NAIC NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Date: 7/7/22

Virtual Meeting

RECEIVERSHIP LAW (E) WORKING GROUP
Monday July 18, 2022
2:00 - 2:30 PM Central Time

ROLL CALL

Kevin Baldwin, Co-Chair	Illinois	Robert Wake	Maine
Laura Lyon Slaymaker, Co-Chair	Pennsylvania	Christopher Joyce	Massachusetts
Michael E. Surguine	Arkansas	James Gerber	Michigan
Joe Holloway / Jack Hom	California	Shelly Forrest	Missouri
Rolf Kaumann	Colorado	Justin Schrader	Nebraska
Jared Kosky	Connecticut	Alexander S. Adams Vega	Puerto Rico
Miriam Victorian	Florida	Brian Riewe	Texas
Kim Cross	Iowa	Charles Malone	Washington
Tom Travis	Louisiana		

NAIC Support Staff: Jane Koenigsman

AGENDA

1. Adopt the June 10 and May 12 Meeting Minutes—*Kevin Baldwin (IL) and Laura Slaymaker (PA)* — Attachment A

2. Review Edits and Consider Exposing the Draft Memorandum of Understanding for Public Comment—*Kevin Baldwin (IL) and Laura Slaymaker (PA)* — Attachment B

3. Discuss Any Other Matters Brought Before the Working Group
—*Kevin Baldwin (IL) and Laura Slaymaker (PA)*

4. Adjournment

Draft: 7/7/22

Receivership Law (E) Working Group
Virtual Meeting
June 10, 2022

The Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force met June 10, 2022. The following Working Group members participated: Kevin Baldwin, Co-Chair (IL); Laura Lyon Slaymaker, Co-Chair (PA); Joe Holloway and Jack Ham (CA); Jared Kosky (CT); Kim Cross (IA); Tom Travis (LA); Christopher Joyce (MA); Robert Wake (ME); James Gerber (MI); Shelley Forrest (MO); Justin Schrader (NE); Shawn Martin (TX); and Charles Malone (WA).

1. Discussed a Proposal for Enhancing Pre-Liquidation Coordination and Communication

Mr. Baldwin said the National Conference of Insurance Guaranty Funds (NCIGF) gave presentations on its proposals related to pre-liquidation coordination and information sharing to the Financial Analysis (E) Working Group at the 2021 Fall National Meeting and to the Receivership and Insolvency (E) Task Force at the Spring National Meeting (Attachment X).

Ms. Slaymaker said during the last call, the Working Group talked about the various proposals from the NCIGF related to pre-liquidation coordination and information sharing. On that call the Working Group decided to pursue the Memorandum of Understanding (MoU) option. The MoU would be entered into during the process of planning for a liquidation to provide legal ability to share information in advance of liquidation.

Rowe Snider (Locke Lord LLP) said the draft is very flexible. He said similar agreements have been used sporadically in certain rehabilitations, run-offs to liquidation and other insolvency situations. The intent is to make the process better. This document although drafted as a form could be affected by the legislative backdrop in a particular state where state laws affect the kinds of information that could be passed along under this agreement or that may have other constraints or authorizations that might need to be taken into consideration in the documents.

Mr. Snider explained each paragraph of the draft MoU as follows. Discussion or questions were addressed as shown below.

- Introduction and Parties to the Agreement

Mr. Snider said the first paragraph identifies the parties to the agreement and would be tailored to the specific circumstances. It would include the state department of insurance, the receiver, and the applicable guaranty funds. Mr. Kosky asked if the company would need to be a party to the agreement depending on the timing of the receivership, for example, at rehabilitation, or earlier stages such as conservation or supervision. Mr. Kosky said in Connecticut, supervision proceedings are confidential and would need to understand how this agreement would work with that proceeding. Mr. Snider said the intent is to use the document early in the process after a troubled company is identified so there is a long runway into liquidation; longer than has traditionally been in the past. Mr. Snider said there may be occasions where the company would be a party to the agreement if the regulators desired them to be. He said the obligations, duties, and responsibilities of the trouble company would be defined by the laws of the state that govern the obligation of the company to turn over information to the state insurance regulator. The state insurance regulator would then turn over information to the guaranty funds under the terms of the agreement. From a guaranty fund perspective, the preference would be that the troubled company is not party to the agreement. There are enforcement provisions in the agreement that in some situations, the troubled company could cause problems if they were opposed to the next step in the process, such

as moving from rehabilitation to liquidation. He said companies may need to be informed about the dissemination of information in pre-liquidation but that is separate from this agreement.

- I. Definitions
    - 1.1, 1.2, and 1.3

Mr. Snider said within the Definitions section, paragraphs 1.1, 1.2 and 1.3 define confidential information and evaluation materials. These definitions came from models that NCIGF had and are not unusual definitions. Mr. Holloway asked if "material risk of receivership" should be "material risk of liquidation" since guaranty funds are triggered at liquidation. Mr. Snider said if there is a long glide path to liquidation, he did not feel strongly about the phrase.

