

## UNFAIR TRADE PRACTICES ACT

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**Prefatory Note:** By adopting amendments to this model act in June 1990, the NAIC separated provisions dealing with unfair claims settlement into a newly adopted Unfair Claims Settlement Practices Model Act, to make clearer distinction between general unfair trade practices and more specific unfair claim settlement issues and to focus on market conduct practices and market conduct regulation. By doing so, the NAIC is not recommending that states repeal existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

### Section 1. Purpose

The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) and the Gramm-Leach-Bliley Act (Public Law 106-102, 106<sup>th</sup> Congress), by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. Nothing herein shall be construed to create or imply a private cause of action for a violation of this Act.

### Section 2. Definitions

When used in this Act:

- A. “Affiliate” means any company that controls, is controlled by, or is under common control with another company.
- B. “Commissioner” means the commissioner of insurance of this state.

**Drafting Note:** Insert the appropriate term for the chief insurance regulatory official wherever the term “commissioner” appears.

- C. “Customer” means an individual who purchases, applies to purchase, or is solicited to purchase insurance products primarily for personal, family or household purposes.
- D. “Depository institution” means a bank or savings association. The term depository institution does not include an insurance company.
- E. “Insured” means the party named on a policy or certificate as the individual with legal rights to the benefits provided by such policy.

- F. "Insurer" means any person, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including producers, adjusters and third-party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar health service plans as defined in Sections [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance.

**Drafting Note:** Each state may wish to consider the advisability of defining "insurance" for purposes of this Act if its present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

- G. "Person" means a natural or artificial entity, including but not limited to, individuals, partnerships, associations, trusts or corporations.
- H. "Policy" or "certificate" means a contract of insurance, indemnity, medical, health or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any insurer.
- I. "Producer" means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance.

### **Section 3. Unfair Trade Practices Prohibited**

It is an unfair trade practice for any insurer to commit any practice defined in Section 4 of this Act if:

- A. It is committed flagrantly and in conscious disregard of this Act or of any rules promulgated hereunder; or
- B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

### **Section 4. Unfair Trade Practices Defined**

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

- A. Misrepresentations and False Advertising of Insurance Policies. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement, sales presentation, omission or comparison that:
- (1) Misrepresents the benefits, advantages, conditions or terms of any policy; or
  - (2) Misrepresents the dividends or share of the surplus to be received on any policy; or
  - (3) Makes a false or misleading statement as to the dividends or share of surplus previously paid on any policy; or
  - (4) Is misleading or is a misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates; or
  - (5) Uses any name or title of any policy or class of policies misrepresenting the true nature thereof; or
  - (6) Is a misrepresentation, including any intentional misquote of premium rate, for the purpose of inducing or tending to induce the purchase, lapse, forfeiture, exchange, conversion or surrender of any policy; or
  - (7) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any policy; or
  - (8) Misrepresents any policy as being shares of stock.

- B. False Information and Advertising Generally. Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any insurer in the conduct of its insurance business, which is untrue, deceptive or misleading.
  - C. Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any insurer, and which is calculated to injure such insurer.
  - D. Boycott, Coercion and Intimidation. Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.
  - E. False Statements and Entries.
    - (1) Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of an insurer.
    - (2) Knowingly making any false entry of a material fact in any book, report or statement of any insurer or knowingly omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer, or knowingly making any false material statement to any insurance department official.
  - F. Stock Operations and Advisory Board Contracts. Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to purchase insurance.
  - G. Unfair Discrimination.
    - (1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.
    - (2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.
- Drafting Note:** In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted.
- (3) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience.

- (4) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to insure, refusing to renew, canceling or limiting the amount of insurance coverage on the residential property risk, or the personal property contained therein, solely because of the age of the residential property.
- (5) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits. Nothing in this section shall prohibit or limit the operation of fraternal benefit societies.
- (6) To terminate, or to modify coverage or to refuse to issue or refuse to renew any property or casualty policy solely because the applicant or insured or any employee of either is mentally or physically impaired; provided that this subsection shall not apply to accident and health insurance sold by a casualty insurer and, provided further, that this subsection shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract.
- (7) Refusing to insure solely because another insurer has refused to write a policy, or has cancelled or has refused to renew an existing policy in which that person was the named insured. Nothing herein contained shall prevent the termination of an excess insurance policy on account of the failure of the insured to maintain any required underlying insurance.
- (8) Violation of the state's rescission laws at [insert reference to appropriate code section].

**Drafting Note:** A state may wish to include this section if it has existing state laws covering rescission and to insert a reference to a particular code section.

#### H. Rebates.

- (1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.
- (2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:
  - (a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;
  - (b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;
  - (c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year; or

- (d) Engaging in an arrangement that would not violate Section 106 of the Bank Holding Company Act Amendments of 1972 (12 U.S.C. 1972), as interpreted by the Board of Governors of the Federal Reserve System, or Section 5(q) of the Home Owners' Loan Act, 12 U.S.C. 1464(q).

**Drafting Note:** Section 104 (d)(2)(B)(viii) of the Gramm-Leach-Bliley Act provides that any state restrictions on anti-tying may not prevent a depository institution or affiliate from engaging in any activity that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System. The Board of Governors of the Federal Reserve System has stated that nothing in its interpretation on combined-balance discount arrangements is intended to override any other applicable state and federal law. FRB SR 95-32 (SUP). Section 5(q) of the Home Owners' Loan Act is the analogous provision to Section 106 for thrift institutions. The Office of Thrift Supervision has a regulation 12 C.F.R. 563.36 that allows combined-balance discounts if certain requirements are met.

**Drafting Note:** Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

- I. **Prohibited Group Enrollments.** No insurer shall offer more than one group policy of insurance through any person unless such person is licensed, at a minimum, as a limited insurance representative. However, this prohibition shall not apply to employer/employee relationships, nor to any such enrollments.
- J. **Failure to Maintain Marketing and Performance Records.** Failure of an insurer to maintain its books, records, documents and other business records in such an order that data regarding complaints, claims, rating, underwriting and marketing are accessible and retrievable for examination by the insurance commissioner. Data for at least the current calendar year and the two (2) preceding years shall be maintained.
- K. **Failure to Maintain Complaint Handling Procedures.** Failure of any insurer to maintain a complete record of all the complaints it received since the date of its last examination under Section [insert applicable section]. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of each complaint, and the time it took to process each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance.
- L. **Misrepresentation in Insurance Applications.** Making false or fraudulent statements or representations on or relative to an application for a policy, for the purpose of obtaining a fee, commission, money or other benefit from any provider or individual person.
- M. **Unfair Financial Planning Practices.** An insurance producer:
  - (1) Holding himself or herself out, directly or indirectly, to the public as a "financial planner," "investment adviser," "consultant," "financial counselor," or any other specialist engaged in the business of giving financial planning or advice relating to investments, insurance, real estate, tax matters or trust and estate matters when such person is in fact engaged only in the sale of policies. This provision does not preclude persons who hold some form of formal recognized financial planning or consultant certification or designation from using this certification or designation when they are only selling insurance. This does not permit persons to charge an additional fee for services that are customarily associated with the solicitation, negotiation or servicing of policies.
  - (2)
    - (a) Engaging in the business of financial planning without disclosing to the client prior to the execution of the agreement provided for in Paragraph 3, or solicitation of the sale of a product or service that
      - (i) He or she is also an insurance salesperson, and
      - (ii) That a commission for the sale of an insurance product will be received in addition to a fee for financial planning, if such is the case.
    - (b) The disclosure requirement under this subsection may be met by including it in any disclosure required by federal or state securities law.

- (3) (a) Charging fees other than commissions for financial planning by insurance producer, unless such fees are based upon a written agreement, signed by the party to be charged in advance of the performance of the services under the agreement. A copy of the agreement must be provided to the party to be charged at the time the agreement is signed by the party.
  - (i) The services for which the fee is to be charged must be specifically stated in the agreement.
  - (ii) The amount of the fee to be charged or how it will be determined or calculated must be specifically stated in the agreement.
  - (iii) The agreement must state that the client is under no obligation to purchase any insurance product through the insurance producer or consultant.

**Drafting Note:** This subsection is intended to apply only to persons engaged in personal financial planning.

- (b) The insurance producer shall retain a copy of the agreement for not less than three (3) years after completion of services, and a copy shall be available to the commissioner upon request.

N. Failure to file or to certify information regarding the endorsement or sale of long-term care insurance. Failure of any insurer to:

- (1) File with the insurance department the following material:
  - (a) The policy and certificate;
  - (b) A corresponding outline of coverage; and
  - (c) All advertisements requested by the insurance department; or
- (2) Certify annually that the association has complied with the responsibilities for disclosure, advertising, compensation arrangements, or other information required by the commissioner, as set forth by regulation.

O. Failure to Provide Claims History

- (1) Loss Information—Property and Casualty. Failure of a company issuing property and casualty insurance to provide the following loss information for the three (3) previous policy years to the first named insured within thirty (30) days of receipt of the first named insured's written request:
  - (a) On all claims, date and description of occurrence, and total amount of payments; and
  - (b) For any occurrence not included in Subparagraph (a) of this paragraph, the date and description of occurrence.
- (2) Should the first named insured be requested by a prospective insurer to provide detailed loss information in addition to that required under Paragraph (1), the first named insured may mail or deliver a written request to the insurer for the additional information. No prospective insurer shall request more detailed loss information than reasonably required to underwrite the same line or class of insurance. The insurer shall provide information under this subparagraph to the first named insured as soon as possible, but in no event later than twenty (20) days of receipt of the written request. Notwithstanding any other provision of this section, no insurer shall be required to provide loss reserve information, and no prospective insurer may refuse to insure an applicant solely because the prospective insurer is unable to obtain loss reserve information.

- (3) The commissioner may promulgate regulations to exclude the providing of the loss information as outlined in Paragraph (1) for any line or class of insurance where it can be shown that the information is not needed for that line or class of insurance, or where the provision of loss information otherwise is required by law.

**Drafting Note:** Loss information on workers' compensation is an example in some states of loss information otherwise required by law.

- (4) Information provided under Paragraph (2) shall not be subject to discovery by any party other than the insured, the insurer and the prospective insurer.

**Drafting Note:** This provision may not be required in states that have a privacy act that governs consumer access to this information. Those states considering applying this requirement to life, accident and health lines of insurance should first review their state privacy act related to issues of confidentiality of individual insured information.

- P. Violating any one of Sections [insert applicable sections].

**Drafting Note:** Insert section numbers of any other sections of the state's insurance laws deemed desirable or necessary to include as an unfair trade practice, such as cancellation and nonrenewal laws.

### **Section 5. Favored Agent or Insurer; Coercion of Debtors**

- A. No person or depository institution, or affiliate of a depository institution may require as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation a creditor is to acquire or finance, negotiate any policy or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers. Further, no person or depository institution, or affiliate of a depository institution, may reject an insurance policy solely because the policy has been issued or underwritten by a person who is not associated with the depository institution or affiliate when insurance is required in connection with a loan or extension of credit.
- B. No person or depository institution, or affiliate of a depository institution, who lends money or extends credit may:
  - (1) As a condition for extending credit or offering any product or service that is equivalent to an extension of credit, require that a customer obtain insurance from a depository institution or an affiliate of a depository institution, or a particular insurer or producer. However, this provision does not prohibit a person or depository institution, or affiliate of a depository institution, from informing a customer or prospective customer that insurance is required in order to obtain a loan or credit, or that loan or credit approval is contingent upon the procurement by the customer of acceptable insurance, or that insurance is available from the person or depository institution, or affiliate of a depository institution;
  - (2) Unreasonably reject a policy furnished by the customer or borrower for the protection of the property securing the credit or lien. A rejection shall not be deemed unreasonable if it is based on reasonable standards, uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, nor shall such standards call for rejection of a policy because it contains coverage in addition to that required in the credit transaction;
  - (3) Require that any customer, borrower, mortgagor, purchaser, insurer, broker or agent pay a separate charge, in connection with the handling of any policy required as security for a loan on real estate, or pay a separate charge to substitute the policy of one insurer for that of another. This paragraph does not include the interest that may be charged on premium loans or premium advancements in accordance with the terms of the loan or credit document. Further, this paragraph does not apply to charges that would be required when the person or depository institution or affiliate of a depository institution is the licensed producer providing the insurance;

- (4) Require any procedures or conditions of duly licensed producers or insurers not customarily required of those producers or insurers affiliated or in any way connected with the person who lends money or extends credit;
- (5) Use an advertisement or other insurance promotional material that would cause a reasonable person to mistakenly believe that the federal government or the state is responsible for the insurance sales activity of, or stands behind the credit of, the person, depository institution or its affiliate;
- (6) Use an advertisement or other insurance promotional material that would cause a reasonable person to mistakenly believe that the federal government or the state guarantees any returns on insurance products or is a source of payment on any insurance obligation of or sold by the person, depository institution or its affiliate;
- (7) Act as a producer unless properly licensed in accordance with [insert appropriate statutory provisions for producer licensing];
- (8) Pay or receive any commission, brokerage fee or other compensation as a producer, unless the person holds a valid producer's license for the applicable class of insurance. However, an unlicensed person may make a referral to a licensed producer provided that the person does not discuss specific insurance policy terms and conditions. The unlicensed person may be compensated for the referral; however, in the case of a referral of a customer, the unlicensed person may be compensated only if the compensation is a fixed dollar amount for each referral that does not depend on whether the customer purchases the insurance product from the licensed producer. Furthermore, any person who accepts deposits from the public in an area where such transactions are routinely conducted in the depository institution may receive for each customer referral no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction;

**Drafting Note:** The last sentence of this paragraph further limits the referral for customers of personal, family and household insurance products as a result of Section 305 of the Gramm-Leach-Bliley Act and the subsequent adoption of regulations by the federal banking regulators at 12 C.F.R. 14.50, 208.85, 343.50 and 536.50. By including this language the paragraph will be consistent with the Gramm-Leach-Bliley Act and the federal regulations while maintaining the integrity of Section 104(d)(2)(B)(iv) and (v) of the Gramm-Leach-Bliley Act.

- (9) Solicit or sell insurance, other than credit insurance or flood insurance, unless the solicitation or sale is completed through documents separate from any credit transactions;
- (10) Include the expense of insurance premiums, other than credit insurance premiums or flood insurance premiums, in the primary credit transaction without the express written consent of the customer;
- (11) Solicit or sell insurance unless its insurance sales activities are, to the extent practicable, physically separated from areas where retail deposits are routinely accepted by depository institutions; or
- (12) Solicit or sell insurance unless it maintains separate and distinct books and records relating to the insurance transactions, including all files relating to and reflecting consumer complaints.

