



**COMMONWEALTH OF MASSACHUSETTS**  
**Office of Consumer Affairs and Business Regulation**  
**DIVISION OF INSURANCE**

One South Station • Boston, MA 02110-2208  
(617) 521-7794 • FAX (617) 521-7475  
TTY/TDD (617) 521-7490  
<http://www.mass.gov/doi>

MITT ROMNEY  
GOVERNOR

KERRY HEALEY  
LIEUTENANT GOVERNOR

JANICE S. TATARKA  
DIRECTOR, CONSUMER AFFAIRS  
AND BUSINESS REGULATION

JULIANNE M. BOWLER  
COMMISSIONER OF INSURANCE

---

**Revision of the  
Rules of Operation of the  
Commonwealth Automobile Reinsurers  
Docket No. C2004-02**

---

**Decision and Order Following Remand on Changes to Rules  
of Operation 2, 9 through 14, and 17, and Rules 21 through 40**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

To ensure that motor vehicle insurance is available to all applicants, Massachusetts law provides for the establishment of a residual market through which virtually any applicant can obtain insurance.<sup>1</sup> Statutory responsibility for general oversight of the residual market rests with the Commissioner of Insurance (“Commissioner”). Currently, the residual market is managed and operated by Commonwealth Automobile Reinsurers (“CAR”) pursuant to a Plan of Operation and Rules of Operation (“Rules”) approved by the Commissioner.

The dual goals of the residual market are to provide insurance to risks whom the industry declines to write voluntarily and to distribute equitably among the industry the “premiums, losses or expenses, or any combination thereof” generated by those risks (the “Residual Market Burden”). Over the years, many proposals have been made to change the CAR Rules, and some rules have been revised and amended so as to better achieve these goals. By letter dated April 29, 2004, the Commissioner directed CAR to revise its Rules

relating to private passenger automobile insurance because the provisions in place at that time, as applied, did not result in the equitable distribution of the residual market burden among CAR Servicing Carriers. Furthermore, the current system was much more vulnerable to fraud based on the fact that the insurance carriers were not tethered to their ceded risks, which contributed to higher insurance premiums for all drivers. On June 30, 2004, CAR submitted to the Commissioner a Proposal to amend existing CAR Rules 2, 9 through 14, and 17, and to create a set of new Rules, numbered 21 through 40, that would implement an assigned risk plan, the Massachusetts Automobile Insurance Plan (“MAIP”), for the private passenger motor vehicle insurance residual market (the “Proposal”). The amendments to the then current CAR Rules in large measure provided for a transition to the MAIP, and have therefore been referred to as the “Transition Rules.”<sup>2</sup>

In response to a request from the Commerce Insurance Company (“Commerce”), a CAR member, a hearing on CAR’s Proposal took place on July 22, 2004. Twenty-seven individuals spoke at the hearing and numerous written statements were submitted before the record was closed on July 30. By order dated August 27, the Commissioner remanded the Proposal to CAR to address concerns that the Transition and new Rules might substantially increase the size of the residual market, in addition to issues related to policyholder protection. She ordered CAR to submit a new Proposal no later than September 24.

CAR timely submitted a new set of proposed rules (the “Revised Proposal”) and subsequently filed additional revisions to Rule 11, which addressed the allocation of the Residual Market Burden. A hearing on the Revised Proposal and the additional changes to Rule 11 took place on October 29, 2004. Twenty-five individuals spoke at the hearing and additional written commentary was submitted. On November 23, the Commissioner issued a second order (the “November 23 Order”) concluding that the Revised Proposal, while responsive to some concerns expressed in the order remanding the initial Proposal to CAR, only partially addressed a number of critical issues relating to the successful implementation of an assigned risk plan. Therefore, in the November 23 Order the

---

<sup>1</sup> The residual market need not accept applications from people who owe money on insurance premiums for the twelve-month period preceding the application or who are not properly licensed to operate a motor vehicle. See G. L. c. 175, §113H.

Commissioner amended portions of Transition Rules 2, 10 through 14, and 17, and approved them, as revised, together with Rule 9. With respect to the MAIP Rules, the Commissioner amended Rules 23, 24, 25, 27, 33, 34, 35, 37, 39 and 40 to provide greater clarity and consistency and approved them, as revised and amended. The Commissioner made more extensive changes in proposed Rules 21, 22, 26, 28 through 32, 36 and 38 and also approved them as revised and amended.

A well-attended public hearing on the Rules approved in the November 23 Order took place on December 17; eleven individuals spoke and additional written commentary was received through December 22. On December 31, 2004, the Commissioner issued an Order (the "December 31 Order") that affirmed her approval of the Rules in the November 23 Order, with some clarifications and minor revisions. The December 31 Order addressed the reasons for accepting or rejecting proposed revisions to the Rules approved in the November 23 Order.

Commerce, the largest writer under the current system, appealed the December 31 Order to the Superior Court days later. The principal focus of the appeal was the Commissioner's authority to implement the assigned risk plan created under CAR Rules 21-40 as the residual market mechanism.<sup>3</sup> The Superior Court entered an initial order staying implementation of the revised CAR Rules until the matter was resolved. In June 2005 the Superior Court allowed Commerce's motion for judgment on the pleadings. The Superior Court's decision was appealed, and the Supreme Judicial Court allowed a motion for direct appellate review.

On August 23, 2006, the Supreme Judicial Court unanimously affirmed the Commissioner's authority to promulgate an assigned risk plan for the residual market for private passenger motor vehicle insurance, thereby reversing the Superior Court's decision. *Commerce Insurance Company, et al. v. Commissioner of Insurance*, 447 Mass. 478 (2006). The Supreme Judicial Court also reversed the Superior Court's findings as to additional ancillary issues, finding in favor of the Commissioner on all but one of these

---

<sup>2</sup> CAR also manages the residual market for commercial business. The rule changes, however, relate only to the market for private passenger motor vehicles.

<sup>3</sup> Arbella Mutual Insurance Company ("Arbella"), the Center for Insurance Research ("CIR"), and nine insurance producers intervened in the appeal to the Superior Court. Only Arbella, the CIR and Commerce filed appellate briefs with the Supreme Judicial Court. The Massachusetts Public Interest Research Group (MASSPirg) and the Massachusetts Insurance Federation filed amici curiae briefs.

technical issues, known as the "Clean-in-Three" rule. The Supreme Judicial Court remanded only that matter to the Commissioner through the Superior Court for further proceedings on the "Clean-in-Three" provision of the MAIP. The Superior Court entered the Supreme Judicial Court's decision in its docket on October 4, and the matter was again placed before the Commissioner.

However, the CAR Transition Rules did not remain static following the Superior Court's stay of the December 31 Order. Between January 1, 2005 and December 16, 2005, the CAR Governing Committee voted on changes to Rules 11 through 14 and submitted them to the Commissioner for her approval. Public hearings on those proposed changes were held when requested in accordance with the CAR Plan of Operation, and the Commissioner approved such changes. The amended Rules 11 through 14 that the Commissioner approved, and which are now in effect, therefore differ from Rules 11 through 14 approved in the December 31 Order.

Other events also affected the continued applicability of the Transition Rules approved in the December 31 Order. For example, those Rules addressed concerns about the equitable distribution among Servicing Carriers of exclusive representative producers ("ERPs") with exceptionally high loss ratio books of business by creating a class of High Loss Ratio ERPs ("HLR ERPs") and establishing special procedures for their assignment to insurers. In September 2005, the Commissioner approved changes to Rule 13.C that revised the procedures for assigning ERPs to servicing carriers, but conditioned implementation of the revised rule on completion of a qualitative assessment of all ERP business and redistribution of that business in a way that would achieve both quantitative and qualitative parity among Servicing Carriers. After a hearing at the Division of Insurance ("Division") on the appropriate methodology for qualitative assessment, the Commissioner issued a decision on January 27, 2006 approving a methodology and a timetable for implementing the redistribution. The one-time redistribution of ERPs in early 2006 in response to concerns about equitable distribution rendered some provisions of the Transition Rules no longer necessary. In addition, the deadlines in the December 31 Order for MAIP implementation in the Transition and MAIP Rules had already passed. Finally, the court's decision required the Commissioner to make changes to the MAIP Rules regarding the "Clean-in-Three" provision that would have made certain drivers with

“clean” driving records ineligible for coverage through the MAIP and possibly unable to obtain insurance in the voluntary market.

