

June 24, 2019

SENT VIA EMAIL

Doug Stolte
David Smith
Co-Chairs, NAIC Restructuring Mechanisms (E) Subgroup

Via: Dan Daveline
Robin Marcotte

RE: Request for Comments

We want to thank the NAIC for focusing attention on the important issues surrounding alternative restructuring mechanisms being enacted in states around the country. Developing a greater understanding of the benefits, appropriate frameworks, regulatory standards, unique features and numerous consumer protections found in recently passed insurance business transfer (IBT) and corporate division (CD) laws can only benefit insurance regulators, many of whom are—or will be—called upon to administer these laws in their own jurisdictions.

While there have been numerous comments submitted regarding IBT laws that have been adopted, there have been few focused on CD. Therefore, the undersigned submit this letter, which primarily focuses on CD, with a particular focus on the Michigan legislation which became law in 2018. It is our hope that this letter will contribute to the efforts geared toward building a greater understanding and awareness of CD laws as an important element in the toolbox of options available to insurers and regulators in our evolving insurance regulatory framework.

The Subgroup's Request for Comments

The Subgroup recently requested comments regarding its charges and a definition of “runoff company.” While most comments were straightforward and responsive, others sought to cast the new IBT and CD laws in a harshly negative and unjustified light. We disagree with these characterizations. Regulators have for many years conducted similar types of transactional analysis as those contemplated by CD laws in the context of Form A change of control, merger and insurer restructuring transactions. Recognizing this, many in the industry have openly asked regulators to apply “Form A rigor” to the process of evaluating any future CD transactions. We view the new IBT and CD laws as an enhanced Form A review process that gives state insurance regulators the ability and flexibility to review IBT and CD transactions to ensure policyholder and stakeholder protection.

We believe that the NAIC should continue to do what it does best -- which is to approach the issues presented by these new laws in a thorough and comprehensive manner informed by the belief that our state-based approach to insurance regulation has and will continue to work to adequately protect policyholder interests and to use this opportunity to leverage the collective wisdom and experience of the NAIC to provide guidance to individual state regulators as to how best to approach and analyze a potential transaction that may come before them under these new laws.

Many of the criticisms that the Subgroup has received of these new laws are grounded in the belief that domiciliary states will abandon their responsibilities to policyholder protection to permit unsafe or hazardous transactions. We disagree. With appropriate statutory standards of review, an open

regulatory process grounded in comity, adequate analytical support resources (including financial/actuarial, legal and operational supports) and guidance from the NAIC, we believe that state-based regulatory oversight will prove up to the task in much the same way as it has proved effective in reviewing other complex transaction proposals (such as, for example, change of control deliberations).

This letter is submitted to provide some insight into the utility of the restructuring tools that have been developed in several states. As another commenter suggested, these tools neither increase nor decrease liabilities. They do, however, enable an insurer to segregate, and either transfer or assign, assets and liabilities to newly created or existing insurers.

While this authority has been in existence in a limited number of state laws for some time, the recent increase in legislative activity in several states has understandably piqued the interest of the NAIC. As testimony before this Subgroup and the parent Working Group has pointed out, this authority and these transactions are relatively common in jurisdictions around the world. In these jurisdictions, industry has remained stable, the interests of consumers have been protected, contracts are performing and market mechanisms like guarantee funds (or the equivalent mechanism in those jurisdictions) have not been adversely affected.

This stability happened because the laws as drafted contained appropriately tailored regulatory standards and consumer protections that protect the essence of the bargain needing protection—ultimate performance. As we will highlight in this letter, the Michigan CD law similarly contains broad regulatory authority designed to ensure a comprehensive regulatory review prior to any transaction approval. These CD laws provide industry a tool designed to make possible what was previously practically unworkable—the ability to segregate and transfer a block of business by allowing it to occur by court order or operation of law rather than individual contract novation.

No negative outcomes have materialized because financial regulators in those jurisdictions, aided by independent experts, continue to do their jobs by providing appropriately rigorous review and oversight of the transactions. We believe that similar protections have been embedded in IBT and CD laws and firmly believe in the professionalism and competence of our state regulators and trust in their ability to work together through the NAIC to adapt to the challenges presented by these innovations as they have done so countless times in the past.

High Level Overview of CD

CD laws have been in place for decades. In fact, on page 9 of the NAIC white paper entitled “Liability-Based Restructuring Working Group of the NAIC Financial Condition (EX4) Subcommittee, adopted by the subcommittee in June, 1997, adopted by the Executive Committee in September, 1997 and adopted by the Plenary in December, 1997, the white paper notes:

b. Divisions

Division statutes have recently been enacted by two jurisdictions. These statutes permit the division of a single corporation into two or more resulting corporations. In a division, assets and liabilities are allocated among the resulting corporations. An LBR that includes a division may also include other transactions such as changes to a pooling agreement that may require regulatory review in other jurisdictions.

