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Commonwealth Automobile Reinsurers'

Proposed Changes to the Rules of Operation

Docket No. C2004-02

Order on Proposed Changes to Rules of Operation 2, 9 through 14, and 17 And Rules 21 through 40

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I. STATUTORY AND HISTORICAL BACKGROUND

The Mandatory Insurance Law

Massachusetts's law has long required every person who drives an automobile to have liability insurance. M.G.L. c. 90. Since some drivers, due to various factors, cannot find insurance companies that want to insure them, it has been necessary to create other laws to support this requirement. For example, up until 1983, G.L. c. 175, Section 113E, a law known as the "take-all-comers" law, required that no insurance company could deny insurance to an individual provided the individual was "qualified" and "applied in good faith".[1] This law complemented the mandatory insurance requirement by guaranteeing the availability of insurance to the entire population.

The Creation of the Involuntary Market and CAR

In 1983, the Massachusetts legislature repealed the "take-all-comers" law by enacting Chapter 241 of the Acts of 1983, thereby no longer requiring an insurance

[1] Very few "take-all-comers" laws have existed in other states. New Jersey is one of the few other states that implemented such a law. As part of its current automobile reform, however, it is phasing out such law.

company to write insurance for every person who sought it.[2] In order to ensure that insurance would still be available to everyone since it was required under the law, the legislature created a mechanism, the "assigned risk plan", through which individuals who were unable to obtain automobile insurance in the voluntary market were able to obtain it in the residual market. It devised this mechanism by amending an already-existing statute, G.L. c. 175, Section 113H (the "Statute").

The facility through which insurance is now offered in this residual market is the Commonwealth Automobile Reinsurers ("CAR"). In addition to being a reinsurance facility, CAR manages the operations of this market through certain rules and procedures, pursuant to the Statute. All companies that sell automobile insurance are members of CAR. The legislature designated the Massachusetts Commissioner of Insurance ("Commissioner") as the sole person responsible for the oversight of this involuntary market, for ensuring that it operates in a fair manner and that the risks and losses associated with it are distributed equitably among all of its members.

Friction Between Involuntary Market Law and Other Related Laws

While these statutory changes and amendments served the objective at the time, related statutes affecting the private passenger automobile market did not dovetail well with them. Related statutes in all other states with either reinsurance facilities (similar to CAR) or Assigned Risk Plans allow for higher rates to be charged for risks insured in the involuntary market. These rate differentials exist because individuals insured through the involuntary market typically have a history of poor driving, are responsible for increased

[2] Exceptions to this rule exist. A person is not guaranteed automobile insurance if, for example, he has failed to pay any of the premiums due to his insurance carrier for the past twelve months, or if he does not hold, or is not eligible to hold, a driver's license. M.G.L. 175, Sec. 113H(A)(1) and 113H(A)(2).

losses and, therefore, are more expensive to insure. Massachusetts law, under c. 175, Section 113H(D)(fifth paragraph), however, prohibits companies from charging drivers insured in the involuntary market a higher rate than what is charged drivers in the voluntary market, regardless of the fact that drivers in the involuntary market are, as a group, costlier to insure than drivers in the voluntary market. The net result is an unsustainable market, because drivers are unaware that they are being placed in the residual market, do not pay a rate consistent with their risk, and therefore, have no incentive to improve their driving behavior.

The Statutory Rate Setting Process

Massachusetts is the only state that requires the Commissioner to set automobile insurance rates rather than permitting competitive rating. As part of the rate-setting process, the Commissioner is statutorily required to determine the insurance producers'[3] commissions. Accordingly, each year the Commissioner holds hearings over a nine-month period to determine the average statewide rate sufficient to allow insurance companies to cover losses and expenses and earn a profit. That average statewide rate is segmented into average rates for drivers in similar classes and territories. Premiums are based on class and territory rates and will vary depending on elements such as: the type and age of car that is being insured and the type of optional insurance coverage that the driver chooses. Built into the rate-setting process are subsidies that reduce the rates for certain driver classes and certain territories, and because this is a revenue neutral system, inflate the rates for nonsubsidized driver classes and territories.

[3] Individuals formerly known as "agents" and "brokers" are now called "producers" pursuant to a statutory change in 2003.

As a result of this "fix and establish" system, with its pre-constructed subsidies, Massachusetts automobile insurance rates do not vary from one driver to the next as much as they do in other states. More importantly, while the statewide rate is neither excessive nor inadequate, the rates for individual drivers can be both inadequate and excessive. Eighty-six percent of the drivers subsidize 14 percent of the drivers. Furthermore, approximately 4 percent of all drivers, primarily inexperienced urban drivers, receive a rate subsidy in excess of $500.

The Producer (Agency/Broker) Situation and Policyholder "Choice"

In the voluntary market, an individual can purchase insurance either directly from an insurance company or through an insurance producer. In most states, independent producers have contracts with many different automobile companies, providing the consumer with numerous choices. In Massachusetts, however, few producers have contracts with multiple insurance companies. Indeed, many have contracts with only one company. Because the average consumer typically purchases insurance through his producer rather than directly from an insurance company, his choice of producer can have a dramatic effect on the universe of opportunities available to him. Indeed, choice in this regard is more meaningful as it pertains to the choice of *producer* rather than to the *company*. [4]

Fifty-five percent of the producers only have contracts with one insurance company. Therefore, individuals who purchase policies through those producers actually have *no* choice as to which company writes their policies. In 25 percent of the cases,

[4] Of course, an individual could approach an insurance company directly to obtain a policy. This does allow for "choice" in the truest sense. In practice, however, Massachusetts' agency-based system is so integrally woven into the culture that most individuals only go through their producers to purchase this insurance rather than go directly to the company. It is this practice of seeking automobile insurance through a producer where choice is exercised.

producers have contracts with three or fewer companies, giving the individuals very limited choice.

Assignment in the Involuntary Market/Residual Market

In the majority of instances, if an insurance company chooses not to voluntarily retain a policy it writes for an individual, it cedes that individual risk to the residual market. This decision is made after the insurance company reviews the application, runs a model on the individual's potential for losses (known as underwriting) and decides whether it is profitable to retain the policy or to cede it. If the company determines that the consumer's business would not be profitable, it can "cede" this business to the residual market under the under the current Plan of Operations. Not only does the consumer not know about this development, but often even the producer does not know about this cession because the business is transferred directly from the company to CAR for placement in the pool. Even though the consumer's policy is ceded to the residual market, it still is written by the company and the individual gets a policy bearing the name of the company on the policy. The premium and losses from this ceded policy are pooled and shared among the member companies.

Producers for the Involuntary Market – ERPs

Some producers who write in subsidized territories have historically been unable to voluntarily secure contracts with insurance companies. Typically these producers have books of business with large volumes of inadequately priced business that companies do not wish to write for financial reasons. The legislature, in its effort to ensure the availability of insurance for everyone enacted a law, G.L. c. 175, Section 113H(C), guaranteeing contracts for producers with *at least one* insurance company,[5] notwithstanding the fact that the company may have no desire to partner with this producer.[6] Nonetheless, in order to ensure that automobile insurance is available in all geographic areas, CAR assigns these producers, known as "exclusive representative producers" or "ERPs" to insurance companies. This assignment process involves a very complicated subscription methodology that is often manipulated by companies in an effort to protect themselves from being assigned the ERPs with the worst loss ratios.[7]

Further complicating this system is the possibility that a voluntary producer can lose this status and then become an ERP. If a producer has only one contract with an insurance company and that company terminates the relationship, the producer can apply to CAR to become an ERP. The legislative intent behind the creation of the ERP system was to ensure access to insurance in the so-called "market need areas", defined as areas that are not adequately served by producers with voluntary contracts with insurance companies. However, in practice, voluntary producers who are terminated and are unable to obtain a voluntary contract with another insurance company can be appointed as ERPs by CAR regardless of whether the producer is located in a market need area or not. A former voluntary producer with a book of business consisting of low loss ratio exposures can now be added to the list of ERPs. The spread of loss ratios among the ERPs can be as low as 40 percent and as high as 400 percent. This wide variance is what motivates insurance companies to manipulate or "game" the assignment process.

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[5] The CAR rules, however, only permit an ERP to have a contract with *one* insurance company.

[6] While this law has logical underpinnings based on the goal of ensuring state-wide automobile insurance, it too has unintended consequences. For example, the law essentially guarantees employment for any individual who wishes to become a producer but who cannot voluntarily obtain a contract with an insurance company. This guarantee exists regardless of the quality and performance of this producer. It also ensures continued employment for voluntary agents whose contracts are terminated.

[7] Currently, there are approximately 750 ERPs in the automobile insurance market. They write approximately 25 percent of all of the exposures according to the Tillinghast Report.

Assignment of ERPs and Subscription

An insurance company is assigned an ERP based on a "subscription" methodology that compares the company's total market share with how many exposures the insurance company already writes through its ERPs to determine its ought-to-have share of ERP exposures. A company writing more policies than its ought-to-have share is deemed "oversubscribed", and a company writing fewer policies than its ought-to-have share is "undersubscribed". Whichever company is the most "undersubscribed" at the time that a new ERP appointment is made receives this ERP and his entire book of business. Companies try to fill their ought-to-have allotment with low loss ratio books of business for two reasons. First, these producers have profitable books, meaning they are writing better than average and generally overpriced business. Second, the losses associated with the residual market deficit are shared on a utilization basis. If a company cedes a lot of business, it pays a higher percentage of the pooled losses than its total market share. If its ERP business is better than average from a loss standpoint, it will cede less than other companies. Conversely, a carrier who is assigned an ERP with a high loss ratio book of business will cede more, thereby incurring a larger share of the pool losses.

The business of subscription is critical to a company's profitability because it determines the quality of business it inherits when it is assigned an ERP. A company has no "technical" say as to which ERP is assigned to it. Therefore, its profit margin, and its anticipated earnings (or losses) could change drastically at any given time if the company is assigned an ERP with a very large book of business that is highly unprofitable.[8]

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[8] It is important to remember that no matter how badly a producer runs his business, absent misconduct by any financial measure, he or she is guaranteed the opportunity to be a producer, as an ERP, if no company will give him a voluntary contract.

"Gaming" the System

This level of unpredictability, and its potential negative impact on a company's profitability, creates the incentive to engage in ERP arbitrage. To be caught asleep at the wheel in this game results in certain death. Furthermore, a company that has gamed the system well may have its fair share of ERPs, but has been able to assume and keep only ERPs with low loss ratios. A bizarre outgrowth of this system is that the subscription formula motivates companies to offer financial incentives to ERPs to either retain them as their ERPs because they have good books of business or to attract ERPs with favorable loss ratios from other companies. This results in the diversion of valuable capital and resources. Rather than focusing on providing superior claims handling, superior fraud detection and superior customer service, the subscription concept has provided an incentive for companies to invest time and effort in trying to finagle the formulas by which their fair share of the deficit in the residual market is apportioned among the insurance companies[9] rather than offering discounts to consumers or combating the high cost of fraud.

The system that was initially established by the legislature to ensure the availability of automobile insurance to all applicants, has morphed into a system of gamesmanship that causes serious market distortions, disruptions and has been a leading motivating cause of companies withdrawing from the market. Since 1990, the number of insurance companies writing in Massachusetts has decreased from 53 to 19. Indeed, in the last five years, 400,000 policyholders have been transferred from their initial insurance companies to other companies due to such changes. An additional 250,000 policyholders have been transferred to other companies due their companies' efforts to reduce their volume of

[9] See Credits and K Factors discussion below.

voluntary business.[10] Companies end up spending an excessive amount of financial and personnel resources attempting to manage their ERP subscription levels as a means of controlling their deficit share. ERPs are bought and sold, or voluntary agents are terminated and assigned to another carrier by CAR as an ERP. The customers of these producers are needlessly shuffled around. The competition for good drivers and the attendant deviations that consumers enjoy has been replaced by a competition to "win the subscription formula game" against other companies.

The Deficit

Once a company is assigned an ERP with all of its exposures, the company writes such exposures and then decides whether to retain the exposures or cede them to the residual market. If the exposures are ceded to the residual market, the losses are shared on a modified market share basis that takes into account how frequently a company "uses the pool". Because policies ceded to the residual market are typically above-average risks, which are often underpriced, the losses generated by ceded business exceeds the premiums received and generates a deficit. Massachusetts has the greatest deficit in its residual market as compared to other states with residual markets. The Statute is very clear that deficits associated with the residual market are to be shared among all of the insurance companies in an equitable fashion: "Such a plan shall provide for the fair and equitable apportionment among such insurance companies of premiums, losses or expenses, or any combination thereof." It is the Commissioner's statutory obligation to ensure that these losses are shared "equitably" among the companies.

[10] At the October 29 hearing, David Brussard, president of Safety Insurance Company, testified about disruption under the current system, noting that during the last five years 400,000 policyholders have changed carriers because their insurer either left the market or went out of business. He stated that another 250,000 have been moved because their carrier wanted to reduce its writings in Massachusetts.

Because insurance is mandated and rates are a function of losses, companies have a greater financial incentive to investigate suspicious claims actively if the losses are retained 100 percent on their balance sheets rather than pooled among all industry participants. Pooling mechanisms are an ineffective way of reducing losses since each company's share of that loss is pro-rated based on its market share. Indeed, for this reason, pooling mechanisms are rarely used in other states, only nine states have them; 42 jurisdictions have Assigned Risk Plans.

Credits and K Factors

In order to keep the number of policies ceded to the pool to a minimum, the CAR rules contain financial incentives and disincentives to motivate companies to voluntarily retain underpriced business. For example, if a policy is considered underpriced because it originates in a territory that is statistically a subsidized territory, CAR will give credits, based on complicated calculations, to the insurance company for retaining this policy rather than ceding it to the residual market. Likewise, if the company chooses to cede this business to the pool, it is charged a fee. This fee is effectuated through the application of a "K" Factor. Under the current system, CAR charges a company a "K" Factor of 4 if the company cedes a policy to the residual market. This means that the company must pay a penalty to CAR based on its exposure count.[11] Notwithstanding these credits and penalties, the residual market represents 7 percent of the current driver population of Massachusetts. Most states have a residual market that represents only 1 – 2 percent of

[11] A company's share of the deficit pool is based on its total market share. Market share is based on the number of exposures written by a company. As a penalty for ceding a risk to the pool, for each exposure ceded, a company's total number of exposures is increased by four, which is called the "K" Factor. By increasing the company's exposure by four, the company's" utilization" share, and therefore its share of the deficit, is increased.

their driver population. Furthermore, studies have shown that the unprecedented losses in this pool are inequitably distributed among our state's insurance companies.

History of Reform of CAR

Approximately two and one-half years ago, on June 25, 2002, Massachusetts Attorney General Thomas Reilly ("Attorney General" or "AG Reilly") issued a letter to Massachusetts Insurance Commissioner Julianne Bowler ("Commissioner" or "Commissioner Bowler") regarding the residual market and allegations of inequities therein because it was within her statutory authority to regulate this market. The Attorney General reported that he and his staff had studied the residual market and concluded that:

> . . . we believe that the CAR plan for providing access to insurance in the residual market does not comply with the CAR enabling statute, and must be changed to produce a fair and equitable market. I now write to share findings with you and to propose that we work together to develop an equitable result for policyholders and insurers in the residual market.

The Attorney General further noted that he was "writing to [the Commissioner] since [the Commissioner] may request the submission of a new plan or amendments to the CAR plan. See G.L. c. 175, Section 113H." He then invited Commissioner Bowler to work with him and his staff and with CAR members to craft a solution to the current residual market problem.

In response to this letter, the Commissioner and the Attorney General worked together to determine whether, in fact, inequities existed in the residual market, thereby violating one of the major tenets of the Statute. As part of this joint review, the Commissioner and her staff, and the staff of the Attorney General, met with industry representatives and consumer advocates for the next 24 months to study the potential problems, and possible solutions, with regard to the residual market. Consistent with this endeavor, the Commissioner directed Tillinghast/Towers Perrin ("Tillinghast") in April 2003, to conduct a thorough examination of the residual market.

In April 2004, Tillinghast issued a comprehensive report detailing its findings on the Massachusetts private passenger residual market. In short, the report concluded that the current residual market system did not provide the necessary mechanisms for distributing the residual market risks in an equitable manner:

> There is the perception in the Massachusetts [private passenger automobile] market that carriers have manipulated their ERP assignments through various means. The "low loss ratio" and "high loss ratio" ERPs are not distributed proportionately among carriers. We found instances in which carriers were writing less than half and more than double their market share of the high loss ratio ERPs. Given the high loss ratios of some ERPs, the distribution of these agencies means that the financial results of these agencies are not distributed proportionately among the carriers. Those carriers with a higher proportion of "high loss ratio" ERPs have little chance of making a profit in the state, while carriers with less than their proportionate share of these agencies have had significantly better than average results. Many carriers cite the disproportionate distribution of the ERP loss burden as an important factor in carriers' decisions to withdraw from the market, and in other carriers' decisions to not enter the market. (Tillinghast Report, P. 9).

Commissioner Bowler proceeded to issue a letter to CAR, dated April 29, 2004, in which she directed CAR to change its Rules of Operation because they:

> do not provide for the equitable distribution of private passenger automobile insurance premiums and losses among Servicing Carriers. Certain of these rules must be changed in order to provide a process that identifies and assigns private passenger automobile insurance risks of ERPs among Servicing Carriers in an efficient, fair and equitable manner without significant market disruption or adverse impact on policyholders.

This directive was issued pursuant to the provision of the Statute cited above. Additionally, she articulated a list of issues to be addressed in order to achieve the fair and equitable distribution of that burden, and ordered CAR to change specific Rules relating to CAR's residual market structure and claims oversight review.

This matter before us is the result of the Commissioner's instruction to CAR regarding changes to its rules.

II. PROCEDURAL BACKGROUND

On June 30, 2004, CAR submitted to the Commissioner an extensive set of proposed changes (the "Proposal") to the CAR Rules of Operation ("Rules"). The Proposal included amendments to Rules 2, 9 through 14, and 17, that are intended to apply to a transition period, 2005 through 2007, as well as a series of new Rules, numbered 21 through 40, that are designed to create a new Assigned Risk Plan that will begin to be phased in beginning January 1, 2006 and that will permanently replace the current residual market on January 1, 2008. In response to a request for a hearing on the Proposal filed by the Commerce Insurance Company ("Commerce") pursuant to Article X of the CAR Plan of Operation ("CAR Plan"), a hearing notice issued on July 1, scheduling a hearing for July 22. That the Proposal generated widespread interest both in the industry and in the public was demonstrated by the extensive comment on it, submitted in the form of written statements and in testimony offered by 27 individuals at the July 22 public hearing, including a statement from the Attorney General. The record remained open until July 30. During that period, several participants provided supplements to their original submissions, and people who had not been present at the hearing submitted comments.

On August 27, the Commissioner issued an order (the "Remand Order") remanding the Proposal to CAR to address concerns about, among other things, the effect of the proposed rule changes on the size of the residual market and policyholder protection issues. She noted that testimony at the July 22 hearing had raised questions about the feasibility of some aspects of the Proposal and had offered alternatives intended to improve the Proposal's effectiveness at meeting the goals of developing an assigned risk plan that would benefit policyholders, producers and companies, but would minimize market disruption during the transition to that assigned risk plan. The Remand Order also noted that the Proposal reflected significant omissions, *i.e.*, items which CAR expressly reserved for later consideration. It identified issues that, based on the testimony and proposals presented at the hearing, appeared to be most problematic and ordered CAR, on remand, to conduct further review of the Proposal and to develop revised provisions that reflected recommendations made in the Remand Order. Recognizing the need to move expeditiously based on the inequities in the residual market and the fragility of the current system, the Commissioner instructed the CAR Governing Committee to submit a Revised Proposal no later than September 24, and scheduled a hearing on it for October 4.

CAR timely submitted its new Proposal (the "Revised Proposal"). Upon examination, the Commissioner determined that, to ensure adequate time for review by interested persons, the hearing scheduled for October 4 should be continued until October 20. On October 8, CAR filed a second revision to Rule 11, which addressed the allocation of CAR expenses and the profits and losses on CAR policies among CAR members. Aware of the importance of this rule to all CAR members, the Commissioner again continued the hearing on the Revised Proposal to October 29 to allow additional time for analysis of the second revision.

CAR's Revised Proposal follows the format of the initial Proposal. Part I includes changes to Rules 2, 9 through 14, and 17, as they relate to private passenger automobile insurance and establishes new procedures for the operation of the residual market through calendar year 2007. These rules have been referred to as the "transition rules." Part II of the Revised Proposal articulates Rules 21 through 40, which govern the operation of the Massachusetts Assigned Insurance Plan ("MAIP" or the "assigned risk plan"). The MAIP, in brief, changes the residual market mechanism from a system focused on business written by a subset of producers assigned to carriers as ERPs to a system that distributes individual risks to carriers. The Revised Proposal anticipates that implementation of the new system for assigning risks will begin January 1, 2006, and that the transition to the MAIP will be complete as of January 1, 2008.

Like the July 22 hearing, the October 29 hearing was well attended. Twenty-five people made statements, including the Attorney General and three Massachusetts senators, and several others submitted written commentary. The record was left open through November 2. Several written statements were received subsequent to the hearing.

III. SUMMARY OF ORDER

A. Part I – Transition

We accept the Revised Rules as presented, with the modifications summarized below:

Rule 10

1. Establishes uniform claims handling practices for all insurance companies that are applicable to both ceded and retained business.
2. Adopts national claims handling practices as the standard, except where more stringent practices are now utilized in Massachusetts.
3. Raises the performance level that companies must meet in order to demonstrate compliance with the standards.

Rule 11

1. Established one deficit pool. The losses associated with business generated by HLR ERPs are to be allocated to each member company based on its voluntarily produced market share for a 12-month period ending June 30, 2004. The losses associated with business generated by all others will be allocated to each member company based on its pre-credit utilization ratio for the current year.

2. Financial penalties for withdrawing from the market during the transition will be calculated using the same formula as is used to allocate the losses associated with each segment of the total pool.
3. The financial penalties for exiting the private passenger automobile insurance market will be reduced because the number of deficit years for the buyout will reduce during the transition to the MAIP.

Rule 12

1. Credits to be given as mandated by statute for all business retained by companies that would ordinarily be ceded, i.e. from certain territories and classifications of drivers.
2. A subsidy clearinghouse concept is used in 2005 to allocate the portion of the deficit associated with rate subsidies.
3. A true Subsidy Clearinghouse will be implemented beginning January 1, 2006.
4. Beginning in 2006, values for the Subsidy Clearinghouse will be updated by the Commissioner annually as part of the private passenger automobile rate case.

Rules 13 and 14

1. An Agency Management Plan is required. The plan will require carriers to develop Agency Management Plans for their ERPs that are expected to improve the loss ratios of those books of business and thus reduce the CAR deficit.
2. Beginning January 1, 2005, adjusts CAR exposure count for exemption from responsibility to be Servicing Carrier from 5,000 exposures to 2 percent of total market share as of June 30, 2004.
3. Redistributes HLR ERPs and ERPs with three-year loss ratios greater than 60 percent to Servicing Carriers.
4. Allows a one-time rebalancing of oversubscribed companies from the redistribution of HLR ERPs.
5. Eliminates "subscription" system for assigning ERPs to Servicing Carriers.
6. Co-Brokering ban exempts group marketing plans.

Rule 17

1. Rewards industry for overall reduction in producer loss ratios and resulting decrease in the total deficit.
2. If total deficit is reduced, 75 percent of the savings will be divided among the Servicing Carriers, and the remaining 25 percent of the deficit will be shared among all CAR members.

B. Part II – MAIP

We accept CAR's Revised Proposal as it pertains to the MAIP with the following modifications:

1. Implements an assigned risk plan for Massachusetts that is modeled on plans in effect in most other states. Under this plan, a person who is unable to obtain insurance in the voluntary market will be assigned to a company that writes private passenger automobile insurance. The number of risks assigned to a company will depend on the company's voluntary market share.

2. Insurers must inform risks that they decline to write voluntarily of the reasons for their decisions, and tell them that they may obtain insurance through the MAIP by submitting an application through a producer of their choice.

3. Risks may not be assigned through the MAIP if they have had no at-fault accidents or traffic violations in the three years before the effective date of the policy, and have had no vehicular felonies or convictions for operating under the influence in the past five years.

4. The premiums for risks insured through the MAIP, the policy forms and the procedures followed to write the risk do not differ from those for policyholders with the same characteristics, such as driver class and territory, who are written voluntarily.

5. A company that writes an assigned risk will be directly responsible for paying losses on that policy. Through a Subsidy Clearinghouse, companies will receive credits and debits for writing business that is over- or under-priced. The new system will enable insurers to be indifferent to the risk's class and territory when deciding to write a risk, and remove the barrier to writing such business voluntarily that the current system has created.

IV. MAJOR LEGAL ARGUMENTS

A. "Take-All-Comers" Law

Both in the Memorandum of Law of The Commerce Insurance Company ("Commerce") submitted for the July 22 hearing ("Commerce's Memorandum of Law"), and in its Supplemental Memorandum submitted for the October 29 hearing ("Commerce's Supplemental Legal Memorandum"), Commerce argued that the Rules proposed by CAR for the MAIP violate the "take-all-comers" law, which Commerce states is codified in three different places: G.L. c. 175, §§ 22E, 113H and 22H.[12] We do not find Commerce's argument to be persuasive.

The Predecessor to the Current G.L. c. 175, § 22E

Prior to the enactment of 1983 Mass. Acts, c. 241, § 9, an emergency act, approved July 7, 1983, the language of G.L. c. 175, § 22E read as follows, providing only certain reasons for non-renewal of policies of private passenger motor vehicle liability insurance (emphases added):

> Every policy of insurance issued by an insurance company which provides coverage … *shall be renewed at the option of the policyholder* so long as the company is licensed to write such policies in the commonwealth, *except for nonpayment of premiums, fraud …* ; ... No insurance company, and no officer or agent thereof in its behalf, shall refuse to issue, renew or execute as surety a motor vehicle liability policy or bond, or any other insurance based on the ownership or operation of a motor vehicle because of age, sex, race, occupation or principal place of garaging of the vehicle.

With the addition of "marital status" later in 1983 as another impermissible basis for refusing to issue, renew or execute a policy (1983 Mass. Acts, c. 596, § 2), the text of G.L. c. 175, § 22E has remained the same from 1983 to the present, *viz*.:

> No insurance company, and no officer or agent thereof in its behalf, shall refuse to issue, renew or execute as surety a motor vehicle liability policy or bond, or any other insurance based on the ownership or operation of a motor vehicle because of age, sex, race, occupation, marital status, or principal place of garaging of the vehicle. A particular company may make a general reduction in volume of automobile insurance in the commonwealth if such a reduction is determined by the commissioner not to be an attempt to circumvent the purposes of this section and

[12] Since the concept of "Dual Status Producers" no longer figures in either the proposed CAR or MAIP Rules, we find that Commerce's arguments that the creation of "Dual Status Producers" violates the purported "take-all-comers" law need not be addressed.

> that the company's refusal to write motor vehicle liability policies or bonds is not contrary to the public interest by disrupting the market for said insurance in the commonwealth. Any company which does not intend to issue a renewal policy shall give written notice of its intent not to issue a policy for the ensuing policy period in accordance with the provisions of section one hundred and thirteen F and such notice shall specify the reasons for such nonrenewal.

What Commerce does not explain with regard to its assertion that this statute contains a "take-all-comers" law is why the Legislature would feel the need to prohibit insurers from refusing to issue, renew or execute a motor vehicle liability policy or any other insurance based on the ownership or operation of a motor vehicle because of age, sex, race, occupation, marital status, or principal place of garaging of the vehicle if there were ***no*** legally permitted reasons for denying a policyholder a policy providing private passenger motor vehicle liability coverage, other than the two listed in G.L. c. 175, § 113H(A), *i.e.*, failure to pay an insurance company private passenger automobile liability insurance premiums due or contracted during the preceding twelve months or ineligibility to obtain an operator's license. In particular, we are not persuaded that the Legislature would consider the list of prohibited reasons for not issuing a policy so important that it would bother to enact legislation (1983 Mass. Acts, c. 596, § 2) in order to add the words "marital status" to the first sentence of G.L. c. 175, § 22E if there were ***no*** legally permitted reasons for denying a policyholder a policy providing private passenger motor vehicle liability coverage ***in any event***, except for the two reasons listed in G.L. c. 175, § 113H(A). The Commerce argument that Massachusetts still retains a "take-all-comers" law renders the prohibitions contained in G.L. c. 175, § 22E mere surplusage. We decline to see the important limitations imposed by G. L. c. 175, § 22E as mere surplusage.[13]

The "take-all-comers" law under the Predecessor to the Current Version of G.L. c. 175, § 113E

[13] In note five of its decision in Maryland Cas. Co., v. Commissioner of Ins., 372 Mass. 554 (1977), the Supreme Judicial Court noted as follows (emphasis added):

> The deputy commissioner concluded that Maryland Casualty could have revoked its notices of cancellation territory and driver class combination as of December 15, 1975, and thus brought itself into conformity with the law. Maryland Casualty does not deny that it could have done so but argues that by that date many, if not most, existing policyholders would have obtained alternative coverage, leaving only the "worst" of its policyholders without coverage. ***Such an argument has no merit if Maryland Casualty was legally obligated to renew existing policies, and its "worst" policyholders did not fall within the permissible grounds for nonrenewal provided by G. L. c. 175, Section 22E.***

Maryland Cas. Co., v. Commissioner of Ins., supra at 560, n.5. In understanding and appreciating the significance of this comment, it must be remembered that the Court in the Maryland Casualty case, dealt with the text of G. L. c. 175, § 22E as it existed in 1976. Prior to 1983 Mass. Acts, c. 241, § 9, § 22E read as follows (emphasis added):

> Every policy of insurance issued by an insurance company which provides coverage as described in section thirty-four O of chapter ninety; or coverage against loss or damage to, or loss of use of, a motor vehicle resulting from collision, fire, lightning, larceny, pilferage, theft, malicious mischief, vandalism or other perils usually insured against; or provides personal injury protection or which insures any person against legal liability for loss or damage on account of the bodily injury or death of any other person or on account of any damages to property of another, arising out of the ownership, maintenance, control or use of a motor vehicle including motor vehicle liability policies, as defined in section thirty-four A of chapter ninety, ***shall be renewed at the option of the policyholder*** so long as the company is licensed to write such policies in the commonwealth, ***except for nonpayment of premiums; fraud or a material misrepresentation in the application for insurance or renewal thereof, or unless the operator's license or motor vehicle registration of the named insured or of any other person who resides in the same household as the named insured and who usually operates a motor vehicle insured under the policy has been under suspension or revocation during the policy period;*** or in the case of a particular insurer a general reduction in volume of automobile insurance in the commonwealth is determined by the commissioner not to be an attempt to circumvent the purposes of this section. No insurance company, and no officer or agent thereof in its behalf, shall refuse to issue, renew or execute as surety a motor vehicle liability policy or bond, or any other insurance based on the ownership or operation of a motor vehicle because of age, sex, race, occupation or principal place of garaging of the vehicle. Any company which is authorized not to issue a renewal policy because of the exceptions contained in this section shall give written notice of its intent not to issue a policy for the ensuing policy period in accordance with the provision of section one hundred and thirteen F of this chapter.