Mr. Baldwin said "evaluation materials" may be too vague and suggested the definition be more specific on the types of information, analysis, studies, etc., are needed. Barbara Cox (Barbara Cox LLC, representing NCIGF) said it would be broader than "data," such as odd policy forms or unique lines of business. She said NCIGF can clarify this definition. Mr. Snider said the definition was intended to be broad in case there is material that gets shared so that regulators and receivers have comfort that anything turned over will be confidential. Mr. Baldwin suggested it still have the broad language for that reason but suggested adding a list that is "including but not limited to." Ms. Cox said she would add a list.

Ms. Slaymaker said in paragraph 1.2.b, it includes information that is subject to "privilege." She said she would be concerned about accidentally waiving the privilege by turning over this information. Mr. Snider said if there was a necessity to turn over privileged information, e.g., attorney client privileged information, there would have to be either a written common interest agreement to preserve the privilege or a state statute that allows and maintains the privilege for examination information that is turned over by the receiver. That is an individual situation. This agreement is intended to be flexible. The agreement does not create an obligation on the part of the regulator to turn over privileged information.

    - 1.10

Mr. Snider said in paragraph 1.10 covered claims is defined by reference to the appropriate state statute.

- II. Recitals
    - 2.1, 2.2 and 2.3

Mr. Snider said recitals are articulations of the background. Recitals 2.1 and 2.2 explain the responsibility of the commissioner and regulatory background. "Material risk of receivership" can be changed to "material risk of liquidation." Patrick Cantilo (Cantilo & Bennett LLP) suggested changing "Commissioner will" to "Commissioner may" in 2.2. For 2.3, Mr. Cantilo suggested adding "or if other statutory requirements are met" after "a finding of insolvency" as there may be other statutory triggers for liquidation. Mr. Snider agreed.

    - 2.4

Mr. Snider said 2.4 is the premise of the agreement that preparation for liquidation and transition is essential. It doesn't create any obligations but puts the parties on the same page.

    - 2.5

Mr. Snider said 2.5 articulates the process of sharing appropriate and necessary information. It states what is shared is subject to the commissioner's discretion. It does not create an obligation. The last sentence is a comfort sentence that is an emphatic confidentiality clause. The clause is an express ability for the commissioner, under appropriate circumstances to withhold the name of the company. The guaranty funds have enormous incentive to comply with these agreements, which is the motivation to add this clause.

- 2.6

Mr. Snider said 2.6 articulates that this memorandum is consistent, necessary, and proper with respect to the statutory roles of the guaranty funds, the state insurance regulator, and the receiver.

- III. Use and Treatment of Evaluation Materials
  - 3.1

Mr. Snider said section three is critical to the agreement. He said 3.1 limits and articulates the legitimate purposes for which the guaranty funds can use the evaluation materials including copying them for their own purposes.

- 3.2

Mr. Snider said 3.2 is key to the confidentiality provisions. This language is the sort of confidentiality clause that appears in protective orders and common interest agreements. With respect to "privilege," even though privilege is mentioned here, there is no obligation to share any privilege, which is a protective aspect.

- 3.3

Mr. Snider said 3.3 is a clause that permits the guaranty funds and NCIGF to share evaluation materials with consultants, attorneys, and agents, as necessary. It requires those persons to agree to the terms of the agreement and subjects them to the injunctive remedies. It also creates a joint liability whereby if a guaranty fund or NCIGF turned over information to a consultant, attorney or agent and that agent breaches the agreement, both the turnover party and the breaching party would be liable and subject to an injunction.

Mr. Gendron said the examination statues have language that information is confidential and not subject to subpoena. Does this clause cover subpoenas? Mr. Snider said the privilege that is alluded to in this agreement is not limited to the conventional attorney client privilege that you might see in a common interest agreement or a protective order in the litigation context. That is a statutory privilege. The privilege language in this agreement is intended to preserve that. It's a question for each states' interpretation of how that works. If you interpret that as having authority to provide privileged information to third parties, this says the guaranty fund will work with the state to preserve that privilege. He said there is no intention that sharing information under the agreement waives any of the protections for that information. Guaranty funds do not want to be subpoenaed for information in their custody that they think is protected. Mr. Snider said it may need tailoring to your state or the citation to the state statute may need to be added. Mr. Gendron suggested using the language that is in *Model Law on Examinations* (Model #390) section 1.A.

- 3.4

Mr. Snider said this is a forbidden recipient clause that guaranty funds or NCIGF will not share information with a list of recipients but focuses on boards of directors who might be recipients only as necessary to discharge their official duty.

- 3.5

Mr. Snider said 3.5 is a promise to cooperate. It is common language in other agreements. It obligates the guaranty funds to take reasonable actions to prevent confidentiality.

- IV. Remedies
  - 4.1

Mr. Snider said the intent of this section is to provide injunctive relief and is common language in other agreements.

- 4.2

Mr. Snider said 4.2 is an attorney's fee clause providing for reasonable fees and the source of the fees. There is a clause that forbids guaranty funds or NCIGF from filing a claim in the estate for reimbursement of attorney's fees.

- 4.3

Mr. Snider said 4.3 is a standard non-waiver clause.

- 4.4

Mr. Snider said 4.4 is a disclaimer of liability or assertion of liability by the recipients of the evaluation materials against the commissioner or receiver. This is related to paragraph 5.4.