While IBT laws are modeled after Part VII of the UK Financial Services & Markets Act of 2000, CDs are fundamentally different in that—an IBT transaction uses a court as an added step in the approval process, after satisfactory completion of the insurance regulatory review process and a recommendation for approval, to effectuate the ultimate transfer through the issuance of a court order—CD transactions instead rely on the Insurance Commissioner expertise in exercising regulatory authority after a thorough review and vetting process where the Commissioner may use subject matter experts and affirmatively determines, among other things, that the interest of policyholders and other stakeholders will be adequately protected. In states where the Department of Insurance issues certificates of authority, the Department is responsible for the creation of the corporate entity and is subsequently responsible for regulating all aspects of those licensed insurers, including any subsequent changes in their corporate form (for example, mergers, sale, or even in exceptional cases, insurer liquidation and termination of the certificate of authority).

While Insurance Codes traditionally provided a framework for a Commissioner to approve a merger, CD laws enable the Commissioner to approve what is, in essence, a reverse merger, whereby all assets and liabilities are parceled into resulting entities which are created after a thorough process that includes the application of numerous regulatory standards designed to protect those with a vested interest in the outcome of the transaction, often following expert analysis, public notice, and a public hearing.

Why are Alternative Restructuring Mechanisms Needed?

Alternative restructuring mechanisms like IBT and CD are needed because, under current law, insurers that seek to exit one line of business and focus their organizational attention on others are practically incapable of voluntarily divesting themselves of these blocks of business.

IBTs and CDs can be used for a variety of other purposes, including effecting an intra-group transfer, achieving finality on a book of business in run-off, and exiting legacy or non-core businesses – all recognized legitimate business needs. Restructuring transactions promote both efficiency and effectiveness in managing runoff blocks of in force policies and annuities by accessing platforms with more demonstrable scale economies and improving managerial focus. These transactions are more straightforward and efficient than reinsurance-based business transfers. As to policy management, a good and workable alignment of authority and responsibility is achieved by avoiding the ceding company's unwieldy and awkward continuing role. These approaches also eliminate unnecessary long-term credit exposure to the reinsuring company and avoid the need for expensive collateralization mechanisms. In addition, restructuring mechanisms provide regulators added flexibility, which can be critical in times of stress. In the UK, IBT reportedly has been deployed in response to Brexit – an example of utilizing a flexible tool in response to an unforeseen significant circumstance. The processes that are contemplated bring about an approved transfer through a transparent, straightforward, and documented mechanism, under the oversight of capable regulators or the courts, which over time will itself develop a library of effective supporting precedent and best practices.

While it is true that a company can seek to obtain regulatory approvals and novations from all of its affected policyholders, for blocks of business of any substantial size, this is a practical impossibility. A company can engage in reinsurance transactions, however even if there is 100% reinsurance, residual counterparty risk always remains and the block could ultimately return to the insurer years later, until the final contractual obligations run their course. The cumbersome nature of these transactions has driven insurers to seek ways to ensure the benefit of the ultimate bargain is protected, contract performance, thus ensuring policyholder protections, while at the same time providing current

management the ability to have some degree of flexibility in setting the future direction and focus of an insurer decoupled from the obligation to personally administer every policy ever written by the entity.

In virtually every other sector of the economy, businesses are permitted to spin off portions where management decides for a variety of business reasons that they no longer wish to focus on in the future. This is true even within heavily regulated industries such as banking, where regulators routinely review and approve transactions that transfer long term business relationships from one entity to another, promoting an environment that enables greater flexibility to decide how to allocate capital and management focus.

Permitting the realization of these goals is reasonable and, most likely given the trends around the world and across the states, inevitable. The CD laws that have passed contain both strong consumer protections and broad grants of regulatory authority thus ensuring that these transactions occur within a controlled regulatory framework.

An Example: Michigan's CD Law Has Strong Consumer Protections & Expansive Regulatory Authority

Opponents of CD laws have insinuated that the laws passed lack regulatory authority for proper transactional oversight. Nothing could be farther from the truth.

