

Appendix "A"

The Procedural History of the MAIP

As stated in the *December 13 Decision*, the "dual goals of the residual market are to provide insurance to risks whom the industry decline to write voluntarily and to distribute equitably among the industry the 'premiums, losses or expenses, or any combination thereof' generated by those risks." Over the years, the CAR Rules have been revised and amended to attempt to achieve these goals more effectively.¹ None of the statements made at the June 15 hearing presented sufficient reasons to reject prior decisions affirming the need for residual market reform and adopting an assigned risk plan, as sanctioned by the Supreme Judicial Court, as the preferred format to achieve an equitable distribution of the residual market burden among insurers. The three-year decline in the statewide average private passenger motor vehicle rate, recent offers of voluntary contracts to many exclusive representative producers ("ERPs"), and the substantial reduction in residual market losses, for example, are all welcome news to all insurance constituencies, including consumers, insurers, producers and regulators, but do not address the shortcomings or the fragility of the underlying structure of the current residual market format, which has been found to foster inequitable distribution of those losses.² Changes to the CAR Rule addressing the subscription methodology that governs the assignment of ERPs to its member companies, and the extraordinary physical redistribution of some ERPs in January 2006 pursuant to an order of the Commissioner, have helped reduce market inequities but do not resolve structural issues that have created those inequities.³

¹ For example, the June 15 testimony of the Premier Insurance Company relates the history of efforts to achieve fairness through a system based on broker (*i.e.*, producer) assignments; testimony from the Property Casualty Insurers Association of America, a trade association, affirms that history. Proposals to delay implementation of the MAIP were addressed in the *December 13 Decision*, at 6-8. Other reasons for preferring an assigned risk plan, including greater incentives to control claim costs and fraud, were identified and addressed in previous Decisions. See, *e.g.*, *November 23 Decision*, 8-10.

² The testimony of the Amica Insurance Company ("Amica") about its treatment under the current CAR Rules is illuminating. Amica acknowledged that the system has improved, but characterized the changes as insufficient to resolve all problems with the system. It commented that the constant shuffling of ERP books of business is inefficient and disruptive.

³ In a *Decision on Proposed Changes to CAR Rule 13*, issued on September 30, 2005 in Docket No. C2005-04, Commissioner Bowler ordered CAR to carry out a physical redistribution of ERPs to establish for all servicing carriers overall parity in the quantity and quality of their ERP exposures, as a condition precedent

These events emphasize the reason for adopting an assigned risk plan: to ensure that, in accordance with the statutory requirement, the residual market premiums, losses or expenses are equitably distributed among the insurers participating in the motor vehicle insurance market.⁴ Change to the structure of the residual market, coming at a time of relative stability in the overall market, will have the beneficial effect of helping to smooth the transition to an assigned risk plan.⁵

The *April 19 Decision* remanded the MAIP to CAR to reconsider the provisions relating to Clean-in-Three drivers. The detailed history of the MAIP Rules relating to Clean-in-Three drivers was addressed in that *Decision* and need not be repeated here. In brief, the Supreme Judicial Court expressed concern that, because Massachusetts has no “take all comers” law requiring insurers to accept all applicants in the voluntary market, the proposed MAIP Rules that rendered all Clean-in-Three drivers ineligible for placement in the residual market might effectively make it impossible for some drivers to obtain insurance. Subsequently, the MAIP Rules relating to Clean-in-Three were revised to address the Court’s concern while preserving the principle that it is reasonable to expect

to adoption of other changes to the subscription methodology set out in CAR Rule 13. Speakers at the February 15 hearing commented that, approximately one year after the redistribution, the system was again out of balance, and that one, and perhaps two, insurers had already requested subscription relief. Another speaker commented that five companies continued to be responsible for much more or much less than their fair shares of the residual market deficit. Commissioner Bowler also ordered CAR ultimately to expand the methodology used to reassign ERPs under Rule 13 to ensure that the process addresses both the quality and quantity of ERP exposures. The CAR Governing Committee approved proposed amendments to Rule 13 on June 4, 2007; at the request of a member company, a hearing has been scheduled on those amendments.

