRA rating of satisfactory or better. CRA assessments are made during regularly scheduled examinations. A written performance evaluation of the depository institution's CRA activities, including a CRA rating, is prepared at the end of each CRA examination and made available to the general public. The ratings are "outstanding," "satisfactory," "needs to improve," or "substantial noncompliance." Each federal depository institution regulator has authority to issue rules and conduct CRA exams with respect to its regulated entities. Uniform rules were adopted by the banking agencies in 1995.

Home Mortgage Disclosure Act (HMDA)

HMDA requires all mortgage lenders to collect and disclose certain information about their mortgage lending activities. There are three purposes for the disclosure: (1) to assist consumers and regulators in identifying discriminatory lending practices; (2) to allow consumers and regulators to determine whether depository institutions are meeting their obligation to serve the housing needs of the communities and neighborhoods in which they are located; and (3) to assist public officials in targeting public investments. Regulatory authority is granted to the Federal Reserve (Reg. C). Administration enforcement authority is granted to each federal depository institution regulator for depository institution lenders and to HUD for all other types of lenders. State laws are preempted to the extent of any inconsistency, as determined by the Board.

Customer Relationships

Expedited Funds Availability Act

Ensures consumers the timely availability of funds from deposited checks by establishing expedited funds availability schedules. Requires depository institutions to pay interest on deposits within mandated time frames. Requires depository institutions to disclose

their funds availability policies to customers before an account is opened. The Board has regulatory authority (Reg. CC). Federal depository institution regulators have administrative enforcement authority with respect to their regulated institutions. State laws that require funds to be made available in a time period shorter than established by the Act are preserved and apply to all federally insured depository institutions in that state. Any other state law inconsistent with the Act is preempted.

Right to Financial Privacy Act

Prohibits government agencies from obtaining and financial institutions from disclosing an individual's financial record, except with customer consent or in cases of known or suspected violations of law. "Financial record" is information derived from any record held by a depository institution, credit card issuer, or consumer finance company pertaining to a customer's relationship with the financial institution. The Act gives customers the right to receive notice that the information has been requested.

Credit Practices

F*air Credit Reporting Act*

Requires consumer-reporting agencies to adopt reasonable procedures for reporting consumer credit, personnel, insurance, and other information that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.

The Fair Credit Reporting Act (FCRA): (1) states conditions under which credit reports must be disclosed and the maximum fees; (2) gives consumers the right to "opt out" of credit information sharing among affiliates; (3) establishes procedures for conducting "investigative consumer reports;" (4) requires consumer reporting agencies to establish internal controls to ensure accuracy of information and compliance with the Act; (5) establishes procedures for disclosure of consumer credit information to the consumer; (6) establishes procedures to resolve disputes between consumers and agencies over the accuracy of information, including deadlines for investigation and notification; (7) prohibits the reporting of obsolete information; (8) regulates the conduct of entities that use credit reports; and mandates three notices that credit bureaus must provide to consumers, users of credit reports, and creditors that furnish information to credit bureaus advising

each of their rights and responsibilities under the FCRA; and (9) regulates prescreening and firm offers of credit or insurance.

The FTC has primary regulatory authority and enforcement authority; federal depository institution regulators retain enforcement authority over depository institutions. States have certain enforcement authority as well. The FCRA has complicated state law preemption provisions. Certain state laws that provide greater protection for consumers are preserved. Some state laws are preempted in all cases, e.g. state laws concerning prescreening, form and content of FCRA notices, solicitation of firm offers of credit or insurance, and affiliate information sharing. Some of the federal preemption provisions are for specified time periods only.

Securities

Our federal and state securities laws were enacted to protect individual investors and the investing public by regulating the issuers and sellers of securities and the markets on which securities are traded. The underlying premise of this protection is disclosure. Securities laws mandate and regulate the disclosure of accurate, timely, material, and meaningful information to enable investors to make informed decisions.

The primary securities laws are: The Securities Act of 1933 (1933 Act), The Securities Exchange Act of 1934 (1934 Act); and the Investment Company Act of 1940 (1940 Act). The Securities and Exchange Commission (SEC) administers and enforces federal securities laws. It also oversees several self-regulatory organizations (SROs), including the National Association of Securities Dealers (NASD), the Municipal Securities Rulemaking Board (MSRB), the New York Stock Exchange (NYSE), and the American Stock Exchange (ASE). Each SRO regulates the securities markets it operates and the issuers and sellers in those markets.