- V. Warranties and Representations
  - 5.1

Mr. Snider said 5.1 is a mutual good faith, cooperation and communication clause that is standard in these types of agreements.

- 5.2

Mr. snider said 5.2 states that guaranty funds and NCIGF have authority to enter into this agreement.

- 5.3

Mr. Snider said 5.3 is a representation with respect to authorized signatures.

- 5.4

Mr. Snider said 5.4 is an express disclaimer of warranties about the accuracy or completeness of evaluation materials made by the recipients, guaranty funds and NCIGF. This is intended to provide comfort about the disclosures creating any kind of liability with respect to accuracy or completeness.

Mr. Cantilo suggested a new paragraph 5.5 to state that the guaranty funds understand and acknowledge that the evaluation information may include information furnished by consultants, access to which will require additional agreements with such consultants, for example, actuarial agreements. Mr. Snider and Ms. Cox agreed.

- VI. Termination
  - 6.1

Mr. Snider said 6.1 permits termination of the agreement with 30-days' notice. The termination of the agreement, without further agreement, does not eliminate the confidentiality of the evaluation materials. The term receivership can be changed to liquidation.

- 6.2

Mr. Snider said 6.2 articulates what the guaranty funds can do with evaluation materials up to the date of termination. It also addresses that the agreement would terminate without obligation to destroy evaluation material or maintain it as confidential, in the event of a receivership order. The term receivership can be changed to liquidation.

Mr. Baldwin asked if the intent of 6.2 is to mean that the confidentiality is over? He asked that upon liquidation the receiver would enter into confidentiality agreements with the guaranty funds, so why would this confidentiality be terminated? Mr. Snider said yes, as drafted, it would terminate the confidentiality. He said the guaranty funds would prefer to eliminate the pre-planning agreement and replace it with another agreement upon entering liquidation. He said guaranty funds could be flexible on this or this paragraph could be stricken.

- 6.3

Mr. Snider said 6.3 addresses the duty of the guaranty funds to destroy evaluation materials and not retain anything if the agreement is terminated without an order of liquidation and to provide an affidavit attesting to

the destruction. Another option that could be tailored to the situation is to return the materials; however, with digital copies it is easier to destroy than to return.

Ms. Slaymaker said that because the Pennsylvania insurance department's office of corporate and financial regulation is separate from the receivership office, the receivership office would not be able to agree to some of these terms without the other office. Mr. Snider said the parties to the agreement could be tailored, as necessary.

Ms. Cross asked how fees and expenses of the guaranty fund as a result of pre-planning would be handled and if fees would be assessed to the receivership estate. Ms. Cox said she feels these expenses will not be material since most files will be electronic. She said she has not yet fully vetted this topic with guaranty fund and NCIGF is open to discussion about this topic.

- VII. Miscellaneous Provisions
    - 7.1

Mr. Snider said 7.1 states there is no attorney client relationship.

    - 7.2

Mr. Snider said 7.2 is a choice of law provision that suggests the domiciliary state be the law chosen.

    - 7.3

Mr. Snider said 7.3 is a counterparts provision that allows signature pages to be exchanged.

    - 7.4

Mr. Snider said 7.4 allows the agreement to be retroactive for evaluation materials that were shared before the effective date of the agreement.

    - 7.5

Mr. Snider said 7.5 is a notice provision that can be tailored to the specific situation.

    - 7.6

Mr. Snider said 7.6 is a good faith cooperation clause that adds an agreement to meet periodically to discuss the implementation of the agreement.

Jane Koenigsman (NAIC) suggested adding a cover page to address some of the comments. Ms. Cox said NCIGF could draft edits based on the discussion. Mr. Baldwin said NAIC staff would circulate the notes from today's call to those that had comments and to NCIGF to draft edits. He asked for edits to be sent to NAIC staff by July 1.

Bill O'Sullivan (National Organization of Life and Health Insurance Guaranty Associations—NOLHGA) said life guaranty associations have not experienced challenges entering into these kinds of arrangements, when necessary to get access to information, in a variety of situations, even pre-receivership, which is rare. He said typically, the agreements are more complicated. The agreements are typically confidentiality, and joint and common interest agreements. For these reasons NOLHGA does not want to sidetrack this effort by pursuing a similar sort of effort on the life side. Mr. Baldwin suggested the cover memo indicate this MoU is applicable to property and casualty.

Having no further business, the Receivership Law (E) Working Group adjourned.

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Draft: 6/9/22

Receivership Law (E) Working Group
Virtual Meeting
May 12, 2022

The Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force met May 12, 2022. The following Working Group members participated: Kevin Baldwin, Co-Chair (IL); Laura Lyon Slaymaker, Co-Chair (PA); Joe Holloway (CA); Rolf Kaumann (CO); Jared Kosky (CT); Miriam Victorian (FL); Tom Travis (LA); Christopher Joyce (MA); Robert Wake (ME); James Gerber (MI); Shelley Forrest (MO); Brian Riewe (TX); and Darryl Colman (WA).

1. Discussed a Proposal for Enhancing Pre-Liquidation Coordination and Communication

Mr. Baldwin said the National Conference of Insurance Guaranty Funds (NCIGF) gave presentations on its proposals related to pre-liquidation coordination and information sharing to the Financial Analysis (E) Working Group at the 2021 Fall National Meeting and to the Receivership and Insolvency (E) Task Force at the Spring National Meeting (Attachment X).

