NAIC NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Date: 5/31/22

Virtual Meeting

RECEIVERSHIP AND INSOLVENCY (E) TASK FORCE
June 2, 2022
4:00 – 5:00 p.m. ET / 3:00 – 4:00 p.m. CT / 2:00 – 3:00 p.m. MT / 1:00 – 2:00 p.m. PT

ROLL CALL

James J. Donelon, Chair	Louisiana	Gary D. Anderson	Massachusetts
Cassie Brown, Vice Chair	Texas	Chlora Lindley-Myers	Missouri
Jim L. Ridling	Alabama	Troy Downing	Montana
Lori K. Wing-Heier	Alaska	Edward M. Deleon Guerrero	N. Mariana Islands
Peni Itula Sapini Teo	American Samoa	Eric Dunning	Nebraska
Michael Conway	Colorado	Marlene Caride	New Jersey
Andrew N. Mais	Connecticut	Mike Causey	North Carolina
Trinidad Navarro	Delaware	Judith L. French	Ohio
David Altmaier	Florida	Glen Mulready	Oklahoma
Colin M. Hayashida	Hawaii	Michael Humphreys	Pennsylvania
Dana Popish Severinghaus	Illinois	Alexander S. Adams Vega	Puerto Rico
Doug Ommen	Iowa	Elizabeth Kelleher Dwyer	Rhode Island
Vicki Schmidt	Kansas	Michael Wise	South Carolina
Sharon P. Clark	Kentucky	Carter Lawrence	Tennessee
Timothy N. Schott	Maine	Jon Pike	Utah
		Mike Kreidler	Washington

NAIC Support Staff: Jane Koenigsman

AGENDA

1. Consider Adoption of its 2022 Spring National Meeting Minutes —*Commissioner James J. Donelon (LA)* — Attachment One

2. Discuss Comments on Exposure Draft for Request for NAIC Model Law Development—*Commissioner James J. Donelon (LA)* — Attachment Two-Exposure, Attachment Three-Comments

3. Consider Next Step including Consideration of Adoption of the Request for NAIC Model Law Development —*Commissioner James J. Donelon (LA)*

4. Discuss Any Other Matters Brought Before the Task Force — *Commissioner James J. Donelon (LA)*

5. Adjournment

Draft Pending Adoption

Draft: 4/12/22

Receivership and Insolvency (E) Task Force
Kansas City, MO
April 6, 2022

The Receivership and Insolvency (E) Task Force met in Kansas City, MO, April 6, 2022. The following Task Force members participated: Cassie Brown, Vice Chair, represented by Brian Riewe (TX); Lori K. Wing-Heier represented by David Phifer (AK); Michael Conway represented by Rolf Kaumann (CO); Andrew N. Mais represented by Jared Kosky (CT); David Altmaier represented by Anoush Brangaccio (FL); Colin M. Hayashida represented by Patrick P. Lo (HI); Doug Ommen represented by Kim Cross (IA); Dana Popish Severinghaus represented by Kevin Baldwin (IL); Vicki Schmidt represented by Justin McFarland (KS); Gary D. Anderson represented by Christopher Joyce (MA); Timothy N. Schott represented by Robert Wake (ME); Chlora Lindley-Myers represented by Shelley Forrest (MO); Mike Causey represented by Jackie Obusek (NC); Eric Dunning represented by Lindsay Crawford (NE); Michael Humphreys represented by Laura Lyon Slaymaker and Crystal McDonald (PA); Elizabeth Kelleher Dwyer represented by Matt Gendron and Patrick Smock (RI); Carter Lawrence represented by Trey Hancock (TN); Jon Pike represented by Reed Stringham (UT); and Mike Kreidler represented by Charles Malone (WA).

1. Adopted its 2021 Fall National Meeting Minutes

Ms. Cross made a motion, seconded by Mr. Stringham, to adopt the Task Force's 2021 Fall National Meeting minutes (*see NAIC Proceedings – Fall 2021, Receivership and Insolvency (E) Task Force*) minutes. The motion passed unanimously.

2. Received the Report of the Receiver's Handbook (E) Subgroup

Mr. Baldwin said the Receiver's Handbook (E) Subgroup has not met in 2022. However, it has established drafting groups that have met in 2022 to draft revisions to Chapter 3, Chapter 4, and Chapter 5 of the *Receiver's Handbook for Insurance Company Insolvencies* (Receiver's Handbook). The Subgroup plans to schedule a meeting to expose those revisions for public comment.

3. Received a Referral from the Restructuring Mechanisms (E) Working Group and Exposed a Request for NAIC Model Law Development

Mr. Riewe said the Restructuring Mechanisms (E) Working Group sent a referral to the Task Force (Attachment One). The Working Group was charged to look at state laws regarding insurance business transfers (IBTs) and corporate divisions (CDs). The Working Group is in the process of developing a white paper on the topics. One area it identified where model laws may need to be amended was regarding how policyholders retain guaranty fund coverage after such transactions. The referral outlines the positions of both the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) and the National Conference of Insurance Guaranty Funds (NCIGF). Mr. Riewe said for property/casualty (P/C), the referral states that needed revisions have been identified for the *Property and Casualty Insurance Guaranty Association Model Ac*t (#540). The NCIGF suggested that possible technical gaps may exist in states that have adopted Model #540 within the definitions of "covered claim," "member insurer," "insolvent insurer," and "assumed claims transaction." The referral includes a draft Request for NAIC Model Law Development to amend Model #540. The Working Group has not received any opposition to addressing the coverage gap in Model #540.

Mr. Riewe said the Task Force will consider advancing the Request for NAIC Model Law Development to the Financial Condition (E) Committee. While there are suggested model law edits within the request, the language is

not final. There will be opportunity to draft the language after the request has been approved by Executive (EX) Committee.

