

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

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In the Matter of:

Continental Indemnity Company,  
Applied Underwriters, Inc.,  
Applied Risk Services Inc.,  
Applied Risk Services of NY, Inc.,  
and Applied Underwriters Captive Risk Assurance Company, Inc.

Respondents.

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CONSENT ORDER

WHEREAS the New York State Department of Financial Services (the "Department") commenced an investigation in December 2015 of Continental Indemnity Company ("Continental"), Applied Underwriters, Inc. ("Applied"), Applied Risk Services Inc. ("ARSI"), Applied Risk Services of NY, Inc. ("ARSNY") (collectively, Applied Risk Services, or "ARS") and Applied Underwriters Captive Risk Assurance Company, Inc. ("AUCRA") (collectively, "Respondents") pursuant to the New York Insurance Law and Financial Services Law (the "Investigation");

WHEREAS the Department investigated whether Respondents' design, offering, and marketing and subsequent sale to New York employers of a program consisting of workers' compensation insurance offered with a separate agreement that was not filed with the Department (the "Program") violated the Insurance Law and Financial Services Law;

WHEREAS Respondents voluntarily ceased offering the Program in New York after the Department's Investigation began;

NOW, THEREFORE, the Department and Respondents are willing to resolve all matters involving the Program cited herein in lieu of proceeding by notice and a hearing.

### **FINDINGS**

The findings of the Department are as follows:

#### **Relevant Entities**

1. Applied is based in Omaha, Nebraska that, through its subsidiaries, offers workers' compensation insurance to employers in New York. Among its affiliates are Continental and AUCRA. Applied manages most of Continental's insurance business, pursuant to a Management Services Agreement with Continental, including establishing underwriting standards and managing claims.
2. Continental is a subsidiary of North American Casualty Co. ("NAC"), which is, in turn, a subsidiary of Applied, and is incorporated in Iowa. Continental is a property/casualty insurer duly licensed in New York to issue workers' compensation policies.
3. AUCRA is a subsidiary of NAC, and a property casualty company incorporated and licensed in Iowa. AUCRA is not licensed or otherwise authorized to offer insurance in New York.
4. ARS is a subsidiary of Applied, and is incorporated in Nebraska with its principal place of business in Nebraska. ARS acts as a billing agent, collecting and remitting funds on a pass-through basis for the Program.
5. ARSNY d/b/a ARS Insurance Agency, is a subsidiary of Applied and is incorporated in New York with its principal place of business in Omaha, Nebraska. ARSNY is duly licensed by the Department as a property/casualty agent to produce workers' compensation

insurance in New York and is listed as a third-party administrator, with a New York City address and phone number, by the New York Workers' Compensation Board.

### **Background**

6. New York Workers' Compensation Law §§ 2 and 3 require that nearly all New York employers provide workers' compensation coverage for their employees. Workers' compensation insurance is one of the biggest expenses for nearly any business, large or small. Most workers' compensation insurance written in New York is in the form of guaranteed-cost policies, by which insurers charge a set premium based on identified employee classifications and corresponding payroll.

7. Pursuant to Insurance Law § 2313, the New York Compensation Insurance Rating Board ("CIRB") serves as the nongovernment rate service organization ("RSO") for New York State workers' compensation insurers. CIRB is a private unincorporated association of insurance carriers responsible for the collection of workers' compensation data, and the development of workers' compensation rates and rules regarding the proper application of these rates to workers' compensation policies. CIRB also administers various individual risk-rating plans such as the Retrospective Rating Plan, which is publicly available on the CIRB website.

8. Retrospective rating, set out in the Retrospective Rating Plan, is an optional program which is mutually agreed-upon by the employer and the insurer. Retrospective rating premiums are based on projected loss experience and are subject to a contractual adjustment after policy expiration based upon the individual employer's actual loss experience. In contrast, a guaranteed-cost policy sets premiums at a monthly amount that is not subject to change based on an individual employer's loss experience. Retrospective rating programs are approved by the

Superintendent in accordance with Article 23 of the Insurance Law, provided that premiums are calculated using uniformly-applied criteria applicable to all insured employers in a non-discriminatory manner.

9. New York's smallest employers, who generally pay the least in premiums for workers' compensation insurance, are not eligible for retrospective rating and cannot thereby reduce their workers' compensation costs if they manage their claims and have a robust safety program. Pursuant to CIRB's Retrospective Rating Plan Manual, which the Department has approved, retrospective ratings is an option in New York only for policies with at least \$25,000 of standard workers' compensation premium.

