RECEIVERSHIP AND INSOLVENCY (E) TASK FORCE

Receivership and Insolvency (E) Task Force Nov. 19, 2020, Minutes
   Receivership and Insolvency (E) Task Force’s Oct. 7 Conference Call Minutes (Attachment One)
   Task Force’s 2021 Proposed Charges with the Proposed Edits (Attachment One-A)
   Combined Comments (Attachment One-B)
Receivership Large Deductible Workers’ Compensation (E) Working Group’s Nov. 5 and Sept. 30 Conference Call Minutes (Attachment Two)
Model Guideline for Administration of Large Deductible Policies in Receivership (Attachment Three)
Large Deductible Revisions of the Receiver’s Handbook for Insurance Company Insolvencies (Attachment Four)
Receivership Law (E) Working Group’s Oct. 29 Conference Call Minutes (Attachment Five)
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Draft Model Guideline for Definition of Reciprocal State in Receivership Laws (Attachment Seven)
Report on Macroprudential Initiative (MPI) Referral (Attachment Eight)

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The Receivership and Insolvency (E) Task Force met Nov. 19, 2020. The following Task Force members participated: Texas, Chair, represented by James Kennedy (TX); Karima M. Woods, Vice Chair, represented by Nathaniel Kevin Brown (DC); Lori K. Wing-Heier represented by David Phifer (AK); Alan McClain represented by Steve Uhrynowycz (AR); Ricardo Lara represented by Kevin Baldwin (IL); Vicki Schmidt represented by Jane Koenigsman (NAIC); Robert Muriel represented by Kevin Baldwin (IL); Vicki Schmidt represented by Jane Koenigsman (NAIC); Michael Conway represented by Rolf Kaumann (CO); Andrew N. Mais represented by Jared Kosky (CT); David Altmaier represented by Toma Wilkerson (FL); Doug Ommen and Kim Cross (IA); Robert H. Muriel represented by Kevin Baldwin (IL); Vicki Schmidt represented by Tish Becker (KS); Sharon P. Clark represented by Jeff Gaither (KY); Gary Anderson represented by Christopher Joyce (MA); Eric A. Cioppa represented by Robert Wake (ME); Anita G. Fox represented by James Gerber (MI); Chlora Lindley-Myers represented by Shelley Forrest (MO); Mike Causey represented by Jackie Obusek (NC); Bruce R. Ramge represented by Lindsay Crawford (NE); Marlene Caride represented by Diana Sherman (NJ); Glen Mulready represented by Donna Wilson (OK); Jessica K. Altman represented by Jackes Gendron (RI) and Tanji J. Northrup represented by Jake Garn (UT).

1. **Adopted its Oct. 7 Meeting Minutes**

   Mr. Kennedy said the Task Force met Oct. 7. During this meeting, the Task Force: 1) adopted its Summer National Meeting minutes; 2) adopted 2021 proposed charges for the Task Force and its Working Groups; and, 3) discussed comments received on key provisions of receivership and guaranty fund laws.

   Mr. Baldwin made a motion, seconded by Ms. Wilkerson, to adopt the Task Force’s Oct. 7 minutes (Attachment One). The motion passed unanimously.


   Ms. Wilkerson said the Receivership Financial Analysis (E) Working Group met Nov. 2 in regulator-to-regulator session pursuant to paragraph 3 (specific companies, entities or individuals) of the NAIC Policy on Open Meetings to discuss the status of individual receiverships and related issues. The Working Group also released a public request for feedback and best practices on overcoming challenges related to the impact of the COVID-19 pandemic on the administration of receiverships. She said the purpose is to learn from each other during this time and that any feedback should be sent by Dec. 4 to Jane Koenigsman (NAIC).

   Ms. Wilkerson made a motion, seconded by Mr. Baldwin, to adopt the Working Group’s report. The motion passed unanimously.

3. **Adopted the Report of the Receivership Large Deductible Workers’ Compensation (E) Working Group**

   Ms. Wilson said the Working Group met Nov. 5 and Sept. 30. The Working Group was charged to complete the work that began in 2018 to consider enhancements to states’ receivership laws and practices related to the receivership of insurers with significant books of large deductible workers’ compensation business. The Working Group began work on the Guideline for the Administration of Large Deductible Policies in Receivership in 2019. Substantive comments were received on the original draft, and a drafting group was formed to complete the redrafting. During several meetings, the drafting group developed an alternative to *Insurer Receivership Model Act* (#555) Section 712, Administration of Loss Reimbursement Policies. A dozen states have already adopted variations of the National Conference of Insurance Guaranty Funds (NCIGF) model language. The guideline follows similar principles as the NCIGF model, but the Working Group believes this is an improvement upon prior versions and on Model #555 Section 712. A central topic was the issue of ownership of collateral, which is addressed in the guideline. States that already have a current large deductible provision may choose not to make any changes, or they may choose to update their laws with the guideline language. For that reason, it is proposed as a guideline rather than as a revision to Model #555. It will be especially helpful for states that currently do not have a large deductible receivership provision. As the Working Group reported originally in 2018, having a large deductible provision in law is better than not having any large deductible provision, so once adopted, the Working Group strongly encourage states that do not currently have a receivership provision that addresses large deductible policies to consider the guideline. The Working Group exposed the guideline for a 30-day public comment period ending Oct. 30. No substantive comments were received, and the Working Group adopted the guideline on Nov. 5.
Ms. Wilson said that in developing the guideline, the Working Group also determined that the *Receiver’s Handbook for Insurance Company Insolvencies* (Receiver’s Handbook) should be updated to reference the guideline and its principles. The Working Group exposed the revisions for a 30-day public comment period, and it adopted them on Nov. 5. Due to the Receiver’s Handbook revisions referring to the new guideline, the revisions would be applicable once the NAIC Plenary adopts it.

Ms. Wilson said the adoption of these two work products completes the Working Group charges, and the Working Group will disband. The Working Group has no charges for 2021.

Ms. Wilson made a motion, seconded by Ms. Slaymaker, to adopt the Working Group’s report and disband the Working Group (Attachment Two). The motion passed unanimously.

4. **Adopted the Model Guideline for Administration of Large Deductible Policies in Receivership**

Ms. Slaymaker made a motion, seconded by Mr. Kaumann, to adopt the Guideline for Administration of Large Deductible Policies in Receivership (Attachment Three). The motion passed unanimously.

5. **Adopted Updated Guidance for Large Deductible Policies in the Receiver’s Handbook**

Mr. Baldwin made a motion, seconded by Mr. Uhrynowycz, to adopt the Receiver’s Handbook revisions subject to the NAIC’s adoption of the Guideline for Administration of Large Deductible Policies in Receivership (Attachment Four). The motion passed unanimously.


Mr. Baldwin said the NAIC Executive (EX) Committee approved a Request for NAIC Model Law Development at the Summer National Meeting that allowed the Working Group to begin discussing how to best address the issue of continuation of essential services by affiliates in receivership. The Working Group also considered changes to the *Insurance Holding Company System Regulatory Act* (#440) and the *Insurance Holding Company System Model Regulation with Reporting Forms and Instructions* (#450). The Working Group met Aug. 18 in regulator-to-regulator session pursuant to paragraph 6 (consultations with NAIC staff members related to NAIC technical guidance) of the NAIC Policy Statement on Open Meetings. It also met Oct. 29 and Aug. 25. During these meetings, the Working Group requested and reviewed recommendations from state insurance regulators and interested parties on possible revisions to Model #440 and Model #450, as well as other possible options to address the continuation of essential services issue. The Working Group agreed to draft revisions provided by the National Organization of Life and Health Guaranty Associations (NOLHGA) and the NCIGF to Section 5 of Model #440. These revisions establish that if an affiliate enters into a service agreement with an insurer, and a receiver is appointed for the insurer, the affiliate would be subject to the receivership proceedings and the authority of the receiver. There were also several suggestions to strengthen the language in Model #450 Section 19 regarding affiliated transactions. The Working Group is currently working on a first draft of the revisions that it will consider during a future meeting.

Mr. Baldwin said the Working Group was also charged to develop enhancements to the guidance for receivers regarding qualified financial contracts (QFCs). The revisions to Chapter 4 of the Receiver’s Handbook are an update to the guidance that already existed for QFCs. The revisions were exposed for a 30-day public comment period. Comments were incorporated into the draft, and the Working Group adopted the revisions on Oct. 29. Mr. Baldwin said the Working Group reviewed the guidance for the use of bridge financial institutions but agreed not to make any revisions to the existing Receiver’s Handbook guidance. He said these updates complete this portion of the Working Group’s charges.

Mr. Baldwin made a motion, seconded by Mr. Holloway, to adopt the Working Group’s report (Attachment Five). The motion passed unanimously.

7. **Adopted Updated Guidance for QFCs in the Receiver’s Handbook**

Mr. Kaumann made a motion, seconded by Mr. Phifer, to adopt the Receiver’s Handbook revisions for QFCs (Attachment Six). The motion passed unanimously.

8. **Exposed a Draft Guideline for the Definition of “Reciprocal State” in Receivership Laws**

Mr. Kennedy said that the Task Force discussed the definition of the term “reciprocal state” in state receivership laws on its Oct. 7 call. While some states have updated the reciprocity provisions, most states have laws based on older version of NAIC
Model #555. Some of these laws are not consistent with newer NAIC models. As a result, stays and injunctions in a receivership might not be recognized in other states, which can impact receiverships that effect multiple states. The draft Guideline for the Definition of “Reciprocal State” in Receivership Laws is consistent with NAIC Financial Standards and Accreditation Program for meeting the Part A standard for a receivership law. If a state has a receivership scheme, it would be considered a reciprocal state under this definition. Although it uses the same criteria as the Accreditation Standards, it does not explicitly require a state or jurisdiction to be accredited to be reciprocal. The guideline includes a drafting note that provides an explanation of why this definition can be critical the recognition of receivership stays and injunctions.

Mr. Kennedy said the draft guideline would be exposed for a 42-day public comment period ending Dec. 31 (Attachment Seven).


Mr. Kennedy said an ad hoc group was formed during the Task Force’s Oct. 7 meeting to discuss the Financial Standards and Accreditation Program Part A standards for receivership and guaranty fund laws and explore whether changes should be considered to encourage more states to update their laws. Six regulators and several interested parties volunteered. The group met Nov. 4. NAIC accreditation and legal staff explained the current standard. He said the goal of the Accreditation Program is based on outcomes, not uniformity, so the focus is on achieving the intended goal of a receivership and guaranty fund law. The group discussed the difficulty in making any changes to the standard given the differences across states’ laws. An approach that was discussed was whether to provide additional guidance in the accreditation interlineations, which are interpretive guidance for the accreditation program. Clarifying the interlineations would not change the standard for receivership and guaranty fund laws but would describe the outcome that these laws should produce. This would not require a state to change any laws, but it might encourage states to consider whether their receivership and guaranty fund laws should be updated to meet the intended outcome of laws. Mr. Kennedy said that the group will have further discussions before any recommendations are made.

10. **Adopted a Report to the Financial Stability (EX) Task Force**

Mr. Kennedy said the Task Force drafted a report to the Financial Stability (EX) Task Force that describes the conclusions from the evaluation of receivership and guaranty fund laws and practices in the context of the Macroprudential Initiative (MPI). The report was exposed for a 14-day public comment period ending Nov. 13. One edit from Maine was accepted and included in the draft.

Mr. Baldwin made a motion, seconded by Mr. Wake, to adopt the report (Attachment Eight). The motion passed unanimously.

11. **Heard an International Resolution Update**

Mr. Kennedy said the Resolution Working Group of the International Association of Insurance Supervisors (IAIS) developed a draft *Application Paper on Resolution Powers and Planning*. The IAIS adopted the draft paper at its November Annual Meeting, and it is available on the IAIS website. There will be a public stakeholder session on the draft paper Nov. 30, and the deadline for providing comments is Feb. 5, 2021. Mr. Kennedy said that the Resolution Working Group has proposed an application paper on policyholder protection schemes for its 2021 workplan.

Having no further business, the Receivership and Insolvency (E) Task Force adjourned.
Draft: 11/18/20

Receivership and Insolvency (E) Task Force
Virtual Interim Meeting
October 7, 2020

The Receivership and Insolvency (E) Task Force met virtually Oct. 7, 2020. The following Task Force members participated: Kent Sullivan represented by James Kennedy, Chair (TX); Karima M. Woods, Vice Chair, represented by N. K. Brown (DC); Alan McClain represented by Steve Uhrynowycz (AR); Elizabeth Perri (AS); Ricardo Lara represented by Susan Bernard (CA); Michael Conway represented by Rolf Kaumann (CO); Andrew N. Mais represented by William Arfanis (CT); David Altmaier represented by Toma Wilkerson (FL); Doug Ommen represented by Kim Cross (IA); Vicki Schmidt represented by Tish Becker (KS); Sharon P. Clark represented by Jeff Gaither (KY); Gary Anderson represented by Christopher Joyce (MA); Eric A. Cioppa represented by Robert Wake (ME); Anita G. Fox represented by James Gerber (MI); Chlora Lindley-Meyer and Shelley Forrest (MO); Matthew Rosendale represented by Steve Matthews (MT); Mike Causey represented by Jackie Obusek (NC); Bruce R. Ramee represented by Justin Schrader (NE); Marlene Caride represented by Diana Sherman (NJ); Glen Muleady represented by Donna Wilson (OK); Jessica K. Altman represented by Laura Lyon Slaymaker (PA); Elizabeth Kelleher Dwyer and Matt Gendron (RI); Raymond G. Farmer represented by Gwen Fuller McGriff (SC); Hodgen Mainda represented by Patrick Merkel (TN); and Tanji. J. Northrup represented by Jake Garn (UT).

1. **Adopted its Summer National Meeting Minutes**

Ms. Wilson made a motion, seconded by Ms. Lyon Slaymaker, to adopt the Task Force’s Aug. 7 minutes (see NAIC Proceedings – Summer 2020, Receivership and Insolvency (E) Task Force). The motion passed unanimously.

2. **Adopted its 2021 Proposed Charges**

Mr. Kennedy said one comment was received jointly from the National Organization of Life and Health Guaranty Associations (NOLHGA) and the National Conference of Insurance Guaranty Funds (NCIGF) to insert the phrase “among other solutions” into the Receivership Law (E) Working Group’s revised charge under C.2. Mr. Kaumann made a motion, seconded by Ms. Wilson, to adopt the Task Force’s 2021 Proposed Charges with the proposed edit (Attachment One-A). The motion passed unanimously.

3. **Received Comments on Key Provisions of Receivership and Guaranty Fund Laws**

Mr. Kennedy said comments were received from 15 state insurance regulators and interested parties on each of the key provisions of receivership and guaranty fund laws that states should consider adopting into their laws, particularly with respect to receivership of insurers operating in multiple states (Attachment One-B).

   a. **Critical to a Multi-Jurisdiction Receivership**

   Mr. Kennedy said this project began with a referral from the Financial Stability (EX) Task Force to address an evaluation of receivership and guaranty fund laws and practices in the context of the Macroprudential Initiative (MPI). While a receivership of a multi-jurisdictional insurer would not likely have a material impact on financial stability or the broader financial markets, this project has highlighted areas of our receivership process that may need attention.

   Mr. Kennedy said based on the comments received, eight of the 14 key topics have a majority of responses indicating that it is critical for states to a multi-jurisdictional receivership, including: 1) conflicts of law; 2) stays and injunctions; continuation of coverage; priority of distribution; ancillary conservation of foreign insurers; 6) domiciliary receivers in other states; treatment of large deductible workers’ compensation policies; and 8) 2017 revisions to the Life and Health Insurance Guaranty Association Model Act (#520).

   Mr. Kennedy said states are encouraged to ensure that their states’ law addresses three of the topics, including conflicts of law, continuation of coverage, and priority of distribution. The Task Force will encourage states through help from the NAIC to provide outreach and updates to states’ legislative liaison staff and education on future legal webinars.

   Mr. Kennedy said the Louisiana comment letter involved the broader issue of a state receivership court affecting the policyholders in other states, especially in rehabilitation. The topic before the Task Force is regarding full faith and credit of
stays and injunctions. The Task Force is focused on the effect of whether a stay or injunction entered into a receivership court is honored in another state. This has been the subject of a lot of litigation, and receivers have expressed concern about this issue. Mr. Kennedy recommended that the three related topics be addressed, including stays and injunctions, ancillary conservation of foreign insurers, and domiciliary receivers in other states. He said the Task Force could draft a guideline as an alternative to address how states define reciprocity, as was adopted in Florida and suggested in written comments from Patrick Cantilo (Cantilo & Bennett LLP). Mr. Cantilo and Ms. Wilkerson agreed to help draft a guideline for future consideration by the Task Force.

Mr. Kennedy said the treatment of large deductible workers’ compensation policies is being addressed by the Receivership Large Deductible Workers’ Compensation (E) Working Group that is developing a draft Guideline for Administration of Large Deductible Policies in Receivership, which will be an alternative to Section 712 of the Insurer Receivership Model Act (#555). He said once adopted, states will be encouraged to adopt the guideline.

Mr. Kennedy said 32 states have adopted the 2017 revisions to Model #520, and three states have it under consideration. He said this is good progress, and he does not believe the Task Force should take any further action. Hearing no further comments, the Task Force took no further action on this topic.

Mr. Kennedy said based on the comments and discussion, a final report to the Financial Stability (EX) Task Force would be drafted and exposed in advance of the next Receivership and Insolvency (E) Task Force meeting to consider adoption at that meeting.

b. Consider as an Accreditation Standard or Other Methods to Encourage Adoption

Mr. Kennedy said for most of the 14 key provisions, commenters were not in favor of the development of revised Part A Accreditation standards for receivership and guaranty fund laws. Wayne Mehlman (American Council of Life Insurers—ACLI) said the ACLI’s comment letter includes recommendations to improve accreditation standards without listing specific provisions. Barbara F. Cox (NCIGF) said it may be difficult and unrealistic in certain states to adopt the Property and Casualty Insurance Guaranty Association Model Act (#540) to meet an accreditation standard. Chris Petersen (Arbor Strategies LLC) said he represents a coalition of large health insurers that believe the 2017 revisions to Model #520 should be an accreditation standard. Peter G. Gallanis (NOLHGA) said he agrees with Ms. Cox that there are good faith policy differences state-to-state regarding property and casualty guaranty fund laws that create challenges in adopting Model #540 in all states. He said there are less state-to-state issues for life and health guaranty association laws. He said even though there has not been much broad opposition to the 2017 revisions to Model #520, there have been some disagreements in some states. He said if there is a move toward a new accreditation standard, there would need to be consideration given to transition timing and clarity on what requirement a state would need to meet now and in the future if models are amended. Mr. Kennedy recommended that an ad hoc group be formed to further discuss this topic and report back to the Task Force at its next meeting. The Task Force agreed.

c. Feedback on Other Topics

Mr. Kennedy said feedback was requested on various other topics that had been raised in previous comment letters that do not fit within the MPI referral. He said many of the topics are being pursued and addressed in other NAIC workstreams. Coordination between the Financial Analysis (E) Working Group and the Receivership Financial Analysis (E) Working Group is ongoing, and it recently included updates to pre-receivership guidance for state insurance regulators. The Task Force took no further action on this topic.

Mr. Kennedy said the topic of continuation of inter-affiliate services is being addressed by the Receivership Law (E) Working Group. He said the topic of orphan claims in large deductible workers’ compensation is largely addressed in the draft Guideline for Administration of Large Deductible Policies in Receivership under development by the Receivership Large Deductible Workers’ Compensation (E) Working Group. Ms. Cox said the NCIGF is working to address this topic in states’ guaranty fund laws and practices, but situations occur outside of the guaranty fund authority, such as when policies are sold in states where the insurer is not licensed.

Mr. Kennedy said the topic of business risk transfers are being addressed by the Restructuring Mechanisms (E) Working Group. He said guidance for state insurance regulators on crisis management groups is being address through a project of the Group Solvency Issues (E) Working Group to develop regulatory guidance on the requirements for supervision of internationally active insurance groups (IAIGs) under the Common Framework for the Supervision of Internationally Active Insurance
Groups (ComFrame). As these two workstreams are in progress, the Task Force will provide input at an appropriate time in the future.

Mr. Kennedy said for the topic of promoting cost effective resolution, the feedback from commenters indicates that state insurance regulators already strive to achieve this result. He said the suggestion to provide standardized judicial education would be difficult to address due to differences between states’ laws and practices. The feedback from commenters indicate that the concept of an NAIC receivership “SWAT Team” would be difficult to achieve due to costs and procurement requirements. Further, the Task Force and its working groups already consist of receivership experts. The Task Force took no further action on these three topics.

Mr. Kennedy said regarding the topic of addressing administrative costs of the guaranty funds not associated with insolvency activity, some states’ guaranty fund laws do not allow for those types of assessments. Ms. Cox said the NCIGF is working on a project in NCIGF Model for an optional provision to allow states to assess for certain overhead expenses. It would be disastrous to have states’ guaranty funds offices close due to lack of funding. Insolvencies occur with short notice, so maintenance of an office is necessary. Mr. Gallanis said this is not an issue for life and health guaranty associations. There may be certain situations that arise in states, but those states have found resolutions to those issues. Bill O'Sullivan (NOLHGA) said he agrees with Mr. Gallanis. He said this issue was addressed for life and health guaranty associations through the 2017 revisions to Model #520, where the dollar cap on class A assessments was eliminated. Mr. Kennedy agreed and encouraged states to adopt those amendments. The Task Force took no further action on this topic.

4. **Discussed Other Matters**

Mr. Kennedy reminded all parties that comments are due Oct. 30 on the exposure drafts of the Receivership Large Deducible Workers’ Compensation (E) Working Group. He said the Task Force’s next WebEx meeting will be held Nov. 19.

Having no further business, the Receivership and Insolvency (E) Task Force adjourned.
Ongoing Support of NAIC Programs, Products or Services

1. The Receivership and Insolvency (E) Task Force will:
   A. Monitor and promote efficient operations of insurance receiverships and guaranty associations.
   B. Monitor and promote state adoption of insurance receivership and guaranty association model acts and regulations
      and monitor other legislation related to insurance receiverships and guaranty associations.
   C. Provide input and comments to the International Association of Insurance Supervisors (IAIS), the Financial Stability
      Board (FSB), or other related groups on issues regarding international resolution authority.
   D. Monitor, review, and provide input on federal rulemaking and studies related to insurance receiverships.
      other related NAIC publications, and the Global Receivership Information Database (GRID); and make any necessary
      updates.
   F. Monitor the work of other NAIC committees, task forces and working groups to identify and address any issues that
      affect receivership law and/or regulatory guidance.
   G. Perform additional work as directed by the Financial Condition (E) Committee and/or received through referral by
      other groups.

2. The Receivership Financial Analysis (E) Working Group will:
   A. Monitor receiverships involving nationally significant insurers/groups to support, encourage, promote and coordinate
      multistate efforts in addressing problems.
   B. Interact with the Financial Analysis (E) Working Group, domiciliary regulators, and lead states to assist and advise as
      to what might be the most appropriate regulatory strategies, methods and/or action(s) with regard to potential or
      pending receiverships.

The Receivership Large Deductible Workers' Compensation (E) Working Group will:

3. Complete work based on recommendations for possible enhancements to the U.S. receivership regime, as approved and
   directed by the Receivership and Insolvency (E) Task Force, resulting from a study of the states' receivership laws and
   practices related to the receivership of insurers with significant books of large deductible workers' compensation
   business. Complete by the 2020 Summer National Meeting.

4. The Receivership Law (E) Working Group will:
   A. Review and provide recommendations on any issues identified that may affect states’ receivership and guaranty
      association laws; e.g., for example, any issues that arise as a result of market conditions, insurer insolvencies, federal
      rulemaking and studies, international resolution initiatives, or as a result of the work performed by or referred from
      other NAIC committees, task forces and/or working groups.
   B. Discuss significant cases that may impact the administration of receiverships.
   C. Complete work as assigned from the Receivership and Insolvency (E) Task Force to address recommendations from
      the Financial Stability (EX) Task Force’s Macroprudential Initiative (MPI) referral as follows:
   D. Complete work related to qualified financial contracts (QFCs), including: 1) explore if bridge institutions could be
      implemented under regulatory oversight pre-receivership to address an early termination of qualified financial

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contracts (QFCs), and, if appropriate, develop applicable guidance; 2) Review, develop enhancements to the Receiver's Handbook guidance on QFCs and, if necessary, draft enhancements; and, 3) identify related pre-receivership considerations related to QFCs and, if necessary, make referrals to other relevant groups to enhance pre-receivership planning, examination and analysis guidance.