Mr. Riewe said that upon the Executive (EX) Committee's approval, he recommends delegating the Receivership Law (E) Working Group to finalize the edits to Model #540.

Barbara Cox (Barbara Cox LLC, representing NCIGF) said NCIGF supports the Request for NAIC Model Law Development to amend Model #540.

Mr. Gendron, Mr. Baldwin, and Mr. Wake stated they support the Task Force's consideration of this Request for NAIC Model Law Development. Mr. Wake said the Task Force should also consider a review of the *Life and Health Insurance Guaranty Association Model Act* (#520) to determine if any amendments are necessary to preserve guaranty association coverage in assumption novation. Mr. Riewe said he agrees with Mr. Wake's comments.

Hearing no objection, Mr. Riewe said the Request for NAIC Model Law Development will be exposed for 30-day public comment period ending May 6.

4. Heard a Presentation from the NCIGF

Roger Schmelzer (NCIGF) delivered a presentation of the NCIGF on the topic of pre-receivership coordination and information sharing (Attachment Two). He said the number of insolvencies has declined over the past 20 years. He said the NCIGF is not bringing complaints. The short runway is an outdated business model for the protection of insurers. Companies that fail are more complex, including multi-state, multi-line carriers; a high volume of electronic claims files; claims operations that are delegated to third-party administrators (TPAs)/multiple information technology (IT) systems; and today there are fewer people with specialized insolvency data management expertise due to fewer insolvencies. He said the NCIGF's need is consistent and timely transfer of usable claims data to guaranty funds and receivers at the time of insolvency. This is only going to happen if there is enhanced pre-liquidation coordination between receivers, state insurance regulators, and guaranty funds. Mr. Schmelzer said the NCIGF has invested in IT solutions and that currently guaranty funds handle roughly 90% of claims data extraction activities in insolvencies.

Mr. Schmelzer said the public policy solution is the confidential exchange of fundamental information between state insurance regulators, receivers, and guaranty funds well before the liquidation order is signed. There are four advantages. First, there may be insights gained from the data exchange that might affect the regulatory decision on timing as ideally the liquidation order would not be signed until all parties agreed the data is ready to be transferred. Second, guaranty fund operations may need time to scale operations to handle the scope of the liquidation. Third, the receivers will have usable data sooner. Fourth, it would reduce the cost of insolvency management.

Mr. Schmelzer said the confidential information that would be shared is triggered when state insurance regulators see an insurer is headed to insolvency. The type of information would be policy information, claims records, and information about TPA relationships. This information is important as it relates to cyber liability coverage and services that need to be offered.

Mr. Schmelzer said there has been progress made with the recent amendments to model laws and revisions to the *Financial Condition Examiners Handbook*. There is also ongoing work on the Receiver's Handbook and the recent discussion on the Restructuring Mechanisms (E) Working Group referral.

Ms. Cox said to share information at an earlier time may require states implement statutory changes. She said a proposal in Illinois calls for changes to Model #540, the *Insurance Holding Company System Regulatory Act* (#440), and the *Model Law on Examinations (#390)*. She said another approach is a memorandum of understanding (MoU). She said California is exploring this option with its guaranty fund and has put the MoU on hold pending the Task Force's consideration of this proposal. Both drafts are included in Attachment Two. She said everyone is concerned by confidentiality. She said the guaranty fund system is populated by industry personnel. They serve on the NCIGF board of directors, state guaranty association board members, and committees. She said to protect confidentiality, the information would not be shared with the NCIGF or state board members. She said the NCIGF has a plan to work through that.

Patrick Hughes (Faegre Drinker Biddle & Reath) said that is one idea to face these challenges. He said updates to NAIC handbooks is another way to document and potentially join various legal authorities and the coordination with receivers, state insurance regulators, and guaranty funds. Updating various handbooks may be able to be advanced more easily. He said NCIGF is trying to reach practical solutions and have sought feedback from state insurance regulators to develop this proposal. He said every state may not be the same and may have different legal structures and preferences as to which options works.

Mr. Schmelzer said he recognizes that other foreign jurisdictions may not believe the U.S. resolution system is as coordinated as it should be. Guaranty funds and state insurance regulators have worked to disprove that belief, and this is another important step. He said under the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the federal government has an opportunity if state insurance departments do not respond quickly enough. The guaranty funds need to be as robust as possible.

Hearing no objection, Mr. Riewe said the Receivership Law (E) Working Group will be referred to consider options to address the issues raised by the NCIGF, including review of the MoU and draft statutory language. Mr. Baldwin and Ms. Slaymaker, Receivership Law (E) Working Group co-chairs, agreed.

5. Heard an Update on Federal Activities

Patrick Celestine (NAIC) said the NAIC's proposed State Insurance Receivership Priority (SIRP) Act establishes a clear claim filing deadline in the Federal Priority Act (FPA) for the U.S. Department of Justice (DOJ) to file claims of the U.S. to insolvent insurance company estates and to ensure state insurance regulators are not held personally liable if claims of the government are not paid first. Several members of the Task Force and NAIC staff are working with U.S. Rep. Madeleine Dean's (D-PA) office and the DOJ to finalize edits to the SIRP Act. It is expected to be introduced to the U.S. House of Representatives this year.

6. Heard an Update on International Activities

Mr. Wake said he worked with NAIC staff, the NOLHGA, and the NCIGF to complete a survey of the International Association of Insurance Supervisors (IAIS) to gather information to inform the development of an application paper on policyholder protection schemes. Mr. Wake said the U.S. recently completed its in-person meetings for the IAIS-targeted jurisdictional assessment regarding the holistic framework, which included an assessment of insurance receivership, and recovery and resolution planning.