Ms. Slaymaker summarized the NCIGF's proposals. She said the reasons the NCIGF gave for proposing changes to the pre-receivership coordination process are that companies that fail are more complex and have a high volume of electronic claims files, and multiple information technology (IT) systems and claims operations are delegated to third-party administrators (TPAs). The NCIGF's need is for a more consistent and timely transfer of usable claims data to guaranty funds and receivers at the time of insolvency. The NCIGF's proposed solution is to have a confidential exchange of fundamental information between state insurance regulators, receivers, and guaranty funds well before the liquidation order is signed. The type of information would be policy information, claims records, and information about TPA relationships. The NCIGF proposed that states implement statutory changes that would modify the *Property and Casualty Insurance Guaranty Association Model Act* (#540), the *Insurance Holding Company System Regulatory Act* (#440), and the *Model Law on Examinations* (#390). However, understanding that that may not be a solution for all states and states may not be willing to revise those models, the NCIGF has proposed the revisions as a model guideline. Another proposed alternative approach is a memorandum of understanding (MoU). The NCIGF stated in its presentation to the Task Force that to protect confidentiality, the information would not be shared with the NCIGF or state board members, which includes industry members. The NCIGF said it has a plan to work through that. A final part of the proposal is to make updates to NAIC handbooks, including the *Troubled Insurance Company Handbook*, which is confidential and maintained by the Financial Analysis (E) Working Group; the *Financial Analysis Handbook*; and the *Financial Condition Examiners Handbook*, to include guidance, references, and reminders for early coordination.

Barbara Cox (Barbara Cox LLC, representing NCIGF) said if information flow is not timely, it creates problems for receivers, guaranty funds, and hurts consumers. For example, with health care claims, the guaranty fund cannot authorize surgery for a consumer without policyholder information. Another example with auto insurance is that the guaranty fund cannot authorize payment for repairs for auto damage without policy and claim information, delaying the claimant's ability to get their car out of the shop.

Ms. Cox said the guaranty fund system is studying cybersecurity risk, which has a different time frame from that which guaranty funds are used to. The longer the situation remains without mitigation or repairing data, the longer the situation is on hold. This may be worse for small to medium size companies.

Mr. Travis said without taking a position, the Receivership Law (E) Working Group should look at options to speed up the transfer of data. In Louisiana, several property/casualty (P/C) insurers that went under due to hurricanes have resulted in problems for policyholders with the insurer and the guaranty fund largely due to the difficulties in the transition. Mr. Travis said there have been proposals in the Louisiana legislature to make the guaranty funds liable for penalties and attorney's fees under the bad faith laws, which are currently exempt.

Mr. Gerber said there seems to be a reluctance to use rehabilitation. It would give policyholders time to shop for replacement coverage and the state insurance regulator time to notify loss payees (e.g., mortgage companies and servicers). A short rehabilitation would give the state insurance regulator time to work with the guaranty fund to settle things in advance. Mr. Baldwin said there are a lot of examples of where rehabilitation has been used to achieve these kinds of goals. He asked if the fact that the rehabilitation could be used for consumer protection could be put into a guideline.

Ms. Cox said the NCIGF appreciates a long runway to liquidation and a rehabilitation where guaranty funds can do things in advance. She said a rehabilitation is normally a public proceeding, and if there is a concern that the company may be salvaged, the attention a company would get in a formal rehabilitation proceeding would not help matters. There may be reluctance on the part of the state insurance regulator to put the company into rehabilitation for this purpose. Ms. Slaymaker said in Pennsylvania, the state insurance regulator cannot use rehabilitation if they know there will be a liquidation. The court requires that they try to rehabilitate the company. Mr. Baldwin said those are good points and counterpoints, where rehabilitation may not be an available tool.

Mr. Gerber said seizure and conservation may be available, as they are confidential proceedings. Mr. Baldwin said there may be some merit to what the NCIGF is proposing; i.e., to have a clear statutory permission to share the existence of such confidential proceedings to prepare for a potential liquidation.

Ms. Cox said there may be some reluctance under current law and practice to share and coordinate with guaranty funds. Before a public proceeding, there are efforts being made to save the company. Sometimes states do not have resources to plan for liquidation while they work on saving the company. The recent changes to the IT examination guidelines might be able to ameliorate some of that, but this is still a concern. That is not to say conservation or a confidential proceeding will not work, but the culture around that type of situation needs to change.

Mr. Kaumann said an interim solution is to call a targeted examination to be able to have department staff at the company, identify key people, locate bank accounts and signatories, and identify claims systems and servers so the state can have all of the information ready when the receiver and guaranty fund arrive on day one. He said he believes this is something all states have the authority to do. This could be implemented immediately through best practices to address some of the issues. Ms. Cox said this suggestion aligns with new guidance for IT examinations where data can be reviewed on examination to determine information about data systems (e.g., if it is segregated, easily segregated, convertible to a Uniform Data Standards (UDS) format, as well as information about relationships between parties). She suggested that guaranty funds be involved in this process, as they have experience that may be helpful, or at least the information can be shared with guaranty funds at the earliest juncture. She suggested that the Receivership Law (E) Working Group hear from the IT Examination (E) Working Group about the new examination guidelines.