At a high level, we believe for effective oversight of a CD, and in order to ensure due process, several key elements need to be embedded in law:

- The ability of a Commissioner to hire one or more experts for specialized transaction review and financial testing, to be paid for by the applicant;
- Authority for the Commissioner to decide what portions of the experts' analysis should be included in a public file, accessible to any party in advance of a public hearing, thereby equipping interested parties with key information regarding the transaction;
- Notice to interested parties (policyholders, reinsurers, shareholders, guarantee funds, other state regulators, etc.) in advance of any public hearing along with access to information concerning the transaction;
- A public hearing (conducted as a contested case hearing) with all the procedural safeguards provided for under administrative law and public access to key supporting regulatory analyses;
- Broad standards that give the Commissioner wide latitude to assess every aspect of the transaction in order ensure that policyholders and other key stakeholders—including guarantee funds—are protected; and
- Empowering the Commissioner, as the public official empowered under the Insurance Code to exercise regulatory authority over domestic insurers, from issuance of a certificate of authority to its termination, and everything in between, to conduct a thorough and comprehensive review of the proposed transaction and ultimately decide whether it meets the applicable legal requirements; including whether newly-formed entities are adequately capitalized and otherwise meet all requirements to be licensed as domestic insurers.

Individually, each of these provides important protections to policyholders. Taken together, they represent a comprehensive framework designed to ensure that the Commissioner has all the tools necessary to conduct a comprehensive inquiry. We are confident that these statutory protections – taken together with local regulatory process requirements that will be articulated on a case-by-case basis—will be adequate to ensure that a fair and comprehensive opportunity for input will be available

to all interested parties. We believe that all of these protections are found in the Michigan CD law and will be found in the statutes and process requirements of other jurisdictions as well.

The proverbial “gorilla in the room” at the heart of many criticisms of CD and IBT statutes is the fear that a domiciliary regulator – when faced with the challenges of assessing a proposed CD or IBT will be unwilling or unable to honor its principal obligation to adequately protect policyholder interests. We believe that this fear is unfounded. Moreover, we believe that the NAIC’s best energies should be spent assisting in the substance and the processes involved in regulatory assessments rather than in constraining or defeating the application of these statutes.

Regulatory Standards

Using the recently passed Michigan CD law as an example, not only are the standards applicable to a Form A (See MCL 500.1315(1)) review and approval incorporated and made applicable to Division transactions, but several additional sections are added to MCL 5507(2), in order to enhance policyholder protection and ensure adequate capitalization (new protections identified in parenthesis):

MCL 5507(2)

(2) Subject to subsection (12), the director of the department shall approve a plan of division unless the director of the department finds any of the following:

(a) The interest of the policyholders of the dividing insurer that may become policyholders of a resulting insurer will not be adequately protected by the resulting insurer or acquiring party of a resulting insurer, if any.

(New protection in addition to Form A requirements)

(b) After the division, any resulting insurer would not be able to satisfy the requirements for the issuance of a certificate of authority.

(c) The division would substantially lessen competition in insurance in this state or tend to create a monopoly in this state.

(d) The financial condition of an acquiring party of a resulting insurer, if any, is such that it might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders or the interests of a remaining shareholder that is unaffiliated with the acquiring party.

(e) The terms of the plan of division are unfair and unreasonable to the dividing insurer’s policyholders or shareholders.

(f) An acquiring party of a resulting insurer, if any, has plans or proposals to liquidate the resulting insurer, sell its assets, or consolidate or merge the resulting insurer with a person, or to make any other material change in its business or corporate structure or management, that are unfair and unreasonable to the resulting insurer’s policyholders, and not in the public interest.

(g) The competence, experience, and integrity of the persons who would control the operation of a resulting insurer are such that it would not be in the interest of the resulting

insurer's policyholders or the general public to permit the division.

(h) The division is likely to be hazardous or prejudicial to the insurance-buying public.

(i) The proposed division violates the uniform voidable transactions act, 1998 PA 434, MCL 566.31 to 566.45.

(New protection in addition to Form A requirements)

(j) The division is being made for purposes of hindering, delaying, or defrauding any policyholders or other creditors of the dividing insurer.

(New protection in addition to Form A requirements)

(k) One or more resulting insurers will not be solvent on the consummation of the division.

(New protection in addition to Form A requirements)

(l) The assets allocated to 1 or more resulting insurers will be, on consummation of a division, unreasonably small in relation to the business and transactions in which the resulting insurer was engaged or is about to engage.

(New protection in addition to Form A requirements)

Taken together, the seven existing Form A requirements and the additional five CD standards provide the Michigan Director with a broad grant of discretion to evaluate a proposed plan of division from every conceivable angle. They explicitly require findings that the transaction will provide adequate consumer protection, sufficient assets to support liabilities, and that the terms of any plan approved are not unfair or unreasonable to policyholders or shareholders.

Armed with these broad grants of regulatory authority, the Michigan Department of Insurance and Financial Services (Michigan Department) is equipped to ensure that stakeholder interests are identified and addressed. For example, ensuring that any resulting entity is licensed in every jurisdiction in which it will have admitted policies allocated to it in the plan of division is essential to protect proper ongoing regulatory oversight as well as ensuring guarantee fund protection.

The very first of these broad-based tests ensures that the interests of policyholders are protected under law.