To address these issues, the Commissioner reviewed the Transition and MAIP Rules approved in the December 31 Order and revised them to: 1) eliminate provisions of the Transition Rules that are no longer necessary because of intervening changes to CAR Rules 11 through 14; 2) integrate retained provisions of the Transition Rules into the current CAR Rules; 3) set a new timetable for the implementation of the MAIP; and 4) revise the MAIP Rules to conform to the Court’s remand decision regarding “Clean in Three” risks and to clarify procedures relating to the operation of the MAIP. These rules (the “Second Revised Rules”) govern the operation of the residual market for private passenger motor vehicle insurance during the transition from the current system to the MAIP, the phase-in period of the MAIP, and on-going operation of the MAIP.

On October 18, 2006, the Commissioner issued a hearing notice scheduling a hearing on the Second Revised Rules for November 10. The notice stated that the purpose of the hearing was to afford all interested parties an opportunity to provide oral and written testimony on the proposed changes, following remand, to Rules 2, 9 through 14 and 17 and Rules 21 through 40. It specified that the hearing was limited to testimony on those proposed changes and would not readdress provisions in the Rules that were not appealed. The notice asked speakers to submit, in advance of the hearing, a short written statement of the issues they intended to address in their testimony. Unlike the three previous hearings in this matter, the November 10 hearing was expected to focus on a limited range of topics arising out of the Supreme Judicial Court decision and revisions required as a result of interim changes to the Transition Rules after December 31, 2004. The hearing notice further stated that paper copies of the proposed rule changes were available for review at the Division, and identified web links to the Rules approved on December 31, 2004, the amended rules dated October 20, 2006, a redlined version of the amended rules, and an executive summary of changes to the CAR Rules.

The hearing on the Second Revised Rules took place as scheduled on November 10, 2006. Consistent with those held in 2004, it was extremely well-attended. Forty individuals spoke, and many others submitted written statements to be included in the docket, which remained open through November 14. The speakers included a

representative of the Attorney General (“AG”), members of the Legislature, and a member of the Boston City Council. Seventeen people spoke on behalf of insurance companies, company trade associations or organizations servicing the residual market. One member of a producer trade organization and eleven producers gave testimony, as well as two consumer advocates.<sup>4</sup>

## **II. THE SECOND REVISED RULES**

Few specific suggestions for changes to the Second Revised Rules were submitted either at the hearing or in the written submissions. Despite the unanimous decision of the Supreme Judicial Court, those opposed to an assigned risk plan continued to object to the MAIP, often making the same arguments presented in previous hearings before the Commissioner and to the Court. As a result of the nearly two-year hiatus between the December 31, 2004 order and the distribution of the Second Revised Rules, a number of speakers expressed concern about the timing of implementing this assigned risk plan in light of imminent changes in the state administration resulting from the recent election. Several legislators voiced the opinion that an assigned risk plan should not be implemented now because of the possibility of forthcoming broader reform legislation that would coordinate changes in the residual market with changes in the voluntary market. Producers expressed concern about the effect of the MAIP on their operations, raising the question of a possible conflict between G.L. c. 175, §162F and the proposed MAIP rule that would require CAR to advise insurers when a risk written through the residual market is "Clean-in-Three" so that the policyholder can be evaluated for writing in the voluntary market. Commerce, in particular, raised numerous questions about the specific procedures that would be in place. We have considered all of the testimony and the written submissions and now issue this order on the Second Revised Rules.

### ***A. Implementation of the Second Revised Rules***

We are not persuaded that we should delay implementation of the MAIP. Conversion of the residual market to an assigned risk plan, viewed in context, is neither unanticipated nor revolutionary. As several speakers noted, the need for reform of the

---

<sup>4</sup> Most of the written submissions came from producers. Of that group, many utilized one of two form letters of unknown origin.

residual market was identified many years ago. In June 2002, the Attorney General (“AG”) sent a letter to the Commissioner about problems he had identified in the residual market and his conclusion that the rules needed to be changed to produce a fair and equitable market. The Commissioner thereafter engaged Tillinghast Towers Perrin, a consulting firm, to conduct an examination of CAR; its report, submitted in April 2004, served as the immediate catalyst for the Commissioner’s directive to CAR to revise its rules. The proposal to move to an assigned risk plan from a plan based on the distribution of pooled premiums, losses and expenses associated with policies ceded to the plan was placed on the table over two years ago and approved by the Commissioner in December 2004. She has expressed her intent for several years now to more equitably distribute the losses among the carriers and to reduce the amount of fraud that is particular to the current type of residual market. Indeed, its phased-in implementation would have begun almost two years ago had Commerce, Arbella and a small group of producers not commenced their protracted, and ultimately unsuccessful, lawsuit.

It was noted at the hearing that an assigned risk plan for the residual market is consistent with the practice in some 42 other states and the District of Columbia. Its adoption in 2004, as noted in at least one submission, dovetailed with recent initiatives to combat fraud in the Massachusetts motor vehicle insurance market.<sup>5</sup> Although an assigned risk plan represents a new direction for Massachusetts, insurers that operate in multiple jurisdictions are familiar with the operation of such plans. With the exception of New Hampshire, the residual markets in all other New England states, as well as in New York, Pennsylvania and New Jersey, are assigned risk plans.

We are persuaded that residual market reform should proceed without further delay. As several speakers at the November 10 hearing affirmed, market reform remains essential to resolve the issue of equitable distribution of responsibility for the residual market and to continue to reduce fraud in the marketplace. Postponing implementation of the MAIP will further delay a process that a significant portion of the market supports. Further, we are not persuaded that a structural change to the operation of the residual market presents an obstacle to developing legislative proposals for automobile insurance reform; issues such as differential rating that would affect the residual market are identical no matter how that

---

<sup>5</sup> Those initiatives have expanded since 2004.

market is structured. Similarly, issues relating to insurer underwriting practices are equally applicable whatever the format of the residual market.

Questions were also raised at the hearing about the timetable for implementing MAIP operations, and the reasons for setting a January 1, 2007 effective date, even though business may not be placed in the MAIP until April 1, 2007. The January 1 date allows CAR time to make the necessary changes to its operating systems and to implement administrative procedures such as the appointment of Assigned Risk Companies (“ARCs”), Limited Assignment Distribution Companies (“LADCs”), and Assigned Risk Producers (“ARPs”) before starting the actual assignment of any business to the MAIP. It provides insurers and producers with several months in which to make any necessary changes to their information management systems and to obtain training on new procedures. A number of producers have expressed concern about CAR’s ability to institute the requisite support structure in a timely fashion. However, we have been presented with no reliable evidence from CAR or any third party to suggest that the lead time is inadequate. We have, however, concluded that universal concerns about the potential growth of the residual market during the early years of MAIP operation will be best addressed by reinstating a longer transition period that is comparable to that set out in the Rules approved in the December 31 Order. Therefore, these revisions take a dual approach to new and renewal business that is expected to maintain the residual market for the first full year of MAIP operations at its current level and, simultaneously, establish a three-year transition period during which non-renewals of “Clean-in-Three” business are constrained. Measured implementation over three years will limit the amount of business that could, potentially, be assigned to the MAIP, minimize disruption to the current market, and provide insurers with a reasonable time period within which to adjust to the new market structure. We have revised MAIP Rule 21 accordingly.