1. Review and provide recommendations for remedies to ensure the continuity of essential services and functions to an insurer in receivership by affiliated entities, including non-regulated entities. Among other solutions, this will encompass a review of the Insurance Holding Company System Regulatory Act (M#440) and the Insurance Holding Company System Model Regulation with Reporting Forms and Instructions (M#450) to provide proposed revisions to address the continuation of essential services through affiliated intercompany agreements in a receivership.

2. Consult with and/or make referrals to other NAIC Working Groups, as deemed necessary, as the topic relates to affiliated intercompany agreements and pre-receivership considerations. Complete by the 2021 Fall National Meeting.

NAIC Support Staff: Jane Koenigsman
**RECEIVERSHIP & INSOLVENCY (E) TASK FORCE**

**SUMMARY OF COMMENTS ON KEY PROVISIONS**

On Aug. 7, 2020, the Receivership and Insolvency (E) Task Force requested additional feedback (below) on the comments previously received, specifically, respond to: 1) is the key provision listed critical for all states to have in receivership and guaranty fund law for a multi-state receivership; 2) should the key provisions listed be considered for a limited scope accreditation standard; 3) if not accreditation, what other options do you propose to encourage states to adopt these key provisions; and 4) what impediments, if any, do you foresee in implementing any of these provisions into state law. Comments were due Sept. 8, 2020

15 Responses: AR, FL, LA, MA, MI, MO, PA, SD, TX, WA, ACLI, CANTILO & BENNETT LLP, ARBOR STRATEGIES, LLC, MORGAN LEWIS, JOINT COMMENTS FROM NOLHGA & NCIGF

- Responses are compiled below. Comment letters that contained additional feedback or explanation are attached. (LA, TX, ACLI, ARBOR STRATEGIES, NOLHGA/NCIGF)

<table>
<thead>
<tr>
<th>Key Provisions Identified in Comments</th>
<th>Related Model Section</th>
<th>Is it critical to a multi-jurisdictional receivership? (Y/N)</th>
<th>Should it be considered as an accreditation standard? (Y/N)</th>
</tr>
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<tbody>
<tr>
<td>Conflicts of Law:</td>
<td>#555 § 102</td>
<td>• Y=FL, MI, MO, PA, SD, WA, ACLI</td>
<td>• Y=MO (Part A only), WA</td>
</tr>
<tr>
<td>• The receivership act and insurance guaranty association acts prevail if there is a conflict with other laws, which ensures that these laws control over general laws.</td>
<td></td>
<td>• N=AR ($§102 on its face is limited to “this state”), MA, TX, CANTILO, MORGAN_LEWIS</td>
<td>• N=AR, MI, PA, SD, TX, ACLI, CANTILO, MORGAN_LEWIS</td>
</tr>
<tr>
<td>Stays &amp; Injunctions</td>
<td>#555 § 108</td>
<td>• Y=AR, FL, MI, MO, PA, SD, TX, WA, ACLI, CANTILO, MORGAN_LEWIS (but courts have the authority and are doing it; better to have in statute perhaps), NOLHGA/NCIGF</td>
<td>• Y=AR, MI, MO (Part A only), TX, WA, CANTILO</td>
</tr>
<tr>
<td>• Provides automatic stay of actions against receivership estate and insureds.</td>
<td></td>
<td>• N=MA</td>
<td>• N=PA, SD, ACLI, MORGAN_LEWIS</td>
</tr>
<tr>
<td>• Court may issue any stays, injunctions, or other orders as necessary or appropriate.</td>
<td></td>
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<tr>
<td>Section</td>
<td>Description</td>
<td>Y States</td>
<td>N States</td>
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<td>Continuation of Coverage for life and health policies:</td>
<td>Governs the continuation of policies when a liquidation order is entered. Specifies that policies or annuities covered by a life and health insurance guaranty association continue in force after the entry of a liquidation order.</td>
<td>Y=AR, FL, MA, MI, MO, PA, SD, TX, WA, ACLI, CANTILO, NOLHGA/NCIGF</td>
<td>N=MORGAN_LEWIS</td>
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<td>Priority of Distribution:</td>
<td>Priority scheme for distribution of assets must comport with the Supreme Court's decision in United States Department of Treasury v. Fabe.</td>
<td>Y=AR, FL, MA, MI, MO, SD, TX, ACLI, CANTILO, MORGAN_LEWIS, NOLHGA/NCIGF</td>
<td>N=PA, WA</td>
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<td>Ancillary Conservation of Foreign Insurers:</td>
<td>Limits scope of ancillary receiverships.</td>
<td>Y=AR, FL, MA, MI, MO, SD, TX, WA, ACLI, CANTILO</td>
<td>N=PA, MORGAN_LEWIS</td>
</tr>
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<td>Domiciliary Receivers in Other States:</td>
<td>Other states' receivership laws and are given full faith and credit, which promotes the consistent application of laws and orders and avoids conflicting reciprocity standards. Provides for the disposition of deposits, and ensures that they are available to the receivership estate or guaranty associations, as applicable.</td>
<td>Y=AR, FL, MA, MI, MO, PA, TX, WA, ACLI, CANTILO</td>
<td>N=LA (See comment letter), SD MORGAN_LEWIS</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Section</th>
<th>#555 §712 or pending alternate guideline</th>
<th>#555 § 105 K</th>
<th>#555 § 205 #555 § 208</th>
<th>#555 § 105 L #555 § 403 #555 § 404</th>
<th>#555 § 611, 612, #520 8.N.</th>
<th>#540 § 8.A.(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treatment of Large Deductible Workers Compensation policies:</td>
<td>Procedures govern parties’ rights regarding large deductible policies in liquidation.</td>
<td>• Y=AR, MA, MI, PA, TX, WA, NOLHGA/NCIGF</td>
<td>• Y=MA, PA, SD, ACLI</td>
<td>• Y=AR, PA, SD, ACLI</td>
<td>• Y=AR, WA</td>
<td>• Y=WA, CANTILO</td>
</tr>
<tr>
<td>Designated court for receivership proceedings:</td>
<td>Court may order that one judge hears all matters in a delinquency proceeding.</td>
<td>• N=FL, MO, SD, CANTILO, MORGAN_LEWIS</td>
<td>• N=FL, MA, MI, MO, TX, WA, CANTILO, MORGAN_LEWIS</td>
<td>• N=FL, MA, MI, MO, TX, WA, CANTILO, MORGAN_LEWIS</td>
<td>• N=AR, MA, MI, MO, PA, SD, TX, WA, ACLI, CANTILO, MORGAN_LEWIS</td>
<td>• N=AR, MA, MI, MO, PA, SD, TX, ACLI, CANTILO, MORGAN_LEWIS</td>
</tr>
<tr>
<td>Limitation on judicial discretion regarding a receivership petition:</td>
<td>Court must enter judgment on petition within 15 days of conclusion of the evidence.</td>
<td>If grounds for receivership are established, the court must grant the petition.</td>
<td>• Y=AR, PA, SD, ACLI</td>
<td>Other observations=NOLHGA/NCIGF (see comment letter)</td>
<td>• Y=AR, MA</td>
<td></td>
</tr>
<tr>
<td>Timing of Proceedings:</td>
<td>Limit how long receivership proceeding can remain open (e.g., deadline for filing of rehabilitation plan).</td>
<td>Address the timing of liquidation orders.</td>
<td>• N=FL, MA, MI, MO, PA, SD, TX, WA, CANTILO, MORGAN_LEWIS</td>
<td>• Y=AR, ACLI</td>
<td>• Y=AR, MA</td>
<td></td>
</tr>
<tr>
<td>Reinsurance:</td>
<td>Align receivership and life / health guaranty association laws regarding reinsurance.</td>
<td></td>
<td>• Y=FL, MA, WA, ACLI</td>
<td>• N=AR, MI, MO, PA, SD, TX, CANTILO, MORGAN_LEWIS, NOLHGA/NCIGF</td>
<td>• Y=MA, WA</td>
<td></td>
</tr>
<tr>
<td>Property &amp; Casualty Guaranty Fund Limits:</td>
<td></td>
<td></td>
<td>• Y=WA, CANTILO</td>
<td>• Y=AR, FL, MA, MI, MO, PA, SD, TX, MORGAN_LEWIS</td>
<td>• Y=WA, CANTILO</td>
<td></td>
</tr>
</tbody>
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- Establish minimum limits of
  guaranty fund coverage.

Life / Health Guaranty Association
Model:
- Encourage states to adopt 2017
  revisions to Model #520.

#520 (2017)
- Y=FL, MI, PA, SD, WA, ACLI, ARBOR
  (Model 520, see comment letter)
- N=AR, MA, MO, TX, CANTILO,
  MORGAN_LEWIS

- Y=WA, ARBOR (Model 520, see comment
  letter)
- N=AR, MA, MI, MO, PA, SD TX, ACLI,
  CANTILO, MORGAN_LEWIS

Guideline for Implementation of State
Orderly Liquidation Authority:
- Addresses the implementation of a
  receivership in the event of a
  proceeding under Title II of the
  Dodd-Frank Wall Street Reform and
  Consumer Protection Act.

GDL # 1700
- Y=MI, SD, TX, WA, ACLI
- N=FL, MA, MO, NO, PA, CANTILO,
  MORGAN_LEWIS, NOLHGA/NCIGF
  (may not need to be adopted in every
  state, see comment letter)
- No opinion =AR

- N=MA, MI, MO, PA, SD, TX, WA, ACLI,
  CANTILO, MORGAN_LEWIS

Other Comments:
- CANTILO: For the sake of simplicity and adoption, I recommend considering a revised uniform definition of RECIPROCAL STATE that includes the selected key provisions and making being a RECIPROCAL STATE as thus redefined the accreditation standard. Most of these are important but they are not all essential to an effective multi-state receivership. The more that is included, the harder the “sell” as an accreditation standard.
- ACLI = See Comment letter for recommended wording changes to accreditation standards.
- NOLHGA/NCIGF=See comment letter for observations on addressing the judicial framework for resolution.

Question:
If not an update to accreditation
standards, what other options do you
propose for encouraging states to
adopt these provisions into law?

- AR=All provisions considered “critical” are recommended as “accreditation standard”.
- MA=We would be supportive of additional Guidance being issued by the RITF or the Receivership Law (E) Working Group, as well as the benefits of certain provisions being discussed in the Receiver’s Handbook for Insurance Company Insolvencies. In either case, it would be helpful, where possible, to provide examples of real life situations where having had a specific provision in place would have been beneficial and why.
- MI=I think industry trade groups and NCOIL have influence to decide which key provisions are entered into law.
- PA= We marked most as no because we would be unable to achieve the standard and would never pass accreditation.
- SD=Encourage states. These are not and should not be accreditation standards.
- TX= The insurance industry has successfully sought amendments to specific receivership laws (e.g., IRMA § 711 and the NCIGF large deductible provision). When any changes to receivership laws are sought, the critical
provisions identified by the RITF could be included in the legislation. Additional training to Commissioners and staff regarding receiverships could explain the necessity of updated receivership laws.
- WA= Propose certain sections to be adopted as an accreditation standard rather than substantially similar or entire model law.
- NOLHGA/NCIGF=We suggest considering route as an alternative to accreditation standards to achieve the Task Force goals. See Comment Letter.

<table>
<thead>
<tr>
<th>Question: What impediments, if any, do you foresee in implementing any of these provisions into state law?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• AR=General legislative bias against granting deference or priority to a sister state’s laws to its citizens perceived detriment.</td>
</tr>
<tr>
<td>• FL=State legislatures and governors will focus on budgetary and public health issues rather than receivership laws. Limiting judicial discretion and directing assignment of judges will likely draw constitutional challenges.</td>
</tr>
<tr>
<td>• MA= Challenges in this case would include 1) the legislative calendar in each state, 2) convincing the legislature that these changes are needed when there may not be an immediate need and there are many other pressing priorities, and 3) educating individual legislators on the insurer receivership process generally, as well as the benefits it provides to consumers.</td>
</tr>
<tr>
<td>• MI= Different state economics, marketplaces, domestic insurers who pay the guaranty fund assessments and help determine coverage, different types of insurance coverages laws within the state (no fault system vs at fault), disagreements among the insurance industry as to who should pay for insolvencies.</td>
</tr>
<tr>
<td>• PA= The biggest implementation is the number of provisions. Passing laws in our marked is difficult and lengthy.</td>
</tr>
<tr>
<td>• WA= States and interested parties differing priorities how receivership proceedings should be governed under the state receivership courts.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Comments Received</th>
<th>Additional Feedback?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Create accreditation standard requiring adoption of Life and Health Insurance Guaranty Association Model Act in a “functionally consistent” manner.</td>
<td>• AR=Unnecessary.</td>
</tr>
<tr>
<td></td>
<td>• MI= Not supportive overall of having a one size fits all approach for guaranty fund laws since assessment bases vary from state to state.</td>
</tr>
<tr>
<td></td>
<td>• PA= We do not think this is feasible.</td>
</tr>
<tr>
<td></td>
<td>• ARBOR=See comment letter “We therefore urge the Task Force to make model #520 an accreditation standard”)</td>
</tr>
<tr>
<td></td>
<td>• NOLHGA/NCIGF=The question of additional uniformity for the guaranty system has been discussed by the NAIC, Congress, and the Federal Insurance Office. Both the life and health guaranty system and property casualty insurance guaranty system are in need of a federal standard to provide a uniform approach to guaranty system law.”</td>
</tr>
</tbody>
</table>
| Promote cost effective resolution in early stages of receivership proceedings. | • AR= Usually, if there is a “cost effective” resolution, it is pursued by Management/Ins Dept prior to filing receivership proceedings.  
• MI= The key question is how and the fact that no two receiverships are exactly alike.  
• PA= I feel we already strive for this.  
• ACLI= should be considered by the Task Force. |
| Provide standardized judicial education on the receivership process. | • AR= Work on this was done many years ago with the National Judicial College, but funding from NAIC wasn’t available.  
• MI= Supportive of proposal, didn’t IAIR have a program to do this?  
• MO= It would be beneficial to have Continuing Legal Education (“CLE”) courses.  
• PA= That is difficult because the process varies from state to state and some states have seasoned receivership judges.  
• ACLI= should be considered by the Task Force.  
• NOLHGA/NCIGF= We view opportunities for judicial education and coordination to be worthwhile where possible... (see comment letter). |
| Strengthen the NAIC’s Financial Analysis Working Group (FAWG) and Receivership Financial Analysis Working Group (R-FAWG). | • AR= Since insurance regulation is state based and state controlled, not sure how effective strengthening could be.  
• MI= Goals and actions to do this?  
• ACLI= should be considered by the Task Force.  
• NOLHGA/NCIGF= We commend the RITF and its Receivership Financial Analysis Working Group (“RFAWG”) for leadership driving further coordination and planning. The RITF also has enhanced communication between RFAWG and the Financial Analysis Working Group (“FAWG”) in order to promote pre-planning for receiverships where possible. NOLHGA and NCIGF have commented on the importance of those goals on several occasions. We see the good and ongoing progress made by receivership leaders and stakeholders as being driven by RITF, RFAWG, and FAWG leadership. |
| **Create NAIC “SWAT” team of receivership experts.** | • AR= IAIR and NAIC already produce lists of experts and their expertise  
• MI= Nice idea, but who pays the costs and who controls the experts?  
• MO= The Task Force and Working Groups already have receivership experts.  
• PA= Many states have procurement requirements that dictate who can be appointed.  
• ACLI= should be considered by the Task Force. |
|--------------------------------------------------|--------------------------------------------------------------------------------------------------|
| **Revise Section 7 of the Insurance Holding Company System Regulatory Act to ensure the continuation of inter-affiliate services in receiverships.** | • AR= In progress.  
• MI= Yes, I would support that.  
• TX= The Receivership Law Working Group is currently working on this.  
• ACLI= should be considered by the Task Force.  
• ARBOR= we do not believe that section 7 of the Insurance Holding Company System Regulatory Act need to be revised. Regulators have significant authority already over activities within holding company systems, including the ability to enforce existing contracts. No additional regulatory powers are needed, or appropriate. |
| **Create crisis management groups for supervisory colleges within Section 7 of the Insurance Holding Company System Regulatory Act and/or guidance such as the Receivers’ Handbook.** | • MI= Supportive of this concept.  
• ACLI= should be considered by the Task Force.  
• MORGAN_LEWIS= Y  
• NOLHGA/NCIGF= Meanwhile, some comments under consideration appear to be being managed as parts of other NAIC workstreams, and the Task Force may want to consider whether they are ripe for additional input as part of this process. RLWG is considering changes to the Model Holding Company System Regulatory Act to help provide continuity of services from an affiliate in receivership. |
| **Develop statutory changes to accommodate transactions under Insurance Business Transfer and corporate division statutes.** | • AR= In progress.  
• MI= I would wait and see what happens under the limited number of states that have adopted these provisions.  
• ACLI= should be considered by the Task Force.  
• ARBOR= While we do not have comments at this point in time regarding any changes to accommodate transactions under Insurance Business Transfer or corporate division statutes, we remain concerned that these transactions could negatively impact the guaranty association system. We therefore reserve our comments until further details about the proposals are available.  
• NOLHGA/NCIGF= Meanwhile, some comments under consideration appear to be being managed as parts of other NAIC workstreams, and the Task Force may want to consider whether they are ripe for additional input as part of this process. ...And the Restructuring Mechanisms (E) Working Group will be evaluating statutes that would accommodate restructuring transactions. That Working Group’s charge includes examining the impact of restructuring mechanisms on guaranty associations and policyholders, on which we assume the RITF will have... |
input. NOLHGA and NCIGF have been commenting to the Working Group about identified concerns and potential solutions.

| Develop statutory changes (if needed) to permit guaranty funds to assess for administrative costs that are not tied to the volume of insolvency activity. | • AR= Changes recently made to NCIGF Model Act.  
• MI= I would agree that a safety net needs to be there.  
• ACLI= should be considered by the Task Force. |
| Develop statutory changes as needed to prevent “orphan claims” scenarios. | • AR=Alredy covered in L&H Model; P&C changes needed, but could be complicated to develop.  
• ACLI= should be considered by the Task Force.  
• MORGAN_LEWIS=Yes |
<table>
<thead>
<tr>
<th>Related Model Section</th>
<th>Is it critical to a multi-jurisdictional receivership?</th>
<th>Should it be considered as an accreditation standard?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conflicts of Law</td>
<td>Yes. It is useful as it resolves conflicts between receivership acts and other laws, but is not necessarily critical.</td>
<td>Yes. A stay in a receivership serves a vital purpose.</td>
</tr>
<tr>
<td>Priorities of Distribution</td>
<td>Yes. Priority scheme must comport with the Supreme Court's decision in United States Department of Treasury v. Fabe.</td>
<td>Yes. A priority scheme must protect policyholders while complying with this U.S. Supreme Court decision.</td>
</tr>
<tr>
<td>Ancillary Conservation of Foreign Insurers</td>
<td>No. It is useful as it avoids unnecessary ancillary receiverships, but is not necessarily critical.</td>
<td>No. It is useful as it avoids unnecessary ancillary receiverships, but is not necessarily critical.</td>
</tr>
<tr>
<td>Treatment of Large Deductible Workers Compensation policies</td>
<td>Yes, if insurers writing large deductible workers compensation policies are domiciled in a state.</td>
<td>No.</td>
</tr>
<tr>
<td>Designated court for receivership proceedings</td>
<td>No. While these requirements can be helpful, they are not necessarily critical.</td>
<td>No.</td>
</tr>
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<td><strong>Property &amp; Casualty Guaranty Fund Limits:</strong></td>
</tr>
<tr>
<td>- Establish minimum limits of guaranty fund coverage.</td>
</tr>
<tr>
<td>No. Minimum coverage limits are not necessarily critical. No.</td>
</tr>
<tr>
<td><strong>Life / Health Guaranty Association Model:</strong></td>
</tr>
<tr>
<td>- Encourage states to adopt 2017 revisions to Model #520.</td>
</tr>
<tr>
<td>No. This process is ongoing. No.</td>
</tr>
<tr>
<td><strong>Guideline for Implementation of State Orderly Liquidation Authority:</strong></td>
</tr>
<tr>
<td>- Addresses the implementation of a receivership in the event of a proceeding under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.</td>
</tr>
<tr>
<td>Yes, if an insurer that might be subject to the Guideline is domiciled in the state. No.</td>
</tr>
</tbody>
</table>

**Question:**
If not an update to accreditation standards, what other options do you propose for encouraging states to adopt these provisions into law?

- The insurance industry has successfully sought amendments to specific receivership laws (e.g., IRMA § 711 and the NCIGF large deductible provision). When any changes to receivership laws are sought, the critical provisions identified by the RTF could be included in the legislation.
- Additional training to Commissioners and staff regarding receiverships could explain the necessity of updated receivership laws.

**Question:**
What impediments, if any, do you foresee in implementing any of these provisions into state law?

**Additional Feedback?**

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<td>Create NAIC &quot;SWAT&quot; team of receivership experts.</td>
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<td>Revise Section 7 of the Insurance Holding Company System Regulatory Act to ensure the continuation of inter-affiliate services in receiverships. The Receivership Law Working Group is currently working on this.</td>
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<td>Create crisis management groups for supervisory colleges within Section 7 of the Insurance Holding Company System Regulatory Act and/or guidance such as the Receivers’ Handbook.</td>
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<td>Develop statutory changes to accommodate transactions under Insurance Business Transfer and corporate division statutes.</td>
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<tr>
<td>Develop statutory changes as needed to prevent “orphan claims” scenarios.</td>
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September 8, 2020

Mr. James Kennedy  
Chairman, Receivership and Insolvency Task Force  
National Association of Insurance Commissioners  
11000 Walnut Street  
Kansas City, MO 64106-2197  

Re: Receivership and Insolvency Task Force Request for Comments on Key Provisions of Receivership and Guaranty Association Laws

Dear Mr. Kennedy and Ms. Koenigsman:

Thank you for the opportunity to respond to the Task Force’s request for comments regarding key provisions of your Receivership and Guaranty Association Model Laws. Specifically, the Louisiana Department of Insurance (LDI) responds to the following sentence contained in Section 1002 of the Insurance Receivership Model Act addressing “full faith and credit”:

The statutory provisions of another state and all orders entered by courts of competent jurisdiction in relation to the appointment of a domiciliary receiver of an insurer and any related proceedings in another state shall be given full faith and credit in this state.

The proposed language would clearly be subject to challenge under the United States Constitution. In 1945, Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1011, by which Congress stated the following as a declaration of policy: “Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” Section 1012(q) of the McCarran-Ferguson Act provides that “[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.” The empowerment of each state with respect to the business of insurance was reinforced by Congress in 1999 with the enactment of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6701 et seq. In that Act, Congress stated that the McCarran-Ferguson Act “remains the law of the United States” and that “the insurance activities of any person…shall be functionally regulated by the States.”
Further, regulation of the insolvencies of insurance companies is also indirectly delegated to the states by virtue of the inability of insurance companies to seek bankruptcy relief under the United States Bankruptcy Code. See 11 U.S.C. 109(b) and (d) (providing that a “domestic insurance company” may not be a debtor under Chapter 7 or 11 bankruptcies). Thus, there is no Federal law or regulation that governs the rehabilitation of insurance companies.

The suggested accreditation standard could have the unintended consequence of creating a nationalized insurance receivership and rehabilitation process, which could either create issues among the states or invite a federal bankruptcy solution. This matter requires careful study and analysis as it proposes a “fix” for a system that has served the state based system of insurance regulation extremely well for many decades.

The LDI does not believe the referenced provision of Section 1002 of the Insurance Receivership Model Act allows the necessary flexibility in receivership and rehabilitation cases and could interfere with the rights of the respective states to regulate policy rates and benefits. The LDI would oppose the adoption of Section 1002 as an accreditation standard.