⁴ As noted in the *November 23 Decision*, problems with the current producer-based residual market system have caused many insurers to withdraw from the market. These withdrawals have created opportunities for the remaining insurers to increase their books of business. Several speakers at the June 15 hearing raised the issue of the relationship between the adoption of an assigned risk plan and the entry of additional insurers into the market for private passenger motor vehicle insurance, questioning the need to make the Massachusetts market more attractive to outside insurers. The Commissioner is obligated to ensure that the residual market is fair and complies with the statutory requirements, independent of the number of insurers in the market, regardless of whether any new insurers enter the market. Further, all insurers are obligated to comply with the entire range of Massachusetts laws relating to private passenger motor vehicle insurance; any new insurers would be required to comply with those laws. Nothing in this record provides any foundation for anxiety that an assigned risk plan would allow insurers to come into the market and “cherry-pick” consumers.

⁵ Opponents of change to the residual market include the company with the largest market share of private passenger motor vehicle insurance and the company with the third largest market share. That some companies have been extremely successful under the current system is not a basis for eschewing the Commissioner’s obligation to regulate the residual market consistent with the statutory mandates.

the voluntary market to write drivers with such records. The revisions also were designed to continue to promote the salutary goals of controlling the size of the residual market, minimizing market place disruption, and providing a reasonable time period for insurers to adjust to the new market structure.⁶

Plymouth Rock, the first company to request a hearing on the May 16 Amendments, objected to them on the ground that they do not prohibit insurers from referring Clean-in-Three drivers to the MAIP. Its position, as well as that of Commerce, the second company to request a hearing on the May 16 Amendments, echoes the AG's position that the MAIP rules should ensure that drivers who qualify for Clean-in-Three status are not placed in the residual market.⁷ To achieve this goal, they propose that the CAR Rules prohibit member companies outright from refusing to write applicants *voluntarily* who have Clean-in-Three records.⁸ As noted by several speakers, CAR considered such an option but concluded that it would be imprudent to adopt such a proposal. It was uncertain it had legal authority to establish a rule, applicable to its members' entire books of business, including its voluntary writings, that would require those insurers to write all Clean-in-Three drivers *voluntarily*.⁹

The May 16 Amendments should not be rejected simply because they do not absolutely prohibit assignment of Clean-in-Three drivers to the MAIP. MAIP Rule 21, with the May 16 Amendments, still provides for a temporary prohibition, for three years,

⁶ *December 13 Decision*, 8-10.

⁷ Plymouth Rock noted at the hearing that it had presented an alternative proposal, described as a hybrid system, to CAR that would require companies to write such drivers but allow them to cede the business to CAR as they now do. Although this hearing focuses on the merits of the May 16 Amendments relating to Clean-in-Three drivers and the residual market, witnesses from the Premier and Hanover insurance companies testified to the process that led to the Governing Committee's approval of those amendments. Responsibility for developing rule changes in response to the *April 19 Decision* was delegated to the MAIP Steering Committee, which met three times and reviewed a total of five proposals, including that submitted by Plymouth Rock. The MAIP Steering Committee's rejection of the Plymouth Rock proposal does not mean that the MAIP Steering Committee is wrong; it simply made a different decision.

⁸ One speaker characterized Plymouth Rock's proposal as a request to establish a limited take all comers rule in the voluntary market.

⁹ CAR's mandate is to oversee and manage the residual market, which exists because insurers do not wish to provide to some applicants on a voluntary basis a product that drivers must, by law, purchase. CAR does not require insurers to specify the reasons why they do not wish to provide voluntary coverage. The AG disagrees with CAR's position that CAR rules cannot address underwriting decisions in the voluntary market. Resolution of any dispute over CAR's legal authority could lead to protracted litigation.

against non-renewing current policyholders with Clean-in-Three records. These drivers will continue to be served in the voluntary market.¹⁰

Other participants in the hearing opposed the MAIP on the ground that the requirement that insurers renew all Clean-in-Three business during a three-year transition period is inadequate to protect such consumers from being assigned to the residual market in the future. Several speakers criticized the MAIP Rules for limiting what they term the “protection” given to Clean-in-Three drivers to a three year period rather than imposing it on a permanent basis.¹¹ At the end of three years, they assert, insurers will be able to nonrenew those policyholders for a variety of reasons, thereby forcing them into the residual market. MAIP opponents appear to envision a post-transition era in which companies will flood the residual market by electing on a wholesale basis not to renew Clean-in-Three operators.¹² Underlying their prediction is the puzzling premise that insurers will not find it attractive to insure consumers with accident free driving records. An unstated premise, furthermore, is a perception that all insurers apply identical rules to decisions not to write business, without regard for programs and procedures that insurance companies may develop for evaluating business, and without consideration of operators’ individual characteristics and experience. Opponents simply assume that a consumer rejected by one company inevitably would be unable to obtain voluntary coverage from another company. Insurance companies in our marketplace have not operated in such lockstep fashion and there is no reason to expect that they will in the future.