States also regulate the offer and sale of securities. State securities commissioners interpret and enforce state laws individually and work cooperatively through the North American Securities Administrators Association (NASAA). State regulators tend to focus on the consumer protection aspects of securities regulation; the SEC has a more market-oriented focus.

The Securities Investor Protection Act of 1970 established the Securities Investor Protection Corporation (SIPC) that pays claims of customers of insolvent securities firms. Unlike the FDIC or

state insurance guaranty funds, SIPC protects only customer cash and securities held by broker-dealers. It does not cover market losses or protect customer investments.

The 1933 Act

The 1933 Act governs the offer and sale of securities in interstate commerce or through the use of the mails. Its primary focus is on the registration and prospectus delivery requirements. Companies that want to publicly offer and sell their securities must register them with the SEC under the 1933 Act, subject to certain exemptions. The purpose of registration is to provide persons with sufficient information to allow them, not the regulator, to make an informed judgment about the offered securities. Companies must describe the security to be issued, disclose material information about their business and the purpose of the offering, offer information about the management of the company, and provide certified financial statements in the registration statement. The SEC reviews the registration statement to ensure that it complies with the disclosure requirements. The SEC does not conduct a merit review of the securities. That is, the SEC does not determine whether the securities are good or bad. Instead, its role is to require material facts to be fully, clearly, and accurately disclosed so that investors can make an informed investment decision.

The 1934 Act

The 1934 Act authorized the creation of the SROs, created the SEC and gave it broad authority over all aspects of the securities industry, including administration of the 1933 and 1934 Acts. Pursuant to the 1934 Act, the SEC registers and regulates broker-dealers, oversees the SROs, requires publicly traded companies to file periodic financial reports, regulates the solicitation and use of voting proxies from the shareholders of reporting companies, regulates tender offer solicitations, restricts “insider” trading, and regulates margin trading.

The Investment Company Act

The 1940 Act governs the activities of companies that invest in securities, commonly known as mutual funds. The 1940 Act requires investment companies to register with the SEC, regulates their structure, management, and operations, and requires them to disclose their financial condition and investment policies to investors.

Enforcement

The SEC has a wide variety of administrative enforcement powers under the securities laws. It can impose civil penalties, issue cease and desist orders, suspend or revoke the registration of any broker-dealer or SRO; and order additional relief, such as disgorgement of profits. In addition, through its division of enforcement, the SEC can seek injunctive relief, civil penalties, and ancillary relief in federal courts.

The SEC does not typically respond to individual investor complaints. The SEC acts to protect the markets and to respond to multi-state problems, as was the case in the Penny Stock Reform Act. It relies on state regulators to protect individual investors, as noted in “State Regulation” below.

The SROs

The SEC delegates much of its regulatory authority over the exchanges and over-the-counter markets to the SROs. All broker-dealers that do business with the public are required to join and be regulated by the NASD.⁴ The responsibilities of the SROs include: formulation of rules governing business practices and markets; formulation of rules governing sales practices; examination of securities firms for compliance with net capital and other financial and operational requirements; surveillance of the markets; review of member supervisory practices and procedures; investigation and enforcement of violations of SRO rules. The NASD administers tests, licenses securities professionals and reviews advertising and sales literature prior to its use by members.

The SROs must file any new rules or amendments to existing rules with the SEC and notify it of any disciplinary actions taken against SRO members. The SEC can impose sanctions on the SROs and their members, and add to or amend SRO rules.

Consumer Protections

In addition to the disclosure requirements of the 1933 and 1934 Act, the SEC protects customers through rules on sales practices and financial and operating standards for securities firms.

⁴ In 1996 the NASD separated its regulatory activities from its market activities by forming a subsidiary, NASD Regulation, Inc. For purposes of this memo, references to the NASD include NASD Regulation, Inc. unless otherwise noted.