With best wishes and kindest personal regards, I remain

Very truly yours,

James J. Donelon
Commissioner of Insurance
Wayne Mehlman  
Senior Counsel

September 8, 2020

James Kennedy, Chair  
Receivership and Insolvency (E) Task Force  
National Association of Insurance Commissioners  
2301 McGee Street, Suite 800  
Kansas City, MO 64108

RE: Key Provisions and Other Recommendations to Promote the Effectiveness and  
Consistency in State Receivership and Guaranty Association Laws

Dear Chairman Kennedy:

The American Council of Life Insurers (“ACLI”)\(^1\) appreciates this opportunity to provide comments  
on the key provisions and other recommendations that were submitted to the Receivership and  
Insolvency Task Force.

As we stated in our letter dated February 7, 2020, we believe that both the state receivership and  
guaranty association systems have operated very efficiently and effectively and that there is a high  
degree of consistency among the states, particularly with regard to state guaranty association laws.  
Notwithstanding, both systems can and should be improved, which is why we included a list of  
potential improvements in that letter.

We support all of the key provisions that appear on Pages 1 and 2 of the exposed document and  
believe that they are critical for states to adopt and incorporate into their receivership and guaranty  
fund laws for multi-state receiverships. We do not, however, take a position on those provisions  
relating to the treatment of large deductible workers compensation policies or property and casualty  
guaranty fund limits.

That being said, we do not believe that any of the key provisions should be incorporated into the  
receivership and/or guaranty association model acts, since amending those models could turn out to  
be very time-consuming, difficult to achieve and delay the enactment of the 2017 revisions to the Life  
and Health Insurance Guaranty Association Model Act in the remaining 17 states and the District of  
Columbia. Instead, we suggest that they be included in NAIC regulatory guidance, such as the  
Receivers’ Handbook for Insurance Company Insolvencies, including Chapter 6 (Guaranty  
Funds/Associations) and Chapter 9 (Legal Considerations).

\(^1\) The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and  
advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance  
industry for financial protection and retirement security. ACLI’s member companies are dedicated to protecting  
consumers’ financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance,  
disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI’s 280  
member companies represent 94 percent of industry assets in the United States. Learn more at www.acli.com.

American Council of Life Insurers  
101 Constitution Avenue, NW, Washington, DC 20001-2133  
(202) 624-2135 waynemehlman@acli.com
Furthermore, we do not believe that any of the key provisions should be considered as an accreditation standard. However, we do suggest that the existing accreditation standards for Receivership and Guaranty Funds be modified as follows:

**Accreditation standard for Receivership:**
- Include a reference to the Insurers Rehabilitation and Liquidation Model Act since many states have already partially or fully adopted it.
- Make the adoption of one of the receivership models suggestive instead of prescriptive, by using “such as that contained in” instead of “as set forth in”, in order to allow for the adoption of either model.
- As revised, the accreditation standard would read as follows:
  
  State law should set forth a receivership scheme for the administration, by the insurance commissioner, of insurance companies found to be insolvent as set forth such as that contained in the NAIC’s Insurer Receivership Model Act or Insurers Rehabilitation and Liquidation Model Act.

**Accreditation standard for Guaranty Funds:**
- Include references to the Life and Health Insurance Guaranty Association Model Act and the Post-Assessment Property and Liability Insurance Guaranty Association Model Act since most states have already substantially adopted them.
- Make the adoption of the guaranty association models prescriptive instead of suggestive, by using “as set forth in” instead of “such as that contained in”, in order to require the adoption of both models.
- As revised, the accreditation standard would read as follows:
  
  State law should provide for a regulatory framework such as that contained as set forth in the NAIC’s model acts on the subject Life and Health Insurance Guaranty Association Model Act and Post-Assessment Property and Liability Insurance Guaranty Association Model Act, to ensure the payment of policyholders’ obligations subject to appropriate restrictions and limitations when a company is deemed insolvent.

With regard to the “Other Comments Received” that appear on Page 3 of the exposed document, we believe that all of these recommendations should be considered by the Task Force.

Thanks again for this opportunity to comment. If you have any questions, feel free to contact me at waynemehlman@acli.com or 202-624-2135.

Sincerely,

Wayne Mehlman

Senior Counsel, Insurance Regulation
September 4, 2020

Commissioner Kent Sullivan  
Chair, Receivership and Insolvency (E) Task Force  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

Via email to Jane Koenigsman, NAIC

RE: Request for Comments – Key Provisions

Dear Commissioner Sullivan,

I am writing on behalf of a Coalition\(^1\) of health carriers representing some of the country’s largest major medical insurers and health maintenance organizations. Thank you for the opportunity to provide comments regarding key provisions for states to have in their receivership and guaranty fund laws for multi-state receiverships. The Coalition agrees with the Task Force that a national system of receivership and guaranty fund laws that is substantially similar from state to state is preferable to a patchwork of state laws and regulations that are difficult for regulators, industry and consumers to understand. The NAIC’s Accreditation Program was developed many years ago in an attempt to create and encourage much of this uniformity.

We agree that with respect to the Life and Health Guaranty Association Model (#520), it would be preferable for all states to adopt its provisions, and we would encourage the Task Force to ensure that it is an accreditation standard. While it is not mandatory that consumers all have

\(^1\) Anthem, Cigna, CVS Health/Aetna, HCSC, and UnitedHealthcare, who together provide health insurance and health maintenance organization coverage to more than 227 million members nationwide, are the members of this Coalition.
the same financial limits from state to state, a consumer’s basic right to protection should not vary by state. Consumers who purchase health maintenance organization coverage are entitled to the same safety net as consumers who purchase commercial coverages. We therefore urge the Task Force to make model #520 an accreditation standard.

With respect to the continuation of life and health policies when a liquidation order is entered, we note that the HMO Subcommittee of the Health and Managed Care (B) Committee recently voted to remove the continuation of benefits section (Sec. 14) from the Health Maintenance Organization Model Act (#430). We urge the Task Force to maintain consistency between the receivership and guaranty association models and this model, with respect to health insurance and HMO contracts.

We do not believe that Section 7 of the Insurance Holding Company System Regulatory Act needs to be revised. Regulators have significant authority already over the activities within holding company systems, including the ability to enforce existing contracts. No additional regulatory powers are needed, or appropriate.

While we do not have comments at this point in time regarding any changes to accommodate transactions under Insurance Business Transfer or corporate division statutes, we remain concerned that these transactions could negatively impact the guaranty association system. We therefore reserve our comments until further details about the proposals are available.

Thank you for the opportunity to provide our comments. We look forward to continuing this discussion in the near future.

Sincerely yours,

Chris Petersen
Arbor Strategies, LLC

Cc: Jane Koenigsman
Thank you for the opportunity to provide feedback on the Receivership & Insolvency Task Force’s (“RITF” or “Task Force”) consideration of important statutory provisions in receivership and guaranty fund laws. Many questions raised in the request for comment involve priorities for the national state-based guaranty system.

NOLHGA and NCIGF appreciate the inclusion and partnership that has been extended by the Task Force in addressing important operational and policymaking issues for the national state-based resolution system. Because of RITF leadership, the goals of communication and pre-planning continue to progress, both for the system in general and on individual insolvencies. Our ability to speak in a coordinated way as one resolution system has increased our collective effectiveness on a range of priorities both domestically and internationally. That partnership has produced tangible results on high-stakes and complex matters – for example, achieving a consensus on the funding for Long-term Care Insurance guaranty coverage, strengthening regulator guidance on pre-planning and coordination with the guaranty system, and correcting international standard proposals that would have materially conflicted with the U.S. resolution system. We approach this workstream from that same point of view of collective commitment to an effective resolution system and partnership with receivers in supporting that goal.

We have two general comments as the project moves forward, as well as initial feedback on several of the specific areas identified by the request.

**General Comments**

We encourage the Task Force to continue to define the standard by which it identifies and evaluates statutory provisions and practices. In December 2017, the Financial Stability Task Force referred to the RITF consideration of the resolution elements of the Macro-prudential Initiative (“MPI”), which focuses on financial stability. The referral to the RITF had three components, as described by the RITF chair in March 2018:

- examining recovery and resolution planning;
- addressing mismatches between federal and state law (on which some relevant items are now pending with the Receivership Law Working Group (“RLWG”)); and
- “[u]ndertak[ing] an evaluation of our current recovery and resolution laws, guidance, tools, etc. to evaluate whether they incorporate best practices regarding the above areas identified as important to financial stability.”

We suggest that continuing to take stock of the specific goals of the project is important here. If the questions under consideration relate to the MPI, then that initiative’s focus on financial
stability may inform the standard for ultimately adopting and advancing a proposal. If the current request for feedback is a more general examination of best practices, then the standard for inclusion may be different. The question of where to place the focus is one we suggest the Task Force continue to discuss and articulate in coordination with stakeholders.

We suggest considering routes as an alternative to accreditation standards to achieve the Task Force goals. There are several routes as an alternative to accreditation to promote policy and practices in the receivership area, and there are notable successes from deploying those routes. On topics where there is a broad consensus among stakeholders and regulators, the receivership community – with RITF leadership – has been able to accomplish change on a state-by-state basis, even where the stakes are high. Good, practical proposals related to identified significant goals seem to be at least as achievable on a state-by-state basis as would proposing that elements be an accreditation requirement.

However, on issues as to which there is no consensus, arguably it would be as unachievable to establish an accreditation standard, as it would be to have it adopted widely. As you know, accreditation includes a long exposure period and a super-majority requirement at the F Committee, Executive Committee, and plenary level, followed by two years of implementation. Instead of that high hill, we encourage resolution leaders to continue to explore guiding improvements in U.S. policy through guidelines, the Receiver’s Handbook, other regulatory handbooks, and developing best practices. NOLHGA and NCIGF continue to offer partnership with receivers on those efforts.

Initial Comments on Select Specific Topics

We have suggestions about a number of specific areas identified for comment. We expect that we will have an opportunity to provide additional and more detailed input on areas that affect the guaranty system, the fulfillment of its obligation to policyholders, and its role in the overall resolution process. Generally, we have noted at this stage a few areas where (1) evaluating the importance of adopting statutory provisions may be particularly valuable, (2) work is already underway and progress toward identified goals is happening, or (3) regarding the judicial framework, we have observations on pursuing legislative or process changes.

Evaluating the importance of statutory provisions in certain areas

We have noted a few areas that were raised in your request for comments where we think evaluating the importance of broader adoption of model language or other precedent will be worthwhile:

1. Stays and injunctions are important to the administration of a receivership and to the receivers’ authority over assets and liabilities.
2. Continuation of coverage for life and health policies upon liquidation is an important element of a life and health receivership.
(3) Where a priority scheme for distribution of assets does not reflect the Supreme Court’s decision in *United States Department of Treasury v. Fabe*, a statutory change to accomplish a “Fabe cure” would make sense.

(4) Evaluating the alignment of receivership and life and health guaranty association laws regarding reinsurance is also valuable.

**Productive action and deliberations are underway on several topics**

Several of the following identified topics have rightly been recognized as areas for NAIC consideration, and therefore are being addressed on an ongoing basis.

**Large Deductible:** NAIC staff has acknowledged that “[h]aving the necessary statutory authority specific to large deductible workers’ compensation products in receiverships is key to the successful resolution of these insurers.” (November 12, 2019 Staff Memo to Receivership Large Deductible Workers Compensation (E) Working Group.) We therefore suggest that large deductibles in resolution are already acknowledged as a priority. There is more to do, and NCIGF continues to work with the Working Group on an acceptable guideline that most states would consider adopting.

**Title II:** Seven states have adopted the Title II implementation guideline, and any stalled progress may have been on account of new priorities rather than opposition to the guideline. The Title II guideline also may not need to be adopted in every state to ensure national readiness for a theoretical Title II receivership.

**Uniformity:** The question of additional uniformity for the guaranty system has been discussed by the NAIC, Congress, and the Federal Insurance Office. Both the life and health guaranty system and property casualty guaranty system operate with a functional consistency. Most states are following NAIC models; and to the extent there are inconsistencies among states, there is a rational basis that reflects state-specific conditions. State legislatures can adapt their guaranty fund laws to local conditions, and we would expect states to defend that authority.

**FAWG and RFAWG Role:** We commend the RITF and its Receivership Financial Analysis Working Group (“RFAWG”) for leadership driving further coordination and planning. The RITF also has enhanced communication between RFAWG and the Financial Analysis Working Group (“FAWG”) in order to promote pre-planning for receiverships where possible. NOLHGA and NCIGF have commented on the importance of those goals on several occasions. We see the good and ongoing progress made by receivership leaders and stakeholders as being driven by RITF, RFAWG, and FAWG leadership.

**Other Workstreams:** Meanwhile, some comments under consideration appear to be being managed as parts of other NAIC workstreams, and the Task Force may want to consider whether they are ripe for additional input as part of this process. RLWG is considering changes to the Model Holding Company System Regulatory Act to help provide continuity of services from an
affiliate in receivership. And the Restructuring Mechanisms (E) Working Group will be evaluating statutes that would accommodate restructuring transactions. That Working Group’s charge includes examining the impact of restructuring mechanisms on guaranty associations and policyholders, on which we assume the RITF will have input. NOLHGA and NCIGF have been commenting to the Working Group about identified concerns and potential solutions.

**Observations on addressing the judicial framework for resolution**

Several areas relate to the judicial framework for overseeing an insurance receivership, including limits on discretion and deadlines for ruling on a petition, closing a receivership, or filing a rehabilitation plan. Generally speaking, our experience is that receivership courts exercise discretion in an appropriate way, and that their discretion can be a valuable tool given the unique circumstances and lack of predictability around any particular receivership.

Where judicial discretion arguably has disserved policyholders and the guaranty system, statutory changes are unlikely to prevent those results, and in any event face an uphill battle given the broad range of stakeholders that have interests in the statutory framework for a state judicial system. We view opportunities for judicial education and coordination to be worthwhile where possible, and of course will continue to work in coordination with receivers toward good results on individual receiverships and the development of precedent that serves policyholders and the protections afforded by the guaranty system.

Thank you again for the opportunity to provide feedback at this stage. We look forward to the chance to contribute to this important workstream as it moves forward.

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The Receivership Large Deductible Workers’ Compensation (E) Working Group of the Receivership and Insolvency (E) Task Force met via Webex Meeting November 5, 2020. The following Working Group members participated: Donna Wilson, Co-Chair (OK); Laura Lyon Slaymaker, Co-Chair (PA); David Phifer (AL); Steve Uhrynowycz (AR); Toma Wilkerson (FL); Sarah Crittenden (GA); Robert Wake (ME); Shelly Forrest (MO); Tom Green (NE); John Rehagen (MO); and James Kennedy (TX).

1. Adopt a Model Guideline for Administration of Large Deductible Policies in Receivership

Ms. Wilson said the new Model Guideline for the Administration of Large Deductible Policies in Receivership was exposed for a 30-day comment period ending Oct. 30. 2020. Only a few non-substantive punctuation edits were received and are incorporated in the draft. The drafting group based the Guideline largely on the principles and structure of the National Conference of Insurance Guaranty Funds (NCIGF) Model Large Deductible Act (NCIGF Model) with certain modifications. The Guideline is not the NCIGF Model but is based on the principles of the NCIGF Model because the NCIGF Model approach has been adopted by several states using varying language. The NCIGF Model has evolved over time based on additional experiences from insolvencies. The drafting group felt that the new Guideline would serve as a viable alternative to Insurer Receivership Model Act (#555) Section 712.

Mr. Wake made a motion to adopt the new draft Guideline for Administration of Large Deductible Policies in Receivership which was seconded by Mr. Green (Attachment Three). The motion passed unanimously.


Ms. Slaymaker said the draft was exposed for a 30-day comment period ending Oct. 30. 2020. Only a few non-substantive punctuation edits were received and are incorporated in the draft. asked for a motion to adopt revisions to the Receiver’s Handbook for Insurance Company Insolvencies (Handbook). These revisions incorporate the new Model Guideline for Administration of Large Deductible Policies in Receivership. Mr. Uhrynowycz made a motion to adopt the revisions to the Handbook which was seconded by Ms. Wilson (Attachment Four). The motion passed unanimously.

Having no further business, the Receivership Large Deductible Workers’ Compensation (E) Working Group adjourned.
The Receivership Large Deductible Workers’ Compensation (E) Working Group of the Receivership and Insolvency (E) Task Force met via Webex Meeting Sept. 30, 2020. The following Working Group members participated: Donna Wilson, Co-Chair (OK); Laura Lyon Slaymaker, Co-Chair (PA); Steve Uhrynowycz (AR); John Rehagen and Shelly Forrest (MO); Tom Green (NE); Mark Jordan (NM); and James Kennedy (TX).

1. **Exposed a Model Guideline for Administration of Large Deductible Policies in Receivership**


2. **Exposed Revisions to the *Receiver’s Handbook for Insurance Company Insolvencies***

Ms. Wilson introduced exposure of revisions to the *Receiver’s Handbook for Insurance Company Insolvencies* (Handbook). These revisions are based on the guideline and have been made primarily to align the handbook to the draft guideline for Model #555. Therefore, the revisions to the Handbook are contingent upon adoption of the guideline. The Working Group directed NAIC staff to expose the revisions to the Handbook for 30-day public comment period ending Oct. 30, 2020.

Having no further business, the Receivership Large Deductible Workers’ Compensation (E) Working Group adjourned.
GUIDELINE FOR ADMINISTRATION OF LARGE DEDUCTIBLE POLICIES IN RECEIVERSHIP

Drafting Note: Having the necessary statutory authority specific to large deductible workers’ compensation products in receiverships is key to the successful resolution of these insurers. There are currently two statutory authority options available, and there are differences across states as to which authority has been adopted: 1) Section 712 of the NAIC Insurer Receivership Model Act (#555—IRMA), Administration of Loss Reimbursement Policies; and 2) the National Conference of Insurance Guaranty Funds (NCIGF) Model Large Deductible Legislation, Administration of Large Deductible Policies and Insured Large Deductible Collateral. Both provide statutory guidance that articulates the respective rights and responsibilities of the various parties, which greatly enhance a state’s ability to manage complex large deductible programs in liquidation. Generally, both approaches provide for the collection of reimbursements, resolve disputes over who gets the reimbursements and ensure that the claimants are paid. The provisions in each of the two options generally complement each other, except for conflicting provisions regarding the issue of the ultimate ownership of, and entitlement to, the deductible recoveries and large deductible collateral as between the estate and the guaranty association. The issue is whether the guaranty associations, on behalf of the claimants, are entitled to any deductible reimbursements or whether they are a general estate asset that is shared pro rata by the guaranty associations and the uncovered claimants.

As of the drafting of this Guideline, the NCIGF model approach has been adopted by several states using varying language. However, the NCIGF model has evolved over time based on additional experiences from insolvencies and the NCIGF continues to modify its model as warranted. The NAIC has developed the following Guideline based largely on the principles and structure of the NCIGF model with certain modifications made by the NAIC Large Deductible Workers’ Compensation (E) Working Group of the Receivership and Insolvency (E) Task Force. The following statutory language is not an amendment to the NAIC receivership models but is intended as a Guideline for use by states as an alternative to IRMA Section 712, Administration of Loss Reimbursement Policies.

Administration of Large Deductible Policies in Receivership

This Guideline shall apply to workers’ compensation large deductible policies issued by an insurer subject to delinquency proceedings under [insert cite to state’s receivership statute]. Large deductible policies shall be administered in accordance with their terms, except to the extent such terms conflict with this Guideline. This Guideline does not apply to policies where the insurer has no liability for the portion of a claim that is within the deductible or self-insured retention.

A. Definitions.

For purposes of this Guideline:

(1) “Large deductible policy” means any combination of one or more workers’ compensation policies and endorsements and contracts or security agreements entered into between an insured and the insurer in which the insured has agreed with the insurer to:

(a) Pay directly the initial portion of any claim covered under the policy up to a specified dollar amount which the insurer would otherwise be obligated to pay, or the expenses related to any claim; or

(b) Reimburse the insurer for its payment of any claim or related expenses under the policy up to the specified dollar amount of the deductible.

The term “large deductible policy” includes policies which contain an aggregate limit on the insured’s liability for all deductible claims, a per-claim deductible limit or both. The primary purpose and distinguishing characteristic of a large deductible policy is the shifting of a portion of the ultimate financial responsibility under the large deductible policy to pay claims from the insurer to the insured, even though the obligation to initially pay claims may remain with the insurer, and the insurer remains liable to claimants in the event the insured fails to fulfill its payment or reimbursement obligations.

Drafting Note: States may wish to establish a minimum dollar deductible threshold for application of this statute based on local conditions. Because the payment of the entire amount of the claim remains the unconditional obligation of the insurer, the insured’s loss reimbursement obligation should not be treated as a “deductible” for the purpose of any applicable exclusion from guaranty association coverage, even though these policies are commonly referred to as “large deductible policies.”

Large deductible policies do not include policies, endorsements or agreements which provide that the initial portion of any covered claim shall be self-insured and further that the insurer shall have no payment obligation within the self-insured retention. Large deductible policies also do not include policies that provide for retrospectively rated premium payments by the insured or reinsurance arrangements or agreements,
except to the extent such reinsurance arrangements or agreements are put in place as security for the policyholder’s large deductible obligations.

(2) “Deductible claim” means any allowed claim, including a claim for loss and defense and cost containment expense (unless such expenses are excluded), under a large deductible policy to the extent it is within the deductible.

(3) “Large deductible collateral” means any cash, letters of credit, surety bond, or any other form of security posted by the insured, or by a captive insurer or reinsurer, to secure the insured’s obligation under the large deductible policy to pay deductible claims or to reimburse the insurer for deductible claim payments. Large deductible collateral may also secure an insured’s obligation to reimburse or pay to the insurer as may be required for other secured obligations.

(4) “Commercially reasonable” means to act in good faith using prevailing industry practices and making all reasonable efforts considering the facts and circumstances of the matter.

(5) “Other secured obligations” means obligations of an insured to an insurer other than those under a large deductible policy, such as those under a reinsurance agreement or other agreement involving retrospective premium obligations the performance of which is secured by large deductible collateral that also secures an insured’s obligations under a large deductible policy.

B. Handling of Large Deductible Claims.

Unless otherwise agreed by the responsible guaranty association, all large deductible claims that are also “covered claims” as defined by the applicable guaranty association law, including those that may have been funded by an insured before liquidation, shall be turned over to the guaranty association for handling.

(1) If a deductible claim is not covered by any guaranty association, the receiver shall draw on available large deductible collateral to pay the claim; or make other arrangements with the insured to ensure the timely payment of the claim. The receiver shall pay the claim promptly from the large deductible collateral unless the insured pays the claim directly or there is no available large deductible collateral.

(2) Deductible claims paid by the insured or by the receiver in accordance with this Guideline shall not be treated as distributions of estate assets under [insert cite to state’s liquidation priority distribution statute]. To the extent the insured, or a third-party administrator on behalf of the insured, pays the deductible claim, pursuant to an agreement by the guaranty association or otherwise, the insured’s payment of a deductible claim in whole or in part will extinguish the obligations, if any, of the receiver and/or any guaranty association to pay that claim or that portion of the claim. No credit or charge for an imputed or constructive distribution of any kind shall be made against the receiver or a guaranty association on the basis of an insured’s payment of a deductible claim.

Drafting Note: This provision addresses so called “orphan claims,” which are situations where, because of variations in state law or for other reasons, claims generally covered by the guaranty fund system are not provided such protection. States should take steps, through statutory revision or otherwise, to avoid orphan claims, especially for workers’ compensation insurance. However, if such claims do exist, this provision permits the receiver to utilize available large deductible collateral, or other funds provided by the employer, to ensure that they continue to be paid. Alternative language that states may consider is as follows: “In cases where a deductible claim is not a guaranty association covered claim and the claimant has no other remedy either from the employer or other resources available in a state, the receiver may pay the claim to the extent of the deductible with available Large deductible collateral as described in subsection E(2) below.”

C. Deductible Claims Paid by a Guaranty Association.

To the extent a guaranty association pays any deductible claim for which the insurer would have been entitled to reimbursement from the insured, a guaranty association shall be entitled to the amount of the reimbursement, and available large deductible collateral as provided for under subsection E to the extent necessary to reimburse the guaranty association. Such amounts shall be paid to the guaranty association net of any of the receiver’s collection costs as described in subsection F. Reimbursements paid to the guaranty association pursuant to this subsection shall not be treated as distributions under [insert cite to state’s liquidation priority distribution statute] or as early access payments under [insert cite to state’s early access statute].
To the extent that a guaranty association pays a deductible claim that is not reimbursed either from large deductible collateral or by an insured’s payments, or incurs expenses in connection with large deductible policies that are not reimbursed under this subsection, the guaranty association shall be entitled to assert a claim for those amounts in the delinquency proceeding, except as provided in subsection D(5).