Having no further business, the Receivership and Insolvency (E) Task Force adjourned.

REQUEST FOR NAIC MODEL LAW DEVELOPMENT

This form is intended to gather information to support the development of a new model law or amendment to an existing model law. Prior to development of a new or amended model law, approval of the respective Parent Committee and the NAIC's Executive Committee is required. The NAIC's Executive Committee will consider whether the request fits the criteria for model law development. Please complete all questions and provide as much detail as necessary to help in this determination.

Please check whether this is: ☐ **New Model Law** **or** ☒ **Amendment to Existing Model**

1. **Name of group to be responsible for drafting the model:**

   Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force to complete the drafting. Referred by the Restructuring Mechanisms (E) Working Group.

2. **NAIC staff support contact information:**

   Jane Koenigsman
   jkoenigsman@naic.org
   816-783-8145

   Dan Daveline
   ddaveline@naic.org
   816-783-8134

3. **Please provide a brief description of the proposed new model or the amendment(s) to the existing model. If you are proposing a new model, please also provide a proposed title. If an existing model law, please provide the title, attach a current version to this form and reference the section(s) proposed to be amended.**

   - ***Property and Casualty Insurance Guaranty Association Model Act (#540)***

   In 2019, the Financial Condition (E) Committee formed the Restructuring Mechanisms (E) Working Group who was charged with the following:

   1. Evaluate and prepare a white paper that:
      a. Addresses the perceived need for restructuring statutes and the issues those statutes are designed to remedy. Also, consider alternatives that insurers are currently employing to achieve similar results.
      b. Summarizes the existing state restructuring statutes.
      c. Addresses the legal issues posed by an order of a court (or approval by an insurance department) in one state affecting the policyholders of other states.
      d. Considers the impact that a restructuring might have on guaranty associations and policyholders that had guaranty fund protection prior to the restructuring.
      e. Identifies and addresses the legal issues associated with restructuring using a protected cell.

   Background for Proposed Change
   This proposed change is being precipitated by discussions within the NAICs Restructuring Mechanisms (E) Working Group initiative, which is focused on documenting in the form of a White Paper, the various issues related to insurance business transfers (IBT) and corporate division (CD) transactions. The number of states adopting laws that permit either of these transactions is still relatively low, however one of the most significant issues that has been discussed during the meetings of the Working Group is the need for policyholders of such transactions to retain guaranty fund coverage. Representatives of the National Conference of Insurance Guaranty Funds (NCIGF) have suggested that an amendment to a state's guaranty fund act, or other related law is necessary to address this issue. They have specifically suggested that the NAIC update the Property and Casualty Insurance Guaranty Association Model Act to incorporate specific language they have developed to address this issue. This will better enable those states that have incorporated #540 into their laws to update their laws for this important issue. This change is needed to ensure policyholders in all states retain their coverage, which is necessary regardless of how few states adopt changes to their laws to allow IBT and CD transactions.

Scope of the Proposed Revisions to Model 540

The scope of the request is limited to addressing the issue of guaranty fund coverage and as a result would be limited to specific suggestion of additional language within the definition of "Covered Claim" within #540. The following is the additional language (underlined language) that is being proposed to be added to Section 5, Definitions, within #540.

H. "Covered claim" means the following:

(a) The claimant or insured is a resident of this State at the time of the insured event, provided that for entities other than an individual, the residence of a claimant, insured or policyholder is the State in which its principal place of business is located at the time of the insured event; or

(b) The claim is a first party claim for damage to property with a permanent location in this State.

(c) Notwithstanding any other provision in this Act, an insurance policy issued by a member insurer and later allocated, transferred, assumed by or otherwise made the sole responsibility of another insurer, pursuant to a state statute providing for the division of an insurance company or the statutory assumption or transfer of designated policies and under which there is no remaining obligation to the transferring entity (commonly known as "Division" or "Insurance Business Transfer" statutes), shall be considered to have been issued by a member insurer which is an Insolvent Insurer for the purposes of this Act in the event that the insurer to which the policy has been allocated, transferred, assumed or otherwise made the sole responsibility of is placed in liquidation.

(d) An insurance policy that was issued by a non-member insurer and later allocated, transferred, assumed by or otherwise made the sole responsibility of a member insurer under a state statute described in subsection (a) shall not be considered to have been issued by a member insurer for the purposes of this Act.

4. Does the model law meet the Model Law Criteria? ☒ **Yes** **or** ☐ **No** **(Check one)**

(If answering no to any of these questions, please reevaluate charge and proceed accordingly to address issues).

a. Does the subject of the model law necessitate a national standard and require uniformity amongst all states? ☒ **Yes** **or** ☐ **No** **(Check one)**

If yes, please explain why:

This proposed change is needed to ensure policyholders in all states retain their guaranty fund coverage, which is necessary regardless of how few states adopted changes to their laws to allow IBT and CD transactions.

It should be noted that with respect to guaranty fund coverage for life and health insurance, the National Organization of Life and Health Insurance Guaranty Associations are suggesting a different approach in addressing the same issue which centers around the need for such transaction to require the assuming or resulting insurer to be licensed in all states where the issuing insurer was licensed or ever was licensed to retain the needed coverage for policyholders.

b. Does Committee believe NAIC members should devote significant regulator and Association resources to educate, communicate and support this model law?

☒ **Yes** **or** ☐ **No** **(Check one)**

5. What is the likelihood that your Committee will be able to draft and adopt the model law within one year from the date of Executive Committee approval?