¹⁰ The *August 27 Decision* remanded CAR’s original proposal for revisions to ensure that it addressed consumer protection issues, established equitable methodologies for sharing the residual market burden, and limited the size of the residual market.

¹¹ Commerce asserts, for example, that the MAIP rules do not provide Clean-in-Three “protection” for new drivers, but only for renewals. Its concern is not entirely clear. Drivers who have not been licensed for three years cannot qualify as Clean-in-Three, and therefore the Clean-in-Three provisions are irrelevant to them. The MAIP rules do not require experienced drivers new to Massachusetts to be placed in the residual market. For such operators, as now, companies may make their own decisions, consonant with Massachusetts statutes, to write the business voluntarily. As discussed, *infra*, the Massachusetts statutes generally applicable to motor vehicle insurance do not distinguish between the residual and the voluntary market. The statute establishing the residual market, G.L. c. 175, §113H, requires the residual market plan to provide virtually identical coverage to policies written through it as are offered to insureds covered voluntarily.

¹² Several speakers asserted that such insurer decisions would have adverse effects on urban drivers. There is nothing in the record to indicate that fewer drivers in urban areas currently qualify for Clean-in-Three status.

Some opponents gave the impression that the MAIP Rules only address concerns about keeping Clean-in-Three drivers out of the residual market for only three years; this is not the case. MAIP Rule 29. I specifically directs CAR, no later than April 1, 2009, to develop a credit mechanism to encourage carriers to insure Clean-in-Three drivers on a voluntary basis; the system would be available to carriers as of April 1, 2011. This approach is consistent with G.L. c. 175, §113H (C), which states that the residual market plan is expected to control the size of the residual market through a system of credits, which are intended to encourage companies to write risks voluntarily. Commerce argues that the MAIP cannot be fully evaluated at this time absent information about the credit system that may be developed prospectively. Its position fails to recognize that the residual market credit system, under MAIP Rule 29. F must be reviewed annually. There is no reason to delay implementation of an assigned risk plan pending development of a detailed credit mechanism related to Clean-in-Three drivers to take effect in the future. The timing of the MAIP Rule requiring CAR to develop a credit system after the MAIP has been in effect reflects the principle that a credit system should reflect the realities of the marketplace, and cannot be developed or evaluated absent data on market conditions. As with other changes to the CAR Rules relating to the credit system, Clean-in-Three credits will be approved as rule amendments, with all CAR members having an opportunity to review them and to request a hearing before the Commissioner. The MAIP rules should not be disapproved simply because they do not address every possible future contingency. There is no reason to believe that CAR will not propose future rule changes as may be needed to ensure smooth operation of an assigned risk plan. In any event, the Commissioner has the authority to order CAR to submit changes, if it does not do so otherwise.

Clean-in-Three risks also will benefit from Rule 21. D, which specifically directs CAR to submit, by December 15, 2009, proposed rules to control the size of the residual market after April 1, 2011. The three year transition period is designed to control the size of the residual market, a matter that has been of concern since the first review of the proposed changes to the CAR Rules. Ultimately, however, the need for and the nature of future rulemaking will depend on the extent to which insurers, who make decisions to accept or reject applicants, act responsibly to control the size of the residual market.

Insurers exercise judgment as to whom they wish to insure voluntarily, whether the residual market operates as an assigned risk plan or under another model. The MAIP does not change CAR's role as the operator and manager of the residual market or the Commissioner's oversight of that market. It does not alter CAR's continuing obligation to monitor and manage the system so as to prevent overpopulation of the residual market. If, after the three-year transition period, it appears that insurers are unwilling or unable to control the size of that market, or that it has a disproportionate effect on certain groups of policyholders, CAR will amend its rules, as necessary. The MAIP does not change the Commissioner's authority to ask CAR to amend its rules or her discretion to accept or disapprove rules that CAR proposes. The multi-year process of reviewing the MAIP Rules demonstrates that the rules have evolved; we have no reason to doubt that they will continue to do so. That change may be needed in the future is not a sufficient reason to reject an assigned risk plan at this time.¹³ Proceeding with the MAIP will remove uncertainty and allow CAR and its members to focus their energies on completing their transition plans.