Nothing in this subsection limits any rights of the receiver or a guaranty association that may otherwise exist under applicable law to obtain reimbursement from insureds for claims payments made by the guaranty association under policies of the insurer or for the guaranty association's related expenses, such as those provided for pursuant to [insert cite to state’s guaranty association net worth provision], or existing under similar laws of other states.

D. Collections

(1) The receiver shall take all commercially reasonable action to ensure that the large deductible collateral remains adequate to secure the insured’s obligations, and to collect reimbursements owed for deductible claims as provided for herein:

(a) Paid by the insurer prior to the commencement of delinquency proceedings;

(b) Paid by a guaranty association upon receipt by the receiver of notice from a guaranty association of reimbursable payments;

(c) Paid or allowed by the receiver; or

(d) Approved by the receiver for payment.

(2) If the insured does not make payment within the time specified in the large deductible policy, or within sixty (60) days after the date of billing if no time is specified, the receiver shall take all commercially reasonable actions to collect any reimbursements owed.

(3) Neither the insolvency of the insurer, nor the receiver’s or insurer’s inability to perform any of its obligations under the large deductible policy, shall be a defense to the insured’s reimbursement obligation under the large deductible policy.

(4) An allegation of improper handling or payment of a deductible claim by the insurer, the receiver and/or any guaranty association shall not be a defense to the insured’s reimbursement obligations under the large deductible policy.

(5) If the receiver declines to seek or is unsuccessful in obtaining reimbursement from the insured for a large deductible obligation and there is no available large deductible collateral, a guaranty association may, after notice to the receiver, seek to collect the reimbursement due from the insured on the same basis as the receiver, and with the same rights and remedies including without limitation the right to recover reasonable costs of collection from the insured. The guaranty association shall report any amounts so collected from each insured to the receiver. The receiver shall provide the guaranty association with available information needed to collect a reimbursement due from the insured. The receiver shall notify all other guaranty associations that have paid large deductible claims on behalf of the same insured. Amounts collected by a guaranty association pursuant to this paragraph shall be treated in accordance with subsection C. The expenses incurred by a guaranty association in pursuing reimbursement shall not be permitted as a claim in the delinquency proceeding at any priority, except as a agreed by the receiver at or before the time the expenses are incurred; however, a guaranty association may net the expenses incurred in collecting any reimbursement against that reimbursement.

E. Large Deductible Collateral

(1) Subject to the provisions of this subsection, the receiver shall utilize large deductible collateral, when available, to secure the insured’s obligation to fund or reimburse deductible claims or other secured obligations or other payment obligations. A guaranty association shall be entitled to large deductible collateral as provided for in this subsection to the extent needed to reimburse a guaranty association for the payment of a deductible claim. Any payments made to a guaranty association pursuant to this subsection...
shall not be treated as distributions of estate assets under [Insert cite to state’s liquidation priority distribution statute] or as early access payments under [Insert cite to state’s early access statute]. Such payments shall extinguish the receiver’s obligations to the guaranty association with respect to any claim or portion of a claim that has been reimbursed from large deductible collateral.

(2) All claims against the large deductible collateral shall be paid first to reimburse claim payments made by the insurer, the receiver, or the guaranty associations to reimburse their deductible claim payments on large deductible policies. After these obligations are satisfied, remaining claims shall be paid in the order received and no claim of the receiver, except in accordance with this subsection, shall supersede any other claim against the large deductible collateral.

(3) Notwithstanding any agreement between the insured and the insurer, the receiver shall draw down large deductible collateral to the extent necessary in the event that the insured fails to:

(a) Perform its funding or payment obligations under any large deductible policy;

(b) Pay deductible claim reimbursements within the time specified in the large deductible policy or within sixty (60) days after the date of the billing if no time is specified;

(c) Pay amounts due the estate for pre-liquidation obligations;

(d) Timely fund any other secured obligation; or

(e) Timely pay expenses.

(4) Excess large deductible collateral may be returned to the insured when deemed appropriate by the receiver after a periodic review of claims paid, outstanding case reserves, and allowance for adverse development and claims incurred but not reported as determined by the receiver.”

F. Administrative Fees

(1) The receiver is entitled to recover through billings to the insured or from large deductible collateral all reasonable expenses that the receiver incurred in fulfilling its collection obligations under this Guideline. All such deductions or charges shall be in addition to the insured’s obligation to reimburse claims and related expenses and shall not diminish the rights of claimants or guaranty associations.

(2) To the extent the receiver cannot collect such expenses pursuant to paragraph (1), the receiver is entitled to deduct from the large deductible collateral or from the deductible reimbursements reasonable and actual expenses incurred in connection with the collection of the large deductible collateral and deductible reimbursements.

(3) To the extent such amounts are not available from reimbursements or large deductible collateral, the receiver, or guaranty associations if provided under an agreement with the receiver under subsection D(5), shall have a claim against the estate as provided pursuant to [insert cite to state’s liquidation priority distribution statute].

Drafting Note: State policymakers should decide whether this provision, when enacted, should apply to existing liquidations.
Chapter 5 – Claims

V. PAYMENT OF APPROVED CLAIMS [HANDBOOK PAGE 291]

A. Priority of Distribution in Receiverships

5. Class 3 and 4 – Claims for Policy Benefits

a. Deductible and Limits

The policyholder’s claim is for the amount that the insurer should have paid. The insurer’s liability attaches after the deductible has been paid by the insured (“Non-Advancement Policies”). However, for some policies (e.g., some workers’ compensation policies), the insurer is required to pay the claim and seek the deductible from the insured (thereafter, known as “Large Deductible Policies”). It is common for insureds to post collateral with the insurer for deductible payments that may be made by the insurer, for which the insurer then seeks reimbursement from the insureds. With other policies, the insurer’s liability attaches after the deductible has been paid by the insured (“Non-Advancement Policies”). There are three available Model alternatives that provide for the disposition of large deductible policy recoveries between receivers and guaranty associations: IRMA Section 712, the Guideline for Administration of Large Deductible Policies in Receivership (Guideline XXXX) and, National Conference of Insurance Guaranty Funds (NCIGF) Model Large Deductible Act (NCIGF Model) provides for the disposition of Large Deductible Policy recoveries between receivers and guaranty associations. Individual state statutes (see, for example, 40 PA §221.42a) based on the NCIGF Model or Guideline XXXX may differ from IRMA Section 712 in certain respects."

IX. BEST PRACTICES FOR SUCCESSFUL BILLING AND COLLECTION OF LARGE DEDUCTIBLE PROGRAMS IN LIQUIDATION [HANDBOOK PAGES 307-314]

A. Overview of Large Deductible Workers’ Compensation

A large deductible workers’ compensation policy or program is a method of insuring workers’ compensation risk with the employer assuming some of that risk in a deductible of $100,000, $250,000, or even higher per claim (varies by state) and an insurer taking on the remaining risk. Large deductible programs for workers’ compensation can be complex arrangements and depend on the employer’s fulfillment of its obligation to reimburse all claims within the deductible. If the employer is unable to fulfill that obligation, the financial consequences to the employer could be catastrophic, and the employer’s inability to pay could have a cascading impact on the financial health of the insurer. In order to manage this risk successfully, insurers and state insurance regulators must have a clear understanding of the nature and size of the insurer’s exposure. Additionally, they must ensure that there are adequate measures in place to limit and mitigate the risk of the employer’s failure to pay and ensure injured workers will receive benefits in compliance with state law.

In states that permit professional employer organizations (PEOs), PEO’s often operate large deductible workers’ compensation programs that are backed by large deductible policies. A PEO is an outsourcing firm which provides services to small and medium sized businesses. The PEO enters into a contractual co-employment agreement with its clientele. Where permitted by state law, these services generally include workers’ compensation coverage obtained by the PEO in its own name. If the PEO assumes
most of the risk of that program by purchasing a large deductible policy, it recovers the estimated cost through the fees it charges its clients. If those fees are inadequate to cover the actual costs of the claims, or if the employer or the PEO fails to pay for any other reason to reimburse its share of the claims, the insurer incurs an unexpected liability, and the failure of the claim reimbursement mechanism has been a significant factor in a number of insurer insolvencies. For further information and guidance on high-deductible workers’ compensation insurance and PEOs, refer to the NAIC’s 2016 Workers’ Compensation Large Deductible Study.

B. Administration of Large Deductible Plans

The administration of large deductible plans is impacted by entry of an order of liquidation. In such cases, there are two options available regarding statutory authority concerning Large Deductible Worker’s Compensation, namely are three versions of applicable model legislation for states to consider. The most recent is Guideline XXXX. The three Model alternatives are as follows:

(a) Insurer Receivership Model Act (Model #555—IRMA) Section 712 Administration of Loss Reimbursement Policies, or;

(b) Guideline for Administration of Large Deductible Policies in Receivership (Guideline XXXX); or,

(c) National Conference of Insurance Guaranty Funds (NCIGF) Model Large Deductible Act (NCIGF Model).

Both Each of these three alternatives provide statutory guidance that articulates the respective rights and responsibilities of the various parties, which would greatly enhancing the ability to manage complex large deductible programs post-liquidation. Generally, both-all approaches provide for the collection of large deductible reimbursements from policyholders, clarify entitlement to reimbursement, and ensure that the claimants are paid. The provisions in each of the two options generally complement each other except for conflicting provisions regarding the issue of the ultimate ownership of and entitlement to the deductible recoveries and collateral as between the estate and the guaranty fund. The most significant difference is the approach taken to address the ultimate ownership of and entitlement to the deductible recoveries paid by the employer or drawn from collateral as between the estate and the guaranty fund. IRMA § 712 generally treats these funds as general assets of the estate, while Guideline XXXX and the NCIGF Model apply them directly to the payment of claims. It should be noted that the NCIGF Model has evolved over time based on additional experiences from insolvencies and the NCIGF continues to modify its Model as warranted; as a result, states that have based their laws on the NCIGF Model have done so with varying language.

C. Communication and Reporting Between the Liquidator, Policyholders and Guaranty Associations, Including Administration of Self-Funded Policyholder Programs

1. Claim payment, reserve, and reimbursement reporting.

The administration of large deductible programs requires strong communication and reporting programs between the Liquidator, guaranty associations, and policyholders. Under the both-all three Model Acts alternatives, the Liquidator is required to administer large deductible programs, and related collateral securing large deductible obligations, consistent with the policyholder’s policy provisions and large deductible agreement (“LDA”) except where those provisions conflict with the statute, as amended by the provisions of the Model Act. Both All three Model Acts alternatives make provision for two types of LDAs, those that permit self-funding/direct payment by the policyholder, and those that require initial payment by the insurer or guaranty association with reimbursement by the policyholder. Both arrangements necessitate the reporting of claim payments and outstanding claim reserves to the Liquidator for billing.
reimbursement, and establishing collateral need requirements. The Liquidator’s uniform data standard or UDS should be deployed as the reporting protocol for guaranty association claim payments and outstanding claim reserves. Policyholders that continue self-payment funding under their LDA will need to continue or establish a claim information reporting protocol with the Liquidator through the policyholder’s third-party claim administrator or through a proprietary claim information aggregator. Both All three Model Act alternatives require the Liquidator to form an independent opinion on outstanding claim reserves reported by policyholders and guaranty associations, including a safety factor, an allowance for adverse development, and incurred but not reported liability to ensure that collateral remains adequate throughout the administration of the program.

2. Agreements between Liquidator and guaranty associations.

An agreement between the Liquidator and the guaranty funds may be advisable. For though it is less important in states that have enacted one of the two Model Acts or one of the three Model alternatives or other comprehensive similar statutory framework for the Liquidator’s administration of large deductible programs, an agreement between the Liquidator and the guaranty associations is not necessary. The Models provide a comprehensive framework for administration of the program. For states that have not enacted either Model, an agreement between the Liquidator and guaranty associations may be advisable. The Model alternatives can serve as an outline for the issues that should be addressed in such an agreement in states that have not enacted pertinent legislation. Among other things, an agreement should address: whether large deductible recoveries are estate assets subject to the Liquidator’s distribution regime or directly pass through to the guaranty association on account of its prior claim payments; claim reporting protocols; frequency of collateral review and reimbursement activity; and, administration of collateral for under collateralized non-performing policyholder accounts.

3. Converting policyholder accounts from an incurred to paid basis

Generally, LDAs are on a paid basis with collateral for the reserves. The NCIGF Model Act provides for the conversion of a policyholder’s LDA at liquidation from an “incurred” to a “paid” basis. However, liquidators may encounter contractual arrangements where an LDA is constructed such that policyholders pay periodic large up-front payments that were accounted as premium based on losses incurred, as opposed to paid basis. After a certain number of years, the LDA provides policyholders with an opportunity to elect paid basis rather than incurred basis; which converts the incurred payments to collateral. The liquidator may wish to negotiate a conversion at the outset of liquidation. Conversion of a policyholder’s LDA at liquidation from an “incurred” to a “paid” basis is beneficial to policyholders in several ways. Most importantly, conversion at liquidation treats pre-liquidation incurred loss payments made by the policyholder to the insurer as collateral, and thus property of the policyholder pledged to the insurer and restricted to the satisfaction of that policyholder’s claims, rather than as a general asset of the liquidation estate. Conversion also offers flexibility to a policyholder as to the type of security provided to an insurer in satisfaction of the collateral requirement. Conversion affords policyholders the ability to utilize a letter of credit to secure an insurer for the outstanding portion of their loss, rather than payment of cash, since the outstanding bill after conversion is reflected in the Liquidator’s collateral need analysis, rather than an incurred loss billing.

The NCIGF Model Act recognizes these important policyholder rights and provides incentive to policyholders to cooperate with the Liquidator’s administration of large deductible programs and guaranty association reimbursement. The Liquidator should consider notifying large deductible policyholders of these important policyholder rights at the inception of a liquidation proceeding and offer policyholders the opportunity to elect to convert their large deductible programs from an incurred to paid basis, in accordance with the NCIGF Model Act, memorializing any elections with an endorsement that otherwise follows and requires the policyholder to adhere to the provisions of the applicable law: the NCIGF Model Act.

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4. **Large deductible billing by Liquidator.**

The Liquidator should establish a large deductible billing and collection program that bills policyholders on a periodic basis, e.g., quarterly, that meets Liquidator and policyholder expectations for claim payments made by the estate prior to liquidation and by guaranty associations after liquidation. The Liquidator’s invoice to policyholders should communicate a claim payment summary that includes detail such as the insurer or guaranty association’s check number, date of payment, payee, account year, and remaining large deductible limits. Large deductible programs that are self-funded paid directly by policyholders should also report their claim payments to the Liquidator on a similar periodic basis, so that the Liquidator can establish appropriate claim reserves, track the exhaustion of the policyholder’s deductible limits, report to reinsurers and collect reinsurance. Consideration should be given to using one of many proprietary billing and collection software programs to automate the large deductible billing and collection process. Large deductible recoveries that are subject to guaranty association reimbursements should be aggregated and distributed on a quarterly or other periodic basis that balances the Liquidator’s accounting requirements and the guaranty associations’ reimbursement needs.

5. **Annual collateral review by Liquidator.**

The NCIGF Model Act Guideline XXXX and the NCIGF Model, consistent with the typical LDA, require the Liquidator to perform an periodic annual collateral review for each policyholder account. Consistent with the typical LDA, this review should be performed annually, to ensure that the Liquidator holds adequate collateral to support a policyholder’s large deductible obligations and to release any excess collateral held back to the policyholder. This review should include a report to the policyholder on total incurred claims, claims paid, outstanding reserves, including an appropriate allowance for adverse development and claims incurred but not reported, any additional safety factor and total collateral need. The Liquidator’s collateral review should result in a report to the policyholder and an invoice for additional collateral need or a release and distribution of excess collateral. The Liquidator should consider whether any additional safety factor should be included for non-performing policyholder accounts. The NCIGF Model Act Guideline XXXX provides flexibility on the timing of the annual review, enabling the Liquidator to perform the annual review process throughout the calendar year so that all policyholder account reviews are not due at the same time.

**D. Administration Fees**

Section 712 (G) of IRMA provides:

The receiver is entitled to recover through billings to the insured or from large deductible policy collateral all reasonable expenses that the receiver or guaranty associations incur in fulfilling their responsibilities under this Section. All such deductions or charges shall be in addition to the insured’s obligation to reimburse claims and related expenses and shall not diminish the rights of claimants.

Further, Section 712(F) provides, in part:

The expenses incurred by a guaranty association in pursuing reimbursement shall not be permitted as a claim in the delinquency proceeding at any priority; however, a guaranty association may net the expenses incurred in collecting any reimbursement against that reimbursement.

Several states have adopted statutory provisions similar to the IRMA provisions regarding handling of large deductibles in an insolvency and provide for the Receiver to retain reasonable actual expenses incurred from the reimbursement to the guaranty association(s). Similarly, statutes may provide for the guaranty association to net expenses incurred in collecting a reimbursement.
Guideline XXXX subsection (F) provides:

(a) The receiver is entitled to recover through billings to the insured or from collateral all reasonable expenses that the receiver incurred in fulfilling its collection obligations under this section. All such deductions or charges shall be in addition to the insured’s obligation to reimburse claims and related expenses and shall not diminish the rights of claimants or guaranty associations.

(b) To the extent the receiver cannot collect such expenses pursuant to paragraph (1), the receiver is entitled to deduct from the collateral or from the deductible reimbursements reasonable and actual expenses incurred in connection with the collection of the collateral and deductible reimbursements.

(c) To the extent such amounts are not available from reimbursements or collateral, the receiver, or guaranty associations if provided under an agreement with the receiver under subsection D(5), shall have a claim against the estate as provided pursuant to [insert state priority of claim statute].

When there is no statutory guidance, receivers should include a provision for reimbursement of reasonable actual expenses in an agreement with the guaranty associations regarding the collection and allocation of large deductibles.

E. Policy and Collateral Definitions

It is important that state laws define large deductible workers’ compensation policies and large deductible collateral. Defining the treatment of such policies and associated collateral is imperative for developing polices and processes for administering the collection of assets. The following definition is taken from Guideline XXXX. The definitions in the other Model Acts are similar; however, the term used in IRMA is “loss reimbursement policy”.

For purposes of this handbook, “Large deductible policy” means any combination of one or more workers’ compensation policies and endorsements issued to an insured, and contracts or security agreements entered into between an insured and the insurer in which the insured has agreed with the insurer to:

(a) Pay directly the initial portion of any claim covered under the policy up to a specified dollar amount, which the insurer would otherwise be obligated to pay, or the expenses related to any claim; or

(b) Reimburse the insurer for its payment of any claim or related expenses under the policy up to the specified dollar amount of the deductible.

The term “large deductible policy” also includes policies which contain an aggregate limit on the insured’s liability for all deductible claims, in addition to a per claim deductible limit or both. The primary purpose and distinguishing characteristic of a large deductible policy is the shifting of a portion of the ultimate financial responsibility under the large deductible policy to pay claims from the insurer to the insured, even though the obligation to initially pay claims may remain with the insurer, and the insurer remains liable to claimants in the event the insured fails to fulfill its payment or reimbursement obligations.

The dollar amount of “large” will vary by state law. While many states might associate a minimum financial threshold, it is more important to consider the administration of the policy compared to a traditional policy. Deductible amounts can include claim-related payments by the insurer for medical and indemnity benefits, allocated loss adjustment expenses, such as medical case management expenses, legal defense fees, and independent medical exam expenses. It is critical that the policy specify the claim-related payments that are the responsibility of the policyholder and not be inside agreements or other agreements outside of the policy.
Collateral held by the insurer should be defined as amounts held as security for the insured’s obligations under the large deductible policy. The policy should specify acceptable financial instruments that can be held for the large deductible policy. Typical collateral requirements include: cash, letters of credit, surety bonds, or other liquid financial means held for the benefit of the insurer.

Guideline XXXX defines “large deductible collateral” to mean “any cash, letters of credit, surety bond, or any other form of security posted by the insured, or by a captive insurer or reinsurer, to secure the insured’s obligation under the large deductible policy to pay deductible claims or to reimburse the insurer for deductible claim payments. Collateral may also secure an insured’s obligation to reimburse or pay to the insurer as may be required for other secured obligations.”

F. Responsible Party for Collection of Large Deductible Reimbursements

It is critical to immediately establish the party responsible for billing and collecting large deductible payments or reimbursements. While some states might have specific statutory language that specifies the entity responsible, some statutes might be silent. In the case where the statutes do not specify responsibility, it is recommended that the receivers and guaranty associations enter into an agreement that allows for the most efficient administration of the large deductible collections.

Specific consideration should be given to large deductible policies that provide coverage in multiple states and have claimants subject to the jurisdiction of multiple guaranty funds. If feasible, the most efficient approach for such policies would likely be for the receiver to administer the deductible billing and collection process. Throughout the life of the estate, claimants continue to incur benefit payments and expenses and deductible collection efforts may last beyond the life of the estate. The party responsible for collections needs the ability to compromise and settle the future obligations.

The receiver should make provisions in its discharge motion and Court order, to the extent possible, regarding the transition of ongoing deductible collections to the guaranty association as well as the disposition of any collateral being held by the receiver.

G. Treatment of Collateral in Receivership

When collateral has been posted by or on behalf of a large deductible policyholder, what does the receivership estate actually own? The answer is generally found in the documents pledging the collateral to the insurer.

The Insurance Receivership Model Act, NAIC Model Law # 555 (“IRMA”) defines “property of the estate” to include “all right, title and interest in property ... includ[ing] choses in action, contract rights, and any other interest recognized under the laws of this state.” In states without an explicit statutory definition, the common-law definition is substantially similar.

This means that the insurer’s right to draw on the collateral automatically becomes an asset of the receivership estate, but the collateral itself is not an estate asset unless and until it is drawn. In the first instance, the conditions and procedures for drawing the collateral should be spelled out in the relevant contract documents (which could include third-party instruments such as letters of credit or surety bonds), but state law could provide additional rights, and will specify what the receiver may do when the documents are silent, incomplete, or missing.

1 IRMA § 104(V)(1).
2 For example, IRMA § 712(D) specifically provides that the relevant provisions of the policy are not controlling “where the loss reimbursement policy conflicts with this section.”
Possession and control over the collateral are distinct from ownership. The insurer could already be in possession of the collateral before the receivership, or the receiver might act to take possession by enforcing applicable contract rights or by negotiating an agreement. Nevertheless, this does not immediately give the receiver the right to use the collateral to pay claims. Commonly, the right to draw on collateral only attaches after the policyholder has defaulted or has consented to a draw, or, if the collateral is a letter of credit (LOC), after the issuer has given notice of nonrenewal (in which case the receiver must act promptly to call the LOC or obtain replacement collateral). There could also be the opportunity to negotiate an agreement under which the policyholder turns over the collateral and makes a lump-sum payment to commute any further reimbursement obligations, or the collateral might have been structured from the outset as a “working” loss fund from which the insurer was expected to pay claims in the ordinary course of business.

In any case, while it is essential for the receiver to preserve and exercise the right to access the collateral as needed, it is also essential to ensure that collateral is not dissipated to pay claims that the policyholder should be funding. Special consideration needs to be given in situations where the policyholder is at risk of being or becoming judgment-proof, or where rights to the collateral are shared with other creditors of the policyholder and prompt action is necessary to preserve the receiver’s priority.

When the guaranty association is paying the claims, it is generally entitled to receive the proceeds of any policyholder reimbursements, including draws on the collateral. Under laws substantially similar to IRMA, these payments are considered early access distributions (but without the necessity for court approval) which may be subject to subsequent clawback, while Guideline XXXX and laws substantially similar to the NCIGF Model treat them as the ultimate source of funding for the underlying claims, so that they belong unconditionally to the guaranty association. Either way, however, it is the receiver rather than the guaranty association that has the right and obligation to draw on the collateral, unless there is a formal written agreement assigning that right to the guaranty association.

Finally, there is always the hope that the policyholder’s reimbursement obligations will be oversecured or will become oversecured as claims are run off. In that case, any excess collateral will revert to the policyholder or the policyholder’s guarantor. State law might expressly provide a process for determining when excess collateral is being held by or on behalf of the receiver, or the ability to return collateral before the estate is closed might be part of the general powers of the receiver. However, because workers’ compensation is a long-tail exposure with significant risk of adverse reserve development, receivers must take great care not to make premature or excessive return distributions.