☒ **1** ☐ **2** ☐ **3** ☐ **4** ☐ **5** **(Check one)**

High Likelihood **Low Likelihood**

Explanation, if necessary:

6. What is the likelihood that a minimum two-thirds majority of NAIC members would ultimately vote to adopt the proposed model law?

☒ **1** ☐ **2** ☐ **3** ☐ **4** ☐ **5** **(Check one)**

High Likelihood **Low Likelihood**

Explanation, if necessary: See previous discussion.

7. What is the likelihood that state legislatures will adopt the model law in a uniform manner within three years of adoption by the NAIC?

☒ **1** ☐ **2** ☐ **3** ☐ **4** ☐ **5** **(Check one)**

High Likelihood **Low Likelihood**

Explanation, if necessary:

At this juncture, the changes in concepts being considered are simple and because they have the potential to reduce expenses incurred by receivership estates, we believe such changes will be widely supported by all parties.

8. Is this model law referenced in the NAIC Accreditation Standards? If so, does the standard require the model law to be adopted in a substantially similar manner?

Not referenced in Accreditation Standards.

9. Is this model law in response to or impacted by federal laws or regulations? If yes, please explain.

No.

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

ATTACHMENT TWO

MEMORANDUM

TO: Receivership and Insolvency (E) Task Force

FROM: Restructuring Mechanisms (E) Working Group

DATE: March 28, 2022

RE: Referral Regarding Potential Change to NAIC Model

The NAIC formed the Restructuring Mechanisms (E) Working Group because of recent changes to state laws in the areas of Insurance Business Transfer (IBT) and Corporate Divisions (CD). The Working Group is in the process of drafting a white paper that, among other things, documents the issues the statutes are designed to address and some of the legal issues. Specific to that point, during public discussions, the Working Group received input from both the National Conference of Insurance Guaranty Funds (NCIGF) and the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) on how policyholders can retain guaranty fund coverage after such a transaction. The following summarizes such input, which is further explained at the end of this memorandum.

NCIGF – The NCIGF's position is that where there was guaranty fund coverage before the IBT or CD, state insurance regulators should ensure that there is coverage after the IBT or CD. An IBT or CD should not reduce, eliminate, or in any way affect guaranty fund coverage. A CD or IBT should not create, expand, or in any way affect coverage. The NCIGF suggested that possible technical gaps may exist in states that have adopted the *Property and Casualty Insurance Guaranty Association Model Act* (#540) and proposed specific changes to the model to address.

NOLHGA – Described the three conditions that are needed for guaranty fund coverage after an IBT or CD. In general, restructuring statutes (or state insurance regulators reviewing proposed restructuring transactions) should clearly provide that assuming or resulting insurers must be licensed so policyholders maintain eligibility for guaranty association coverage from the same guaranty association that would have provided coverage immediately prior to a restructuring transaction. This means the resulting insurer must be licensed in all states where the transferring insurer was licensed or had ever been licensed with respect to the policies being transferred.

To that end, attached is a Request for NAIC Model Law Development form, which sets forth proposed changes to Model #540, as suggested by the NCIGF. The Working Group is not the technical expert in this area, but it does support the intent of retaining guaranty fund coverage; therefore, the Working Group asks the Receivership and Insolvency (E) Task Force to review the attached and determine where such changes could generally be supported. We are not trying to determine if this is the exact change to make to the model at this time, but rather whether the Task Force supports the project and would be willing to complete an update to the language if approved by the Financial Condition (E) Committee

and the Executive (EX) Committee. To the extent possible, perhaps the Task Force could expose the attached Request for NAIC Model Law Development form, debate it, and return it to the Working Group prior to the Summer National Meeting, where the request could be made to the Financial Condition (E) Committee.

Please let the Working Group know if you have any questions.

The following is a more comprehensive summary of the positions of the NGIGF and the NOLHGA:

> The Working Group received input from the NOLHGA about the concerns for insurance consumers of personal lines life and health insurance business. The NOLHGA indicated that for there to be guaranty association coverage in the event of a life or health insurer insolvency, there are three conditions that must be present. Those conditions are:
>
> 1. The consumer seeking protection must be an eligible person under the guaranty association statute; typically, this is achieved by being a resident of the guaranty association's state at the time of the insurer's liquidation.
>
> 2. The product must be a covered policy.
>
> 3. The failed insurer for which protection is being sought must be a member insurer of the guaranty association of the state where the policyholder resides. To be a member insurer, the insurer must be licensed in that state or have been licensed in the state to write the lines of business covered by the guaranty association.

In most states, coverage can also be provided for an "orphan" policyholder of the insurer by the guaranty association in the insolvent insurer's domestic state. Orphan policyholders are policyholders who are residents of states where the guaranty association cannot provide coverage because the insolvent insurer is not a member insurer due to not being licensed at the time required by the *Life and Health Insurance Guaranty Association Model Act* (#520). The orphan policyholder situation can arise when a policyholder purchases a policy in a state where the issuing company is licensed—i.e., is a member of the guaranty association—but subsequently moves to a state where the issuing insurance company was never licensed; i.e., is not a member of the guaranty association. The provision in Model #520, and the laws of most states, that provides that orphan policies are covered by the guaranty association in the insolvent insurer's domestic state is designed to plug the gap in these rare situations.

A key factor when considering a life or health IBT or CD transaction is whether the resulting insurer is or will be a member insurer in each state. If the resulting insurer is a member insurer of the same guaranty associations as the transferring insurer, guaranty association coverage will be preserved and not changed for all policyholders. Of course, specific guaranty association coverage will be determined if/when the resulting insurer is placed under an order of liquidation with a finding of insolvency. If the resulting insurer is not a member insurer of the same guaranty associations as the transferring insurer, policyholders may lose guaranty association coverage or be covered as orphans by the guaranty association in the insurer's domestic state. Orphan coverage was not designed to plug the gap in this situation. Shifting the coverage

obligation to the domestic state guaranty association could result in guaranty association coverage being concentrated in that state.