Sales Practices

- **Suitability.** The NASD Rules of Fair Practice prohibit securities salespeople from recommending securities unless the salesperson has reasonable grounds to believe that the securities are suitable for the customer in light of the customer's financial situation, other securities holdings, and other relevant data.
- **Churning.** Excessive trading by a broker-dealer in a customer's account for the purpose of generating commissions, otherwise known as churning, has been found to be a manipulative and deceptive practice.
- **Fair commissions and markups.** NASD guidelines prohibit broker-dealers from selling securities at excessive markups.
- **Penny Stocks.** The Penny Stock Reform Act of 1990 regulates sales of "penny stocks" – low priced, speculative securities of small, new companies. The rules impose explicit suitability, disclosure, and record-keeping requirements on broker-dealers that recommend penny stocks.

Broker-Dealer Financial Standards

Registered broker-dealers must comply with financial and operational standards established by the SEC and any SRO to which they belong. The SEC and the SROs have conservator and receivership powers with respect to financially troubled securities firms.

Examinations

Each securities firm has a designated examining authority (one of the exchanges or the NASD) that is responsible for reviewing the firm's financial and operating condition and compliance with sales practice and other applicable laws and rules. The NYSE and NASD conduct annual exams and the SEC conducts back up exams on a selected sample of broker-dealers.

State Regulation

Generally, issuers must register securities with the securities commissioner of any state in which the securities will be sold, unless an exemption is available. States also require registration of broker-dealers who will sell securities in the state and prohibit fraud and deceptive practices in the sale of securities. As with insurance laws, the substance and scope of state securities laws varies, although many states have adopted all or part of the Uniform Securities Act and the Revised Uniform Securities Act promulgated by the North American Securities Administrators Association (NASAA)⁵ (jointly referred to herein as the Uniform Securities Act). State enforcement personnel oversee local markets through routine review and investigation of customer complaints as well as newspaper, radio and television broadcasts to insure compliance with securities laws.

State Registration

Most states require securities to be registered with the securities commissioner prior to their sale in the state. Some states conduct a merit review of the offering. The Uniform Securities Act also permits registration by “coordination” for offerings simultaneously being registered with the SEC. State laws normally exempt other types of offerings, including limited offerings (dollars or persons), isolated transactions, private offerings, and sales to accredited investors. State laws allow administrative remedies and civil liability for violations of the registration requirements.

In 1996, Congress enacted the National Securities Markets Improvement Act of 1996. The 1996 Act enhanced uniformity by preempting state regulation of many securities offerings. In addition, certain transactions that are exempt from registration under the 1933 Act are exempted from state registration and regulation, including private placements. States can continue to regulate intrastate offerings and small offerings and can require notice filings and payment of fees. States also retain investigation and enforcement authority with respect to securities fraud or deceit.

Broker-Dealer Registration

Most state securities regulators have authority to register, regulate, and discipline broker-dealers. The 1996 Act generally preserves state regulation with respect to registration and anti-fraud and sales practice regulation. However, the federal law prohibits states from regulating the capital,

⁵ The NASAA is an association of the state securities regulators who work together.

custody, margin, financial responsibility, record keeping, or financial and operational reporting requirements of broker-dealers.

Securities Investor Protection Corporation

Congress created the Securities Investor Protection Corporation (SIPC) in 1970 to promote public confidence in the securities markets by guaranteeing the return of property to investors if securities firms fail or go out of business. SIPC ensures that when securities firms fail, customers will receive their cash and securities held by the broker-dealer up to prescribed limits. Every registered broker-dealer must be a member of SIPC. SIPC also has authority to initiate and oversee liquidations of troubled firms.

SIPC protections differ from federal deposit insurance coverage for banks in that SIPC does not insure the value of any securities purchased by an investor. Insurance guaranty fund protections also differ from SIPC protections since guaranty funds pay claims, up to statutory limits.

Comparative Summary

Insurance, banking, and securities transactions are now necessities for most Americans. As a consequence, each industry is subject to extensive consumer protection regulation.

The focus of banking and insurance regulation is similar. While safety and soundness are the primary focus, other aspects of consumer protection are highly regulated.

Congress gave the Federal Reserve interpretative authority over most banking consumer protection laws, including those that extend to non-depository institutions. Consequently, there is a federal law that is interpreted by a federal regulator. Each institution's regulator then enforces the law and subsequent regulations.