**Drafting Note:** The Gramm-Leach-Bliley Act contains two "safe harbors" that relate to information sharing. Section 104(d)(2)(B)(vi) describes the circumstances surrounding the release of a customer's insurance information. Section 104(d)(2)(B)(vii) describes the circumstances surrounding the use of a customer's health information obtained from the insurance records of the customer. If a state has adopted the NAIC's Privacy of Consumer Financial and Health Information Model Regulation, no further action is needed. If not, language implementing the two safe harbors should be considered. It should be noted, however, that during the drafting process, there were concerns expressed about the application of the preemption provisions of the Fair Credit Reporting Act (FCRA) in circumstances involving the sharing of information with affiliates. Nothing in this Act shall be construed to modify, limit or supersede the operation of the FCRA (15 U.S.C. 1681 *et seq.*). In addition, no inference shall be drawn on the basis of the provisions of this Act regarding whether information is transaction or experience information under Section 603 of FCRA.



- C. Every person or depository institution, or affiliate of a depository institution that lends money or extends credit and who solicits insurance primarily for personal, family or household purposes shall disclose to the customer in writing that the insurance related to the credit extension may be purchased from an insurer or producer of the customer's choice, subject only to the lender's right to reject a given insurer or agent as provided in Subsection B(2). Further, the disclosure shall inform the customer that the customer's choice of insurer or producer will not affect the credit decision or credit terms in any way, except that the depository institution may impose reasonable requirements concerning the creditworthiness of the insurer and the scope of coverage chosen as provided in Subsection B(2).
- D. (1) A depository institution that solicits, sells, advertises or offers insurance, and any person who solicits, sells, advertises or offers insurance on behalf of a depository institution or on the premises of a depository institution shall disclose to the customer in writing, where practicable and in a clear and conspicuous manner, prior to a sale, that the insurance:
- (a) Is not a deposit;
  - (b) Is not insured by the Federal Deposit Insurance Corporation or any other federal government agency;
  - (c) Is not guaranteed by the depository institution, its affiliate (if applicable) or any person that is soliciting, selling, advertising or offering insurance (if applicable); and
  - (d) Where appropriate, involves investment risk, including the possible loss of value.
- (2) For purposes of these requirements, an affiliate of a depository institution is subject to these requirements only to the extent that it sells, solicits, advertises, or offers insurance products or annuities at an office of a depository institution or on behalf of a depository institution. These requirements apply only when an individual purchases, applies to purchase, or is solicited to purchase insurance products or annuities primarily for personal, family or household purposes and only to the extent that the disclosure would be accurate.

**Drafting Note:** The requirements of this provision are meant to apply only when the consumer may have a reasonable belief that the product is a deposit; that it is insured by the Federal Deposit Insurance Corporation; that it is guaranteed by the person or depository institution; and that, where appropriate, it involves investment risk, including the possible loss of value. This provision is not intended to require every entity or person in a financial holding company to provide the disclosure as a result of having both solicitation of insurance and extending of credit or lending of money occurring within an entity in the financial holding company group.

- (3) A depository institution that solicits, sells, advertises or offers insurance, and any person who solicits, sells, advertises or offers insurance on behalf of a depository institution or on the premises of a depository institution shall obtain written acknowledgement of the receipt of the disclosure from the customer at the time the customer receives the disclosure or at the time of the initial purchase of the insurance policy. If the solicitation is conducted by telephone, the person or depository institution shall obtain an oral acknowledgement of receipt of the disclosure, maintain sufficient documentation to show that the acknowledgment was given by the customer, and make reasonable efforts to obtain a written acknowledgment from the customer. If a customer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the customer may retain or obtain later, the person or depository institution may provide the disclosure and obtain acknowledgement of the receipt of the disclosure from the customer using electronic media.
- (4) For the purposes of Paragraph (1), a person is selling, soliciting, advertising or offering insurance on behalf of a depository institution, whether at an office of the depository institution or another location, if at least one of the following applies:
- (a) The person represents to the customer that the sale, solicitation, advertisement or offer of the insurance is by or on behalf of the depository institution;

- (b) The depository institution refers a customer to the person who sells insurance and the depository institution has a contractual arrangement to receive commissions or fees derived from the sale of insurance resulting from the referral; or
  - (c) Documents evidencing the sale, solicitation, advertisement or offer of insurance identify or refer to the depository institution.
- E. The commissioner shall have the power to examine and investigate those insurance activities of any person, depository institution, affiliate of a depository institution or insurer that the commissioner believes may be in violation of this section. The person, depository institution, affiliate of a depository institution or insurer shall make its insurance books and records available to the commissioner and the commissioner's staff for inspection upon reasonable notice. An affected person may submit to the commissioner a complaint or material pertinent to the enforcement of this section.
- F. Nothing herein shall prevent a person or depository institution, or affiliate of a depository institution, who lends money or extends credit from placing insurance on real or personal property in the event the mortgagor, borrower or purchaser has failed to provide required insurance in accordance with the terms of the loan or credit document.
- G. Nothing contained in this section shall apply to credit related insurance.

**Drafting Note:** The consumer protection rules promulgated by the banking regulatory agencies pursuant to Section 305 of the Gramm-Leach-Bliley Act apply to retail sales practices, solicitations, advertising or offers of any insurance product or annuity. If a state has adopted the NAIC's Consumer Credit Insurance Model Act and Consumer Credit Insurance Model Regulation, no further action is needed. If not, the state should consider eliminating Subsection G.

#### **Section 6. Power of Commissioner**

The commissioner shall have power to examine and investigate the affairs of every person or insurer in this state in order to determine whether such person or insurer has been or is engaged in any unfair trade practice prohibited by this Act. However, in the case of depository institutions, the commissioner shall have the power to examine and investigate the insurance activities of depository institutions, in order to determine whether the depository institution has been or is engaged in any unfair trade practice prohibited by this Act. The commissioner shall notify the appropriate federal banking agency of the commissioner's intent to examine or investigate a depository institution and advise the appropriate federal banking agency of the suspected violations of state law prior to commencing the examination or investigation.

#### **Section 7. Hearings, Witnesses, Appearances, Production of Books, and Service of Process**

- A. Whenever the commissioner shall have reason to believe that any insurer, person, depository institution or affiliate of a depository institution has been engaged or is engaging in this state in any unfair trade practice whether or not defined in this Act, and that a proceeding by the commissioner in respect thereto would be in the interest of the public, the commissioner shall issue and serve upon such insurer, person, depository institution or affiliate of a depository institution, a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than [insert number] days after the date of the service thereof. With respect to a depository institution, the commissioner's authority to call a hearing is limited to the depository institution's insurance underwriting, sales, solicitation and cross marketing activities. The commissioner shall provide a copy of the notice of hearing to the appropriate federal banking agency when a depository institution is involved.
- B. At the time and place fixed for the hearing, the insurer, person, depository institution or affiliate of a depository institution shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring the insurer, person, depository institution or affiliate of a depository institution to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at the hearing by counsel or in person.

- C. Nothing contained in this Act shall require the observance at the hearing of formal rules of pleading or evidence.
- D. The commissioner, at the hearing, may administer oaths, examine and cross examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence or other documents the commissioner deems relevant to the inquiry, provided, however, that in the case of depository institutions, the commissioner shall have the power to require the production of books, papers, records, correspondence or other documents that the commissioner deems relevant to the inquiry only on the insurance activities of the depository institution. The commissioner, may, and upon the request of any party, shall cause to be made a stenographic record of all the evidence and all the proceedings at the hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena or to testify with respect to any matter concerning which he may be lawfully interrogated, the [insert title] Court of [insert county] County or the county where the person resides, on application of the commissioner, may issue an order requiring such person to comply with the subpoena and to testify; and any failure to obey any order of the court may be punished by the court as contempt.
- E. Statements of charges, notices, orders and other processes of the commissioner under this Act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by the statement, notice, order or other process at the person's residence or principal office or place of business. The verified return by the person so serving the statement, notice, order, or other process, setting forth the manner of service, shall be proof of the same, and the return postcard receipt for the statement, notice, order or other process, registered and mailed as specified, shall be proof of the service of the same.

**Section 8. Cease and Desist and Penalty Orders**

- A. If, after a hearing, the commissioner finds that an insurer, person, depository institution or affiliate of a depository institution has engaged in an unfair trade practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer, person, depository institution or affiliate of a depository institution charged with the violation, a copy of the findings in an order requiring the insurer, person, depository institution or affiliate of a depository institution to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion order:
  - (1) Payment of a monetary penalty of not more than \$1,000 for each violation, but not to exceed an aggregate penalty of \$100,000, unless the violation was committed flagrantly in a conscious disregard of this Act, in which case the penalty shall not be more than \$25,000 for each violation not to exceed an aggregate penalty of \$250,000; and/or
  - (2) Suspension or revocation of the insurer's license if the insurer knew or reasonably should have known that it was in violation of this Act.
- B. In the case of a depository institution, the commissioner shall, if practicable, notify the appropriate federal regulator before imposing a monetary penalty on a depository institution or suspending or revoking the depository institution's insurer's license, and provide to the federal regulator a copy of the findings.

**Section 9. Judicial Review of Orders**

- A. An insurer, person, depository institution or affiliate of a depository institution subject to an order of the commissioner under Section 8 or Section 11 may obtain a review of the order by filing in the [insert title] Court of [insert county] County, within [insert number] days from the date of the service of the order, a written petition praying that the order of the commissioner be set aside. A copy of the petition shall be served upon the commissioner, and thereupon the commissioner shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commissioner. Upon filing of the petition and transcript, the court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of the petition shall operate as a stay of the order of the commissioner, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in the transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by [insert type] evidence, shall be conclusive.

**Drafting Note:** Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination.

- B. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of the order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify the findings of fact, or make new findings by reason of the additional evidence so taken, and shall file the modified or new findings that are supported by [insert type] evidence with a recommendation if any, for the modification or setting aside of the original order, with the return of the additional evidence.

**Drafting Note:** Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination. In a state where final judgment, order or decree would not be subject to review by an appellate court provision therefor should be inserted here.

- C. An order issued by the commissioner under Section 8 shall become final:
- (1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the commissioner may thereafter modify or set aside the order to the extent provided in Section 9B; or
  - (2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.
- D. No order of the commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

**Section 10. Judicial Review by Intervenor**

If after any hearing under Section 7 or Section 11, the report of the commissioner does not charge a violation of this Act, then any intervenor in the proceedings may within [insert number] days after the service of the report, cause a petition [notice of appeal] [petition for writ of certiorari] to be filed in the [insert title] Court of [insert county] County for a review of the report. Upon review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding the report of the commissioner, constitutes a violation of this Act, and containing penalties pursuant to Section 8.

**Drafting Note:** The type of procedure should conform to state procedure. See also note to Section 9 concerning review by appellate courts.

**Section 11. Penalty for Violation of Cease and Desist Orders**

Any insurer, person, depository institution or affiliate of a depository institution that violates a cease and desist order of the commissioner and while such order is in effect, may after notice and hearing and upon order of the commissioner, be subject at the discretion of the commissioner to:

- A. A monetary penalty of not more than \$25,000 for each and every act or violation not to exceed an aggregate of \$250,000 pursuant to any such hearing; and/or
- B. Suspension or revocation of the insurer's license.

**Section 12. Regulations**

The commissioner may, after notice and hearing, promulgate reasonable rules, regulations and orders as are necessary or proper to carry out and effectuate the provisions of this Act. Such regulations shall be subject to review in accordance with Section [insert applicable section].

**Drafting Note:** Insert section number providing for review of administrative orders.

**Section 13. Provisions of Act Additional to Existing Law**

The powers vested in the commissioner by this Act shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

**Section 14. Immunity From Prosecution**

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required may tend to incriminate or subject the person to a penalty or forfeiture, and shall notwithstanding be directed to give testimony or produce evidence, the person shall nonetheless comply with the direction, but shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which the person may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against the person upon any criminal action, investigation or proceeding; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed while so testifying and the testimony or evidence so given or produced shall be admissible against the person upon any criminal action, investigation or proceeding concerning such perjury, nor shall the person be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this state. Any such person may execute, acknowledge and file in the office of the commissioner a statement expressly waiving immunity or privilege in respect to any transaction, matter or thing specified in the statement and thereupon the testimony of the person or evidence in relation to the transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced the person shall not be entitled to any immunity or privilege on account of any testimony the person may give or evidence produced.

**Section 15. Separability Provision**

If any provision of this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of the provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby.

*Chronological Summary of Actions (all references are to the Proceedings of the NAIC).*

1947 Proc. 383, 392-400, 413 (adopted).  
1960 Proc. II 485-487, 509-515, 516 (reprinted).  
1972 Proc. I 15, 16, 443-444, 491, 493-501 (amended and reprinted).  
1977 Proc. I 26, 28, 211, 226-227 (amended).  
1979 Proc. II 31, 34, 38, 39, 525 (amended).  
1985 Proc. I 19, 39, 85-86 (amended).  
1989 Proc. II 13, 21, 129-130, 132, 133-140 (amended and reprinted).  
1990 Proc. I 6, 25, 122, 146 (changed name of model).  
1990 Proc. II 7, 13-14, 160, 169-177 (amended and reprinted).  
1991 Proc. I 9, 16, 192-193, 196-203 (amended and reprinted).  
1993 Proc. I 8, 136, 242, 246-254 (amended and reprinted).  
1993 Proc. I<sup>st</sup> Quarter 3, 34, 267, 274, 276 (amended).  
2001 Proc. 2<sup>nd</sup> Quarter 7, 9, 836, 843-853 (amended and reprinted).

The NAIC amended this model during the 2008 Summer National Meeting. These amendments were adopted as guidelines under the NAIC's model laws process. The 2008 2<sup>nd</sup> Quarter Guideline Amendments are highlighted in grey.

## UNFAIR TRADE PRACTICES ACT

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**Prefatory Note:** By adopting amendments to this model act in June 1990, the NAIC separated provisions dealing with unfair claims settlement into a newly adopted Unfair Claims Settlement Practices Model Act, to make clearer distinction between general unfair trade practices and more specific unfair claim settlement issues and to focus on market conduct practices and market conduct regulation. By doing so, the NAIC is not recommending that states repeal existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

### Section 1. Purpose

The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) and the Gramm-Leach-Bliley Act (Public Law 106-102, 106<sup>th</sup> Congress), by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. Nothing herein shall be construed to create or imply a private cause of action for a violation of this Act.

### Section 2. Definitions

When used in this Act:

- A. "Affiliate" means any company that controls, is controlled by, or is under common control with another company.
- B. "Commissioner" means the commissioner of insurance of this state.

**Drafting Note:** Insert the appropriate term for the chief insurance regulatory official wherever the term "commissioner" appears.