Mr. Riewe said the targeted examination is a logical approach because it is addressing the issue of gathering the information. He said it is often not because the state is not sharing the information with the guaranty fund; rather, the state insurance regulators cannot get to the information.

Mr. Baldwin said programming that is required to gather the information and distribute it in the format that guaranty funds need takes time.

Mr. Holloway said California uses administrative supervision as the early detection tool to get into a company and evaluate the situation. He said all goals are aligned in that claimants and consumers need to be protected and it must be ensured that there is not an interruption in the payment of claims. Where it is possible for state insurance regulators, receivers, and guaranty funds, they should coordinate their efforts in support of that goal. Mr. Holloway said California would like to work with the Working Group on the MoU. He said he believes there are enough tools available through examination to handle this issue. He does not believe changes are necessary to existing laws.

Mr. Baldwin said every state may be different, where some states may need to change their laws and others might find the MoU necessary. He asked Ms. Cox if either is acceptable. She said yes, and they would also favor handbook changes because statutory changes are hard to do. She said the NCIGF wants the opportunity to be able to share information and coordinate, however that is accomplished.

Ms. Slaymaker asked what the trigger would be to share information. Ms. Cox said it could be tied to a specific risk-based capital (RBC) level. She said in conversations with the IT Examination (E) Working Group, she was told by financial regulators that RBC may be too late. Another option is to trigger if there is "a material possibility of insolvency." Mr. Baldwin said the Illinois Legislature recently addressed this by amending IL law to permit information disclosure to guaranty associations, based on an early RBC trigger, subject to the "Director's discretion."

Mr. Baldwin asked Ms. Cox to describe the type of information to be shared. Ms. Cox said the primary focus has been on data, including claim data, location of data, condition of data, segregated data, ability to make the data transition, volume of claims, states where claims are located, policy information, and any cyber components, to name a few key types of information. She said the NCIGF had a receivership that included cybersecurity polices, which is new to guaranty funds. Other information could be on large deductible coverage, collateral securing the large deductible, how the collateral is secured, what collection processes are in place, and what would need to happen to have a seamless liquidation process.

Bill O'Sullivan (National Organization of Life and Health Insurance Guaranty Associations—NOLHGA) said the experience on the life and health side is different than the P/C side. He said the life and health guaranty funds have generally had good success in getting access to information needed; although, it is not always perfect. NOLHGA has found ways to get around concerns regarding confidentiality and privilege. The guaranty funds typically enter into common interest and confidentiality agreements early in the process (e.g., pre-receivership).

Mr. O'Sullivan said NOLHGA has experienced similar sensitivities to early sharing of information as the NCIGF describes. To the extent that there are solutions that work on the P/C side, the relevance on the life and health side and any parallel treatment on the P/C side should be considered.

Mr. Kosky asked Mr. O'Sullivan if the insurers are a party to the common interest and confidentiality agreements. Mr. O'Sullivan said yes, in certain cases, the insurer would be party to the agreement. Mr. Kosky asked Ms. Cox what the enforceability of the draft MoU would be if, as drafted, the insurer is not a party to the agreement. Ms. Cox said the involvement of the insurer is not something the NCIGF has looked at, but she would like to talk about that further. She said there is some coverage within the draft statutory revisions where the state insurance regulator should have the comfort to share information in these situations, just as they have authority to share information with federal law enforcement and other parties. She said this can be made clearer within the MoU.

Mr. Baldwin said Illinois has had experience with the insurer opposing sharing confidential information with guaranty funds, which is part of why the Illinois legislative changes include the director's discretion, regardless of the insurer's opposition. He asked Ms. Cox to explain who the information is intended to be shared with. Ms. Cox said it would be limited to guaranty fund staff, counsel, and technicians. She said it would not be shared with any other company staff that are on guaranty fund boards and committees. Sharing with guaranty fund boards and committees would be limited until such time as there is a public order of liquidation or rehabilitation, boards have voted on an assessment, etc.

Ms. Slaymaker asked the Receivership Law (E) Working Group for its preference on pursuing drafting a model guideline or an MoU. Working Group members indicated their preference for an MoU. Connecticut, Massachusetts, and Michigan all agreed with pursuing the MoU. Ms. Slaymaker said a virtual meeting would be set up to walk through and consider revisions to the initial draft MoU that the NCIGF proposed. She said regarding best practices, the Receiver's Handbook (E) Subgroup can consider revising the takeover checklists and in other areas of the *Receiver's Handbook for Insurance Company Insolvencies*. Mr. Baldwin said as he is chair of the Subgroup, it will consider revisions. Ms. Slaymaker said any recommended changes to other handbooks previously mentioned are handled by other NAIC groups, so referrals can be sent, as determined necessary, after the Working Group completes the work on the MoU.

Having no further business, the Receivership Law (E) Working Group adjourned.