To address these concerns with respect to IBT and CD transactions involving life or health insurance, restructuring statutes (or state insurance regulators reviewing proposed restructuring transactions) should clearly provide that assuming or resulting insurers must be licensed so policyholders maintain eligibility for guaranty association coverage from the same guaranty association that would have provided coverage immediately prior to a restructuring transaction. This means the resulting insurer must be licensed in all states where the transferring insurer was licensed or had ever been licensed with respect to the policies being transferred.

One interpretation of Model #540 is that based on the definitions of "Covered Claim," "Member Insurer," "Insolvent Insurer," and "Assumed Claim Transaction," an orphan policyholder could not be covered by the state guarantee association. Consequently, there is a concern that no guaranty association coverage would be provided if policies are transferred to a nonmember insurer. Many property/casualty (P/C) guaranty fund statutes require that the policy be issued by the now-insolvent insurer, and it must have been licensed either at the time of issue or when the insured event occurred. However, these limitations are designed to avoid coverage being provided when the policy at issue did not "contribute" to the association, which would not exist in the case of an assessable policy later transferred to an insurer that was not a member at the time the policy was issued. Moreover, the restrictions exist to prevent claims resulting from a company regulated as surplus lines, or a similar structure, to benefit from the protections afforded licensed business when a licensed company is liquidated.

The NCIGF's position is that where there was guaranty fund coverage before the IBT or CD, state insurance regulators should ensure there is coverage after the IBT or CD. An IBT or CD should not reduce, eliminate, or in any way affect guaranty fund coverage. A CD or IBT should not create, expand, or in any way affect coverage. The NCIGF suggested that possible technical gaps may exist in states that have adopted Model #540. These gaps could include the definitions of "Covered Claim," "Member Insurer," "Insolvent Insurer," and "Assumed Claims Transaction" found in Section 5 of the model.

Fulfilling this intent will likely require that P/C guaranty fund statutes be amended in each of the states where the original insurer was a member of a guaranty association before the transaction becomes final. The NCIGF indicated that it created a subcommittee to address this issue and oversee a coordinated national effort to enact the necessary changes in each state. It should be noted that the same membership and timing issues that are raised by IBTs could also be raised in the case of any other policy novation, including the assumption reinsurance transactions.

The Maine Bureau of Insurance has the following comments on the Request for Model Law Development:

As we commented in Kansas City, the Request as currently worded might be too narrow in scope, for two reasons. One is that the need to clarify Model # 540 isn't limited to insurance business transfers. The real issue here is that any time a covered policy is novated to a new insurer, the new insurer's needs to be deemed to be a guaranty association member by operation of law, relating back to the date the old insurer issued the covered policy. We don't see any new issues arising from IBTs that aren't already relevant to assumption reinsurance, similar regulatory processes such as bulk reinsurance, or novation by contractual agreement.

The other issue is that we should consider whether to look at Model # 520 as well as Model # 540. Under Model # 520, if a foreign insurer becomes insolvent, This State's guaranty association only covers resident policyholders and their beneficiaries *(e.g.,* covered household members) if the insolvent insurer is a Member Insurer. This is a fairly broad protection, because on the life and health side, membership under the Model isn't based on licensure at any specific time – as the term "member insurer" is defined, it "includes an insurer or health maintenance organization whose license or certificate of authority in this State may have been suspended, revoked, not renewed or voluntarily withdrawn." And even if the insurer was never licensed in This State, coverage is still available as long as the failed insurer's domiciliary state has an "Orphan Clause," substantially similar to Subparagraph 3(A)(2)(b) of Model 520. However, as the NOLHGA comment explained *(emphasis added)*, "policyholders [should] maintain eligibility for guaranty association coverage from the **same** guaranty association that would have provided coverage immediately prior to a restructuring transaction," so as to minimize the domiciliary guaranty association's exposure under the Orphan Clause.

What all this means is that if I understand the situation correctly, we don't need to revisit Model 520 if all we care about is whether protection is still available from **some** guaranty association, but if we want to ensure that protection is still available from the guaranty association in the consumer's state of residence in most or all cases, I think 520 does raise the same general issue as 540 – whether we need to add some mechanism to specify that the resulting insurer inherits the membership obligations of the original insurer. Relating back to policy issuance isn't a 520 issue because it doesn't matter when they were licensed or deemed to have been licensed, but the issue of novations in general (as opposed to IBTs/CDs) is still relevant on the life and health side.

NOLHGA has proposed an alternative approach, but it doesn't seem realistic: "the resulting insurer must be licensed in all states where the transferring insurer was licensed or had ever been licensed with respect to the policies being transferred." This gives a veto to every state where the transferring insurer has ever been licensed to issue one or more transferred policies, and legislatures seem unlikely to be willing to do this if they have any inclination to allow transfers at all.