#### **The Insurance Program**

10. Applied offered the Program in New York under multiple names, including "SolutionOne" and "EquityComp." The Program included guaranteed-cost workers' compensation policies issued by Continental on forms and rates approved by the Department along with another contract titled a "Reinsurance Participation Agreement" ("RPA"), that employers entered into with AUCRA. Respondents offered policies under the Program to New York employers ("New York Policies") from as early as January 2010, to late 2016. While some New York employers paid less for coverage under the Program than they would have paid under the workers' compensation policies alone, some New York employers paid more for coverage under the Program than they would have paid under the workers' compensation policies alone, many significantly more.

11. Although the guaranteed-cost policy forms represented that "[t]he only agreements relating to this insurance are stated in this policy," to participate in the Program

employers obtaining guaranteed-cost policies were required to sign the RPAs, which were related to the policies. The RPAs established a loss-sensitive formula, which modified and superseded the agreement established by the guaranteed-cost policies, operating similarly to a retrospective rated workers' compensation insurance policy. The RPAs required the employer to fund a segregated cell with AUCRA from which the insurer's losses would be paid subject to a minimum and maximum estimated at the inception of each Program although Continental remained exclusively responsible for the payment of any and all losses under the policies.

12. Employers remitted monthly payments to ARS, which forwarded the payments to Continental. Continental allocated the monthly payments to AUCRA to fund the employer's segregated cell. When a claim was filed, Continental would pay the claim, but then would cede the liability to AUCRA, which would in turn cede the liability to the employer's segregated cell. As disclosed in Program documents, because the RPAs required the employer to fund the segregated cell, the terms of the RPAs controlled the amount of the employers' monthly payments regardless of the terms of the guaranteed-cost policy.

13. On March 15, 2011, officers of Applied were granted Patent No. 7,908,157 B1 for a "Reinsurance Participation Plan," the formula used in the RPA. The patent explicitly states that its purpose is to introduce a novel premium structure into the marketplace enabling the offering of retrospective-style insurance to small and medium-sized insureds and describes the program as "a reinsurance based approach to providing non-linear retrospective plans to insureds . . . while at the same time complying with state regulation." However, the Program as implemented did not comply with New York law. The patent is filed and publicly available.

14. The RPA was not filed with the Department, and as a result the RPA and the Program as a whole were not reviewed or approved by the Department.

15. Despite the fact that the Program was marketed as a way that employers could “share in the underwriting profit” of their workers’ compensation insurance, and because workers’ compensation claims have a long tail, the RPAs required the employer to wait three years to receive any “profit distributions,” and gave AUCRA the option to withhold funds in some cases for up to four more years.

16. The formula by which the RPAs calculate costs was complex and the way in which it was presented to employers was misleading. When offered the Program, employers were given a visual representation that showed their lowest and highest possible costs, but that did not give an indication of what their total payments might be. The Program’s formula was based on a non-linear model, which was novel enough that the Respondents received a patent for it. Under the formula, Program fees can rise rapidly with the first few claims to levels substantially higher than what would have been paid under a typical linear retrospective model.

17. The Department determined that parts of the Program constituted an unlicensed insurance business. Some of the Respondents engaged in the unlicensed business while others actively aided it. Moreover, the RPAs were policy forms that should have been filed with the Department but Respondents issued them for delivery to employers without doing so. The RPAs resulted in fees that were different from the rates in the filed and approved guaranteed-cost policy.

18. Applied has cooperated with the Department’s investigation.

19. Respondents have agreed to this Consent Order to avoid the time, expense and distraction of litigation. This Consent Order includes Findings of the Department which have not been the subject of an adjudicatory hearing or judicial process in which Respondents have had an opportunity to present evidence and examine witnesses. The parties agree that this Consent Order

does not create any private rights or remedies against Respondents, create any liability for Respondents, constitute evidence of wrongdoing by Respondents for the purpose of any third-party proceeding, or waive any defenses of Respondents against any person or entity not a party to this Consent Order.

### **Violations**

20. By reason of the foregoing, the Department finds that Respondents violated Sections 1102, 2117, 2307, and 2324 of the Insurance Law and Section 408 of the Financial Services Law:

- a. As described under Insurance Law § 1101(b)(1)(E), Applied has engaged in doing an unlicensed insurance business in this state in violation of Insurance Law § 1102;
- b. ARS and AUCRA aided unlicensed insurance business in violation of Insurance Law § 2117;
- c. AUCRA issued for delivery, and ARS delivered, unfilled policy forms in violation of Insurance Law § 2307;
- d. Continental and ARS offered and provided inducements and rebates to consumers in violation of Insurance Law § 2324; and
- e. Applied violated Financial Services Law § 408.