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BACKGROUND OF THE

MEMORANDUM OF UNDERSTANDING

When a property & casualty insurer is liquidated, our regulatory system mitigates the adverse effects on policyholders and claimants through the state insurance resolution system. This system includes the coordinated management of the liquidation and wind down of the insurance company, in accordance with the state's receivership laws, and the payment of statutorily defined "covered claims" by the state guaranty fund system. In today's technological world, the insurance financial regulators, insurance receivers and the guaranty funds need advance planning for the transition from a troubled insurance company to liquidation.

This model Memorandum of Understanding ("MOU") is flexible and can be tailored the individual state insurance department and the specific troubled property and casualty insurer situation.

The MOU is intended to be used to facilitate transitional planning and preparation, starting when a troubled property and casualty insurer faces a material risk of being liquidated as insolvent[1]. Such a liquidation creates various obligations for the insurance receiver and triggers the guaranty funds' statutory duties to pay "covered claims." One goal of this transitional planning is to ensure that the guaranty funds are prepared and have the appropriate information necessary to assume their statutory duties to protect policy claimants promptly upon liquidation. Another important goal of this early estate planning process is to facilitate the receiver's duties upon liquidation, which include transition of claims to the guaranty funds, marshalling the remaining company assets and resolving claims against the insurer.

This planning process necessarily involves the sharing of confidential information about the troubled company that is protected by statutory confidentiality and privilege provisions. The parties sharing such information intend that it stay confidential and privileged and that no such protection be waived. This MOU is intended to document an agreement to that effect. The parties are the (1) Commissioner, (2) the insurance receiver if appointed (and who may be added later) or a standing insurance receivership office, if applicable, (3) the potentially triggered guaranty funds, and (4) the National Conference of Insurance Guaranty Funds ("NCIGF").[2] If separate from a state's receivership office, the state's insurance financial regulatory office could also be a party to the MOU, as the MOU can be tailored to the specific state.

The MOU provides that all non-public planning information provided to the guaranty funds under it shall be kept confidential, with the protective mechanism to maintain confidentiality spelled out. Specifically, confidential information initially may only to be shared with NCIGF and guaranty fund staff, agents, and counsel and, importantly, *may only be used for purposes of planning for liquidation of the troubled company*. Confidential information will not be shared with industry representatives who sit on or participate in a guaranty fund's Board of Directors until such time as the information is necessary for the Board to discharge statutory duties or consider or take for official action. Confidential information received by the Insurance Commissioner pursuant to its examination authority, which based upon NAIC Model 390 typically is "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," is as shared agreed to retain such privileged status, particularly given the common interest of the parties in the MOU in facilitating the

[1] This model MOU is intended for use with only property and casualty receiverships. Life and health guaranty associations utilize confidentiality, and joint and common interest agreements, to gain access to information in the event of receivership, when necessary.

[2] See https://www.ncigf.org/. In general, the legal relationships between the troubled company and the regulatory authorities will be governed comprehensively by appropriate statutes and regulations in the state insurance code, thus generally there is no need for the troubled company be a party to the MOU. There may be, however, considerations in particular cases where it would be prudent to add the troubled company as a party, particularly if slow or incomplete compliance with disclosure and reporting requirements are an issue. For example, additional enforcement mechanisms could be added and troubled company cooperation with the prospective receiver and the guaranty funds could be spelled out in more detail.

prospective liquidation proceedings and the insurance resolution mechanism. As further protection for the privileged status of such confidential information, the guaranty funds are obligated under the MOU to defend against any attempt to discover any confidential or privileged information shared with them and to notify the other parties to the MOU of discovery or disclosure request.

The proposed MOU is a template that contains the essential terms of a confidential information sharing agreement and can easily be customized to address specific issues that may arise in the course of addressing troubled company concerns and in planning for liquidation.

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is among the [state] Department of Insurance ("DOI"), the [Receiver of the insolvent company – if appointed] and the -[guaranty fund in the state of domicile of the troubled company, the other insurance guaranty funds which have executed this agreement (collectively "Guaranty Funds") and the National Conference of Insurance Guaranty Funds.(NCIGF)

Definitions:

1.1 "Agreement" or "MOU" refers to this Memorandum of Understanding;

1.2 "Confidential Information" refers to any:

a) documents, data or other information relating to any domestic insurance company in the State of [state] where the Commissioner has determined that the financial condition of such company creates a material risk of ~~Receivership~~ Liquidation that are not publicly available or public records, whether written or not, including but not limited to claims files and data; financial analyses, modeling and projections; trade secrets, technical processes and know-how; agency agreements, arrangements, accounts, proposals, lists, and other information; policyholder lists and information; costs and pricing information; internal procedures, strategies and plans; and computer programs;

b) work product or other information regarding any such Company that is confidential and/or privileged; ~~and~~

c) communications between the Parties regarding any potential or pending legal actions involving any such company that is a threat to such companies' solvency; and~~.~~

~~c)~~d)specifically contemplates information received by the Insurance Commissioner pursuant to its examination authority [insert state adoption of NAIC Model Law 390], which is "confidential by law 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."