Rule 21 adopts a three-pronged approach that maintains the current CAR pool for a progressively narrowing segment of the residual market while simultaneously, and gradually, expanding the segment of the market that can be assigned through the MAIP, until April 1, 2008, when the CAR pool is phased out completely and the MAIP becomes fully operational. Analogous to slowly opening a spigot, Rule 21 uses three concepts to assure a measured growth of the MAIP, and to avoid a harmful growth of the CAR pool.



The first concept is that of “new business,” meaning a new driver applying to a company for his or her own policy or risk or a driver who has not been insured in the Commonwealth in the 12 months preceding the application for coverage. The second concept used in Rule 21 is all business, including all renewal business, that is not new business. The third concept used in Rule 21 is “Clean-in-Three” risks, the characteristics of which have previously been defined in the December 31 Order and are again articulated in Rule 22.

Beginning on April 1, 2007, new business risks are the first risks who, if not written voluntarily, can be placed through the MAIP. These risks can no longer be ceded to CAR as of April 1, 2007. Additionally, as of April 1, 2007, insurers may not non-renew business that is Clean-in-Three as defined in Rule 22, subject to the exceptions in Rules 21.C and 22. This constraint will continue for three years, until April 1, 2010. Renewal business can continue to be ceded to the CAR pool as of April 1, 2007, however. The exceptions in Rule 21.C account for, among other things, the situation in which the producer terminates his relationship with the Member and the producer transfers his book of business, including Clean-in-Three risks, from such Member to a different Member. The previous Member will be required to make certain disclosures in its non-renewal notice to all of such Clean-in-Three risks regarding their renewal rights as a protected class during the transition period. This provision provides all policyholders with meaningful and timely disclosure as to their insurance status that empowers them to make informed decisions.

As of July 1, 2007, all business, including renewal business, rated with 10 or more SDIP points that is not written voluntarily can only be referred to the MAIP, rather than being ceded to CAR. Placement of these risks with 10 or more SDIP points is equivalent to the “free cede” that companies are familiar with in the current CAR pool mechanism and that equates to steps 20 – 24 under the old SDIP system. Business that has fewer than 10 SDIP points, other than new business, may continue to be ceded to the CAR pool as of July 1, 2007.

As of April 1, 2008, *all* business becomes eligible for placement through the MAIP and can no longer be ceded to the CAR pool. Accordingly, as of April 1, 2008, the CAR pool is closed to any additional exposures. All business, with the exception of Clean-in-

Three risks, that is not voluntarily written must be referred to the MAIP. Insurers continue to be prohibited from non-renewing Clean-in-Three risks through March 31, 2010.

As of April 1, 2010, the phase-in period ends and risks that insurers choose not to write voluntarily will be written through the MAIP.

In response to questions about the relationship between the current CAR Rules and the MAIP Rules we note that, as stated in the executive summary posted on the Division of Insurance website, following completion of the phase-in period for the MAIP, Rules 1-20 will continue to apply to the residual market for commercial business only.

***B. The Transition Rules***

At the November 10 hearing, Commerce submitted an extensive list of questions about the Second Revised Transition Rules, some of which address general issues while others relate to specific Rules. We note that many of Commerce's comments do not address actual changes to the Second Revised Transition Rules but, rather, raise issues with respect to longstanding language in the CAR Rules that could, and indeed should, have been addressed over time by the Governing Committee, of which Commerce was a long-standing member. Other comments raise concerns about specifics that are appropriately addressed to the CAR Governing Committee to iron out as the new residual market is implemented.

For example, with respect to Rule 2, Commerce expresses concern about allowing non-resident producers to obtain ERP appointments. The current CAR Rule 2 allows producers with a place of business in a state contiguous to Massachusetts to apply for appointment as an ERP; the revised rule applies the same standard to producers for commercial business. Thus, there has been no substantive change to this provision. Any issues about the application of the Rule should be presented in the first instance to the Governing Committee. Similarly, the concept of market need has not been changed from the current CAR Rules and, to the extent that it limits producer appointments, should be read in conjunction with the production requirements. Again, questions about the application of the market need criterion should be addressed to the CAR Governing Committee.

We agree that the definition of private passenger motor vehicle in CAR Rule 2 should be consistent with the AIB definition. CAR Rule 2 now adopts the definition of

private passenger motor vehicle set out in the Automobile Insurers Bureau 2006 Private Passenger Automobile Insurance Manual.

With respect to Rule 10, Commerce raises a question about whether a training program now offered by the Massachusetts Association of Insurance Agents (“MAIA”) pursuant to Rule 10 will meet the training requirements under the MAIP Rules. This is a procedural question that should not be addressed in Rule 10. Common sense indicates that, to the extent that the MAIP rules impose different requirements and as new approaches to claim handling are developed, current training programs may need to be revised. It appears that MAIA, rather than individual companies, has taken responsibility for conducting the actual training sessions. Therefore CAR, the industry and MAIA should continue to work together to revise the training program as necessary and to obtain the Division’s approval as needed.

Commerce asks whether the change in Rule 10.E relating to reimbursement for excess judgments applies to commercial policies, asserting that, as drafted, the Rule relates to all Servicing Carriers. Rule 10.E was revised to make clear that for private passenger auto Servicing Carriers, special reimbursements requested pursuant to subsection E would be considered only in connection with claims that arise from business ceded to CAR, i.e., business written before July 1, 2008. If CAR intends to allow such reimbursements in connection with commercial claims, it should revise the rule accordingly.

Commerce notes that Rules 11 and 12, as now in place, apply to calendar year 2006. It points out that the K-factor and the “minimum allowable” provisions of Rule 11 require revision, and that the credit system prescribed by Rule 12 will need to change if new territories are approved, and may need to be revised to address a deficit level that may be lower for 2007. We anticipate that these issues will be timely addressed at CAR and submitted to the CAR Governing Committee for approval, as they have routinely been in the past. Comments on the credit system are included in the section of this Order that addresses MAIP Rule 29.

The third paragraph of Rule 14.A.2, relating to the ERP assignment of a former voluntary agent has been eliminated. The additional questions that Commerce raises about the assignment process and the distribution of ERPs appear to be addressed in Rule 13.C, subscription methodology.

### **C. The MAIP**

It is apparent from both testimony at the hearing and written submissions filed in the docket that opposition to the MAIP is based, in part, on misperceptions about its interface with the entire range of Massachusetts laws relating to automobile insurance. Residual market plans are required pursuant to G.L. c. 175, §113H. As a mechanism for providing private passenger motor vehicle insurance to consumers that insurers will not write in the voluntary market the MAIP is, like the current residual market plan, fully subject to the statutes and regulations that now apply to such insurance policies and, among other things, protect consumers from various underwriting procedures. For example, the MAIP does not, and indeed could not, alter existing statutes that prohibit insurers from refusing to issue insurance for such reasons as the consumer's age, race, or occupation and establish penalties for violation of the statutory requirements (G.L. c. 175, §§22E, 22H), or address the grounds and procedure for canceling motor vehicle insurance (G.L. c. 175, §§22C, 22D). Nor does it change statutes relating to the cancellation of policies and the return of premiums (*e.g.*, G.L. c. 175, §187B). Objections to the MAIP based on the argument that it will supersede operation of the panoply of existing laws are unfounded and reflect what may be a gross misunderstanding of the function of the MAIP or, worse, a misguided effort to create unnecessary and baseless fear and anxiety for consumers.