For the most part, insurance companies make reasonable and independent judgments about the risks they choose to accept.¹⁴ It is ironic that a few companies have stated that an absolute Clean-in-Three rule is needed to protect good drivers from the companies' potential bad behavior (refusing these good drivers voluntary policies), as if they will not be able to restrain themselves from making such bad business decisions. Why a company would not want to voluntarily write profitable Clean-in-Three business remains a mystery. The MAIP Rules, which apply to all companies participating in the residual market, do not, and should not, address every aspect of insurer decision making. It is appropriate that rulemaking develop as a response to issues of general applicability to

¹³ Comparing the changes to CAR Rules 1-20 and the MAIP Rules that CAR initially proposed in 2004 to those approved in the *December 31* and *December 13 Decisions* demonstrates an evolutionary process. The timetables for implementation have been necessarily adjusted, in part because of the appeal of the *December 31 Decision*. The *December 31 Decision*, 12, commented that implementation of the MAIP will require development of uniform procedures, and CAR would be required to issue a Manual of Administrative Procedures to address details. The *December 13 Decision*, similarly, stated that some concerns expressed by Commerce related to specific details that should be addressed to the CAR Governing Committee to iron out as the MAIP is implemented.

¹⁴ As a practical matter, in a market in which insurers compete for profitable business, a marketing strategy that emphasized rejection rather than acceptance and retention of business would be unlikely to attract consumers.

the industry; it should not replace insurer autonomy with respect to deciding issues that primarily apply to its particular business operations.

The implementation of the MAIP should not be further delayed. Rule 21 provides for a phase-in period during which the change to an assigned risk plan will be closely observed and monitored. If the MAIP Rules produce anomalies, there are mechanisms to effect changes that may be necessary to resolve problems. The change to an assigned risk plan does not affect the Commissioner's regulatory authority to fine tune the system or her obligation to ensure that it operates in accord with the statutory requirements.

At the June 15 hearing, opposition to the MAIP principally focused on a variety of additional concerns relating to consumers. Regrettably, it again was true, as we stated in the *December 13 Decision*, that such opposition was, in part, based on misperceptions about the assigned risk plan and its interface with the panoply of Massachusetts laws relating to motor vehicle insurance.¹⁵ The CAR enabling statute, G.L. c. 175, §113H, imposes only two special rules relating to eligibility for obtaining insurance in the residual market: 1) the usual operator of the vehicle must be properly licensed; and 2) the applicant or the usual operator owes no motor vehicle insurance premiums that were due within the past twelve months. In all other respects, all applicants for insurance, whether the policy is written voluntarily or in the residual market, benefit from the same General Laws and have the same rights relating to, among other issues, underwriting, nonrenewal and cancellation. The MAIP does not, and indeed could not, change the statutory rights conferred by the Legislature.¹⁶ In addition, both the current CAR Rules and the MAIP Rules themselves prohibit insurers from treating policyholders differently depending on whether the business is written voluntarily or in the residual market.¹⁷

¹⁵ The conclusions reached in our prior decisions on such issues remain unchanged. See, e.g., *December 13 Decision*, 13-14.

¹⁶ The provisions in the Massachusetts General Laws relating to the relationships between insurers and policyholders are too numerous to list here. All insureds also benefit from the consumer protections provided under statutes such as G.L. c. 176D, which governs, among other things, claim handling procedures.

¹⁷ See CAR Rule 13.B.4 (a), which states that "[f]or private passenger business, policies and other forms mailed to policyholders shall be the same as those used for non-Servicing Carrier motor vehicle business. Servicing Carriers shall provide the same level and type of service to policies issued through CAR, as they provide to policies issued voluntarily." MAIP Rule 30 B. 1 parallels this language.