1.3 "Evaluation Material" refers to all information, oral or written, including but not limited to Confidential Information as defined herein, that is furnished to Guaranty Funds or NCIGF under the terms of this Agreement, and all analyses, compilations, studies, or other materials prepared by Guaranty Funds or NCIGF containing or based in whole or in part upon such information. "Evaluation Material" includes but is not limited to information on the financial condition of the company, information data systems utilized and condition of the data, location of data files, involved third party administrators, UDS test files that may be created, policy forms – especially those for unique or complex lines of business, company organization charts, claims counts and liability amounts by line and by state, and lists of cases in trial, attorney contacts and any other information appropriate to enable the Guaranty Funds to fulfill their statutory duties upon liquidation. This material shall be updated from time to time as appropriate.

1.4 "Company or Companies" refers to any domestic property and casualty insurance company in the State of [state]where the Commissioner has determined the financial condition of such company creates a material risk of ~~receivership~~Liquidation.

1.5 "Commissioner" refers to the Commissioner of Insurance of the State of [state].

1.6 "Party" and "Parties" refer to the Commissioner, the Receiver, if appointed, the signatory Guaranty Funds and the NCIGF.

1.7 "Receivership Court" refers to the [court with jurisdiction over the receivership]

1.8 "Receivership" refers to the rehabilitation or liquidation of any domestic insurance company in the State of [state].

1.9 "Receiver" refers to [name of deputy receiver if appointed]or any of his or her successors.

1.10 "Covered Claim" shall have the same meaning as contained in the applicable statutes of the Guaranty Funds.

II. Recitals

2.1 The Commissioner is responsible for the financial regulation of Companies. From time-to-time the financial condition of one or more of such Companies creates a material risk of ~~Receivership~~Liquidation.

2.2 Should a Receivership occur of a Company, the Commissioner may~~will~~ appoint a special deputy receiver who will be responsible for the handling of such Receivership.

2.3 If the Receivership of a Company includes an order of liquidation with a finding of insolvency or if other statutory requirements are met, the Guaranty Funds will have the responsibility for the payment of "Covered Claims" arising from such Receivership.

2.4 The Parties agree that in order to properly prepare for any Receivership, to provide for a smooth transition to liquidation should it become required, and in order to avoid delay in the payment of "Covered Claims," it is essential to share Confidential Information among them with respect to any Company the Commissioner determines is at material risk of ~~Receivership~~Liquidation.

2.5 It is agreed by the Parties that, subject to the Commissioner's discretion, the Commissioner can freely consult with the Receiver (if appointed), the Guaranty Funds, and NCIGF, with respect to any Company, including but not limited to, the dissemination of Confidential Information and Evaluation Material as defined herein. It is understood that such consultations are to be held in strictest confidence and the Commissioner may, in his or her discretion, withhold the name of the Company being discussed from the Guaranty Funds and the NCIGF.

2.6 The Guaranty Funds have determined that in order to protect consumers and to better fulfill their mission (*see* cite to applicable Guaranty Funds' statutes) it is necessary and proper for them to enter into this Agreement and likewise it is necessary and proper for the NCIGF, as a membership organization that supports the Guaranty Funds in their mission, to enter into this Agreement. The DOI and Receiver have determined that this Agreement enables them to better serve the insurance consumers in [involved states] and to better protect them from the adverse consequences of a Company liquidation.

III. Use and Treatment of Evaluation Material

3.1 Subject to the terms of this Agreement, the Commissioner and Receiver will grant the Guaranty Funds and NCIGF access to Evaluation Material as they determine is appropriate. The Evaluation Material shall be used by the Guaranty Funds and NCIGF to determine potential obligations of the

Guaranty Funds, prepare for the possible assumption of such obligations, and to perform such statutory obligations in the event they become obligated to pay "Covered Claims" under policies of insurance issued by a Company. The Guaranty Funds and NCIGF shall be allowed to copy such Evaluation Material for their own use consistent with the terms of this Agreement.

3.2 The Guaranty Funds and the NCIGF agree to maintain the confidentiality of all Evaluation Material provided to them, and of any privileges with respect to such information. The Guaranty Funds and the NCIGF agree not to disclose any Evaluation Material to any person or entity, except as expressly provided herein.

3.3 The Guaranty Funds and the NCIGF may share Evaluation Material with their respective counsel, consultants or agents as they~~it~~ deem~~s~~ necessary, provided that such persons agree to comply with terms of this Agreement, including but not limited to the remedies provided under Part IV. In the event of a breach of this Agreement by any person to whom Evaluation Material has been provided, the Party or Parties providing such information shall also remain liable for the breach.

3.4 The Guaranty Funds and the NCIGF agree that no Evaluation Material shall be provided to any insurance companies or the owners, directors, officers, employees, agents, representatives, or affiliates of any insurance companies, except as necessary to discharge statutory duties, for official action or consideration by the Board of Directors.

3.5 In the event that the Guaranty Funds or the NCIGF are served with process seeking the production of Evaluation Material, including but not limited to a subpoena or order of a court of competent jurisdiction, an investigation by a government entity, or discovery demand issued in connection with any action, the Guaranty Funds and NCIGF, as appropriate, shall notify the Commissioner and Receiver in writing as promptly as practicable. The Guaranty Funds and NCIGF, as appropriate, shall take reasonable actions to protect the confidentiality and, if applicable, the privileged status of such information, unless otherwise requested by the Commissioner or the Receiver. If a protective order or other remedy is not obtained prior to the date that compliance with the request is legally required, the Guaranty Funds and the NCIGF, as appropriate, will furnish only that portion of the Evaluation Material or take only such action as is legally required.