Even a cursory review of this provision manifests how different it is from G. L. c. 175, § 22E as it now exists. Indeed, this very difference supports the views we take of the current laws regarding the issuance and renewal of private passenger motor vehicle liability insurance policies in Massachusetts.

By 1973 Mass. Acts, c. 551, § 4, approved July 27, 1973, and by § 7 made effective Nov. 1, 1973, a "take-all-comers" law was enacted by the Massachusetts Legislature as an amendment to G.L. c. 175, § 113E. Following the 1973 legislation, G.L. c. 175, § 113E provided in relevant part:

> (a) No insurance company shall refuse to issue or execute as surety a motor vehicle policy or bond both as defined in section thirty-four A of chapter ninety, ***to any person applying in good faith for such policy or bond***, on a standard form prescribed by the commissioner for any reason; except that no insurance company shall be required to issue such policy or execute such bond if:
>
> (1) The applicant or any person who usually drives the motor vehicle has failed to pay an insurance company any motor vehicle insurance premiums due or contracted during the preceding twelve months; or
> (2) Any person who usually drives the motor vehicle does not hold or is not eligible to obtain an operator's license.

However, this "take-all-comers" law was repealed by the Legislature in 1983. 1983 Mass. Acts c. 241, § 13, an emergency act, approved July 7, 1983, deleted the entirety of the language enacted in 1973 and replaced it with the language still in force today, *viz.*:

> Nothing in this chapter shall be construed to prohibit an insurance company, its agent or any broker, from requiring a deposit premium before issuance of a policy or execution of a bond, providing the per vehicle deposit does not exceed thirty per cent of the annual premium or the full short term premium for the insurance requested, whichever is less, unless the applicant has been in default in the payment of any premium for automobile insurance during the preceding twenty-four months.

Thus, G.L. c. 175, § 113E currently does not provide a "take-all-comers" law for private passenger automobile liability insurance policyholders. It should be noted, however, that the two enumerated reasons for declining to write a private passenger automobile liability policy that appeared in the old superceded version of § 113E now appear in G.L. c. 175, §§ 113H(A)(1) and (2), the provisions dealing with a plan by which to provide private passenger automobile liability insurance to those policyholders who cannot obtain such insurance on the voluntary market.

G.L. c. 175, § 22H

Both in Commerce's Memorandum of Law and in Commerce's Supplemental Legal Memorandum, Commerce asserts that G.L. c. 175, § 22H guarantees an individual Massachusetts private passenger motor vehicle liability insurance policyholder the right to require any particular private passenger motor vehicle liability insurer to provide that policyholder with a policy. We do not agree. G.L. c. 175, § 22H provides as follows (emphases added):

> If any company refuses to issue motor vehicle liability policies or bonds as set forth in sections thirty-four A and thirty-four *O* of chapter ninety without a written determination by the commissioner that such refusal, which may be a refusal in whole or in part, is justifiably required to protect the solvency of the refusing company, the commissioner shall hold a public hearing at which the company may appeal the commissioner's initial determination concerning solvency and at which shall be considered whether the company's refusal to write motor vehicle liability ***policies or bonds*** is contrary to the public interest by disrupting the market for said insurance in the commonwealth. If the commissioner finds, on the basis of said public hearing, that the company's refusal is not justified by the protection of solvency and is contrary to the public interest, he shall suspend such company's licenses to issue or sell any other form of insurance within the commonwealth until such company resumes the issuance or renewal of motor vehicle liability ***policies or bonds*** in compliance with the laws and rules and regulations prescribed by the commissioner. For purposes of this section, a refusal to issue motor vehicle liability ***policies or bonds*** shall be sufficiently evidenced by a single notice of cancellation or non-renewal for grounds other than those specifically permitted in the general laws.

The defect in Commerce's arguments concerning G.L. c. 175, § 22H is that Commerce ignores the statute's focus on policies and bonds, ***plural***, within the context of the Massachusetts insurance market; not on an individual's right to obtain a policy from a particular insurer. Section 22H addresses a situation where an insurer refuses to write ***any policies*** of private passenger motor vehicle liability insurance in Massachusetts rather than a refusal to write a specific policy, the occurrence of which may be proved by that insurer's refusal to write or reissue even one such policy. See Maryland Cas. Co., v. Commissioner of Ins., 372 Mass. 554 (1977). Based on our review of the language and history of § 22H, we are convinced that the focus of § 22H is the public goal of ensuring the continued participation of automobile insurance companies in the market. This requirement is particularly important in light of our law mandating insurance for all drivers. It is further necessary in order to keep market disruptions to a minimum.

The sole provision of § 22H that speaks to an individual policy is the provision that pertains to what constitutes sufficient proof of an insurer's failure to issues policies or bonds, proof of a single notice of each territory and driver class combination or non-renewal, for grounds other than those specifically permitted in the general laws, being established as constituting sufficient proof. Despite this evidentiary provision, we find that the focus of § 22H nevertheless is an insurer's actions in the market as a whole.[14] We find

[14] Case law supports our understanding of G.L. c. 175, § 22H. In the only reported case in which the Massachusetts Supreme Judicial Court addressed § 22H, the Court described § 22H as providing an evidentiary standard and a minimum basis for action by the Commissioner:

> We agree with the Commissioner's determination as to the applicability of the December amendment to the proceedings in this case. While the nonrenewal notices mailed on December 3, 1975, to Maryland Casualty policyholders are, under the terms of Section 22H, sufficient evidence to show a refusal to issue, the evidentiary standard thus provided does not purport to define the entirety of the violation which will give rise to proceedings under this section. A violation of Section 22H occurs when the notices of nonrenewal or cancellation territory and driver class combination are sent to policyholders, and a single

that § 22H provides no guarantee to the individual policyholder. The standard in § 22H is "disruption of the market," and the sole sanction for violation of § 22H is contained in § 22H. Maryland Cas. Co., v. Commissioner of Ins., 372 Mass. 554, 571, n. 16 (1977); Frontier Management Co. v. Balboa Ins. Co., 622 F. Supp. 1016, 1020 (1985) (Section 22H provides an express remedy, which is the suspension of licenses to issue or sell any form of insurance within the Commonwealth.). Since, as a practical matter, the refusal to write only one policy for one policyholder could not conceivably result in a disruption of the entire marketplace for personal passenger motor vehicle liability insurance in the Commonwealth, and since § 22H provides no private remedy, we find that § 22H does not provide a "take-all-comers" entitlement for individual policyholders.

Further, § 22H states that a refusal to issue the policies or bonds shall be "sufficiently evidenced by a single notice of **cancellation** or **non-renewal** for grounds other than those specifically permitted in the general laws" (emphasis added). Under this part of the statute, evidence of refusal to issue a policy is limited to evidence of *non-renewal* or *cancellation*, not evidence of an actual refusal to *issue a* policy in the *first instance*. This is consistent with our interpretation of the purpose of §22H, which is to

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such notice is a sufficient basis on which the Commissioner may hold a public hearing as provided by this section.

The statute provides merely the minimum basis for action by the Commissioner, indicating the Legislature's intent that the Commissioner be empowered to take action prior to the actual effective date of nonrenewal or cancellation in the interest of protecting the stability of the market and the interests of Massachusetts insurance consumers. Section 22H in no way confines violation of its provisions to the happening of one particular event at one discrete point in time; refusal to issue without the required written determination by the Commissioner that such refusal is justifiably required to protect the solvency of the company is a continuing violation which begins when the cancellation or nonrenewal notices are sent to policyholders and which extends to the actual effective date of the cancellation or nonrenewal.

Maryland Cas. Co. v. Commissioner of Ins., 372 Mass. 554, 559-60 (1977).

minimize disruption in the marketplace. Cancellation or non-renewal of policies is far more disruptive than the refusal to issue a single policy in the first instance.

Finally, by citing to “grounds other than” those allowed under other general laws, the Legislature appears to be acknowledging that there are other reasons in the laws to permit non-renewal or cancellation in addition to those reasons identified in § 113H. Had the Legislature intended to limit those other reasons to only those articulated in § 113H, it would have cited specifically to §113H, rather than alluding to other legal reasons for the cancellation or non-renewal in the general laws.

G.L. c. 175, § 113H

Commerce asserts that a “take-all-comers” law mandate is contained in G. L. c. 175, § 113H. We disagree. We find that § 113H(A) provides two reasons why an insurer may decline to issue a policy of automobile insurance, but we are not persuaded that these reasons are exhaustive. We find these reasons are in fact reasons for which a policyholder can be denied coverage even from the very plan intended to offer a source for automobile insurance for those policyholders otherwise unable to get such insurance by any other means or from any other source. In other words, § 113H(A) are the exclusive reasons (see emphasized phrase below) why a policyholder may not be able to get private passenger motor vehicle liability insurance in Massachusetts, ***at all, period***. In part, G. L. c. 175, § 113H(A) provides as follows (emphasis added):

> (A) Insurance companies undertaking to issue motor vehicle liability policies or bonds, both as defined in section thirty-four A of chapter ninety, shall cooperate in the preparation and submission of a plan which shall provide motor vehicle insurance to applicants who have been unable to obtain insurance through the method by which insurance is voluntarily made available; ***except that***

> ***the plan shall provide that no insurance company shall be required to issue such policy or execute such bond if***:
> (1) The applicant or any person who usually drives the motor vehicle has failed to pay an insurance company any motor vehicle insurance premiums due or contracted during the preceding twelve months; or
> (2) Any person who usually drives the motor vehicle does not hold or is not eligible to obtain an operator's license.

We find that the very terms of G.L. c. 175, § 113H presuppose that there will be Massachusetts policyholders who cannot obtain insurance voluntarily, which would not be the case if Massachusetts were still a "take-all-comers" jurisdiction.[15] In this regard, G.L. c. 175, § 113H(E) provides in relevant part as follows in the twelfth and final paragraph of that provision:

> The plan shall adopt performance standards for claims handling and anti-fraud efforts, including but not limited to programs to control costs and expenses . . . for risks insured or reinsured by the plan. The plan shall provide for periodic audits of all members of the plan as required by the commissioner. ***The audit shall include policies not insured or reinsured by the plan in order to determine whether there is a difference in claims handling between policies insured voluntarily and those insured or reinsured by the plan.*** …

We find that this language would be meaningless, nonsensical surplusage if, because of a "take-all-comers" law, no Massachusetts policyholders could exist who had

[15]Although CAR was silent on this issue, we further note that this interpretation is also inconsistent with what appears to be CAR's belief and practice. Specifically, Rule 13.A.1.a(1) states that only carriers with 5,000 or more reported written property damage liability exposures are required to become servicing carriers in the private passenger automobile insurance market. Carriers with fewer than 5,000 PDL exposures are not required to become servicing carriers and it appears they are not required to write business that would be ceded to the residual market. It is curious why Commerce, which has had a seat front and center at CAR's Governing Committee for several years, or any other company for that matter, has never raised this issue before.

been denied voluntary coverage, and therefore no Massachusetts policyholders could exist who were "***insured . . . by the plan***" (emphasis added).

G.L. c. 175, § 113F

Commerce neither explains nor discusses why the Legislature would need to create a mandate requiring an insurer to inform a policyholder that he could get a policy through the residual market if he could not get it a policy from the voluntary market (G.L. c. 175, § 113F), if no insurer could turn down a policyholder except for the two reasons stated in G.L. c. 175, § 113H(A) (failure to pay an insurance company private passenger automobile liability insurance premiums due or contracted during the preceding twelve months or ineligibility to obtain an operator's license). In part, G.L. c. 175, § 113F provides as follows (emphasis added):

> Any company which does not intend to issue, extend or renew a motor vehicle liability policy … in favor of the insured or the principal named in an existing policy … shall …give written notice of its said intent … Such notice shall be in a standard form prescribed by the commissioner and shall include the following statement: This notice shall not be deemed a refusal under section one hundred and thirteen D of chapter one hundred and seventy-five of the General Laws of the commonwealth of Massachusetts to issue a motor vehicle liability policy or to execute a motor vehicle liability bond as surety.
>
> …
>
> The insured or principal ***shall be advised*** in any such notice that, in accordance with the provisions of the plan established by section one hundred and thirteen H, he shall be eligible for nonrenewed coverages if he is unable to obtain such coverages by the method which insurance is voluntarily made available.

We find that it is illogical to require that an insurer inform the policyholder that he is eligible for insurance coverage through § 113H when the policyholder is turned down, if the insurer, in fact, lacks the authority to turn down the policyholder. If an insurer cannot turn down a potential customer, the notice that is required by § 113F is nonsensical.

Position Taken By the Division of Insurance

While Commerce argues that the Division has purportedly acknowledged that Massachusetts is a "take-all-comers" jurisdiction (see Commerce's Supplemental Legal Argument, page 12, footnote 10, and Commerce's Memorandum of Law, pages 15-16), Commerce makes no mention in its arguments of the statements made in the "Overview of Chapter 241 of the Acts of 1983" issued by Joan A. Gerrity, then-General Counsel for the Division. Under the heading "A. Guaranteed Availability" to Section II of this Overview ("Insured's Access to Automobile Insurance"), General Counsel Gerrity discussed the abolition of the previous Massachusetts "take-all-comers" law when the Legislature amended G. L. c. 175, s.113E and G. L. c. 175, s.113H in 1983:

> Prior to Chapter 241, every automobile insurer doing business in the Commonwealth was obligated to issue a policy to any qualified applicant who applied in good faith. Pursuant to G. L. c. 175, s.113E, insurers could refuse to issue a policy only if the applicant had failed to pay premiums due in the preceding twelve months or did not hold a valid driver's license.
>
> Chapter 241 amends G. L. c. 175, s.113E, the "take-all-comers" law,[16] and guarantees availability through a new residual market plan. Every qualified applicant is still able to obtain automobile insurance, but not necessarily from the company of his/her choice. Insurance companies which

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[16] In Maryland Cas. Co., v. Commissioner of Ins., 372 Mass. 554 (1977), the Deputy Commissioner of the Division of Insurance who issued findings against Maryland Casualty Company found, *inter alia*, that (emphases added): "(2) Maryland Casualty violated G. L. c. 175, Section 22E, by refusing to renew insurance policies at the option of the policyholder ***for reasons other than those specified as permissible under that section;*** (3) Maryland Casualty violated G. L. c. 175, Section 113E, by refusing to issue automobile insurance policies ***for reasons other than those provided by that section*** . . .." Id. at 557. The historical context of these positions is significant, however, since the Maryland Casualty case predates the 1983 amendments to G.L. c. 175, §§ 22E and 113E, by which the "take-all-comers" law was removed/abolished from Massachusetts law, as previously has been discussed in this Order (see pages __________ above) and as was stated by the General Counsel of the Division of Insurance in the text to which this footnote is attached/appended.

> are appointed to act as Servicing Carriers for the new residual market plan must accept any qualified applicant as was required of all companies in the past. G. L. c. 175, s.113H, as amended by St. 1983, c. 241, s.17. …

We find that Commerce's argument that the Division has embraced the notion of a "take-all-comers" law subsequent to 1983 to be not only unfounded, but incorrect.

Position Taken By the Attorney General

Commerce also argues that the Attorney General has operated under the auspices of a "take-all-comers" law. While Commerce points to a "5 day letter" (Exhibit M), an Assumption of Discontinuance, which by its very terms "does not constitute a finding or admission of any violation of Massachusetts law" (Exhibit BB) and a press (news) release (Exhibit FFF), Commerce cites no official Opinion of the Attorney General that states/finds that Massachusetts as of the present has a "take-all-comers" law. Accordingly, we find Commerce's argument to be unpersuasive.

B. <u>113H's Purported Prohibition Against Informing Insureds of Their Assignment to the Involuntary Market</u>

In both of Commerce's Memoranda of Law, it argues that CAR's Revised Rules may result in notification to the insured that his or her policy has been placed in the involuntary market, in violation of the fifth paragraph of Section 113H(C), which provides that a Servicing Carrier "may not endorse or declare that the policy is underwritten by the plan." G.L. c. 175, § 113H(C). Commerce's Supplemental Legal Memorandum, pages 14-15; Commerce's Memorandum of Law, page 10.

We do not find Commerce's argument to be persuasive. First, it makes two large and unjustified extensions of the actual prohibition contained in the fifth paragraph of G.L. c. 175, § 113H(C). Commerce ignores how such a reading of the prohibition is at odds with other policyholder notification requirements in Massachusetts automobile insurance laws. Second, Commerce has taken the quoted prohibitory language out of the transitional context within which the Legislature articulated the prohibition.

The first unjustified extrapolation is that it inflates a prohibition on ***endorsing*** or ***declaring*** that a policy is underwritten by the residual market plan into a purported broader provision that signifies/means that a Servicing Carrier is prohibited from ***informing***, ***notifying*** or ***telling*** an insured that he or she has been placed in the involuntary market. This distinction is meaningful and we find this extension to be unsupported by law and unwarranted by common sense and common language usage. The terms "endorse" or "declare" as used in the fifth paragraph of G.L. c. 175, § 113H(C) are to be understood as terms of art within the context of insurance law. We find that it would constitute highly unusual language usage to use the word "declare" when referring to the act of informing, notifying or telling someone of something. The way that the phrase is stated, furthermore ("may not endorse or declare that the policy is underwritten by the plan"), with no reference to the recipient of the declaring or endorsing, we find is yet another indication that a public documentary act by the Servicing Carrier is what is prohibited; not a communication directly with the insurance policyholder.

The Legislature knows how to require that a policyholder be advised, notified or told of something. See, in this regard, the Legislature's clarity in Chapter 175, § 113F (emphasis added): "***The insured or principal shall be advised*** in any such notice that . . . he shall be eligible for non-renewed coverages if he is unable to obtain such coverages by the method which insurance is voluntarily made available." See also G.L. c. 175, § 22E: "Any company which does not intend to issue a renewal policy shall give written notice of its intent not to issue a policy . . . and such notice shall specify the reasons for such non-renewal."

Furthermore, Commerce's argument ignores the possibility that the objective of Section 113H(C) is to prohibit a Servicing Carrier from endorsing or declaring that the policy is technically *underwritten* by the Plan *per se*. The Legislature may not have wanted consumers who became insured through the Plan to be confused that their policies were actually underwritten by the Plan when, in fact, the policies continued to be issued by the company who wrote the policy and on such company's letterhead. Under the MAIP, there is no potential for confusion in this regard because the policies will be assigned directly to the companies.

For all these reasons, we find that what is prohibited by the fifth paragraph of G.L. c. 175, § 113H(C) is (1) an "endorsement" of the policy that states that the policy is underwritten by the residual market plan or (2) a "declaration" on the declarations page for the policy ("dec sheet" or "coverage selection page") that states that the policy is being underwritten by the residual market plan. An endorsement or a declaration that a policy is underwritten by the plan would be a documentary act by a Servicing Carrier that would be published to the world, marking a policy for all to see.

In contrast, we find that the act of informing a policyholder that his policy is being underwritten in the residual market not only constitutes good policyholder law, but also constitutes good insurance law. It complements and furthers the public policy of disclosure to the policyholder that is manifested in G.L. c. 175, § 113F, which requires that an insurer ***must notify*** a policyholder that he can get a policy through the residual market if he cannot get it from the voluntary market: (emphasis added):

> Any company which does not intend to issue, extend or renew a motor vehicle liability policy . . . in favor of the insured or the principal named in an existing policy . . . shall . . . give written notice of its said intent . . .Such notice shall be in a standard form prescribed by the commissioner and shall include the following statement: ""This notice shall not be deemed a refusal under section one hundred and thirteen D of chapter one hundred and seventy-five of the General Laws of the commonwealth of Massachusetts to issue a motor vehicle liability policy or to execute a motor vehicle liability bond as surety."
> The insured or principal ***shall be advised*** in any such notice that, in accordance with the provisions of the plan established by section one hundred and thirteen H, he shall be eligible for non-renewed coverages if he is unable to obtain such coverages by the method which insurance is voluntarily made available.

The manner in which Commerce urges us to read and understand the prohibition stated in the fifth paragraph of G.L. c. 175, § 113H(C) makes no sense since the law ***requires*** that a policyholder be told that he or she cannot obtain a policy through the voluntary market when he or she is told that a policy can be obtained through the residual market plan. We find that the law is not so nonsensical that it would ***require*** that a policyholder be told that he cannot obtain a policy through the voluntary market, but can through the residual market, and then, having been told this, would prohibit the same policyholder from being told that he or she in fact has obtained insurance after all through that residual market.

Informing a policyholder that his policy is underwritten in the residual market also constitutes good insurance practice, since the policyholder may be motivated to address the reasons (*e. g.*, poor driving record) that explain why he cannot obtain a policy in the voluntary market. We find that this general policy of disclosure to the insurance policyholder is further manifested under G.L. c. 175, § 22E, which provides in relevant part as follows:

> "Any company which does not intend to issue a renewal policy shall give written notice of its intent not to issue a policy for the ensuing policy period in accordance with the provisions of section one hundred and thirteen F and such notice shall specify the reasons for such nonrenewal."

Commerce's argument ignores the resulting conflicts with the policyholder notification requirements found elsewhere in Massachusetts automobile insurance laws if Commerce's proposed reading of the prohibition contained in the fifth paragraph of G.L. c. 175, § 113H(C) were adopted.

The second unjustified extension that Commerce makes is the inflation of a prohibition on a ***Servicing Carrier's*** endorsing or declaring that a policy is underwritten by the residual market plan into a purported broader provision that means that ***no one*** may notify an insured that he or she has been placed in the residual market. We find this to be unsupported by law and unwarranted by common sense. We find it to be far more likely that an insurance policyholder will interface with a producer rather than having any direct dealings with a Servicing Carrier, outside of the receipt of the carrier's paperwork (declaration, dec sheet or coverage selection page and policy). Indeed, we find it probable that this explains why the prohibition of the fifth paragraph of § 113H(C) is stated in terms of prohibiting the Servicing Carrier from ***endorsing*** or ***declaring*** that the policy is underwritten by the plan, rather than by stating that the Servicing Carrier is prohibited from ***informing***, ***notifying*** or ***telling*** the policyholder that the policy is underwritten by the plan. If the Legislature truly intended that policyholders could not be told that their policies were underwritten by a residual market plan -- to protect their self-esteem by reason of the "stigma of being rejected by carriers and being placed in the involuntary market" (Commerce's Memorandum of Law," page 11) -- it would have prohibited ***producers*** from telling the policyholder, since producers are the people with whom policyholders interact most frequently.

In any event, there is a more fundamental reason why we find Commerce's arguments about the fifth paragraph of § 113H(C) to be unpersuasive. Commerce's Memorandum of Law accurately quotes language from the fifth paragraph of § 113H(C), but Commerce omits the all-important context for the quoted language. G.L. c. 175, § 113H(C)(fifth paragraph) in its entirety provides as follows (emphasis added):

> ***In order to insure an orderly transition from the existing plan***, the plan shall provide for assignment of licensed agents and brokers, as far as is practicable, to a Servicing Carrier through whom such agent or broker is currently writing a substantial portion of his private passenger automobile insurance business and such carrier shall service such agent or broker under substantially the same contractual terms and conditions governing their normal agency relationship and may not endorse or declare that the policy is underwritten by the plan.

By its very terms, the prohibition on endorsing or declaring that a policy is underwritten by the plan is temporal in that it only applies to a transition period, a period long past since the current language of § 113H(C) was enacted by 1983 Mass. Acts, c. 241, § 17. We find it to be significant that this fifth paragraph of G.L. c. 175, § 113H(C) is the only paragraph of G.L. c. 175, § 113H(C) that contains this prefatory language. Indeed, nowhere else in the entirety of G.L. c. 175, § 113H is there a similar limitation on the operation of a provision contained in the section. This circumstance persuades us that the Legislative intention was that the prohibition on a Servicing Carrier's endorsing or declaring that a policy is underwritten by the plan applies only to a transition period, a period long since past.

In conclusion, we find that to read and understand the fifth paragraph of § 113H(C) as Commerce argues that it should be, not only ignores the transitional nature of the provision patently stated by the Legislature, but also improperly generalizes ("the consumer cannot be told") the specific prohibition contained in the paragraph ("such carrier . . . may not endorse or declare that the policy is underwritten by the plan"), so that it makes no sense in light of other required disclosures required in the private passenger automobile insurance context (*i. e*., G.L. c. 175, §§ 113F, 22E) and is contrary to general policies favoring policyholder information, requiring that more, rather than less information be provided to policyholders.

C.<u>The Rules in the CAR's Revised Proposal Do Not Violate the Enabling Statute of G.L. c. 175, §113H</u>

In Commerce's memoranda of law, it argues that the Rules proposed by CAR for the MAIP violate the enabling statute that created G.L. c. 175, § 113H. We do not find these arguments Commerce to be persuasive.

Commerce has argued that the scope of § 113H is restricted by the title of the Act that amended G.L. c. 175, § 113H in 1973. The title of Mass. Acts, c. 551, § 5 is: "AN ACT RESTRICTING THE RIGHT OF INSURANCE COMPANIES TO CANCEL OR REFUSE TO ISSUE AUTOMOBILE INSURANCE POLICIES AND ESTABLISHING A PLAN OF REINSURANCE AMONG THE COMPANIES." We find that § 113H is much broader than Commerce asserts and that this title would suggest.

The Supreme Judicial Court has stated that a legislative enactment's "title may be considered in determining the construction of a statute whose terms are such as to render its meaning ambiguous and uncertain" but that the title to a statute "cannot limit its

Commonwealth v. Tilley, 306 Mass. 412, 417 (1940). Although the title to a statute may be considered in determining its construction, its apparent scope and extent cannot be restricted by the title itself. Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 501 (1938); Inspector of Buildings of Watertown v. Nelson, 257 Mass. 346, 350 (1926). Thus, the Court of Appeals found that the title of an Act that read "AN ACT REQUIRING PAYMENT OF DETERMINED WAGES TO OPERATORS OF TRUCKS AND OTHER EQUIPMENT RENTED FOR USE ON PUBLIC WORKS," did not mean that only contracts in the nature of a rental were within the scope of the statute thereby enacted, when the entirety of the language of the statute was taken into account. Perlera v. Vining Disposal Service, Inc., 47 Mass. App. Ct. 491 (1999). The title of the Act, the Court reasoned, could not be treated as a reliable interpretive guide to the substantive provisions, because to confine the statute to rentals would ignore the broader connotation of terms that appeared in the statute, violating the maxim that no portion of a statute's language may be deemed superfluous. . Id.

Following these guidelines for statutory construction, we find that the plain language of G.L. c. 175, § 113H does not justify the restrictive reading that Commerce urges. Indeed, we note that the twelfth paragraph of G.L. c. 175, § 113H(E) refers to policies "***insured*** or ***reinsured*** by the plan" (emphasis added). We find that § 113H provides no strictures regarding the mechanism of the plan authorized by § 113H, although there are several requirements about the provisions that must be addressed by any § 113H plan. On the other hand, the object and the goal of any plan established pursuant to the authority of § 113H is clearly stated; the focus being on the goal, not on the methodology:

> (A) Insurance companies undertaking to issue motor vehicle liability policies or bonds . . . shall cooperate in the preparation and

> submission of a plan which shall provide motor vehicle insurance to applicants who have been unable to obtain insurance through the method by which insurance is voluntarily made available . . . Such a plan shall provide for the fair and equitable apportionment among such insurance companies of premiums, losses or expenses, or any combination thereof.

In achieving these functions and goals, the statute is very specific about some of the provisions that a § 113H plan must contain. For example, § 113H specifies the minimum coverages that a § 113H plan must offer; § 113H(A); that there must be a governing committee for a § 113H plan; § 113H(B); that every producer must be assigned to at least one Servicing Carrier, a term that is not defined and eligibility for which status is delegated to the plan; § 113H(C); that a § 113H plan must include guidelines for an installment payment plan; § 113H(C); and that a § 113H plan must annually provide for territorial and classification credits; § 113H(C).