REQUEST FOR NAIC MODEL LAW DEVELOPMENT

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Please check whether this is: ☐ **New Model Law** **or** ☒ **Amendment to Existing Model**

1. **Name of group to be responsible for drafting the model:**

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2. **NAIC staff support contact information:**

   Jane Koenigsman
   jkoenigsman@naic.org
   816-783-8145

   Dan Daveline
   ddaveline@naic.org
   816-783-8134

3. **Please provide a brief description of the proposed new model or the amendment(s) to the existing model. If you are proposing a new model, please also provide a proposed title. If an existing model law, please provide the title, attach a current version to this form and reference the section(s) proposed to be amended.**

   - ***Property and Casualty Insurance Guaranty Association Model Act (#540)***

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   Background for Proposed Change
   This proposed change is being precipitated by discussions within the NAICs Restructuring Mechanisms (E) Working Group initiative, which is focused on documenting in the form of a White Paper, the various issues related to insurance business transfers (IBT) and corporate division (CD) transactions. The number of states adopting laws that permit either of these transactions is still relatively low~~;~~; however, one of the most significant issues that has been discussed during the meetings of the Working Group is the need for policyholders ~~of~~ subject to such transactions to retain guaranty fund coverage. Representatives of the National Conference of Insurance Guaranty Funds (NCIGF) have suggested that an amendment to a state's guaranty fund act, or other related law, is necessary to address this issue. They have specifically suggested that the NAIC update the Property and Casualty Insurance Guaranty Association Model Act, and ~~to incorporate specific language~~ they have developed specific language to address this issue. ~~This~~ An amendment will better enable those states that have incorporated #540 into their laws to update their laws for this important issue, ~~. This change is needed~~ to ensure policyholders in all states retain their coverage. Because guaranty association coverage follows the state of licensure rather than the state of domicile, ~~, which~~ adequately addressing

these concerns is necessary regardless of the type of transfer ~~or~~and regardless of how few states adopt changes to their laws to allow IBT and CD transactions.

Scope of the Proposed Revisions to Model 540

The scope of the request is limited to addressing the issue of continuity of guaranty fund coverage when a policy is transferred from one insurer to another. The request ~~and~~ is ~~as a result~~ therefore ~~would be limited~~ to the specific ~~suggestion of additional language within~~proposal to revise the definition of "Covered Claim" within #540, or other language determined to be appropriate to address the need for continuity of protection. The following is the additional language (underlined language) that ~~is being~~has been proposed to be added to Section 5, Definitions, within #540.

H. "Covered claim" means the following:

(a) The claimant or insured is a resident of this State at the time of the insured event, provided that for entities other than an individual, the residence of a claimant, insured or policyholder is the State in which its principal place of business is located at the time of the insured event; or

(b) The claim is a first party claim for damage to property with a permanent location in this State.

(c) Notwithstanding any other provision in this Act, an insurance policy issued by a member insurer and later allocated, transferred, assumed by or otherwise made the sole responsibility of another insurer, pursuant to a state statute providing for the division of an insurance company or the statutory assumption or transfer of designated policies and under which there is no remaining obligation to the transferring entity (commonly known as "Division" or "Insurance Business Transfer" statutes), shall be considered to have been issued by a member insurer which is an Insolvent Insurer for the purposes of this Act in the event that the insurer to which the policy has been allocated, transferred, assumed or otherwise made the sole responsibility of is placed in liquidation.

(d) An insurance policy that was issued by a non-member insurer and later allocated, transferred, assumed by or otherwise made the sole responsibility of a member insurer under a state statute described in subsection (a) shall not be considered to have been issued by a member insurer for the purposes of this Act.

4. Does the model law meet the Model Law Criteria? ☒ **Yes** **or** ☐ **No** **(Check one)**

(If answering no to any of these questions, please reevaluate charge and proceed accordingly to address issues).

a. Does the subject of the model law necessitate a national standard and require uniformity amongst all states? ☒ **Yes** **or** ☐ **No** **(Check one)**

If yes, please explain why:

This proposed change is needed to ensure policyholders in all states retain their guaranty fund coverage, which is necessary regardless of how few states adopted changes to their laws to allow IBT and CD transactions.

It should be noted that with respect to guaranty fund coverage for life and health insurance, the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) ~~are~~ is suggesting a different approach to address ~~in addressing~~ the same issue in the life and health context. NOLHGA's proposal~~which~~ centers around the need for such transaction to require the assuming or resulting insurer to be licensed in all states where the issuing insurer was licensed or ever was licensed to retain the needed coverage for policyholders.

b. Does Committee believe NAIC members should devote significant regulator and Association resources to educate, communicate and support this model law?

☒ **Yes** **or** ☐ **No** **(Check one)**

5. What is the likelihood that your Committee will be able to draft and adopt the model law within one year from the date of Executive Committee approval?

☒ **1** ☐ **2** ☐ **3** ☐ **4** ☐ **5** **(Check one)**

High Likelihood **Low Likelihood**

Explanation, if necessary:

6. What is the likelihood that a minimum two-thirds majority of NAIC members would ultimately vote to adopt the proposed model law?

☒ **1** ☐ **2** ☐ **3** ☐ **4** ☐ **5** **(Check one)**

High Likelihood **Low Likelihood**

Explanation, if necessary: See previous discussion.

7. What is the likelihood that state legislatures will adopt the model law in a uniform manner within three years of adoption by the NAIC?

☒ **1** ☐ **2** ☐ **3** ☐ **4** ☐ **5** **(Check one)**

High Likelihood **Low Likelihood**

Explanation, if necessary:

At this juncture, the changes in concepts being considered are simple and because they have the potential to reduce expenses incurred by receivership estates, we believe such changes will be widely supported by all parties.

8. Is this model law referenced in the NAIC Accreditation Standards? If so, does the standard require the model law to be adopted in a substantially similar manner?

Not referenced in Accreditation Standards.

9. Is this model law in response to or impacted by federal laws or regulations? If yes, please explain.

No.

I agree that we should review the guaranty association model laws to ensure that policyholders impacted by IBTs or CDs retain guaranty fund coverage, and while I believe it is appropriate for the Receivership Law (E) Working Group to complete the drafting for any changes to the model law, I am wondering about the timing. The Restructuring Mechanisms (E) Working Group is still in the process of revising a White Paper on the various issues related to IBT and CD transactions. Before we start making changes to model laws, we may want to be sure that there is a clear consensus among parties regarding these transactions. As the NAIC continues working through the issues, it is possible that additional changes to the model acts will become necessary.