- C. "Customer" means an individual who purchases, applies to purchase, or is solicited to purchase insurance products primarily for personal, family or household purposes.
- D. "Depository institution" means a bank or savings association. The term depository institution does not include an insurance company.
- E. "Insured" means the party named on a policy or certificate as the individual with legal rights to the benefits provided by such policy.

- F. "Insurer" means any person, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including producers, adjusters and third-party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar health service plans as defined in Sections [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance.

**Drafting Note:** Each state may wish to consider the advisability of defining "insurance" for purposes of this Act if its present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

- G. "Person" means a natural or artificial entity, including but not limited to, individuals, partnerships, associations, trusts or corporations.
- H. "Policy" or "certificate" means a contract of insurance, indemnity, medical, health or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any insurer.
- I. "Producer" means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance.

### **Section 3. Unfair Trade Practices Prohibited**

It is an unfair trade practice for any insurer to commit any practice defined in Section 4 of this Act if:

- A. It is committed flagrantly and in conscious disregard of this Act or of any rules promulgated hereunder; or
- B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

### **Section 4. Unfair Trade Practices Defined**

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

- A. Misrepresentations and False Advertising of Insurance Policies. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement, sales presentation, omission or comparison that:
  - (1) Misrepresents the benefits, advantages, conditions or terms of any policy; or
  - (2) Misrepresents the dividends or share of the surplus to be received on any policy; or
  - (3) Makes a false or misleading statement as to the dividends or share of surplus previously paid on any policy; or
  - (4) Is misleading or is a misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates; or
  - (5) Uses any name or title of any policy or class of policies misrepresenting the true nature thereof; or
  - (6) Is a misrepresentation, including any intentional misquote of premium rate, for the purpose of inducing or tending to induce the purchase, lapse, forfeiture, exchange, conversion or surrender of any policy; or
  - (7) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any policy; or
  - (8) Misrepresents any policy as being shares of stock.



- B. False Information and Advertising Generally. Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any insurer in the conduct of its insurance business, which is untrue, deceptive or misleading.
- C. Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any insurer, and which is calculated to injure such insurer.
- D. Boycott, Coercion and Intimidation. Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.
- E. False Statements and Entries.
  - (1) Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of an insurer.
  - (2) Knowingly making any false entry of a material fact in any book, report or statement of any insurer or knowingly omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer, or knowingly making any false material statement to any insurance department official.
- F. Stock Operations and Advisory Board Contracts. Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to purchase insurance.
- G. Unfair Discrimination.
  - (1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.
  - (2) (a) Refusing life insurance to, refusing to continue life insurance of, or limiting the amount, extent, or kind of life insurance coverage available to an individual based on the individual's past lawful travel experiences.
  - (b) Refusing life insurance to, refusing to continue life insurance of, limiting the amount, extent, or kind of life insurance coverage available to an individual, or determining the premium of life insurance based on the individual's future lawful travel plans unless:
    - (i) (I) The risk of loss for individuals who travel to a specified destination at a specified time is reasonably anticipated to be greater than if the individuals did not travel to that destination at that time; and
    - (II) The risk classification is based on sound actuarial principles and actual or reasonably anticipated experience.

- (ii) An action shall be deemed to meet the requirements of subparagraph (i) of this paragraph if it is taken because either one of the following is true with respect to the travel destination:
    - (I) The Director of the Centers for Disease Control and Prevention of the Department of Health and Human Services has issued a highest level alert or warning, including a recommendation against non-essential travel, due to a serious health-related condition; or
    - (II) There is an ongoing armed conflict involving the military of a sovereign nation foreign to the country of conflict.
  - (c) (i) The commissioner may adopt regulations necessary to implement the provisions of this paragraph and may provide for limited exceptions that are based upon national or international emergency conditions that affect the public health, safety, and welfare and that are consistent with public policy.
  - (ii) An insurer shall make any pertinent underwriting guidelines and supporting analyses available to the commissioner on request.
- (3) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.
- Drafting Note:** In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted.
- (4) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience.
  - (5) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to insure, refusing to renew, canceling or limiting the amount of insurance coverage on the residential property risk, or the personal property contained therein, solely because of the age of the residential property.
  - (6) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits. Nothing in this section shall prohibit or limit the operation of fraternal benefit societies.
  - (7) To terminate, or to modify coverage or to refuse to issue or refuse to renew any property or casualty policy solely because the applicant or insured or any employee of either is mentally or physically impaired; provided that this subsection shall not apply to accident and health insurance sold by a casualty insurer and, provided further, that this subsection shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract.
  - (8) Refusing to insure solely because another insurer has refused to write a policy, or has cancelled or has refused to renew an existing policy in which that person was the named insured. Nothing herein contained shall prevent the termination of an excess insurance policy on account of the failure of the insured to maintain any required underlying insurance.

(9) Violation of the state’s rescission laws at [insert reference to appropriate code section].

**Drafting Note:** A state may wish to include this section if it has existing state laws covering rescission and to insert a reference to a particular code section.

H. Rebates.

- (1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.
- (2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:
  - (a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;
  - (b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;
  - (c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year; or
  - (d) Engaging in an arrangement that would not violate Section 106 of the Bank Holding Company Act Amendments of 1972 (12 U.S.C. 1972), as interpreted by the Board of Governors of the Federal Reserve System, or Section 5(q) of the Home Owners’ Loan Act, 12 U.S.C. 1464(q).

**Drafting Note:** Section 104 (d)(2)(B)(viii) of the Gramm-Leach-Bliley Act provides that any state restrictions on anti-tying may not prevent a depository institution or affiliate from engaging in any activity that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System. The Board of Governors of the Federal Reserve System has stated that nothing in its interpretation on combined-balance discount arrangements is intended to override any other applicable state and federal law. FRB SR 95-32 (SUP). Section 5(q) of the Home Owners’ Loan Act is the analogous provision to Section 106 for thrift institutions. The Office of Thrift Supervision has a regulation 12 C.F.R. 563.36 that allows combined-balance discounts if certain requirements are met.

**Drafting Note:** Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

- I. Prohibited Group Enrollments. No insurer shall offer more than one group policy of insurance through any person unless such person is licensed, at a minimum, as a limited insurance representative. However, this prohibition shall not apply to employer/employee relationships, nor to any such enrollments.
- J. Failure to Maintain Marketing and Performance Records. Failure of an insurer to maintain its books, records, documents and other business records in such an order that data regarding complaints, claims, rating, underwriting and marketing are accessible and retrievable for examination by the insurance commissioner. Data for at least the current calendar year and the two (2) preceding years shall be maintained.

- K. **Failure to Maintain Complaint Handling Procedures.** Failure of any insurer to maintain a complete record of all the complaints it received since the date of its last examination under Section [insert applicable section]. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of each complaint, and the time it took to process each complaint. For purposes of this subsection, “complaint” shall mean any written communication primarily expressing a grievance.
- L. **Misrepresentation in Insurance Applications.** Making false or fraudulent statements or representations on or relative to an application for a policy, for the purpose of obtaining a fee, commission, money or other benefit from any provider or individual person.
- M. **Unfair Financial Planning Practices.** An insurance producer:
- (1) Holding himself or herself out, directly or indirectly, to the public as a “financial planner,” “investment adviser,” “consultant,” “financial counselor,” or any other specialist engaged in the business of giving financial planning or advice relating to investments, insurance, real estate, tax matters or trust and estate matters when such person is in fact engaged only in the sale of policies. This provision does not preclude persons who hold some form of formal recognized financial planning or consultant certification or designation from using this certification or designation when they are only selling insurance. This does not permit persons to charge an additional fee for services that are customarily associated with the solicitation, negotiation or servicing of policies.
  - (2) (a) Engaging in the business of financial planning without disclosing to the client prior to the execution of the agreement provided for in Paragraph 3, or solicitation of the sale of a product or service that
    - (i) He or she is also an insurance salesperson, and
    - (ii) That a commission for the sale of an insurance product will be received in addition to a fee for financial planning, if such is the case.
  - (b) The disclosure requirement under this subsection may be met by including it in any disclosure required by federal or state securities law.
  - (3) (a) Charging fees other than commissions for financial planning by insurance producer, unless such fees are based upon a written agreement, signed by the party to be charged in advance of the performance of the services under the agreement. A copy of the agreement must be provided to the party to be charged at the time the agreement is signed by the party.
    - (i) The services for which the fee is to be charged must be specifically stated in the agreement.
    - (ii) The amount of the fee to be charged or how it will be determined or calculated must be specifically stated in the agreement.
    - (iii) The agreement must state that the client is under no obligation to purchase any insurance product through the insurance producer or consultant.

**Drafting Note:** This subsection is intended to apply only to persons engaged in personal financial planning.

- (b) The insurance producer shall retain a copy of the agreement for not less than three (3) years after completion of services, and a copy shall be available to the commissioner upon request.

- N. **Failure to file or to certify information regarding the endorsement or sale of long-term care insurance.** Failure of any insurer to:

- (1) File with the insurance department the following material:
  - (a) The policy and certificate;
  - (b) A corresponding outline of coverage; and
  - (c) All advertisements requested by the insurance department; or
- (2) Certify annually that the association has complied with the responsibilities for disclosure, advertising, compensation arrangements, or other information required by the commissioner, as set forth by regulation.

O. Failure to Provide Claims History

- (1) Loss Information—Property and Casualty. Failure of a company issuing property and casualty insurance to provide the following loss information for the three (3) previous policy years to the first named insured within thirty (30) days of receipt of the first named insured's written request:
  - (a) On all claims, date and description of occurrence, and total amount of payments; and
  - (b) For any occurrence not included in Subparagraph (a) of this paragraph, the date and description of occurrence.
- (2) Should the first named insured be requested by a prospective insurer to provide detailed loss information in addition to that required under Paragraph (1), the first named insured may mail or deliver a written request to the insurer for the additional information. No prospective insurer shall request more detailed loss information than reasonably required to underwrite the same line or class of insurance. The insurer shall provide information under this subparagraph to the first named insured as soon as possible, but in no event later than twenty (20) days of receipt of the written request. Notwithstanding any other provision of this section, no insurer shall be required to provide loss reserve information, and no prospective insurer may refuse to insure an applicant solely because the prospective insurer is unable to obtain loss reserve information.
- (3) The commissioner may promulgate regulations to exclude the providing of the loss information as outlined in Paragraph (1) for any line or class of insurance where it can be shown that the information is not needed for that line or class of insurance, or where the provision of loss information otherwise is required by law.

**Drafting Note:** Loss information on workers' compensation is an example in some states of loss information otherwise required by law.

- (4) Information provided under Paragraph (2) shall not be subject to discovery by any party other than the insured, the insurer and the prospective insurer.

**Drafting Note:** This provision may not be required in states that have a privacy act that governs consumer access to this information. Those states considering applying this requirement to life, accident and health lines of insurance should first review their state privacy act related to issues of confidentiality of individual insured information.

P. Violating any one of Sections [insert applicable sections].

**Drafting Note:** Insert section numbers of any other sections of the state's insurance laws deemed desirable or necessary to include as an unfair trade practice, such as cancellation and nonrenewal laws.

**Section 5. Favored Agent or Insurer; Coercion of Debtors**

- A. No person or depository institution, or affiliate of a depository institution may require as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation a creditor is to acquire or finance, negotiate any policy or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers. Further, no person or depository institution, or affiliate of a depository institution, may reject an insurance policy solely because the policy has been issued or underwritten by a person who is not associated with the depository institution or affiliate when insurance is required in connection with a loan or extension of credit.
- B. No person or depository institution, or affiliate of a depository institution, who lends money or extends credit may:
- (1) As a condition for extending credit or offering any product or service that is equivalent to an extension of credit, require that a customer obtain insurance from a depository institution or an affiliate of a depository institution, or a particular insurer or producer. However, this provision does not prohibit a person or depository institution, or affiliate of a depository institution, from informing a customer or prospective customer that insurance is required in order to obtain a loan or credit, or that loan or credit approval is contingent upon the procurement by the customer of acceptable insurance, or that insurance is available from the person or depository institution, or affiliate of a depository institution;
  - (2) Unreasonably reject a policy furnished by the customer or borrower for the protection of the property securing the credit or lien. A rejection shall not be deemed unreasonable if it is based on reasonable standards, uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, nor shall such standards call for rejection of a policy because it contains coverage in addition to that required in the credit transaction;
  - (3) Require that any customer, borrower, mortgagor, purchaser, insurer, broker or agent pay a separate charge, in connection with the handling of any policy required as security for a loan on real estate, or pay a separate charge to substitute the policy of one insurer for that of another. This paragraph does not include the interest that may be charged on premium loans or premium advancements in accordance with the terms of the loan or credit document. Further, this paragraph does not apply to charges that would be required when the person or depository institution or affiliate of a depository institution is the licensed producer providing the insurance;
  - (4) Require any procedures or conditions of duly licensed producers or insurers not customarily required of those producers or insurers affiliated or in any way connected with the person who lends money or extends credit;
  - (5) Use an advertisement or other insurance promotional material that would cause a reasonable person to mistakenly believe that the federal government or the state is responsible for the insurance sales activity of, or stands behind the credit of, the person, depository institution or its affiliate;
  - (6) Use an advertisement or other insurance promotional material that would cause a reasonable person to mistakenly believe that the federal government or the state guarantees any returns on insurance products or is a source of payment on any insurance obligation of or sold by the person, depository institution or its affiliate;
  - (7) Act as a producer unless properly licensed in accordance with [insert appropriate statutory provisions for producer licensing];

- (8) Pay or receive any commission, brokerage fee or other compensation as a producer, unless the person holds a valid producer’s license for the applicable class of insurance. However, an unlicensed person may make a referral to a licensed producer provided that the person does not discuss specific insurance policy terms and conditions. The unlicensed person may be compensated for the referral, however, in the case of a referral of a customer, the unlicensed person may be compensated only if the compensation is a fixed dollar amount for each referral that does not depend on whether the customer purchases the insurance product from the licensed producer. Furthermore, any person who accepts deposits from the public in an area where such transactions are routinely conducted in the depository institution may receive for each customer referral no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction;

**Drafting Note:** The last sentence of this paragraph further limits the referral for customers of personal, family and household insurance products as a result of Section 305 of the Gramm-Leach-Bliley Act and the subsequent adoption of regulations by the federal banking regulators at 12 C.F.R. 14.50, 208.85, 343.50 and 536.50. By including this language the paragraph will be consistent with the Gramm-Leach-Bliley Act and the federal regulations while maintaining the integrity of Section 104(d)(2)(B)(iv) and (v) of the Gramm-Leach-Bliley Act.