The first thing that we find to be striking about the scope and flexibility of G.L. c. 175, § 113H is the way that the statute merely refers to "a plan," without describing it at any point in the thirty or so paragraphs of the statute as a plan of reinsurance, a joint underwriting association, a reinsurance facility or an assigned risk system. Indeed, the statute even authorizes changes in the plan enacted pursuant to § 113H from time to time based on events in the marketplace. Thus, the third paragraph of § 113H(E) sets out the steps by which a § 113H plan can be amended:

> Amendments to such plan shall be prepared and filed in the same manner as herein provided with respect to the original plan. Such amendments, unless sooner approved or disapproved in writing by the commissioner, shall be deemed to meet the requirements of this section in thirty days from the date of filing. The commissioner shall, prior to the disapproval of any such amendments, issue a notice specifying in what respects the amendments do not meet the requirements of this section and fixing a date for a public hearing

> thereon, at which insurance companies and any other parties having a direct interest shall have an opportunity to be heard.

The provision just quoted highlights another principal of statutory construction that Commerce overlooks; that statutes, such as G.L. c. 175, § 113H, that are framed in general terms commonly look to the future and may include conditions as they arise periodically not even known at the time of enactment, provided they are fairly within the sweep and the meaning of the words and fall within their obvious scope and purpose. Degrenier v. Reid, 47 Mass. App. Ct. 783, 785; Hayon v. Coca Cola Bottling, Co. of N.E., 375 Mass. 644, 649 (1978).

In this regard, the seventh paragraph of Section 113H(E) specifically empowers the Commissioner of Insurance to act if the distribution of "***risks*** or ***expenses*** or ***losses of risks"*** is currently unfair and inequitable:

> The rules for such plan shall require that separate statistical data be recorded for risks insured in the plan and may provide incentives and penalties to prevent abuse of such plan. The rules for such plan shall also include a provision giving the commissioner authority, after due hearing and investigation, to order that any company he finds using practices which have the effect of distributing risks or expenses or losses of risks unfairly and inequitably on other companies or agents or brokers be assigned a share of the expenses and losses of said risks to insure a fair and equitable distribution. The commissioner may relieve any insurer of a part or all of its obligations under the plan, if he finds that continuation of such obligations would threaten the solvency of such insurer.

It was just such a finding of unfairness and an inequitable condition in the sharing of risks, losses and expenses that motivated the Commissioner to initiate the process that has lead to the new Rules that are promulgated by this Order.

The fourth and fifth paragraphs of § 113H(E) specifically empower the Commissioner to promulgate her own § 113H plan "as [she or] he finds will best carry out the purposes of" § 113H (emphases added):

> If the commissioner shall have requested the submission of a new plan or amendments to the plan, and no such plan or amendments have been filed with and approved by the commissioner within sixty days after such request, the commissioner may, if he deems it necessary to carry out the purposes of this section, prepare and publish proposed amendments or a proposed plan ***that in his opinion would carry out the purposes of this section***. He shall submit a copy of such proposed amendments or proposed plan to the joint committee on insurance at the time of publication, and shall schedule a public hearing thereon not less than ten days after the publication thereof. After such hearing the commissioner may promulgate such plan or amendments thereto ***as he finds will best carry out the purposes of this section***.
> When such plan or amendment has been approved **or** ***promulgated***, no insurer may thereafter issue a motor vehicle policy or bond unless such insurer shall participate in such an approved or promulgated plan.

This statutory reference to the promulgation of a § 113H plan we find manifests that the Legislature clearly contemplated the possibility and allowed for the promulgation of a § 113H plan established by the Commissioner without further statutory action. We therefore find unpersuasive Commerce's argument that the changes made by this Order must instead be made, and only can be made, by further Legislative action. The legal definition of "promulgate" includes "[a]n administrative order that is given to cause an agency law or regulation to become known and obligatory." Black's Law Dictionary 1214 (6^{th} ed., 1990). We find that this use of the term must be the intended meaning of the statutory language when it is considered in light of § 113H as a whole. Furthermore, we note that for a statute to note that a later statute could amend it would be quixotic, since this is axiomatic. We note, moreover, that the breadth of the Commissioner's powers and discretion in regulating the insurance industry has recently been upheld by the Supreme Judicial Court. Attorney General v. Commissioner of Ins., No. SJC-09219 (Mass. filed November 16, 2004)(Commissioner has "wide discretion" in making final determinations in automobile rate setting process); see also Aetna Cas. & Sur. Co.v. Commissioner of Ins., 408 Mass. 363, 378-79 (1990)(court gives deference and "due weight to the commissioner's experience, technical competence, specialized knowledge, and discretionary authority"). Indeed, the court in Attorney General v. Commissioner of Ins., 442 Mass. 793 (2004) recognized the breadth of discretion that the Commissioner possesses when she statutorily responds to "new conditions" and strives to "improv[e] a market climate where the number of insurance companies willing to underwrite automobile policies in Massachusetts is declining". Id. at [ ].

The rules that the Commissioner is promulgating by this Order have been carefully crafted after exhaustive deliberation and are, we find, designed to better provide the functions and achieve the twin goals of any plan that is promulgated pursuant to § 113H: "to provide motor vehicle insurance to applicants who have been unable to obtain insurance through the method by which insurance is voluntarily made available" and to "provide for the fair and equitable apportionment among such insurance companies of premiums, losses or expenses, or any combination thereof." We find that there is nothing incompatible between the creation of a plan such as the MAIP and the requirement of fair and equitable apportionment of losses from the residual market. A fair and equitable assignment of individual risks should result in a proportionate sharing of loss and expense among insurers. Furthermore, if this is not achieved in the first instance, the Rules for the MAIP provide appropriate corrective measures.

D. The Commissioner Does Not Lack the Authority to Create the MAIP.

Commerce argues that the creation of the MAIP would violate the provision of Section 113H, mandating the existence of a residual market structure through the "apportionment among such insurance companies of premiums, losses or expenses, or any combination thereof." G.L. c. 175, § 113H(A). Part I.B. of Commerce's Supplemental Legal Memorandum (pages 9-10). We do not find this argument to be persuasive, because we do not find that the reference to premiums, losses or expenses in § 113H(A) dictates or limits the ways in which the § 113H(A) can be structured but, rather, states the goals and functions of a plan crafted under § 113H.

Indeed, the seventh paragraph of Section 113H(E) specifically empowers the Commissioner of Insurance to act if the distribution of "***risks*** or ***expenses*** or ***losses of risks"*** is currently unfair and inequitable:

> The rules for such plan shall require that separate statistical data be recorded for risks insured in the plan and may provide incentives and penalties to prevent abuse of such plan. The rules for such plan shall also include a provision giving the commissioner authority, after due hearing and investigation, to order that any company he finds using practices which have the effect of distributing risks or expenses or losses of risks unfairly and inequitably on other companies or agents or brokers be assigned a share of the expenses and losses of said risks to insure a fair and equitable distribution. The commissioner may relieve any insurer of a part or all of its obligations under the plan, if he finds that continuation of such obligations would threaten the solvency of such insurer.

It was just such a finding of unfairness and an inequitable condition in the sharing of risks, losses and expenses that motivated the Commissioner to initiate the process that has lead to the new Rules that are promulgated by this Order.

Furthermore, the fourth and fifth paragraphs of § 113H(E) specifically empower the Commissioner to promulgate her own § 113H plan "as [she or] he finds will best carry out the purposes of" § 113H (emphases added):

> If the commissioner shall have requested the submission of a new plan or amendments to the plan, and no such plan or amendments have been filed with and approved by the commissioner within sixty days after such request, the commissioner may, if he deems it necessary to carry out the purposes of this section, prepare and publish proposed amendments or a proposed plan ***that in his opinion would carry out the purposes of this section***. He shall submit a copy of such proposed amendments or proposed plan to the joint committee on insurance at the time of publication, and shall schedule a public hearing thereon not less than ten days after the publication thereof. After such hearing the commissioner may promulgate such plan or amendments thereto ***as he finds will best carry out the purposes of this section***.
> When such plan or amendment has been approved **or promulgated**, no insurer may thereafter issue a motor vehicle policy or bond unless such insurer shall participate in such an approved or promulgated plan.

We find that this statutory reference to the promulgating of a § 113H manifests that the Legislature clearly granted the Commissioner statutory authority to promulgate a § 113H plan without further statutory action. We also refer back to our supporting statements in Section A of Legal Arguments regarding the Commissioner's broad authority in this regard.

E. The MAIP Rules Do Not Constitute Regulations.

Commerce also argues that the Commissioner lacks the authority to create an assigned risk plan under G.L.c. 175, §113H because the regulations creating the plan fall outside the ambit of the enabling statute. In addition, Commerce alleges that the "regulations" conflict with §113H. We are persuaded that Commerce's argument is based on a misinterpretation of the Statute.

CAR's authority to promulgate Rules of Operation does not directly reside in §113H. Rather, §113H mandates the creation of a "plan" to govern the residual market. The plan mandates the creation of the Rules of Operation, and articulates a specific procedure for the promulgation of the Rules. The Rules are not regulations, and are not promulgated under G.L. c. 30A, which is the statute governing the promulgation of regulations. Indeed, several courts have already ruled on this issue, finding that the CAR Rules do not constitute regulations. Hanover Insurance Co. v. Bender, member, et al, Civil No. 02-01277-BLS2 (Suffolk Super. Ct, October 20, 2004)(Judge Botsford agreed with the prior decisions that CAR is an "unincorporated association", not a governmental agency, and that its rules are not regulations subject to the statutory provisions governing their promulgation) *See also* CAR v. Allstate Ins. Co., No. 90-12620-K(D. Mass.Jan. 22, 1992); Peerless Ins. Co. v. Aetna Casualty & Surety Co., No. 87-490-D (D.N.H. May 4, 1990); Liberty Mut. Ins. Co. v. Commissioner of Ins., Civil No. 01-5464 BLS (Suffolk Super. Ct. March 31, 2003) (van Gestel, J.), Utica Mut. Ins. Co. v. Comm'r of Ins., Civil No. 90-0539D (Suffolk Super. Ct. Sept 25, 1991) (White, J.). Indeed, it is the opinion of these hearing officers that this entire proceeding is not governed by the Administrative Procedure Act of M.G.L. c. 30A.

F. Retroactivity is Not an Issue with Regard to this Order.

Commerce further argues that the CAR rules are regulations which have been promulgated retroactively in violation of the state and federal constitutions, and that the impact of the rules impacts vested contract rights between companies and their producers. CAR argues that companies would have made different business decisions had they known of the retroactive impact of the regulations. As decided above as an initial matter, CAR rules do not constitute regulations. Nor do the proposed CAR rules have any retroactive implementation date. Rather, the proposed CAR rules use historical data in order to equitably allocate the deficit generated by ceded business. Commerce's argument that it might have made different business decisions is precisely why it is vital to use historical data in the allocation methodology. The mandate of §113H is to have a plan that equitably distributes the premiums, losses and expenses of the residual market among the companies in a "fair" and "equitable" manner. Allowing a company lead time to manipulate the system allows for gaming, and would allow a company to reduce its share of the deficit to the detriment of other companies. This is precisely what has been happening under the current system, and what led to the exodus of many companies from the market and the resulting crisis in the private passenger automobile industry in Massachusetts today. Using historical data from twelve-month period ending June 30, 2004 prevents any company from being able to manipulate the system to reduce its share of the deficit, and will force the deficit to be distributed equitably, as mandated by the statute.

V. DISCUSSION AND ANALYSIS OF PART I OF THE REVISED PROPOSAL

As a preliminary matter, the Remand Order addressed the need for technical changes to the CAR Rules to reflect related statutory changes. For example, the Massachusetts General Laws were recently changed to provide for a "producer" licensing system rather than a system in which "agents" and "brokers" are separately licensed. The "agent" and "broker" language needed to be changed to the term "producer" throughout the Proposal. No objections were voiced to such changes at the July 22 hearing. Furthermore, in an effort to provide as much clarity on these issues as possible, we have identified the exact language that we have adopted in the body of this Decision. We also have attached to the Decision, a complete set of Rules that should be implemented with the changes detailed herein.

The Remand Order examined each of the proposed changes, identified the Commissioner's concerns, and issued comments that were intended to provide guidance to CAR in preparing its Revised Proposal. This order adopts that model. For each rule, we have examined how the Revised Proposal differs from the initial Proposal, and whether it addresses the issues raised in the Remand Order. We have also considered and incorporated testimony given at the October 29 hearing including, but not limited to, CAR's answers to specific questions from the Commissioner about the Revised Proposal, and testimony submitted after the hearing but prior to the closing of the record. Article X of the CAR Plan permits the Commissioner, if she disapproves the rules that CAR has submitted at her request, to promulgate, after a hearing, such rules, as she deems necessary for the efficient and equitable operation of CAR. To the extent that the Commissioner disapproves portions of the Rules, as submitted in the Revised Proposal, this order will incorporate revisions or amendments to those Rules that the Commissioner deems necessary for the efficient and equitable operation of CAR. CAR is to distribute the Rules that the Commissioner approves, as revised and amended, to its members. A public comment hearing regarding these Rules will take place on December 17 at the Division.

Rule 2. Definitions.

CAR's Initial Proposal. CAR's original Proposal added definitions of "Designated Servicing Carrier" ("DSC") and "High Loss Ratio Exclusive Representative Producer" ("HLR ERP") to the Rules.

The Remand Order. The Remand Order suggested that CAR specify a methodology for calculating an ERP's loss ratio in the definition of HLR ERP. In addition, a "Subsidy Clearinghouse" was created and defined in Rule 12, but was not defined in Rule 2. Other undefined terms appeared in various places in the Proposal so we recommended CAR add them. These included "rehabilitation plan" and/or "high loss ratio improvement plan," "assigned risk plan" and "new business".

CAR's Revised Proposal. CAR resolved most of our requests for additional definitions. The term "Rehabilitation Plan" remains undefined, as does "Assigned Risk Plan". In addition, the definition of "New Business" is somewhat ambiguous. A new question arose regarding the definition of "Paid Loss Ratio Incentive Plan" that we addressed with CAR at the October 29 hearing.

Discussion. The term "Rehabilitation Plan" is not defined and is used several times in Rules 13 and 14. During the October 29 hearing, CAR clarified that such term was meant to be, in essence, a best practices plan and, therefore, could be more appropriately called an "agency management plan". CAR also testified that it was intended to apply to all ERPs, not only to HLR ERPs.

CAR defined "New Business" broadly as "business with the same policy origination date and policy effective date that is new to a company". We find this definition to be overly broad and could lead to gaming and market disruption during the transition, so we narrow it in the order. With regard to the "Paid Loss Ratio Incentive Plan", we suggested to CAR at the October 29 hearing that the definition be amended to include language so that it is a plan for additional reimbursement to Servicing Carriers for improvement to the collective loss ratio and reduction in the deficit pool not associated with the rate subsidies.

Order. Accordingly, Rule 2 shall include the following definitions:

"Agency Management Plan": "A plan jointly developed between each ERP and its carrier which must include the requirements in Rules 10, 13 and 14, and may include, as appropriate, practices identified in the High Loss Ratio Improvement Plan in the Manual of Administrative Procedures."

"Market need area" is to be defined as those territories where the current rate subsidy averages 10 percent or more.

"New Business" is ordered to be defined as "business that is new to Massachusetts, the policyholder not previously having been licensed or insured in the past ninety days in Massachusetts, and who can also provide evidence of licensing in a jurisdiction outside of Massachusetts or a new driver and who has not been previously licensed in any jurisdiction and who is obtaining his or her own policy".

"Paid Loss Ratio Incentive Plan" is to be defined as "the additional reimbursement paid to Servicing Carriers for the overall improvement in the ultimate paid loss ratio (excluding the effects of rate subsidy) for all ceded business.

In addition, as these terms become relevant in Rule 12 as discussed below, we order that "Subsidy" be defined in Rule 2 as "for the purposes of the operation of the Subsidy Clearinghouse established by Rule 36, for a given year the rate established for each territory and driver class combination in the subsidy matrix calculated annually by the Automobile Insurers Bureau of Massachusetts which compares the rate decision of the Commissioner for that year to the actual cost based rate for that territory and driver class combination".   "Subsidy Clearinghouse" shall be defined as "the method by which positive and negative rate subsidy values, by class, territory and coverage will be allocated to Members".

We also order that the sentence "The objectives of such plans shall be developed jointly" by the Servicing Carrier and the HLR ERP be inserted between the first and second sentences in the definition of "High Loss Ratio Improvement Plan", consistent with CAR's testimony at the October 29 hearing. Finally as discussed in detail in Rules 13 and 14, the proposed definition Designated Servicing Carrier shall be deleted.

Rule 9. Audit Review.

CAR's Initial Proposal. The Proposal adds to the current rule the authority to audit policies written by a member of CAR, or any other entity subject to the CAR Plan and Rules, for anything that has a bearing on deficit sharing, as well as on credits or penalties. The proposed rule also extends review and audit authority of CAR to any successor entity to CAR.

Discussion. No objections were voiced to the proposed changes to Rule 9, and we note no concerns.

Order. We accept CAR's Rule 9 in its entirety.

Rule 10. Claim Practices.

Rule 10 governs the handling of insurance claims by Servicing Carriers and the implementation of internal mechanisms, such as internal audits and the establishment of internal special investigative units to detect potentially fraudulent claims. It provides requirements that insurance carriers must meet in their handling of insurance claims in order to ensure prompt and reasonable payment of such claims. These requirements are also intended to expose, and minimize, the number of fraudulent claims that exist in the automobile insurance industry. Uniform claim practices in this area are necessary due to the fact that the costs that arise from fraudulent insurance claims are shared among all drivers in the form of the rate that is set under statutory rate setting process.

CAR's Initial Proposal. In summary, CAR's Initial Proposal required the Governing Committee to establish procedures for the review of claim practices of Servicing Carriers, to ensure compliance with CAR's Performance Standards for the Handling and Payment of Claims by Servicing Carriers, and to monitor Servicing Carriers' performance. It required CAR to review both voluntary and involuntary (ceded) business in conducting periodic audits of claim practices. A requirement was added obligating carriers to conduct internal claim quality audits of their involuntary market similar to audit procedures for their voluntary business. This Proposal also required carriers, on their internal audit reports of their claims departments; to consolidate comments relating to both voluntary and involuntary business claims adjustment, rather than permitting them to do so at their discretion.

The Remand Order. The Remand Order observed that CAR's amendments to Rule 10 would ensure that carriers employ consistent claims handling practices with respect to both involuntary and voluntary market claims, thereby ensuring the fair treatment of all policyholders and the minimization of payments on excessive or fraudulent claims, whether the policies are written voluntarily or involuntarily. Furthermore, the Commissioner suggested that CAR, to ensure that claims handling procedures in Massachusetts conform to national standards, incorporate into Rule 10 a requirement that performance measures, such as the acceptable error rate, be consistent with those established by the National Association of Insurance Commissioners and, to ensure compliance, provide for an adequate enforcement mechanism.

CAR's Revised Proposal. CAR's Revised Proposal adds to the first paragraph of Rule 10 the statement that: "NAIC guidelines are incorporated where applicable into the Performance Standards." Section A.1 is enlarged to require Servicing Carriers:

> "[u]pon receipt of a new claim, investigate policy information for garaging, listed operator, prior accidents, or any other issues. Information developed may be used to affirm or deny claim payments. Discrepancies shall be communicated to the Underwriting Department and the premium recalculated and billed if appropriate and in accordance with Division of Insurance requirements."

It adds to section A.5 the requirement that the carriers' special investigative units "shall also conduct an audit on a representative sample of policies to verify garaging and policy facts." The Revised Proposal also adds subsections (10), (11) and (12) to Rule 10.A. Those subsections, respectively, require Servicing Carriers: 1) to have direct telephone reporting available for first and third party claims; 2) to provide producers with a list of approved inspection services for conducting pre-inspections and to establish underwriting criteria for pre-inspection of vehicles that would normally be exempt in accordance with 211 CMR 94.05; and 3) to offer training on claim reporting and fraud recognition to producers. Subsection (11) (a) further specifies that Servicing Carriers will not be allowed to waive pre-inspections if the same owner requests physical damage coverage after a lapse in coverage or if such coverage is requested on any vehicle over ten model years old in contrast to 211 CMR 94.05.

Discussion. At the October 29 hearing, CAR was questioned as to why it failed to adopt the NAIC's specific measures of performance standards as recommended in the

Remand Order. Mr. Trovato of CAR stated that CAR had identified certain provisions of the NAIC standards that were not as stringent as the standards currently incorporated into Massachusetts practice. For example, on a PIP claim CAR requires personal contact with the injured person within 48 hours, while most states only require a company to mail a claims form to the injured person within five to ten days. Furthermore, CAR stated that it expected to impose on Servicing Carriers higher standards, ranging from eighty to ninety percent, for measuring compliance with the CAR performance standards.[17] Mr. Trovato also noted that the error tolerance level under the NAIC performance measure standards is ten percent for procedures and seven percent for claim resolution.[18] In addition, he explained that CAR's sampling technique differs from that of the NAIC in that CAR only reviews policies on which claims have been made and the NAIC guidelines provide for random reviews of all policies, some of which have no claims. CAR observed that changing its procedures to comply with the NAIC's standards in this regard would result in very few differences. CAR also highlighted that its proposed enforcement mechanisms for Servicing Carriers that do not meet the performance standards is similar to those of the NAIC's, because CAR's Performance Standards Manual also incorporates a penalty program. Changes to that manual will be approved by the Governing Committee and sent to the Commissioner for her approval.

[17] CAR publishes a manual of Performance Standards for the Handling and Payment of Claims. The manual addresses such items as time standards for claims payments, and standards for investigating claims. Compliance is determined through a process of reviewing answers to questionnaires, file selection, and statistical data. The first time a carrier fails to comply with the standards, it receives a warning; in subsequent years it may be fined.

[18] The NAIC standards to which Mr. Trovato referred relate to market conduct examinations of insurance companies, and state that the tolerance level, used to contain the size of the statistical sample, should be not more than ten percent for procedures except those tied to claim resolution, and not more than seven percent for claim procedures. The NAIC also points out that these levels do not signify that the regulator should be tolerant of that level of error.

CAR clarified that the reference to "Division of Insurance requirements" in subsection A.1 is to Division Bulletin 99-02. CAR agreed that the language referring to the Division's requirements could be removed from the Revised Proposal. Further addressing the additions to Rule 10A.1, CAR commented that the provision for direct telephone reporting is directed at policyholders and is intended to reduce the time for implementing the claims handling process. It noted that companies generally send information on claim reporting forms to policyholders with their policies, and that CAR would hold training sessions with its member companies and ERPs to educate them about this provision.

On the issue of pre-inspections, the Revised Proposal incorporates and redrafts as Rule 10.A (11) a provision of the High Loss Ratio Improvement Plan referred to in the Initial Proposal. That provision instructed Designated Servicing Carriers to develop underwriting guidelines for pre-inspection of vehicles that would normally be exempt under 211 CMR 94.06. The Remand Order, in its discussion of Rule 13, expressed concern about that requirement, noting that the Improvement Plan did not make clear which exemptions from the pre-inspection requirement it intended to address. It also noted that, if CAR had concluded that 211 CMR 94.06 exemptions should be revised, it would be appropriate for CAR to seek such change in the form of a request for a regulation change.

The Revised Proposal is responsive to the Remand Order, to the extent that it identifies two specific areas of the regulation that the new rule is intended to address. CAR's Revised Proposal removes a Servicing Carrier's discretion to require or waive pre-inspection in two specified circumstances and instead establishes bright line requirements, which will, in those circumstances, permit no exemption from pre-inspection or waiver.

CAR stated that the purpose of the revision is to prohibit insurers from waiving the pre-inspection requirement for vehicles over ten model years old and when there has been a lapse in physical damage coverage, because CAR views those categories as fraud indicators. The changes impose neutral rules applicable to all policyholders. For insurers, the proposed change to uniform and immutable requirements removes discretion and, with it, the need to extensively document the reasons for requiring an inspection under two circumstances.

The Revised Proposal, however, raises three concerns. First, CAR has offered no reason for shifting this requirement to a rule relating to claims handling practices rather than retaining it with other Servicing Carrier requirements in Rule 13.B. Second, in the second sentence of the first paragraph of Rule 10.A.11, CAR limits approved inspection services to those that "have passed the Servicing Carrier's quality control audits as required by 211 CMR 94.13." This regulatory provision requires insurers to maintain records on costs and savings related to pre-inspection requirements and establishes that they are responsible for monthly auditing of inspection reports. It also requires insurers to provide their "authorized representatives" who conduct pre-insurance inspections, except producers, with status reports that include the number of incomplete or incorrect reports. The regulation does not characterize these as quality control audits, or set performance standards for such inspections. Furthermore, it excludes producers from any audit requirements. Ensuring quality inspection services is an appropriate and admirable goal, a reference to 211 CMR 94.13, as currently drafted, is inadequate to achieve it, however. Third, CAR has not addressed the question of consistency between subsection (a) of the revised rule and current regulatory requirements. Under 211 CMR 94.04, an insurer may not issue physical damage coverage on a private passenger motor vehicle unless it has inspected the vehicle. Currently, 211 CMR 94.05 exempts some vehicles from this pre-inspection requirement and 211 CMR 94.06 permits insurers to waive inspections under two specific circumstances. 211 CMR 94.05 permits insurers to require an inspection of an otherwise exempt vehicle, provided the decision is reasonable, is supported by objective facts, is not based on factors such as, among other things, the age, sex or race of the applicant, and the reasons for requiring an inspection are documented in writing and placed in the applicant's policy record. 211 CMR 94.06 allows insurers to waive inspections if the vehicle is over ten model years old. As with a decision to inspect an otherwise exempt vehicle, decisions to waive inspection must not be based on prohibited factors and the reasons for the waiver must be included in the applicant's policy record. The pre-inspection requirement does not apply if the applicant for physical damage coverage is an existing customer of a producer, and a waiver may be granted if the applicant has been a customer of the producer for at least three years under a Massachusetts automobile insurance policy that included physical damage.

Because proposed Rule 10.A.11(a) substitutes an obligation not to waive for discretion to waive pre-inspection under two scenarios, it is inconsistent with the current regulation. Moreover, if the applicant whose coverage lapses remains a customer of a particular producer, the revised rule appears inconsistent with the regulation+.

The last new subsection to Rule 10.A.1 requires Servicing Carriers to provide training for producers. CAR has agreed that it is appropriate to add time limits for conducting such training and to expand the requirement to cover producers and their staff.

Order. With the following changes and exceptions, we will approve the text of Rule 10, as it appears in the Revised Proposal. In the first paragraph, the full name of the NAIC will be articulated. At the end of the first paragraph, the following sentence will be added: "An error tolerance rate of ten percent (10 percent) for procedures and seven percent (7 percent) for claims resolution, will be implemented and enforced." In Rule 10.A.1, the phrase "and in accordance with Division of Insurance requirements" shall be deleted.

CAR has added language to Rule 10.A.5 that enlarges the responsibilities of the Servicing Carrier's Special Investigation Unit to include audits of a representative sample of policies. The language is approved but, because it does not relate to claims handling, has been removed and added to Rule 13.A.3.a(5), which addresses the responsibilities of Servicing Carriers and their SIUs. Similarly, CAR's proposed Rule 10.A.1(11) does not relate to claims handling and has been removed from that section, added to Rule 13.B, and renumbered as subsection (q).

Further refinements need to be made to this provision as it will appear in Rule 13.B. We approved the first sentence of the first paragraph of the proposed rule that requires Servicing Carriers to provide producers with lists of approved inspection services for conducting pre-inspections. The second sentence of the first paragraph and Subsection (a) are disapproved at this time for the reason that they are in conflict with regulations. Finally, Rule 10.A.1(12) is amended to add the words "and their customer service representatives" to the first sentence and to add the following language regarding time limits: "Such training shall be completed for current producers and customer service representatives within six months of approval of this rule, and for new producers and customer service representatives within six months of licensing or employment."

G. L. c. 175, §113H, (C) (iv) requires CAR to submit performance standards to the Commissioner at least once every two years. Although such changes were most recently approved on October 30, 2003, in light of the Proposals to change the Rules, CAR is ordered to submit revisions to its Claims Procedure Manual that include, but are not limited to, performance measures and penalties for failure to comply with those measures, to the Commissioner no later than January 15, 2005.

Rule 11. Assessments and Participation.

Rule 11 governs the allocation of the profits and losses, and the expenses, in the residual market among the member companies. It provides for a series of methods in which such calculations are to be made. Further, Rule 11 provides the penalty that a company must pay to CAR if it withdraws from the automobile insurance market.

CAR's Initial Proposal. CAR's initial proposed Rule 11 divided the current deficit pool into two pools for 2005 through 2007: one for all business ceded by ERPs, the other for business ceded by non-ERP producers, each with a different method for sharing the deficit. In addition, a new formula was created to address the penalty imposed on a company withdrawing from the automobile insurance market, based on the company's estimated share of the total residual market burden over the three-year period following its withdrawal. The penalty included the company's share of the non-ERP/Dual Status Producer deficit, the ERP deficit, and the MAIP obligations.

The Remand Order. CAR conceded that its proposed Rule 11 would likely have caused a significant increase in the size of the residual market, which we have specifically stated is unacceptable. We directed CAR to make certain changes to address this issue, including a reassessment of the proposed K factors[19] for different types of business, consideration of using a company's "ought to have share" in determining its participation ratio for the sharing of the HLR ERP deficit, the creation of a two-tiered producer system and proposed penalty for withdrawing companies.

CAR's Revised Proposal. CAR's Revised Proposal again creates two deficit pools, one for HLR ERPs, and one for all other ERPs and voluntary producers. For the HLR ERP pool, premiums, losses and expenses would be shared based on the company's voluntary agent and direct written market share for the prior calendar year. In calculating the company's deficit participation ratio, the proposed rule does not offer credits to a company for retaining business produced by HLR ERPs. Such adjustment does exist, however, in the calculation of the participation ratio for the other deficit pool consisting of risks ceded by all producers other than HLR ERP producers. The K factor for HLR ERP business would be zero.