Much of the testimony in opposition to the MAIP reiterated issues that were raised in the initial stages of the rule revision process, some of which were specifically addressed by the Supreme Judicial Court in its decision affirming the Commissioner's authority to approve an assigned risk plan for the residual market. For example, many producers again argued that consumers who are told that they must apply for insurance through the residual market will be somehow stigmatized. They continue to make this argument notwithstanding the Division's repeated assertions to the contrary and the Supreme Judicial Court's conclusion that no statute bars informing an applicant for insurance that he has been placed in the residual market and its rejection of the argument that placement in the residual market stigmatizes drivers and violates public policy. *Commerce v. Commissioner, supra*, 488-489. The Court noted that, indeed, G.L. c. 175, §113F *requires* written notice to people who are rejected in the voluntary market and, further, endorsed the

Commissioner's position that such notice may be an incentive to high-risk drivers to improve their driving records.<sup>6</sup> The reasoning supporting the MAIP rule relating to notice to consumers remains unchanged: consumers who are informed about the grounds for declination of their applications will understand the basis for the company's decision and can contest it or, if possible, take appropriate action to correct conditions that underlie that decision.

The testimony and written submission of the Pilgrim Insurance Company, addressing the need for a declination letter as a condition for eligibility for the MAIP, noted that there are consumers who will simply never qualify for voluntary coverage, and suggested that a set of standards be developed that would exempt such consumers from the declination letter requirement. We agree that this proposal has merit and therefore, in the interest of consumers, have revised Rule 26.A.1 by adding a list of circumstances that would qualify for such an exemption, including conviction of driving under the influence, conviction of various crimes relating to the use of a motor vehicle, license suspension, conviction of fraud relating to an insurance claim, or accumulation of driver points. This change should expedite and streamline the process of assignment to the residual market for some risks.

Many producers expressed concern that a consumer who is insured through the MAIP risks being turned down for other insurance policies or loans. However, they misread the plan: a person who is insured through the MAIP has not been *denied* insurance coverage. Therefore, their concern is unfounded.

Another recurrent theme in the submissions relates to underwriting practices, such as the use of credit scoring or homeownership as a basis for determining whether to write a consumer voluntarily. These concerns are wholly unfounded. The MAIP is neutral on underwriting criteria; it makes no changes in the legal obligations that insurers must now follow. Further, issues relating to specific underwriting criteria have been long held to be in the legislature's bailiwick. (*See, e.g., Telles v. Commissioner of Insurance*, 410 Mass. 560 (1991); *Life Insurance Association of Massachusetts v. Commissioner of Insurance*, 403 Mass. 410 (1988)). Concerns about expanding those criteria as they apply to motor

---

<sup>6</sup> Consumers with good driving records who know that they are written voluntarily will also have an incentive to preserve those driving records.

vehicle insurance should therefore be addressed through proposals to amend the statutes. In order to ensure fairness to consumers, underwriting policies must be uniformly applied. The MAIP makes no changes in the Commissioner's authority to investigate company compliance with the existing statutes or with its own internal practices or to the enforcement options available to her. It does not alter the options open to consumers who have reason to believe they have been treated unfairly.

Two speakers proposed adding a MAIP rule, comparable to Rule 32, Claim Practices, that would set standards for underwriting complaints or policy service requirements related to underwriting. Mass PIRG proposes that the plan include a comprehensive list of all underwriting factors that insurers may consider in deciding whether to deny voluntary coverage. G.L. c. 175, §113H requires CAR to establish claims handling performance standards, but is silent on the question of guidelines for underwriting. While underwriting standards that are analogous to the claim handling standards might prove helpful to those unfamiliar with the Massachusetts market, we are not persuaded that such a provision should be included in the CAR Rules at this time. As noted above, a rule could not impose any new underwriting requirements. Current statutory underwriting standards are well-understood by companies writing in Massachusetts. The manuals applicable to private passenger automobile insurance provide an appropriate forum for clarifying the procedures for applying those standards to actual policies. We encourage CAR to respond to concerns raised by companies and to consider issuing or revising its publications to address matters of general interest.

Both producers and consumer advocates continue to raise the spectre of higher insurance rates for policyholders written through the MAIP compared to those written voluntarily, despite the Division's repeated assurances that there is no basis for that position, and the Supreme Judicial Court's explicit affirmation, in *Commerce v. Commissioner*, supra, at 491-492, that the MAIP does not alter the uniform pricing in the residual market mandated by G.L. c. 175, §113H (D). That competitive rating is in place in many jurisdictions in which assigned risk plans operate does not support the contention that an assigned risk plan will automatically result in competitive rating in Massachusetts. Massachusetts law now explicitly prohibits disparity in the rates for the voluntary and residual markets. Legislative action would be necessary to allow differential rates for

business written through the residual market. Similarly, the MAIP does not affect the Safe Driver Insurance Plan that, under G.L. c. 175, §113B, is a part of the fixed and established rates, or change the law relating to the offer of deviations.<sup>7</sup>

Producers also reiterate a variety of concerns about the effect of the MAIP on consumers and potential loss of their current customers. Insurance producers now compete for business in the marketplace. The MAIP does not change the competitive nature of that marketplace. Because the rates for coverage are fixed and established, producers must distinguish themselves on other bases, such as customer service. Currently, a person who insures a motor vehicle is free to choose an insurance producer or to purchase insurance from a company that writes directly rather than through agents. The consumer is equally free to change producers or to seek coverage from a different direct writer. The MAIP does not change that situation.

As to the expressed concern that consumers will somehow suffer by being placed in the MAIP, we note that the Division is charged, in part, with protecting and furthering the interests of insurance consumers. Both Massachusetts law and the CAR Rules emphasize that consumers who are insured through the residual market, in large measure, must receive the same insurance coverage as those who are written voluntarily. For example, the statute requires the residual market to offer coverages that are, in essence, identical to those available in the voluntary market *at the same price*, and mandates audits of claims handling that will identify any difference between the treatment of voluntary and residual market policies. The CAR Plan and Rules provide that servicing carriers must use the same forms and meet the same service standards for policies written through the residual market as they do for voluntary policies. All such protective measures remain constant whether we continue with the current residual market or whether we transition to the MAIP.

Another recurring objection is the assertion that the MAIP deprives consumers of their choice of insurer. Currently, as noted in Ms. Blank's testimony of July 22, 2004, and in the November 23 Order, p. 48, over 55 percent of producers in Massachusetts represent only one insurer. Unless a producer represents more than one company offering private

---

<sup>7</sup> One producer incorrectly asserted that the MAIP would eliminate the SDIP appeal process. Commerce questions whether rate deviations must be offered to eligible policyholders who are insured on the residual

passenger automobile insurance, the choice of a producer *de facto* places the consumer's business with the one insurer whom that producer represents. The availability to consumers of ancillary benefits such as discounts on other lines of insurance is thus dependent on the offerings of the one company that the producer represents. A consumer who prefers to obtain insurance from a different company must find another producer who represents that company. Consumer options are further limited by transactions in the market, such as the purchase of a producer's book of business or the reassignment of an ERP to a different Servicing Carrier. Such transactions may change the producer's access to the market. For a particular consumer such a change, over which he or she has no control, may result in the gain or loss of such benefits as a reduced premium for homeowner's insurance. If the customer loses a desirable benefit he or she has the choice whether to stay with the producer or find a new producer who represents the customers' current company. The MAIP places no new constraints on the purchase and sale of insurance agencies.<sup>8</sup>

In addition to the products and services that a producer offers, other factors may affect a consumer's decision to select or to remain with a particular producer. For example, a person who becomes eligible for an employer or association group discount may choose to change insurers because of particular benefits that are available. Similarly, a consumer who is eligible for insurance through a group may, upon investigation, find that it is preferable to obtain coverage elsewhere. For a producer operating in a competitive market for personal lines insurance business, the risk is constant that a customer will look for a different producer. Any change to the system for obtaining private passenger automobile insurance in Massachusetts brings with it an obligation to educate consumers about their options and responsibilities and presents opportunities for all those involved in the insurance transaction to assist consumers in new ways. Cooperative efforts to address issues such as training for new producer employees

---

market. A deviation based on safe driver points must apply to all drivers in that class.