- (9) Solicit or sell insurance, other than credit insurance or flood insurance, unless the solicitation or sale is completed through documents separate from any credit transactions;
- (10) Include the expense of insurance premiums, other than credit insurance premiums or flood insurance premiums, in the primary credit transaction without the express written consent of the customer;
- (11) Solicit or sell insurance unless its insurance sales activities are, to the extent practicable, physically separated from areas where retail deposits are routinely accepted by depository institutions; or
- (12) Solicit or sell insurance unless it maintains separate and distinct books and records relating to the insurance transactions, including all files relating to and reflecting consumer complaints.

**Drafting Note:** The Gramm-Leach-Bliley Act contains two “safe harbors” that relate to information sharing. Section 104(d)(2)(B)(vi) describes the circumstances surrounding the release of a customer’s insurance information. Section 104(d)(2)(B)(vii) describes the circumstances surrounding the use of a customer’s health information obtained from the insurance records of the customer. If a state has adopted the NAIC’s Privacy of Consumer Financial and Health Information Model Regulation, no further action is needed. If not, language implementing the two safe harbors should be considered. It should be noted, however, that during the drafting process, there were concerns expressed about the application of the preemption provisions of the Fair Credit Reporting Act (FCRA) in circumstances involving the sharing of information with affiliates. Nothing in this Act shall be construed to modify, limit or supersede the operation of the FCRA (15 U.S.C. 1681 *et seq.*). In addition, no inference shall be drawn on the basis of the provisions of this Act regarding whether information is transaction or experience information under Section 603 of FCRA.

- C. Every person or depository institution, or affiliate of a depository institution that lends money or extends credit and who solicits insurance primarily for personal, family or household purposes shall disclose to the customer in writing that the insurance related to the credit extension may be purchased from an insurer or producer of the customer’s choice, subject only to the lender’s right to reject a given insurer or agent as provided in Subsection B(2). Further, the disclosure shall inform the customer that the customer’s choice of insurer or producer will not affect the credit decision or credit terms in any way, except that the depository institution may impose reasonable requirements concerning the creditworthiness of the insurer and the scope of coverage chosen as provided in Subsection B(2).
- D. (1) A depository institution that solicits, sells, advertises or offers insurance, and any person who solicits, sells, advertises or offers insurance on behalf of a depository institution or on the premises of a depository institution shall disclose to the customer in writing, where practicable and in a clear and conspicuous manner, prior to a sale, that the insurance:
- (a) Is not a deposit;
- (b) Is not insured by the Federal Deposit Insurance Corporation or any other federal government agency;

- (c) Is not guaranteed by the depository institution, its affiliate (if applicable) or any person that is soliciting, selling, advertising or offering insurance (if applicable); and
  - (d) Where appropriate, involves investment risk, including the possible loss of value.
- (2) For purposes of these requirements, an affiliate of a depository institution is subject to these requirements only to the extent that it sells, solicits, advertises, or offers insurance products or annuities at an office of a depository institution or on behalf of a depository institution. These requirements apply only when an individual purchases, applies to purchase, or is solicited to purchase insurance products or annuities primarily for personal, family or household purposes and only to the extent that the disclosure would be accurate.

**Drafting Note:** The requirements of this provision are meant to apply only when the consumer may have a reasonable belief that the product is a deposit; that it is insured by the Federal Deposit Insurance Corporation; that it is guaranteed by the person or depository institution; and that, where appropriate, it involves investment risk, including the possible loss of value. This provision is not intended to require every entity or person in a financial holding company to provide the disclosure as a result of having both solicitation of insurance and extending of credit or lending of money occurring within an entity in the financial holding company group.

- (3) A depository institution that solicits, sells, advertises or offers insurance, and any person who solicits, sells, advertises or offers insurance on behalf of a depository institution or on the premises of a depository institution shall obtain written acknowledgement of the receipt of the disclosure from the customer at the time the customer receives the disclosure or at the time of the initial purchase of the insurance policy. If the solicitation is conducted by telephone, the person or depository institution shall obtain an oral acknowledgement of receipt of the disclosure, maintain sufficient documentation to show that the acknowledgment was given by the customer, and make reasonable efforts to obtain a written acknowledgment from the customer. If a customer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the customer may retain or obtain later, the person or depository institution, may provide the disclosure and obtain acknowledgement of the receipt of the disclosure from the customer using electronic media.
- (4) For the purposes of Paragraph (1), a person is selling, soliciting, advertising or offering insurance on behalf of a depository institution, whether at an office of the depository institution or another location, if at least one of the following applies:
- (a) The person represents to the customer that the sale, solicitation, advertisement or offer of the insurance is by or on behalf of the depository institution;
  - (b) The depository institution refers a customer to the person who sells insurance and the depository institution has a contractual arrangement to receive commissions or fees derived from the sale of insurance resulting from the referral; or
  - (c) Documents evidencing the sale, solicitation, advertisement or offer of insurance identify or refer to the depository institution.
- E. The commissioner shall have the power to examine and investigate those insurance activities of any person, depository institution, affiliate of a depository institution or insurer that the commissioner believes may be in violation of this section. The person, depository institution, affiliate of a depository institution or insurer shall make its insurance books and records available to the commissioner and the commissioner's staff for inspection upon reasonable notice. An affected person may submit to the commissioner a complaint or material pertinent to the enforcement of this section.
- F. Nothing herein shall prevent a person or depository institution, or affiliate of a depository institution, who lends money or extends credit from placing insurance on real or personal property in the event the mortgagor, borrower or purchaser has failed to provide required insurance in accordance with the terms of the loan or credit document.
- G. Nothing contained in this section shall apply to credit related insurance.



**Drafting Note:** The consumer protection rules promulgated by the banking regulatory agencies pursuant to Section 305 of the Gramm-Leach-Bliley Act apply to retail sales practices, solicitations, advertising or offers of any insurance product or annuity. If a state has adopted the NAIC's Consumer Credit Insurance Model Act and Consumer Credit Insurance Model Regulation, no further action is needed. If not, the state should consider eliminating Subsection G.

## **Section 6. Power of Commissioner**

The commissioner shall have power to examine and investigate the affairs of every person or insurer in this state in order to determine whether such person or insurer has been or is engaged in any unfair trade practice prohibited by this Act. However, in the case of depository institutions, the commissioner shall have the power to examine and investigate the insurance activities of depository institutions, in order to determine whether the depository institution has been or is engaged in any unfair trade practice prohibited by this Act. The commissioner shall notify the appropriate federal banking agency of the commissioner's intent to examine or investigate a depository institution and advise the appropriate federal banking agency of the suspected violations of state law prior to commencing the examination or investigation.

## **Section 7. Hearings, Witnesses, Appearances, Production of Books, and Service of Process**

- A. Whenever the commissioner shall have reason to believe that any insurer, person, depository institution or affiliate of a depository institution has been engaged or is engaging in this state in any unfair trade practice whether or not defined in this Act, and that a proceeding by the commissioner in respect thereto would be in the interest of the public, the commissioner shall issue and serve upon such insurer, person, depository institution or affiliate of a depository institution, a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than [insert number] days after the date of the service thereof. With respect to a depository institution, the commissioner's authority to call a hearing is limited to the depository institution's insurance underwriting, sales, solicitation and cross marketing activities. The commissioner shall provide a copy of the notice of hearing to the appropriate federal banking agency when a depository institution is involved.
- B. At the time and place fixed for the hearing, the insurer, person, depository institution or affiliate of a depository institution shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring the insurer, person, depository institution or affiliate of a depository institution to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at the hearing by counsel or in person.
- C. Nothing contained in this Act shall require the observance at the hearing of formal rules of pleading or evidence.
- D. The commissioner, at the hearing, may administer oaths, examine and cross examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence or other documents the commissioner deems relevant to the inquiry, provided, however, that in the case of depository institutions, the commissioner shall have the power to require the production of books, papers, records, correspondence or other documents that the commissioner deems relevant to the inquiry only on the insurance activities of the depository institution. The commissioner, may, and upon the request of any party, shall cause to be made a stenographic record of all the evidence and all the proceedings at the hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena or to testify with respect to any matter concerning which he may be lawfully interrogated, the [insert title] Court of [insert county] County or the county where the person resides, on application of the commissioner, may issue an order requiring such person to comply with the subpoena and to testify; and any failure to obey any order of the court may be punished by the court as contempt.

- E. Statements of charges, notices, orders and other processes of the commissioner under this Act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by the statement, notice, order or other process at the person's residence or principal office or place of business. The verified return by the person so serving the statement, notice, order, or other process, setting forth the manner of service, shall be proof of the same, and the return postcard receipt for the statement, notice, order or other process, registered and mailed as specified, shall be proof of the service of the same.

#### **Section 8. Cease and Desist and Penalty Orders**

- A. If, after a hearing, the commissioner finds that an insurer, person, depository institution or affiliate of a depository institution has engaged in an unfair trade practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer, person, depository institution or affiliate of a depository institution charged with the violation, a copy of the findings in an order requiring the insurer, person, depository institution or affiliate of a depository institution to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion order:
  - (1) Payment of a monetary penalty of not more than \$1,000 for each violation, but not to exceed an aggregate penalty of \$100,000, unless the violation was committed flagrantly in a conscious disregard of this Act, in which case the penalty shall not be more than \$25,000 for each violation not to exceed an aggregate penalty of \$250,000; and/or
  - (2) Suspension or revocation of the insurer's license if the insurer knew or reasonably should have known that it was in violation of this Act.
- B. In the case of a depository institution, the commissioner shall, if practicable, notify the appropriate federal regulator before imposing a monetary penalty on a depository institution or suspending or revoking the depository institution's insurer's license, and provide to the federal regulator a copy of the findings.

#### **Section 9. Judicial Review of Orders**

- A. An insurer, person, depository institution or affiliate of a depository institution subject to an order of the commissioner under Section 8 or Section 11 may obtain a review of the order by filing in the [insert title] Court of [insert county] County, within [insert number] days from the date of the service of the order, a written petition praying that the order of the commissioner be set aside. A copy of the petition shall be served upon the commissioner, and thereupon the commissioner shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commissioner. Upon filing of the petition and transcript, the court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of the petition shall operate as a stay of the order of the commissioner, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in the transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by [insert type] evidence, shall be conclusive.

**Drafting Note:** Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination.

- B. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of the order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify the findings of fact, or make new findings by reason of the additional evidence so taken, and shall file the modified or new findings that are supported by [insert type] evidence with a recommendation if any, for the modification or setting aside of the original order, with the return of the additional evidence.

**Drafting Note:** Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination. In a state where final judgment, order or decree would not be subject to review by an appellate court provision therefor should be inserted here.

- C. An order issued by the commissioner under Section 8 shall become final:
  - (1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the commissioner may thereafter modify or set aside the order to the extent provided in Section 9B; or
  - (2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.
- D. No order of the commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

#### **Section 10. Judicial Review by Intervenor**

If after any hearing under Section 7 or Section 11, the report of the commissioner does not charge a violation of this Act, then any intervenor in the proceedings may within [insert number] days after the service of the report, cause a petition [notice of appeal] [petition for writ of certiorari] to be filed in the [insert title] Court of [insert county] County for a review of the report. Upon review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding the report of the commissioner, constitutes a violation of this Act, and containing penalties pursuant to Section 8.

**Drafting Note:** The type of procedure should conform to state procedure. See also note to Section 9 concerning review by appellate courts.

#### **Section 11. Penalty for Violation of Cease and Desist Orders**

Any insurer, person, depository institution or affiliate of a depository institution that violates a cease and desist order of the commissioner and while such order is in effect, may after notice and hearing and upon order of the commissioner, be subject at the discretion of the commissioner to:

- A. A monetary penalty of not more than \$25,000 for each and every act or violation not to exceed an aggregate of \$250,000 pursuant to any such hearing; and/or
- B. Suspension or revocation of the insurer's license.

#### **Section 12. Regulations**

The commissioner may, after notice and hearing, promulgate reasonable rules, regulations and orders as are necessary or proper to carry out and effectuate the provisions of this Act. Such regulations shall be subject to review in accordance with Section [insert applicable section].

**Drafting Note:** Insert section number providing for review of administrative orders.

#### **Section 13. Provisions of Act Additional to Existing Law**

The powers vested in the commissioner by this Act shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

**Section 14. Immunity From Prosecution**

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required may tend to incriminate or subject the person to a penalty or forfeiture, and shall notwithstanding be directed to give testimony or produce evidence, the person shall nonetheless comply with the direction, but shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which the person may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against the person upon any criminal action, investigation or proceeding; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed while so testifying and the testimony or evidence so given or produced shall be admissible against the person upon any criminal action, investigation or proceeding concerning such perjury, nor shall the person be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this state. Any such person may execute, acknowledge and file in the office of the commissioner a statement expressly waiving immunity or privilege in respect to any transaction, matter or thing specified in the statement and thereupon the testimony of the person or evidence in relation to the transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced the person shall not be entitled to any immunity or privilege on account of any testimony the person may give or evidence produced.

**Section 15. Separability Provision**

If any provision of this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of the provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby.

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*Chronological Summary of Actions (all references are to the Proceedings of the NAIC).*

- 1947 Proc. 383, 392-400, 413 (adopted).*
- 1960 Proc. II 485-487, 509-515, 516 (reprinted).*
- 1972 Proc. I 15, 16, 443-444, 491, 493-501 (amended and reprinted).*
- 1977 Proc. I 26, 28, 211, 226-227 (amended).*
- 1979 Proc. II 31, 34, 38, 39, 525 (amended).*
- 1985 Proc. I 19, 39, 85-86 (amended).*
- 1989 Proc. II 13, 21, 129-130, 132, 133-140 (amended and reprinted).*
- 1990 Proc. I 6, 25, 122, 146 (changed name of model).*
- 1990 Proc. II 7, 13-14, 160, 169-177 (amended and reprinted).*
- 1991 Proc. I 9, 16, 192-193, 196-203 (amended and reprinted).*
- 1993 Proc. I 8, 136, 242, 246-254 (amended and reprinted).*
- 1993 Proc. 1<sup>st</sup> Quarter 3, 34, 267, 274, 276 (amended).*
- 2001 Proc. 2<sup>nd</sup> Quarter 7, 9, 836, 843-853 (amended and reprinted).*
- 2008 Proc. 2<sup>nd</sup> Quarter, Vol. I, 159-162, 294, 398, 422, 569-582, 717 (guideline amendments adopted).*

## UNFAIR TRADE PRACTICES ACT

**This chart is intended to provide readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings related to the NAIC model. Such guidance provides readers with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state's activity in this area and has determined whether the citation most appropriately fits in the Model Adoption column or Related State Activity column based on the definitions listed below. The NAIC's interpretation may or may not be shared by the individual states or by interested readers.**

**This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Nor does this state page reflect a determination as to whether a state meets any applicable accreditation standards. Every effort has been made to provide correct and accurate summaries to assist readers in locating useful information. Readers should consult state law for further details and for the most current information.**

**UNFAIR TRADE PRACTICES ACT**

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**UNFAIR TRADE PRACTICES ACT****KEY:**

**MODEL ADOPTION:** States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

**RELATED STATE ACTIVITY:** Examples of Related State Activity include but are not limited to: older versions of the NAIC model, statutes or regulations addressing the same subject matter, or other administrative guidance such as bulletins and notices. States that have citations identified in this column **only** (and nothing listed in the Model Adoption column) have **not** adopted the most recent version of the NAIC model in a **substantially similar manner**.