In addition, CAR proposes to use lagged data[20] to distribute the deficit associated with HLR ERPs. At the October 29, 2004 hearing, CAR was asked to explain the value of using lagged data to distribute the deficit, as it appeared that using the carriers' voluntary market share figures at a definite point in time and applying that constant for each of the three years would be a better deterrent to market manipulation during the transition. Mr. Trovato testified that an annual calculation would be more responsive to events in the market, but he agreed that an approach using the commissioner's recommended time period of July 1, 2003 through June 30, 2004 for the three-year period would be workable.

[19] The "K factor" refers to the penalty that the company must pay for ceding business to the residual market.
[20] "Lagged" data is non-current data.

Because the HLR ERPs are proposed to be reassigned among a limited number of Servicing Carriers, the rule provides that any company excused from the servicing of HLR ERPs will have those exposures that are serviced on its behalf counted as if they were written by the excused entity.

The revised rule regarding HLR ERPs also maintains the minimum allowable rule for companies who are reducing their voluntary writings in the state. Like the initial proposal, this provision applies a reduced penalty for exit by the use of a 1.0 K factor rather than a 4.0 K factor.

The second deficit pool, which consists of all other ERPs and voluntary agents, is to be shared based on a company's participation ratio as defined in the rule. For this calculation, unlike that for the HLR ERP pool, a company's pre-credit utilization ratio and participation credits are used to determine the final participation ratio, similar to the current approach. The K-factor in this formula for voluntary agents is set at nine. The K factor for the other ERPs (non-HLR ERPs) would be five, nine or thirteen, depending on certain circumstances. Non-HLR ERPs will be assigned a K factor for cessions based on the three-year average claims frequency for the agency.

One of the goals of restructuring the residual market is to motivate carriers to offer voluntary contracts to ERPs. In an effort to accomplish this, 15 percent of the exposures of an ERP who is given a voluntary contract will be excluded from the definition of ceded exposures in calendar year 2005, which will result in more carriers offering ERPs voluntary contracts. In 2006, the free cedes for ERPs receiving a voluntary contract drop to 10 percent of exposures. Ceded exposures for SDIP risks of step 20 and above, and ceded exposures for inexperienced operators would remain excluded from the definition of ceded exposures.

The financial barrier for exiting the private passenger automobile market will be reduced because the number of deficit years for the buyout will reduce over the course of the transition. Because we are transitioning to an assigned risk plan, which is intended to be fully operational by 2008, the three-year buyout under Rule 11.B.4 would decrease annually as the full implementation of the MAIP draws nearer. For example, for a carrier electing to leave in 2006, the buyout would consist only of obligations for 2007 as the MAIP would be in place in 2008 and there would be no new CAR obligations as of that date.

The proposed rule further reduces the financial penalty for exit because it sets the withdrawing company's participation ratio[21] for the three year period as the company's pre-credit utilization ratio as determined in Rule 11.B.2.e[22], which is the formula for determining the ratio for the voluntary agent and non-HLR ERP deficit. The voluntary agent and non-HLR ERP deficit is the smaller of the pooled deficits. It is unclear from the proposed rule as to whether the buy-out is based on applying the pre-credit utilization ratio determined in 11.B.2.e to the deficit attributable to business ceded by other ERPs and voluntary agents or the entire deficit attributable to all business ceded.

Discussion. The Revised Proposal makes significant improvements to the Initial Proposal, and incorporates some of the recommendations from our Remand Order. Certain problems remain, however.

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[21] This formula is extensively detailed in Exhibit 4 of the SRB's testimony at the July 22 hearing.
[22] We note that CAR erroneously cites 11B.2.c rather than 11.B.2.e.

The proposed method of using different allocation methods for assessing each company's share of the deficit associated with HLR ERP business and the deficit produced by other ERPs and voluntary producers seems like a clear and careful approach to distributing the deficit fairly among all carriers. After careful consideration, however, we do not consider this the equivalent of maintaining two distinct deficit pools. The deficit allocation method for HLR ERPs makes sense because the deficit from these agencies will be eliminated once the MAIP is fully operational. Time has proven that assigning agencies such as these to single carriers cannot be done fairly. Since drivers, not agencies, will be assigned to companies under the MAIP, it is appropriate to fix each company's participation in these agencies throughout the transition period. The deficit allocation method for other ERPs and voluntary agents mirrors the dynamics in the current market that will continue when the MAIP is fully implemented. The allocation of the smaller deficit levels associated with these agencies is more appropriately based on total market share since a number of the features of this reform are designed to make the majority of the business serviced by these agencies truly "voluntary" from the carrier's perspective. We discuss this in more detail below.

Chapter 175, §113H of the Massachusetts General Laws requires that carriers be given appropriate credits for retaining any business that would ordinarily be ceded, regardless of who produced that business. In short, the Statute is clear that credits apply to individual risk and are not based on producer type. Accordingly, CAR's proposed rule does not meet the statutory requirement. The purpose of providing credits is to ensure that no driver class or territory is disproportionately represented in the residual market. Credits should be provided to carriers who retain business generated by HLR ERPs in a manner consistent with credits offered for the retention of business generated by other producers. Failure to provide these credits would likely result in a disproportionate number of policyholders in certain territories and of certain classifications in the pool.

When drivers from certain territory and driver class combinations are disproportionately represented in the ceded pool, the net rate subsidy in the underlying ceded premium does not equal zero. At present, the net subsidy in the premium ceded to the pool is negative. This means that a portion of the deficit associated with the pool is actually just the net negative subsidy. This, in turn, implies that the net subsidy of all the business retained (not ceded) is greater than zero. Because rate subsidies are established to balance to zero statewide, the net retained subsidy should be equal to the net ceded subsidy.

Since the credit system is intended to recognize the number of underpriced risks (negative subsidy) that a company has voluntarily retained, the best way to adjust deficit share for this practice is to allocate the deficit that results from subsidy based on the ratio of a company's total net retained subsidy to the total net retained subsidy of the industry. This also has the benefit of explicitly preventing member companies who are not Servicing Carriers from "skimming" the best risks (who pay more in rate as a result of subsidy) and pocketing the subsidy as profit.

Calculating the deficits associated with ceded business net of subsidy provides a more accurate picture of the actual losses associated with this business, and a more appropriate baseline from which to measure improvements obtained through heightened scrutiny of claims and also allows us to target the problem.[23]

[23] Commerce argues against CAR's revised proposal on a number of grounds, including the lack of credits available for retained HLR ERP business in violation of G.L. c. 175,§113H and the allocation of the deficit

In calculating a carrier's share of the HLR ERP deficit pool in its proposal, CAR proposed using lagged data. To prevent market manipulation during the transition, we think it a better approach to use data from the period July 1, 2003 through June 30, 2004 as it will fix every company's share at what it was at the time of CAR's submission of its Initial Proposal to the Commissioner. To calculate a carrier's share of that part of the deficit generated by other ERPs and voluntary agents, we accept CAR's proposal that the calculation be determined as a function of a carrier's pre-credit utilization of the residual market using a sliding K factor for non-HLR ERPs, and a fixed K factor for business produced by voluntary agents or directly written. The Proposed Rules do not address deficit participation for new entrants to the market.

While this proposal appears to introduce a two-tiered agency system, the objective and workings of the Revised Proposal are distinctly different from the initial proposal. First, the Revised Proposal does not incorporate the concept of dual status producers. The Revised Proposal recognizes only voluntary and ERP agencies. The sliding K factor for ERPs, in conjunction with the "free cede" options to ERPs who are given voluntary contracts, was designed for the express purpose of increasing the number of voluntary producers, thereby decreasing the number of ERPs.

Secondly, the sliding K factor proposal was developed in response to the Remand Order, that specified that the proportion of vehicles ceded to the high-risk pool could not more than double during the transition period.

In order to ensure that carriers do not create disruption by leaving the market during this transition period, the financial penalty to exit should not be reduced to the degree that

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share without applying credits, the K factor or exclusions to the ceded business. We agree with Commerce on those two issues and order the necessary changes to comply with the law.

CAR proposed. As the MAIP is instituted, the financial penalty for companies exiting the market will naturally be reduced as there will be less business in the pool. CAR's proposal called for the calculation of the three-year buyout to be based on the company's pre-credit utilization ratio based on the cessions of the voluntary and non-HLR ERP producers' pool. The proposed rule is silent as to how the deficit attributable to HLR ERPs should be handed in an exit situation.

Order. CAR has used lagged voluntarily produced market share data to distribute the losses created by HLR ERPs, presumably to reduce the potential for companies to game the system. CAR proposes to use data from the previous year to determine deficits. Thus a carrier could manipulate its business in such a way as to affect its share of the losses in the following year. In order to prevent that and to encourage companies to focus on improving the dynamics of the market, we order that the voluntarily produced market share that is used as the measure of allocating losses, premiums and expenses of HLR ERPs ceded to CAR to be frozen to a 12-month period ending June 30, 2004. Freezing each company's participation at the level that existed in the 12-month period ending June 30, 2004 for policy years 2005-2007 will provide necessary stability to the companies during the transition, and provide flexibility to the market for the purpose of increasing the number of voluntary agencies within the state. In light of this, a minimum allowable exposure adjustment will no longer be necessary in connection with participation in the deficit generated by HLR ERPs. Therefore, the entirety of Rule 11.B.2.c is deleted.

As discussed above, we order CAR to manage the ceded losses, premiums and expense as a single pool for the purposes of establishing retention credits and estimating the three-year buyout penalty for carriers electing to withdraw from the market. Within that single pool, deficits generated by business from HLR ERPs will be allocated to companies on a different basis than the deficits generated by business produced by other ERPs and voluntary producers. The basis of the buyout is the pre-credit utilization ratio for the deficit generated by the non-HLR ERPs and voluntary producers. The basis of the buyout for the deficit generated by the HLR ERPs will be the voluntarily produced market share for the 12-month period ending June 30, 2004.

Further, to be consistent with the treatment of non-HLR ERPs and voluntary producers, any agency or portfolio acquired by an HLR ERP through merger or acquisition between November 23, 2004 and December 31, 2007 will continue to be ceded under the terms that would have applied on November 23, 2004. Moreover, no business so acquired will be considered as part of the policy year 2005, 2006 or 2007 deficit associated with HLR ERPs. Additionally any voluntary agent as of November 23, 2004, who becomes an ERP and is then offered a voluntary contract is ineligible to participate in the free cede program. To further motivate companies to make voluntary appointments in areas of market need, newly emerging voluntary producers will be ceded at a K factor of 9 and be eligible to participate in the free cede program. Such a mechanism will discourage carriers from terminating voluntary producers with higher than average loss ratios and again meet the public good of keeping the residual market contained.

Consistent with the Commissioner's Remand Order, Page 13, the participation ratios associated with HLR ERP and non-HLR ERP/voluntary producer components of the deficit shall be applied to those deficits adjusted to remove the effect of the net ceded subsidy level on the value of the deficit. The additional deficit generated by the subsidies in the Commissioner's rate will be separately allocated among the companies based on the proportion of the subsidy retained by each company. This approach will offer all the benefits of a true Subsidy Clearinghouse in 2005 and remain within the allocation methods used to estimate each company's participation in the final deficit. As described more fully in connection with Rule 12, the method of allocating the deficit attributable to rate subsidy will be done without regard to how the business was produced. Further, new entrants to the market will participate prospectively in the entire deficit based on their actual market share beginning on the first day of operations. As a result, Rule 11.B.2.g is deleted in its entirety.

It is noted that throughout Rule 11, the phrase "voluntary and ceded exposures" is used when what is meant is *retained* and ceded exposures. In the attachment, this change has been made. In addition, in Rule 11.B.1.c, where the rule discusses the total of the retained and ceded exposures from voluntary agents *or* directly written, we take note that the "or" should more appropriate be an "and", and we make that administrative change as well. In order to clarify the final paragraph in Rule 11.B.1.c, we administratively re-write the paragraph to read as follows (changes italicized):

> If the company's minimum allowable exposures are less than or equal to the total of the company's *retained* and ceded exposures *produced by* voluntary agents *and directly written*, then the company's actual ceded exposures excluding those meeting the exclusion criteria as determined above will be used to calculate the company's final participation ratio.

Rule 12. Credit Provisions.

Rule 12 governs the allocation and dissemination of credits to insurance carriers. It is intended to motivate carriers to write rate-subsidized business that would otherwise be placed in the residual market, by providing financial rewards, or "credits", to such carriers.

CAR's Initial Proposal. The current system assigns residual market participation credits to CAR members based on retained business in certain territories, and in certain rate and statistical (driver) classes that would be otherwise disproportionately represented in CAR.[24] The initially proposed Rule 12 stopped such credit assignments at the end of policy year 2004 and established a "Subsidy Clearinghouse" for policy year 2005 and thereafter. Under the clearinghouse system, each CAR member would have had a clearinghouse account, with sub-accounts for 'voluntary agent retained,' 'voluntary agent ceded,' and 'ERP-ceded' business. Members would have been credited positive dollar amounts for writing under-priced risks, and negative dollar amounts for over-priced risks. Payments to and distributions from the Clearinghouse account would be made quarterly by CAR.

The Remand Order. A credit system is necessary to encourage carriers to retain risks from driver classifications and territories they might ordinarily cede. The purpose of a credit system is to prevent the disproportionate representation of certain driver classes and territories in the pool. The current credit system fails that goal.[25] The Subsidy Clearinghouse proposal is a significant step toward the achievement of that goal, but the proposed method for determining clearinghouse credits needed considerable revision before it would work effectively. In addition, the SRB found a number of problems with the Subsidy Clearinghouse as proposed initially by CAR. Specifics of the SRB's findings are detailed in its filing after the July 22, 2004 hearing and the Remand Order and will not be repeated here. We remanded the issue of the Subsidy Clearinghouse to CAR with instructions that certain issues be resolved.

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[24] As examples, credits are given for retained business written in the more urban-rated territories and for inexperienced operators.

[25] This was colorfully demonstrated by Commerce's map at both hearings.

CAR's Revised Proposal. In its Revised Proposal, CAR removed all references to a Subsidy Clearinghouse, and instead appears to have adopted a territory/driver classification matrix methodology for calculating rate subsidies, with specific credit factors to be determined annually. The goal of the credit matrix in 2005 is to more accurately credit rate subsidized driver and territory combinations rather than assigning credits independently for territory and driver class. This latter approach, which has been used for many years, had the unfortunate effect of giving credit to driver classes that were not underpriced due to subsidy. When asked why CAR's Revised Proposal did not tie credit matrix values more explicitly to rate subsidies at the October hearing, CAR testified that such a recommendation was to be discussed and, if approved there, it would be submitted to the Commissioner for approval then.

Discussion. We find that a Subsidy Clearinghouse is the most equitable, and efficient mechanism for ensuring that certain territories and classifications are not disproportionately represented in the plan because it puts the value of the subsidy back into the premium and makes the company indifferent to the geographic territory or experience level of the risk. At the October 29 hearing, CAR testified that the Subsidy Clearinghouse is intended to be used for all business beginning January 1, 2006 even though such intention was not expressly articulated in the Revised Proposal. CAR proposed that it estimate the credits until the transition to the MAIP is complete.

A Subsidy Clearinghouse approach has several benefits over the present system, including the ability to determine credit values independent of the size of the retained market, the number of credits actually written or the ultimate value of the CAR deficit by simply using the actual rate subsidy estimates. In addition, since the Subsidy

Clearinghouse is based directly on the actual rate subsidies for the current policy year, it is more responsive to emerging market conditions. Accordingly, the Subsidy Clearinghouse permits a more accurate alignment of subsidies relative to the deficits they generate during periods of change. The Subsidy Clearinghouse would facilitate an open market for all driver classes and territories under an assigned risk plan.

The retention credits developed at CAR are based directly on the subsidies in the rates and are updated annually. This year, the CAR Actuarial Committee adopted a more refined approach to estimating credits through the use of the policy year 2004 subsidy matrix which is prepared annually by the Automobile Insurers Bureau of Massachusetts. For 2005, CAR has proposed that these matrix rate subsidies be used in conjunction with projected deficit estimates and various parameters to derive the number of credits attributable to each territory/driver class combination, as well as the value of a credit. If both of these components are accurately valued, the product of the value of a credit and the number of credits should produce the subsidy from the subsidy matrix.

The Subsidy Clearinghouse has clear advantages both in its simplicity and its responsiveness to changes in the market place. However, based on the provisions of Article VI of the CAR Plan, no credit may be given to any risk insured through the plan. As a result, the concept of the Subsidy Clearinghouse within the context of a reinsurance facility needed to be modified for the transition period. Once the MAIP is in place, the concept of the Subsidy Clearinghouse as outlined in this record will be much simpler to apply directly.

Order. Based on the above, we therefore amend the Revised Proposal for Rule 12 for policy year 2005 to create a retention credit system that reflects the effects of both positive and negative rate subsidies. Given the practical difficulties of implementing a formal Subsidy Clearinghouse for policy year 2005, as originally proposed by CAR, and the even greater difficulties of estimating future deficit levels under the new participation rules, the method outlined below will most easily and fairly recognize retention credits that are applied uniformly to all business within the state.

For each company, determine a credit adjustment to be added to the otherwise calculated deficit share in 11.B.1 and 11.B.2 for retained credits. Credits are based on retained business from all sources (CAR Identification Codes 0 and 1). For liability and physical damage separately:

(i) Estimate the industry weighted average percentage subsidy in the policy year premium ceded to CAR (CAR ID codes (4) and (5)) based on the 2005 average premiums and subsidies underlying the subsidy matrix. The weights shall be the 2005 policy year industry ceded exposures by territory/rate and statistical class combination as compiled by CAR. The portion of the total deficit attributable to subsidy is estimated as the policy year premium ceded to CAR (CAR ID Codes (4) and (5) minus the {ceded premium/(1.0 – average percentage subsidy)}).

(ii) For each Member, estimate the weighted average percentage subsidy retained based on the 2005 average premiums and subsidy underlying the subsidy matrix. The weights shall be the 2005 policy year Member retained exposures (CAR ID Codes (0) and (1)) by territory/rate and statistical class combination as compiled by CAR.

(iii) Calculate the net subsidy retained premium dollars for each Member by multiplying each Member's total 2005 retained exposures (CAR ID Codes (0) and (1)) by the average retained premium and the average percentage subsidy based on the calculations in (ii) above.

(iv) Compute each Member's share of the net subsidy retained premium dollars as a proportion of total net subsidy retained premium dollars for Members.

(v) Each Member's share of the deficit resulting from rate subsidies shall equal the share computed in (iv) multiplied by the estimated subsidy underlying the current deficit computed in (i) above.

(vi) Each Member's share of the deficit resulting from rates subsidies as calculated in (v) above shall be added to the Member's share of the remaining deficit as calculated in 11.B.1 and 11.B.2.

To fairly make these apportionments, the AIB will need to provide 2005 premium and subsidy matrices for minimum mandatory liability coverages, collision coverage, and comprehensive coverage.

We further amend the Revised Proposal for Rule 12 by making the current Rule 12, in its entirety, Rule 12.A, and adding in a new section of Rule 12 to be Rule 12.B, Subsidy Clearinghouse, to read as follows:

> For policy years 2006 and subsequent, in order to assure access to the voluntary market for risks in subsidized driver classes and territories, a Subsidy Clearinghouse is hereby created as the mechanism for equalizing market access.
>
> The Subsidy Clearinghouse is the means by which negative and positive subsidy values will be applied in order to render a Member indifferent as to driver class and territory rate subsidies in its decision to write business voluntarily. The Subsidy Clearinghouse is based on a driver class/territory matrix of subsidy calculations based on the Commissioner's rate decision for a given policy year.
>
> Beginning in policy year 2006, each Member will have a Subsidy Clearinghouse account, with sub-accounts for business retained that would otherwise have been ceded to CAR, and business retained that would otherwise have been assigned to the MAIP. For each under-priced risk written, the Member's account will reflect a "negative dollar" Subsidy specific to the driver class and territory of the risk, separately for each sub-account. For each over-priced risk written, the Member's account will reflect a "positive dollar" Subsidy specific to the driver class and territory of the risk, separately for each sub-account.
>
> At the close of each accounting term, Members with a subsidy balance greater than zero in either sub-account will make a payment in that amount to the Subsidy Clearinghouse, and Members with a subsidy balance less than zero in either sub-account will receive a payment in that amount from the Subsidy Clearinghouse. Similarly, at the close of each accounting term, the total payments made by all Members to the Clearinghouse that are not otherwise due to other Members for business retained that is otherwise eligible for placement in the MAIP shall be applied as an adjustment to the overall CAR deficit. Off-balance factors will be applied, where applicable, to ensure that the sum of all Subsidy Clearinghouse sub-accounts for all Members will be equal to zero. 2005 rate subsidies calculated by AIB will be the equivalent of what was previously the number of credits times the value of the credit. CAR is to submit an outline of the actual subsidy deficit sharing calculation to the Commissioner by March 30, 2005. As the Subsidy Clearinghouse will be in place for 2006, values for the underlying Subsidy

Clearinghouse will be updated annually as part of the Commissioner's decision on rates beginning in 2006.

Rule 13. Servicing Carrier Responsibilities and Rule 14, Representative Producer and ERP Requirements.

As noted in the Remand Order, Rules 13 and 14, although they relate, respectively, to the obligations of Servicing Carriers and of ERPs, in part consist of interconnected provisions. As in the Remand Order, we will first consider matters that relate only to individual rules, but will, in our discussion, simultaneously address issues common to both.

Rule 13. Servicing Carrier Responsibilities.

Rule 13 structures the manner in which insurers appointed by CAR as "Servicing Carriers", manage their ERPs and report ceded business to CAR. As applied to the current marketplace for private passenger automobile insurance, it requires that almost all carriers that issue such insurance become Servicing Carriers, creating only a few exceptions arising out of nominal market share. Rule 13 also sets "subscription" parameters that determine when, and under what circumstances, CAR will assign an ERP to a Servicing Carrier, which must then service that ERP's book of business, and under what circumstances ERPs may be transferred from a Servicing Carrier who is determined to be "oversubscribed" to exposures written by ERPs to a Servicing Carrier which is "undersubscribed." The rule also establishes standards for the relationship between Servicing Carriers and their ERPs.

CAR'S Rule 13 Initial Proposal. Rule 13 proposed to create a subset of Designated Servicing Carriers ("DSC"), i.e. Servicing Carriers with a market share of 7 percent or more, and the appointment of HLR ERPs to them. It provided for equitable distribution of HLR ERPs among DSCs based on the HLR ERP's exposure volume and loss ratio, and the DSC's total market share. Rules 13.B.4.c and 13.B.4.d, changed the procedure for reporting coverages written to CAR to require a Servicing Carrier to cede 100 percent of the new and renewal private passenger business written by an ERP with effective dates from January 1, 2005 through December 31, 2007. The revisions required a Servicing Carrier who wanted to retain any portion of an ERP's business to execute a voluntary contract with the ERP. The Initial Proposal also set time periods within which Servicing Carriers were required to continue to write ceded new business and ceded renewal business for their ERPs which had obtained voluntary contracts.

Rule 14. Representative Producer and ERP Requirements.

Rule 14, like Rule 13, provides the backdrop for the relationship between ERPs and their Servicing Carriers. This rule, however, pertains specifically to the requirements of an ERP.

CAR's Initial Proposal. The Initial Proposal expanded the concept of Dual Status Producer ("DSP") to limit the period in which an ERP which obtained a voluntary contract for policies would retain an involuntary assignment for renewal business to voluntary contracts effective December 31, 2004 and earlier. An ERP which obtained a voluntary contract for private passenger business effective January 1, 2005 and later, would retain its ERP status for some private passenger business through calendar years 2006 and 2007. The Initial Proposal also added a new section, Rule14.B.1, regarding the obligations of an HLR ERP to develop jointly with its DSC a rehabilitation plan, and provided that failure to comply with such requirements could be grounds for termination of an ERP appointment.

The Remand Order. The Remand Order approved the Initial Proposal's provisions that would allow for the appointment of DSCs, the identification of HLR ERPs, assignment of HLR ERPs to DSCs, and joint development of management plans with the goal of reducing HLR ERP loss ratios. It highlighted testimony at the July 22 hearing that, under the current system, business from HLR ERPs has been shifted repeatedly with no effort to address the underlying causes of the high loss experience.

The Remand Order concluded that concerns about the effect on policyholders of reassigning HLR ERPs to DSCs address issues that do not, in principle, differ from those generated by the reassignments of ERPs to Servicing Carriers under the current CAR Rules. It observed that ERP reassignments occur routinely in the market as a result, among other things, of mergers and acquisitions of producers, company withdrawals and of CAR decisions relating to compliance with ERP subscription requirements. The Remand Order recommended that the CAR Rules should provide that, to the extent possible, HLR ERPs be assigned to their current Servicing Carrier, noting that this approach would minimize market disruption by reducing the number of transferred policyholders, and allow companies that are familiar with these producers to continue to serve them and to deal more effectively with these producers' issues. The Remand Order responded to objections that the rehabilitation plan for HLR ERPs would hold those producers to different performance standards and impose on them a higher degree of oversight than that required for other producers by noting that the High Loss Ratio ERP Improvement Plan, appearing in the Manual Administrative Procedures, was based on the premise that the implementation of specific business management practices would prove effective in reducing the loss ratios of HLR ERP books of business, and would thereby help achieve the goals of reducing the CAR deficit and the financial burden on the market.

The Remand Order acknowledged that the number of carriers who became DSCs might be less than twenty, and also noted that the number of companies operating in the market, and the market share distribution, may constrain the number of Servicing Carriers. The Remand Order advised CAR to address this issue in its Revised Proposal. It also expressed concern about the provision relating to DSPs, including the continued relationship between an ERP who received a voluntary contract and its former Servicing Carrier. It noted that the Revised Proposal should make clear that a Servicing Carrier could offer an ERP assigned to another Servicing Carrier a voluntary contract under which the new Servicing Carrier could make independent cession decisions. This provision was intended to promote the goal of encouraging Servicing Carriers to offer voluntary contracts to ERPs.

In response to questions raised at the July 22 hearing about group discounts and multi-car discounts, that might not be available to customers of DSPs under the MAIP, the Remand Order recommended that CAR consider modifications to those rules which would resolve this issue.

The Remand Order addressed other transition issues, with the goal of maintaining a stable marketplace for policyholders and producers during the transition period. Among its recommendations were the modification of Rule 13.C.2 to provide that voluntary producers who become eligible for an ERP appointment as a result of losing their last voluntary contract be assigned to their last carrier of record, and creation of incentives for companies to write voluntary business in geographical areas where the 2003 HLR ERP market share exceeds ten percent. It suggested that favorable cession terms be applied to business generated by new voluntary producers or direct marketing efforts in those areas, and offered a specific program covering three years of the producer's operations.

***The Revised Proposal*.**

Rule 13. The Revised Proposal generally retains the system for identifying HLR ERPs and assigning them to a subset of Servicing Carriers. However, it makes a number of changes to the Initial Proposal, which are summarized below in the order in which they appear. In Rule 13.B, which addresses terminations of ERPs by Servicing Carriers, language in the Initial Proposal that allowed termination for failure to comply with the requirements of the High Loss Ratio Improvement Plan as referenced in Rule 13.A.2, is revised, expanding it to failure to comply with any rehabilitation plan. The Revised Proposal also adds a new reason for terminating an ERP, failure to refrain from brokering private passenger business, as defined in Rule 14.B.2.s.

It also eliminates proposed subsection (c) to Rule 13.B, as included in the Initial Proposal. That subsection required Servicing Carriers, for business effective January 1, 2005 through December 31, 2007, to cede all ERP new and renewal business to the residual market, and required that, in order to retain any portion of the ERP business, the Servicing Carrier execute a voluntary contract with the producer. The Revised Proposal no longer defines time periods within which, for an ERP who obtained a voluntary contract, ceded and ceded renewal business would continue to be written by its former Servicing Carrier, and periods within which new business and renewal business would be eligible for the assigned risk plan. It also removes the provision in the Initial Proposal that restricted a Servicing Carrier's option to cede 100 percent of new business written by an ERP to policies effective before January 1, 2005.

As revised, Rule 13.C provides a different methodology for equitably redistributing HLR ERPs. Rather than considering total market share, distribution is to be based on voluntary agent market share. The Revised Proposal also provides that HLR ERPs are to be assigned, to the extent possible, to their existing Servicing Carriers. It continues to state that the identification of HLR ERPs will be reviewed annually, and HLR ERPs added as may be necessary, but omits language in the Initial Proposal that allowed for the removal of producers from the HLR ERP category. The Revised Proposal adds provisions stating that, after the redistribution of HLR ERPs: 1) the exposures referenced in later subsections of Rule 13.C will not include exposures from HLR ERPs; and 2) that carriers whose non-HLR ERP subscription level exceeds 110 percent of their ought-to-have share may, within thirty days, request relief and shall be provided with a one-time random redistribution in order to reduce their share to 100 percent. It also provides that, subsequent to the redistribution of HLR ERPs, two-party agreements between an ERP and a Servicing Carrier will not be permitted.

Rule 14. Representative Producer and Exclusive Representative Producer Requirements.