Participants at the hearing continued to express concerns that adoption of the MAIP will allow insurers to reject applicants for insurance for socio-economic reasons that do not relate directly to their driving history. The MAIP does not change the principle expressed in the statute that the residual market must make insurance available to all applicants who are licensed and do not owe premiums for motor vehicle insurance during the past twelve months. Neither does it mandate any change in the process by which insurers who are members of CAR currently determine what exposures they retain voluntarily and which they cede to CAR. Under the current system, an insurer who accepts an application for insurance is not required to retain the business in its voluntary book, but may elect to cede it to the residual market. No statute or regulation prescribes bases for cession decisions; each insurer develops and applies its own rules to identify a driver that, in its opinion, presents a risk that it does not want to insure voluntarily. The MAIP does not change the insurers' ability to make such choices.¹⁸

Participants expressed particular concern throughout this hearing, as in earlier hearings, that adopting an assigned risk plan will allow insurers to underwrite using information contained in an individual's credit report. While this anxiety may be genuine, it is misplaced as connected to the introduction of the MAIP. An assigned risk plan simply will allow insurers to decline coverage to risks that they do not wish to write for a variety of reasons, so long as these decisions are not based on reasons that are prohibited by law, rather than accept the business and cede it to the residual market as they now may do. The introduction of the MAIP does not change any prohibitions about underwriting practices.

For consumers, the MAIP provides an opportunity to learn why an insurer does not want to offer them insurance voluntarily; they then may seek coverage from another company.¹⁹ Even though CAR's proposed change to Rule 26 removes the requirement that insurers advise applicants in writing of the reasons why they do not want to write them voluntarily, consumers now may ask why, and the Commissioner expects insurers to

¹⁸ Although the AG criticizes the MAIP on the grounds that it would allow insurers to reject policyholders arbitrarily, she does not explain how those decisions to reject differ from current cession decisions which are of the same ilk.

¹⁹ Under the current system for ceding policies to CAR, consumers have no opportunity to acquire such information.

provide honest answers to consumers when they ask why they have been turned down for voluntary coverage.²⁰ The *December 31 Decision* noted that fairness dictates honest answers, so that consumers can resolve any misunderstandings.²¹ Because, under an assigned risk plan, insurers will be required to convey directly to consumers their decisions about accepting business, and to provide detailed information, if asked, consumers may obtain access to information that should ultimately help them to improve their options relating to insurance coverage. The shift from cession decisions, which are not disclosed to consumers, to decisions that must be conveyed to consumers in an open and transparent transactional environment may require insurers to revise their communications strategies. These potential changes to insurers' practices in communicating with current or potential policyholders should be beneficial to consumers and are not a reason to reject the MAIP.

The MAIP does not, nor could it, alter the legislative prerogative to set underwriting standards for all applicants for motor vehicle insurance.²² The laws on underwriting standards are the same, whether the residual market retains its current form or is converted to an assigned risk plan.

The relationship between an assigned risk plan and insurance rates remained a concern for a number of participants in the hearing. Some continue to link assigned risk plans with potential premium increases for many insureds, equating the MAIP with the deregulation of insurance rates. Their argument, however, is unsupported by Massachusetts law. A principle of rate consistency for a policyholder, whether he or she is written voluntarily or in the residual market, is set out in G.L. c. 175, §113H. That statute provides that the premium for policies written in the residual market can be no higher than the premium that same risk would pay if the residual market servicing carrier

²⁰ It is in the Commissioner's discretion to decide precisely what kind of rejection notice insurers must provide applicants. *Commerce Insurance Company v. Commissioner of Insurance, supra*, at 490. The Court observed that informing consumers of the reasons for rejection might provide an incentive to high-risk drivers to improve their driving records.

²¹ The *November 23 Decision*, 32, reached the same conclusion in connection with its discussion of disclosure of residual market status to consumers.

²² See *Telles v. Commissioner of Insurance*, 410 Mass. 560 (1991) and *Life Insurance Association of Massachusetts v. Commissioner of Insurance*, 403 Mass. 410 (1988) (issues relating to insurance underwriting are held to be in the legislature's bailiwick).

wrote the business voluntarily.²³ The statute applies even if insurers file for competitive rates.