**H. Issues Raised by Net Worth Exclusions and Deductible Exclusions**

Unlike other lines of insurance, workers’ compensation insurance is generally exempt from the statutory caps on guaranty association coverage, so that the guaranty fund is usually obligated to pay workers’ compensation claims in full. However individual states may have adopted caps on guaranty association coverage. States have created this exception to honor their state’s promise that injured workers will be paid the full benefits to which they are entitled. Compare IRMA § 712(C)(3) with Guideline XXXX § (C) and NCIGF ModelA § 712(C). See Guideline XXXX § (E)(3) and NCIGF ModelA § 712(E)(3). See, e.g., Guideline XXXX § (E)(4) and NCIGF ModelA § 712(E)(5).

See Property and Casualty Insurance Guaranty Association Model Act, NAIC Model Law #540 (“PCGA Act”), § 8(A)(1)(a)(i). Almost all states have some provision requiring payment in full of workers’ compensation claims, but some states might have caps or other limitations on coverage.

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entitled. The general purpose of these exclusions is to avoid any obligation for the guaranty association to pay losses that can and should be borne by the policyholder. Net worth exclusions make guaranty association protection unavailable to policyholders with net worth above a specified threshold, while deductible exclusions expressly prohibit guaranty association coverage for amounts within a policy deductible.

Unless these exclusions are drafted and implemented carefully, there is a risk that they could result in delays in claims payments or even a complete loss of coverage. In some states, claimants might be protected by an uninsured employer fund, but that is not the purpose of those funds, so even if such a fund exists in your state, it should be a priority to ensure that however it is done, the estate, employer, or guaranty association will provide for payment in full of all benefits due under the state’s workers’ compensation laws. If this is not possible under current law, regulators should advocate for a change in the law. A variety of successful approaches are available; there is not a single one-size-fits-all solution that is best for every state.

1. Net Worth Exclusions:

The Property and Casualty Insurance Guaranty Association Model Act (§540) contains an optional section, with a variety of alternative provisions states can select, excluding coverage for high-net-worth insureds, whether they are individuals or business entities. The base version sets the threshold at $50 million, while one of the alternatives sets the threshold at $25 million. Many states have enacted some version of this clause or some comparable net worth exclusion.

The impact on workers’ compensation coverage depends on how the exclusion is structured. In states with provisions substantially similar to any of the three alternatives under the PC GA Act Model 540, coverage is excluded completely for first-party claims by high-net-worth insureds, but workers’ compensation claims against high-net-worth policyholders are administered by the guaranty association on a “pay-and-recover” basis: that is, the guaranty association has the obligation to pay the claim in the first instance, and the right to be reimbursed by the policyholder. Thus, claimants are fully protected, and for large deductible policies, this mirrors the structure of the policy for claims within the deductible. In states with guaranty association laws similar to Guideline XXXX or the NCIGF Model, this is the same reimbursement right the guaranty association would have in the absence of the exclusion as the insurer’s successor.

If the policyholder is cooperative, the guaranty association has the option of negotiating an agreement where the policyholder advances funding for claims within the deductible. However, if the policyholder is not cooperative, guaranty associations have expressed concern that the pay-and-recover framework is burdensome and gives the policyholder too much leverage to avoid or delay paying its obligations in full. If PC GA Act Model 540’s Alternative 2 is modified to treat workers’ compensation claims the same as other third-party claims, then the guaranty association has no obligation unless the formerly high-net-worth policyholder has become insolvent. Otherwise, the claimant’s only recourse is against the policyholder or the insured’s estate. As stated above, the injured worker should be protected by some means in these cases.

When a guaranty association net worth exclusion and a large deductible both come into play on the same claim, it is imperative that the receiver and guaranty association stay in close communication in order to avoid

8 Alternative 1 applies the pay-and-recover obligation to all third-party claims. Alternative 2 excludes most third-party claims as well as all first-party claims, but requires the guaranty association to pay workers’ compensation claims, statutory automobile insurance claims, and other claims for ongoing medical payments. Alternative 3 excludes only first-party claims and claims by out-of-state claimants that are subject to a net worth exclusion in the claimant’s home state; this alternative does not create any statutory right of recovery when the guaranty association is obligated to pay a third-party claim.

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any confusion regarding which entity is responsible for the collection. In both IRMA §712, Guideline XXXX and the NCIGF Model large deductible model statute, the guaranty fund is entitled to collect net worth reimbursements. Coordination of these collections with receiver efforts to collect on high deductible will do much to avoid duplication of billings and potential resulting collection delays.

2. Deductible Exclusions:

The PC GA ActModel 540 does not contain any explicit deductible exclusion. Instead, it simply provides that “In no event shall the association be obligated to pay a claimant an amount in excess of the obligation of the insolvent insurer under the policy or coverage from which the claim arises.”\(^\text{10}\) However, some states have enacted explicit language further clarifying that there is no guaranty association coverage for amounts within a policy’s deductible or self-insured retention.\(^\text{11}\) For example, Minnesota law excludes “any claims under a policy written by an insolvent insurer with a deductible or self-insured retention of $300,000 or more, nor that portion of a claim that is within an insured’s deductible or self-insured retention” from coverage by the property and casualty guaranty association.\(^\text{12}\) A Minnesota employer entered into an employee leasing arrangement with a PEO, which obtained a workers’ compensation policy with a $1 million deductible.\(^\text{13}\) Both the PEO and the insurer became insolvent, and the Minnesota Court of Appeals held that there was no guaranty association coverage for workers’ compensation claims against the client employer because of the statutory deductible exclusion.\(^\text{13}\) The court observed that the Legislature deliberately chose to protect the guaranty association from unlimited exposure, without mentioning that the Legislature also deliberately created an exception making the cap on coverage inapplicable to workers’ compensation claims (which strongly suggests that the statute in question, which is tied to the statutory $300,000 cap on coverage, was not written with workers’ compensation in mind).\(^\text{14}\) Likewise, the court took for granted that the statute’s undefined term “deductible” included the contract provision at issue in the case, even though the insurer had assumed the unconditional liability to pay all claims in full.\(^\text{13}\) The opinion did not consider the possibility that the Legislature’s intent was simply to clarify that the guaranty association has no obligation to drop down and pay claims from the first dollar if the insurer would have had no obligation to pay those claims.

Therefore, if states determine that there is a need to include express provisions addressing deductibles and self-insured retentions in their guaranty association laws, it is essential to avoid unintended consequences.\(^\text{15}\) In particular, the key terms should not be left undefined. For this reason, IRMA coined the term “loss reimbursement policy” in its section addressing these types of policies, to distinguish them from true deductibles, where the insurer has no obligation to pay anything except the portion of the loss that exceeds the deductible.\(^\text{15}\)

\(^{10}\) PC GA ActModel 540, § 8(A)(1)(b).—Compare LH GA ActLife and Health Insurance Guaranty Association Model Act (§520), § 3(B)(2)(a), expressly excluding from life and health guaranty association coverage “A portion of a policy or contract not guaranteed by the member insurer, or under which the risk is borne by the policy or contract owner.”

\(^{11}\) Currently, the only states with language specifically excluding claims within policy “deductibles” are Iowa, Louisiana, Minnesota, Missouri, and Nevada.\(^\text{12}\) Louisiana’s exclusion applies only to policies issued to group self-insurance funds, and Missouri’s does not apply to workers’ compensation claims.

\(^{12}\) Minn. Stat. § 60C.09(2)(4).


\(^{14}\) Minn. Stat. § 60C.09(3).

\(^{15}\) For example, if a consumer has an auto policy with a collision deductible of $1,000, and the repair costs $5,000, the insurer’s liability is limited to $4,000.\(^\text{15}\) “Self-insured retentions” (SIRs) in commercial excess policies are designed to function the same way on a larger scale. If a business is found liable (or a third-party claim is settled) for $500,000, and its liability policy has an SIR of $300,000, the insurer is never responsible for more than the remaining $200,000, even if the policyholder is bankrupt.
This is the crucial difference between a “large deductible” workers’ compensation policy and an excess policy. Although “large deductible” policies transfer a significant amount of risk back to the policyholder, they do not extinguish the insurer’s liability. That is why “large deductible” policies, in states that allow them, are accepted as a mechanism for satisfying the policyholder’s compulsory coverage obligations, while excess policies generally are not. Usually, excess workers’ compensation policies may only be issued to self-insurers that have been approved by the state. It is the approved self-insurance program, not the excess policy, that satisfies the employer’s compulsory coverage obligation, and the insurer has no liability for any portion of a claim that falls within the employer’s self-insured retention. Thus, despite the terminology that is commonly used, it is the excess policy, not the large deductible policy, that functions as a “deductible” in the traditional sense of the term.

It is worth noting, however, that commercial self-insured retention and large deductible policies can vary widely in policy terms and sometimes “side agreements” supplement the policies. Arrangements can contain aggregate limits, can vary on the obligation for defense costs and expenses and, in some cases permit the insured to “self-fund” its claims with an account in the possession of the TPA which is handling the claims. Because of these complexities, policy terms and any related endorsements and side agreements should be carefully reviewed. Whether such side agreements are legally enforceable requires a thorough case-by-case analysis in light of applicable state laws.

Chapter 6 – Guaranty Funds/Associations

II. PROPERTY AND CASUALTY GUARANTY FUNDS [HANDBOOK PAGES 332-333]

J. Large Deductible Policies

In March of 2016, the NAIC adopted a white paper titled Workers’ Compensation Large Deductible Study. The paper revisits and reconsiders issues raised in an earlier 2006 Workers’ Compensation Large Deductible Study. The 2016 study provides valuable information about how large deductible policies work and special issues that can arise with their use.

As used in workers’ compensation coverages, large deductible policies allow employers to retain a certain amount of claims risk, thereby reducing the cost of their workers’ compensation coverage. Typically, these policies are administered by the insurer or a third-party administrator paying claims within the deductible and obtaining reimbursement from the insured employer. In the receivership context, where guaranty funds pay claims within the deductible, there is an issue as to the handling of the insured employer’s reimbursement of payments within the deductible. That is, should the reimbursement be paid to the guaranty fund outside the receivership distribution scheme, or should the reimbursement be treated as an asset of the receivership estate subject to the claims of all creditors? At the time the NAIC white paper was adopted, four states, Pennsylvania, Illinois, California and Texas had provisions in place in their respective receivership liquidation statutes which provided that large deductible reimbursements should be paid directly to the guaranty fund outside the receivership distribution scheme.

Subsequently, Michigan and Utah have also amended their liquidation statutes to deal with the issue of large deductible reimbursements, both of which call for the assets to flow at 100% to the guaranty associations and not be treated as general assets of the estate.

16 In many states, a separate self-insurance guaranty fund protects claimants if a self-insured employer becomes insolvent. Those funds typically operate entirely under the state’s workers’ compensation laws, not the state’s insurance receivership or insurance guaranty fund laws.

18 MCL 500.8132a; UT 31A-27a-612(6)

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Legislation continues to be proposed on this issue and receivers should consult their state’s laws. (The New Jersey Workers’ Compensation Guaranty Fund act has also been amended to address this issue.) 19 Among the findings and recommendations contained in the NAIC white paper is: “Guaranty fund laws should be changed or clarified to assure that reimbursements by employers for claims paid by guaranty funds under deductible plans go to the guaranty fund instead of simply becoming assets of the estate.” As mentioned above, this can also be accomplished by amending receivership/liquidation statutes and this has been the most typical approach in state legislatures thus far. For examples of state codes, see Exhibit 6-4.

Where the insolvent insurer wrote large deductible policies, the receiver should be mindful of this issue and should consult with the affected guaranty associations as soon as possible. The receiver should also review those states’ guaranty fund statutes where the claims will be processed to determine whether claims within large deductibles are “covered claims” as defined in the appropriate guaranty fund act. Typically, claims under workers compensation policies will be covered. However, claims under policies for other lines of business may not be covered. The availability of guaranty fund coverage is to some extent dependent upon the specific language of the policy involved.

IRMA provides for a different treatment of large deductible collections. Under IRMA § 712, payments of such monies to the guaranty funds are treated as early access. See IRMA § 712. Under the Guideline for Administration of Large Deductible Policies in Receivership (Guideline XXXX) subsection B, “Unless otherwise agreed by the responsible guaranty association, all large deductible claims that are also “covered claims” as defined by the applicable guaranty association law, including those that may have been funded by an insured before liquidation, shall be turned over to the guaranty association for handling.” Refer to the Guideline subsection B for further discussion of deductible claims paid.

Chapter 9 – Legal Considerations

III. CLAIMS [HANDBOOK PAGES 545-546]

I. Large Deductibles

The purpose of these large deductible amounts is to reduce premiums for the insured while permitting the insured to meet statutory or regulatory insurance requirements. Large deductible policies are most common in the workers compensation area but may be found in other types of liability insurance.

Typically, a large deductible policy provides that the insurer will pay claims in full and then collect the deductible amount from the insured. Conversely, first party claims against an auto policy with a deductible are paid minus the amount of the deductible. To ensure that the deductible will be paid, most insurers that write this type of policy will require the insured to post some form of security. This can be a letter of credit, securities placed in a trust or escrow account for the benefit of the insurer, or some other form of a third-party commitment to reimburse for claims within the large deductible, such as a bond or large deductible reimbursement insurance policy. When the insurer pays a claim, depending on the agreement with the insured, the insurer may either submit a bill to the insured for the amount of the claim paid within the deductible or collect directly from the collateral.

As long as the insurer and the insured remain solvent, there are seldom any difficulties with large deductible arrangements. If the insured becomes insolvent and stops paying the deductible billings and if

19 N.J.S.A. 34:15-111.
the collateral held is insufficient to pay current and future billings, the insurer’s ability to collect the amounts due will be adversely affected.

If the insurer becomes insolvent and is placed into liquidation, the property and casualty and workers compensation guaranty associations will be triggered to begin paying claims. Just like the insurer, the guaranty association will be responsible for first dollar coverage of the claims. After the guaranty association pays the claim, the liquidator can then collect the amount of the claim within the deductible from the insured or the collateral. Historically, receivers and the guaranty associations disagreed on the disposition of these proceeds. Some receivers believe that the proceeds are claims based assets, similar to reinsurance recoverables, which should go into the general assets of the estates and be distributed pro rata to all claimants. The guaranty associations believe that, to the extent that the claim payment is within the deductible, they are not paying a claim on behalf of the insolvent insurer but rather on behalf of the insured and therefore, they should receive the reimbursement directly.

The first significant incidence of large deductible policies in a receivership occurred in the administration of the Reliance Insurance Co. Estate. During the early years of this receivership, the guaranty associations paid several hundred million dollars of claims within large deductible limits. After extensive unsuccessful negotiations between the Pennsylvania liquidator and the guaranty associations, a suit was filed in the Commonwealth Court of Pennsylvania asking the Court to determine entitlement to the large deductible recoveries. The suit was rendered moot by passage of Act 46 of 2004 by the Pennsylvania General Assembly. Act 46 provided that the liquidator would collect the deductible reimbursements and deliver them to the guaranty associations that had paid the claims. The Act allows the liquidator to retain part of the reimbursements to offset the expense of collection.

Subsequently, several other states including Texas, Illinois, Michigan, Utah and California have enacted legislation addressing this issue modeled after the National Conference of Insurance Guaranty Funds (NCIGF) Model Large Deductible Act (NCIGF Model). On [date], the NAIC adopted Guideline for Administration of Large Deductible Policies in Receivership (Guideline XXXX) that also addresses this issue. As this area is constantly evolving, a newly appointed Statutes vary by state, therefore, the receiver for a property and casualty large deductible insolvency should refer the applicable statutes of the domiciliary state and states where the claims will be processed.

- § 712 of IRMA requires the receiver to collect the deductible reimbursements as a general asset of the estate, but the amount collected is to be distributed to the guaranty associations that have paid claims within the deductible amount as early access subject to claw-back if the amount distributed ultimately exceeds the amount to which the receiving guaranty association would be entitled from the final estate distribution.

- Under Guideline XXXX subsection B, “Unless otherwise agreed by the responsible guaranty association, all large deductible claims that are also “covered claims” as defined by the applicable guaranty association law, including those that may have been funded by an insured before liquidation, shall be turned over to the guaranty association for handling.” Refer to the Guideline subsection B for further discussion of deductible claims paid.
The Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force met Oct. 29, 2020. The following Working Group members participated: Kevin Baldwin, Co-Chair (IL); Laura Lyon Slaymaker, Co-Chair (PA); Steve Uhrynowycz (AR); Jack Hom (CA); Jared Kosky (CT); Miriam Victorian (FL); Kim Cross (IA); Christopher Joyce (MA); Robert Wake (ME); James Gerber (MI); Shelley Forrest (MO); Justin Schrader (NE); James Kennedy (TX); and Melanie Anderson (WA). Also participating was: Donna Wilson (OK).

1. Discussed Comments Received on the Continuity of Essential Services in Receivership

Mr. Baldwin said the Working Group is charged with developing recommendations for remedies to ensure continuity of essential services and functions to an insurer in receivership that can create costly legal and operational challenges in receivership. These services are often provided by affiliated entities, including non-regulated entities, through intercompany agreements. As a result, one possible recommendation is to make necessary changes to the *Insurance Holding Company System Regulatory Act* (#440) and the *Insurance Holding Company System Model Regulation with Reporting Forms and Instructions* (#450). He said state insurance regulators and interested parties were asked to respond to several questions, including recommendations for specific revisions to Model #440 and Model #450 to address this issue, recommendations for any options other than Model #440 and Model #450, and any challenges or issues. Mr. Baldwin said seven comment letters were received from Maine; Michigan; Oklahoma; Pennsylvania; America’s Health Insurance Plans (AHIP); Arbor Strategies LLC; and a joint letter from the National Organization of Life and Health Guaranty Association (NOLHGA) and the National Conference of Insurance Guaranty Funds (NCIGF) (Attachment Five-A). In addition, NAIC staff provided a document summarizing recommendations from the comment letters (Attachment Five-B).

a. Model #440, Section 5(A) Standards and Management of an Insurer Within an Insurance Holding Company

Peter Gallanis (NOLHGA) said he is sympathetic to the Working Group’s goal to identify techniques and tools that allow for enhanced enforcement of service commitments made to insurers that go into receivership. There is concern in doing this by broadening the definition of “insurer.” NOLHGA believes that there is an ability to increase enforcement through the proposed amendments and to clarify that to the extent there are material commitments on the part of the service providers that are not regulated entities, the receivership court be explicitly granted and be recognized as having jurisdiction over those entities for purposes of enforcing their obligation under those agreements. This would diminish procedural receivership court obstacles.

Roger Schmelzer (NCIGF) said the NCIGF also supports shoring state laws to assist receivers in a smooth transition to liquidation. A priority for the NCIGF is that the availability of claims data is extremely critical to a property/casualty (P/C) insolvency. He said the NCIGF supports modifications to Model #440 and possibly also the *Insurer Receivership Model Act* (#555).

Chris Petersen (Arbor Strategies LLC) said Arbor Strategies LLC has concerns about including non-insurers in the definition of “insurer.” He said he supports the language proposed by the NOLHGA and the NCIGF as he believes it is a better approach and addresses the issue without the unintended consequences of a change in the definition of “insurer.”

Mr. Kennedy said he has experienced receiverships where an affiliate that went into bankruptcy held all the insurer’s data and information technology, and the affiliate had all of the employees that supported the insurer. He said agreements between insurers and the affiliates providing the services should include language that state that the records of the insurer held by the affiliate are the property of the insurer. If the affiliate files for bankruptcy, the bankruptcy court can point to the agreement to show the data and records are not property of the bankruptcy estate. He also suggested the agreement have a choice of law provision that states that in the event of a lawsuit over the agreement, the jurisdiction of the insurer is the jurisdiction where the lawsuit would be filed, which would be the same jurisdiction as the receivership.

Mr. Baldwin said the language proposed by the NOLHGA and the NCIGF will be included as part of the drafting process. Mr. Kennedy, Ms. Slaymaker and Mr. Wake agreed.

b. Model #450, Section 19 Transactions Subject to Prior Notice–Notice Filing (Form D)
Mr. Baldwin said several states and interested parties submitted recommendations to amend Model #450, Section 19 regarding transactions subject to prior notice.

Ms. Slaymaker said Pennsylvania has experienced situations where the data is comingled and must pay the affiliate to separate the data at the expense of the estate. She suggests the agreement specify the data is maintained in a segregated and usable format.

Robert Ridgeway (AHIP) said AHIP recommends an amendment to the Model #450 that would provide for indemnification of the insurer not only for gross negligence or willful misconduct, but also for actions by the affiliate that violate subsections (11), (12) or (13), addressing access to the books and records, termination of the agreement, and continuation of essential services respectively. AHIP also suggests making a referral to other authorities that have direct ability to affect the affiliate, which may require modifications to that official’s statutory authority. He said since Model #555 gives the receiver authority to act, Section 108.J and Section 601 are related and may need amending.

Ms. Wilson said Oklahoma has similar recommendations but also included a recommendation for a fine to be assessed so that there is a cost to the affiliate for not cooperating with the receiver. A requirement without a fine or penalty means the affiliate may not cooperate. Mr. Wake said in Maine, the insurance code provides for penalty options for any violation of the insurance code, unless otherwise stated. Mr. Kennedy said a fine may work for a nonaffiliated third-party administrator (TPA) or managing general agent (MGA) but may not be helpful for an affiliated entity. He said typically when the insurer enters receivership, the affiliate does not survive either. Mr. Wake said the fine should be imposed for compliance in the ordinary course of business before an insurer fails. Mr. Kennedy said financial examiners should be looking for these issues in the examination of a holding company system.

Mr. Gerber said Michigan has similar recommendations regarding the books and records being property of the insurer. He also recommends, as part of the contract, the entity providing the services to the insurer should be required to have a surety bond to perform so that the insurer can collect on the surety bond to fund the operations. He said he thinks a surety bond may be a better option than a fine or penalty because the insurer has the surety bond to collect on.

Mr. Baldwin said the recommendations received and discussed on Model #450, Section 19 will be included as part of the drafting process. He said NAIC staff and several Working Group members will work together to create a draft for discussion during a future meeting.

c. Model #440, Definition of “Insurer”

Mr. Baldwin said only four comments were received on amending the definition of “insurer” in Model #440 to encompass affiliated entities whose sole purpose is to provide services to the insurer. Three of the commentors were opposed. Mr. Petersen said the changes proposed to Model #440, Section 5(A) and Model #450, Section 19 eliminate the need for a change in the definition of “insurer.” Mr. Baldwin said amending the definition will not be part of the initial drafting process.

d. Other Recommendations

Mr. Baldwin said a few recommendations were suggested other than modifications to Model #440 and Model #450 that the Working Group can consider, including updates to Receiver’s Handbook for Insurance Company Insolvencies (Receiver’s Handbook) guidance once model revisions are adopted; communication and coordination with financial solvency units within the states’ insurance department; and licensing affiliated service providers as TPAs. Mr. Gerber said Michigan recommended that affiliates that provide claims benefit administration could be licensed as third-party administrators.

2. Adopted Revisions to the Receiver’s Handbook

Ms. Slaymaker said the Working Group received comment letters from Indiana, Michigan and the American Council of Life Insurers (ACLI) regarding proposed revisions to the Receiver’s Handbook regarding qualified financial contracts (QFCs) in chapter four (Attachment Five-C). Ms. Slaymaker said NAIC staff also proposed minor amendments to Chapter 4. She said no changes were proposed to Chapter 11 for use of bridge financial institutions.

Mr. Gerber made a motion, seconded by Mr. Kennedy, to adopt the revisions to Chapter 4 of the Receiver’s Handbook for QFCs, including proposed amendments from ACLI and NAIC staff (Attachment Six).
3. **Adopted its Aug. 25 Minutes**

The Working Group met Aug. 25 and took the following action: 1) exposed a request for comment on the continuity of essential services in receivership; and 2) exposed revisions to the Receiver’s Handbook for QFCs and bridge financial institutions.

Mr. Schrader made a motion, seconded by Mr. Gerber, to adopt the Working Group’s Aug. 25 minutes (Attachment Five-D). The motion passed unanimously.