**NO CURRENT ACTIVITY:** No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama		ALA. CODE §§ 27-12-1 to 27-12-24 (1971/1994).
Alaska	ALASKA STAT. §§ 21.36.010 to 21.36.350 (1976/2009).	ALASKA STAT. § 21.36.500 (1992) (financial planners); § 45.50.471 (1970/2009); ALASKA ADMIN. CODE tit. 3, § 26.110 (2015); BULLETIN 2007-6 (2007).
American Samoa	NO CURRENT ACTIVITY	
Arizona	ARIZ. REV. STAT. ANN. §§ 20-441 to 20-461 (1954/2008).	
Arkansas	ARK. CODE ANN. §§ 23-66-201 to 23-66-316 (1959/2011).	ARK. CODE R. 19 (1985/2005); BULLETIN 8-2014 (2014).
California	CAL. INS. CODE §§ 790 to 790.10 (1959/2000).	CAL. INS. CODE §§ 759 to 764 (2002).
Colorado	COLO. REV. STAT. §§ 10-3-1101 to 10-3-1113 (1963/2015).	B-5.32 (2013); BULLETIN B-4.72 (2014).
Connecticut	CONN. GEN. STAT. §§ 38a-815 to 38a-819 (1955/2013).	CONN. GEN. STAT. §§ 38a-824 to 38a-832 (1949/1980); BULLETIN HC-69-010 (2008); BULLETIN IC-35 (2013).
Delaware	DEL. CODE ANN. tit. 18, §§ 2301 to 2314 (1953/2013).	
District of Columbia	D.C. CODE §§ 31-2231.01 to 31-2231.25 (2000/2012).	
Florida	FLA. STAT. §§ 626.951 to 626.9641 (1982/2014).	FLA. STAT. § 626.572 (1990/2005) (rebating).

**UNFAIR TRADE PRACTICES ACT**

<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Georgia	GA. CODE ANN. §§ 33-6-1 to 33-6-14 (1972/2005).	GA. COMP. R. & REGS. 120-2-20-.03 to 120-2-20-.04 (2012).
Guam		GU ST. T. 5 § 32201 (1993/2007).
Hawaii	HAW. REV. STAT. §§ 431:13-101 to 431:13-204 (1988/2014).	
Idaho	IDAHO CODE ANN. §§ 41-1301 to 41-1331 (1961/2005).	BULLETIN 88-2 (1988).
Illinois		215 ILL. COMP. STAT. 5/421 to 5/434 (1959/2015); 5/236 (1937/2004).
Indiana	IND. CODE §§ 27-4-1-1 to 27-4-1-18 (1947/2009).	
Iowa	IOWA CODE §§ 507B.1 to 507B.14 (1955/2010).	IOWA ADMIN. CODE r. 191-15.11 (2011); BULLETIN 13-07 (2013); Bulletin 2014-2 (2014).
Kansas	KAN. STAT. ANN. §§ 40-2401 to 40-2421 (1955/2007).	
Kentucky	KY. REV. STAT. ANN. §§ 304.12-010 to 304.12-230 (1970/2010).	KY. REV. STAT. ANN. § 304.17A-150 (1994/2012) (Health benefit plans); Advisory Opinion 2014-1 (2014).
Louisiana	LA. REV. STAT. ANN. §§ 22:1961 to 22:1973 (1966/2014).	
Maine	ME. REV. STAT. ANN. tit. 24-A, §§ 2151 to 2182 (1970/2001) (Some extra provisions).	BULLETIN 384 (2012).
Maryland	MD. CODE ANN., INS. §§ 27-101 to 27-219 (1957/2014).	MD. CODE REGS. 31.15.01.01 to 31.15.14.9999 (1970/2014); BULLETIN 2014-23 (2014).
Massachusetts	MASS. GEN. LAWS ch. 176D, §§ 1 to 14 (1972/2012).	BULLETIN B-2010-10 (2010).
Michigan	MICH. COMP. LAWS §§ 500.2001 to 500.2093 (1957/2011) (Some extra provisions).	BULLETIN 2006-07 (2006).
Minnesota	MINN. STAT. §§ 72A.17 to 72A.32 (1967/2013).	BULLETIN 2013-3 (2013).
Mississippi	MISS. CODE ANN. §§ 83-5-29 to 83-5-51 (1956/2009).	



**UNFAIR TRADE PRACTICES ACT**

<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Missouri	MO. REV. STAT. §§ 375.930 to 375.948 (1978/2004).	MO. REV. STAT. § 376.502 (2009); MO. CODE REGS. ANN. tit. 20, § 100-2.100 (2008) (financial planners).
Montana	MONT. CODE ANN. §§ 33-18-101 to 33-18-1006 (1959/2015).	Memorandum 1-29-2014 (2014).
Nebraska	NEB. REV. STAT. §§ 44-1522 to 44-1535 (1973/2003).	
Nevada	NEV. REV. STAT. §§ 686A.010 to 686A.280 (1971/2013).	BULLETIN 2014-009 (2014).
New Hampshire	N.H. REV. STAT. ANN §§ 417:1 to 417:17 (1947/2010).	
New Jersey	N.J. REV. STAT. §§ 17:29B-1 to 17:29B-14 (1947/2001).	
New Mexico	N.M. STAT. ANN. §§ 59A-16-1 to 59A-16-30 (1985/1999).	
New York	N.Y. INS. LAW §§ 2401 to 2409; §§ 2602 to 2612 (1984/2013).	
North Carolina	N.C. GEN. STAT. §§ 58-63-1 to 58-63-60 (1949/1999).	
North Dakota	N.D. CENT. CODE §§ 26.1-04-01 to 26.1-04-19 (1983/2011).	
Northern Marianas	4 N. MAR. ISLAND CODE § 7302 (1984).	
Ohio	OHIO REV. CODE ANN. §§ 3901.19 to 3901.26 (1955-1956/2013); OHIO ADMIN. CODE § 3901-1-07 (1975/2011).	
Oklahoma	OKLA. STAT. tit. 36, §§ 1201 to 1220 (1957/2012); § 1250.5 (2012).	
Oregon		OR. REV. STAT. §§ 746.005 to 746.270 (1967/2010); OR. ADMIN. R. 836-080-0235 (1980/2010).
Pennsylvania	40 PA. CONS. STAT. §§ 1171.1 to 1171.15 (1974/2014).	40 PA. CONS. STAT. §§ 1171.3 to 1171.5 (2014).

**UNFAIR TRADE PRACTICES ACT**

<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Rhode Island	R.I. GEN. LAWS §§ 27-29-1 to 27-29-13 (1958/2015).	HEALTH BULLETIN 2013-5 (REVISED) (2014).
Puerto Rico	P.R. LAWS ANN. tit. 26, §§ 2701 to 2740 (1974/1987).	
South Carolina	S.C. CODE ANN. §§ 38-57-10 to 38-57-310; §§ 38-59-10 to 38-59-50 (1988/1999).	S.C. CODE ANN. § 38-55-50 (1987/2004) (rebating).
South Dakota	S.D. CODIFIED LAWS §§ 58-33-1 to 58-33-46.1 (1966/2000); §§ 58-33-66 to 58-33-69 (1986/1989).	
Tennessee	TENN. CODE ANN. 56-8-104 (2012).	
Texas	TEX. INS. CODE ANN. §§ 541.001 to 541.454 (2005/2013).	28 TEX. ADMIN. CODE §§ 21.1 to 21.122 (1981/2010).
Utah		UTAH ADMIN. CODE r. 590-154 (1993/2013) (Unfair marketing practices); BULLETIN 2013-5 (2013); BULLETIN 2015-8 (2015).
Vermont	VT. STAT. ANN. tit. 8, §§ 4721 to 4726 (1974/2007).	
Virgin Islands		V.I. CODE ANN. tit. 22, §§ 1201 to 1228 (1968).
Virginia	VA. CODE ANN. §§ 38.2-500 to 38.2-516 (1986/2013).	
Washington	WASH. REV. CODE ANN. §§ 48.30.010 to 48.30.270 (1947/2015).	
West Virginia	W. VA. CODE §§ 33-11-1 to 33-11-10 (1957/2005).	
Wisconsin		WIS. STAT. §§ 628.31 to 628.46 (1975/1998); WIS. ADMIN. CODE INS. § 6.68 (1979/1984).
Wyoming	WYO. STAT. ANN. §§ 26-13-101 to 26-13-124 (1967/1986).	33 WYO. CODE R. §§ 1 to 5 (1980/1997).

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On June 5, 1944, the Supreme Court handed down the decision in the *Southeastern Underwriters* case, (*United States v. Southeastern Underwriters Association* 64 U.S. 1162) which reversed the fundamental basis underlying state regulation of the business of insurance by holding that insurance was commerce. One of the immediate effects of this decision was to make applicable to the insurance business a number of federal acts which were, in many cases, in direct conflict with the provision of state laws. **1945 Proceedings 26.**

Immediately after *Southeastern Underwriters*, proposals were considered by Congress to put insurance regulation back in the hands of the states. One suggestion was an amendment to the Federal Trade Commission Act eliminating insurance business from the scope of that act. **1945 Proceedings 28.**

Public Law 15 of the 79th Congress (known as the McCarran-Ferguson Act) was adopted to specifically declare that Congress felt continued regulation of insurance by the states was in the public interest. The Federal Trade Commission Act would not apply to the business of insurance or to acts in the conduct thereof. The Sherman Act provision regarding boycott, coercion or intimidation would continue to apply. **1946 Proceedings 132-133.**

P.L. 15 contained a moratorium from the application of federal laws to permit the states time to develop laws. After that period federal law would apply to the extent states had not assumed the responsibility. **1946 Proceeding 134.**

One of the initial efforts at developing state legislation in response to McCarran-Ferguson was the development of trade practices legislation. Among the considerations in developing a model law was the view that it was impractical to give each commissioner the power to determine what constituted unfair trade practices. It was contended such a plan would lead to lack of uniformity in administration and conflicting interpretations of the same practices in different jurisdiction. On the other hand it was asserted that if individual trade practices acts were not enacted in each state, the field would not be covered completely, thereby creating dual jurisdiction with its attendant problems. **1946 Proceedings 142-143.**

At the time it was first developed, the drafters gave the model the title “An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance.” The task force considering market conduct activities recommended changing the title to “Unfair Trade Practices Act” as it was commonly known. There was no intent that the change should imply any change in concept. **1990 Proc. IA 146.**

The prefatory note was added in 1990 when provisions regarding claims settlement practices were deleted from the Unfair Trade Practices Act and incorporated in a freestanding model. **1990 Proc. II 169.** [See proceeding citations for Model 900 for further information.]

After passage of the Gramm-Leach-Bliley Act of 1999 (known as “GLBA” or the Financial Services Modernization Act), a new working group was appointed to consider ways for states to enforce adequate consumer safeguards related to bank sales of insurance. The new federal law affirmed the McCarran-Ferguson Act, the 1945 law that authorized the states to regulate the business of insurance, and provided for “functional regulation” of insurance activities by state insurance regulators. State law would be subject to preemption only if it “prevents or significantly interferes” with a bank’s insurance sales activities. **2000 Proc. 1<sup>st</sup> Quarter 984-985.**

GLBA provided 13 “safe harbors” from preemption for state regulatory authority over bank sales activities. State laws that imposed restrictions that are substantially the same as the safe harbors, but not more restrictive, were protected from federal preemption. **2000 Proc. 1<sup>st</sup> Quarter 985.**

The working group discussed the form of state adoption of the safe harbors. Some interested parties urged adoption of a model law. Others said there was no need for legislation, since the safe harbors were outlined in GLBA and legislative remedies were only needed if problems were identified. **2000 Proc. 2<sup>nd</sup> Quarter 1016.**

An interested party said that legislation about the 13 safe harbors would promote uniformity among the states. It was important for public policy reasons, because if states did not act, they faced federal preemption. A consumer representative also spoke in favor of a proactive rather than a reactive approach. **2000 Proc. 2<sup>nd</sup> Quarter 1017.**

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A trade association representative noted that the NAIC's Unfair Trade Practices Act already contained many of the safe harbors within it, and she believed another layer of regulation would be confusing for consumers. A commissioner opined that, if states do not have the safe harbors codified in state law, they may have abdicated their regulatory reach to a federal agency. She expressed surprise that the trade associations were not advocating uniformity in this instance, given the uniformity mantra they had been espousing. **2000 Proc. 2<sup>nd</sup> Quarter 1017.**

A commissioner urged the group to develop model legislation as soon as possible. The chair noted that the group has not yet reached consensus on that issue. Some favored development of a whole model law, some favored developing model language by section, and some favored doing nothing. He suggested that if federal regulators did not take action on the pending preemption requests, the working group could decide a model was unnecessary. If the federal regulators took an aggressive stance toward preemption, the working group should develop more precise language for states to follow to avoid preemption requests. **2000 Proc. 3<sup>rd</sup> Quarter 1003.**

By the next meeting of the working group, a decision had been made to draft amendments to the NAIC Unfair Trade Practices Act to incorporate the safe harbors and rules from Section 305 of the Gramm-Leach-Bliley Act. Federal banking regulators were supportive of the idea, hoping that having a uniform model law available that has been reviewed by all parties would minimize the number of individual preemption requests received. **2000 Proc. 4<sup>th</sup> Quarter 851.**

The Unfair Trade Practices Act already contained a section on coercion of debtors. For that reason, the working group decided to amend the Unfair Trade Practices Act to address the 13 safe harbors. **2000 Proc. 4<sup>th</sup> Quarter 852.**

A regulator opined that it was preferable for states to create consistent public policy through development of model laws rather than leaving interpretation of dissimilar laws to the courts. The chair agreed that, even with the model law approach, there will be some litigation; however, the model law approach at least provided a framework. **2000 Proc. 4<sup>th</sup> Quarter 853.**

During development of the 2001 amendments, regulators addressed 11 of the 13 safe harbors in the proposed amendments to the Unfair Trade Practices Act. They decided not to address the two safe harbors related to privacy, as the NAIC's privacy regulations adequately addressed privacy disclosures. **2001 Proc. 2<sup>nd</sup> Quarter 836.**

### Section 1. Purpose

A committee was appointed to draft model legislation to attempt to cover the field through state legislation with respect to matters covered by Section 5 of the Federal Trade Commission Act. The committee expressed the opinion that state laws must be strengthened if insurance commissioners were to be in a position to demonstrate that the states were adequately covering the field. **1946 Proc. 145.**

The committee reported, after review of various alternatives, that there was doubt whether existing state statutes would sustain the argument that insurance business was subject to state control in the field of unfair trade practices. After continued study they recommended a pattern of legislation for strengthening state laws bearing on unfair trade practices. **1946 Proc. 148.**

Section 1 was, on its face, a declaration on the part of the adopting state of the state legislature's intention to cover the field previously occupied by the Federal Trade Commission. The legislation served as an answer to the invitation by Congress for the states to act if federal laws are not to apply. The drafters considered it to be of legal and practical importance to unmistakably establish the intention of state legislatures to act under P.L. 15 and to occupy the field. **1946 Proc. 148.**

When amendments were being considered, it was suggested that a consumer class action suit might be authorized for commission of unfair trade practices. The proposals included: (1) creating unlimited class action rights; (2) creating a right to a class action triggered only by a finding by the commissioner that an unfair trade practice had been committed; and (3) empowering the commissioner to sue on behalf of injured members of a class for damages sustained. **1971 Proc. II 344.**

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#### Section 1 (cont.)