### **AGREEMENT**

**IT IS HEREBY UNDERSTOOD AND AGREED** by Respondents and all subsidiaries, affiliates, successors, assigns, agents, representatives and employees, that:

### Injunctive Relief

21. Respondents have voluntarily ceased offering the Program in New York and will not resume offering the Program in New York without the Department's approval. Respondents shall not issue new RPAs, or any documents equivalent to RPAs, or renew existing RPAs relating to any New York Policies.

22. Respondents shall not collect or seek to collect any additional funds from insureds who paid less under the Program than they would have paid pursuant to Continental's filed and approved guaranteed-cost rates. Should Respondents attempt to do so for any reason, including in relation to any private action, Respondents shall return all additional premiums owed to all New York residents who were assessed greater amounts pursuant to the Program than otherwise would have been owed pursuant to Continental's filed and approved guaranteed-cost workers' compensation insurance rates.

23. After the effective date of this Consent Order, Respondents shall not commence arbitration proceedings or enforce arbitration provisions pursuant to contracts entered into in the State of New York or by New York employers.

24. Should any New York employer wish to maintain coverage through Respondents, Respondents shall offer such employer the opportunity to renew the filed policy.

25. Respondents shall comply with New York Insurance Law provisions specified in Paragraph 20, and with New York Financial Services Law § 408, as well as all other applicable laws and regulations.



### **Civil Penalty**

26. No later than ten (10) business days after the Effective Date of this Consent Order, Applied, on behalf of Respondents, shall pay a civil penalty in the amount of three million dollars (\$3,000,000) to the Department. The payment shall be made by wire transfer in accordance with the Department's instructions.

27. Neither Respondents, nor any of their parents, subsidiaries, or affiliates shall, collectively or individually, seek or accept, directly or indirectly, reimbursement or indemnification, including but not limited to payment made pursuant to any insurance policy referenced in this Consent Order, or from any of its parents, subsidiaries, or affiliates, with regard to any or all of the amounts payable pursuant to this Consent Order.

28. Respondents agree that they will not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax, directly or indirectly, for any portion of the civil penalty paid pursuant to this Consent Order.

### **Other Relief**

29. Respondents will not contest the authority of the Department to effectuate this Consent Order. Respondents will cease and desist from engaging in any acts in violation of the New York Insurance Law and will comply with those and any other applicable New York laws and regulations.

### **Breach of the Consent Order**

30. If any of Respondents default on any material obligation under this Consent Order, the Department may terminate this Consent Order in its entirety, at its sole discretion, upon five (5) business days' written notice. In the event of such termination, Respondents

expressly agree and acknowledge that this Consent Order shall in no way bar or otherwise preclude the Department from commencing, conducting or prosecuting any investigation, action, or proceeding against Respondents, however denominated, related to the provisions of the Consent Order, or from using in any way statements, documents or other materials produced or provided by Respondents prior to or after the date of this Consent Order, including, without limitation, such statements, documents or other materials, if any, provided for purposes of settlement negotiations.

31. In the event that the Department believes any Respondent to be materially in breach of this Consent Order ("Breach"), the Department will provide written notice to such Respondent of the Breach. Within ten (10) business days from the date of receipt of said notice, or on a later date if so determined in the sole discretion of the Superintendent, such Respondent must appear before the Department and shall have an opportunity to rebut the Department's assertion that a Breach has occurred, and, to the extent pertinent, demonstrate that any such Breach is not material or has been cured.

32. Respondents understand and agree that failure to provide the required submission to the Department within the specified period as set forth in Paragraph 31 of this Consent Order is presumptive evidence of a Breach thereof. Upon a finding of Breach, the Department has all the rights and remedies available to it under the New York Insurance Law, Financial Services Law, or other applicable laws and may use any and all evidence available to the Department for all ensuing hearings, notices, orders and other remedies that may be available under the New York Insurance Law, Financial Services Law, or other applicable laws.

### Other Provisions

33. Respondents shall submit to the Department annual affidavits of compliance with the terms of this Consent Order for a period of three (3) years commencing from the Effective Date of this Consent Order.

34. The Department has agreed to the terms of this Consent Order based on, among other things, the representations made to the Department by Respondents. To the extent that representations made by Respondents—either directly or through their counsel—are later found to be materially incomplete or inaccurate, this Consent Order is voidable by the Department in its sole discretion.

35. Upon the request of the Department, Respondents shall provide all documentation and information reasonably necessary for the Department to verify compliance with this Consent Order.