States can enact laws that provide greater consumer protections than those provided by the federal law. State chartered depository institutions and other lenders operating in the state must then comply with those laws. The Federal Reserve is generally given the authority to review state law and make the determination of whether it is preserved or preempted.

This regulatory scheme enhances uniformity among types of institutions. Most would agree that consumers benefit from such uniformity, especially in today's society where people are highly mobile and in which depository institutions and other lenders often operate on a regional or national scale.

However, federal regulation does not score as highly for responsiveness to consumer complaints. Federal regulators are found only in Washington, D.C., or regional offices. Consumers do not enjoy the same degree of access or familiarity with federal banking regulators as they do with their state counterparts.

Securities regulation is also primarily federal. Self-regulatory organizations are unique to securities regulation; they play an important role in promoting effective and uniform regulation. States are actively enforcing securities laws, but their regulatory authority is limited. This system of uniform regulation and "local" enforcement has surely benefited issuers, sellers, and investors of securities. Our capital markets are the envy of the world and open to issuers and investors alike.

Consumer protections in the insurance industry are as important and comprehensive as those of the banking and securities industry. However, they are regulated only through a state regulatory system. The resulting variety of state laws imposes costs on insurers that are ultimately borne by consumers. A regulatory system that promotes uniformity but retains state enforcement would benefit the insurers and policyholders. It would also allow insurance companies to be on equal footing with their colleagues in the banking and securities industries in the new world of financial holding companies under GLBA.

A Proposal for Reform in the Insurance Industry

A New Market Conduct Paradigm

By necessity, adoption of an open competition approach to rates and forms requires a new approach to protection of consumers. This can be accomplished by focusing public policy on two fundamental goals. First, increasing efficiency, which results in reduced costs to insurers through a model patterned after the current financial examination system where the state of domicile takes responsibility for coordinating MCEs of domestic insurers. And second, implementing a remediation system as a logical conclusion to the market conduct examination

process, where the aim is to ensure that insurers are fixing material problems for the benefit of consumers and where regulators impose a uniform set of enforcement sanctions only as a last resort.

As described above the financial examination process generally has worked well for state insurance regulators in overseeing the financial solvency of insurers across state lines. A similar process should work for regulators performing routine, comprehensive MCEs. This recommendation presumes that states will first adopt a set of voluntary minimum standards for MCEs similar to the accreditation standards that are in place for financial examinations and based upon the existing Market Conduct Examiner's Handbook.

In that regard, regulators already have several tools at their disposal. As Alan J. Schmitz, author of *The Market Conduct Examination Guide: Principles in Managing Market Conduct Examinations* notes, the NAIC Market Conduct Examiner's Handbook describes a workable MCE process. The Handbook emphasizes a focus on general business practices and patterns and not inadvertent or technical errors unless they have an adverse or unfair impact on consumers, policyholders, claimants, or beneficiaries. It clearly articulates the public policy benefits of relying more fully on targeted MCEs over routine scheduled exams. It also provides a framework for national market conduct standards flexible enough to take into account local market needs and geographic issues.

If the Handbook can be combined with the template for scheduling exams under the NAIC Examination Tracking System, Schmitz observes that regulators will "have crafted a regulatory scheme that, on paper, creates an efficient and fair model of regulatory oversight."

The question of which insurers should be subject to routine, comprehensive MCEs should be determined by the underlying presumption that since insurers operating in multiple states have the potential to affect more consumers than an insurer doing business in a single state, the multi-state insurer should be subject to a regularly scheduled MCE.

Under this model, regulators would agree that the domiciliary state should conduct any routine, comprehensive MCE on "national" companies in its jurisdiction. The domiciliary state should use the NAIC examination call system to notify other interested states of the exam. Other states could elect to participate, but the domiciliary state should be responsible for limiting the number of examiners who ultimately participate. If a state does not currently have a separate market conduct

unit, its role should be less as the “lead” regulator and more as a “coordinator” in facilitating completion of the MCE with other states.

This model does not preclude a state from conducting its own targeted MCE of an insurer, but if that state calls an exam, the insurer should have the opportunity to appeal to the domiciliary state for intervention if the non-domiciliary state’s exam is seen as unwarranted or untimely. This process should help to efficiently allocate scarce regulatory resources, eliminate redundant examinations, and reduce examination costs to insurers while achieving the regulatory goal of eliminating untoward practices that adversely effect policyholders, consumers, and claimants.