<sup>8</sup> A decade ago, many insurers filed for rate deviations to apply to drivers with good driving records. With the exception of one company, a direct writer, companies have discontinued such deviations. Consumers who purchase insurance through a group discount offered through an employer or other organization remain eligible for the discount so long as they are members of the group and the group continues to offer the program.



represent creative approaches to applying the current CAR Rules and should continue under the MAIP.

Producers also raise the spectre of disruption in the marketplace. That there will be differences in the way consumers are insured through the residual market does not equate to extreme disruption of the marketplace. Some producers apparently find it disconcerting that they will be assigned to more than one Servicing Carrier, a provision of the MAIP that the Supreme Judicial Court found complies with Massachusetts law, and a reality in other states.<sup>9</sup> We are not persuaded that the potential need to adjust some current ways of doing business is a basis for rejecting the MAIP; such new relationships may present new opportunities as well. Further, as the Supreme Judicial Court noted in its decision, the Commissioner has anticipated the inconvenience that will flow from the change in plans and addressed it in the transition rules. *Commerce v. Commissioner*, supra, at 493.

The potential size of the MAIP is also a matter of concern. The residual market is now estimated to be about five percent of all policyholders, or approximately 200,000 risks, a far cry from the level that prevailed in the late 1980s.<sup>10</sup> Projections of the change that may occur under an assigned risk plan range from one to over two million consumers. However, no person has presented any credible support for those estimates. CAR itself has not attempted to predict the size of the residual market under the MAIP. CAR now controls the size of the residual market through the credit system; insurers may write policyholders voluntarily or cede them to CAR and receive credits for retaining risks in certain driver class/territory cells. The decision to cede may be made regardless of whether the business was produced by an agency with which the company has a voluntary contract, by an ERP or was written directly. Companies retain in their books of voluntary business a significant portion of business written through ERPs; indeed, the 2006 redistribution of ERPs generated offers of voluntary contracts to most of the producers who were expected to be reassigned. A company that has invested resources in educating its customers and working with its producers remains motivated to retain those relationships rather than discard them.

---

<sup>9</sup> Further, producers in Massachusetts often represent a number of different insurers with respect to homeowners, commercial, or other lines of business.

<sup>10</sup> In 1989, 68.7 percent of policies were ceded to the residual market.

Further, the entire statutory scheme relating to Massachusetts automobile insurance presupposes that a company will keep business it has insured as long as the policyholder qualifies for insurance and has paid the premium for the policy. G.L. c. 175, §22C sets out specific limited circumstances in which a company may cancel a policy. Moreover, G. L. c. 175, §22E prohibits a company from non-renewing policies for a number of reasons, including age, race, occupation or principal place of garaging of the motor vehicle; it also requires that the notice of non-renewal specify the reasons for the company's decision. Further, a single notice of cancellation or non-renewal may trigger the operation of G.L. c. 175, §22H. A company that fails to specify the reasons for non-renewal or uses improper grounds faces the potential for disciplinary action. For example, G.L. c. 176D prohibits unfair methods of competition and unfair or deceptive trade practices in the business of insurance, and authorizes the Commissioner to determine whether a company's trade practices violate this provision. The MAIP does not change these statutory provisions; no company should presume that the change from the current residual market to an assigned risk plan presents an unfettered opportunity to divest itself of business that it now writes voluntarily.<sup>11</sup> Indeed, the Division strongly discourages any Member from attempting to undermine this residual market reform by "dumping" business into the MAIP in an effort to implode the residual market. The Division will monitor the market closely to ensure that no company runs afoul of any of these laws or practices.

G. L. c. 175, §113H (C) specifically mandates use of a credit system to control the population size of the residual market. The MAIP continues to incorporate a credit system in Rule 29. Several producers assert that the credit system, rather than control the size of the MAIP, will affect its composition, and express fear that companies will decline to write voluntarily all business for which the rates are perceived to be inadequate. We have been given no sound reason to conclude that insurers will suddenly discontinue retention of customers whom they now insure, particularly if they will continue to receive a credit for keeping them out of the residual market.

Nevertheless, both insurers and producers have questioned whether the credit system, by itself, is adequate to ensure that the residual market does not mushroom to an

---

<sup>11</sup> Some two-thirds of Massachusetts operators who have been licensed for at least six years have driving records that show no more than one moving traffic violation or at-fault accident within that period.

unacceptable level. Uncontrolled expansion could prove to be disruptive to the market and to consumers. Successful implementation of the MAIP therefore requires adequate time for insurers to perform the multi-faceted analysis of the effect of the new plan on their historic approaches to writing business and for consumers to become educated about the greater possibilities available to them.

For that reason we find that, in the interest of all participants in the market, it is preferable to implement the MAIP through a gradual transition period that incorporates the principle that the residual market is intended to accommodate the relatively small number of applicants whose driving experience is either unknown, generally because they are newly licensed, or has demonstrated that they are substantially riskier than other insureds. Thus, we find merit in the proposal advanced by the Premier Insurance Company at the November 10 hearing, which preserves the principle, first set out in proposed CAR Rule 26.A.3.b. approved in the December 31 Order, that during the first few years of the MAIP business that meets certain standards should not be placed in the residual market, and have therefore incorporated it into a revised MAIP Rule 21. As redrafted, the Rule will, by constraining non-renewals during the first three years of MAIP operations, improve market stability and minimize the effect on consumers.

Proposed CAR Rule 26.A.3.b, approved in the December 31, 2004 Order, specified circumstances which would render an applicant for insurance ineligible for the MAIP, including what is known as the "Clean-in-Three" Rule which, in effect, prohibited insurers from placing drivers with the "cleanest" recent driving records into the residual market. Specifically, it basically provided that a company could not place in the MAIP an applicant who had not been found to be at-fault for an accident that generated an insurance claim, including a claim under the personal injury protection coverage ("PIP"), or a traffic moving violation within the 36 months immediately preceding the effective date of the policy. The Clean-in-Three rule was derived from a uniform model for assigned risk plans developed by the Automobile Insurance Plan Service Office ("AIPSO") and widely used in other jurisdictions; Ms. Blank, an actuary at the Division, testified in July 2004 that assigned risk plans are designed not to accept experienced drivers with clean driving records. However, the Supreme Judicial Court, in its decision, observed that risks that satisfied those conditions might, nevertheless, be unable to obtain insurance in the

voluntary market as no mandatory “take all comers” law currently exists in this market, and, thus, some risks might be placed in the untenable position of not being able to obtain insurance. Therefore, the MAIP Rules were remanded to the Commissioner to ensure that operators rejected in the voluntary market for whatever reason would have access to insurance.

The Clean-in-Three Rule had two salutary goals: to provide a bright line test for placement in the residual market that would treat consumers uniformly based on driving records, and to limit the size of the MAIP by reducing the pool of potential candidates.<sup>12</sup> In response to the Court’s decision, the Second Revised Rules dropped the rule excluding all risks with Clean-in-Three driving records from the residual market, but attempted to preserve the concept for the benefit of some consumers without running afoul of the law, by adopting a different approach. Rather than render all such risks ineligible for assignment, Rule 26.C required CAR to distribute to its members information on consumers who satisfied the Clean-in-Three criterion but nevertheless were insured in the residual market, anticipating that insurers might well wish to write these risks on a voluntary basis.

At the November 10 hearing, however, concerns were expressed about this alternative approach, particularly with respect to issues of consumer privacy and G.L. c. 175, §162F, which gives insurance producers operating under the American Agency system an ownership interest in policy information. Moreover, the AG stated that he intended to offer an amendment to the Second Proposed Rules that would satisfy the Supreme Judicial Court’s concerns about Clean-in-Three.