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

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Although I agree that it is appropriate to develop amendments to Models 440 and 450, I do not believe they should take the form of deeming non-insurance affiliates to be “insurers.” Depending on how such an expansion of the definition of “insurer” is structured, this could give rise to a wide range of potential unintended and undesirable consequences. We can recognize their role as regulated entities within the business of insurance without changing what it means to be an insurer.

It seems likely that changes to the receivership laws might also be desirable, but not in a manner that might upset the current balance between state and federal jurisdiction by purporting to take these non-insurer service providers outside the reach of federal bankruptcy laws.
From: Gerber, Jim (DIFS)
Sent: Wednesday, August 26, 2020 11:12 AM
To: Koenigsman, Jane M.
Subject: Essential Services

Jane:


b. Recommendations for other options outside of Models 440& 450 to resolve this issue? I continue to be interested in the party providing the essential services having a surety bond in case of non-performance of the contract. I think we should require the parties providing the service to provide services for a minimum time after termination (90 days?) as a contract requirement. I think the books and records belonging to the insurer and providing them should be a contract requirement since many of these entities are not regulated through the insurance code. Rather than changing the definition of insurer to include these companies, maybe require these companies to be licensed as third party administrators which in most states put them under the rules and regulations and examination of the insurance department.

c. What issues/challenges have you faced in this area that the Working Group should consider when working on recommendations? If resolved, how did you resolve? What would have been needed to resolve more efficiently or effectively?

None.

d. Any hurdles or unintended consequences to be aware of?

None.

James Gerber, CFE
Director of Receiverships
Department of Insurance and Financial Services -State of Michigan
September 24, 2020

Kevin Baldwin, Co-Chair  
Laura Lyon Slaymaker, Co-Chair  
Receivership Law Working Group  
National Association of Insurance Commissioners  
230 McGee Street, Suite 800  
Kansas City, MO 64108  

RE: Request for Comment: Essential Services

Dear Co-Chairs Baldwin and Slaymaker:

Thank you for the opportunity to comment on the continuation of essential services provided through affiliated intercompany agreements during receivership of an insurance company.

The insurance holding company system can be a very effective structure by which to operate insurer(s) with the proviso of honest management practicing full disclosure under prudent corporate governance. In this environment, Models 440 and 450 provide ample oversight and the holding company system is beneficial.

Unfortunately, this is often not the case with troubled insurance companies. Instead, affiliate transactions are constructed to appear to be arms-length and to appear to be entered in good faith and compliant with the Insurance Holding Company System Regulatory Act. In reality, the agreements can be self-dealing, favoring the affiliate and siphon assets away from the insurer. Often these related parties have no business purpose other than to provide services to the insurer.

The result is a self-inflicted, often fatal, wound necessitating regulatory action to protect policyholders and other creditors.

During a rehabilitation, the affiliate may continue to be engaged and committed as they have an incentive for the rehabilitation plan to succeed. However, once a liquidation order is entered, the collaborative effort evaporates. Affiliates can become unwilling to continue support services and may withhold data essential to the receiver; whether to try to extort a payment from the receiver or avoid litigation for their negligence, malpractice, or fraud. The cessation of services requires the receiver to take immediate and sometimes drastic action.

Oklahoma has frequently encountered issues with affiliates. The insurer may not have direct staff. Their data may be housed and maintained by an affiliate. The facility, furniture and equipment may be owned by yet another affiliate. In such cases, the receiver has had to find an alternative including evaluating the affiliate staff and make offers of employment to essential employees, move operations to another location that can be secured or incur costs to retain other service providers.
This frustrates the receiver’s efforts for the timely notification to policyholders and transmission of claims data to the guaranty association and burdens the estate with additional expenses.

The potential solution identified in the Request for NAIC Model Law Development adopted by Executive Committee on August 13, 2020 to revise the definition of “insurer” to encompass affiliated entities whose sole purpose is to provide services to the insurer would be useful.

Other potential solutions could include:

1. **Insurance Holding Company System Model Regulation (#450):**
   - provide in Section 19(B)(11), that if the insurer is placed in receivership, services will continue to be provided without regard to pre-receivership unpaid fees;
   - provide in Section 19(B)(12), that upon entry of a Receivership Order, those employees essential to operations and the services associated therewith become the exclusive right of the insurer directly at the Receiver’s sole discretion and direction, subject to the supervising court’s approval.

2. The ability of the regulator to assess a substantial fine upon a related party that hinders the Receiver’s efforts may be another useful tool to incentivize collaborative efforts by related parties.

If you have any questions, please feel free to contact me at dwilson@okaro.org or (405)947-0022.

Sincerely,

Donna L. Wilson, CIR-ML
Assistant Receiver/Estate Manager
PENNSYLVANIA COMMENTS

From: McDonald, Crystal  
Sent: Wednesday, September 23, 2020 1:48 PM  
To: Koenigsman, Jane M.  
Subject: RLWG Request for Comments

Jane,

Below are Pennsylvania’s answers to the Receivership Law Working Group’s request for comment.

Model Act 440 & 450

(a) While looking into the recommendations for specific revisions to Models 440 & 450 provisions, Pennsylvania focused on Section 6 – Examination. Section 6 makes the insurer responsible for supplying the commissioner with all books and records reasonably necessary to comply with this section. The examination is conducted at no cost to the commissioner and if the commissioner requires the use of a consultant, the company bears the cost of that consultant. Section 6 B(2) even allows for the possibility of penalties or suspension or revocation of the insurers license.

In pre-receivership, the Commissioner has “teeth” to obtain what is needed and at no cost. Post-liquidation requires most of the same information with a shift in who pays for that information. The liquidator would like to see the “affiliate” that is holding the books and records held to the same standard as the company is pre-receivership. The liquidator would be able to demand the records and require receipt without depleting company assets.

In addition, Section 12- Receivership states that the commissioner may proceed as provided to take possessions of the property of the domestic insurer and to conduct its business. This provision provides for the receiver to take possession but lacks the “teeth” referenced above.

(b) The only recommendation we have for options outside of the Models is to continue to work closely with the solvency side of the Pennsylvania Insurance Department, namely the financial analysts and examiners. They have the background information necessary for the receiver to gain knowledge about the inner workings of the company. In addition, we lean heavily on our liquidation statute and our liquidation orders to show what authority we have with respect to records and data. These resources lack penalties or punishment options for failure of the “affiliate” to comply. Any ability to force compliance by statute with penalties for failure to comply would save the liquidator time and money as our only recourse now is payment from estate assets for the necessary data or litigation to enforce the order, which is usually more costly and very time consuming.

(c) The issues and challenges faced in various liquidations involve data. In many instances when there are holding companies involved, the data is commingled data and/or unusable. Attempts to retrieve the data are usually rebuffed. The liquidator is provided with a fee schedule, not always open to negotiation, of costs associated with the retrieval of the data and conversion to a useable format. The data is usually housed on servers with other entities and those servers...
are owned by the holding company, or an “affiliate” not the liquidated company. Payment of the fees is usually more cost effective than litigation, which is often our only other option.

What would have been needed to resolve more efficiently or effectively? A statutory requirement to segregate data and files held by different entities under the same holding company. The requirement to provide that data in a usable format would alleviate time delays and costs to the estates. Many of these companies use old, outdated or obscure systems that require a third party to convert. Any fees paid to separate or convert data come from the estate assets to the detriment of the claimants.

(d) One hurdle we need address is when the holding company has two, or more insurance companies under it and one is found to be insolvent while the others are not. Since all companies are housed under one roof and the solvent company(s) are still actively conducting business, the liquidator does not have freedom to collect the data and records required. As guests of the company we are housed in conference rooms with company guides. The liquidator has no control over which documents are being destroyed by personnel. The amount of time that goes by while attempting to figure out if all the data needed has been provided allows for corruption or destruction. In some estates the liquidator pays rent for a space to be allowed to remain on premises because the premises is wholly owned or leased by the holding company and not the insolvent entity.

Lastly, while most companies are moving away from paper records, we have encountered instances where an “affiliate” handled the business of two or more entities and the paper records pertaining to those entities have been co-mingled to the extent records could not be segregated. In order to properly obtain all books and records, every box would have to be reviewed in order to segregate those records properly. Review of every box because of the co-mingled records must done by holding company employees. This task must be paid for and there is not guarantee the liquidator receives every applicable file.

We do not feel as though we have the depth of knowledge necessary to answer any questions regarding QFCs and Bridge Financial Institutions at this time. We look forward to any educational opportunities provided to us that will help bolster our understanding.

If there is anything else you need please let me know.

Best,

Crystal McDonald

Crystal D.B. McDonald, Esquire | Project Director
Pennsylvania Insurance Department | Office of Liquidations, Rehabilitations and Special Funds
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Virtual Meetings Available Upon Request
September 24, 2020

Kevin Baldwin, Co-Chair
Laura Lyon Slaymaker, Co-Chair
Receivership Law (E) Working Group
National Association of Insurance Commissioners

Via e-mail to Jane Koenigsman: jkoenigsman@naic.org

Re: Request for Comment: Essential Services

Dear Ms. Slaymaker and Mr. Baldwin;

America’s Health Insurance Plans (AHIP) appreciates the opportunity to comment on the Receivership Law (EE) Working Group’s questions pertaining to Essential Services.

   a. Recommendations for specific revisions to the Models 440 & 450 provisions to address this issue?

We note with concern the potential solution expressed in the Request For Model Law Development, i.e., to revise the definition of “insurer” in state holding company laws to encompass affiliated entities whose sole purpose is to provide services to the insurer. This would not set a good precedent, and may instead result in a slippery slope for others who might want to further expand the definition of “insurer” in the future. As seen in other issues, actions which expand insurance regulators’ authority beyond their licensees are problematic and often impinge on the authority of other state officials, such as attorneys general. This alone can prove fatal to state legislation.

A preferable alternative would be to clarify Section 19.B(10) of the Insurance Holding Company System Model Regulation, #450, to provide for indemnification of the insurer not only for gross negligence or willful misconduct, but also for actions by the affiliate which violate subsections (11), (12) or (13), addressing access to the books and records, termination of the agreement, and continuation of essential services respectively.

Another option would be to include clear language in Model #450 so that in instances in which the receiver or commissioner has limited or no authority over the licensure of an entity, the receiver or commissioner has a statutorily authorized method by which to refer the issue to the
state authority which does, e.g., attorney general, health department, or secretary of state. If it is believed that those authorities might be unable or unwilling to act on such referrals, other targeted statutory language outside of insurance code provisions could be considered to clarify that such other officials not only have the authority to act on such referrals, but should do so.

b. Recommendations for other options outside of Models 440 & 450 to resolve this issue?

When feasible and appropriate under the complex circumstances of a particular case, receivers should be encouraged to take aggressive actions to seek indemnification under the revisions to Section 19.B(10) from uncooperative affiliates, not only to secure the conduct needed, but also to set strong precedents to serve as examples for other affiliates in other receiverships.

We would also suggest the Working Group do a careful review of the *Insurer Receivership Model Act*, #555, which is the foundational model and source of most of a receiver’s statutory authority to act. Some of the suggestions in this letter might be better placed or duplicated and reinforced there, for example in Section 108.J and Section 601.

Also, see last recommendation under a., above.

c. What issues/challenges have you faced in this area that the Working Group should consider when working on recommendations?

N/A.

d. Any hurdles or unintended consequences to be aware of?

Caution should be exercised in any actions taken to modify the Holding Company Act, the Regulation, or other state legislation. Just as our insurance regulatory system is designed to carefully protect insurance entities’ assets and solvency for policyholders’ protection, it is reasonable to anticipate some level of resistance to actions proposed to compel better cooperation from affiliates. This resistance might come not only from other state government authorities, but also from within a holding company itself stemming from concern that the insurer’s insolvency can become a contagion impacting other entities within the holding company structure.

Again, AHIP appreciates this opportunity to offer comments and responses to your questions, and we look forward to working with you to find the most productive way forward.

Sincerely,

Bob Ridgeway
Senior Government Relations Counsel
Bridgeway@AHIP.org
501-333-2621
Arbor Strategies, LLC

Chris Petersen
703-847-3610
cpetersen@arborstrategies.com

September 24, 2020

Mr. Kevin Baldwin
Illinois Department of Insurance
State of Illinois
320 W. Washington St., 4th Floor
Springfield, Illinois 62767-0001

Ms. Slaymaker
Pennsylvania Insurance Department
1326 Strawberry Square
Harrisburg, Pennsylvania 17120

Via email to Jane Koenigsman, NAIC

Dear Mr. Baldwin and Ms. Slaymaker:

I am writing on behalf of Anthem, Cigna, CVS Health/Aetna, and UnitedHealthcare. These companies thank you for the opportunity to provide comments regarding the continuation of essential services through affiliated intercompany agreements in the context of a receivership.

These companies have a track record of working to strengthen protections for consumers who find themselves in the position of being insured by an insolvent company. Most recently, when the NAIC amended the Guaranty Association Model Act in 2018, we worked with states to develop and implement a resolution system that provides consumers with far more protections that it previously had – in many cases, at a significant financial cost to these companies. Unfortunately, the solutions under consideration by this Working Group are overly broad and do not put consumers in a better position than they are today. We hope to work with this Working Group to explore other options to protect consumers and reduce costs to the insolvency system.

919 E. Main Street | Suite 1000 | Richmond, VA 23219
Arbor Strategies, LLC
September 24, 2020
Page 2

Their main concern with the current proposal is the significant change to the definition of “insurer” in Model #440, the Insurance Holding Company System Regulatory Act (the Holding Company Model) to include affiliates “whose sole purpose is to provide services to the insurer.” It appears that the Working Group supports the notion that these changes are needed to assist receivers in minimizing administrative costs.

We appreciate the Working Group’s desire to minimize administrative costs in receiverships – and we agree there are efficiencies to be realized. In addition, we agree that receivership law should allow receivers to hold non-insurers within the holding company system to the terms of their contracts, similarly to how contracts outside the holding company system are handled. However, we do not agree that changing the definition of “insurer” is the best way to meet the Working Group’s regulatory objectives. There are many other efficiencies that can be realized through the receivership process that do not fundamentally redefine what it means to be an “insurer.”

Existing NAIC receivership laws and the Holding Company Model currently contemplate that receivers, who are appointed by the Insurance Commissioner, can stand in the shoes of the insolvent company and enforce its contractual rights. If the contracting parties refuse, the receiver has the statutory ability to secure a court order.

In addition, the Insurance Holding Company System Model Act gives regulators the authority to approve affiliate transactions.\(^1\) Therefore, the domestic regulator of an insolvent company already has the opportunity to ensure that transactions between the insolvent insurer and the non-regulated affiliate will not adversely impact insurance consumers, and is fair and reasonable. Further, the Insurance Holding Company System Model Regulation includes additional protections by providing that affiliates of insolvent insurers may not automatically terminate\(^2\) their services under a contract; thereby, eliminating the concern that the insurers will no longer be able to perform the essential services promised in the policy.

Finally, changing the definition of insurer to include affiliates will lead to significant unintended consequences. While Insurance Commissioners have broad regulatory authority over “insurers,” they generally do not have regulatory authority over the operations of non-insurers within an insurance holding company system. By changing the definition of “insurer” in the context of receiverships, insurance regulators will have broad authority over the finances of entities not otherwise within their jurisdiction or expertise, while providing no additional benefit to consumers. This is a significant expansion of regulatory reach into companies that have no nexus to insurance other than to provide services to an insurer.

\(^1\) Insurance Holding Company System Regulatory Act §5A (2)(d).
\(^2\) Insurance Holding Company System Model Regulation §19B.(12).
Existing NAIC model laws and regulations already contain the authority this Working Group seeks to give to receivers. While the process to access this authority might not be as easy as the receiver would like it to be, i.e. in cases with a recalcitrant insurer or service provider, ease of administration is not the only principle the Working Group should consider. Before the Working Group fundamentally changes what it means to be an “insurer,” regulated entities should have a better understanding of the nature of the problem we are trying to fix and we hope that the Working Group is open to alternatives to ease some of the administrative burdens often found in the receivership process.

Sincerely yours,

Chris Petersen
Arbor Strategies, LLC

Cc: Jane Koenigsman
The insurance promise is backed not only by capital; it also is backed up by the operational ability to deliver on that promise to consumers. The guaranty system partners with receivers after an insurer’s failure to make good on that promise to the greatest extent possible, and therefore shares the goal of the Receivership Law (E) Working Group ("RLWG" or "Working Group"), expressed in its charge to "[r]eview and provide recommendations for remedies to ensure continuity of essential services and functions to an insurer in receivership by affiliated entities, including non-regulated entities.”

We believe this is important to ensure insurance benefits to policyholders in the event the insurer’s domestic regulator/receiver were to conclude it was necessary to assert jurisdiction over the service affiliates in the insurer's receivership proceedings. Without the service affiliates being answerable to the receivership proceeding, the receiver and the receivership court will have no meaningful opportunity to address administration of the insurance policies, employees, insurance policy files and records, office space from which to administer the insurance policies, insurance coverage, and management of investments supporting insurance policies, among other things.

In contributing to those recommendations, we start with a few principles:

- Continuity of essential services through affiliated intercompany agreements has a direct impact on consumers and on the ability of the guaranty system to help protect them when an insurer fails.
- The operational delivery of those essential services is an integral part of the business of insurance, and a group’s structure should not affect either the insurer’s obligation to deliver on that obligation, or the receiver and overseeing court’s authority to enforce it.
- The “essential services and functions” under that authority are operational; we do not read the charge to purport to affect capital across a group.
- Any effective remedy must support a receiver’s authority, rather than merely provide additional contractual assurances.

Issues and Challenges

The collective experience of resolution professionals confirms that continuity of services from affiliates is an integral part of the insurance contract relationship between the insurer and policyholder and is a necessary component to providing insurance coverage to policyholders in receivership.
To illustrate the importance of the continuity of essential services, we offer the following scenario drawn from our collective experience (further details and a hypothetical organizational chart are set forth on Exhibit A):

- A large holding company controls an insurer writing nationally across multiple lines.
- The insurance group under common control of the holding company includes non-insurer affiliates providing administrative/management services, investment management, and personnel to the insurer affiliates pursuant to services and employee sharing agreements (the "service affiliates"). The holding company and the service affiliates are incorporated in a different state than the insurer’s domicile (and different than any state issuing a certificate of authority). The insurer has no employees of its own and owns no real estate – instead, leasing personnel, space, and infrastructure from the service affiliates.
- The service affiliates also provide services to non-affiliated companies – for example, third party administrative services to hospitals or for closed blocks of policies to non-affiliated insurers that are domestic insurers in different states, and investment management services for non-affiliated financial entities.
- Claims data files managed by a third party administrator may be co-mingled with claims data of other insurers not in receivership and the administering entity may be reluctant to segregate the data in order to provide it to the receiver.
- The domestic regulator discovers significant financial irregularities and shortfalls at the insurance company and commences rehabilitation. The insurer faces liquidity challenges, with all liquid assets held by its investment management affiliate.
- The insurers and hospitals serviced by the service affiliates are concerned, and they are considering working with the holding company’s officers to explore bankruptcy proceedings for the holding company and the service affiliates.
- The service affiliates honor their contractual obligations to the insurer but make no other concessions to the receiver.
- The data handling entity is financially troubled as well – perhaps as a result of the insurance company liquidation - and is laying off staff at the same time as the transition.

**Recommendations for Revisions to Model Holding Company Act**

There are legal theories that support including non-insurer affiliate entities in a receivership, including substantive consolidation, alter ego, abstention, and others. The legal bar for using such theories is high, and they may not be applicable in many cases, though receivers have used those theories successfully in appropriate cases and could seek to pursue those theories without any statutory change. The proposed language below is not intended to replace or impede use of those theories, which would continue to be available to receivers depending on the applicable circumstances and legal standards.

Instead, the proposed changes are intended to ensure that the receivership court has jurisdiction over an affiliate so that critical services necessary to the insurance relationship can be addressed in a receivership. Confirming jurisdiction of the receivership court would help ensure that the receiver can provide insurance coverage and benefits under the circumstances while avoiding significant delays and expenses that could harm policyholders. It also would help avoid judicial inefficiencies and inconsistent rulings arising from multiple courts being presented with similar or identical issues.
The Model Insurance Holding Company System Regulatory Act ("MHCA") already regulates affiliate transactions. The Model Insurance Holding Company System Regulation ("MHCR") requires that, as regards affiliate "[a]greements for cost sharing services and management services" the agreement shall provide that (1) a receiver steps into the contractual rights of the failed insurer, (2) a receiver has access to the affiliate's books and records, (3) the affiliate has no automatic right to terminate based on receivership, and (4) the affiliate must maintain operational programs and infrastructure. MHCR Section 19(B). These contractual obligations are helpful in receivership administration and could be enhanced, but enforcement is the challenge, and that enforcement requires the jurisdictional reach of the receiver and receivership court. Likewise, those obligations are of limited value as the larger group fails, with the prospect of individual bankruptcy proceedings for the non-insurer affiliates.

The Illinois receivership code provides a valuable model for statutory language contributing to a receivership court's ability to protect the effective administration of estates where affiliates are providing essential services. Under provisions regarding the scope of the receivership article, the Code provides that covered entities include insurers, affiliates, and persons specified in the article, as well as:

... agents, managing general agents, brokers, premium finance companies, insurance holding companies, and all other non-risk bearing entities or persons engaged in any aspect of the business of insurance on behalf of an insurer against which a receivership proceeding has been or is being filed under this Article, including, but not limited to, entities or persons that provide management, administrative, accounting, data processing, marketing, underwriting, claims handling, or any other similar services to that insurer, whether or not those entities are licensed to engage in the business of insurance in Illinois, if the entity or person is an affiliate of that insurer.

215 ILCS 5/187(2) (emphasis added).

Similarly defining the scope of certain authority under the MHCA (or other appropriate statutory provision) would facilitate the regulation of insurance policies and directly benefit insurance policyholders and support the coverage provided under insurance policies in the event of an insurer's receivership. Such a provision also would help demonstrate a legislative intent to regulate those entities within the scope of state insurance regulation.

As a starting point, we suggest considering the addition of a new Section 5(A)(6) to the MHCA. The goal would be to establish that if an affiliate enters into a service agreement with an insurer, and a receiver is appointed for the insurer, the affiliate would be subject to the receivership proceedings and the authority of the receiver. Section 5 of the MHCA covers material affiliate transactions, requiring notice and regulatory non-disapproval for those transactions through the Form D process. A new Section 5(A)(6) could state:

Any affiliate that is party to an agreement required to be filed pursuant to Section 5(A)(2)(d) providing essential services to an insurer that are an integral part of the insurer’s insurance operations, the insurance contract relationship, or the insurer's ability to provide the related insurance coverage (including but not limited to management, administrative, accounting, data processing, marketing, underwriting, claims handling, investment, or any other similar services) shall be subject to the receivership proceedings and authority of any supervisor, rehabilitator, or liquidator for the insurer appointed pursuant to [receivership act] for the purpose of interpreting, enforcing, and overseeing the affiliate’s agreements, relationship, and dealings with the insurer. An
affiliate’s act of entering into an agreement subject to Section 5(A) is considered intentional conduct creating the necessary minimum contacts, and the receivership court shall have personal jurisdiction and exclusive subject matter jurisdiction related thereto. After notice and a hearing, the receivership court may limit application of the receivership proceedings to the affiliate upon finding that the services are not integral to the insurance contract relationship and the related insurance coverage.

Once the Working Group develops its recommendations, we also suggest drafting guidance through the Receiver’s Handbook for Insurance Company Insolvencies. Resolution stakeholders would benefit from advanced thinking on the strategies and tactics, lessons learned, and potential challenges around authority over affiliates.

****

We expect that additional constructive solutions will emerge from the Working Group’s deliberations, and we look forward to contributing to those discussions as the Working Group addresses the issue of continuity of essential services.

Contact Information

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President
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Exhibit A
Four States; Five Companies; Multiple Lines

Assume the following facts occurring in the following fictional states: East Dakota; New Holland; East Cali; and West Kansas.