To the extent that the NAIC moves forward at this time with revising the *Property & Casualty Insurance Guaranty Association Model Act* (#540), we may also want to consider reviewing the *Life and Health Insurance Guaranty Association Model Act* (#520) to see if any changes need to be made.

Best regards,

Shelley L. Forrest
Receivership Counsel
Missouri Department of Commerce and Insurance

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May 27, 2022

Jane M. Koenigsman, FLMI
Sr. Manager II, L&H Financial Analysis
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106

Re: Request for NAIC Model Law Development for the P&C Insurance Guaranty Association Model Act

Dear Ms. Koenigsman:

This letter is submitted with respect to the Receivership and Insolvency Task Force's recent exposure of a "Request for NAIC Model Law Development" ("MLD") relating to the Property & Casualty Insurance Guaranty Association Model Act (the "P&C Model Act"). We understand that the MLD's sole purpose is to propose changes to the P&C Model Act tailored to ensure that P&C guaranty fund coverage is not lost, expanded, or otherwise affected by corporate division ("CD") or insurance business transfer ("IBT") transactions (collectively, "Restructuring Transactions"). Given that the MLD is solely focused on P&C GA coverage, NOLHGA has no position on the MLD but rather will defer to the views of those with expertise in P&C guaranty funds (e.g., the NCIGF and its members).[1]

NOLHGA, however, would like to address comments submitted in response to the MLD that suggested consideration also should be given to amending the Life and Health Insurance Guaranty Association Model Act ("L&H GA Model Act"). In particular, one of the comments suggested that the L&H GA Model Act should be amended to deem successor entities in Restructuring Transactions, irrespective of their licensing status, to be member insurers of the life and health guaranty associations (L&H GA).

For the reasons that will be discussed further below, NOLHGA would reiterate its view that successor entities in Restructuring Transactions involving life and health policies should be licensed in all states where the predecessor entity was ever licensed with respect to the policies being transferred. This not only will ensure that the successor entity's inherited life and health policies will remain eligible for coverage by the L&H GAs in those states, but it also will ensure that the successor entity is subject to regulatory oversight in each of those states for the benefit of each state's insurance consumers. As reflected in the draft Restructuring Mechanisms White Paper[2], requiring licensing of a successor entity where it inherits business could be important to ensuring ongoing regulatory control over the entity and avoiding potential harm to insurance consumers.

[1] As previously noted, NOLHGA also does not have a position on whether states should adopt laws authorizing Restructuring Transactions. That is, NOLHGA neither supports nor opposes such laws but rather is focused on the potential implications of Restructuring Transactions to its member life and health insurance guaranty associations, and the protection its members provide to insurance consumers when their insurance company is placed in liquidation.

[2] The above reference, and similar references to "White Paper" in this letter, refer to the draft Restructuring Mechanisms White Paper, dated March 28, 2022, that was created by the Restructuring Mechanisms (E) Working Group of Financial Condition (E) Committee.

Most Life and Health Products Evidence Long-Term Policyholder Obligations

Virtually all life and annuity products, and many health products, represent long-term obligations by an insurer to provide essential financial security protection to its policyholders.[3] Consumers who buy these products have an expectation that their insurer will provide this protection for decades into the future, or even for a lifetime (or longer, in the case of some annuities). This long-term commitment of life and health insurers is extremely important to policyholders since, as they age and/or experience health problems, they will find it increasingly difficult, if not impossible, to obtain similar coverage on comparable terms.

The nature of life and health products is quite different from most property and casualty products. Property and casualty products typically provide coverage on an annually renewable basis. This permits property and casualty policyholders to go back into the marketplace to seek replacement coverage if they become dissatisfied with their insurer's performance or the terms of their policy, or if their insurance company fails. In addition, property and casualty coverage typically does not become prohibitively expensive or completely unavailable to consumers because of advancing age or developing health conditions. As a result, property and casualty policyholders should have the ability to non-renew their coverage and obtain comparable replacement coverage if they became dissatisfied with the insurer that takes over their policy in a Restructuring Transaction. Importantly, many life and health insurance policyholders would not have that option, for the reasons stated above.

L&H GAs have Long-Term Obligations to Continue Coverage for Policyholders

Given the long-term nature of many life, annuity, and health insurance policy obligations, and the difficulty consumers may experience in replacing this coverage, L&H GAs have explicit statutory obligations to continue coverage for policyholders of insolvent insurers. This statutory duty to continue coverage often results in L&H GAs having obligations that continue for many years into the future. As an example, L&H GAs affected by the Penn Treaty/ANIC insolvencies have obligations for covering long term care policies that are projected to continue for the next 30 years or more.

There are Important Policy Reasons Member Insurers of L&H GAs Should be Licensed

Given the long-term nature of L&H GA Coverage obligations, and concerns about the risks to L&H GAs of backstopping the obligations of insurers that are not subject to regulation, the L&H Model Act has provided from its inception that insurers must be licensed to be members of a state's L&H GA.[4] In effect, the licensing requirement ensures a level, regulatory playing field among insurers that will be eligible to have their products covered by the L&H GA. In this way, the L&H GA Model Act is designed

[3] Certain forms of health insurance, which are renewed on an annual basis, are exceptions to this statement (e.g., most forms of conventional medical insurance issued today). However, other forms of health insurance (e.g., individual long term care insurance and disability income insurance) are guaranteed renewable for the life of the policyholder and therefore do represent long-term obligations to policyholders.