The producers uniformly opposed the proposal that CAR, on its own initiative, was required to disseminate the names of insureds who qualify for Clean-in-Three status to carriers so that they can offer coverage to those individuals in the voluntary market. The provision, they argue, violates the right to control policy expirations granted to them by G.L. c. 175, §162F, interferes with business relationships that they have built over the years and affects the consumer’s right to choose a producer. They characterize as unfair a

---

<sup>12</sup> In his July 2004 testimony supporting a Clean-in-Three provision in the MAIP, the AG noted that its inclusion would render nearly three-quarters of the drivers in Massachusetts ineligible for the residual market, and further commented that insurers would voluntarily write many drivers who might be eligible for assignment under an assigned risk plan.

provision that would, they claim, automatically distribute to carriers the names of customers satisfying the Clean-in-Three rule with whom a producer has worked over time. Without a full analysis of the relationship between the proposed rule and G. L. c. 175, §162F, we cannot comment on the legal correctness of the producers' position. However, we are concerned about the fairness to producers of a rule that could involuntarily interject CAR into the relationship between consumers and producers, and have therefore amended Second Revised Rule 26.C. Further addressing producer concerns about maintaining their books of business, we have revised Rule 21 to create a phase-in period that: 1) establishes separate dates for MAIP eligibility for new and renewal business; 2) in substance, retains the current system for most renewal business during the period April 1, 2007 through March 31, 2008; and 3) during the three year period April 1, 2007 through March 31, 2010, prohibits insurers from non-renewing certain business that conforms to specified standards. We note that the MAIP, in no way, changes commission arrangements for producers who continue to be identified as producers of record for that business.

However, we find that consumers will benefit from the market assistance program incorporated into Rules 26.A.1.b and 29 F.1.a., which requires CAR, at the request of a policyholder insured through the residual market, to help that person obtain insurance on a voluntary basis by making known to all Members, and his producer of record, that the consumer is seeking voluntary coverage. The process would be initiated entirely at the behest of the consumer rather than at CAR's initiative. CAR will need to develop a form that a consumer can use to direct CAR to advertise his or her interest in a voluntary policy at the time of application or renewal.<sup>13</sup> Because a policyholder always has a right to change producers and to seek insurance from a different company, a request from a consumer to disseminate his or her policy information would not conflict with any alleged ownership interests of producers.<sup>14</sup>

The AG submitted his revised proposal for a Clean-in-Three Rule on November 14. His proposed Rule would reinstate the rule rendering a risk who satisfied the Clean-in-

---

<sup>13</sup> We note that this measure is not new to this Decision. In the December 31, 2004 Order, the Commissioner advised CAR to address specific procedures about such notification, including privacy issues, the extent and nature of the information to be distributed, notification to producers, and the timing of distributions, in its Manual of Administrative Procedures.

<sup>14</sup> A producer who knows that a customer is seeking voluntary coverage has an opportunity to assist with placement.

Three requirement ineligible for the MAIP as previously articulated in the Commissioner's December 31 Order, and would add a requirement that servicing carriers "*shall issue a motor vehicle insurance policy upon the request of any applicant who meets the conditions [in this rule].*"<sup>15</sup> The AG's proposal, in essence, would have the Commissioner establish a limited "take all comers" requirement in the voluntary market through a CAR rule.<sup>16</sup> While adoption of such a rule would undoubtedly satisfy one of the concerns expressed by the Supreme Judicial Court in *Commerce v. Commissioner*, the AG offers no legal support for the Commissioner's authority to regulate the voluntary market in such a fashion. Even if the Commissioner has such authority, we believe adoption of this measure not to be advisable at this time.

We are also persuaded that the AG's approach would, in any event, provide limited benefits. It addresses only new applicants for insurance and would not apply to insureds seeking renewal of their policies, a matter of greater and more immediate concern. Company decisions not to renew current customers have a larger potential for contributing to excessive growth in the residual market. As drafted, the AG's proposal would affect only the group of new applicants for insurance with three years of past driving history. Therefore, it would have no effect until such new drivers had three years of driving history under their belts, or 2010, at the earliest. This proposal, therefore, has no immediate effect on the market. We are also reluctant at this time to impose a requirement that insurers write this group voluntarily, and conclude that it is preferable to allow insurers to accept or reject such business based on the information available to them, so long as the applicable standards are applied fairly and consistently. The AG's proposal also fails to address the question of credits that should apply to such new business, which CAR must calibrate.

Notwithstanding the infirmities in the AG's November 14<sup>th</sup> submission, the Commissioner remains persuaded that a Clean-in-Three approach for determining eligibility for the residual market is a useful approach that would have the salutary effect of

---

<sup>15</sup> In addition to Clean-in-Three status, the applicant must have been licensed to operate an automobile in Massachusetts for at least 36 successive months before the effective date of the policy, been continuously insured for those 36 months, with no more than one period of lapsed coverage, and had no conviction for driving under the influence or a motor vehicle felony for the 60 months prior to the policy effective date.

<sup>16</sup> Viewed as a take all comers requirement, the AG's proposal would reinstitute through a CAR Rule a requirement that the Supreme Judicial Court found the legislature had created and expressly repealed in 1983. At this time, the legislature may wish to reconsider whether, by statute, insurers should be required to insure all applicants who meet specified underwriting guidelines.

providing all those involved in the insurance transaction with clear guidelines. An unambiguous rule will provide an incentive to consumers to establish or retain good driving records and, because a high percentage of Massachusetts policyholders already meet that standard, reduce the number of risks that might be assigned to the residual market. A market-based approach such as a credit mechanism is a reasonable approach to encourage Members to insure voluntarily risks that satisfy the Clean-in-Three criteria. We are therefore directing CAR to review this issue during the initial phases of MAIP operations for the purpose of developing any amendments to the Plan of Operation and reasonable rules that will appropriately limit the size of the residual market for new business. Such an approach has the merit of using a statutorily authorized mechanism with which Members are familiar, and will give CAR the benefit of data and Member commentary to assist it in structuring the credit mechanism to achieve the desired result for new business. Sufficient time exists to craft an effective rule because questions about the non-renewal of new business that achieves Clean-in-Three status will not arise until April 1, 2010.

Our principal concern at this time, however, is the immediate task of ensuring that the transition to an assigned risk plan does not result in excessive growth of the residual market, particularly in the initial years of its operation. To that end, we have incorporated into the MAIP a three-year transition period that separately addresses new and all other business, including renewal business. Beginning April 1, 2007, and continuing thereafter, companies may only refer to the MAIP new business that they decline to write voluntarily. For the period April 1, 2007 through June 30, 2007, all other business remains eligible to be ceded to CAR under the current residual market plan. As of July 1, 2007, only business consisting of risks rated with ten or more points under the Safe Driver Insurance Plan who are not written voluntarily must be referred to the MAIP rather than ceded to CAR. Companies may continue to cede to CAR under the current system all business, other than new business, rated at fewer than ten SDIP points with effective dates between July 1, 2007 and March 31, 2008. As of March 31, 2008, however, the current system for ceding risks to CAR will terminate and the MAIP will be the sole source for private passenger automobile insurance in the residual market.

In order to limit the potential number of non-renewals, the transition period also constrains company non-renewals of current business. For the three year period April 1, 2007 through March 31, 2010, companies must comply with standards relating to policy renewal that will, during that temporary transition period, limit non-renewals to risks that do not satisfy the Clean-in-Three standard, subject to a few exceptions. Only those risks who do not meet that standard and are unable to obtain insurance in the voluntary market may be referred to the MAIP.

The rules also require Members to submit data that will enable CAR to develop appropriate rules that may be needed to ensure future limitations on the size of the MAIP. The graduated approach in the MAIP rules should provide adequate time for all constituencies to examine the data and make recommendations for future MAIP operations. If at any time in the transition period problems arise that may require adjustments to the initial MAIP rules, CAR is expected to address the matters accordingly.