The Revised Proposal eliminates the DSP system that was established under Rule 14.A.c and revises the current rule regarding the time period for retention of an involuntary assignment when an ERP obtains a voluntary contract with another Servicing Carrier (or non-Servicing Carrier). The revised Rule 14A.2.c(1) provides that the ERP retain the involuntary assignment for both new and renewal business for only thirty days from the effective date that he obtains a voluntary contract with another Servicing Carrier. This revision departs from the prior rule that provided for the assignment of the renewal business for three months from that date.[26] A new provision, Rule 14.A.2.c.(2), allows a

[26] Commerce asserts that Rule 14.A.2.c.1 violates G.L.c. 175, Section 163, which requires 180-days notice if a company intends to cancel or modify a contract with an independent insurance agent. It relies on erroneous readings of Section 163 and the effect of the Producer Licensing Law, G.L. c. 175, Section 162 through 177. Those portions of Section 163 that refer to contracts were unchanged as a result of passing the Producer Licensing Law. That statute itself, prescribes a single form of license and specifically allows insurers to

Servicing Carrier that offers a voluntary contract to its own ERP the option, on thirty days notice, to decline new and renewal business from that ERP when a second carrier offers the same ERP a voluntary contract.

Rule 14.B does not change the requirement that HLR ERPs develop rehabilitation plans, but now requires that all ERPs comply with the requirements of the rehabilitation plan, including the High Loss Ratio Improvement Plan referenced in Rule 14.B.1. It adds a requirement that prohibits ERPs from brokering private passenger business and defines "brokering" for purposes of the Rule, as:

> "the placing of private passenger motor vehicle insurance risks with a carrier on behalf of, or at the request of another producer which has an appointment with a Servicing Carrier or non-Servicing Carrier of CAR for binding private passenger motor vehicle insurance risks, where the producer placing the risk pays to the other producer some form of compensation including, but not limited to, money, barter, services, or expense reductions or where the originating broker retains control or ownership rights of the motor vehicle risk."

Discussion. At the October 29 hearing, CAR confirmed that the intent of the rehabilitation plans under Rules 13 and 14 of the Revised Proposal was to expand Servicing Carriers' obligations to develop management plans for all ERPs. However, CAR also noted that HLR ERPs will be expected to comply with additional requirements in the Improvement Plan included in the Manual of Administrative Procedures. Mr. Trovato also affirmed that the rehabilitation plans for HLR ERPs are to be developed jointly between the DSC and the producer. CAR further agreed that, although Rules 13 and 14 establish that failure to comply with an agency management plan, including the High Loss Ratio Improvement Plan, would be grounds for terminating a producer's ERP

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appoint producers as their agents. Further, that the 180-day notice requirement does not apply to brokerage contracts. See In re Empire Ins. Agency, DOI Docket No. C94-02.

appointment, the rules also place responsibility on carriers to manage the producers. Mr. Trovato noted that CAR has mediation and appeal processes to support producers and Servicing Carriers.

In response to questions about CAR's decision to omit from the Revised Proposal language permitting an HLR ERP to be removed from the list if the producer's loss ratio fell below the 125 percent threshold, Mr. Trovato stated that because CAR believed that the transition rules would be in place for only a short time period, the credit for servicing such business should not be taken away from a DSC which had worked hard to reduce the loss ratio. CAR further stated that the change in using a Servicing Carrier's voluntary producer market share (*i.e.*, business produced by non-ERPs) rather than its total market share as the basis for sharing the HLR ERP deficit was based on the premise that the deficit would be shared after the HLR ERPs had been distributed. At that time, Mr. Trovato stated, companies who stated that they already had more than their fair share of HLR ERPs would get more, which would increase their total market share. CAR attached an exhibit to its testimony that compared historical data on voluntary producer market share and total market share and concluded that in many cases there was little difference between them.

During the October 29 hearing, CAR confirmed that Rule 14 of its Revised Proposal regarding co-brokering differed from what it had submitted to the Commissioner regarding the same issue in a separate proceeding in 2003, which remains pending. Mr. Trovato stated that he did not know if the change was intentional. He explained that the reason for the inclusion of Rule 14.A.2.c(2) in the Revised Proposal was to permit a Servicing Carrier who makes a voluntary contract offer to its own ERP an option to decline new and renewal business when a second carrier offers the same ERP a voluntary contract. He stated that it was intended to create an incentive to induce direct writers to offer voluntary contracts to their ERPs, without concern that a second carrier would come in and assume all the good business. He also agreed that while the proposed rule referred to "offer" of a contract, it was only intended to apply when the ERP accepts a contract.

We have considered CAR's Initial and Revised Proposals as they relate to the management of ERP business and the equitable distribution of the CAR deficit among member companies. The problems that have arisen under the current system have been extensively described, notably in the Attorney General's letter to the Commissioner of June 25, 2002, and the Tillinghast Report. The Commissioner's April 2004 letter to CAR stated that, based on that Report, she concluded that the existing residual market system does not distribute the financial burden associated with high-risk drivers in a fair and equitable manner. She noted that ERPs with very high loss ratios were not equitably distributed among Servicing Carriers and called on CAR to change its Rules of Operation. Although the ultimate goal of changes to the CAR Rules is to create an assigned risk insurance system, the Commissioner recognized that, in order to minimize market disruption and adverse effects on policyholders, such a system could not be implemented immediately but should be phased in over several years. To that end, the Commissioner stated that the CAR rules should be changed to provide a "process that identifies and assigns private passenger automobile insurance risks of ERPs among Servicing Carriers in an efficient, fair and equitable manner without significant market disruption or adverse impact on policyholders."

Our review of CAR's Proposals persuades us that an approach that combines enhanced oversight of ERPs, particularly HLR ERPs, with a removal of financial incentives to manage ERPs for the principal purpose of manipulating subscription ratios will best achieve the twin goals of reducing the overall deficit and distributing it equitably. Our changes to Rules 13 and 14, in combination with revisions to Rules 11 and 12, are intended to create a system that will stabilize the market during the transition to the MAIP which is in all policyholders' best interests.

On the first issue, management of producers assigned to Servicing Carriers, we have concluded that the principle underlying the DSC approach, that reduction of the CAR deficit is linked to greater oversight of HLR ERPs, supports implementation of special management tools for HLR ERPs.[27] At the same time, we recognize that limiting the number of companies undertaking such supervision may lead to redistribution of a significant number of exposures. We also question whether the capacity to oversee HLR ERPs is appropriately viewed as a function of the size of the carrier based on its resources, or should be considered in terms of the carrier's familiarity with agency operations. For direct writers operating in Massachusetts, such familiarity arises when the carrier has a sufficiently high voluntary market share to generate assignment of a reasonable number of ERP exposures to it. We have considered at length the relationship between the companies that are now appointed as CAR Servicing Carriers and the ERP population. CAR currently defines a Servicing Carrier, as one which has a minimum of 5000 property damage liability ("PDL") exposures; under that definition, nineteen carriers writing private passenger

[27] The objections to special management programs were extensively addressed in the Remand Order, and need not be reiterated here. Our concern that the implementation of what are, in many cases, best practices for sound agency management should not be limited to HLR ERPs has been adequately addressed in the Revised Proposal.

automobile insurance currently qualify for that status.[28] We conclude that, in order to improve the management of all producers assigned to the residual market, Servicing Carriers should be defined as companies, or company groups, that write at least two percent of the statewide PDL exposures rather than the current requirement of fewer than 5,000 such exposures.[29] Nothing in this change affects the rights of a Massachusetts domestic insurance company to be appointed as a Servicing Carrier. By increasing the threshold to two percent the number of Servicing Carriers participating in programs to improve the management of ERP operations will double from CAR's Proposal of six to twelve. We have therefore revised CAR Rule 13.A.1.a to reflect that definition.

While the statute incorporates a requirement for at least twenty Servicing Carriers, we are not persuaded that it, as drafted, achieves its intended result when it is applied to the current marketplace for private passenger automobile insurance. At the time it was enacted, the number of companies participating in the market was significantly higher than it is now. The reduction in those numbers has contributed to the critical situation that the market is currently experiencing. The Tillinghast Report notes that, in 1990, 53 companies were offering private passenger automobile insurance in Massachusetts. Viewed as a proportion of the overall market, twenty Servicing Carriers would have been

[28] In response to the Initial Proposal, the Commerce Insurance Company raised the question of whether the appointment of a limited number of DSCs would satisfy the statutory requirement. The Remand Order instructed CAR to address any questions that might arise regarding any difference between the statutory requirement for twenty Servicing Carriers and the number of such carriers now servicing private passenger automobile insurance. Although the Revised Proposal does not address this issue, Commerce states that the matter was raised at the September 15, 2004 meeting of the CAR Governing Committee and that CAR counsel agreed that the twenty-carrier requirement is mandatory, but that it included both private passenger and commercial Servicing Carriers. Because there are nineteen Servicing Carriers for private passenger automobile insurance and one for commercial vehicles, CAR concluded that it is in compliance with the statute. We offer no opinion on the merits of its position.

[29] In the past, CAR has made changes to the threshold that requires a company to act as a Servicing Carrier. In 2000, CAR reduced the exposure count from 1% of total market share to 5,000 exposures.

approximately forty percent of the total number of participants at that time.[30] Redefining "Servicing Carrier" for the sole purpose of ensuring that the number of carriers so-identified reaches a particular number has the perverse effect of forcing companies that may not have the experience or resources to oversee residual market producers to take on that task. Neither policyholders nor the industry benefit if companies must make choices about entering the Massachusetts market or increasing their commitment to it in terms of management obligations for a particular group of producers.[31]

Based on current data, twelve companies out of the nineteen, 65 percent of the total number of participants and now defined as Servicing Carriers, will satisfy the revised definition. We will require each of these 12 companies to participate in the redistribution of HLR ERPs and to develop agency management plans for all their ERPs, including their HLR ERPs. Increasing the number of participants in the HLR ERP management program to twelve, in combination with the requirement that, insofar as possible, HLR ERPs will remain with their current Servicing Carriers, should reduce potential transfers of books of business and minimize marketplace disruption. We have, accordingly, revised the Rule 13 provisions in the Revised Proposal that relate to the oversight and management of ERPs and HLR ERPs.

The second goal of residual market reform is to remove elements of the system that motivate Servicing Carriers to establish and maintain contractual relationships with their

[30] It is probable that the extensive requirements for becoming a Servicing Carrier would tend to encourage only applicants with a significant commitment to writing private passenger automobile insurance in Massachusetts to seek such status.

[31] We note that CAR's reduction of this threshold in the past, all in an effort to satisfy the servicing carrier number of 20, has resulted in several negative outcomes. It has served as a barrier to entry to carriers who may wish to write private passenger automobile insurance who may have written it if it remained at the higher threshold; it also swept in companies who were ill-equipped to manage these ERPs and thus hastened their departure from this market.

producers that are based less on objective criteria, such as the loss ratio of a book of business, than on how the particular contractual relationship will affect the Servicing Carrier's participation in the CAR deficit. Under the current system, a Servicing Carrier's residual market deficit share is a function of its voluntarily retained exposure-based market share, as further modified by the system for awarding credits set out in Rule 12. Companies that retain a higher than average proportion of all insureds pay a lower proportion of the CAR deficit because they contribute a lower than average proportion of exposures to the pool. The system does not value ERP exposures based on the potential losses they may generate; an exposure generated by an ERP with an overall loss ratio of sixty percent is equal to one generated by an ERP whose book of business has a loss ratio of four hundred percent. The results of this system are two-fold. Servicing Carriers compete to acquire, or create, ERPs with relatively low loss ratios, because of the potential they offer to obtain credits through retention of business. A Servicing Carrier whose ERP business, whether as a result of successful management or otherwise, has relatively low loss ratios has no incentive to offer the ERP a voluntary contract, because of the risk that it will thereby become an undersubscribed Servicing Carrier and be assigned an ERP with a high loss ratio.

For an ERP who has a loss ratio comparable to that of producers with voluntary contracts, the current system discourages carriers from offering that producer a voluntary contract and, in effect maintains a marketplace in which more than half of producers represent only one carrier. At this time, approximately 30 percent of producers are ERPs and they service approximately 25 percent of all exposures. The loss of 34 carriers since 1990 has resulted in a system in which 55 percent of all producers represent only one company.[32] Because nearly 80 percent of Massachusetts private passenger automobile insurance is purchased through insurance agencies, rather than directly from a company, the current system, in practice, adversely affects policyholder choice.

The ERP system arose initially because the fixed-and-established rates incorporate subsidies for business written in certain territories and for certain driver classes. Because of the general reluctance of companies to offer voluntary contracts to producers in areas where the rates are highly subsidized, the current system of assigning producers in those areas to companies was developed. The proposed changes to Rule 12, which govern credits to carriers for writing subsidized business, create a Subsidy Clearinghouse and effectively neutralize the reasoning that underlies carrier decisions not to offer voluntary contracts to producers in subsidized territories. The Subsidy Clearinghouse will, in essence, redistribute subsidy dollars on a statewide basis so that carriers will obtain the correct average premium for each risk. This change will facilitate appointment of voluntary producers in all geographic areas. A Servicing Carrier will not be penalized or rewarded by a decision to acquire an ERP producer or a decision to offer a voluntary contract to its own ERP or to the ERP of another Servicing Carrier.

Encouraging expansion of the voluntary market will improve the private passenger automobile marketplace by expanding the real choices open to policyholders in all parts of the Commonwealth. In support of that goal, we are revising the CAR rules to end the practice of ERP redistribution to meet "ought-to-have" subscription levels in 2005. Pursuant to Rule 13.C.d.1, after HLR ERPs are distributed, a one-time redistribution will

[32] Andrew Carpentier, of Encompass Insurance, noted at the October 29 hearing that 82 percent of Massachusetts producers of private passenger automobile insurance have three or fewer carriers. He contrasted that to Connecticut and Rhode Island, where his company's representatives typically represent six to ten automobile insurance companies.

take place to correct subscription levels. That redistribution is to be based on each Servicing Carrier's voluntarily produced market share relative to the ERP exposures that remain after removing both the HLR ERP exposures and exposures from ERPs whose three year loss ratio is 60 percent or less. Removal of low loss ratio ERPs from the subscription allocation process will ensure a fairer allocation to Servicing Carriers of business that the ERP system is intended to produce.

Order. The implementation of a free cede option in years 2005 and 2006 to encourage carriers to offer ERPs voluntary contracts is an excellent idea. Our concern is that carriers will terminate producers with higher than average loss ratios in order to avoid the cession penalty. To prevent manipulation of this incentive, two further refinements must be instituted: (1) Beginning November 23, 2004, any voluntary agent who loses his last voluntary contract and who is converted to an ERP, must be reassigned to the company with which he held his last voluntary contract, and that producer's ceded exposures will be subject to K factor of 13; (2) Beginning November 23, 2004, any producer who had a voluntary contract in good standing will be ineligible to participate in the free cede program regardless of any changes to his status that occur after November 23, 2004.

Although the Revised Proposal is responsive to concerns addressed in the Remand Order, some provisions remain unclear. Further, some additions to Rules 13 and 14 are unacceptable. We conclude, as well, that retention of the current system for assigning ERPs to Servicing Carriers is not conducive to the goal of improving policyholder access to the market by increasing the number of producers who have voluntary contracts with insurers. With the following changes and deletions we will, however, approve the text of Rules 13 and 14 as set out in the Revised Proposal.

Effective January 1, 2005, the definition of Servicing Carrier in Rule 13.A.1.a shall be revised by deleting "5000 or more" and substituting "two percent or more of the statewide" reported written property damage liability exposures. References to "Designated Servicing Carriers" in the first two sentences of Rule 13.A.2 shall be deleted, and the rule revised to state that "For private passenger business effective January 1, 2005 through December 31, 2007, High Loss Ratio Exclusive Representative Producers, as defined in Rule 2, shall be appointed to Servicing Carriers in accordance with Rule 13.C.1. In addition, the word "designated" shall be deleted from struck from the third sentence of Proposed Rule A.3. Throughout Rule 13, the words "Agency Management Plan" shall be substituted for the term "Rehabilitation Plan." Rule 13.A.3.a(5), which refers to the duties of Servicing Carrier special investigation units, is amended by adding, after the word "fraud", "and to verify garaging and policy facts on a representative sample of policies."

The requirement that, within 90 days of the approval of these rules, a Servicing Carrier shall provide to each of its ERPs an agency management contract that identifies the best practices for achieving compliance with the CAR Rules and ensuring reasonable loss ratios shall be added to the general duties of Servicing Carriers listed in Rule 13.B.3.a. The rule shall also state that the Agency Management Plan is to be developed jointly with the ERP and may include, as appropriate, practices identified in the High Loss Ratio Improvement Plan in the CAR Manual of Administrative Procedures. Further, the President of CAR is to certify to the Commissioner within a week following the 90-day period that Servicing Carriers have met their obligations regarding Agency Management Plans.

The following provision shall be added, as Rule 13.B.7, to the listed responsibilities of Servicing Carriers:

> If CAR determines that either a Servicing Carrier or a Non-Servicing Carrier member of CAR provided a direct incentive for either an ERP or a voluntary producer to engage in brokering activity prohibited by this section, it shall assess a penalty on such Servicing Carrier or Non-Servicing Carrier for all exposures or premium identified as being so brokered. The assessment shall be $2,000 per exposure for private passenger motor vehicles for each of the calendar years in which the business was brokered, with a minimum penalty of $25,000.[33]

With respect to the equitable distribution of HLR ERPs, Rule 13.C.1.a shall provide that the equitable distribution of HLR ERPs to Servicing Carriers will be based on the Servicing Carrier's voluntarily produced and direct written market share based on the twelve-month period ending June 30, 2004, using processes to ensure that the distribution equitably reflects the differences in loss ratio among HLR ERPs and maximizes the number of HLR ERPs assigned to their existing carriers. In Rule 13.C.1.b, the word "added" shall be deleted and replaced with the word "removed." Rule 13.C.1.c is amended to state that, following the redistribution of HLR ERPs, the exposures used to calculate a Servicing Carrier's "ought-to-have" subscription share shall exclude both exposures written by HLR ERPs and exposures written by ERPs whose 2001-2003 calendar/accident year loss ratio was sixty percent or less.[34]

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[33] The text of CAR's 2003 proposal to revise Rule 14 is included, with some extraneous materials, as Exhibit HHH to Commerce's October 29, 2004 submission.

[34] The valuation date of the three-year loss ratio should be March 31, 2004 consistent with the valuation date used to identify HRL ERPs.

As proposed by CAR, Rule 13.C.1.d provides that, after redistribution of HLR ERPs, carriers whose subscription level of non-HLR ERP producers is higher than 110 percent of their ought-to-have share, may request relief and obtain a one-time redistribution of ERPs to achieve a 100 percent level. We approve the one-time redistribution, but require that it be based on the basis of each Servicing Carrier's voluntarily produced market share relative to the ERP exposures that remain after removing both the HLR ERP exposures and exposure from ERPs whose three year loss ratio is 60 percent or less. The redistribution shall, like the HLR ERP assignment, use processes to ensure that the distribution equitably reflects the differences in loss ratios among non-HLR ERPs with three-year loss ratios in excess of 60 percent, and maximizes the number of such ERPs who are assigned to their existing Servicing Carrier. Further, redistribution will be effected only for Servicing Carriers whose subscription level of non-HLR ERPs with three-year loss ratios in excess of 60 percent for three years exceeds 110 percent of their ought-to-have share, calculated using voluntarily produced market share for the twelve-month period ending June 30, 2004, and shall have the goal of reducing the non-HLR ERP distribution to 100 percent of that share, with a five percent tolerance.

Rule 13.C.2.a, which relates to subscription share methodology, is amended by adding the following language after (ERPs): "remaining in the ERP pool after redistribution of HLR ERPs and exclusion of ERPs with three-year loss ratios of 60 percent or less." The word "remaining" shall be inserted before "ERP exposures" in the second sentence of the section. Similarly, in Rule 13.C.2.b and the first paragraph of Rule 13.C.2.c, the word "remaining" shall be inserted before "ERP exposure" each time that phrase appears in those sections. Subsections (1) through (5) of Rule 13.C.2.c are hereby deleted.

The following changes shall be made to Rule 13.C.3, that relates to subscription relief. Rule 13.C.3(a) is deleted. Rule 13.C.1.d provides for a one-time adjustment to non-HLR ERP subscription levels and, for the reasons stated above, no further adjustments will be made. The procedures set out in the remaining subsections of Rule 13.C.3 shall be applied, as appropriate, to the one-time redistribution under Rule 13.C.1.d. Rule 13.C.4.d, which addresses future ERP redistributions, is deleted.

Paragraph 2 of Rule 14.A.2.a is hereby deleted, and replaced with the following: An applicant for an ERP appointment who is applying because of the involuntary cancellation of a voluntary contract with an insurer shall, insofar as possible, be assigned to the insurer which last cancelled the voluntary contract for placing private passenger motor vehicle insurance. The following language shall be added to Paragraph 2: "Newly qualified producers, with offices in market need areas as defined in Rule 2, who receive ERP appointments shall be assigned to Servicing Carriers whose total market share in that market need area is below their total market share statewide".

CAR's Proposed Rule 14.A.2.c(2) is revised to state that "A Servicing Carrier which enters into a voluntary contract with its own ERP will, with thirty days notice, have the option to decline new and renewal business when the ERP enters into a voluntary contract with a second Servicing Carrier.[35] Rule 14.B.1 shall be revised to read "A High

[35] Commerce has objected to the provision allowing a Servicing Carrier who executes a voluntary contract with its ERP the option of declining to write new and renewal business if the ERP obtains a voluntary contract with another carrier, on the ground that it violates the "take-all-comers" law. Even assuming, *arguendo*, that there is such a law, we are not persuaded that, if a former ERP has more than one voluntary contract, it would be fair to require the carrier to which it was assigned as an ERP to write all business the ERP submits to it.

Loss Ratio Exclusive Representative Producer" and, consistent with Rule 13, shall be further revised, to substitute the term "Agency Management Plan" for "rehabilitation plan." Rule 14.B.2.r shall be revised to delete the word "designated" in line two and to state that an ERP must "comply with the Agency Management Plan developed jointly by the ERP and its Servicing Carrier. Such Agency Management Plan may include, as appropriate, practices identified in the High Loss Ratio Improvement Plan in the CAR Manual of Administrative Procedures.

Rule 14.B.2.s, as drafted, is approved, with the following changes. The word "broker" in the final sentence of the paragraph is to be replaced with the word "producer." The following paragraphs are to be added:

> Exclusive Representative Producers may engage in brokering risks pursuant to a brokerage agreement approved by their Servicing Carrier for the sole purpose of providing access by the ERP to its Servicing Carrier's private passenger automobile group marketing program(s). Such business shall be coded and statistically reported to CAR as emanating from the originating producer. If an ERP engages in brokering prohibited under this section, its Servicing Carrier shall issue a thirty-day notice of termination of the ERP's appointment.

Rule 17. Expense Allowance to Servicing Carriers.

CAR's Initial Proposal. The Initial Proposal made several substantive changes to Rule 17 to be effective in calendar years 2005 through 2007. It added to Rule 17.A.1.b a provision that the CAR expense allowance for private passenger motor vehicle business be calculated separately for HLR ERP business, but it left the details of the calculation to be determined at future CAR Committee meetings. The Initial Proposal also added a Paid Loss Ratio Incentive Program (PLRIP), which would pay Servicing Carriers an additional ceding expense reimbursement for a specified improvement in the paid loss ratios of their HLR ERPs. Again, the details of the proposed rule were left for future CAR committee meetings. Finally, the Original Proposal eliminated subsections 1 and 2 of Rule 17.C, which provided for miscellaneous expense allowances to offset the expenses associated with newly assigned representative producers. The Proposal retained the text of Rule 17.C.3 and eliminated subsections 4 and 5.

The Remand Order. We requested that CAR provide more detail on the method for calculating the expense allowance for HLR ERP business and the PLRIP. The proposed rule also made a distinction between expense allowances for HLR ERPs and non-HLR ERPs that we characterized as problematic because most of the HLR ERPs are now and will continue to be assigned to companies that will become DSCs. We also requested additional details on the PLRIP.

The Revised Proposal. CAR's Revised Proposal provides more detailed information on the ceding expense allowance, proposing a standard expense allowance to DSCs for servicing ceded HLR ERP business in policy years 2005 through 2007. The allowance is to be figured as a percentage of ceded liability and physical damage written premium combined, and includes an expense allowance of 33 percent for Unallocated Loss Adjustment Expenses, Company and General Expenses. Commission and Brokerage expenses and premium taxes would be reimbursed at the rate provided in the commissioner's annual private passenger rate decision. The ceding expense allowance would further include reimbursement for miscellaneous expenses such as the insolvency fund assessment as in the rate decision.

The Revised Proposal also provides additional detail on the operation of the Paid Loss Ratio Incentive Program proposing that DSCs be paid an additional reimbursement for improvement in their HLR ERP ceded plus retained paid loss ratio for policy years 2005 through 2007. A HLR ERP paid loss ratio would be established for each DSC for each policy year. The current year HLR ERP paid loss ratio for each DSC would be compared to a base year paid loss ratio that would be calculated as a 3-year combined paid loss ratio ending in the second prior year. For policy year 2005, results would be compared to policy year 2001-2003, for policy year 2006, results would be compared to policy years 2002-2004, and for policy year 2007, results would e compared to policy year 2003-2005 results.

The proposal states that similarly developed industry current and base year total paid loss ratios shall also be established, but does not say when this is to occur.

Discussion. In the Commissioner's April 29 letter, and in our remand order, we specifically requested that CAR develop an expense allowance provision for DSCs that considers claim frequency. This was not done in the Revised Proposal. We also requested they re-examine using a different expense allowance for HLR ERP business and non-HLR ERPs. We thought it problematic to make a distinction between the two since many of the HLR ERPs are currently assigned to carriers slated to become DSCs and we saw no reason to pay those carriers differently for handling the same business they are currently handling.

CAR's Revised Proposal not only maintains the distinction between HLR ERPs and non-HLR ERPs, it *increases* the unallocated loss adjustment expense allowance for HLR ERPs to 33 percent, which is nearly two times the amount paid to them today for servicing this same business.

At the October 29 hearing, CAR asserted that a higher expense allowance for HLR ERP business is necessary for other ceded business as the current expense allowance does not fairly compensate a company for the cost of servicing this business. Mr. Trovato of CAR testified that the Actuarial Committee recommended 33percent as a "sort of historical number that was used way back when designated brokers were representative of the so-called now high-loss-ratio ERPs ." (Tr. Pg.106).

CAR has not shown any persuasive reason why the expense allowance should be increased so dramatically for HLR ERP business. The SRB testified that the current unallocated loss adjustment expense is 16.1percent, and that there is no foundation to support a higher expense allowance than what carriers receive under the current rules. In addition, the SRB opined that the application of a fixed percentage ceding expense allowance would not adjust to changing conditions within the agency.

We agree that the idea for a PLRIP is an acceptable approach to rewarding Servicing Carriers for a demonstrated reduction in the loss of HLR ERPs. A superior approach, however, is to reward the results from the collective effort of all Servicing Carriers to reduce the portion of the deficit that is not attributable to rate subsidy. Rewarding Servicing Carriers on an individual basis would pit one Servicing Carrier against another to avoid the riskier business, and would lead to a gaming of the system without accomplishing the goal of reducing the overall loss ratio and deficit. Tying the reward to the overall reduction in the portion of the deficit not attributable to subsidies facilitates the collaborative efforts necessary to contain costs.

Order. Proposed Rule 17A.2 is disapproved and deleted in its entirety. Unallocated loss adjustment expense for HLR ERP business will remain the same as that for non-HLR ERP business.

Proposed Rule 17A.3 is disapproved and deleted in its entirety and replaced with the following:

> The PLRIP is adopted, with the incentive tied to a collective reduction in loss ratio calculated on an ultimate basis and a reduction in the deficit in the entire pool excluding the portion of the deficit due to rate subsidy. Any reduction in the deficit will be calculated, and then divided among the members as follows: Up to 75 percent of the savings will be divided among the Servicing Carriers, and up to 25 percent of the savings will be divided among all members.

The specifics of declaring the incentive and its allocation among Servicing Carriers and Members is to be included in the Manual of Administrative Procedures which is to be submitted to the Commissioner no later than January 15, 2005.

VI. DISCUSSION AND ANALYSIS OF PART II OF THE REVISED PROPOSAL

The Massachusetts Automobile Insurance Plan ("MAIP")

Introduction

The twenty rules in Part II of CAR's Initial Proposal address future operations of the residual market; the Massachusetts Automobile Insurance Plan ("MAIP"). CAR proposed a January 1, 2006 effective date for these rules, although the assigned risk plan that they create will not be fully implemented until January 1, 2008.

The Remand Order

The Remand Order noted that CAR's proposed effective date for the MAIP rules created uncertainty about the relationship between the current rules 1 through 20 and the new rules 21 through 40 during the transition period to full implementation of the MAIP. It recommended that CAR reconsider this matter to ensure that there would be no conflict with operations during those years. The Remand Order further stated that CAR's MAIP Rules did not fully meet the objective of a fair and equitable distribution of risks written through it. It particularly noted that CAR had not included provisions relating to consumer awareness and protection, such as rules that would ensure those insured in the MAIP continued access to multi-vehicle and other types of discounts, and would impose no financial penalties on them if they later obtained voluntary coverage. The Remand Order specifically recommended that CAR incorporate a so-called "Clean in 3" proposal that would, in essence, render ineligible for the MAIP those policyholders with no at-fault accidents or traffic violations during the past three years. CAR was advised to use as a model for the MAIP the Uniform Automobile Insurance Plan developed by AIPSO

(“Uniform Plan”), which is widely used in other jurisdictions. The Remand Order also commented that CAR’s proposal was unclear on the operations of the Subsidy Clearinghouse, the mechanism for determining company financial obligations to the MAIP. In addition, it recommended a number of changes to specific rules.

CAR’s Revised Proposal

CAR’s Revised Proposal did not address the concerns raised in the Remand Order. It included few provisions targeted toward ensuring that the MAIP is fair to consumers and adequately protects their interests. CAR did not provide a substantive analysis of the differences between the MAIP and the Uniform Plan, or explain why it chose to adopt or reject specific provisions.