36. Respondents represent and warrant, through the signatures below, that the terms and conditions of this Consent Order are duly approved, and execution of this Consent Order is duly authorized.

37. All notices, reports, requests, certifications, and other communications to any party pursuant to this Consent Order shall be in writing and shall be directed as follows:

**For the Department:**

Bruce Wells  
Associate Counsel, Enforcement  
New York State Department of Financial Services  
One State Street  
New York, New York 10004-1511

**For Continental:**

10805 Old Mill Road  
Omaha, Nebraska 68154  
Attention: Jeffrey A. Silver

with a copy to:  
DLA Piper LLP  
1251 Avenue of the Americas  
New York, New York 10020  
Attention: Shand Stephens

**For Applied:**

10805 Old Mill Road  
Omaha, Nebraska 68154  
Attention: Jeffrey A. Silver

with a copy to:  
DLA Piper LLP  
1251 Avenue of the Americas  
New York, New York 10020  
Attention: Shand Stephens

**For Applied Risk Services Inc.:**

10805 Old Mill Road  
Omaha, Nebraska 68154  
Attention: Jeffrey A. Silver

with a copy to:  
DLA Piper LLP  
1251 Avenue of the Americas  
New York, New York 10020  
Attention: Shand Stephens

**For Applied Risk Services of NY, Inc.:**

10805 Old Mill Road  
Omaha, Nebraska 68154  
Attention: Jeffrey A. Silver

with a copy to:  
DLA Piper LLP  
1251 Avenue of the Americas  
New York, New York 10020  
Attention: Shand Stephens

**For AUCRA:**

10805 Old Mill Road  
Omaha, Nebraska 68154  
Attention: Jeffrey A. Silver

with a copy to:  
DLA Piper LLP  
1251 Avenue of the Americas  
New York, New York 10020  
Attention: Shand Stephens

38. This Consent Order and any dispute thereunder shall be governed by the laws of the State of New York without regard to any conflicts of laws principles.

39. Respondents waive all rights to further notice and hearing in this matter as to any allegations of past violations up to and including the Effective Date of this Consent Order and agrees that no provision of the Consent Order is subject to review in any court or tribunal outside the Department.

40. This Consent Order may not be amended except by an instrument in writing signed on behalf of all the parties to this Consent Order.


41. In the event that one or more provisions contained in this Consent Order shall for any reason be held invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Consent Order.

42. This Consent Order may be executed in one or more counterparts, and shall become effective when such counterparts have been signed by each of the parties hereto and the Consent Order is So Ordered by the Superintendent of Financial Services or her designee (the "Effective Date").


43. Upon execution of this Consent Order by the parties, the Department will discontinue the Investigation as to and against Respondents solely with respect to the practices set forth herein through the Effective Date of this Consent Order. No further action will be taken by the Department against Respondents for the conduct set forth in this Consent Order provided Respondents comply fully with the terms of the Consent Order.

WHEREFORE, the signatures evidencing assent to this Consent Order have been affixed hereto on the dates set forth below.


DEPARTMENT OF FINANCIAL SERVICES

By:   
R. BRUCE WELLS  
Associate Counsel, Enforcement  
Consumer Protection and Financial  
Enforcement Division

July 17, 2019

By:   
CHRISTOPHER B. MULVIHILL  
Deputy Superintendent, Enforcement  
Consumer Protection and Financial  
Enforcement Division

July 17, 2019

By:  /s/ SF  
KATHERINE A. LEMIRE  
Executive Deputy Superintendent  
Consumer Protection and Financial  
Enforcement Division

July 17, 2019

APPLIED UNDERWRITERS, INC.,

By:   
JEFFREY A. SILVER, Secretary

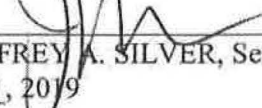
July 17, 2019

CONTINENTAL INDEMNITY COMPANY,

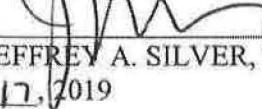
By:   
JEFFREY A. SILVER, Secretary

July 17, 2019

APPLIED RISK SERVICES INC.,

By:   
JEFFREY A. SILVER, Secretary  
July 17, 2019

APPLIED RISK SERVICES OF NY, INC.

By:   
JEFFREY A. SILVER, Secretary  
July 17, 2019

APPLIED UNDERWRITERS CAPTIVE RISK  
ASSURANCE COMPANY, INC.

By:   
JEFFREY A. SILVER, Secretary  
July 17, 2019

THE FOREGOING IS HEREBY APPROVED.  
IT IS SO ORDERED.

  
LINDA A. LACEWELL  
Superintendent of Financial Services

July 17, 2019