Insurer Alphabet Insurer, Inc. (“Alpha”) is an insurance company domiciled in East Dakota licensed in 27 states, but not licensed in New Holland. Alpha’s insurance products include whole life, annuities, small value life products related to burial contracts, and long term care. Alpha is owned by Big Corporation (“Big”). Big is a privately held stock company organized in New Holland, and also owns the following: Admin Services, LLC (“Admin, LLC”), an LLC organized in East Cali; Burial Services, Inc. (“Burial, Inc.”), a West Kansas company that sells preneed and cemetery contracts; and Investment Management, Inc. (“Investments, Inc.”), also a stock company organized in New Holland.¹ A corporate organization chart reflects this hypothetical group:

¹ An affiliated Netherlands reinsurer could be added and/or an affiliated captive insurer domiciled in yet another state could be added. Those additions would increase the complexity by several factors and could be more realistic but for these purposes, those additional complexities are not included.
All the Big subsidiaries have a majority of the same officers and directors. Admin, LLC provides all the employment and administrative services for all the Big companies pursuant to a management services agreement. Alpha has no employees.

Investments, Inc. owns the home office and owns and/or manages all the investments for Alpha and the other Big companies. Alpha owns no real estate and pays rent for office space under the administrative services agreement.

Burial, Inc. arranges for trusts in order to protect the assets for the preneed contracts. All of the trust investments are in Alpha insurance products.

Some of the affiliates provide services to other non-affiliated companies. Admin, LLC has contracts to provide third party administrative services to two hospitals in East Cali and for three closed blocks of life policies to three non-affiliated insurers that are not domiciled in East Dakota. Investments, Inc. manages investments for other financial entities. All the data, processes, systems, hardware and software associated with the administration of insurance contracts is owned and in the possession of Admin, LLC. All the data, processes, systems, hardware and software associated with the administration of insurance contracts is owned and in the possession of Admin, LLC.

During the course of operations, all regulatory approvals have been secured, in particular regarding the management services agreement, all affiliated transactions, the state licensing requirements for TPAs, and the regulatory requirements applicable to preneed companies.

The East Dakota regulators discover significant financial irregularities and shortfalls and commence rehabilitation. Alpha’s liquidity is bad and most of the liquid assets are held by Investment, Inc.

The hospitals and insurers serviced by Admin, LLC are concerned and are working with Big’s officers to explore bankruptcy proceedings for Big, Admin, LLC and Investments, Inc. Several funeral homes in West Kansas are also concerned and are exploring state receivership options against Burial, Inc.

The affiliates honor their contractual obligations but make no other concessions with the Receiver.

In order to provide insurance benefits to policyholders, the East Dakota regulators are convinced they need the three affiliates, Admin, LLC, Investments, Inc., and Burial, Inc., to be subject to the jurisdiction and answerable to orders in Alpha’s receivership proceedings. Without that, the concern is that the Receiver and the Receivership Court will have no meaningful opportunity to address administration of the insurance policies, employees, insurance policy files and records, office space from which to administer the insurance policies, insurance coverage, and management of investments supporting insurance policies, among others.
Full comment letters on Continuation of Essential Services in Receivership are attached. The following contains only excerpts that identify recommendations, or in some cases where issues are described but no recommendation is identified.

# Recommendations for Model #440 Section 5(A) - Standards and Management of an Insurer Within an Insurance Holding Company System

<table>
<thead>
<tr>
<th>Commentor</th>
<th>Topic</th>
<th>Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>NOLHGA &amp; NCIGF</td>
<td>Include Non-insurer affiliates subject to receivership proceedings</td>
<td>As a starting point, we suggest considering the addition of a new Section 5(A)(6) to the MHCA. The goal would be to establish that if an affiliate enters into a service agreement with an insurer, and a receiver is appointed for the insurer, the affiliate would be subject to the receivership proceedings and the authority of the receiver. Section 5 of the MHCA covers material affiliate transactions, requiring notice and regulatory non-disapproval for those transactions through the Form D process. A new Section 5(A)(6) could state:</td>
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</table>

> Any affiliate that is party to an agreement required to be filed pursuant to Section 5(A)(2)(d) providing essential services to an insurer that are an integral part of the insurer’s insurance operations, the insurance contract relationship, or the insurer's ability to provide the related insurance coverage (including but not limited to management, administrative, accounting, data processing, marketing, underwriting, claims handling, investment, or any other similar services) shall be subject to the receivership proceedings and authority of any supervisor, rehabilitator, or liquidator for the insurer appointed pursuant to [receivership act] for the purpose of interpreting, enforcing, and overseeing the affiliate’s agreements, relationship, and dealings with the insurer. An affiliate’s act of entering into an agreement subject to Section 5(A) is considered intentional conduct creating the necessary minimum contacts, and the receivership court shall have personal jurisdiction and exclusive subject matter jurisdiction related thereto. After notice and a hearing, the receivership court may limit application of the receivership proceedings to the affiliate upon finding that the services are not integral to the insurance contract relationship and the related insurance coverage.
<table>
<thead>
<tr>
<th>Oklahoma</th>
<th>Affiliated Contract Requirements – Unpaid fees</th>
<th><em>Insurance Holding Company System Model Regulation (#450): provide in Section 19(B)(11), that if the insurer is placed in receivership, services will continue to be provided without regard to pre-receivership unpaid fees;</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Oklahoma</td>
<td>Affiliated Contract Requirements – Essential employees</td>
<td><em>Insurance Holding Company System Model Regulation (#450): provide in Section 19(B)(12), that upon entry of a Receivership Order, those employees essential to operations and the services associated therewith become the exclusive right of the insurer directly at the Receiver’s sole discretion and direction, subject to the supervising court’s approval.</em></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Fines – Access to data and records and lack of cooperation</td>
<td>The ability of the regulator to assess a substantial fine upon a related party that hinders the Receiver’s efforts may be another useful tool to incentivize collaborative efforts by related parties.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Affiliated Contract Requirements – Data and Records</td>
<td>In addition, we lean heavily on our liquidation statute and our liquidation orders to show what authority we have with respect to records and data. These resources lack penalties or punishment options for failure of the “affiliate” to comply. Any ability to force compliance by statute with penalties for failure to comply would save the liquidator time and money as our only recourse now is payment from estate assets for the necessary data or litigation to enforce the order, which is usually more costly and very time consuming.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Affiliated Contract Requirements – Commingled Data and Records</td>
<td>A statutory requirement to segregate data and files held by different entities under the same holding company. The requirement to provide that data in a usable format would alleviate time delays and costs to the estates. Many of these companies use old, outdated or obscure systems that require a third party to convert. Any fees paid to separate or convert data come from the estate assets to the detriment of the claimants.</td>
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</table>
Lastly, while most companies are moving away from paper records, we have encountered instances where an “affiliate” handled the business of two or more entities and the paper records pertaining to those entities have been co-mingled to the extent records could not be segregated. In order to properly obtain all books and records, every box would have to be reviewed in order to segregate those records properly. Review of every box because of the comingled records must be done by holding company employees. This task must be paid for and there is not guarantee the liquidator receives every applicable file.

<table>
<thead>
<tr>
<th>Pennsylvania</th>
<th>Affiliated Contract Requirements – Access to data and record when holding company has multiple insurers</th>
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<tr>
<td></td>
<td>One hurdle we need address is when the holding company has two, or more insurance companies under it and one is found to be insolvent while the others are not. Since all companies are housed under one roof and the solvent company(s) are still actively conducting business, the liquidator does not have freedom to collect the data and records required. As guests of the company we are housed in conference rooms with company guides. The liquidator has no control over which documents are being destroyed by personnel. The amount of time that goes by while attempting to figure out if all the data needed has been provided allows for corruption or destruction. In some estates the liquidator pays rent for a space to be allowed to remain on premises because the premises is wholly owned or leased by the holding company and not the insolvent entity.</td>
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<table>
<thead>
<tr>
<th>Pennsylvania</th>
<th>#440, Section 6 Examinations —Access to data and records and lack of cooperation</th>
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<tbody>
<tr>
<td></td>
<td>Section 6 – Examination. Section 6 makes the insurer responsible for supplying the commissioner with all books and records reasonably necessary to comply with this section. The examination is conducted at no cost to the commissioner and if the commissioner requires the use of a consultant, the company bears the cost of that consultant. Section 6 B(2) even allows for the possibility of penalties or suspension or revocation of the insurers license. In pre-receivership, the Commissioner has “teeth” to obtain what is needed and at no cost. Post-liquidation requires most of the same information with a shift in who pays for that information. The liquidator would like to see the “affiliate” that is holding the books and records held to the same standard as the company is pre-receivership. The liquidator would be able to demand the records and require receipt without depleting company assets.</td>
</tr>
<tr>
<td>Location</td>
<td>Affiliated Contract Requirements – Limit on Termination of Services</td>
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<td>---------------------------------------------------------------------</td>
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<tr>
<td>Michigan</td>
<td>Affiliated Contract Requirements – Access to Data and Records</td>
</tr>
<tr>
<td>AHIP</td>
<td>Affiliated Contract Requirements - #450, Section 19.B(10)</td>
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<tr>
<td>AHIP</td>
<td>Affiliated Contract Requirements - #450</td>
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</tbody>
</table>
clarify that such other officials not only have the authority to act on such referrals, but should do so.

| AHIP | Affiliated Contract Requirements - #450, Section 19.B(10) | When feasible and appropriate under the complex circumstances of a particular case, receivers should be encouraged to take aggressive actions to seek indemnification under the revisions to Section 19.B(10) from uncooperative affiliates, not only to secure the conduct needed, but also to set strong precedents to serve as examples for other affiliates in other receiverships. |

**Comments on Definition of “Insurer” in Holding Company Laws**

| ME, AHIP, Arbor Strategies LLC | Opposes a Revised Definition of Insurer | Opposes a revised definition of “insurer” in state holding company laws to encompass affiliated entities whose sole purpose is to provide services to the insurer. |

| Oklahoma | Supports a Revised Definition of Insurer | The potential solution identified in the Request for NAIC Model Law Development adopted by Executive Committee on August 13, 2020 to revise the definition of “insurer” to encompass affiliated entities whose sole purpose is to provide services to the insurer would be useful. |

**Recommendations Other than Holding Company Laws**

| Michigan | License service provider as a TPA | Rather than changing the definition of insurer to include these companies, maybe require these companies to be licensed as third-party administrators which in most states put them under the rules and regulations and examination of the insurance department. |

| Michigan | Surety Bond | I continue to be interested in the party providing the essential services having a surety bond in case of nonperformance of the contract. |

| AHIP | Update IRMA | We would also suggest the Working Group do a careful review of the Insurer Receivership Model Act, #555, which is the foundational model and source of most of a receiver’s statutory authority to act. Some of the suggestions in this letter might be better placed or duplicated and reinforced there, for example in Section 108.J and Section 601. |
Once the Working Group develops its recommendations, we also suggest drafting guidance through the Receiver’s Handbook for Insurance Company Insolvencies. Continue to work closely with the solvency side, namely the financial analysts and examiners. They have the background information necessary for the receiver to gain knowledge about the inner workings of the company.
To: RECEIVERSHIP WORKING GROUP

Re: REQUEST FOR COMMENTS: RECEIVERSHIP HANDBOOK FOR INSURANCE COMPANY INSOLVENCIES

From: Roy Eft, Chief Financial Examiner
Indiana Department of Insurance

September 24, 2020

Indiana has kept pace in adopting the provisions of the Insurance Holding Company System Regulatory Act and the Insurance Holding Company System Model Regulation with Reporting Forms and Instructions developed by the National Association of Insurance Commissioners (“NAIC”). We find Indiana’s Supervision, Rehabilitation, and Liquidation Laws to be more than adequate to handle financially troubled insurance companies, to protect its policyholders, shareholders, employees and Indiana citizens. Our Insurance Department enjoys a good relationship with Indiana’s insurance and business communities but we feel that relationship might be jeopardized by federal actions like Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

As pointed out in “State Implementation of Dodd-Frank Receivership” Dodd-Frank was adopted to deal with “an extraordinarily remote set of circumstances” stemming from the worst financial crisis since the Great Depression.1 Certainly Dodd-Frank exposed a disturbing number of weaknesses in the national and global financial markets and systems and, given the dire circumstances, the adoption of Dodd-Frank answered the emergency conditions faced by the global financial systems, such as banks, finance companies, insurance companies, multi-national companies and small town businesses. The shocking number of banks closed by the FDIC (465 between 2009 and 2012) evidenced the severity of the crisis in the US and the rest of the world.

No segment of the financial system was spared during the crisis, however, the tendency to lump the insurance industry in with banks, brokerage firms and other financial organizations is misplaced. A report issued by the Government Accountability Office (“GAO”) summarized the financial impact the crisis had on the insurance industry: “While some insurers experienced capital and liquidity pressures in 2008, their capital levels had recovered by the end of 2009. Net income also dropped but recovered somewhat in 2009. Effects on insurers’ investments, underwriting performance, and premium revenues were also limited,” says the GAO report titled, “Insurance Markets- Impact of and Regulatory Response to the 2007-2009 Financial Crisis.”

Through it all the Insurance laws and regulations in Indiana along with the expertise and professionalism of staff of the Department of Insurance were able to see our insurance industry through the 2008 financial crisis and enable it to attain the strength and stability of current times. Many of us feel that the independence and local expertise of the insurance regulators in the US contributed substantially to the insurance industry’s quick recovery from the financial crises. Given these thoughts, Indiana agrees that Dodd-Frank’s insurance receivership provisions were hastily drafted and left many questions unanswered. Unfortunately, Dodd-Frank has set the

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1 It remains to be seen whether the 2008 Financial Crisis will be surpassed by the 2020 Covid 19 Pandemic.
stage for the insurance industry to follow the banking industry into the regulatory mess national and state banking institutions confront.

We support strengthening state based insurance regulation and allowing each state regulator the independence successfully enjoyed for many years. To the extent that Dodd-Frank has placed state regulators in uncertain regulatory waters we agree it may be appropriate to shore up our regulatory independence. However, Indiana is not willing to surrender its regulatory independence to either the federal government or in multi-state regulatory groups that result in state regulators governing insurance institution in other states. We endorse cooperation among the states but are unwilling to sign on regulation by state groups of regulators with authority to dictate decisions on insurance regulation in Indiana.
MICHIGAN COMMENTS

From: Gerber, Jim (DIFS)
Sent: Wednesday, August 26, 2020 12:08 PM
To: Koenigsman, Jane M.
Subject: QFCs/Bridge

Chapter 4 - QFCs
a. Comments on proposed edits to Chapter 4 - None
b. Additional recommended edits to Chapter 4 - None
c. Recommendations for additional edits for:
- Guidance where insurers do not directly hold the QFC but rather are in contracts with a market-facing third party that holds the QFC.
- Guidance for pre-receivership advance planning for QFCs.

Under guidance if not already required by the NAIC each insurer having QFCs should be required to file an annual report with its state of domicile providing a written description of its hedging strategy including which risks are being hedged and why and how its current QFCs holdings fit with the strategy. There should be separate descriptions for those with counterparties and those with over the counter QFCs. Said annual report would remain confidential. Such annual report would be useful for receivers, examiners and internal analysts.

Chapter 11 – Bridge Financial Institutions
d. Consider the use of bridge financial institutions outside of the Dodd Frank Receivership of a systemically important financial institution (SIFI) in addressing QFCs in receivership. Do you feel there would be a use for bridge financial institution outside of a Dodd Frank Receivership?
   Yes, there are many large companies with QFCS that are do not meet the criteria of Dodd-Frank but are important based on number of policyholders. In Michigan alone these would include Jackson National Life, the largest writer of variable annuities. If so, is the guidance in Chapter 11 applicable and useful for receivers in that context? Yes.
e. Comments and any recommended edits on this topic within Chapter 11. No.

James Gerber, CFE
Director of Receiverships
Department of Insurance and Financial Services - State of Michigan
Wayne Mehlman
Senior Counsel

September 24, 2020

Kevin Baldwin, Co-Chair
Laura Lyon Slaymaker, Co-Chair
Receivership Law (E) Working Group
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108

RE: Guidance on Qualified Financial Contracts (QFCs) in the Receivers’ Handbook

Dear Co-Chairs Baldwin and Slaymaker:

The American Council of Life Insurers (“ACLI”)
appreciates this opportunity to provide comments
to the Receivership Law Working Group on guidance on qualified financial contracts (QFCs) that is
in Chapter 4 of the Receivers’ Handbook for Insurance Company Insolvencies.

General comment:

We suggest that Chapter 4 (Investigation and Asset Recovery) be patterned after Chapter 11 (State
Implementation of Dodd-Frank Receivership) which we believe is better organized and well-
footnoted.

Specific comments:

Page 1 – Header: The word “involving” is misspelled.

Page 1 - Second sentence in the first paragraph: The word “arises” is misspelled.

Page 2 – First paragraph in the Footnote: We suggest that the following language (in red) be added to
the last sentence:

States that permit the termination and netting of QFCs may want to consider adopting a similar stay
provision following the appointment of a receiver for certain insurers – generally larger entities that
may be significant in size but outside of being subject to a potential Dodd-Frank receivership.”

1 The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and
advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance
industry for financial protection and retirement security. ACLI’s member companies are dedicated to protecting
consumers’ financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance,
disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI’s 280
member companies represent 94 percent of industry assets in the United States. Learn more at www.acli.com.
Page 3 - Last sentence of the last bullet in Section C: We do not believe this sentence is necessary since initial margin requirements for all derivatives transactions not subject to clearing are being phased in to effectively require that all counterparties facing swap dealers post initial margins by September 2021.

Page 3 - Third bullet in Section D: We do not believe that this bullet is necessary since entering into a receivership constitutes an “event of default” by its terms.

Page 4 - After the last bullet in Section D: We suggest that another bullet be added (in red) as follows:

Consider how ongoing hedging of obligations and assets can be accomplished during and following a receivership.

Thanks again for this opportunity to comment. If you have any questions, feel free to contact me at waynemehlman@acli.com or 202-624-2135.

Sincerely,

Wayne A. Mehlman
Senior Counsel, Insurance Regulation
The Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force met via conference call Aug. 25, 2020. The following Working Group members participated: Kevin Baldwin, Co-Chair (IL); Laura Lyon Slaymaker, Co-Chair (PA); Steve Uhrynswycz (AR); Jack Hom (CA); Rolf Kaumann (CO); Jared Kosky (CT); Toma Wilkerson (FL); Christopher Joyce (MA); Robert Wake (ME); James Gerber (MI); Shelley Forrest (MO); Justin Schrader (NE); and James Kennedy (TX).

1. Discussed its 2020 Charges

Mr. Baldwin summarized the Working Group’s 2020 charges. He said any topics related to receivership and guaranty fund laws can be brought to this Working Group at any time.

2. Exposed a Request for Comment on the Continuity of Essential Services in Receivership

Mr. Baldwin said the Receivership and Insolvency (E) Task Force completed its Macroprudential Initiative (MPI) review in 2019, and earlier this year, it began discussions on the need to make the necessary model law changes to resolve the issue of the continuity of essential services through affiliated intercompany agreements that arise during the receivership of an insurance company. The Request for NAIC Model Law Development to consider amendments to the Insurance Holding Company System Regulatory Act (#440) and the Insurance Holding Company System Model Regulation with Reporting Forms and Instructions (#450) specific to this issue was adopted by the Executive (EX) Committee on Aug. 13. The Working Group should complete its work on this charge by the 2021 Fall National Meeting.

Mr. Baldwin said receivers have faced several challenges regarding the issue of the continuity of essential services, including:

- Ensuring that the services that the affiliate performs continue to be performed in receivership.
- In some cases, the affiliate may be operating the insurer(s) in the group.
- The affiliate is generally not subject to the receivership order.
- The affiliate may have physical custody of the books and records, which may create information technology (IT) issues.
- The affiliate that holds the records may charge fees to the estate to pay for the insurer’s records beyond the cost to transfer the records.
- Data is commingled, and there are additional costs to separate the data.
- Insurers and affiliates in multi-state groups involve laws and authorities in multiple jurisdictions.
- Multiple insurers in the group may share the same affiliate’s services.

Mr. Baldwin said some possible recommendations include the following, noting that some options may create issues that need to be considered further:

- Strengthening the language in the provisions within Model #440 and Model #450 regarding affiliated agreements to: 1) reinforce the requirements that the affiliate does not have an automatic right to terminate the agreement upon the insurer entering receivership; 2) require that intercompany agreements mandate that any records of the insurer held by the affiliate are property of the insurer; and 3) require that records be made immediately available and turned over immediately upon request.
- Consider how affiliated entities whose sole purpose is to operate and provide services to the insurer in the holding company group could be defined in Model #440, Model #450, and the Insurer Receivership Model Act (#555) to be considered an insurer for the purposes of a receivership.
- Include a provision that the affiliate providing services to insurers in the holding company group agree to be subject to the jurisdiction of the receivership court if the insurer goes into receivership.
- Issue injunctions preventing the affiliate from ceasing services to the insurer in receivership until the receiver or the receivership court terminates and releases it from the contract.
- Require a surety bond of the affiliate so that if it is unable to continue to provide services to the insurer in receivership, the receiver can collect on the bond to find another service provider.
Mr. Baldwin recommended gathering ideas from both state insurance regulators and interested parties based on experiences handling this issue in receivership. He requested that the responses to a request for comment be specific, including such things as: 1) specific proposed revisions to Model #440 and Model #450 provisions; 2) other options to resolve this issue outside of Model #440 and Model #450; 3) issues or challenges faced by receivers; 4) how those issues or challenges were resolved; and 5) what would have made the resolution more efficient or effective. He said the request for comment will be released for a 30-day public comment period ending Sept. 24.

Barbara F. Cox (National Conference of Insurance Guaranty Funds—NCIGF) said the topic of cyber insurance in its white paper, Insurance Resolution: Preparing for Cyber Claims, which was presented at the Receivership and Insolvency (E) Task Force meeting on Aug. 7, is a topic to consider when drafting begins.

3. **Exposed Revisions to the Receiver's Handbook for Insurance Company Insolvencies**

Ms. Slaymaker said two of the Working Group’s charges are to look at the current guidance for qualified financial contracts (QFCs) and develop any additional guidance for the Receiver’s Handbook for Insurance Company Insolvencies (Handbook), if necessary. She said the current Handbook guidance includes QFCs in Chapter 4. She said NAIC staff have edited Chapter 4 to include the drafting note that was adopted by the NAIC in 2019 into the Guideline for Stay on Termination of Netting Agreements and Qualified Financial Contracts (#1556), and they updated the statutory reporting references.

Ms. Slaymaker said the Working Group charges include consideration of how bridge financial institutions could be used in an advance planning or pre-receivership process. There is some guidance on the use of bridges in a federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) receivership of a systemically important financial institution (SIFI) in Chapter 11 of the Handbook.

Mr. Kennedy said the Handbook guidance may need to address that many insurers may not hold the QFCs directly but instead have contracts with third-party market-facing entities that hold the QFCs.

Ms. Slaymaker said both chapters would be exposed for review and comment. She requested that a review of the section on QFCs in Chapter 4 include a review of the revisions drafted by NAIC staff, a review of the current guidance, and comments on any recommendations for further revisions. For Chapter 11, while no recommended revisions are proposed, she requested consideration and comments on the use of bridge financial institutions outside of a SIFI receivership under the Dodd-Frank Act and whether the existing guidance in Chapter 11 would be applicable to a non-SIFI receivership and useful for receivers in that context. She said the exposure of the two chapters and the request for comment will be released for a 30-day public comment period ending Sept. 24.

4. **Discussed Other Matters**

Ms. Cox said the NCIGF submitted language that it developed regarding restructuring, such as insurance business transfers and company divisions, to the Restructuring Mechanisms (E) Working Group for consideration. She suggested flagging this topic as a possible future topic for discussion by this Working Group.

Having no further business, the Receivership Law (E) Working Group adjourned.
VII. RECEIVERSHIP INVOLVING QUALIFIED FINANCIAL CONTRACTS

Insurer Receivership Model Act (#555, commonly known as IRMA) Section 711 – Qualified Financial Contracts (or Similar Provision) addresses stays termination or transfers of netting agreements or qualified financial contracts (QFCs).

When financial markets are uncertain, it causes heightened scrutiny in the capital markets and among financial institutions about identifying, managing and limiting risk, as well as the need for adequate capitalization and for understanding the interdependency of the different financial sectors. One source of risk to financial market participants that arises due to the lack of certainty in the financial markets is the treatment of qualified financial contracts (QFC) and netting agreements in the event of the insolvency of state regulated insurers.

A. Definition of Qualified Financial Contract

IRMA defines a QFC as “any commodity contract, forward contract, repurchase agreement, securities contract, swap agreement and any similar agreement that the commissioner determines by regulation, resolution or order, to be a qualified financial contract for purposes of this Act.”