Despite discussion in past decisions, “consumer choice” under an assigned risk plan remains contentious for a variety of reasons. Characterization of “choice” as a valued aspect of the current system that will vanish under an assigned risk plan is inconsistent with current marketplace reality. Consumers now have the ability to seek insurance from a direct writer; this will not change under an assigned risk plan. In Massachusetts a preponderance of motor vehicle insurance is written through independent agents, licensed producers who either have voluntary contracts with insurers or are assigned to a single company as an ERP. Although consumers now have real choices with respect to *producers*, for most consumers that does not equate with a choice of *insurers*. A consumer who wants insurance from a particular company that is not a direct writer must locate a producer who represents that company. For consumers who prefer, instead, to obtain insurance through a particular producer, the “choice” of company is severely limited because over half of all independent agents represent only one insurance company, and all ERPs represent only one company.²⁴

Choosing an insurer is not a meaningful concept for consumers who desire to maintain a continuous relationship with a producer if that producer loses a voluntary contract with an insurer or, as an ERP, is reassigned to a different servicing carrier. Because the current system utilizes a subscription methodology based on the assignment of ERPs to individual companies, rebalancing the system requires reassignment of ERPs to different companies. Consumers written by those ERPs have no choice in the outcome and are automatically written through the new company. Policyholders who are eligible for reduced insurance rates as members of a group must accept the insurer who writes the group. For these reasons, under the current system consumer choice of insurer is best characterized as ephemeral. Consumer choice of insurer will attain real meaning only when insurers decide to offer voluntary contracts to a far greater number of producers.

²³ The statutory requirement is contained in G.L. c. 175, §113H(D)(15), and sometimes is referred to as the “Lane-Bolling amendment.” The Court’s decision in *Commerce Insurance Company v. Commissioner of Insurance*, *supra*, at 492, confirms that the assigned risk plan promulgated by the Commissioner provides for uniform pricing in conformity with the statute.

²⁴ See *November 23 Decision*, 5.

Viewed in the context of a realistic assessment of the lack of choices now available to consumers in the private passenger motor vehicle marketplace, the introduction of the MAIP does not reduce consumer choice in any meaningful way.

Some participants expressed concerns that consumers will lose access to discounts on their motor vehicle insurance. Currently, consumers may be eligible for two classes of discounts on their motor vehicle insurance premiums: those that apply to all insureds generally, regardless of what company writes the business or whether it is written voluntarily or in the residual market, and those that individual insurers elect to offer to their own customers. Adoption of an assigned risk plan does not alter the availability of industry-wide discounts, such as those related to age, safety features and low mileage.²⁵ The MAIP also does not affect the statutory rules relating to participation in group insurance offerings. Insurers must comply with G.L. c. 175, §193R.²⁶ Although the decision in the first instance to offer discounts to members of various groups rests solely with insurers, under the statute insurers must offer the discount to all members of the group who are eligible for the insurance coverage that is offered. In some cases, insurers have sought approval to deviate rates downward, as permitted under G.L. c. 175, §113B, for their own customers. As with other discounts, by statute the deviation must be made available to all eligible drivers, regardless of whether the business is written voluntarily or in the residual market.²⁷

²⁵ Some discounts are permitted by statute. See, e.g., G.L. c. 175, §113B(¶7)-(¶9); G.L. c. 175E, §4 (d)(¶3). Others have been developed as part of the methodology for fixing and establishing rates pursuant to §113B.

²⁶ The MAIP Rules do not allow insurers to place business written through a group plan in the MAIP. Commerce, operator of the largest group insurance plan in Massachusetts, argues that the MAIP should be rejected because of alleged uncertainties about the details of treating group marketing business under the plan. The issue arises in connection with the calculation of quota shares for purposes of determining a company's residual market share. Although Commerce expresses concern about the viability of the group marketing business under an assigned risk plan, the group marketing statute requires that companies demonstrate, based on data on losses and expenses for at least three years, that a group rate modification is justified. The *December 31 Decision*, 14-16, considered at length arguments raised by Commerce and the Arbella Mutual Insurance Company relating to the treatment of policies written through groups. The Supreme Judicial Court, affirming that aspect of the *December 31 Decision*, noted that under §193R, an insurer that obtains reinsurance for group business may have the experience of the group plan considered in determining its losses and expenses in accordance with the attribution rules established in the residual market plan. *Commerce Insurance Company v. Commissioner of Insurance, supra*, at 491.

²⁷ The availability of such deviations should provide an incentive to consumers to maintain accident and violation-free driving records. Insurers are, however, under no obligation to file for rate deviations.