(2) Subject to subsection (12), the director of the department shall approve a plan of division unless the director of the department finds any of the following:

(a) The interest of the policyholders of the dividing insurer that may become policyholders of a resulting insurer will not be adequately protected by the resulting insurer or acquiring party of a resulting insurer, if any.

(emphasis added)

Importantly, the Michigan Director cannot approve a plan of division if the interests of policyholders are not adequately protected, and it follows that any proposed transaction that did not result in the same guarantee fund protection to policyholders, or sister-state regulatory oversight, would likely fail to satisfy this standard from the outset.

And while having strong, broad grants of regulatory authority are critical to ensure proper overall oversight of the totality of a division transaction, the law also contains a variety of consumer, regulatory and shareholder notice and due process protections, such as:

Advance Regulatory Notice—Section 5503 — The Michigan Department is provided a plan of division that outlines in advance many aspects of the proposed transaction for review.

Board and Shareholder Approvals—Section 5505(1) — Any plan of division must be approved by the insurer’s board of directors and shareholders.

Reinsurer Notice—Section 5505(3) —Specific notice to reinsurers within 10 days of filing a plan with the Michigan Department.

Public File—Section 5505(8) —Using a balancing test, in advance of a public hearing, the Michigan Department has authority to make information public deemed in the public interest.

Department Expenses—Section 5505(9)—All expenses incurred by the Michigan Department (including outside professionals and experts retained by the Michigan Department) associated with the proposed CD must be paid by the applying insurer.

Public Hearing—Section 5507(1)—Requires a public hearing after reasonable notice. The hearing is a contested case hearing subject to Michigan’s Administrative Procedures Act.

Shareholder Rights—Section 5517—Provides shareholders of a dividing insurer the right to dissent and obtain fair value for shares.

The state-based insurance regulatory system has demonstrated over the last 148 years that it is fully capable of adapting to changing times, evolving to meet the challenges of a dynamic environment. Rather than viewing these laws as a threat to the foundations of the system, they are more appropriately viewed as additional tools being incorporated into our system from jurisdictions around the globe. The process you are embarking on should be forward thinking and risk focused, and if new tools or additional surveillance is required in order to provide proper regulatory oversight, we fully support reasonable efforts in that regard.

Incorporating These Types of Consumer Protections in State Laws Is Sound Public Policy

By incorporating these types of consumer protections in state laws, you will ensure that policyholders and other interested stakeholders have ample notice of a proposed transaction, the ability to learn how it impacts them and if necessary, the ability to directly share their views about the transaction with their state regulator. By mandating a public hearing after notice to interested parties, we will avoid the specter of “dead of night” transactions outside the public view with little or no public input. These important procedural and substantive due process rights will engender public confidence and ensure that the Commissioner has the tools at their disposal to conduct a thoughtful, comprehensive review of any proposed transaction, and use the discretion provided to ensure the correct outcome, based on the specific facts and circumstances of each individual transaction.

Efforts to Restrict the Use of IBT and CD Laws are Inappropriate

Critics of IBT and CD laws have outlined numerous ways in which they would like to arbitrarily restrict their use (e.g. not for certain lines of business, not where a monoline results, etc.) or impose impossible-to-meet standards that would effectively make such laws impractical to use.

We would caution the NAIC and this Subgroup against accepting these invitations from commenters who would have you substitute well-intentioned, regulatory judgement regarding the proper scope and application of these laws in place of the of the elected legislators who passed, and the governors who signed, these laws. These laws were designed to be flexible enough to be used in a wide variety of circumstances and rely on the domiciliary state regulators to ensure that policyholder interests are adequately protected.

We believe the NAIC's position on IBT and CD laws should respect the state-based approach to insurance regulation that has and will continue to work to adequately protect policyholder interests. Moreover, we hope that the NAIC would leverage its considerable wisdom and experience to help create analytical tools or resources that states could use to effectively evaluate pending transactions and to identify capable independent experts to assist in this process. We would be happy to provide assistance to the Subgroup as it considers such tools and resources.

Respectfully submitted,



Ken Ross
Vice President & Counsel, Government Relations
John Hancock



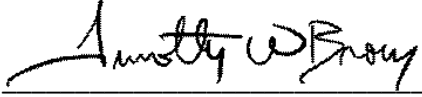
Mark Sarlitto
Sr Vice President and General Counsel
Wilton Re Group



Joseph B. Cohen
Senior Vice President, Deputy General Counsel
Athene USA Corporation



Michael S. Gugig
Vice President, State Gov't Relations & Assoc. General Counsel
Transamerica Life Insurance Co.



Timothy W. Brown
Executive Vice President and Chief Legal Officer
Venerable Holdings, Inc.

Cc: Buddy Combs and Elizabeth Kelleher Dwyer,
Co-Chairs, Restructuring Mechanisms (E) Working Group