The advisory committee spoke out against inclusion of consumer class action suits for damages resulting from violations of the Act. They felt such a provision was unnecessary and undesirable for several reasons: (1) the common law in all states recognizes the principle of representative actions, so the consumer is not without remedy; (2) there is less reason for such legislation as applied to such a heavily regulated industry as insurance; (3) the regulator has the practical power to accomplish on behalf of the consumer what consumer class actions are designed to accomplish; (4) insurers would not then be able to rely on the decision of the regulator; (5) consumer class actions would result in “judicial” regulation of the insurance business; (6) the class action principle has been abused, with the principle beneficiaries being lawyers; (7) class actions impact on the entire industry and are not restricted to isolated acts by one insurer; (8) class actions tend to encourage champerty; (9) the insurer would not be able to rely on the opinion of counsel, or even the decision of the regulator, regarding interpretation of unclear laws because of the fear of class actions; and (10) the costs of the defense of class action suits are prohibitive. **1971 Proc. II 350-351.**

When revisions were adopted in late 1971, the final decision of the subcommittee was that a provision related to class actions was inappropriate. The remedies in the model bill provided broad relief, thus affording the consumer the complete protection of the insurance department, including complaint handling mechanisms, which had proved most effective. **1972 Proc. I 491.**

In 1989 the subgroup considering amendments to the model discussed what the NAIC position was regarding whether a private cause of action was intended to be created by the Unfair Trade Practices Act. They decided no private cause of action was intended and added proposed draft language to that effect. **1989 Proc. II 204.**

The amendment adopted in 1990 included a new final sentence to this section to clarify the private cause of action issue. **1990 Proc. II 169.**

The amendments developed in 2000-2001 in response to the Gramm-Leach-Bliley Act (GLBA) included a direct reference to that act in the purpose section. An insurance association commented that the proposal to identify GLBA expressly illustrated the harm that would be perpetuated by adoption of unnecessary model laws. They opined that any state that identified GLBA in its statute would be limiting rather than expanding the Unfair Trade Practices Act. They argued that the proposed amendment would surrender the states’ most valuable tool in regulating insurance trade practices. **2000 Proc. 4<sup>th</sup> Quarter 846.**

#### Section 2. Definitions

A. The definition of affiliate was included in the 2001 amendments. **2001 Proc. 2<sup>nd</sup> Quarter 844.**

C. One interested party commented that the definition of “customer” was overly simplistic and broad. The definition of customer could be interpreted to apply to corporate entities, expanding the reach of the consumer protections beyond natural persons. The draft that was the subject of this comment used the term “person” in the definition. **2000 Proc. 4<sup>th</sup> Quarter 847.**

Another interested party argued that the protections of the Unfair Trade Practices Act should extend to all customers. Like individuals, corporate entities could also be the victim of unfair or deceptive practices or be harmed by inequalities in bargaining power. **2000 Proc. 4<sup>th</sup> Quarter 847.**

A comment on the first draft suggested that the definition of customer should not extend to persons who were solicited to obtain insurance because soliciting has little to do with being a customer. Another interested party responded that this misperceives the nature of the protections of the Unfair Trade Practices Act. These protections were designed to prevent unfair or deceptive trade practices to anyone that could be a victim of such practices, whether he was a policyholder, applicant, or just being solicited to commence the purchasing process. **2000 Proc. 4<sup>th</sup> Quarter 847.**

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#### Section 2C (cont.)

After review of a later draft of the model, an industry trade association again urged the working group to redefine customer more narrowly to apply solely to individuals. The suggested language was incorporated into the draft of the model. **2001 Proc. 1<sup>st</sup> Quarter 753.**

The federal consumer protection rules were drafted to apply solely to individuals and insurance regulators expressed no objection to using the same definition in the NAIC model. **2001 Proc. 2<sup>nd</sup> Quarter 838.**

D. The definition of “depository institution” was added with the amendments adopted in 2001. An interested party commented that the definition was too simplistic, potentially building controversial extraterritorial authority, for example, expanding the act to cover depository institutions outside the state. **2000 Proc. 4<sup>th</sup> Quarter 846.**

Another interested party countered that the first comment misunderstood the nature of insurance regulation. Whereas banks were regulated according to where the bank was located, insurance was regulated according to where the customer was located. The fact that the Unfair Trade Practices Act did not specify that it applied to institutions within the regulating state was fully consistent with other insurance regulation. Persons doing business in the regulating state were subject to the state’s restrictions regardless of where they were located. **2000 Proc. 4<sup>th</sup> Quarter 847.**

Later in the drafting process the chair pointed out that the definition of depository institution was clarified by adding that a depository institution does not include an insurance company. **2001 Proc. 1<sup>st</sup> Quarter 752.**

An insurance trade association continued to urge adoption of a more extensive definition of depository institution, arguing that the definition in the model was too simplistic. **2001 Proc. 1<sup>st</sup> Quarter 754.**

E. This subsection was added when technical amendments were adopted in December 1990. **1991 Proc. IA 197.**

F. The amended model adopted in 1971 included a provision to bring Blue Cross and Blue Shield plans under its terms. **1972 Proc. I 491.**

The amendments adopted in 1990 included revisions to this section. The entities that had been referenced in the drafting note were defined as insurers and the drafting note eliminated. In addition, the model was changed throughout to replace “person” with “insurer” where appropriate. **1990 Proc. II 170.**

I. When considering amendments to the model in 1991 and 1992, the drafters agreed to add a definition of producer to make the Act consistent with recent amendments to other NAIC models. It recognized the producer concept to include not just agents, but anyone involved in the production of insurance business. **1992 Proc. IA 226.**

#### Section 3. Unfair Trade Practices Prohibited

The subgroup drafting model amendments in 1989 held extensive discussions as to whether it was appropriate to broaden the scope of the model act regarding the long-standing “general business practice” standards. **1989 Proc. II 204.**

#### Section 4. Unfair Trade Practices Defined

The drafters of the model cautioned that no statute of this character could specify every act or practice that might meet the concept of what is unfair or deceptive. The initial adopted model included the following unfair trade practices: misrepresentation and false advertising of policy contracts, false information, defamation, boycott and coercion, false financial statements, stock operations and advisory committee contracts, discrimination and rebates. **1946 Proceedings 145-146.**

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#### Section 4 (cont.)

A member of other subjects were considered by the committee for inclusion, but after consideration were excluded. Fraud, barratry, bribery, and making of political contributions were excluded, as preferably being dealt with as unfair trade practices generally, and not as unfair trade practices confined to the insurance business. **1946 Proc. 146.**

At the time the model was adopted, the drafters again cautioned that no statute could specify every act, method or practice which might be unfair or deceptive. All that can be expected is a reasonably adequate coverage of sufficient extent to reflect a considered exercise of legislative judgment and declaration of policy. **1946 Proc. 149.**

When considering amendments to propose to regulators, the advisory committee had to determine what “trade practices” were for the purposes of the Act. In order to determine what prohibitions might be appropriate under the model act, they recommended against inclusion of practices which might, in the general scheme of statutory enactments, be found in other portions of the insurance law. For example, a practice relating to unfair discrimination in fire and casualty rates should appear in the rating laws rather than in an unfair trade practices act. They suggested the model act should not become a repository for specific acts which the commissioner can reach through existing law. **1971 Proc. II 345-346.**

A. One of the unfair practices identified was lowballing: purposely quoting a lower rate. The phrase added to Paragraph (6) was designed to address this concern. **1991 Proc. IA 219.**

When the drafters were considering the addition of language to Paragraph (5) to refer to race, religion and national origin, there was extensive debate about whether to add similar language to Paragraphs (1) and (2). On one side were those who asserted that broadened nondiscrimination language would assure that discrimination would be dealt with effectively no matter how it might manifest itself. The responsive argument was advanced that discrimination was already dealt with effectively in the state rating law and that adding a provision to Paragraphs (1) and (2) would be redundant, unnecessary, and potentially would lead one to falsely conclude that the language was actually necessary for a state to deal effectively with discrimination on the basis of race, religion or national origin. **1992 Proc. IIA 150.**

B. After the decision in *Federal Trade Commissioner v. Traveler's Insurance Co.* 362 U.S. 293 (1960) was handed down, the committee looked at ways to provide a method for the commissioner to proceed against a nonadmitted insurer for commission of any unfair trade practice. Since the concern of the committee was not limited to the area of false advertising, but reached all unlawful activities of nonadmitted insurers, a more comprehensive solution was needed. **1960 Proc. II 486-487.**

E. It was proposed that Section 4E(2) be amended by adding the last phrase. It was the intent of the drafters to hold companies responsible for oral statements made to department officials or contract examiners. **1992 Proc. IA 227.**

G. When amendments were being considered in 1971, it was suggested that specific language be added dealing with refusal to insure risks solely because of age, residence, race, color, creed, marital status, ancestry, lawful occupation; or solely because the insured would not agree to place collateral business with a particular insurer, if such practices are performed with such frequency as to constitute a general business practice. **1971 Proc. II 342.**

The subcommittee reviewed several drafts which would have restricted the right of insures to reject persons as risks solely because of race, color, creed, marital status, sex, national origin, residence, age, lawful occupation, failure to place collateral insurance, or previous refusal by another insurer. They decided not to incorporate the provisions because some of the matters were covered in civil rights laws, some were covered in special laws related to auto insurance, and the broad philosophical issues would appear to be more appropriate for a separate bill. **1972 Proc. I 491.**

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#### Section 4G (cont.)

While considering amendments to the Unfair Trade Practices Act dealing with redlining and similar discriminatory practices, the task force also recommended addition of a provision to prohibit discrimination based on the sex or marital status of an individual. Although the initial thought was to adopt a provision related to auto insurance, the paragraph drafted covers all lines of insurance. **1979 Proc. II 552-554.**

In 1977 a task force was appointed to consider the issue of “redlining,” especially with respect to personal lines insurance. More specifically, the committee was charged to develop a definition of redlining and consider its relationship to the unfair trade practices laws in the states. **1977 Proc. II 627.**

A statement of principles and objectives adopted by the Availability of Essential Insurance Subcommittee stated there was evidence that some insurers were refusing to insure, refusing to renew, or limiting the amount or type of property and automobile insurance coverage available to individuals because of the geographic location of a particular risk. The availability of insurance should not be dependent on the geographic location of a particular risk. It is the position of the NAIC that the insurance industry has been perceived to be redlining, and the perception can only be altered by implementing such practices as stating exact reasons for rejections, cancellations and nonrenewals. The insurance industry should also abandon underwriting “short-cuts” such as refusing to accept an application solely because the applicant was refused coverage by another carrier. **1978 Proc. I 628.**

The first draft of an amendment to prevent redlining was simply to define as an unfair trade practice “refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to a risk because of the geographic location of the risk.” An accompanying drafting note stated the language was intended to have broad application to all lines of insurance where unfair discrimination is practiced with regard to the geographic location of the risk. However, the drafters recognized that some states might want to limit the application of the proposed language to certain lines or classes of insurance. **1978 Proc. I 629.**

A nonprofit public interest organization presented a report on redlining to the committee considering amendments to the Unfair Trade Practices Act. **1978 Proc. I 642-644.** Their definition of redlining included arbitrary and capricious denial of insurance based on the geographic location of the property to be insured, and arbitrary and unfair price discrimination based on the geographic location of the property. **1978 Proc. I 643.**

The report suggested that insurance has become a necessity for everyday life for most citizens, and as such, must be available to anyone who wants it at a fair price. Risk must be taken into account on a fair, equitable and open basis. Classes of risk with similar characteristics should be treated consistently, in an objective fashion. The report suggested that rating territories should be entire states or large sections of states. Cities should not be rating territories, nor should there be special rate factors for cities. **1978 Proc. I 644.**

Another type of rate differential the drafters were asked to define as discriminatory was differing rates based on the age of the property being insured. One comment received suggested that this was a way of discriminating against those in low income groups. **1978 Proc. I 659.**

The committee was interested in the extent of the redlining problem and suggested hearings in the states and the possibility of a study to determine the full extent of the problem. **1978 Proc. II 467-471.**

In attempting to illustrate the meaning of the proposed redlining amendment to the model, the task force also prepared a draft model regulation. Its purpose was to state specific examples of the types of practices that should be deemed unfair. **1978 Proc. II 475-476.**

A study of redlining in New York was included in the *Proceedings*. **1978 Proc. II 478-509.**



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#### Section 4G (cont.)