Discussion

CAR’s response to the Remand Order with regard to the MAIP was disappointing. It did not attempt to conform the MAIP to the Uniform Plan. Its Proposed Rules may be characterized as an effort to graft a residual market mechanism based on assignment of individual risks onto rules developed for a residual market based on pooling exposures. The failure to develop MAIP provisions that are, to the extent possible, consistent with the provisions of residual market plans in over forty other states is particularly serious. A residual market plan must provide state-specific rules, where necessary to conform to unusual local conditions or unique state laws. For aspects of such a plan that need not respond to state-specific issues, adoption of a nationally utilized plan is appropriate. A MAIP that is modeled on the residual market provisions widely used in other states will reduce expenses for insurers doing business here; such savings are important to consumers because they directly affect insurance rate requests. It will also help make Massachusetts an attractive location for insurers, particularly national insurers who do not now write here. In contrast, a MAIP that requires insurers to develop special systems will discourage them from committing resources to this market. An increase in the number of companies writing private passenger automobile insurance in Massachusetts will improve consumer choice. CAR, further, did not consider whether concepts such as market need area that relate to the appointment of ERPs are appropriate in the MAIP environment.

Some of the Proposed Rules, particularly those that relate to the structure of CAR and its internal operations, did not generate controversy at the hearing. We determined, however, that some changes are appropriate to ensure clarity and consistency and have made amendments to achieve those goals. As amended, we will approve Rules 23, 24, 25, 27, 33, 34, 35, 37, 39 and 40.

The remaining Proposed Rules required more extensive changes to achieve the goal of creating a MAIP that is responsive to concerns expressed by the Commissioner. The actual changes are incorporated into Rules 21, 22, 26, 28 through 32, 36 and 38. The intent of each revision is briefly summarized here. To Rule 21, General Provisions, we have added Subsection B that provides temporary provisions for the transition period from January 1, 2006 through December 31, 2007. The purpose of this section is to achieve a smooth transition from the current reinsurance plan to the MAIP by ensuring that the MAIP is not overwhelmed with applications in the first year of its existence. To achieve that goal, the revisions provide a stratified system for allowing business to be placed in the MAIP.

Rule 22 has been changed slightly, by amending CAR's definitions of "Assigned Risk Company" and "Quota Share," eliminating its definition of "New Business," and adding a definition of "Subsidy." For the following reasons, we have retitled CAR Rule 26, Underwriting Guidelines; it now addresses "Policyholder Rights and Responsibilities." We determined that the provisions of CAR's Proposed Rule 26 in general addressed the obligations of companies and producers, and therefore we transferred those sections to the rules that are specific to those entities. In its place, we have assembled requirements that directly address placement in the MAIP and are therefore particularly important for consumers. In brief, the revised Rule 26 ensures that an applicant will not be assigned to the MAIP unless he or she has been declined for coverage in the voluntary market. The insurer that declines to cover the applicant must provide a letter stating the reasons for its decision. Under Rule 26, the applicant has a right to appeal the declination to the MAIP, and requires the MAIP to resolve the matter within five business days.

As in the current residual market, applicants are not eligible for the MAIP if they are not eligible to purchase insurance under G.L. c. 175, §113H (A). Rule 26 further provides that an applicant who has been licensed and insured in Massachusetts for at least thirty-six months before the effective date of the policy, and has not been involved in an at-fault accident or had a traffic violation for three years, or been convicted of a vehicular felony or driving under the influence in the past five years, is not eligible to be insured through the MAIP. Policyholders who obtain insurance through a group marketing plan established pursuant to G.L. c. 175, §193R also are ineligible. Under these rules, experienced drivers with good driving records will be automatically excluded from the MAIP. Rule 26 also ensures that a policyholder who has been insured through the MAIP will incur no financial penalty if he or she obtains coverage on the voluntary market.

Rule 28, the Application Process, establishes premium deposit requirements for applicants who obtain insurance through the MAIP that are the same as those applicable to insureds written in the voluntary market. We have revised CAR's proposed rule on installment plans to limit the monthly fee to four dollars, comparable to the fees imposed in the voluntary market. However, the rule allows higher installment payments if the policyholder's coverage has lapsed for more than one day in the past twelve months.

Rule 29 addresses the assignment of eligible risks to individual companies, and sets the requirements for transferring documents such as the application to the company. It prescribes a system for determining individual company quota shares for assigned business and provides credits to companies for voluntarily writing risks that would be eligible for placement in the MAIP. Such credits are designed to ensure that no territories or classifications are disproportionately represented in the residual market.

Rules 30 and 31 set out the responsibilities of CAR members who are appointed as Assigned Risk Companies ("ARCs"), Limited Assigned Distribution Companies ("LADCs"), and Assigned Risk Producers ("ARPs"). As with current CAR Rules 13 and 14, the responsibilities and obligations of the companies (ARCs and LADCs) are mirrored in the responsibilities and obligations of producers who are appointed as ARPs. We have revised CAR's proposed Rule 30 to sets standards for appointment as an LADC that are higher than those proposed by CAR, to ensure that MAIP business will be serviced by companies that have at least an A- rank from A. M. Best, a leading industry analyst.

For consumers, Rules 30 and 31 ensure that ARCs and LADCs utilize in their MAIP business the policy forms and other prescribed documents and the Direct Payment Plan that they use to service the voluntary market. ARPs must satisfy experience requirements prescribed by CAR. Overall, these requirements relating to MAIP business emphasize the importance of obtaining complete and accurate information from applicants, and provide for extensive oversight of business written through the MAIP. Careful attention to such business may help the ARC ultimately control its losses.

Rule 32, Claim Practices, has been revised to be consistent with our revisions to current CAR Rule 10. It requires claim handling practices to follow guidelines set by the National Association of Insurance Companies, and sets performance standards to measure compliance with those practices. Language in CAR's proposed rule that would change the underwriting criteria for pre-inspection of vehicles has been deleted for the same reasons that it was deleted from CAR's proposed change to the current Rule 10.

Rule 36 implements the Subsidy Clearinghouse for the MAIP, and Rule 38 addresses termination from or withdrawal by ARCs and LADCs from the MAIP.

Rule 21 – General Provisions and Temporary Provisions

for the Transitional Period January 1, 2006 to December 31, 2007

A. General Provisions

The Massachusetts Automobile Insurance Plan has been created to provide private passenger automobile insurance coverage to eligible risks, as defined by Rule 22, who seek coverage and are unable to obtain such coverage through the voluntary market, and to assure that the policies written through the Massachusetts Automobile Insurance Plan are distributed equitably based upon the quota share, as defined by Rule 22, of each Member, as defined by Rule 22.

The Rules of Operation of the Massachusetts Automobile Insurance Plan are adopted in accordance with the Plan of Operation in order to carry out the provisions of the Plan and shall apply to private passenger motor vehicle insurance policies beginning January 1, 2006, subject to the limitations provided by the Temporary Provisions for the Transitional Period January 1, 2006 to December 31, 2007 set out in Rule 21(B) below.

B. Temporary Provisions for the Transitional Period January 1, 2006 to December 31, 2007

In order to achieve as smooth a transition as possible from the reinsurance facility administered by Commonwealth Automobile Reinsurers to the Massachusetts Automobile Insurance Plan, several transitional rules are necessary, so as to ensure that the Massachusetts Automobile Insurance Plan is not overwhelmed in its initial three years of operation. Accordingly, the following limitations on the risks eligible for submission to the Massachusetts Automobile Insurance Plan are established.

1. Limitations on Eligible Risks

    a. Beginning on January 1, 2006, only a producer having a voluntary contract with a Member since November 23, 2004, and who meets the eligibility requirements set out in Rule 31, may submit only such business to the Massachusetts Automobile Insurance Plan as meets the following criteria:

        1. an eligible risk, as defined in Rule 22, who is new to Massachusetts, not having been licensed or insured in the past ninety days in Massachusetts, and who can also provide evidence of licensing in a jurisdiction outside of Massachusetts; or

        2. an eligible risk, as defined in Rule 22, who is a new driver with no previous driver's license experience in any jurisdiction and who is obtaining his or her own policy.

    b. Beginning on January 1, 2007, only a producer having a voluntary contract with a Member and who meets the eligibility requirements set out in Rule 31 may submit only such business to the Massachusetts Automobile Insurance Plan as meets the following criteria:

        1. an eligible risk, as defined in Rule 22, who is new to Massachusetts, not having been licensed or insured in the past ninety days in Massachusetts, and who can also provide evidence of licensing in a jurisdiction outside of Massachusetts; or

        2. an eligible risk, as defined in Rule 22, who is a new driver and who has not been previously licensed in any jurisdiction and who is obtaining his or her own policy; or

        3. an eligible risk, as defined in Rule 22 for which coverage was in effect for the preceding twelve-month period, from a producer having a voluntary contract with a Member since November 23, 2004, and who meets the eligibility requirements set out in Rule 31.

    c. Beginning on January 1, 2008, any producer who meets the eligibility requirements set out in Rule 31 shall be eligible to submit business to the Massachusetts Automobile Insurance Plan.

Rule 22 – Definitions

When used in the Rules, the following terms shall have the stated meanings:

ASSIGNED RISK COMPANY (ARC) means a Member that has been appointed pursuant to the Plan and rules of Operation to issue private passenger motor vehicle insurance policies assigned by the MAIP and, for the purposes of the MAIP, is a servicing carrier as this term is used in G.L. c. 175, § 113H.

ASSIGNED RISK PRODUCER (ARP) means any person licensed as a property and casualty insurance producer pursuant to G.L. c. 175 §162H to §162X inclusive, that has completed the MAIP requirements and has been certified by the Governing Committee or its designee to immediately submit motor vehicle insurance policies for placement through the Massachusetts Automobile Insurance Plan with an Assigned Risk Company.

CAR means Commonwealth Automobile Reinsurers.

CAR YEAR OF EXPOSURE means one car insured for twelve months.

COMMISSIONER means the Commissioner of Insurance of Massachusetts.

ELIGIBLE RISK means any person who qualifies for a private passenger motor vehicle, insurance policy under the provisions of G.L. c.175 §113H and §193R excluding antique motor vehicles pursuant to G.L.c.175 §113U.

HOUSEHOLD MEMBER means anyone living in a person's household who is related to that person by blood, marriage, or adoption. This includes wards, stepchildren or foster children.

INACTIVE MEMBER means any insurer which is licensed to write motor vehicle insurance policies or bonds in Massachusetts, but which did not, in fact, issue any motor vehicle insurance policies or bonds in Massachusetts during the most recent calendar year and which is not the issuing company on any outstanding Massachusetts motor vehicle insurance policies or bonds.

LIMITED ASSIGNED DISTRIBUTION COMPANY (LADC) means a Member that has been approved pursuant to the Plan and Rules of Operation to enter into an agreement with another Member that has been appointed as an Assigned Risk Company for the purpose of servicing the quota share of assigned risk business of that Member.

MAIP means the Massachusetts Automobile Insurance Plan. The MAIP is the mechanism by which eligible risks who are unable to obtain voluntary coverage are assigned to a Member for the purpose of obtaining private passenger automobile insurance coverage, and by which such policies are distributed equitably based upon each Member's quota share.

MANUAL OF ADMINISTRATIVE PROCEDURES means the Manual of Administrative Procedures of the MAIP.

MEMBER means any insurer which is licensed to write motor vehicle insurance policies or bonds in Massachusetts and which does not qualify for inactive membership status. Groups of companies under the same ownership and/or management will be treated as a single Member.

MOTOR VEHICLE INSURANCE means direct insurance against injury or damage, including the legal liability arising out of the ownership, operation, maintenance or use of motor vehicles, including but not limited to bodily injury liability insurance, personal injury protection insurance, property damage liability insurance, physical damage insurance, medical payments insurance, uninsured/underinsured motorists insurance and towing and labor insurance.

PERSON means every natural person, firm, co-partnership, association, corporation, government or agency.

PLAN OF OPERATION or PLAN means the Plan of Operation of the Massachusetts Automobile Insurance Plan.

PRINCIPAL PLACE OF BUSINESS as it applies to the definition of an eligible risk means the chief or usual place of business. It is the head office, the place where the principal officers generally transact business and the place to which reports are made and from which orders emanate. It is also the place where the corporate functions are performed. It is where executive offices are located and corporate decisions are made. The burden of proof with regard to the location of the principal place of business, consistent with the definition as stated above, lies with the applicant who seeks to qualify as an eligible risk.

PRIVATE PASSENGER MOTOR VEHICLE means those vehicles as defined in the Massachusetts Private Passenger Automobile Insurance Manual published by the Automobile Insurers Bureau of Massachusetts.

QUOTA SHARE means the volume of business to be assigned to Members participating as an Assigned Risk Company in the MAIP.

RULES OF OPERATION or RULES or RULE means the Rules of Operation of the Massachusetts Automobile Insurance Plan (MAIP) or a Rule of the MAIP.

SUBSIDY, for the purposes of the operation of the Subsidy Clearinghouse established by Rule 36, is defined for a given year as the rate established for each territory and driver class combination in the subsidy matrix calculated by the Automobile Insurers Bureau of Massachusetts, which compares the rate decision of the Commissioner for that year to the actual cost-based rate for each territory and driver class combination.

SUBSIDY CLEARINGHOUSE means the method by which positive and negative rate subsidy values, by class, territory and coverage will be allocated to Members.

Rule 23 – Member Obligations

A. Member Obligations

1. Every Member shall be bound by the Plan of Operation and all Rules adopted pursuant to it.

2. Financial Obligations

   a. Each Member agrees to pay assessments levied against it for the operating expenses of the MAIP; to pay penalties levied against it under the Rules adopted by the Governing Committee; and to submit in a timely and accurate fashion all statistics, records and accountings required by the MAIP.

   b. Each Member, in recognition of the absolute necessity for timely payments of balances owed the MAIP, shall pay late payment fees at the prime rate as established by the Federal Reserve Bank of Boston compounded monthly for late payment of any assessment or late payment fees levied in accordance with the Plan or Rules of Operation. Each Member shall also compensate the MAIP for all damages and expenses incurred by the MAIP as a result of the failure of any Member to pay any balance owed the MAIP pursuant to the provisions of Rule 23 or 35, which remains unpaid as of the tenth calendar day following the invoice due date, written notice of the default having been mailed by certified mail to the company by the MAIP on or after the first business day following the invoice due date. Damages and expenses as used herein shall include but not be limited to the MAIP's attorney's fees incurred directly or indirectly with the collection of the balance due, all costs of borrowing incurred as a result of the nonpayment, the cost of all staff time spent in connection with efforts to collect the balance outstanding, all financial losses resulting from nonpayment and all other related expenses and losses.

   c. Any Member shall be entitled to appeal to the Governing Committee any assessment, or late payment fees, damages or expenses which were levied in accordance with the Plan or Rules of Operation. However, the Member will be required to pay the amount billed by the MAIP before such appeals will be considered. If the Governing Committee rules in favor of the Member, a proper adjustment, including interest at the prime rate and any damages and expenses assessed, will be made by the MAIP to the Member's account. Before exercising any other right of appeal provided pursuant to G.L. c.175 §113H, the Plan of Operation or Rules of Operation of the MAIP, the Member shall pay all amounts owed to the MAIP.

   d. With respect to Members which have failed to pay assessments, late payment fees or compensatory damages or expenses within forty-five (45) calendar days of the postmark date of the overdue payment notice, a report will be submitted to the Division of Insurance setting forth the fact of such nonpayment for its consideration and, if it deems appropriate, action.

3. When a Member is merged or consolidated into another insurer, or another insurer has reinsured a Member's entire motor vehicle insurance business in Massachusetts, such Member and its successor in interest or such other insurer shall be liable for such Member's obligations. The quota share of the continuing Member will be adjusted to include the business attributable to the merged or consolidated Member.

4. Assigned Risk policies of the transferring Member shall not be subject to cancellation by the Member to which said obligations have been transferred in accordance with the provisions of Rule 29 - Assignment Process; provided however, that nothing set forth herein shall prohibit the cancellation of an Assigned Risk policy pursuant to the provisions defining an eligible risk or the provisions of G.L. c.175 §22C.

5. A Member may terminate its membership in the MAIP upon the surrendering of its license to write motor vehicle insurance policies or bonds in Massachusetts. Terminations of membership shall not discharge or otherwise affect the liabilities of the Member incurred prior to the effective date of the termination of membership or in any way affect the Member's obligation to make payments pursuant to the provisions of Rule 35 – Assessments.

6. If any Member is declared insolvent by a court of competent jurisdiction, its membership in the MAIP shall terminate as of the date it is declared insolvent, but it shall be liable to the MAIP for all obligations incurred under the Plan or these Rules prior to the date it is declared insolvent. The MAIP shall compute the amount of such obligations in accordance with these Rules and shall be entitled to offset any liabilities of the Member to the MAIP against any liabilities of the MAIP to the Member.

7. No judgment against the MAIP shall create any direct liability against the individual Members.

8. There shall be an annual meeting of the Members of the MAIP, which shall be held within seventy-five days of the end of the fiscal year at such time and place as is determined by the Governing Committee and specified in the notice of meeting.

9. Special meetings of the Members of the MAIP shall be called at any time by the Governing Committee upon the written request of eight members of the Governing Committee.

10. Written notice of any such meeting of the Members of the MAIP shall be sent to each Member at least ten days before the date fixed for such meeting stating the purpose of the meeting.

11. Minutes of all such meetings of the Members of the MAIP shall be sent to all Members, the Governing Committee, producer associations, and the Commissioner.

B. Inactive Member Obligations

An Inactive Member shall receive those distributions from the MAIP which are required by Article X of the Plan of Operation or which otherwise emanate from the Massachusetts Division of Insurance. Inactive Members will not be furnished with other MAIP Bulletins and will not be assigned reporting numbers. Inactive Members must abide by the Plan of Operation and Rules of Operation of the MAIP. At such time as an Inactive Member issues a motor vehicle insurance policy or bond in Massachusetts, it must request that a reporting number be assigned to it and at that time, it must fully assume the obligations of a Member.

Rule 24 – Governing Committee

A. __Responsibilities of the Governing Committee__

The Governing Committee of CAR shall have responsibility for the administration of the MAIP, including the preparation and filing of the Plan and Rules of Operation and the adoption and filing of any amendments to the Rules or Plan of Operation.

B. Members and Alternates

Any member of the Governing Committee may designate an alternate for any meeting of the Governing Committee by giving notice to the Commissioner and the MAIP of the name of such alternate prior to the meeting, subject to the approval of the Commissioner. In addition, all members of the Governing Committee shall designate, subject to the approval of the Commissioner, an alternate who may attend one meeting of the Governing Committee during each calendar year without prior approval of the Commissioner for the specific meeting.

C. Powers

The Governing Committee shall have the following powers:

1. To select at the annual meeting a Chairman and Vice-Chairman of the Committee in accordance with the following procedures:

   The position of Chairman and Vice-Chairman shall be rotated annually between those chosen from insurance companies and those chosen from producers of insurance, except the Committee may elect an incumbent Chairman and/or an incumbent Vice-Chairman to a second one year term or, if the incumbent has served for less than a full year, to one new term of one year, regardless of his (her) predecessor. At no time shall the Chairman and Vice-Chairman both be insurer members or producer members of the Committee. No person may serve more than two consecutive terms as Chairman of the Committee. In the event the Chairman is unable to complete his (her) term, the Vice-Chairman shall become Chairman, at which time the Committee shall elect a new Vice-Chairman;

2. a. To appoint and remove the officers of the MAIP, subject to the approval of the Commissioner, and fix their salaries within the ranges established for the position. After an appointment has been approved, the Commissioner may instruct the Governing Committee to remove the officer for cause only. Salary ranges for officers shall be established by the Governing Committee, subject to the approval of the Commissioner,

at a level that is consistent with the level of salaries in public sector organizations in Massachusetts;

b. To appoint or employ others as is necessary to carry out the business of the MAIP;

3. To appoint standing or temporary subcommittees for purposes of assuring that subcommittees fairly represent the Member Companies and producers, with due consideration given to the existence of expertise appropriate for the subcommittee in question. No individual may serve as Chairperson of more than two standing subcommittees;

4. To prepare a Manual of Administrative Procedures which shall contain instructions for the statistical recording and reporting of MAIP business; auditing and claim review procedures; and other pertinent information;

5. To appoint or terminate Assigned Risk Companies (ARCs) as necessary;

6. To certify or revoke the certification of Assigned Risk Producers (ARPs) as necessary;

7. To manage the process by which risks are assigned to ARCs, to hold hearings on appeals by policyholders by reason of placement in the MAIP as is provided by Rule 26(A)(1) and on requests for assignment to a different ARC as is permitted by Rule 26(A)(1), and to report quarterly to the Division the circumstances and outcomes of these appeals;

8. To levy assessments on the Members as necessary for the operating expenses of the MAIP;

9. To assess penalties as provided for in the Rules of Operation or Manual of Administrative Procedures and to report to the Commissioner on a quarterly basis all producer and Member infractions;

10. To authorize contracts as necessary to provide space, equipment and services for the MAIP;

11. To distribute an annual report and minutes of the Annual Meeting of the Governing Committee to the Commissioner, to Members and to producer representatives serving on any committee;

12. To file manuals of classifications, rules, rates, rating plans and policy forms with the Commissioner, as may be permitted or required by law;

13. To initiate or defend legal actions in the name of the MAIP on behalf of the Members;

14. To take any other action it deems necessary or appropriate for efficient and effective operation of the MAIP consistent with the purpose and intent of the MAIP; and

15. To file manuals of classifications, rules, rating plans and policy forms, including declination templates, with the Commissioner, as may be permitted or required by law.

D. Annual Meeting

The Governing Committee shall hold an Annual Meeting in conjunction with the Annual Meeting of the Members and shall report a summary of the previous fiscal year's activities at that time.

E. Additional Meetings

The Governing Committee shall hold additional meetings as necessary when called by the Chairman, by the Commissioner, or upon written petition of four members of the Governing Committee. No meeting shall be held with less than ten days' notice unless at least eight members of the Committee waive the notice requirement, which waiver shall be entered in the minutes of the meeting.

F. Agenda for Meetings

Agendas for meetings shall be furnished to all members of the Governing Committee and to the Commissioner with the notice of such meeting. Only items specifically listed on the agenda will be considered unless two-thirds of the members of the Committee present vote for admission of each additional item.

G. Quorum

A quorum of the Governing Committee shall consist of eight members, at least two of which are insurer members and two of which are producer members. No vote of the Governing Committee shall be taken unless a quorum is present.

H. Procedures

Before the Governing Committee takes final action on a matter that has a direct impact on determination of any member company's quota share or any other significant financial impact, the final text of the motion to be considered will be provided to all members, at least twenty (20) calendar days prior to the scheduled Governing Committee action, unless ten (10) members of the Governing Committee vote to waive the twenty (20) day requirement. The text of the motion, sent to member companies, will be accompanied by an explanation. Any such action taken by the Governing Committee will not take effect for twenty (20) calendar days, unless ten (10) members of the Governing Committee vote that the action will be effective immediately. Any party aggrieved by the action may appeal to the Commissioner of Insurance pursuant to Rule 40, B.

I. <u>Proxy Voting Not Allowed</u>

No member of the Governing Committee shall be permitted to vote by proxy.

<u>J. Open Meetings</u>

All meeting of the Governing Committee meetings shall be subject to the provisions of G.L. c.30A, § 11A½. Upon a two-thirds vote of the members of the Governing Committee present and voting, the Governing Committee may meet in executive session, as permitted by said § 11A½.

Rule 25 – MAIP Officers

The officers of the MAIP shall include a President and such other officers as the Governing Committee may authorize. The position description of the above officers will be contained in the Personnel Manual under the jurisdiction of the Governing Committee. The Personnel Manual will also contain information regarding the term of office and salary ranges of the officers.

The President shall preside at all meetings of the MAIP membership and attend meetings of its committees of which he is a member ex officio, and perform such other duties as may be designated by the Governing Committee.

The President shall be responsible for all property of the MAIP, shall receive and carefully keep all monies of the MAIP, disburse the same only for the business of the MAIP and shall account to the Governing Committee for all such disbursements.

The President, or such other person as the Governing Committee may appoint, may sign and endorse in the name and on behalf of the MAIP in the transaction of its business, but not otherwise, checks, drafts, notes, and bills of exchange, subject to such countersignature as the Governing Committee may determine.

The President, or such other person as the Governing Committee may appoint, shall make such filings with the Commissioner on behalf of the MAIP as may be directed by the Governing Committee.

In the absence of the President, or the inability of the President to act, the Governing Committee shall designate another officer of the MAIP to act as President, with all the powers and duties conferred upon the President by the Plan and the Rules of Operation.

Rule 26 – Policyholder Rights and Responsibilities

A. Eligibility Requirements

1. Applicant Eligible for the MAIP

   To be eligible for coverage as described in Rule 27, the applicant must meet the following criteria:

   a. An individual applying for coverage through the MAIP must provide a letter from an insurance company actively writing private passenger automobile insurance in Massachusetts that confirms that the individual has attempted, and been unsuccessful in obtaining, insurance on a voluntary basis within the 15 days prior to the date of application.

      Any applicant who is unable to obtain insurance in the voluntary market must be informed in writing by the member as to the person the reasons for such declination.

      i. The applicant must be notified in writing that he or she may appeal the declination to the MAIP within two business days of his receipt of the declination.

      ii. The MAIP must resolve the appeal within five business days of its receipt of the appeal.

   b. After providing the letter required by section A(1)(a) of this Rule, the individual shall be considered for assignment upon making application in good faith to the MAIP. An individual shall be considered in good faith if he or she reports all information of a material nature and does not make incorrect or misleading statements in the prescribed application form, or does not come with any of the prohibitions or exclusions shown in section A(3) of this Rule.

   c. If the MAIP assigns the applicant to an ARC that the applicant wants to decline, the applicant may appeal the assignment to the MAIP and request distribution a second time in order to obtain a different ARC, as is authorized by Rule 24(C)(7). The applicant does not have the right to request a particular ARC; an applicant has the right merely to ask for another distribution done by the MAIP pursuant to a random assignment of applications that are eligible for coverage based on each company's individual quota, as is provided by Rule 29. The applicant cannot appeal for reassignment pursuant to Rule 29(G)(3) whenever an outstanding premium balance is due the previously assigned company.

   d. The MAIP shall be available to residents and non-residents of the state only with respect to automobiles that are registered or will be registered in the state within 15 days, except that nonresidents who are members of the United States military forces shall be eligible with respect to automobiles registered in other states provided such military nonresidents are stationed in this state at the time application is made and are otherwise eligible for insurance under the plan.

2. Risks Eligible for Assignment

   The following types of risks shall be assigned to a company:

   a. Private passenger nonfleet, where "nonfleet" is defined as four or fewer motor vehicles of any type.

   b. Miscellaneous nonfleet personal vehicles including the following types that are registered:

      i. Motor homes, auto homes (self-propelled)

      ii. Campers and travel trailers.

      iii. Dune buggies

      iv. All-terrain vehicles

      v. Amphibious autos

      vi. Snowmobiles

      vii. Golf carts

      viii. Motorcycles, motor scooters, motorbikes, trail bikes, and mopeds.

   c. Named nonowner applicants

3. Applicant Not Eligible for the MAIP

   a. An applicant shall not be entitled to coverage, nor shall any Member be required to afford or continue insurance under the following circumstances:

      i. If any person who usually drives the motor vehicle does not hold or is not eligible to obtain an operator's license or fails to obtain such license as required by law, or

      ii. If the applicant or anyone who usually drives the motor vehicle fails to meet all obligations to pay any insurance company any automobile insurance premiums due or contracted during the preceding 12 months, or

iii. An applicant shall not be entitled to physical damage insurance as defined in Rule 27 nor shall any Assigned Risk Company or LADC be required to afford or continue to afford physical damage insurance if the applicant has failed to make the vehicle(s) available for inspection pursuant to 211 CMR 94.

b. An applicant who is eligible for insurance shall not be placed in the MAIP in the following circumstances:

i. If during the three successive years prior to the policy effective date, the named insured and any other person who usually operates the vehicle(s) meet all of the following requirements.

(1) has been licensed to operate an automobile in Massachusetts at least thirty-six (36) successive months prior to the effective date of the policy

(2) has been continuously insured for the past thirty-six (36) months prior to the effective date of the policy, with no more than one period of lapsed coverage and where such period was not in excess of sixty (60) days.

(3) has not been involved in an at fault accident (including PIP claims resulting from an at-fault accident) or a traffic violation in the thirty-six (36) successive months prior to the effective date of the policy;

(4) In the previous sixty (60) successive months prior to the effective date of the policy has not had a DUI conviction or a conviction for a vehicular felony.

ii. If a person obtains insurance through a group marketing plan pursuant to G.L. c. 175, § 193R.

iii. If the applicant is one of two or more entities, in each of which the same person or group of persons or corporations owns a majority interest, none of such entities shall be eligible for insurance under the MAIP if any of such entities has failed to meet its premium obligations as outlined above. If an entity owns the majority interest in another entity that in turn owns the majority interest in anther entity, all entities so related shall be considered under the same majority ownership for purposes of this part.

B. Re-Eligibility for the MAIP

Applicants eligible for assignment in accordance with section A. are subject to the following re-eligibility requirements.

1. New Application

   Any applicant denied insurance under Section A or cancelled under Section C of this Rule may reapply to the MAIP as soon as the cause of ineligibility is removed.

   a. Applicants cancelled for nonpayment of premium may reapply for assignment at any time providing no earned premium is owed the previous assigned company.

   b. If an applicant cancelled for nonpayment of premium reapplies, provided such applicant is otherwise eligible, the application shall be accompanied by the deposit prescribed in Rule 28.

   c. Such application shall be considered a new application and the applicant shall be assigned to a company in accordance with the provisions of Rule 29 or reassigned to the prior company, if applicable, in accordance with Rule 29.