Comprehensive MCEs generally cover seven areas of investigation, including company operations/management, complaint handling, marketing and sales, producer licensing, policyholder services, underwriting and rating, and claims practices. In a reformed examination system regulators should focus on marketing and sales, policyholder services, underwriting and rating, and claims. If regulators determine that other areas of investigation are necessary and meaningful to protect consumers, the domiciliary state should collect and retain that information. This would apply to requirements such as whether an insurer has a disaster recovery plan or keeps a proper complaint log.

Completed MCE reports, in addition to being filed on a timely basis, should prescribe a specific remediation plan for insurers with appropriate deadlines to correct material problems identified in the exam. If problems are not fixed within an allotted time, the insurer should then be subject to administrative penalties. The penalties should follow a set of uniform standards.

To help ensure that consumers continue to be adequately protected from any potential insurer misconduct or misdeeds between periodically scheduled MCEs, “national” companies should be subject to interim market conduct review. For example, Illinois and Ohio currently require property/casualty insurers to fill out annual questionnaires that specifically target private passenger auto and homeowner coverages. The surveys are then used, along with consumer complaint information compiled by the departments, to prioritize those insurers that should be subject to further review.

A “national” questionnaire should be developed by regulators, industry and consumer representatives that allows for some “state-specific” questions, but those questions should be

limited, and subject to a system of peer review, in the interest of developing a uniform national reporting tool.

Regulators also should be encouraged to use other existing regulatory tools (i.e., desk audits, insurer self-audit information) as alternatives to conducting more MCEs. In that regard, the NAIC Market Conduct Issues Working Group needs to re-open a discussion on the merits of adopting a self-evaluative privilege model act that would protect as confidential from class-action plaintiff lawyers self-audit information that an insurer would turn over to a regulator.

Each state also should be responsible for determining the applicable standards for the “non-national” companies under its jurisdiction. These standards should not be any more restrictive than the standards applied to “national” companies.

Under the proposal, a state should be allowed to call a targeted MCE on any insurer, at any time, but the domiciliary state should be notified first, and should be given the opportunity to participate in the exam. Regulators, insurers, and consumer representatives should develop uniform standards for what constitutes a targeted MCE and a protocol when a domiciliary state objects to another state’s targeted exam call.

A dispute resolution mechanism should allow both states to present their respective arguments to a panel of state regulators, who ultimately should decide whether the exam should proceed. If the domiciliary state has no objections to a targeted exam being performed by another state, the exam should proceed and should follow some of the same requirements outlined for routine, comprehensive MCEs, namely how many examiners should participate and that uniform standards are followed for any administrative penalties. Even the process of determining whether an examination should proceed will have a beneficial impact on the future market conduct of the insurer.

Since many of the proposals described in this model are administrative in nature, it may be possible for the states to adopt this new market conduct process by signing a reciprocal agreement and using the existing standards published in the Examiner’s Handbook. This approach may serve as the best mechanism for quickly bringing about a new system for overseeing market conduct activities.

Conclusion

The market conduct model described in this paper represents a reasonable and practical solution for implementing a more coordinated MCE process that eliminates the number of duplicative and unnecessary MCEs, thus reducing insurer costs. The plan also envisions a remediation program that should cause insurers to focus their energies on correcting business practices identified in examinations.

In adopting these new processes, regulators will shift their emphasis away from more routine, comprehensive MCEs placing more attention on correcting egregious market practices. This shift in regulatory philosophy will make insurers more accountable by having them focus on fixing material problems within their organizations rather than simply being fined by regulators for inadvertent administrative or transactional errors with little or no consumer impact. This, in turn, will serve as a better method for protecting consumers and encouraging innovation in the insurance marketplace.

The model presumes that state regulators can and will adopt the practices as part of their administrative procedures and thus could sign voluntary reciprocal agreements among themselves. If a voluntary process proves untenable, an alternative implementation plan must be found.

Reform of market conduct oversight is consistent with consumer protection in the banking and security industries. If state regulation of insurance is to continue for the benefit of insurance consumers, then the NAIC, insurance legislators, and industry representatives must work together to move market conduct regulation into the twenty-first century.

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