An advisory committee was asked to prepare a report on steps the insurance industry must take to address the concerns outlined by the redlining task force. The committee was asked to address itself to several issues: (1) what is the duty of the insurance industry to educate policy holders as to the reason for rejection or cancellation; (2) what has the industry done, or should it do, to identify potential problem areas and advise consumers of necessary corrective action to continue insurance coverage. They also reported on alternative forms of coverage. **1978 Proc. II 515-556.**

The model amendment adopted included the substance of the proposed model regulation, so the need for a separate model regulation was obviated. **1979 Proc. II 525.**

A representative from the U.S. Commission on Civil Rights spoke against the model amendments adopted. He felt that inclusion of the phrase prohibiting the practice unless it is “for a business purpose that is not a pretext for unfair discrimination,” amounts to little more than fitting regulations comfortably around current practices rather than curtailing abusive practices. **1979 Proc. II 579.**

The task force spent a considerable amount of time deciding between two alternative amendments to deal with the discrimination issue in general and redlining in particular. The general amendments simply prohibited discrimination in the issuance, renewal, cancellation or limitation of property insurance. A regulation spelled out details with regard to redlining. **1979 Proc. II 547-548.** A more specific amendment detailed types of discrimination prohibited, and this is the alternative adopted. **1979 Proc. II 39-40.**

When modifications were made to the Unfair Trade Practices Act in 1990 to accommodate the separate free-standing act, there remained unfinished business relative to fair treatment of consumers. The changes to ensure an actively competitive marketplace included consideration of several issues: redlining, refusal to offer coverage, rescission of policies and blackballing (using the underwriting decision of other insurers to deny coverage). **1991 Proc. IIA 265.**

In an attempt to deal with the issue of redlining the drafters considered several proposals. The one they ended up adopting changed Paragraph (3) to add the phrase about sound underwriting in place of a provision which had allowed a limitation for a business purpose that was not a pretext for unfair discrimination. **1992 Proc. IA 227-228.**

A change was also suggested to Paragraph (4) to add the word “solely” and again delete language related to a business purpose. It was the regulators’ intent for this to be an affirmative change to not allow any such exception based upon age of the property alone. **1992 Proc. IA 228, 1993 Proc. I.**

A consumer advocate raised the issue regarding the failure of the Unfair Trade Practices Act to specify race, religion and national origin in Section 4G(5). There was a general consensus that Paragraph (5) should be amended. **1992 Proc. IIA 149.**

As a subsequent drafting session, it was decided that there should be provided an exception for fraternal insurance companies since such insurers are inherently allowed to discriminate in these areas by statute. **1992 Proc. IIA 144.**

A new Paragraph (7) was added in 1992 to deal with the issue of “blackballing.” Some insurers apparently considered it efficient to simply reject those consumer that other insurers had previously rejected without any appropriate underwriting. The advisory committee objected that such language would pose a problem for surplus lines business where an insurer actually must inquire as to the rejection of a risk. The drafters changed the original language, which had prohibited an insurer from requesting information about prior cancellation, to respond to this concern. The drafters stated that the purpose of the provision was to make insurers base their decisions upon sound underwriting principles and not merely on rejection by another insurer. One industry attendee suggested that the policy was currently allowed in life and health business, and wondered if this provision was to apply only to property and casualty business. The committee chair responded that the majority of regulators supported the new language without exceptions. **1992 Proc. IA 230.**

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#### Section 4G (cont.)

At the next drafting session it was decided to add the second sentence to exempt excess and surplus lines. **1992 Proc. IIA 144.**

Several suggestions were considered for what became the rescission reference in Paragraph (8). A concern considered by the drafters was the need to address post claims underwriting to require underwriting on a timely basis. **1992 Proc. IA 232.**

Later the drafters decided that the suggested paragraph was ambiguous, and that a model rescission, cancellation and nonrenewal law should be developed as a separate project. The reference was changed so that Paragraph (8) simply referred to the state's law on rescission. **1992 Proc. IIA 148.**

H. The drafters of the initial NAIC model surveyed state laws to see what type of unfair trade practice laws were already in place. The only law found to be in effect in all states in 1945 was a prohibition on rebating. **1946 Proc. 148-149.**

The model as originally adopted applied only to rebates of premiums for life insurance, annuities, and accident and health insurance. The drafters considered enlarging this section to apply to all lines. The advisory committee expressed disagreement with that concept, pointing out that rating laws might already contain such a provision, which would lead to duplication and could have the effect of imposing double penalties. For states without a rebate provision in the rating law, the advisory committee recommended adoption of that provision rather than enlarging upon the provisions of the Unfair Trade Practices Act. **1972 Proc. I 503.**

Paragraph (2)(d) and the drafting note following it were added in 2001 to recognize specifically one of the safe harbors of the Gramm-Leach-Bliley Act of 1999 (GLBA). This amendment was just one of a set of amendments made in response to GLBA. **2001 Proc. 1<sup>st</sup> Quarter 752.**

Federal thrift regulators suggested changes to the draft proposal to incorporate reference to the Home Owner's Loan Act. **2001 Proc. 1<sup>st</sup> Quarter 754.**

I. This subsection was added when the model was revised in 1990. **1990 Proc. II 173.**

J. With little discussion, the proposal to require maintenance of marketing and performance records was included in the model revisions. **1992 Proc. IA 232-233.**

K. The subcommittee appointed to consider amendments to the model wanted to include specific language which would define as an unfair trade practice the failure of an insurer to assemble all of the complaints received by the company, or its representatives, in one place to facilitate periodic review by insurance department examiners. They decided the proposal should include a requirement that information be maintained indicating the number of complaints received by classification of coverage; the nature of these complaints; the number rejected; and the length of time it took the insurer to act on the complaints. **1971 Proc. II 342.**

The revised model adopted in 1971 contained the provision now labeled Subsection K. Complaint handling procedures were of increasing interest to regulators. The efficiency with which complaints are handled is a test of public confidence due the insurer. In addition, reporting of complaint handling data would reveal much about the efficiency of the laws, regulations and other regulatory tools used by insurance departments. **1972 Proc. I 492.**

The subcommittee considered making the complaint report a public document. The advisory committee spoke out against the idea, since the *number* of complaints may not be a good measure of how good a job a company is doing. Complaint files must be reviewed by examiners to determine whether a complaint is justified. The advisory committee listed several

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#### Section 4K (cont.)

objections: (1) it would be one more set of reports to prepare; (2) making the report a public document could do great harm to insurers because the document could be used without considering the premium volume of the insurer, the geographic area, or the method of operation of the insurer; and (3) it would be admissible evidence in any hearing. **1972 Proc. I 507.**

L. Misrepresentation in insurance applications was not clearly covered by the original law. For this reason the amended version included this provision to make it clear that such actions were prohibited. **1972 Proc. I 492.**

M. This subsection was added to the model in 1989. The drafting committee first considered development of a model law on financial planners, but decided instead to address the concerns voiced regarding the need for adequate disclosure to consumers. **1989 Proc. II 131-132.**

While the 2001 amendments were under development, a suggestion from a financial planning association was considered. It resulted in the inclusion in Subsection M(1) of language that had been in a drafting note below the paragraph. The financial planner also suggested adding the term “certification,” since technically a designation is permanent, such as an MBA or Ph.D., but a certification is on-going. **2001 Proc. 1<sup>st</sup> Quarter 755.**

N. In 1993 this subsection was added by the Long-Term Care Insurance Task Force. It coordinated with amendments to the Long-Term Care Insurance Model Regulation detailing association responsibilities when an association markets or endorses long-term care insurance. **1993 Proc. 1<sup>st</sup> Quarter 276.**

O. When drafting amendments to the model in 1991 and 1992, the committee first considered a brief proposal requiring claims information for the prior three years be made available to the policyholder. There was considerable concern expressed by the advisory committee with particular objection to providing information on group policies. It was the intent of the drafters to limit this to property/casualty policies so they amended the draft to show that. **1992 Proc. IA 233.**

The next time the subcommittee met to consider the draft, they again discussed the issue of whether this provision should apply only to property and casualty policies. A consumer advocate voiced the opinion that it should be made to apply to life and health insurance as well. A regulator from one state suggested that the provision was incomplete because it did not specify what needed to be included in the claims history and recommended the addition of language similar to that found in his state code. One attendee pointed out that the language being put forth was not found in that state’s Unfair Trade Practices Act. **1992 Proc. IIA 148-149.**

There was extended discussion by the drafters on whether claims history needed to be provided automatically within a certain number of days prior to nonrenewal or only upon request. The concern was raised that if the information was required only 60 days prior to nonrenewal that would not be sufficient time for an insured to utilize it prior to being nonrenewed. The chair of the advisory committee noted that there was no general objection to providing claims history in property and casualty insurance or even in life and health with certain stated limits. However, the advisory committee objected to producing a claims history automatically to every insured when it is in actuality only required in less than one percent of all cases. **1992 Proc. IIA 149.**

At a subsequent meeting the language earlier suggested from one of the state codes was adopted, with some modifications. The primary source of debate was whether there exists sufficient justification to report this information at all. It was articulated by the regulators that in many instances the insured was left in the untenable position of being required by a replacing insurer to provide certain loss information when its existing insurer would not provide it. If the industry wants this type of information in order to underwrite an insured, it must also provide the information. Currently if a replacing insurer asks for data that the insured is not able to provide, the replacing company typically will not quote the business. **1992 Proc. IIA 142-143.**

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#### Section 40 (cont.)

There was discussion on whether the time frame for providing the information should be 30 days or 45 days. First the drafters decided to use 45 days, but then agreed that 30 days was clearly sufficient time in the personal lines area. It was also agreed to add a drafting note stating that the provision might not be required in states with a privacy law governing access to the information. **1992 Proc. IIA 143-144.**

At one point in the drafting process it was suggested that the provisions of Subsection O should only apply to *commercial* property and casualty policies. The word was added to the draft at that point, but later removed. **1992 Proc. IIA 149.**

The provisions adopted as a consensus position included removal of a requirement to provide loss reserve information, the addition of a requirement that companies be prohibited from requesting loss reserve information on open claims to underwrite applicants for insurance, and inclusion of an indication that the written notification of the right to request loss information be “prominent.” **1993 Proc. IA 244.**

P. The drafters considered several options for what became the drafting note reference to cancellation laws. They wanted to deal with issues of cancellation and nonrenewal. After discussion there was a consensus that the issue should be considered elsewhere in the insurance code and not in the Unfair Trade Practices Act. It was decided that in place of the drafters’ suggestions, a reference would be made to existing state law. **1992 Proc. IA 231.**

At a later point in the drafting process the drafters again considered including cancellation and nonrenewal in the model. The advisory committee stated the position that it was not appropriate to refer to cancellation and nonrenewal because states have other laws already in their codes. They were concerned with the position courts would take in interpreting the states’ inclusion of cancellation and nonrenewal laws under the Unfair Trade Practices Act as well as the possibility of it leading to bad faith claims judgments. **1992 Proc. IIA 130.**

The position finally agreed upon was to delete any specific reference to cancellation and nonrenewal laws and just to refer in Subsection P to any other sections with a drafting note suggesting states may insert any other laws deemed desirable or necessary, including cancellation and nonrenewal laws. **1993 Proc. IA 243.**

#### Section 5. Favored Agent or Insurer; Coercion of Debtor

Before adoption of the model act, the drafters considered adding another defined unfair trade practice. The committee gave serious consideration to the practice followed by some lenders of insisting upon control of the insurance property before they would agree to loan money. Because this type of provision would have affected people and institutions beyond those normally subject to insurance regulation, it was felt this would be a more appropriate provision for a general statute rather than an insurance regulatory statute. The committee pointed this out in their report lest their action in deleting the section be construed as an abandonment by the committee of its condemnation of the practice. **1946 Proc. 395.**

A group was created in 1971 to review the model Unfair Trade Practices Act. There was considerable interest in four additional practices which the committee wanted to define as unfair trade practices: (a) favored agent or insurer coercion of debtors; (b) use of insurance as an inducement to purchase goods and services; (c) interlocking boards of directors; and (d) claims practices. **1971 Proc. II 341-342.**

The committee looked at provisions prohibiting any requirement that insurance be purchased or renewed through any particular agent, broker, or insurer as a condition to furnishing a loan, service or property. The provisions would not prevent the exercise upon a reasonable basis of any right to approve or disapprove the insurer selected by a person. The advisory committee recommended that this provision be included in the model act as an additional defined unfair practice. **1971 Proc. II 346.**

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#### Section 5 (cont.)

The amended model contained a new section that prohibited discrimination by creditors in favor of certain insurers or agents, and it prohibited coercion of debtors with regard to insurance. The new section was an expansion of the law, but since the abuses related directly in insurance they fit the purpose of the law and were a proper concern. **1972 Proc. I 492.**

In the mid 1970's a task force was created to consider amendments to this section. The objective was to strengthen the model legislation to provide the insurance-buying public freedom of choice as to the placement of insurance and to remove opportunities for unfair competitive advantages held by lender affiliated insurance agencies. **1976 Proc. II 373.**

In December 1976 the format of the section was completely revised. **1977 Proc. I 226-227.**

Amendments to the model under consideration in late 2000 made a number of changes to Section 5. One interested party commented that the proposed amendments extended the model to an affiliate of a depository institution merely because of the affiliation. In the absence of a genuine problem warranting such a compliance burden, the regulatory extension itself would be argued to be discriminatory and susceptible to challenge by either depository institutions or their federal regulator. **2000 Proc. 4<sup>th</sup> Quarter 847.**

Another interested party suggested deleting all reference to depository institutions in Section 5. The commenter agreed that the expansion of the Unfair Trade Practices Act was necessary to ensure that banks were subject to the same treatment as other insurance providers. However, this could be accomplished by expanding the definition of person to include banks and savings associations. This would accomplish the goal of bringing banks within the scope of the model, but would avoid several problems with the various references to depository institutions or affiliates of depository institutions. **2000 Proc. 4<sup>th</sup> Quarter 847-848.**

The interested party noted that although the restrictions in Section 5 were intended to apply to all entities that engaged in leading activities (including insurance agents), distinguishing between banks and other entities by naming them separately only increased the possibility that these restrictions would be seen as applying to them separately, and thus impermissibly. **2000 Proc. 4<sup>th</sup> Quarter 848.**

A. In addition to the references to depository institutions, the 2001 amendments added the last sentence of Subsection A to the model. **2001 Proc. 2<sup>nd</sup> Quarter 848.**

B. This subsection was adopted when the entire section was revised in 1976. **1977 Proc. I 226-227.**

When amendments to the model were considered in 2000-2001, the first draft retained the old language of Paragraph (1), but added additional text about the fact that acceptable insurance was required and that it would be available from the depository institution. **2000 Proc. 4<sup>th</sup> Quarter 863.**

An interested party commented that no safe harbor in the Gramm-Leach-Bliley Act protected the prohibition that had been in the model since 1976 that said a person that lent money could not solicit insurance for the protection of real property after a person indicated interest in securing a first mortgage credit extension, until the person received a commitment in writing from the lender. The commenter opined that this type of restriction would significantly interfere with a depository institution's ability to sell insurance, because the depository institution would be unable to market certain types of insurance products during a time when the customer may need those products the most. **2000 Proc. 4<sup>th</sup> Quarter 848.**

Another interested party responded that a provision would not be prohibited merely because it was not on the list of 13 safe harbors. There must be evidence that the provision significantly interfered with a bank's ability to do business. The commenter opined there was no evidence that Paragraph (1) constituted such an impediment. The reason put forth was that it applied to all lenders, including banks, so did not treat banks any differently. **2000 Proc. 4<sup>th</sup> Quarter 848.**

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#### Section 5B (cont.)

