**Guideline for Troubled Company Information Sharing and Coordination with Guaranty Associations**

Drafting Note: Pre-liquidation information sharing and coordination with guaranty associations has become even more critical in the modern insurance environment. Ideally such sharing and coordination should take place early on when a company becomes a “troubled company.” Regulators should consider involving guaranty funds even before the company is put in a receivership status.0F[[1]](#footnote-2) It is essential that guaranty funds have usable claims data in order to service claims once a company is found insolvent and ordered into liquidation. (This is when most property casualty funds are “triggered.”) Moreover, complex new products such as cyber security are being written by insurance companies. Older products such as large deductible workers compensation often use complex collateral arrangements and collection protocols. Advance study and information sharing in such cases is essential for a smooth transition into liquidation if a liquidation does occur.

Regulators may have concerns regarding whether there is adequate statutory authority to share information before a receivership. The guideline below offers statutory language that could be used to amend state law to clearly permit sharing and coordination in cases where regulators feel it is appropriate. Confidentiality concerns are paramount and are addressed in the text provided below. Note that amendments to the property casualty guaranty fund model act, the Model Holding Company Act and the Examinations Act may be necessary. Amendments to all of these Models is offered.

In some states, a regulator may determine that current state law and regulatory practice already permits pre-receivership coordination. If this is the case a regulator may want to consider memorializing the terms of information sharing and coordination with a Memorandum of Understanding (MOU). A template for such an MOU is also provided as a separate document.

**PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION MODEL ACT**

**NCIGF Suggested Revisions to Section 10**

## Section 10. Duties and Powers of the Commissioner

1. The commissioner shall:

* 1. Notify the association of the existence of an insolvent insurer not later than three (3) days after the commissioner receives notice of the determination of the insolvency. The association shall be entitled to a copy of a complaint seeking an order of liquidation with a finding of insolvency against a member company at the same time that the complaint is filed with a court of competent jurisdiction;

* 1. Provide the association with a statement of the net direct written premiums of each member insurer upon request of the board of directors.

1. The commissioner may:

* 1. Suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of a member insurer that fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the commissioner may levy a fine on a member insurer that fails to pay an assessment when due. The fine shall not exceed five percent (5%) of the unpaid assessment per month, except that a fine shall not be less than $100 per month;

* 1. Revoke the designation of a servicing facility if the commissioner finds claims are being handled unsatisfactorily.

* 1. Examine, audit, or otherwise regulate the association.

* 1. If the Commissioner determines that any member insurer as defined in Section 5K above may be subject to a future delinquency proceeding under Article XIII of this Code (insert citation to the liquidation section of the Code), then in order to assist in the performance of the Commissioner’s duties, the Commissioner may:
		1. share confidential and privileged documents, material, or information reported pursuant to an enterprise risk filing with the Association regarding that member insurer; and

* + 1. share confidential and privileged documents, material, the contents of an examination report, a preliminary examination report or its results, or any matter relating there to, including working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the Commissioner or to any other person in the course of any examination with the Association regarding that member insurer.



## PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION MODEL ACT

1. The Commissioner may disclose the information described in this subsection to the Association so long as the Association agrees in writing to hold that information confidential, in a manner consistent with this Code, and uses that information to prepare for the possible liquidation of the member insurer. Access to the information disclosed by the Commissioner to the Association under this subsection shall be limited to the Association’s staff and its counsel. The Board of Directors of the Association may have access to the information disclosed by the Commissioner to the Association once the member insurer is subject to a delinquency proceeding under this Code (insert citation to the liquidation section) subject to any terms and conditions established by the Commissioner.

1. The Commissioner may disclose the information described in this subsection with Associations in other states, and with any organization of one or more state Associations of similar purposes, so long as the recipient of such information agrees in writing to hold that information confidential, in a manner consistent with this Code, and uses that information to prepare for the possible liquidation of the member insurer. Access to the information disclosed by the Commissioner under this subsection shall be limited to the Association’s staff and its counsel. The Board of Directors of the Association may have access to the information disclosed by the Commissioner to the Association once the member insurer is subject to a delinquency proceeding under this Code (insert citation to the liquidation

section) subject to any terms and conditions established by the Commissioner.