- Commodity contract is defined by reference to the Commodity Exchange Act (7 U.S.C. § 1) (Commodity Act) and is a contract for the purchase or sale of a commodity for future delivery on or subject to the rules of a board of trade or contract market subject to the Commodity Act; an agreement that is subject to regulation under Section 19 of the Commodity Act commonly known as a margin account, margin contract, leverage account or leverage contract; an agreement or transaction subject to regulation under Section 4(b) of the Commodity Act that is commonly known as a commodity option; any combination of these agreements or transactions and any option to enter into these agreements or transactions.

- Forward Contract, Repurchase Agreement, Securities Contract and Swap Agreement shall have the meanings set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1281(e)(8)(D), as amended from time to time.

It should be noted that an insurance contract is not a derivative or a qualified financial contract because an insurance contract includes the indemnification against loss. Therefore, reinsurance agreements would not be considered a swap agreement.

B. Insolvency Treatment of QFCs under the IRMA Section 711 Provision

IRMA Section 711 provides a safe harbor for QFC counterparties of a domestic insurer. The provision largely tracks similar provisions in the Federal Bankruptcy Code and the Federal Deposit Insurance Act (FDIA), as well as laws of other foreign jurisdictions. These safe harbor provisions for QFCs were adopted to avoid disruptions resulting from judicial intervention that can cause unintended chain reactions and significant systemic impact. Section 711 applies in both Rehabilitation and Liquidation proceedings.

Section 711 states that a right to terminate or liquidate or accelerate a closeout under a netting agreement or a QFC with an insurer either due to the insolvency, financial condition or default of the insurer or the
commencement of a formal delinquency proceeding is not prevented by any other provision of IRMA. Section 711 allows a counterparty to net different contracts and realize on collateral without a stay.1

Section 711 addresses transfer of a netting agreement or QFC of an insurer to another party. In a transfer, the receiver has to transfer all of the netting agreement or QFC and all of the property and credit enhancements securing claims under the agreement or QFC. This prevents “cherry picking” and requires the transfer of everything, i.e., all of both the “in-the-money” and “out-of-the-money” positions.

C. Considerations of QFCs held by an Insurer Receivership:

- Although the Investments of Insurers Model Act (either Defined Limits or Defined Standards) (#280) does not include limits on the amount of collateral an insurer is allowed to post, some states have restrictions on derivatives use, including quantitative limits, and limits on the pledging of collateral, based on type and credit quality. The receiver may also need to determine if a derivative use plan, if required, is in effect and if it dictates any collateral requirements.

- If the ability to net exists and there is no stay requirement, it is important that the regulator understand the QFC portfolio before the insurer’s failure, either through a recent or ongoing financial examination or through an assessment made during regulatory supervision that precedes a receivership order, while recognizing that the market value of the derivatives positions can vary

4-1 Except where the state has adopted Guideline for Stay on Termination of Netting Agreements and Qualified Financial Contracts (#1556).

Guideline #1556 Drafting Note: State receivership and insolvency laws may permit a contractual right to cause the termination, liquidation, acceleration or close-out obligations with respect to any netting agreement or qualified financial contract (QFC) with an insurer because of the insolvency, financial condition or default of the insurer, or the commencement of a formal delinquency proceeding. These laws are based upon similar provisions contained in the federal bankruptcy code and the Federal Deposit Insurance Act (FDIA). The FDIA also provides for a twenty-four-hour stay to allow for the transfer of QFCs by the receiver to another entity rather than permitting the immediate termination and netting of the QFC. 12 U.S.C. § 1821(e)(9)-(12). States that permit the termination and netting of QFCs may want to consider adopting a similar stay provision following the appointment of a receiver for certain insurers – generally larger entities that may be significant in size but outside of being subject to a potential Dodd-Frank receivership.

States that consider the enactment of a stay should take into account the relevant federal rules. In 2017 the Board of Governors of the Federal Reserve System (the Federal Reserve), the Federal Deposit Insurance Corporation (the FDIC) and the Office of the Comptroller of the Currency (the OCC) each adopted final rules and accompanying interpretive guidance (Final Rules) setting forth limitations to be placed on parties to certain financial contracts exercising insolvency-related default rights against their counterparties that have been designated as a global systemically important banking organization (GSIB). The Final Rules include the definition of master netting agreement that allows netting even though termination of the transaction in the event of an insolvency may be subject to a “stay” under several defined resolution regimes including Title II of Dodd Frank, the FDIA, as well as comparable foreign resolution regimes. Notwithstanding NAIC’s request for inclusion, stays under the state insurance receivership regime (State Receivership Stays) were not included as an exemption within the definition. Therefore, unless the Final Rules are amended to recognize State Receivership Stays, if a state implements a stay as contemplated by the Guideline, insurers would find themselves disadvantaged, potentially resulting in additional costs and/or collateral requirements given the regulatory treatment for contracts that do not meet requirements for QFCs. Therefore, if a state is considering implementation of this Guideline, consideration should be given to whether the rules of the Federal Reserve, FDIC and OCC have been amended to recognize State Receivership Stays. For example, a state could adopt a stay that would be effective if and when the Final Rules recognize State Receivership Stays.

substantially over relatively short periods of time. The receiver also needs to have a good understanding of the relationship of the QFC contracts to the rest of the insurer’s balance sheet. Because most derivatives transactions are used for hedging purposes, if those contracts are terminated as a result of netting, the assets and liabilities will no longer be hedged.

- The receiver should be aware that there may be areas of contention and disagreement by parties in the netting, termination and closeout of QFC agreements—for example, disagreement over the valuation or in the resolution of transactions where the parties wait too long to terminate the contract.

- Some counterparties may have been accepting less liquid assets such as private placements based on the relative financial strength of the insurance company; typically, collateral for a QFC will be cash and U.S. Treasury bonds. The moving of over-the-counter (OTC) derivatives to centralized clearinghouses will gradually eliminate less liquid assets as well as assets with more volatile market values being used as collateral. It is also worth noting that it is possible to have non-admitted assets eligible as collateral. Where assets exceed concentration limits, the excess can be collateral without being an admitted asset.

- The impact of central clearinghouses (CCH) will be to standardize documentation and collateral requirements. The standard rules for collateral will be more restrictive and be applicable to all parties. These rules will generally allow for only high-quality assets that are more liquid and are expected to have less market value volatility. In addition, all parties will be subject to the same rules for both Initial Margin and Variation Margin. In the past, it was not uncommon for counterparties to not require Initial Margin from their higher quality clients. This will not be the case going forward. Even for derivatives transactions that do not go through central clearing, bank counterparties are facing more stringent capital requirements themselves if their exposures are not properly collateralized.

D. Recommended Procedures for State Insurance Regulators/Receivers:

To the extent possible, in a pre-receivership situation:

- To the extent a company has a small number of large QFC contracts that are important to the overall investment portfolio and operations of the insurer, in pre-receivership and in rehabilitation, the state regulator or receiver should reach out to the counterparty to determine if the counterparty is agreeable to continuing the contract and performing on the contract when the insurer enters receivership.

- Consider practical strategies for successfully managing the netting agreements and QFCs, not only at the inception of the receivership but ongoing during the receivership process.

- The receiver should evaluate the netting agreements and QFCs to gaining an understanding of the triggers for an event of default within the contract (e.g., filing of action, judicial finding, rehabilitation vs. liquidation, or fact of insolvency, etc.).

- Evaluate if the insurer is engaged in netting agreements and QFCs through a market facing affiliate or non-affiliate, whereby the insurer’s contract is with that market facing entity and the market facing entity has the contracts with the counterparties.
• Consider the applicability of any federal master netting agreement rules and regulations to the insurer’s netting agreements and QFCs. (see the references to applicable federal rules in the preceding footnote in this Chapter 2).

• Evaluate the need to consider the use of a bridge financial institution to transfer and manage the netting agreements and QFCs in a pre-receivership proceeding (i.e., administrative supervision). See Chapter 11–State Implementation of Dodd-Frank Receivership of this Handbook for guidance on the use of bridge financial institutions for a Dodd-Frank receivership.

• Carefully review the most recent financial statement filings and interim company records to identify the netting agreements and QFCs active at the time of receivership; understand the terms of the agreements and the valuation of the QFCs; and identify the securities held as collateral and counterparties to the contract. See Appendix for a Summary of Statutory Annual Statement Reporting of QFCs or the most current Statutory Annual Financial Statement and Instructions.

• Consider how ongoing hedging of obligations and assets can be accomplished during and following a receivership.

Once a rehabilitation or liquidation order has been entered:

• Provide notice of the receivership to counterparties, as appropriate under state law.

• Consider implementing a 24-hour stay on termination of netting agreements and QFCs, if allowed under state law. (See Guideline for Stay on Termination of Netting Agreements and Qualified Financial Contracts [#1556] and accompanying drafting note in the preceding footnote in this Chapter3.

• It is important for the receiver to keep track of which transactions have been terminated validly and which have not so that appropriate action can be taken when the validity of the termination is contested.

• Once the set off has occurred, if the receiver disagrees with the counterparties’ valuation of either the collateral or the QFC transaction, the receiver would take the next steps to try to negotiate the correct amount and if unsuccessful pursue legal action.

• Consider engaging an investment expert to assist in the auditing, investigating and management of the netting agreements and QFCs within the investment portfolio. Refer to Chapter 3.VI of this Handbook for more guidance on auditing and investigating the investments of the receivership estate

E. Exhibit — Qualified Financial Contract Annual Statement Reporting (As of 2020)

The subsequent information provides a general description of how and where qualified financial contracts (QFCs) are reported within the Accounting Practices and Procedures Manual and the statutory financial statements.

Derivative Instruments—AP&P Disclosure

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2 See footnote 1 of this Chapter.
3 See footnote 1 of this Chapter.
• Statement of Statutory Accounting Principles (SSAP) No. 27—Off Balance Sheet and Credit Risk Disclosure of Information about Financial Instruments with Off-Balance Sheet Risk and Financial Instruments with Concentrations of Credit Risk
• SSAP No. 86—Accounting for Derivatives Instruments and Hedging, Income Generation, and Replication (Synthetic Asset) Transactions
• SSAP No. 108—Derivatives Hedging Variable Annuity Guarantees

Derivative Instruments—Annual Statement Disclosure
• Schedule DB – Part A, Section 1 – Open Options, Caps, Floors, Collars, Swaps, Swaptions and Forwards
• Schedule DB – Part B, Section 1 – Open Future Contracts
  o — Within Part A and Part B, section 1 identifies the contracts open as of the accounting date, and section 2 identifies contracts terminated during the year.

Schedule DB – Part C – Replication (Synthetic Asset) Transactions (RSAT)
Section 1 contains the underlying detail of replicated assets open ended at the end of the year. Section 2 is reconciliation between years of replicated assets.
• Schedule DB – Part D, Section 1 – Counterparty Exposure for Derivative Instruments Open
• Schedule DB – Part D, Section 2 – Collateral for Derivative Instruments Open

Schedule DB – Part E – Derivative Hedging Variable Annuity Guarantees
  o — Specific to derivatives and hedging programs under SSAP No. 108
• Schedule DL – Part 1 & 2 – Securities Lending Collateral Assets

Notes to Financial Statement – Investments
Notes to Financial Statement – Derivative Instruments
Notes to Financial Statement – Debt (FHLB Funding Agreements)
Notes to Financial Statement – Information about Financial Instruments with Off-Balance Sheet Risk and Financial Instruments with Concentrations of Credit Risk
Notes to Financial Statement – Debt - FHLB Funding Agreements
Notes to Financial Statement – Fair Value Measurements
Notes to Financial Statement – Analysis of Annuity Actuarial Reserve and Deposit Liabilities by Withdrawal Characteristics – FHLB Funding Agreements

On a quarterly basis, the insurer only reports derivative instruments that are open as of the current statement date. Schedule DB – Part A – Section 1 lists the insurer’s open options, caps, floors, collars, swaps and forwards. Open futures are reported in Schedule DB – Part B – Section 1, replications are reported in Schedule DB – Part C – Section 1, and counterparty exposure for derivatives instruments are reported in Schedule DB – Part D.

Repurchase Agreements—AP&P Disclosure
• SSAP No. 103R—Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities

Repurchase Agreements—Annual Statement Disclosure
• Notes to Financial Statement – Investments
• Notes to Financial Statement – Debt

Repurchase agreements are disclosed in various investment schedules within the Annual Financial Statement depending on the type of investment. (Schedule D, DA, E, Supplemental Investment Risk Interrogatories). The Investment Schedule General Instructions provides the following list of codes to use in the appropriate investment schedule code column regarding investments that are not under the exclusive control of the reporting entity, and also including assets loaned to others. For example, a bond subject to a repurchase agreement would be detailed in Schedule D Part 1 – Long-Term Bonds Owned and use a code of RA in Code Column.

Codes
LS – Loaned or leased to others
RA – Subject to repurchase agreement
RR – Subject to reverse repurchase agreement
DR – Subject to dollar repurchase agreement
DRR – Subject to dollar reverse repurchase agreement
C – Pledged as collateral – excluding collateral pledged to FHLB
CF – Pledged as collateral to FHLB (including assets backing funding agreements)
DB – Pledged under an option agreement
DBP – Pledged under an option agreement involving “asset transfers with put options”
R – Letter stock or otherwise restricted as to sale – excluding FHLB capital stock (Note: Private placements are not to be included unless specific restrictions as to sale are included as part of the security agreement.)
RF – FHLB capital stock
SD – Pledged on deposit with state or other regulatory body
M – Not under the exclusive control of the reporting entity for multiple reasons
SS – Short sale of a security
O – Other
LS – loaned or leased to others
RA – subject to repurchase agreement
RR – subject to reverse repurchase agreement
DR – subject to a dollar repurchase agreement
DRR – subject to a dollar reverse repurchase agreement

Repurchase Agreements—Annual Statement Disclosure
• Notes to Financial Statement—Investments—Repurchase Agreements, Restricted Assets
• Notes to Financial Statement—Sales, Transfer and Servicing of Financial Assets and Extinguishment of Liabilities
  General Interrogatory—Investment

***********************************************************************TEXT NOT SHOWN TO CONSERVE SPACE***********************************************************************
GUIDELINE FOR DEFINITION OF RECIPROCAL STATE IN RECEIVERSHIP LAWS

Drafting Note: The receivership laws of most states address the coordination of receiverships involving multiple states. Typically, these laws provide that a domiciliary receiver appointed in another state has certain rights and protections, such as the following:

- The domiciliary receiver is vested with the title to the insurer’s assets in the state;
- Attachments, garnishments, or levies against the insurer or its assets are prohibited; and
- Actions against the insurer and its insureds are stayed for a specified period of time.

In many states’ laws, these provisions may apply only if the domiciliary state is a “reciprocal state.” Frequently, the definition of a reciprocal state is based on NAIC model laws adopted more than twenty years ago. These definitions may be inconsistent with laws in other states, and more prescriptive than the Part A standards of the NAIC Financial Regulation Standards and Accreditation Program for state receivership laws. As a result, the assets of a receivership estate might not be protected outside of the domiciliary state, and the Receiver may be forced to defend litigation in multiple forums.

The provisions described above are intended to promote judicial economy, which benefits all participants in the receivership process. This Guideline provides a statutory definition that may be used by states with a reciprocity requirement to effectuate the purposes of these provisions. Under this definition, any state meeting the applicable NAIC Part A Accreditation standards for receivership laws will be treated as a reciprocal state. The definition recognizes the diversity of existing state receivership laws, and should avoid unnecessary litigation regarding the recognition of a state as a reciprocal state.

Definition of Reciprocal State for Receivership

“Reciprocal State” means a state that has enacted a law that sets forth a scheme for the administration of an insurer in receivership by the state’s insurance commissioner [or substitute the equivalent title used by the state, such as superintendent or director], or comparable insurance regulatory official.

Chronological Summary of Action (all references are to the Proceedings of the NAIC)
To: Financial Stability (EX) Task Force  
From: Receivership and Insolvency (E) Task Force  
Re: Report on Macroprudential Initiative (MPI) Referral  
Date: November 19, 2020

The following report summarizes the conclusions of the Receivership and Insolvency (E) Task Force (RITF) in response to the Macroprudential Initiative (MPI) referral on recovery and resolution. While the RITF has completed its recommendations, the RITF will conduct further work on the issues as described below.

1. **Evaluate recovery and resolution laws, guidance, and tools, and determine whether they incorporate best practices with respect to financial stability**

The Receiver’s powers under laws based on the *Insurer Receivership Model Act* Model #555 (IRMA) and its predecessor, the *Insurer Rehabilitation and Liquidation Model Act* (IRLMA), in conjunction with the authority granted to the Receiver by court orders, generally provide the powers described in:

- International Association of Insurance Supervisors (IAIS) Insurance Core Principle (ICP) 12, *Exit from the Market and Resolution*;
- Common Framework for the supervision of Internationally Active Insurance Groups (ComFrame) material integrated into ICP 12; and
- Financial Stability Board (FSB) *Key Attributes of Effective Resolution Regimes for Financial Institutions* (KAs).

While powers under state laws comport with the ICPs, ComFrame, and the KAs, in some cases the powers are implicit rather than explicit. The RITF reviewed current laws with respect the following issues:

a. **Bridge Institutions**

State receivership laws do not expressly provide for the establishment of a bridge institution (Bridge), but the Receiver may establish a Bridge under those laws. While a Bridge is typically not needed in a receivership, it could have the benefit of addressing an early termination on qualified financial contracts (QFCs). However, implementing a Bridge for this purpose would require a temporary stay on termination rights. As noted in Item 3 below, the current misalignments with Federal rules on the termination of master netting agreements for QFCs effectively precludes temporary stays on termination of QFCs in a receivership, thereby preventing the use of a Bridge for this purpose.

**Conclusion:** The Receivership Law (E) Working Group reviewed guidance in the Receiver’s Handbook for Insurance Company Insolvencies (Receivers Handbook) and developed revisions to guidance regarding the use of bridge institutions and administration of QFCs in receivership and pre-receivership planning.

b. **Providing Continuity of Essential Services and Functions**

KA 3.2 states that a resolution authority should have the power to ensure the continuity of essential services and functions by requiring companies in the group to continue providing services. Under ComFrame (CF) 12.7a, a resolution authority may take steps to provide continuity of essential services by requiring other entities within the IAIG (including non-regulated entities) to continue services. The following authority and tools were identified:
• The Insurance Holding Company System Model Act (#440) requires approval of affiliated transactions, allowing a regulator to identify agreements that could create obstacles in a receivership. The Insurance Holding Company System Model Regulation (#450), Section 19, provides that cost sharing and management agreements specify if the insurer is placed in receivership that an affiliate has no automatic right to terminate the agreement.

• The Receiver can take action against a provider that refuses to continue services under a contract, or seek an order requiring it to turn over records. In some circumstances, such as a situation where an affiliate providing services is inextricably intertwined with the insurer, action can be taken to place the affiliate into receivership.

It was noted that some of these remedies might not address the immediate need to continue services in some cases. Therefore, the Task Force delegated further work on this topic to the Receivership Law (E) Working Group.

Conclusion: The Receivership Law (E) Working Group is developing, among other solutions, revisions to Models 440 and 450 to address remedies to ensure continuity of essential services and functions to an insurer in receivership by other affiliated entities in a holding company group, including non-regulated entities. The Model Law Request to develop revisions to Models 440 and 450 was adopted by Executive (EX) Committee in August 2020. The Working Group expects to finalize its work in this area in 2021.

c. Variances in States’ Receivership Laws

The RITF recognized that few states have adopted IRMA, and most have laws based on IRLMA or prior models. In 2017, the Financial Condition (E) Committee issued a memorandum to states to consider adoption of certain provisions of IRMA.1 The RITF further identified eight key areas within receivership and guaranty fund law that it encourages states to adopt. The key areas include: conflicts of law; continuation of coverage; priority of distribution; stays and injunctions; ancillary conservation of foreign insurers; domiciliary receivers in other states; treatment of large deductible workers compensation policies; and the 2017 revisions to the Life and Health Insurance Guaranty Association Model Act (#520). The RITF also determined that some states may require an alternative solution to revise their laws for stays, injunctions and “full faith and credit” provisions. Therefore, the RITF recommends redefining “reciprocal state” in states’ receivership law as an optional solution. The RITF concluded the following:

Conclusion:
• The RITF developed a Model Guideline defining “reciprocal state” that was released for exposure at the 2020 Fall National Nov. 19, 2020, virtual meeting, and which will be considered for adoption in 2021.
• The RITF will work towards educating states on key areas of receivership and guaranty fund laws that enhance efficiencies and effectiveness of the receivership process, as identified through this workstream, including related new Model Guidelines adopted by the NAIC, outreach to states’ legal staff and other educational opportunities.
• The RITF formed an ad hoc group to discuss Financial Regulation Standards and Accreditation Program Part A standards for receivership and guaranty fund laws and will take any recommendations from the ad hoc group under consideration in the future.

2. Evaluate recovery and resolution planning tools for systemically important cross-border U.S. groups

The RITF determined that many recovery and resolution planning topics in the KAs and ComFrame are generally covered in the guidance for pre-receivership planning in the Receiver’s Handbook. Additionally, some topics were identified that may be captured elsewhere within the US solvency monitoring frameworks (e.g., ORSA, Supervisory Colleges, Crisis Management Groups, Examinations, etc.). The RITF found that:

• The Dodd Frank Act’s provisions for resolution planning address the requirements of the KAs and ComFrame for an insurer designated as a Systemically Important Financial Institution (SIFI). Other jurisdictions may have similar planning requirements for international groups.


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• The requirements in state laws for corrective action plans under risk-based capital (RBC) laws and hazardous financial condition laws may satisfy this requirement for insurers that fall short of the applicable RBC solvency benchmarks, or otherwise trigger a corrective action requirement meeting those solvency benchmarks.

• Regarding crisis management groups and crisis management planning, the NAIC Insurance Holding Company System Model Act (§440) Section 7 provides the commissioner with the authority to develop crisis management plans as part of supervisory colleges. Further, Model 440 Section 7.1, provides for authority for the commissioner to act as the group-wide supervisor of internationally active insurance groups (IAIG) and engage in group-wide supervision activities as outlined in the model, though not explicit to recovery and resolution plans. Additionally, the NAIC Financial Analysis Handbook contains guidance and a template for a crisis management plan. This authority and guidance provide states with the flexibility to discuss the necessity for crisis management plans within supervisory colleges and/or crisis management groups and to make the determination to develop such plans on a case-by-case basis.

Conclusions:
• The RITF agreed that consideration of imposing recovery plan reporting requirements on insurers that are not in financial distress is outside the scope of the RITF and may require consideration by U.S. group-wide supervisors of IAIGs.
• The Group Solvency Issues (E) Working Group is undertaking a project to update insurance regulatory guidance as it pertains to supervision of IAIGs under ComFrame, including guidance on crisis management groups. The RITF will provide input at the appropriate time to this work stream. The Working Group’s project is expected to be completed in 2021.
• The RITF will continue to review and provide input to the IAIS on recovery and resolution topics including the upcoming Application Paper on Resolution Powers and Planning.

3. Evaluate whether there are misalignments between federal and state laws that could be an obstacle to effective and orderly recovery and resolutions for U.S. insurance groups

a. Temporarily Stay Early Termination Rights

The Task Force evaluated the impact of the federal rule recognizing temporary stays on terminating master netting agreements for qualified financial contracts (QFCs), which does not recognize stays in a state receivership proceeding. The regulators held discussions with federal banking authorities regarding the handling of QFCs and bridge institutions in banking resolutions. This information will be used to assess the utility of a stay on QFC terminations in an insurance receivership.

Conclusion:
• In 2019, the NAIC adopted amendments to the Guideline for Stay on Termination of Netting Agreements and Qualified Financial Contracts (#1556) to highlight the conflict with the federal rule to state insurance regulators who may be considering adoption of Guideline #1556.
• The Task Force adopted revisions to existing guidance for receiverships involving qualified financial contracts at the Nov. 19, 2020 virtual 2020 Fall National Meeting.

b. Taxes in Receivership and Federal Releases

The Task Force identified topics where guidance for taxes in receivership and federal releases should be drafted in the Receiver’s Handbook.

Conclusion: The RITF adopted revisions to the Receiver’s Handbook for guidance on taxes in receivership and federal releases at the 2020 Summer National Meeting.