Commerce continues to raise questions about the provision in MAIP Rule 26 that a person who is insured through a group marketing plan under c. 175, §193R is not eligible for the MAIP. The December 31, 2004 Order addresses at length the objections made by insurers to this provision. On appeal, the Supreme Judicial Court did not consider this provision problematic, noting that a person who is covered under a group plan has access to insurance. *Commerce v. Commissioner*, supra, at 490-491. Despite that decision, insurers continue to object to excluding from MAIP eligibility members insured through an approved group plan, because of the potential effect on profitability of retaining all members in a group. The MAIP makes no changes to the statutory requirements for offer or acceptance of insurance written for a group. Chapter 175, §193R provides that rate modification for the members of a group is linked to data on the losses and expenses of that group.<sup>17</sup> The discount offered to a group therefore may change from year to year. The real issue a company must confront is the business decision as to whether it is reasonable to continue to offer a group discount if the company is responsible for all losses and

---

<sup>17</sup> The statute provides for an initial rate adjustment during the three years of operation of a group plan that is based on direct reductions in expenses resulting from group marketing.



expenses generated by the group. Those decisions may require balancing such issues as consumer goodwill and marketing strategies with underwriting projections.<sup>18</sup>

Many of the questions raised about the MAIP, particularly by Commerce and some of the producers, seek information about operational details rather than the structure of the plan. Operational procedures are appropriately addressed through an administrative procedures manual. The MAIP rules do not abrogate the need for such a manual; the December 31, 2004 Order specifically noted that the CAR Manual of Administrative Procedures would need to be revised to conform to the MAIP Rules. Any questions about changes to the standard forms relating to motor vehicle insurance are also independent of the MAIP and should be addressed through the channels now in place. Objections to the MAIP Rules on the ground that they do not provide guidance for every potential problem that may arise in connection with an assigned risk plan are unrealistic. The MAIP Rules, no matter how carefully crafted, cannot answer every question that may arise in the course of implementing an assigned risk plan. Like the current CAR Rules, which have been revised over time, they may need to be amended from time to time to address new or unanticipated events. That changes may need to be made in the future is not a reason to disapprove these rules.

Commerce points out that, in order to comply with the MAIP, the CAR Plan requires some adjustment. In addition to revising the Plan of Operation to be consistent with the MAIP, CAR also must make appropriate changes to the statistical plan and update the penalties in the current performance standards to comply with the MAIP structure. It also will need to revise the credit matrix to include references to new territories created this year. In addition, Commerce has noted a number of technical errors, many of which relate to administrative issues, such as incorrect internal references or statutory references that have been corrected.<sup>19</sup> For example, Rule 26 has been revised to retain a provision, omitted in error, that a person who has failed to pay insurance premiums within the preceding twelve months is not eligible for the MAIP. Rule 29.G.4 has been deleted so as to avoid inconsistency with the definition of a LADC.

---

<sup>18</sup> Offering a group discount that is not actuarially supported, expecting to cede less desirable members to the residual market, creates an opportunity to “game” the system.

<sup>19</sup> See, e.g., comments on Rule 26.D., and Rule 26 E 1.

Commerce raises several issues about the definitions or meaning of terms. As noted above, the Rules define "private passenger motor vehicle" consistent with the definition in the current AIB Private Passenger Automobile Insurance Manual. Commerce's question about compensation under Rule 37 in essence seeks clarification of the definition of assigned risk producer set out in MAIP Rules 22 and 31, an issue that should be addressed at CAR. Rule 37 makes no change to current arrangements for compensating salespeople for direct writers.

Commerce asks about a number of other matters that are appropriately addressed at CAR, such as the issue of whether "new business" for a company should include exposures transferred from one producer to another in the form of a book transfer.<sup>20</sup> Commerce also asks about the time frame for making declination decisions, a question that should also be considered at CAR. The specific language in the documents that the MAIP expects to utilize is appropriately addressed at CAR. The MAIP includes no provision allowing an insurer to contest a reassignment; if that is a matter of concern it should be first addressed at CAR. Commerce also asserts that there is a conflict between Rule 26 and the AIB rules relating to the calculation of pro rata and short rate cancellations; that difference should be resolved at CAR in a manner that ensures fair treatment of consumers. CAR will also develop procedures under Rule 38 governing assignments to companies leaving the market or declared insolvent.

Commerce raises questions about language in the MAIP rules that represents no change from the current CAR Rules; for example, the provision in Rule 24 giving the Governing Committee power to file rates and rating plans with the Commissioner. Commerce's inquiry about Rule 27 addresses language on the coverages that may be provided through the MAIP that is identical to the current CAR Rule. With respect to applications to the MAIP, Commerce asks several questions about installment plans. Offering installment plans to consumers is no different under the MAIP than under the current CAR Rules; insurers may offer the same plans to assigned policies that they offer to the voluntary market. Further, the MAIP makes no changes to current statutes relating to matters such as installment billing, direct bill plans, or the effect of premium payment to

producers. The language in the MAIP rules about the appointment of Assigned Risk Carriers and Assigned Risk Producers is substantially identical to requirements in the current CAR Rules. The MAIP does not supersede principles and practices that are set out in the CAR Rules or the CAR Manual of Administrative Procedures, some of which may have been developed to comply with statutory or case law. If such practices may not be consistent with the MAIP, questions about their application to the assigned risk plan should first be addressed at CAR, as should questions about the need to revise or clarify specific procedures established under the current rules as a result of the implementation of the MAIP.

As noted above, the MAIP makes no changes to Massachusetts statutes relating to writing insurance. An insurer may decline to write a risk voluntarily only on grounds that are not prohibited by law. In response to questions from Commerce about mid-term changes to the listed operators on a policy, the MAIP makes no changes to current practice or requirements. G.L. c. 175, §113F states clearly that a notice of non-renewal of a policy is not a refusal to issue a motor vehicle insurance company. G.L. c. 175, §113A requires a statutory notice of cancellation to include the reasons for that cancellation; there is no basis for Commerce's criticism of language in Rule 26.E.2.b. that it is not consistent with that requirement.

MAIP Rule 29, as does current Rule 12, addresses credits that companies receive for writing business that might otherwise be written in the residual market. Underlying the credit system is each insurer's quota share, which is developed from data on its market share. Because market share shifts over time, credit provisions must be reviewed periodically and revised to address changing circumstances. For that reason, while Rule 29 establishes the principles applicable to the credit system, responsibility for developing the precise methodologies for implementing the rule should remain at CAR. The ultimate goal, to ensure that the system is fair to CAR members and complies with G.L. c. 175, §113H has not changed, but the initial methodologies for achieving that goal will need to be reviewed over time. The system put in place for the transition to the MAIP must balance responsiveness to change with the preservation of market stability. It is not

---

<sup>20</sup> We note that the definition of "new business" has been changed to clarify that, in addition to applications from new drivers, it refers to business that has not been written in Massachusetts within the twelve months

expected, however, to change current practice with respect to CAR's annual review of the credit system. CAR is to analyze and test proposals for credit mechanisms for 2007 and to submit them to the Commissioner by January 15, 2007.

At the hearing on November 10, the Division proposed adding language to Rule 29 to clarify the methodology for giving credits to companies receiving assigned risk business. The addition makes no substantive change to the principle underlying the statutory credit system, but appears necessary as a response to concerns expressed by insurers, including Commerce, about the availability of such credits. The amended language makes clear that under the MAIP insurers will continue to receive credit for voluntarily writing risks in rate-inadequate territories and driver classes, just as they do under the current Rule 12. It represents the longstanding intent that the credits offered under subsection F.2. of Rule 29 would apply to risks voluntarily insured by a company regardless of whether the risk was formerly insured through the MAIP, a provision designed to stabilize the transition from the current plan to an assigned risk plan. The language to be added is a new subsection to Rule 29. F.1., as follows:

“c. Each Member shall receive a credit for each policy voluntarily insured in the territory and operator classes listed under Section F.2 below.”