[4] "Member Insurer" was defined in § 5(7) of the 1970 Model to include any person authorized to transact in this state any kind of insurance to which this Act applies under Section 3. **1971-4 NAIC Proc. 157, 162 (Dec. 14, 1970).** "Authorized" was changed to "licensed" in this definition as part of the 1975 revisions. **1976-4 NAIC Proc. 296, 300 (Dec. 9, 1975)**. The commentary notes that this change was intended to ensure that all unauthorized insurers are excluded from the Act. **1976-4 NAIC Proc. 296, 299 (Dec. 9, 1975)**. The 1975 version of the Model also included a comment at the end of section entitled Scope, which included the following language: "Furthermore, it [this Model Act] applies only to direct insurance issued by persons licensed to transact insurance in this state at any time. Coverage issued by insurers which have not submitted to the application of a state's regulatory safeguards is excluded from protection by this act".

to protect L&H GAs (and their member insurers) from being generally responsible for the insurance obligations of entities that are not subject to state licensing and regulatory requirements.

In 1985, the L&H Model Act was amended to provide that the definition of "member insurer" includes insurers whose license or certificate of authority in this State may have been suspended, revoked, not renewed, or voluntarily withdrawn. This language was not intended to create a general exception to the requirement that insurers should be licensed to be members of the L&H GA, but rather was intended to avoid having policyholders become ineligible for GA coverage due to a state regulatory action.[5] In many cases, financially troubled insurers will have their licenses suspended or revoked even before they are placed in receivership. The 1985 revision to the definition of member insurer was intended to avoid policyholders losing eligibility for GA coverage in those kinds of circumstances.

Concerns with Deeming Non-Licensed Successor Entities to be Member Insurers

As noted in the draft Restructuring Mechanisms White Paper, there is a fundamental regulatory interest in ensuring the licensing status of successor entities in Restructuring Transactions. If a successor entity to a Restructuring Transaction operates without a license in a state, it could result in a lack of regulatory knowledge and control regarding the company's ongoing operations in that state, which in turn could make harm to consumers more likely. This harm potentially could encompass all aspects of state insurance regulation.

These potential harms also could expose L&H GAs to increased risks if successor entities in Restructuring Transactions are deemed member insurers of the GAs without being licensed and subject to regulation in the GAs' home states. These risks could increase, based on the structure and the nature of the business that is the subject of the Restructuring Transaction. As an example, if the successor company is a newly formed or limited purpose entity running off risky forms of business (e.g., long term care policies), there could be substantial increased risk to a GA from such an entity not being licensed and regulated in the GA's home state. This is exactly the type of situation that the drafters of the L&H Model Act sought to prevent by generally requiring member insurers to be licensed entities.

There is an additional concern with unlicensed, successor companies being deemed member insurers of the L&H GAs. This concern relates to Section 11.B of the L&H GA Model Act, which empowers the Commissioner to suspend or revoke the license of a member insurer that fails to timely pay its guaranty association assessments. This provision is commonly viewed as a practical and effective way to ensure that member insurers timely pay their L&H GA assessments. In the event successor companies are deemed to be member insurers without being licensed, the power of a commissioner to enforce the payment of assessments by those insurers by revoking their licenses would not be available.

In addition to the above concerns, NOLHGA believes that obtaining amendments to all 51 L&H GA Acts to include unlicensed entities as member insurers may not be a practical or realistic solution. While the Life and Health GA System has been quite successful over the years working with regulators and legislators to update state GA Acts to be consistent with the Model Act, those results have only been

[5] As reflected in the NAIC Proceedings, the industry proponents of the 1985 amendments to the definition of "member insurer" provided the following explanation for those changes: "To emphasize the importance of what should be the clear dependence of coverage under the act on adequate regulation for solvency and competitive equality, the term "member insurer" has been modified and used to link more clearly the sections of the act relating to purpose, coverage, powers and duties, and assessments. Thus, the definition of member insurer has been expanded to include entities whose license may have been suspended or revoked. Insureds should not lose guaranty association coverage because of enforcement actions against an insurer under the laws and regulations designed to assure solvency, proper market conduct and competitive equality that all member insurers must adhere to. Equally, insurers should not be expected to extend coverage to entities that are not required to adhere to the same laws and regulations." **1984-2 NAIC Proc. 440, 462 (June 3, 1984).**

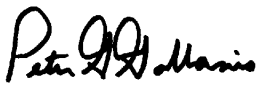
possible because of the widespread support of state regulators and industry members for various Model Act improvements. Given the fundamental change and potential increased risks of deeming unlicensed insurers to be L&H GA members, amendments to achieve that purpose could be considered controversial and difficult to accomplish in many states.

The Draft White Paper's Recommendation for a Possible Solution to Licensing Issues

NOLHGA sees some promise in the draft White Paper's recommendation for a possible solution to addressing licensing issues in Restructuring Transactions. That recommendation, which appears on the last page of the draft White Paper, is to have the appropriate NAIC working group consider whether changes should be made to the licensing process for companies resulting from Restructuring Transactions of runoff blocks. In that regard, the draft White Paper notes, "A streamlined process that still ensures appropriate regulatory oversight (and any licensure necessary to preserve guaranty association coverage) may be appropriate in limited circumstances."

As noted above, the draft White Paper recognizes that the failure of a successor entity to be licensed in relevant states could result not only in the loss of L&H GA coverage, but also in a lack of regulatory knowledge and control regarding the company's ongoing operations, which in turn could result in harm to insurance consumers. This risk to consumers, by itself, would seem to be of sufficient concern to justify the NAIC's consideration of an alternative licensing process for successor entities in Restructuring Transactions.

Very truly yours,



Peter G. Gallanis
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