The commenter pointed out that the new proposed language to be added specifically provided that the restriction did not prohibit a lender from informing a customer that insurance was required and noting it was available from that lender. This limitation would enable lenders to inform consumers of their insurance needs and of the availability of the insurance products from the lender. **2000 Proc. 4<sup>th</sup> Quarter 849.**

An early draft of the 2001 model revisions contained a provision requiring a depository institution to obtain a customer's express consent to disclose credit-related insurance information. Some interested parties raised concerns related to privacy and to the Fair Credit Reporting Act. The chair reported in early 2001 that the paragraph had been deleted and replaced by a drafting note that referred to the NAIC's model privacy regulations and the Fair Credit Reporting Act. **2001 Proc. 1<sup>st</sup> Quarter 753.**

An interested party suggested that the new Paragraph (7) on licensing was unnecessary as it was covered in other NAIC models and was not a safe harbor. The chair responded that the drafters had not limited themselves to the safe harbors, but noted that two of the safe harbors were closely related to licensing. Another interested party noted that there might be difficulty prosecuting an unlicensed individual under the current Unfair Trade Practices Act; the language might limit a regulator's options. **2001 Proc. 1<sup>st</sup> Quarter 754-755.**

A representative from an insurance trade association urged deletion of Paragraph (7). She said that language might allow individuals to pursue a private right of action with respect to licensing matters in those states that allow a private right of action under their Unfair Trade Practices Act. Regulators disagreed that there was potential harm from including the provision. **2001 Proc. 2<sup>nd</sup> Quarter 839.**

The trade association representative also urged deletion of Paragraph (8). She said it was unnecessary because it was covered by another NAIC model and was too restrictive. The working group gave the comment serious consideration but declined to change the draft. **2001 Proc. 2<sup>nd</sup> Quarter 839.**

Just before adoption of the model the working group made a change to Paragraph (8). The purpose of the change was to address concerns regarding the application of the "one-time nominal fee" language. **2001 Proc. 2<sup>nd</sup> Quarter 836.**

An interested party suggested an amendment to the new Paragraph (11) to add the words "by depository institutions" to give context to the term "retail deposits." The generally accepted meaning of "retail deposits" would be deposits accepted in the teller area of a depository institution. Without adding the clarifying context, the term could be read to apply to brokerage and other transactions. **2001 Proc. 1<sup>st</sup> Quarter 754.**

C. The Subcommittee on Unfair Competition considered the possibility of further amendments to this section to address the problems presented by the implicit economic leverage that exists when a credit relationship is established with a lending institution, **1984 Proc. II 78.**

The amendments adopted in 1984 added the second paragraph of Subsection C to address coercion of debtor problems identified. **1985 Proc. I 85-86.**

Subsection C was significantly revised when the 2001 amendments were developed. Interested parties suggested the revisions were redundant and duplicative. Credit lenders were already required by the federal Truth in Lending Act to disclose that property insurance may be obtained from a person of the consumer's choice. **2000 Proc 4<sup>th</sup> Quarter 850.**

An interested party suggested adding a limitation regarding personal, family or household purposes, similar to the action the working group took for Subsection D(1). **2001 Proc. 1<sup>st</sup> Quarter 754.**

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#### Section 5 (cont.)

D. A new Subsection D was developed as a result of the Gramm-Leach-Bliley Act (GLBA) amendments considered in 2000 and 2001. An interested party commented that the first paragraph of Subsection D required a depository institution or affiliate to make four standard disclosures concerning the limited financial backing of an insurance product. Those disclosures were required to be made prior to the insurance sale and must be in writing. He opined that GLBA generally protected this type of state restriction from federal preemption, but the safe harbor would require the disclosure to be in writing “where practicable.” He said that this was an important qualifier; it recognized that there were certain situations, such as a telephone solicitation, where it was extremely impractical to provide disclosures in writing prior to the sale. He suggested that the model include the “where practicable” language to avoid a restriction that would significantly interfere with a depository institution’s authorized insurance activities. **2000 Proc. 4<sup>th</sup> Quarter 850.**

Another commenter opposed the inclusion of the “where practicable” language. He said several agents associations opposed the inclusion of such open-ended, discretionary language without guidance on what is or is not “practicable.” If the language would be included, the NAIC should specify exactly what circumstances would warrant relaxation of the requirement and to what extent. **2000 Proc. 4<sup>th</sup> Quarter 850.**

As the first draft was written, Subsection D contained only Paragraph (1) and a part of Paragraph (2) requiring written acknowledgment. An interested party suggested that this would confuse consumers with mandatory disclosures not related to property and casualty products. He suggested that the disclosures should only be required for insurance products with investment components. **2000 Proc. 4<sup>th</sup> Quarter 850.**

The next draft was changed by adding language limiting the disclosure requirements to insurance transactions that occur on the premises of the depository institution or on behalf of the depository institution. Paragraph (2) was enhanced by limiting the application of the disclosure requirements to insurance products intended for personal, family or household purposes. **2001 Proc. 1<sup>st</sup> Quarter 753.**

An interested party commented on the provisions of Paragraph (3) in regard to electronic commerce. He expressed concern about the potential conflict between the requirement for written acknowledgment and electronic commerce. He noted that it is highly unlikely this provision would be consistent with a state’s insurance code. **2001 Proc. 1<sup>st</sup> Quarter 755.**

E. The amendments considered in late 2000 included a revision of this subsection, first added in 1976. Most important was a sentence allowing the commissioner to examine the books and records.

An interested party voiced objection to this language because it expanded the commissioner’s power far beyond what had been permissible. He said that under existing laws regulators did not have *carte blanche* to examine the banking or lending records of a financial institution. Lenders have neither the authority nor the right to reveal protected borrow information to regulators. The interested party suggested either eliminating the proposed changes or fine-tuning the language so that lenders were not required to make contractually protected consumer information available to insurance commissioners. **2000 Proc. 4<sup>th</sup> Quarter 850.**

G. As originally drafted in 1976, the section referred to credit life and health insurance. A credit insurance trade association suggested adding credit property and credit involuntary unemployment to that list. **2000 Proc. 4<sup>th</sup> Quarter 850.**

An insurer asked regulators to consider adding mortgage insurance to the exemption in Subsection G. Like credit life insurance and credit health insurance, financial institutions have had the authority to offer mortgage insurance products for decades. The commenter suggested the purpose of the proposed amendments was to address new marketing opportunities available to financial institutions as a result of the passage of the Gramm-Leach-Bliley Act. Accordingly, the scope of the NAIC’s model should not include products that lenders have been authorized to offer for decades. He urged the working group to accept the argument that mortgage insurance was functionally equivalent to credit insurance. Like credit insurance, optional mortgage insurance was intrinsically tied to the loan transaction. **2001 Proc. 1<sup>st</sup> Quarter 753.**

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#### Section 5 (cont.)

The drafting note at the end of Section 5 was part of the amendments adopted in 2001 in response to the Gramm-Leach-Bliley Act. **2001 Proc. 2<sup>nd</sup> Quarter 851.**

#### Section 6. Power of Commissioner

Section 6 was substantially revised in 2001 by the addition of the last two sentences. To broaden its scope, references to persons were added wherever insurers were noted. **2001 Proc. 2<sup>nd</sup> Quarter 851.**

#### Section 7. Defined and Undefined Practices: Hearings, Witnesses, Appearances, Production of Books, and Service of Process

The sections now numbered Sections 7 and 8 were originally drafted in six sections setting up procedures for enforcement of the model's prohibitions similar to the procedures prescribed by the Federal Trade Commission Act. **1946 Proc. 149.** Before adoption they were consolidated in much the same fashion as the current version. **1946 Proc. 39.**

The procedures for dealing with "undefined" unfair trade practices in the original model were felt by many commissioners to be too cumbersome. This required notice and hearing, and the commissioner to make a determination, but he had no power to order the licensee to desist from such practices. He was required to go to court to get an injunction in order to enforce his findings. **1971 Proc. II 343.**

The NAIC model was drafted to closely parallel the federal law on trade practices and much of the language was lifted bodily from the federal law. Unlike the federal law, the NAIC model enumerated certain defined acts or practices peculiar to the business of insurance. Since any such enumeration could not cover every conceivable situation, the model act contained an omnibus provision virtually identical to the federal laws. In addition, both acts contained similar enforcement provisions. The persons charged with enforcement of the acts were given the authority to examine and investigate, conduct hearings, and issue cease and desist orders, which were subject to judicial review. Even the penalty provision of the two acts were identical. **1971 Proc. II 345.**

One state regulator submitted suggestions for changes. He recommended a rule-making authority to be substituted for the omnibus clause because it was more equitable to those being regulated by the Act, and could be broader in scope than a cease and desist order, to get at the concept of the unfair act or practice at issue. **1971 Proc. II 367.**

A. References to depository institutions were added with the 2001 amendments. The last two sentences were added at the same time. **2001 Proc. 2<sup>nd</sup> Quarter 851.**

B. During the development of amendments in 2001, Subsection B was amended to clarify that persons, depository institutions and affiliates of depository institutions would be afforded the same rights as insurers. **2001 Proc. 1<sup>st</sup> Quarter 753.**

D. Language regarding production of records of depository institutions was added as part of the 2001 amendments. **2001 Proc. 2<sup>nd</sup> Quarter 851.**

#### Section 8. Cease and Desist and Penalty Orders

A. The original model adopted did not contain any specific language for penalties for violation of cease and desist orders. When amendments were being considered in 1971, one suggestion was for specific language amending the penalty section to include a monetary penalty for violations of the act. **1971 Proc. II 342.**



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#### Section 8A (cont.)

An advisory committee presented a report to the drafting committee suggesting changes to streamline administrative procedures and put more “teeth” in the model. The model as it existed only provided a penalty after a cease and desist order was violated. **1971 Proc. II 343.**

The version adopted in 1971 greatly strengthened the enforcement procedures in the model bill. Every department that had been contacted by the subcommittee expressed dismay and discontent with the originally adopted enforcement powers. The new model made clear that hearings may be held and penalties applied for violations of both defined and undefined trade practices; that the penalties included cease and desist orders, monetary penalties, suspension and revocation of licenses, and other reasonable relief; and that the commissioner could promulgate rules to further clarify the defined unfair trade practices. **1972 Proc. I 492.**

The draft adopted in 1971 set up in Paragraph (1) a two-stage penalty, a lesser amount (\$1,000) for so-called “innocent” or “technical” violations, and a higher amount (\$5,000) for commission of acts which the person “knew or reasonably should have known” were in violation of the Act. The advisory committee suggested that it would be more appropriate not to include monetary penalties for “innocent” violations. **1972 Proc. I 508.**

The penalties were increased when model amendments were adopted in 1990. The aggregate penalty was raised from \$10,000 to \$100,000. The penalty for flagrant violations was raised from \$5,000 to \$25,000 with an aggregate of \$250,000 instead of \$50,000. **1991 Proc. IA 201.**

The grant of authority included in Paragraph (2) the 1971 revision allowed the commissioner to suspend a license if the person “knew or reasonably should have known” he was in violation of the act. The advisory committee suggested the term “willfully” be used instead because it was a somewhat stricter test and was typically required in other state statutes. Consistency with the general statutory scheme would be desirable and appropriate. **1972 Proc. I 508-509.**

The proposed draft of 1971 contained a third alternative penalty. It allowed the commissioner to order such other relief as is reasonable and appropriate. The advisory committee strenuously opposed the provision. They felt it wasn’t needed because the commissioner already had ample authority. They also suggested it conferred on the commissioner the powers of a court of equity without any of the limitations or safeguards prescribed for judicial proceedings. They argued the provision went beyond the authority conferred upon other regulators and was too broad. The laws and legislation committee deleted the provision before final adoption of the model revisions. **1972 Proc. I 509.**

When the model was amended in 2001, Section 8 was rewritten to clarify that persons, depository institutions and affiliates of depository institutions would be afforded the same rights as insurers. **2001 Proc. 1<sup>st</sup> Quarter 753.**

B. Subsection B was added with the 2001 amendments. **2001 Proc. 2<sup>nd</sup> Quarter 852.**

#### Section 9. Judicial Review of Orders

A. While the NAIC was drafting amendments in 2001 in response to the Gramm-Leach-Bliley Act of 1999, reference to depository institutions and insurers was added to Subsection A. **2001 Proc. 2<sup>nd</sup> Quarter 852.**

#### Section 10. Judicial Review of Intervenor

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#### **Section 11. Penalty for Violation of Cease and Desist Orders**

Under the original model act the commissioner could recover up to \$5,000 in penalties in a civil action if there was violation of a cease and desist order. The revisions adopted in 1971 permitted the commissioner to call a hearing and assess a penalty up to \$10,000. A provision was also added to allow suspension or revocation of the insurer's license. **1972 Proc. I 500.**

While amendments were being developed in 2001, reference to insurers and depository institutions was added to Section 11. **2001 Proc. 2<sup>nd</sup> Quarter.**

#### **Section 12. Regulations**

The original model did not confer on the commissioner any authority to promulgate regulations. Some commissioners on the drafting committee considering amendments thought the act could be made more effective if some authority was added in this area. One suggestion was to give the commissioner the power by regulation to add new specific unfair trade practices to the list enumerated in Section 4. **1971 Proc. II 343-344.**

The language of the section was broadened in 1990. Instead of specifying acts prohibited by Sections 4 and 5 which would serve as the subject of regulations, the model was changed to give authority to carry out the provisions of the act by promulgating regulations. **1990 Proc. II 176.**

#### **Section 13. Provision of Act Additional to Existing Law**

#### **Section 14. Immunity from Prosecution**

#### **Section 15. Separability Provision**

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#### *Chronological Summary of Actions*

*June 1947: Model law adopted.*

*December 1971: Included hospital and medical service plans under Act; added provisions regarding claims settlement practices. Section 5 on coercion of debtors also added. Penalty and enforcement provisions strengthened; authority to adopt regulations added.*

*December 1976: Revised Section 5 on coercion of debtors.*

*June 1979: Added subsection on unfair discrimination in response to concerns about redlining.*

*December 1984: Amended Section 5.*

*June 1989: Added disclosure provisions for financial planners.*

*December 1989: Changed name of model.*

*June 1990: Developed freestanding model on claims settlement practices and deleted provisions on subject from Unfair Trade Practices Act. Added provision that no private cause of action is created by model. Made technical amendments.*

*December 1990: Further technical amendments to coordinate trade practices and claims settlement practices provisions. Increased penalty for violation of cease and desist orders.*

*December 1992: Changed terminology to refer to "producer" throughout model, revised unfair discrimination subsection, and added requirement to maintain marketing records. Added requirement to provide claims history upon request.*

*June 1993: Added provision requiring insurers to certify information related to association endorsement of long-term care insurance to Section 4.*

*June 2001: Adopted amendments to address issues raised by the federal Gramm-Leach-Bliley Act of 1999.*

*June 2008: Adopted guideline amendments to address lawful travel underwriting issues.*