The current section F.1.c. will be relabeled as F.1.d. In connection with setting rules for credits available to Members in 2007, CAR is to provide specific details relating to credits for retaining business that might otherwise be assigned to the residual market, sometimes referred to as “keep-out” credits. <sup>21</sup>

Although Commerce asks extensive questions about CAR Rule 29, many of its concerns are more appropriate for consideration by CAR, based on the following recommendations. In the interest of stability, we recommend that initial quota shares for each company remain based on 2006 data, until data is available on the first full year of

---

prior to the application.

<sup>21</sup> On November 14, Commerce requested a separate hearing on this change, asserting that it was a substantive and material change introducing a new credit program, which had not been published before the hearing and was therefore not subject to public comment. We note, however, that so-called “keep-out” credits were approved in the MAIP rules approved on December 31, 2004. The Decision on those rules specified that “[c]redits will be assigned for all credit-eligible risks that are kept out or are taken out of the MAIP, either voluntarily or under the mandatory take-out rules.” We find no merit in Commerce’s characterization of Ms. Blank’s November 10 statement as an offer of a new credit program. In addition, and

MAIP operations or, July 1, 2007 to June 30, 2008. CAR is expected to rebalance the quota shares once the first full year of data is available. However, during the first year of MAIP operation, over and undersubscribed quota share positions may present challenges that CAR will need to address; it will also need to develop procedures to address the obligations of companies that leave the market or become insolvent. A company that substantially reduces its voluntary writings during the first year will remain responsible for its MAIP assignments. In the interest of stability, we recommend that for the first year adjustments be made on a monthly basis. Thereafter the adjustments are to be made on a rolling basis.

In response to the question about the calculation of a company's initial quota share under the MAIP, as it is affected by the exclusion of group business, the rules state that only retained business counts for determining the initial quota share. CAR will need to develop specific procedures addressing Commerce's concerns about excluding other vehicles, such as antique cars, from the calculation. Commerce, citing to the Supreme Judicial Court's discussion of reinsurance group marketing plans, *Commerce v. Commissioner, supra* at 490-491, also argues that the calculation of quota shares should exclude risks written under a group discount plan that the insurer can show that it would otherwise have rejected in the voluntary market. Its argument, however, addresses only one aspect of the Court's decision. Section 193R requires that the experience of each group plan, both voluntary retained and ceded risks, be used in determining a company's residual market losses and expenses. The Court emphasized that in order to trigger the application of the attribution rules for the residual market, the company must have obtained reinsurance for the risk insured under the group plan that it would otherwise have rejected in the voluntary market. Therefore, in order for the risk to be considered in connection with the calculation of the company's quota share, the company must show to the satisfaction of the residual market plan administrator both that it would not have written the risk voluntarily and that it has obtained reinsurance for that particular risk. CAR, as the residual market plan administrator, will need to develop procedures, including specific requirements for documentation that companies must follow in order to

---

ironically, the alleged change reflects a clarification to the rule that Commerce itself sought in its November 10<sup>th</sup> testimony.

demonstrate to the plan that their quota share should be modified to reflect the characteristics of their group marketing plans, including demonstrating that it would have rejected a group applicant.

Commerce also raises questions about basing quota shares on exposures, while counting MAIP assignments based on premiums, and the methodologies for calculating premiums. It notes that Rule 29.D, as drafted, references tracking exposures, rather than premium. We have amended the language to state that the quota share is adjusted based on MAIP quota share premium. By using retained exposures to calculate market share, a common basis is established for all companies, regardless of where the company's business is concentrated. For the purpose of determining a quota share, measured in terms of premium dollars, the market share percentage is applied to a premium base. Companies then satisfy their quota shares based on the premium associated with each risk they actually write. As an example, two companies may have identical quota shares, but one may attain its quota share with fewer residual market assignments because it writes higher risk business than does the other company. The credit values are expressed in the credit matrix as actual cost based premium, which will vary considerably by driver class and territory combination. Highly priced business will reduce the quota share faster than lower priced business. A company can limit its assignments by writing more of such business.

With respect to the premium calculations, after issuance of the Commissioner's decision in the fix-and-establish rate proceedings, manual rates will be calculated that include all the provisions in that decision and follow the methodologies used to calculate the rates charged to policyholders, except for the procedure that introduces subsidies into the rates. This procedure will remove rate redundancies from and add rate subsidies back into the premiums actually charged. It also will eliminate concerns about the adequacy of the total industry quota share premiums, and whether a company's marketing concentration will affect its quota share. This approach will ensure that premiums that the rates used for measuring quota share are cost based and apply equally to all insurers.

Commerce expresses concern about the adjustment of premiums for SDIP points, pointing out that the SDIP applies to collision coverage, which is not in the mix of coverages that are considered in developing quota share premium. Because collision is an optional coverage, and may be written at higher than standard rates, inclusion of collision

in the measurement of quota share premiums would add a layer of complexity that may not be necessary. The rate subsidies underlying collision rates by driver class and territory combination are distributed similarly to rate subsidies for basic limits bodily injury and property damage coverages. If MAIP assignments are actually random, measuring the MAIP quota share using only liability coverages should be adequate and fair. Commerce also questions the exclusion of higher limits bodily injury coverage premiums in measuring quota share premium. However, two-thirds of the vehicles insured on the residual market carry only the minimum mandatory limits. Increased limits coverage is not subsidy neutral, and its inclusion might lead to pressure on consumers in credit eligible communities to purchase additional insurance. With respect to considering rate deviations in calculating quota share premium, the use of the fixed-and-established premiums for that purpose is consistent with the principle and practice of measuring the CAR deficit under the current system. We have been given no persuasive reason to change that methodology.

OneBeacon and managing general agent Robert Plan of NY Corporation (“RPC”) commented that the MAIP may be improved by adding provisions to allow the buying and selling of credits in order to encourage voluntary writing in underpriced areas. Specifically, it was suggested that a Member interested in writing credit business should be permitted to accrue credits in excess of its quota share. Excess credits could then be sold to another Member(s), who might not be as experienced in managing such business, and be applied against the purchaser’s quota share. This concept appears to have been successful in depopulating New York's assigned risk plan and could help minimize market disruption.

We agree that a sale of credit program would be a positive addition to the MAIP, and have revised Rule 29 to add a subsection H that (1) acknowledges that Members may accrue excess credits; (2) authorizes Members to sell, transfer and buy excess credits; and (3) requires that all such transactions be reported to CAR. In order to develop adequate data to support a prospective credit system, and to give Members an opportunity to comment on it, CAR is to develop and submit specific procedures for implementing this Rule by July 1, 2007. We also have added a subsection, Rule 29.I, that requires CAR to develop a credit mechanism that will encourage Members to insure on a voluntary basis all risks that satisfy the criteria by which non-renewals are limited during the transition period.

### **III. CONCLUSION AND ORDERS**

The revisions described in this Decision and Order enhance precision and clarify the Rules attached to the December 31, 2004 in order to ensure that the Transition Rules are consistent with approved changes to those rules made after December 31, 2004 and are properly integrated into the current CAR Rules, and to ensure that the MAIP Rules conform to the decision of the Supreme Judicial Court, as well as to clarify the procedures relating to the operation of the MAIP, and set a timetable for implementation. The “Second Revised Rules” are attached to this document as Appendix A. As revised, these Rules are hereby approved. With respect to the Rules that were not changed following remand, we reaffirm the orders issued on November 23, 2004 and December 31, 2004.

Dated: December 13, 2006

---

Julianne M. Bowler  
Commissioner of Insurance

---

Jean F. Farrington  
Presiding Officer

---

Stephen M. Sumner  
Presiding Officer