1. Should the Commissioner determine a liquidation is likely, he or she may cooperate with the Association and with any organization of one or more state Associations of similar purposes to provide for an orderly transition to liquidation in order to minimize any delay in the handling and payment of claims.

 ~~(3)~~

**Drafting Note:** This section does not require periodic examinations of the guaranty associations but allows the commissioner to conduct examinations as the commissioner deems necessary.

C. A final action or order of the commissioner under this Act shall be subject to judicial review in a court of competent jurisdiction.

# NCIGF Recommended Changes to the NAIC Model Holding Company Act

## Section 8. Confidential Treatment

1. Documents, materials or other information in the possession or control of the Department of Insurance that are obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to Section 6 and all information reported or provided to the Department of Insurance pursuant to Section 3B(12) and (13), Section 4, Section 5 and Section 7.1 are recognized by this state as being proprietary and to contain trade secrets, and shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner’s official duties. The commissioner shall not otherwise make the documents, materials or other information public without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interest of policyholders, shareholders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part in such manner as may be deemed appropriate.
	1. For purposes of the information reported and provided to the Department of Insurance pursuant to Section 4L(2), the commissioner shall maintain the confidentiality of the group capital calculation and group capital ratio produced within the calculation and any NCIGF Recommended Changes to NAIC Model Holding Company Actgroup capital information received from an insurance holding company supervised by the Federal Reserve Board or any U.S. group wide supervisor.
	2. For purposes of the information reported and provided to the [Department of Insurance] pursuant to Section 4L(3), the commissioner shall maintain the confidentiality of the liquidity stress test results and supporting disclosures and any liquidity stress test information received from an insurance holding company supervised by the Federal Reserve Board and non-U.S. group wide supervisors.

**Drafting Note:** This group capital calculation and group capital ratio includes confidential information and filings received from insurance holding companies supervised by the Federal Reserve Board. Similarly, the liquidity stress test may include confidential information and filings received from insurance holding companies supervised by the Federal Reserve Board. The confidential treatment afforded to group capital calculation filings includes any Federal Reserve Board group capital filings and information.

1. Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner or with whom such documents, materials or other information are shared pursuant to this Act shall be permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to Subsection A.
2. In order to assist in the performance of the commissioner’s duties, the commissioner:
	1. May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection A, including proprietary and trade secret documents and materials with other state, federal and international regulatory agencies, with the NAIC, and with any third-party consultants designated by the commissioner, with state, federal, and international law enforcement authorities, including members of any supervisory college described in Section 7, provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the document, material or other information, and has

verified in writing the legal authority to maintain confidentiality.

* 1. Notwithstanding paragraph (1) above, the commissioner may only share confidential and privileged documents, material, or information reported pursuant to Section 4L(1) with commissioners of states having statutes or regulations substantially similar to Subsection A and who have agreed in writing not to disclose such information.

* 1. Notwithstanding paragraphs (1) and (2) above, the Commissioner may share confidential and privileged documents, material, or information reported pursuant to Section 4L(1) or otherwise described in paragraph A of this section with the [name of state property casualty insurance guaranty association]by any member insurer defined in [section in guaranty association act defining member insurer] if the Commissioner determines that the member insurer may be subject to a future delinquency proceeding under [provisions related to delinquency proceeding] of this Code. The Commissioner may disclose the information described in this subsection so long as the parties agree in writing to hold that information confidential, in a manner consistent with this Code, and use that information to prepare for a possible delinquency proceeding of the member insurer . Access to the information disclosed by the Commissioner to the [state guaranty fund] shall be limited to the [state guaranty fund’s] staff and its counsel. The Board of Directors of the [state guaranty fund] may have access to the information disclosed by the Commissioner to the [state guaranty fund] once the member insurer is subject to a delinquency proceeding under [provisions relating to delinquency proceeding] of this Code subject to any terms and conditions established by the Commissioner.