2. Renewal Application

   Any policyholder who fails to pay the renewal premium quoted by the assigned company in accordance with these Rules, may reapply for assignment at any time.

   a. If the applicant reapplies, provided the applicant is otherwise eligible, the application shall be accompanied by the deposit prescribed in Rule 28.

   b. Such application shall be considered a new application and the applicant shall be assigned to a company in accordance with the provisions of Rule 29.

C. Cancellations

1. Cancellation at the request of the Request of the Insured

   If for any reason the insured requests a cancellation, the return premium shall be calculated at 0.90 of the pro rata unearned premium for the period of coverage or the sum of $25 per car or policy, whichever is greater, and return the balance to the policyholder except in the following cases when the return premium shall be computed pro rata:

a. If the insured has disposed of the automobile, provided the insured takes out a new policy with the same company on another automobile to become effective within 30 days of the date of cancellation;

b. If the insured automobile is repossessed under the terms of a financing agreement;

c. If an automobile is cancelled from a policy, the policy remaining in force on other automobiles; or if a concurrent automobile policy, with the same company, but covering another automobile, remains in force in the name of the policyholder or his spouse, if a resident of the same household;

d. If the policyholder enters the armed forces of the United States of America;

e. If the insured automobile is stolen or destroyed (total or constructive total loss) and cancellation is requested by the insured within 30 days following the date the automobile is stolen or destroyed; or

f. If the insured requests cancellation of a policy because coverage has been replaced in the voluntary market, and provides the assigned company written confirmation of the replacement coverage.

2. Cancellation by the Company

   a. A company that has issued a policy under the MAIP shall have the right to cancel the insurance for reasons permitted under Massachusetts law, and by giving notice as required in the policy.

   b. Each such cancellation shall be on a pro rata basis, subject to a minimum premium of $25 per car or policy whichever is greater, with the balance returned to the policyholder. A copy of each such cancellation notice shall be furnished to the producer of record. A statement of facts in support of each such cancellation shall be furnished to the producer of record and to the policyholder 10 days prior to the effective date of cancellation.

Cancellation shall be effective on the date specified and coverage shall cease on that date.

No coverage will be effective if the policyholder's premium remittance that accompanies the application is justifiably dishonored by the financial institution.

If the company issues a cancellation notice for nonpayment of premium to the policyholder and the policyholder's remittance received by the company subsequent to the issuance of such cancellation notice is justifiably dishonored by the financial institution, the MAIP policy will terminate on the date and time shown on the cancellation notice issued for nonpayment of premium.

Nothing herein shall be deemed to affect the company's right to rescind a policy for fraud, misrepresentation, or if the insured's premium remittance that accompanies the application is justifiably dishonored by the financial institution, or to invoke other remedies provided by law.

3. Minimum Refund

At the time of cancellation, the policyholder shall be notified that any unearned premium amounts under $5 will be refunded only upon the policyholder's request.

Rule 27 – Coverages

Policies of an Eligible Risk as defined in Rule 22 – Definitions and written by an ARC or LADC may provide for coverage up to the following limits for private passenger motor vehicles.

1. Bodily Injury Liability: Total policy limits of $500,000 each person, $500,000 each accident;

2. Personal Injury Protection: $8,000 per person, per accident;

3. Property Damage Liability: Total policy limits of $250,000 each accident;

4. Medical Payments: $25,000 each person;

5. Uninsured Motorists: $500,000 each person, $500,000 each accident for bodily injury;

6. Underinsured Motorists: $500,000 each person, $500,000 each accident for bodily injury;

7. Physical Damage Insurance, which shall mean: (a) collision coverage or limited collision coverage, (b) fire and theft coverage, or (c) comprehensive coverage, as those coverages are defined in the Massachusetts Motor Vehicle Insurance Policy. Assigned Risk Companies must charge the extra risk rate as promulgated by the Commissioner of Insurance or, in the alternative, refuse to issue collision, fire, theft or comprehensive coverage under the following circumstances:

    a. Comprehensive, fire and theft or collision coverage on a vehicle customarily driven by or owned by persons convicted within the most recent five year period of any category of vehicular homicide, auto insurance related fraud or motor vehicle theft;

    b. Comprehensive, fire and theft or collision coverage on a vehicle customarily driven by or owned by persons who have, within the most recent five year period, made an intentional and material misrepresentation in making claim under such coverages;

    c. Collision coverage on a vehicle customarily driven by or owned by persons who have been involved in four or more accidents in which such person has been deemed to be at fault in excess of fifty percent within the three years immediately preceding the effective date of the policy;

d. Comprehensive or fire and theft coverages on a vehicle customarily driven by or owned by persons who have had two or more total theft or fire claims within the three years immediately preceding the effective date of the policy;

e. Comprehensive, fire and theft or collision coverage on a vehicle customarily driven, or owned by persons convicted one time within the most recent three year period of any category of driving while under the influence of alcohol or drugs;

f. Comprehensive, fire and theft or collision coverage on any motor vehicle for which a salvage title has been issued by the Registrar of Motor Vehicles unless a new certificate of title has been issued pursuant to G.L. c. 90D, §20D;

g. Comprehensive, fire and theft or collision coverage on a high-theft vehicle that does not have at least a minimum anti-theft or auto recovery device as prescribed by the Commissioner of Insurance. The Commissioner may designate as a "high-theft vehicle" any vehicle, classified according to make, model and year of manufacturer, which has both above average incidence of theft and above-average original sales price, and may approve discounts for appropriate anti-theft or auto recovery devices for such vehicles;

8. An ARC or LADC may waive the deductible amount applicable to a payment under comprehensive coverage for glass damage and be reimbursed, when the insured has elected to repair rather than replace damaged glass as permitted by law and where satisfactory proof of the repair has been presented to the company.

9. Towing and Labor: $100.00 per disablement;

10. Substitute Transportation: $100.00 per day, thirty day maximum.

Rule 28 – Application Process

A. Submitting an Application to the MAIP

To obtain MAIP coverage for an eligible risk an ARP must submit an electronic application for private passenger automobile insurance coverage to the MAIP.

Assigned Risk Producers must assure that the application for insurance through the MAIP is submitted on the prescribed form and that each application is filled out accurately and in its entirety. An incomplete or incorrect application will be returned to the producer for remedy. Once the application for coverage through the MAIP is received and all required information for issuance of the policy is provided, the MAIP will assign a certification number to the application.

B. Assignment of Policy to Assigned Risk Company or Limited Assigned Distribution Company

An application with a certification number will be randomly assigned to an ARC or LADC based on quota share as specified in Rule 29 – Assignment Process. The MAIP will notify the ARC or LADC of the policy assignment. The MAIP will notify the Assigned Risk Producer of the ARC or LADC to which the policy is assigned and the effective date of the coverage.

Once the policy has been assigned to an ARC or LADC, the Assigned Risk Producer is responsible for providing the ARC or LADC with the following items within two working days as specified in Rule 31, B, 2:

1. The original application form, signed by the applicant and the ARP.

2. The required deposit premium as specified below.

C. Premium Deposit and Payment Options

1. Amount of Deposit

   A deposit of at least the amount noted below shall accompany the application for MAIP coverage. The deposit shall be in the form of a personal check, certified check, bank check, money order, premium finance company check or Assigned Risk Producer's check made payable to the ARC or LADC. In the event that an ARP submits a dishonored check, issued either by the agency or by the ARP individually, on one or more occasions during a one-year period, future payments must be submitted by certified check, bank check, or money order.

   a. For a new business policy, a deposit of 30% is required.

   b. For a renewal policy, a deposit of 20% is required.

However, if the eligible risk has previously had a policy cancelled for non-payment, a premium deposit of 100% will be required in addition to the outstanding balance of any earned premium. The eligible risk must complete a new application and the Assigned Risk Producer must verify that the eligible risk has no earned premium outstanding within the last twelve months.

Upon receipt of the deposit accompanying an application for insurance, the assigned ARC or LADC may deduct from such deposit any unpaid balance or earned premium owed to any ARC or LADC by the eligible risk and apply this amount to the unpaid balance. If such balance is not paid within the time permitted by the MAIP, the ARC or LADC shall be entitled to cancel the insurance.

All deposit, installment and additional premium payments shall be submitted gross of any commissions. Commission to the Assigned Risk Producer will be paid in accordance with Rule 37 – Commissions.

2. Installment Plan

Each installment bill will consist of one-tenth of the remainder of the policy premium, subject to a minimum amount due of \$20 (to which any outstanding balance of less than \$20 is to be added), plus an installment charge of \$4 on each installment. If there has been a lapse in coverage of more than one day at any time during the past twelve (12) months, the installment charge will be equal to an Annual Percentage Rate (APR) of 15%. If the insured elects to pay the outstanding balance at any point during the installment billing period, the installment charge for the current bill would apply.

a. 1st installment – 1 month after the effective date of the policy

b. 2nd installment – 2 months after the effective date of the policy

c. 3rd installment – 3 months after the effective date of the policy

d. 4th installment – 4 months after the effective date of the policy

e. 5th installment – 5 months after the effective date of the policy

f. 6th installment – 6 months after the effective date of the policy

g. 7th installment – 7 months after the effective date of the policy

h. 8th installment – 8 months after the effective date of the policy

i. 9th installment – 9 months after the effective date of the policy

j. 10th installment – 10 months after the effective date of the policy

The first installment bill shall reflect the current annual policy premium plus the total installment charge, minus the deposit. Each installment bill should display the status of the account and is to be released to the insured.

Additional premium, less the deposit premium resulting from changes to the policy, shall be spread over the remaining installments, if any, or will be billed immediately as a separate transaction if there are no remaining installments.

Return premium resulting from changes to the policy may be used to reduce the outstanding balance, or if the outstanding balance is eliminated, any amount remaining will be returned immediately. If an outstanding balance remains, the number and amounts of the remaining installments will be adjusted accordingly.

The return premium check shall be sent to the insured. In instances where the premium is financed and a power of attorney is on file with the assigned company, the return premium check shall be sent to the premium finance company.

3. Insufficient Funds Charge

   Any check returned for insufficient funds will be charged a fee of $25.

4. Late Fee or Cancellation Fee

   Any installment premium not paid by the applicable due date will be charged a late fee of $15.

5. Reinstatement on Non-Payment Cancellations

   No grace period shall be allowed for the reinstatement of a policy cancelled for non-payment.

6. Agency Acceptance of Payments

   Acceptance of payment by the Assigned Risk Producer shall be viewed as a payment to the ARC or LADC. To avoid policy cancellation, a payment must be received on or before the policy cancellation date.

7. Premium Financed Policies

   The standards pertaining to premium financing for MAIP policies must be consistent with the existing regulatory requirements applicable to premium finance companies as set forth in the Banking Code sections of the Massachusetts General Laws.

Rule 29 – Assignment Process

A. <u>Limited Assignment Distribution Procedure</u>

A Member may elect to be excused from its Assigned Risk Company responsibilities if the Member executes an agreement with a Limited Assignment Distribution Company ("LADC") to service its quota share and to receive additional assignments of assigned risk business. Each LADC arrangement must have one servicing Member that writes assigned risk business on behalf of those Members of the arrangement that choose to be excused from their quota share.

B. <u>Assignment of LAD Companies/Company Requirements</u>

LADCs must be approved by the Governing Committee and must meet and continuously maintain specified eligibility requirements. If at any time the does not satisfy the specified requirements, the MAIP will take appropriate action. The specified eligibility requirements that a LADC must meet are:

1. have a statutory capital and surplus of at least $25,000,000;
2. have and maintain a net premium to surplus ratio that does not exceed 2 to1;
3. have maintained an A.M. Best's financial rating of A- or better for a continuous three-year period from the most current publication date of the member's rating. A financial rating from an alternative rating service cannot be used to fulfill this eligibility requirement;
4. have been licensed to write automobile liability insurance and physical damage insurance without restriction for a minimum of five years;
5. have a service facility affording policy issuance and all other policyholder services; and
6. have the ability to service insurance claims in every state, the District of Columbia; and Canada, and;

The Governing Committee has the option to consider a LADC application from a company that does not meet the above eligibility criteria with the prior written approval of the Commissioner.

C. <u>Assignment of Applications</u>

The MAIP shall make random assignment of applications that are eligible for coverage based on each company's individual quota. A company's quota shall reflect that company's proportion of private automobile MAIP premiums that its respective voluntary private passenger property damage liability direct written exposures bears to the statewide total of voluntary private passenger property damage liability direct written exposures of all companies in the state.

1. For the purpose of such distribution as described above: (1) voluntary private passenger property damage liability direct written exposures; and (2) private passenger MAIP premiums shall be defined as below:

    a. "Voluntary private passenger property damage liability direct written exposures" shall be the number of private passenger property damage liability car years written by the company for the most recent twelve months, regardless of the type of automobile insurance policy under which such property damage liability care years are written, excluding private passenger liability car years written through the MAIP.

    b. "Private passenger MAIP premiums" shall mean the total of:

        i. automobile bodily injury, property damage liability, medical payments, personal injury protection, uninsured motorists, and underinsured motorists and physical damage premiums for private passenger MAIP insureds.

        ii. the premium credits allowed under this rule.

D. <u>Quota Adjustment</u>

The MAIP shall adjust the current assignment quota share of each ARC or LADC on a monthly basis, to reflect the amount of MAIP exposure which was less than or in excess of the ARC's or LADC's proportionate share of the total MAIP exposure. Adjustments to an ARC or LADC's quota share will include an update of market share base data, a true-up of assigned exposure with actual statistically reported exposure and adjustments for any applicable take-out credits, reversed assignments due to non-payment or insufficient funds, or MAIP risks moving to the voluntary market. On a monthly basis, the MAIP shall notify each ARC or LADC of its quota adjustment.

E. <u>Assignment Period</u>

An eligible risk shall be assigned to a designated ARC or LADC for a period of three consecutive years. The designated ARC or LADC may offer to continue an eligible risk's assignment beyond the period of three consecutive years by offering to write a third or subsequent renewal.

If the eligible risk is unable to obtain insurance in the voluntary market at the end of the three-year period, or unable to obtain an extension by the designated ARC or LADC, reapplication for coverage may be made to the MAIP. Such reapplication shall be considered as a new application.

In the case of nonresident military personnel, as described under Rule 26(A)(1)(d), the designated company shall not be required to renew if at the time of renewal the insured is stationed in another state and his automobile is not registered in Massachusetts.

F. <u>Credit Programs</u>

Any premium credited under Rule 29(E) that in aggregate exceeds 100% of the overall quota may not be credited against the quota.

1. Mandatory and Voluntary Take-Out

   a. The MAIP will make available to all Members a current listing of all MAIP insureds.

   b. Each Member shall receive a take-out credit for each policy presently in the MAIP that it voluntarily writes at the policy's expiration date, through the producer of record or through the Member's own producer.

   c. Credit shall be applied to the Member's quota share in Rule 29(D) for the appropriate take-out premiums as defined under section F(2) below.

2. Credits

   The amount of credit will be as follows:

   200% of the annual premium that would have been charged if the risk had been written through the MAIP for any of the following risks:

   a. Inexperienced Operator Take-Out: Designated inexperienced operator classes having a higher proportion of MAIP risks. The MAIP shall at least annually circulate to Members a list of the inexperienced operator classes for take-out credit. The initial listing of eligible inexperienced operator take-out business will be available only after sufficient experience has developed under the MAIP to identify the inexperienced operator patterns of MAIP risks.

   b. Senior Citizen Take-Out: Any operator of the auto age 65 or over resident in the household.

   c. Territorial Take-Out: Designated rating territories having a higher proportion of MAIP risks. The MAIP shall at least annually circulate to Members a list of the rating territories qualifying for territorial take-out credit. The initial listing of eligible territorial take-out business will be available only after sufficient experience has developed under the MAIP to identify the territorial patterns of MAIP risks.

d. To qualify for credit all of the following requirements must be met:

   i. The company must provide proper notification prior to the expiration of the policy;

   ii. The policy must be in effect for at least ninety days;

   iii. The kinds and amounts of coverage to be offered as a voluntary risk shall at least equal those in the policy being replaced, and the premium for such coverage shall not exceed the MAIP premium for the equivalent coverages;

   iv. The insurer shall be required to submit an approved reporting form to the MAIP monthly for all policies qualifying during the month and agrees to submit supporting data to the MAIP upon request.

e. The insurer shall, if requested by the MAIP, agree to a physical audit of its records to substantiate the credits and exposures stated in the monthly report. The executed request for credit form must be submitted to the MAIP by the last day of the fourth month following the effective date of the policy.

G. <u>Distribution Restrictions</u>

Distribution shall be made on the basis that any applicant within the foregoing definitions eligible for assignment, shall be assigned or reassigned to any company with a quota, subject to the following restrictions:

1. No risk shall be assigned to more than one Company

2. Household Procedure

   If automobile insurance coverage is in force on a vehicle owned by a resident relative in the same household at the time of the application, the applicant shall be assigned to the company providing the existing insurance unless the applicant specifically requests an individual policy separate from the existing policy, provided that the following requirements are met:

   a. The applicant is eligible under the rules of the MAIP.

   b. A copy of the Declarations page for the policy providing automobile insurance coverage for a vehicle owned by a member of the household is submitted with the application.

   c. The limits and coverages requested are available from the assigned household company.

d. An assignment to any company under the provisions of the household procedure will be eligible for credit under the provisions of 29(F). Any assignment to any company under the provisions of the household procedure that is contrary to the above provisions shall be returned to the MAIP promptly for reassignment.

3. Reassignment to Prior Carrier

In the case where an applicant has an outstanding premium balance due a company, the applicant will be assigned to that same company such that the policy premium deposit will be applied first to the outstanding premium due, and, if the outstanding premium is satisfied, any remaining deposit balance will be applied to the new policy. The applicant cannot appeal for reassignment whenever an outstanding premium balance is due the previously assigned company.

4. Companies with Voluntary Writings

No assignments shall be made to a company, which has written no private passenger automobile or physical damage insurance other than for MAIP insures during the period on which the quotas are based.

Rule 30 – Assigned Risk Company and Limited Assignment Distribution Company Requirements

A. Appointments

All Members, as defined in Rule 22 – Definitions, are required to be Assigned Risk Companies. A Member may be excused from its ARC responsibilities for assigned risk business if the Member executes an agreement with a LADC for handling its private passenger business quota share, in accordance with Rule 29 – Assignment Process. The agreement must be reviewed and approved by the MAIP.

The Governing Committee shall appoint Assigned Risk Companies and Limited Assignment Distribution Companies in accordance with the eligibility requirements specified in accordance with the Plan and these Rules. For purposes of determining eligibility, groups of companies under the same ownership and management will be treated as a single Member.

Nothing in this Rule shall be construed to affect the rights of any ARC or LADC to enter into any contractual agreement for the purpose of servicing the ARC's voluntary business. Nothing in this Rule shall be construed so as to relieve any ARC or LADC of its quota share, its share of the administrative expenses of the MAIP, or of its responsibility to provide coverages as required by G.L. c.175 §113H, (A).

In order to assure the protection of the public interest, the Governing Committee, in considering the appointment of a Member as an ARC or LADC, shall require that the member or another entity pursuant to a written agreement reviewed and approved by the Governing Committee or its designee, has the ability to and will effectively meet the following requirements:

1. Provide policy issuance and premium collection services for all eligible classes of risks, except for those classes of risks specifically exempted by the Commissioner upon the request of the applicant.

2. Service insurance claims in every state, the District of Columbia and Canada.

3. Administer a Direct Bill Program.

4. Provide the Installment Payment Plan as described in Rule 28 – Application Process. An ARC or LADC shall cooperate with Assigned Risk Producers to assure that policyholders are made aware of their option to utilize an Installment Payment Plan.

5. Maintain a Special Investigative Unit to investigate suspicious or questionable motor vehicle insurance claims for the purpose of eliminating fraud.

6. Report all required information to the MAIP in an accurate and timely manner.

7. Adopt and maintain a plan approved by the Commissioner of Insurance providing for direct payment by the insurer to the insured under collision, limited collision, comprehensive, and fire and theft coverages.

8. The policy forms, endorsements, new business application and renewal questionnaire shall be those filed by the Automobile Insurers Bureau and approved for use by the Commissioner of Insurance for private passenger automobile insurance.

B. <u>Responsibilities</u>

An ARC or LADC is required to perform the following responsibilities. If an ARC or LADC has contracted with a third party for performing any of its ARC or LADC responsibilities, it guarantees that the following responsibilities will be performed by the third party.

1. ARCs and LADCs must provide quality service to MAIP policyholders by maintaining the standards established as a condition of appointment under Section A, 1 of this Rule. Policies and other forms mailed to policyholders shall be the same as those used for non-ARC or non-LADC motor vehicle business. ARCs and LADCs shall provide the same level and type of service to policies issued through the MAIP, as they provide to policies issued voluntarily.

2. No group or members of a group under the same management or ownership or both may charge rates on business subject to the provisions of G.L. c.175 §113B, different from those fixed and established under such section or provide different levels of service through a member of the group that is not an ARC or LADC than is provided to policyholders insured by an ARC or LADC member of the group.

3. General Duties

   ARCs and LADCs shall perform the following general duties:

   a. Confirm operator driving licenses and records in order to effectively administer the Safe Driver Insurance Plan.

   b. Verify eligibility criteria and comply with all mandatory take-out provisions in these Rules.

   c. Verify that representations contained in the application for insurance are accurate as to classification, garaging, discounts, credits, vehicle use and vehicle description.

   d. Assure that a policy has been issued for each RMV-1 and/or RMV-3 certificate and that the policy effective date and the certification date are the same.

e. Implement procedures to assure collection of premiums billed.

f. Comply with the terms and conditions of premium finance notes and/or agreements submitted to the ARC or LADC, on behalf of applicants for insurance, by the producer or by a premium finance company licensed under the laws of the Commonwealth of Massachusetts.

g. Ensure that there is communication amongst the ARC's or LADC's Underwriting, Claims, and SIU departments and that any discrepancies in information are shared promptly amongst the departments and documented.

h. Maintain and forward to the MAIP a copy of all written complaints filed with the ARC or LADC on all Assigned Risk Producers.

i. Monitoring of Assigned Risk Producers

ARCs and LADCs will be responsible for notifying the MAIP of Assigned Risk Producer infractions that may result in the revocation of the ARP's MAIP certification as follows:

(1) Failure to maintain a valid producer's license as issued by the Division of Insurance.

(2) Willful misappropriation of premium due an ARC or LADC in accordance with the provisions of the MAIP Rules of Operation.

(3) The entry of a finding, by a court of competent jurisdiction that the producer has engaged in fraudulent activity in connection with the business of motor vehicle insurance.

(4) Failure to remit payments to an ARC or LADC on a timely basis in accordance with the MAIP Rules of Operation.

(5) Failure to notify the ARC or LADC of any suspected fraud in the application for insurance or in the underwriting or rating process or in the payment of premium obligations or surrounding a loss.

(6) Failure to assist the ARC or LADC during any audit or investigation.

(7) Failure to report all coverages bound within two working days of the effective date of coverage.

(8) Failure to comply with reasonable procedures as required by the MAIP for processing claims, remitting premiums, and requesting coverages.

(9) Failure to adhere to a directive issued by the Commissioner relative to the charging of Service Fees.

(10) Failure to provide a reasonable and good faith effort to verify the information provided by the applicant, including rating and licensing data.

(11) Failure to comply with applicable agency requirements and procedures, as prescribed in the MAIP Rules of Operation.

(12) Failure to comply with all of the provisions of the Rules of Operation and Manual of Administrative Procedures.

4. Reporting Requirements

On a monthly basis, ARCs and LADCs must report all premiums written, paid losses, allowable expenses and any other information that may be required by the Plan, Rules or Manual of Administrative Procedures.

5. Continuation of Eligibility as an Assigned Risk Company or Limited Assignment Distribution Company

An ARC or LADC must maintain a viable book of voluntarily written motor vehicle policies. The Commissioner may terminate any ARC or LADC if he/she finds that disruptive reductions in voluntarily issued motor vehicle policies are in violation of this section.

C. <u>MAIP Policyholder Take-Out Provisions</u>

1. Mandatory Offer to Write Good Drivers

For the purposes of this section, the term “risk” refers to private passenger nonfleet vehicles and miscellaneous nonfleet personal vehicles.

a. Eligibility

A risk is eligible for take-out if during the three successive years prior to the expiration of the policy the named insured and any other person who usually operates the vehicle(s) meet all of the following requirements:

i. has been licensed to operate an automobile in Massachusetts for at least thirty-six (36) successive months prior to the effective date of the policy.

ii. has been continuously insured for the past thirty-six (36) successive months prior to the effective date of the policy, with no more than one period of lapsed coverage and where such period was not in excess of sixty (60) days.

iii. has not been involved in an at fault accident (including PIP claims resulting from an at-fault accident) or a traffic violation in the thirty-six (36) successive months prior to the effective date of the policy.

iv. has not had a DUI conviction or a conviction for a vehicular felony in the previous sixty (60) successive months prior to the renewal date of the policy.

b. Offer to Write

i. The assigned company or member company of a group shall offer to write the coverage previously afforded by the policy being replaced for a period of one year.

ii. The kinds and amounts of coverage to be offered for such risks shall not be less than those afforded by the policy being replaced unless such kinds and amounts of coverage are refused by the insured.

c. Notification

i. The company or member company of a group shall provide the producer with notice of intent to offer coverage on a prescribed form at the expiration of the policy. Such notice must be mailed 90 days prior to expiration and shall contain the provisional premium quotation for the coverage to be offered. The policyholder shall be mailed the offer for coverage 45 days prior to the expiration with a copy to the producer of record.

ii. If such replacement insurance is obtained by the producer of record within the period of his or her 45-day advance notice, the producer of record shall notify the company offering to write and it shall not make an offer to the policyholder.

d. Company Obligations

i. Following such offer to write, the assigned company shall have no further obligations to the policyholder or to the producer of record if the policyholder obtains replacement insurance from another company except that such company shall issue any required notice of non-renewal.

ii. If such replacement insurance is not obtained and such offer is accepted, the company offering to write shall be required to issue coverage for a period of one year. The company may, at its option and if permitted by the law of the state, offer to service the policy through the producer of record.

iii. If the original offer by the company to write the coverage in accordance with this Section did not contain an offer to continue servicing the policy through the producer of record and replacement coverage is not obtained by the policyholder or the producer of record on his behalf, the company offering to write shall have no further obligation to the producer of record.

iv. If the offer to service the policy through the producer of record was made and the policyholder continues to designate the producer as his or her producer of record, the company issuing the policy under this subsection shall pay an agreed upon compensation to the producer, or in the absence of such an agreement, shall pay not less than the compensation prescribed by Rule 37 of the MAIP.

v. Thereafter, the company issuing such policy shall be obligated to renew coverage from year to year, unless there is a valid basis for cancellation or non-renewal under Massachusetts law.

2. Voluntary Offer to Write or the Writing of Automobile Insurance Plan Risks

a. Voluntary Writing of Present Plan Insured by Assigned Company or Group

i. Eligibility

A risk is eligible if it is currently insured in the MAIP

ii. Offer to Write

The kinds and amounts of coverage to be offered for such voluntary risks shall not be less than those afforded by the policy being replaced unless the insured refuses such kinds and amounts of coverage.

iii. Notification

The producer of record must be mailed notification of such offer on a prescribed form 90 days prior to expiration, which shall contain the provisional premium quotation to be offered. The policyholder shall be mailed the offer for voluntary coverage 45 days prior to expiration with copy to the producer of record.

iv. Company Obligations

Following such offer to write, the company shall have no further obligations to the policyholder or to the producer of record if the policyholder obtains replacement insurance from another company, except that such company shall issue any required notice of termination.

Once the offer to write voluntary coverage is mailed, the company shall have no further obligation to the producer of record if the policyholder accepts its offer and the producer of record is not licensed by that company, except to issue any required notice of termination. However, the company shall have the option of servicing the policy through the producer of record if permitted by the laws of the state.

If such replacement coverage is obtained by the producer of record within the period of his or her 45-day advance notice, the producer of record shall notify the assigned company and it shall not make an offer to the policyholder.

b. Voluntary Writing of Present Plan Insured by Company Other Than Assigned Company

i. Eligibility

A risk is eligible if it is currently insured in the MAIP

ii. Offer to Write

The kinds and amounts of coverage to be offered for such voluntary risks shall not be less than those afforded by the policy being replaced unless such kinds and amounts of coverage are refused by the insured.

c. Right of Insured to Reapply to Plan

Nothing in the provisions of this Section shall render the policyholder ineligible for coverage in the MAIP for the full term of the three-year assignment period. The policyholder may, at his or her option, continue the policy with the assigned company as a MAIP risk if the three-year assignment period has not yet expired.

d. Failure to Comply with the Provisions of this Section

If the Governing Committee finds that any company without good cause is not complying with the provisions of this section it shall notify The Commissioner.

e. Reporting Take-Out Credits

Refer to the Manual of Administrative Procedures for the procedure outlining company reporting of all take-out credits.

Rule 31 – Assigned Risk Producer Requirements

A. Eligibility Requirements

In accordance with G.L. c. 175, § 113H(C), every Assigned Risk Producer shall be assigned to each and every Assigned Risk Company for the sole purpose of placing assigned risk business.

As of January 1, 2006, any licensed property and casualty producer in good standing shall be determined to have met the producer certification requirements of the MAIP. Subject to the provisions of Rule 21(B), these producers shall be eligible to submit business to the MAIP as an Assigned Risk Producer provided that the producer can satisfy the requirements for electronic access to the MAIP and the Registry of Motor Vehicles, holds a property and casualty producer's license and maintains production criteria set out in Section C of this Rule.