IV. Remedies

4.1 The Guaranty Funds and the NCIGF agree that money damages would not be a sufficient remedy for a breach of this Agreement, and that the Commissioner or Receiver shall be entitled to equitable relief, including injunctive relief, as a remedy for such breach. Such remedy shall be in addition to all other remedies available at law or in equity, and shall not be deemed the exclusive remedy for a breach of this Agreement. Any action to enforce this Agreement shall be brought in the [appropriate court for the proceeding].

4.2 In the event of an action alleging a breach of this Agreement, the prevailing party shall be entitled to reimbursement for its reasonable attorney's fees. Any attorney's fees awarded to the Guaranty Funds or the NCIGF shall be handled as an administrative expense in the proceeding, subject to [cite to applicable law]. Any attorney's fees awarded to the Commissioner or Receiver shall be paid from the Guaranty funds and NCIGF's funds, and shall not be submitted as a claim in the proceeding.

4.3 No failure or delay by any Party in exercising any right, power or privilege shall operate as a waiver thereof. Any exercise of a right, power or privilege shall not be considered to preclude any other or further exercise thereof.

4.4 There shall be no liability on the part of the Commissioner or Receiver or the Company(ies) to the Guaranty Funds or NCIGF relating to or arising from the Evaluation Material or any other documents, material, information or communications provided under this Agreement.

V. Warranties and Representations

5.1 The Commissioner, the Guaranty Funds, and the NCIGF to the extent consistent with their statutory and other obligations, shall in good faith cooperate and communicate promptly with each other with respect to the performance of their duties under this Agreement.

5.2 The Guaranty Funds and the NCIGF represent that they have the authority to enter into this Agreement and fulfill their obligations under this Agreement.

5.3 Each undersigned person represents that he or she is authorized to sign this Agreement on behalf of the Party he or she represents.

5.4 The Guaranty Funds and the NCIGF understand and acknowledge that the Commissioner or Receiver makes no representations or warranties as to the accuracy or completeness of any Evaluation Material provided under this Agreement.

5.5 The Guaranty Funds and NCIGF understand and acknowledge that the Evaluation Material may include information furnished by consultants, access to which will require additional agreements with such consultants.

VI. Termination

6.1 This Agreement may be terminated at any time by agreement among the Parties or by any single Party in writing with 30 days' notice, provided that all Evaluation Material obtained prior to such termination shall remain confidential, unless otherwise agreed by the Parties, and except as otherwise provided by law. Further, this Agreement shall be terminated upon a determination in writing by the Commissioner or the Receiver that the Company no longer presents a material risk of ~~Receivership~~Liquidation.

6.2 The Guaranty Funds and the NCIGF are permitted to use Evaluation Material in the manner and for purposes described herein until delivery by the Receiver or Commissioner of a written notice specifying the date of termination of this Agreement. Upon a ~~receivership~~ liquidation order wherein one or more Guaranty Funds are triggered this Agreement shall terminate in all respects without the obligation to destroy Evaluation material or maintain it as confidential.

6.3 Except as provided in Paragraph 6.2, in the event of a termination of this Agreement, the Guaranty Funds and NCIGF shall immediately undertake to destroy all Evaluation Materials, and all copies, summaries, analyses and notes of the contents or parts thereof, and shall provide an affidavit attesting to the destruction of all such Evaluation Materials being provided to the Receiver, if appointed, and the Commissioner within 30 days after termination, and no part thereof shall be retained by the Guaranty Funds or NCIGF in any form without the prior written consent of the Commissioner or Receiver.

VII. Miscellaneous Provisions

7.1 Nothing in this Agreement shall be deemed to create an attorney-client relationship between any Party's counsel and any other Party.

7.2 This Agreement shall be governed by and construed in accordance with the laws of the State of [state of domicile of the insolvency].

7.3 This Agreement may be executed in multiple counterparts, each of which shall be deemed an original for all purposes, and all of which together shall constitute one and the same instrument.

7.4 This Agreement shall be effective upon the date signed by each party and shall also apply to any and all Evaluation Material that has previously been shared between the Parties.

7.5 All communications under this Agreement shall be in writing and shall be sent by email to the addresses specified below. A copy of any such notice shall also be personally delivered or sent by either first class registered or certified U.S. Mail, return receipt requested, postage prepaid, or by a bonded mail delivery service, to the address set out below:

The Commissioner:
[name, address, phone, email address]

The Receiver:
[name, address, phone, email address]

Guaranty Funds:

[list of contact information for signatory funds]

7.6 The Parties agree to meet periodically, at least annually, to discuss issues arising under this Agreement and its implementation with respect to any specific Company.

[SIGNATURES OF PARTIES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties have executed this Agreement on this ____ day of _____, 2019:

Commissioner

By: _____
Its: _____
Date: _____

Receiver (if appointed)
By: _____
Its: _____
Date: _____

NCIGF:

By: _____
Its: _____
Date: _____

Guaranty Fund:

Separate signature pages may be appropriate.