The Commissioner may also, pursuant to this subsection, disclose the information described in this subsection with Associations in other states, and with any organization of one or more state Associations of similar purposes, so long as the recipient of such information agrees in writing to hold that information confidential, in a manner consistent with this Code, and uses that information to prepare for a possible delinquency proceeding of the member insurer. Access to the information disclosed by the Commissioner under this subsection shall be limited to the Association’s staff and its counsel. The Board of Directors of the Association may have access to the information disclosed by the Commissioner to the Association once the member insurer is subject to a delinquency proceeding under this Code (insert citation to the liquidation section) subject to any terms and conditions established by the Commissioner.

Should the Commissioner determine that a delinquency proceeding is likely, he or she may cooperate with the Association and with any organization of one or more state Associations of similar purposes to provide for an orderly transition to liquidation in order to minimize any delay in the handling and payment of claims.

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**MODEL LAW ON EXAMINATIONS**

## NCIGF Recommended Changes to Section in 5F

### Section 5. Examination Reports

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 F. Privilege for, and Confidentiality of Ancillary Information

1. (a) Except as provided in Subsection E above and in this subsection, documents, materials or other information, including, but not limited to, all working papers, and copies thereof, created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this Act, or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as part of the commissioner’s official duties.
	1. Documents, materials or other information, including, but not limited to, all working papers, and copies thereof, in the possession or control of the National Association of Insurance Commissioners and its affiliates and subsidiaries shall be confidential by law and privileged, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action if they are:
		1. Created, produced or obtained by or disclosed to the National Association of

Insurance Commissioners and its affiliates and subsidiaries in the course of the National Association of Insurance Commissioners and its affiliates and subsidiaries assisting an examination made under this Act, or assisting a commissioner in the analysis of the financial condition or market conduct of a company; or

* + 1. Disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries under Paragraph (3) of this subsection by a commissioner.
	1. For the purposes of Paragraph (1)(b), “Act” includes the law of another state or jurisdiction that is substantially similar to this Act.
1. Neither the commissioner nor any person who received the documents, material or other information while acting under the authority of the commissioner, including the National Association of Insurance Commissioners and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials or information subject to Paragraph (1).
2. In order to assist in the performance of the commissioner’s duties, the commissioner:
	1. May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Paragraph (1), with other state,

federal and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication or other information;

* 1. May receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; ~~and~~

* 1. May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Paragraph (1), with the [name of state property casualty guaranty association] regarding any member insurer defined in [section in guaranty association act defining member insurer] if the commissioner determines that the member insurer may be subject to a future delinquency proceeding under [provisions related to delinquency proceeding] of this Code. The commissioner may disclose the information described in this subsection so long as the parties agree in writing to hold that information confidential, in a manner consistent with this Code, and use that information to prepare for a future delinquency proceeding of a member insurer. Access to the information disclosed by the commissioner to the [state guaranty fund] shall be limited to the [state guaranty fund’s] staff and its counsel. The Board of Directors of the [state guaranty fund] may have access to the information disclosed by the Commissioner to the [state guaranty fund] once the member insurer is subject to a delinquency proceeding under [provisions relating to delinquency proceeding] of this Code subject to any terms and conditions established by the commissioner.

The commissioner may also, pursuant to this subsection (3)(c), disclose the information described in this subsection with Associations in other states, and with any organization of one or more state Associations of similar purposes, so long as the recipient of such information agrees in writing to hold that information confidential, in a manner consistent with this Code, and uses that information to prepare for a possible delinquency proceeding of the member insurer. Access to the information disclosed by the commissioner under this subsection shall be limited to the Association’s staff and its counsel. The Board of Directors of the Association may have access to the information disclosed by the commissioner to the Association once the member insurer is subject to a delinquency proceeding under this Code (insert citation to the liquidation section) subject to any terms and conditions established by the commissioner.

Should the commissioner determine that a delinquency proceeding is likely, he or she may cooperate with the Association and with any organization of one or more state Associations of similar purposes to provide for an orderly transition to liquidation in order to minimize any delay in the handling and payment of claims.

* 1. ~~[~~Optional provision] And m~~M~~ay enter into agreements governing sharing and use of information consistent with this subsection.

 PC-390-5

1. The NAIC Troubled Company Handbook suggests that such coordination begin when a company’s RBC levels are --- or below. (Cite) [↑](#footnote-ref-2)