Beginning January 1, 2006, in order to be eligible to submit private passenger business to the MAIP for assignment to an Assigned Risk Company or a Limited Assignment Distribution Company, an Assigned Risk Producer, as defined in Rule 22 – Definitions, must meet the producer certification requirements of the MAIP as follows:

1. has electronic access to the MAIP and the Registry of Motor Vehicles;

2. has within the preceding twelve (12) month period worked for a minimum of six (6) months with a producer licensed by the Division of Insurance, or with a Massachusetts automobile insurer, during which time the applicant's efforts were primarily devoted to the Massachusetts motor vehicle insurance market; and

3. In satisfying the preceding criteria the applicant must conclusively show that he or she:

    a. is applying in good faith;

    b. will operate from an established location properly equipped to meet producer certification requirements;

    c. will maintain regular business hours;

    d. has not been convicted of a crime related to his occupation as an insurance producer;

    e. has not had his or her license to engage as an insurance producer revoked/suspended;

    f. has not been involved in a material and substantial breach of a contract between an ARC or LADC and a producer;

g. is not in default in remittance of any motor vehicle premiums due a Member;

h. agrees to comply with the provisions of the Plan of Operation, the Rules of Operation, the Manual of Administrative Procedures, the MAIP's certification requirements, the production requirements as outlined in Section C of this Rule and the applicable regulations of the Division of Insurance;

i. agrees to notify the MAIP of an agreement to sell the agency fifteen (15) days in advance of the proposed closing of any such sale;

j. has not had an Assigned Risk Producer certification revoked by the MAIP as provided in these Rules, including failure to meet minimum production criteria within the preceding twenty-four (24) months, the revocation not having been reversed by the Governing Committee, the Division of Insurance or a court of competent jurisdiction.

B. <u>Ongoing Assigned Risk Producer Requirements and Responsibilities</u>

It will be the ongoing responsibility of an Assigned Risk Producer to fulfill the following requirements as well as the producer certification requirements in Section A of this Rule. Failure to do so will be grounds for revocation of certification:

1. The Assigned Risk Producer must use the policy forms, endorsements, new business application and renewal questionnaire that are filed by the Automobile Insurers Bureau and approved for use by the Commissioner of Insurance for private passenger automobile insurance.

2. The Assigned Risk Producer must require that all eligible risks applying for insurance coverage by the MAIP for the first time complete a new business insurance application in its entirety.

3. The Assigned Risk Producer must ensure that the application for insurance through the MAIP is submitted on the prescribed forms and that each application is filled out accurately and in its entirety. An incomplete or incorrect application will be returned to the producer for remedy. Steps that the Assigned Risk Producer must take in order to complete an application correctly include the following:

    a. The Assigned Risk Producer must list all licensed operators in the household, including those not used for classification purposes, on the application;

b. The Assigned Risk Producer must include photocopies of the licenses of each listed operator with the new business application;

c. The Assigned Risk Producer must supply documentation supporting the deferral for rating purposes of any household member;

d. The Assigned Risk Producer must confirm each licensed operator's driving record in order to comply with the Safe Driver Insurance Plan;

e. The Assigned Risk Producer must verify that the eligible risk has not been in default in the payment of any motor vehicle insurance premiums in the past twenty-four (24) months;

f. The Assigned Risk Producer must certify, in making application to the MAIP as set forth in Rule 26, that the Assigned Risk Producer has been given a letter evidencing that the risk has made an attempt to obtain private passenger automobile insurance within fifteen (15) days of the application to the MAIP and has been turned down for such insurance;

g. The Assigned Risk Producer must include the full and complete address of the eligible risk. A post office box will not be accepted for the determination of garaging town;

h. The Assigned Risk Producer must verify eligibility for premium discounts through the Registry of Motor Vehicles or other appropriate sources;

i. The Assigned Risk Producer must order only those coverages from the ARC or LADC requested by the eligible risk, for which he or she may be eligible;

j. The Assigned Risk Producer must quote proper premiums based on information provided by the eligible risk for the coverage desired;

k. The Assigned Risk Producer must notify the eligible risk that he or she has the option of utilizing an Installment Payment Plan;

l. The Assigned Risk Producer must verify that the eligible risk has signed the new business application before it is submitted to the MAIP;

m. The Assigned Risk Producer must sign the new business application before it is submitted to the MAIP.

4. The Assigned Risk Producer must submit an electronic application for private passenger automobile insurance coverage to the MAIP to obtain MAIP coverage for an eligible risk.

5. Once the MAIP has notified the Assigned Risk Producer of the certification number assigned to the application, of the ARC or LADC to which the policy is assigned and of the effective date of the coverage, the Assigned Risk Producer is responsible for providing the ARC or LADC with the following items within two working days:

   a. The original application form, signed by the eligible risk and the Assigned Risk Producer;

   b. The required deposit premium as specified in Rule 28.

6. The new business application, any additional coverage, and/or modifications in coverage must be submitted to the ARC or LADC within two days of the effective date of coverage.

7. The Assigned Risk Producer must remit payments on a timely basis. However, an ARC or LADC shall extend the payment period for an additional seven days upon sufficient notice that all or part of a premium is being financed by a licensed premium finance company where the premium finance company has given its written assurance to pay the full premium financed to the ARC or LADC directly. This provision shall not obligate an ARC or LADC to provide such additional time if, notwithstanding any written assurances, the premium finance company has failed to perform its commitment previously.

8. The Assigned Risk Producer must conduct all monetary transactions with the eligible risk and the ARC or LADC as required by the Rules of Operation.

9. The Assigned Risk Producer must advise the premium finance company and/or the policyholder that checks for premiums for all financed accounts are to be made payable to the ARC or LADC.

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10. The Assigned Risk Producer must report all coverages bound and all registrations/titles certified to the ARC or LADC within two working days after binding coverage or certifying a registration.

11. The Assigned Risk Producer must forward to the eligible risk within thirty (30) days of receipt from the ARC or LADC, all policies and endorsements if not mailed directly by the ARC or LADC to the eligible risk.

12. The Assigned Risk Producer must properly order endorsements.

13. The Assigned Risk Producer must retain the necessary documentation of ARC or LADC transactions in accordance with the Manual of Administrative Procedures.

14. The Assigned Risk Producer and his or her employees will be required to receive training on claims reporting and fraud recognition. For current Assigned Risk Producers and employees, such training must be completed within six (6) months of the initial implementation of the MAIP. For new ARPs, such training must be completed within six (6) months of certification by the Governing Committee or its designee to immediately submit motor vehicle insurance policies for placement through the MAIP with an ARC or LADC. For new employees, such training must be completed within six (6) months of hire. Any fraud training program that receives three (3) CEU credits from the Massachusetts Division of Insurance will be acceptable. For purposes of this requirement, any other required training that an ARC or LADC provides to its producers is not considered sufficient for meeting this requirement.

15. The Assigned Risk Producer must notify the MAIP and the ARC or LADC of any suspected fraud surrounding a loss.

16. The Assigned Risk Producer must cooperate with the ARC or LADC and MAIP personnel during all audits and investigations.

17. The Assigned Risk Producer and his or her employees are prohibited from accepting a fee or any other monetary or tangible property for referring the insured or parties to an accident to any glass, repair or rental facility, or to any legal or medical provider.

18. Assigned Risk Producers shall provide referral information to consumers consistent with company practices under regulations relating to motor vehicle repairs.

19. Assigned Risk Producers who meet the producer certification requirements specified in this Rule after January 1, 2008, shall develop and maintain a book of business as required in Section C of this Rule.

C. <u>Production Criteria</u>

Each Assigned Risk Producer that meets the producer certification requirements specified in Rule 31 after January 1, 2008 shall be reviewed annually by the MAIP on the anniversary of his/her certification date. Those ARPs who within the first twelve (12) months after their appointment date as an ARP fail to develop a total book of business of at least 100 private passenger motor vehicles, those ARPs who within twenty-four (24) months following their appointment date fail to develop a total book of business of at least 250 private passenger motor vehicles, those ARPs who within thirty-six (36) months following their appointment date fail to develop a total book of business of at least 400 private passenger motor vehicles, and those who subsequently fail to maintain a total book of business of at least 400 private passenger motor vehicles as of their annual evaluation date, will have their certification revoked unless the Governing Committee or its designee determines particular circumstances that merit a continuation of the certification.

The MAIP shall be responsible for providing the results of the evaluation to the ARP within fifteen (15) days of the evaluation date. The effective date of revocation shall be one year after the evaluation date on which the ARP failed to develop or maintain the applicable minimum book of business. If during the twelve (12) month run-off period, the ARP obtains and maintains the applicable minimum book of business, the certification revocation process shall be suspended and the ARP shall continue to be subject to annual evaluations.

D. Service Fees

1. G.L. c.175 §182 prohibits producers and others in connection with the placing or negotiation of insurance policies or the continuance or renewal thereof from selling or offering to sell anything of value whatsoever not specified in the policy of insurance, and further prohibits producers from charging the insured at a rate different from that fixed, established or approved by the Commissioner. See also G.L. c.176D. The following acts and practices are prohibited:

   a. Charging a fee in addition to the premium rate fixed, established or approved by the Commissioner for certifying a registration on behalf of an ARC or LADC;

   b. Charging a fee in addition to the premium rate fixed, established or approved by the Commissioner for acting as a producer and placing the applicant’s motor vehicle insurance business with an ARC or LADC;

   c. Charging a fee in addition to the premium rate fixed, established or approved by the Commissioner for providing assistance to the insured in the completion of forms which are completed in order for the insured to procure or to continue motor vehicle insurance; and

   d. Charging a fee in addition to the premium rate fixed, established or approved by the Commissioner for the sale of a "service contract" which provides for service or advice relating to the issuance, continuance, or renewal of an insured's motor vehicle insurance policy.

2. Nothing set forth in the provisions above is intended to prohibit producers from charging courier fees and other non-insurance related fees if the following requirements are met;

   a. The producer provides to the applicant a complete description of the non-insurance related services for which the fee, in addition to the premium rate, is being charged;

   b. The producer advises the applicant that there is no obligation to purchase the non-insurance related service and that the insured may obtain motor vehicle insurance through the producer, notwithstanding the insured's decision not to purchase the non-insurance related services;

   c. The applicant, after having been apprised of the above information, agrees to pay the fee; and

   d. The fee for the services provided is reasonable.

3. The producer may enter into a contract with the applicant, pursuant to which the producer provides non-insurance related services to the applicant if the producer complies with all of the requirements above. In the event the producer and applicant execute such a "service contract", the producer shall give to the applicant an executed copy of the contract and shall retain an executed copy in his or her file that shall be made available to the ARC or LADC, Division of Insurance and the MAIP upon request.

<u>E. Certification Ineligibility</u>

1. Grounds for revoking the certification of an Assigned Risk Producer shall be as provided in Rule 30 – Assigned Risk Company and Limited Assignment Distribution Company Responsibilities and Rule 31 – Assigned Risk Producer Responsibilities. Any licensed property or casualty producer who within the preceding twenty-four (24) month period has had an Assigned Risk Producer certification revoked with the said revocation not having been reversed by the Governing Committee, the Division of Insurance, or court of competent jurisdiction, shall be ineligible to place business with the MAIP.

2. An Assigned Risk Producer having its certification revoked for failure to meet minimum production criteria as provided in Rule 31, C shall be ineligible for recertification for a period of two (2) years commencing on the effective date of the revocation.

3. For purposes of this section, the term Assigned Risk Producer includes any licensed producer with whom or which the Assigned Risk Producer whose certification as been revoked has a direct or indirect material and continuing proprietary or management interest.

ARPs whose certification is revoked in conjunction with these Rules must return all MAIP forms, manuals and certification stamp(s) as well as any materials supplied by an ARC or LADC at such time as the revocation becomes effective. The ARP may appeal the revocation in accordance with the procedures specified in Rule 40 – Hearings, Review.

F. Voluntary Termination

An Assigned Risk Producer may choose to terminate its ability to submit business to the MAIP. In this case, the Assigned Risk Producer shall be required to provide thirty (30) days advance written notice to the MAIP.

The Assigned Risk Producer shall return all MAIP forms, manuals and certification stamp(s) as well as any materials supplied by an ARC or LADC.

Rule 32 – Claim Practices

The Governing Committee shall establish and monitor procedures for the review of claim practices of Assigned Risk Companies and Limited Assigned Distribution Companies to insure compliance with the "Performance Standards for the Handling and Payment of Claims". NAIC guidelines are incorporated where applicable into the Performance Standards. The MAIP will conduct periodic audits of ARC and LADC claims including policies in the MAIP and voluntarily written as specified in G.L. c.175 §113H.

A. Claim practices of each ARC and LADC shall comply with the requirements of G.L. c.175 §113H. ARCs and LADCs shall, in accordance with the Performance Standards and the MAIP's Rules:

1. Comply with the standards for prompt investigation of claims. Upon receipt of a new claim, investigate policy information for garaging, listed operator, prior accidents, or any other issues. Information developed may be used to affirm or deny claim payments. Discrepancies shall be communicated to the Underwriting Department and the premium recalculated and billed if appropriate and in accordance with Division of Insurance requirements.

2. Affirm or deny coverage of claims within a reasonable period of time;

3. Effectuate prompt, fair and equitable settlements of claims in which liability is reasonably clear;

4. Maintain claim reserving procedures for all applicable claims.

5. Conduct internal claim quality audit of a reasonably representative number of claim files on MAIP business, commensurate with their procedures for audit of claims on voluntary business, in order to verify compliance with the Performance Standards. With sufficient frequency to reflect reasonable continuity of their quality controls, ARCs and LADCs shall prepare internal reports summarizing the efforts and conclusions of their claim department quality audit. Reports shall consolidate comments relative to both the MAIP and voluntary claim adjustment. Report format shall be at the discretion of each ARC and LADC, or as may be requested from time to time on an individual basis by the Governing Committee, or the Committee's designee.

6. Establish complaint handling procedures, and maintain complete records of all complaints received on claims related to both the MAIP and voluntary business. ARCs and LADCs shall maintain records reflecting the number of complaints received annually. For purposes of this Rule, the term

"complaint" shall mean any written communication initiated by the complainant primarily expressing a grievance.

ARCs and LADCs shall also maintain and forward to the MAIP, records on all written complaints filed on all producers.

7. Acknowledge and act promptly upon communications regarding claims;

8. Promptly provide a reasonable explanation for denial of a claim or for the offer of a compromise settlement.

9. Resolve inter-company subrogation disputes involving Physical Damage and Personal Injury Protection claims through arbitration.

10. Have Direct Telephone Reporting available for first and third party claims.

11. Provide producers with a list of approved inspection services for conducting pre-inspections.

    a.) Appraisers shall report when the damage is inconsistent with the description of the loss.

12. ARCs and LADCs shall offer training on claim reporting and fraud recognition to producers and their customer service representatives. Such training shall be completed for current producer and customer services representatives within six months of approval of this Rule and for new producers and customer services representatives within six months of licensing or employment.

B. In the handling of MAIP claims, ARCs and LADCs shall not:

1. Misrepresent pertinent facts or policy provisions relating to the coverage at issue;

2. Refuse to pay claims without having conducted a reasonable investigation based upon all available information;

3. Fail to promptly settle claims, where liability is reasonably clear, under one portion of the policy coverage in order to influence settlements under other portions of the policy coverage.

C. Every ARC or LADC shall maintain a Special Investigative Unit to investigate suspicious claims for the express purpose of eliminating fraud and shall specifically report to the MAIP evidence of fraud pertaining to theft or misappropriation of a motor vehicle on policies issued through the MAIP as provided in the Manual of Administrative Procedures. Special Investigative Units so established shall be organized and operated to investigate claims on any policies that are issued through MAIP and on policies issued on a voluntary basis by Members. The SIU shall investigate suspicious circumstances surrounding underwriting, rating, and premium issues. A claim shall not be investigated by such a unit solely on the basis that such claim arises from a policy issued through the MAIP. The SIU shall also conduct an audit on a representative sample of policies to verify garaging and policy facts.

D. Compliance with Performance Standards. An error tolerance of ten percent for procedures and seven percent for claim handling will be used to measure compliance with the Performance Standards. Failure to meet the standards or other requirements described in this Rule may result in penalties as directed by the Performance Standards or as may be otherwise imposed by the Governing Committee.

E. Dishonesty

Loss or expense resulting from the dishonesty of those employed to handle claims shall be the sole responsibility of the ARC or LADC.

F. Claim Contingency Procedures

1. Terminations

A Member which terminates its designation as an ARC or LADC as provided in Rule 38 - Terminations shall, subject to the provisions of Rule 32 - Claim Practices, service to a conclusion all claims against all policies issued by it in its capacity as an ARC or a LADC and in effect prior to the date of termination. "Service to a conclusion" shall mean until the claim is properly closed, or until an agreed date.

2. Other Terminations

Upon notice from the Governing Committee of the non-voluntary termination of a Member's designation as an ARC or a LADC, the Vice President-Claims shall examine a representative sample of open claim files to determine the amount of work completed, to estimate the future cost of servicing the claims to a conclusion, and to verify compliance with Rule 32 - Claim Practices. Findings from that examination shall be reviewed with the Claims Advisory Committee, which shall present to the Governing Committee for its consideration the recommendations of the Claims

Advisory Committee for the further servicing of said ARC or LADC claims.

Rule 33 – Statistical Data

Each Member shall furnish or cause to be furnished all statistical data in connection with policies of insurance which may be required by the Governing Committee, and which is not in conflict with Chapter 365 of the Acts of 1977, including data to be used in conjunction with the Safe Driver Insurance Plan. Each Member agrees to permit the Statistical Producer for the Massachusetts Division of Insurance to release statistics requested by the Governing Committee. Statistics shall be furnished at such times and in such form and detail as may be required by the Governing Committee.

Rule 34 – Audit Review

Automobile insurance policies written by a Member of the MAIP or another entity subject to the Plan and Rules of the MAIP shall be subject to a review and audit in a manner and time determined by the Governing Committee. Each Member or entity authorizes the MAIP to audit any portion of its motor vehicle insurance business that has a bearing on any credits, penalties or determination of the quota share attributable to such Member or entity.

Rule 35 – Assessments

Expenses of the MAIP, including all costs of operating the MAIP and all costs, charges, expenses and liabilities and all income, property and other assets which the Governing Committee determine not to be properly chargeable to the profit or loss of risks placed in the MAIP by Members, shall be shared among each Member of the MAIP based upon the proportion that each Member's Massachusetts direct written motor vehicle premiums which are reported on its Annual Statement for the most recent calendar year bear to the total of such premiums for all Members. Assessments for the expenses of the MAIP shall be levied on a quarterly basis or as frequently as the Governing Committee deems necessary.

Premium from those classifications and/or coverages that are not statistically reportable to the MAIP (those classes or coverages not specified in the Massachusetts Private Passenger Statistical Plan) and all premium from Antique Vehicles (Classification Code 0483) is excluded from this calculation.

Rule 36 –Subsidy Clearinghouse

In order to assure access to the voluntary market for risks in subsidized classes and territories, a Subsidy Clearinghouse has been established as the residual market equalization adjustment mechanism for policy years 2006 and subsequent.

The Subsidy Clearinghouse is the means by which positive and negative rate subsidy dollar values will be applied in order to render a Member indifferent as to class and territory in its decision to write business voluntarily. The Subsidy Clearinghouse is based on a class/territory matrix of subsidy calculations for a given year.

For the purposes of the operation of the Subsidy Clearinghouse, Subsidy is defined for a given year as the rate established for each territory and driver class combination in the subsidy matrix pursuant to the rate decision of the Commissioner for that year less the actual cost-based rate for each territory and driver class combination as calculated by the Automobile Insurers Bureau of Massachusetts.

For policy years 2006 and subsequent, each Member will have a Subsidy Clearinghouse account, with sub-accounts for business retained and that would otherwise have been ceded to CAR, and business retained that would otherwise have been eligible for assignment to the MAIP. For each under-priced risk written, a negative dollar subsidy will be applied to the Member's account separately for each sub-account. For each over-priced risk written, a positive dollar subsidy will be applied to the Member's account, separately for each sub-account.

At the close of each accounting term, Members with a net positive subsidy balance in either sub-account will make a payment in that amount to the Subsidy Clearinghouse, and Members with a net negative subsidy balance in either sub-account will receive a payment in that amount from the Subsidy Clearinghouse. Off-balance factors will be applied, where applicable, to ensure that the sum of all Subsidy Clearinghouse sub-accounts for all Members will be equal to zero, in total.

Rule 37 - Commissions

Assigned Risk Producers will be paid the same average commission for private passenger risks insured through the MAIP as are paid for voluntary retained risks in accordance with the rate approved by the Commissioner.

For MAIP business, Assigned Risk Producers that are not operating under the American Agency System will be paid the same average commission as those that are operating under the American Agency System.

Rule 38 – Terminations

A. **Assigned Risk Company and Limited Assignment Distribution Company Terminations**

1. Terminations by the MAIP

   In the event that it becomes necessary for the Governing Committee to terminate a Member from the MAIP, such notice shall be given in writing by the Chairman of the Governing Committee to the Chief Executive Officer of the Member. Such notice shall specify a period of time of no less than six months or such earlier time as the parties may mutually agree, at which time the MAIP will no longer assign new business to the ARC or LADC. The notice to the terminating Member will further stipulate that the Member will be expected, in good faith, to the best of its ability continue to provide service on existing policies as required under the Rules of Operation until the expiration date following the effective date of the termination notice unless the parties shall have mutually agreed to other arrangements for the service of such policies.

   In the event an ARC or LADC experiences unanticipated or unusual operational difficulties that would impair its ability to continue to meet the established ARC or LADC performance standards, the Governing Committee, subject to the approval of the Commissioner, may take such action as it may deem appropriate to alleviate the difficulties. Such actions by the Governing Committee shall be taken when it is evident the interest of the insuring public and the industry would be better served.

   Nothing in this section shall in any manner be deemed to act to modify or reduce an ARC's or LADC's responsibility or obligation under the Plan, Rules of Operation, or Manual of Administrative Procedures.

2. Approval by the Commissioner of Terminations by the MAIP

   No termination of an ARC or LADC will become effective until approved by the Commissioner. In granting his approval, the Commissioner will consider the impact of such termination on policyholders, producers and brokers, and the market for motor vehicle insurance.

3. Terminations by the Commissioner

   The Commissioner may terminate any ARC or LADC which he/she determines to have violated the standards established for ARCs and LADCs in these Rules or the Plan or if he/she finds that the operation or financial stability of such ARC or LADC presents a danger to the interests of policyholders or the continued operation of the MAIP or will create substantial market disruption.

B. Members Electing to Withdraw

1. Withdrawal from the MAIP

   A Member electing not to participate as an Assigned Risk Company (ARC) for the MAIP, but wishing to still maintain its license to write private passenger automobile insurance in the state of Massachusetts, will be required to execute an agreement with an appointed Limited Assignment Distribution Company (LADC) to service its quota share of assigned risk business.

2. Withdrawal from the Massachusetts Automobile Market

   A Member electing to withdraw from the Massachusetts private passenger automobile insurance market shall file a plan for an orderly withdrawal that shall include full settlement of all financial obligations to the MAIP. Approval of the plan for purposes of this section shall mean written approval by the Commissioner of Insurance. Prior to approval, the Commissioner of Insurance shall hold a public hearing if requested to do so by the Governing Committee of the MAIP, a Member of the MAIP, or any association of producers, to consider the effect of the withdrawal on the orderly and equitable conduct and operation of the Massachusetts motor vehicle insurance market. Any such party seeking a hearing must file a request with the Division of Insurance within 10 days of notice by the Division of Insurance to CAR of the opportunity for a hearing. Copies of the plan shall be made public at the time of such notice.

Rule 39 – Indemnification

A. Any person or Member made or threatened to be made a party to any action, suit or proceeding, because such person or any officers, employee or representative of such Member served on the Governing Committee or on any committee of the MAIP or was an officer or employee of the MAIP, shall be indemnified by the MAIP against all judgments, fines, amounts paid in settlement, reasonable costs and expenses including attorneys' fees, and any other liabilities that may be incurred as a result of such action, suit or proceeding, or threatened action, suit or proceeding, except in relation to matters as to which he or it shall be adjudged in such action, suit or proceeding to be liable by reason of breach of duty involving gross negligence, bad faith, dishonest, willful misfeasance or reckless disregard of the responsibilities in the performance of his or its duties or obligations to the MAIP and, with respect to any criminal actions or proceedings, except when such person or Member had reasonable cause to believe that his or its conduct was unlawful. Such indemnification shall be provided whether or not such person or Member is a Member or is holding office or is employed at the time of such action, suit or proceeding and whether or not any such liability is incurred prior to the adoption of this Rule. Such indemnification shall not be exclusive of other rights such person or Member may have and shall extend to the successors, heirs, executors or administrators of such person or Member. In the event of settlement or other termination of a matter before final adjudication, indemnification shall be provided only if the Governing Committee determines with the advice of independent counsel that the person or Member to be indemnified did not in counsel's opinion commit such a breach of duty.

B. In each instance in which a question of indemnification arises, entitlement thereto, pursuant to the conditions set forth in the first paragraph of this Rule, shall be determined by the Governing Committee which shall also determine the time and manner of payment of such indemnification; provided, that a person or Member who or which has been wholly successful, on the merits or otherwise, in the defense of a civil or criminal action, suit or proceeding of this character described in the first paragraph on this Rule shall be entitled to indemnification as authorized in such paragraph. Nothing herein shall be deemed to bind a person or Member who or which the Governing Committee has determined not to be entitled to indemnification, or to preclude such person or Member from asserting the right to such indemnification by legal proceedings. Such indemnification as is herein provided shall be considered an operating expense apportioned among all Members, including any named in any such action, suit or proceeding, according to the Expense Ratio deemed by the Governing Committee to be most appropriate.

Rule 40 – Hearings, Review

A. Any Member, or licensed producer, aggrieved by any unfair, unreasonable, or improper practice of the MAIP or another Member with respect to the operation of the MAIP may request a formal hearing and ruling by the Governing Committee on the alleged practice. The request for hearing must be made within thirty days after the date such person knew of the alleged practice. Any documentation or correspondence which either party wishes to have considered in connection with the deliberations of the matter should be forwarded to the MAIP at least five (5) business days prior to the date scheduled for the hearing.

The hearing shall be held within fifteen business days after the receipt of the original request. Except as may be otherwise provided by the Governing Committee, the hearing shall be held by a panel appointed by the Governing Committee, consisting of three Governing Committee members entitled to vote. The decision of this panel or any committee sitting at the request of or under the authority of the Governing Committee shall be rendered within fifteen business days of the hearing. The ruling of the majority of the panel shall be deemed to be the formal ruling of the Governing Committee unless the full committee on its own motion shall modify or rescind the panel's action.

B. Any formal Governing Committee ruling may be appealed to the Commissioner by filing notice of appeal with the MAIP and the Commissioner within thirty days after the date of the ruling's issuance. The Commissioner may approve, modify, amend or disapprove the ruling or direct the Governing Committee to reconsider the ruling. In addition, the Commissioner may issue any other appropriate order, including granting the aggrieved party a new hearing.

VII. ORDER

After exhaustive review of the extensive testimony and written materials that have been submitted in this proceeding, and after careful deliberation, we conclude that CAR's Revised Proposal, while it responds to some concerns expressed in the Remand Order, only partially addresses a number of issues that are critical to successful implementation of an assigned risk pool that is fair to consumers, equitably distributes the burden of the residual market among companies, and which may encourage, rather than discourage, greater investment of resources in the market for Massachusetts private passenger insurance.

Rule 9 as appearing in CAR's Revised Proposal is hereby approved. However, we have revised some portions of CAR's Revised Proposal for CAR Rules 2, 10, 11, 12, 13, 14 and 17. As amended and redrafted, we approve Rules 2, 10, 11, 12, 13, 14 and 17.

CAR is hereby ordered to distribute copies of Rules 2, 9, 10, 11, 12, 13, 14 and 17 as approved by this Order to its members in accordance with Article X of the CAR Plan.

After making some changes and amendments that we found were appropriate to ensure clarity and consistency, which are addressed in this Order, we approve Rules 23, 24, 25, 27, 33, 34, 35, 37, 39 and 40.

After making the more extensive changes that are incorporated into Rules 21, 22, 26, 28 through 32, 36 and 38 in order to achieve the goal of creating a MAIP that is responsive to concerns expressed by the Commissioner, we approve Rules 21, 22, 26, 28 through 32, 36 and 38 as thus changed and amended.

CAR is hereby ordered to distribute copies of Rules 21 through 40 as approved by this Order to its members in accordance with Article X of the CAR Plan.

To ensure prompt implementation of the Rules approved by this Order, CAR is hereby ordered to comply with time standards as prescribed in the Order. Further, on or before February 15, 2005, CAR is hereby ordered to prepare and submit for approval revisions incorporating these new Rules of Operation to the Manuals that it provides to its Members, including, but not limited to, the Manual of Administrative Procedures and the Manual of Claims Handling and Performance Standards.

The subsidy matrix and the allocation of the losses associated with the various segments of the deficit shall be effective beginning January 1, 2005. However, to afford sufficient transition time for companies and ERPs, the redistribution of ERPs shall be effective on February 1, 2005.

Furthermore, CAR is to submit an outline of the actual subsidy deficit sharing calculation to the Commissioner by March 30, 2005.

A public hearing on all of the Rules shall be held on December 17, 2004 at 10:00 a.m. at the Division of Insurance.

Dated: November 23, 2004

Julianne M. Bowler Commissioner of Insurance	Jean F. Farrington Presiding Office	Stephen M. Sumner Presiding Officer