

NCIGF Package of Amendments to Enhance Pre-liquidation Coordination

At its August 2021 meeting, the NCIGF Board adopted the attached package of amendments designed to encourage and authorize regulators and receivers to coordinate with guaranty funds earlier in the delinquency process.

Due to confidentiality mandates found in other parts of a typical state insurance code, the proposed changes call for corollary amendments to confidentiality provisions in the NAIC Model Holding Company Act and the Examination Model Act along with amendments to the guaranty association act.

Here is a brief explanation of the attached documents:

1. The first document contains the proposed amendments to Section 8 of the NCIGF Model Guaranty Association Act. A full copy of this Act can be found [here](#)
2. The second document contains proposed amendments to the NAIC Holding Company Model Act. There are markups that are not related to our issue – the relevant proposed amendments are in Section 8(c), (They are obvious due to the different colored mark up and larger font.) If you would like to see this entire Act, it can be found [here](#)
3. The third document contains proposed amendments to the NAIC Model Examination Act. The relevant proposed amendments in Section 5. F. (3) (c). If you would like to see this entire Act, you can find it [here](#)

**Proposed new subsection to Section 8 of the NCIGF Model - DRAFT
AUGUST 10, 2021**

Section 8 of the NCIGF Post-Assessment Property and Liability Insurance Guaranty Association Model Act reads as follows:

Section 8. Duties and Powers of the Commissioner

- (1) The Commissioner shall:
 - (a) notify the Association of the existence of an insolvent insurer not later than three days after he receives notice of the determination of the insolvency. The Association shall be entitled to a copy of any complaint seeking an order of liquidation with a finding of insolvency against a member company at the same time that such complaint is filed with a court of competent jurisdiction;
 - (b) upon request of the board of directors, provide the Association with a statement of the net direct written premiums of each member insurer.
- (2) The Commissioner may:
 - (a) suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the Commissioner may levy a fine on any member insurer which fails to pay an assessment when due. Such fine shall not exceed five percent of the unpaid assessment per month, except that no fine shall be less than \$100 per month;
 - (b) revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.
- (3) Any final action or order of the Commissioner under this Act shall be subject to judicial review in a court of competent jurisdiction.

This proposal suggests that a new subsection (c) be added to Section (2):

- (c) If the Commissioner determines that any member insurer as defined in Section 3 (a) above may be subject to a future delinquency proceeding under Article XIII of this Code (insert citation to the liquidation section of the Code), then in order to assist in the performance of the Commissioner's duties, the Commissioner may:
 - (i) share confidential and privileged documents, material, or information reported pursuant to an enterprise risk filing with the Association regarding that member insurer; and
 - (ii) share confidential and privileged documents, material, the contents of

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

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

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

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

Drafting Note: It will likely be necessary to modify certain provisions of the state's insurance code regulating examinations as well as a state's holding company act in order to implement this provision. It is expected that in most cases a written confidentiality agreement will be executed by the entities with whom information is shared.

(Drafters may also want to add language that provides that once there is a liquidation any expenses incurred by the Associations in assisting in the orderly transition shall become a Class 1 administrative expense.)

Group Capital Calculation (E) Working Group: Draft 10/20/2020
INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT

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NCIGF Recommended Changes to NAIC Model Holding Company Act

(Note: NAIC Working Group Changes appear in purple. NCIGF changes appear in red.)

Section 8. Confidential Treatment

- A. Documents, materials or other information in the possession or control of the Department of Insurance that are obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to Section 6 and all information reported or provided to the Department of Insurance pursuant to Section 3B(12) and (13), Section 4, Section 5 and Section 7.1 are recognized by this state as being proprietary and to contain trade secrets, and shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties. The commissioner shall not otherwise make the documents, materials or other information public without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interest of policyholders, shareholders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part in such manner as may be deemed appropriate.

(1) For purposes of the information reported and provided to the Department of Insurance pursuant to Section 4L(2), the commissioner shall maintain the confidentiality of the group capital calculation and group capital ratio produced within the calculation and any group capital information received from an insurance holding company supervised by the Federal Reserve Board or any U.S. group wide supervisor.

Drafting note: This group capital calculation and group capital ratio includes confidential information and filings received from insurance holding companies supervised by the Federal Reserve Board. The confidential treatment afforded to group capital calculation filings includes any Federal Reserve Board group capital filings and information.

- B. Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner or with whom such documents, materials or other information are shared pursuant to this Act shall be permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to Subsection A.

- C. In order to assist in the performance of the commissioner's duties, the commissioner:

(1) ~~(1)~~—May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection A, including proprietary and trade secret documents and materials with other state, federal and international regulatory agencies, with the NAIC ~~and its affiliates and subsidiaries~~, and with any third-party consultants designated by the commissioner, with state, federal, and international law enforcement authorities, including members of any supervisory college described in Section 7, provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the document, material or other information, and has verified in writing the legal authority to maintain confidentiality.

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

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

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

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

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MODEL LAW ON EXAMINATIONS
NCIGF Recommended Changes Draft August 10, 2021
(Changes appear in 5F.)

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Section 5. Examination Reports

A. General Description

An examination report shall be comprised of only facts appearing upon the books, records or other documents of the company, its agents or other persons examined, or as ascertained from the testimony of its officers or agents or other persons examined concerning its affairs, and such conclusions and recommendations as the examiners find reasonably warranted from the facts.

B. Filing of Examination Report

No later than sixty (60) days following completion of the examination, the examiner in charge shall file with the department a verified written report of examination under oath. Upon receipt of the verified report, the department shall transmit the report to the company examined, together with a notice that shall afford the company examined a reasonable opportunity of not more than thirty (30) days to make a written submission or rebuttal with respect to any matters contained in the examination report.

C. Adoption of Report on Examination

Within thirty (30) days of the end of the period allowed for the receipt of written submissions or rebuttals, the commissioner shall fully consider and review the report, together with any written submissions or rebuttals and any relevant portions of the examiner's workpapers and enter an order:

- (1) Adopting the examination report as filed or with modification or corrections. If the examination report reveals that the company is operating in violation of any law, regulation or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure the violation; or
- (2) Rejecting the examination report with directions to the examiners to reopen the examination for purposes of obtaining additional data, documentation or information, and refile pursuant to Subsection A above; or
- (3) Calling for an investigatory hearing with no less than twenty (20) days notice to the company for purposes of obtaining additional documentation, data, information and testimony.

D. Orders and Procedures

- (1) Orders entered pursuant to Subsection C(1) above shall be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, relevant examiner workpapers and any written submissions or rebuttals. An order shall be considered a final administrative decision and may be appealed pursuant to the [insert name of State Administrative Review Law], and shall be served upon the company by certified mail, together with a copy of the adopted examination report. Within thirty (30) days of the issuance of the adopted report, the company shall file affidavits executed by each of its directors stating under oath that they have received a copy of the adopted report and related orders.
- (2) A hearing conducted under Subsection C(3) above by the commissioner or authorized representative shall be conducted as a nonadversarial confidential investigatory proceeding as necessary for the resolution of any inconsistencies, discrepancies or disputed issues apparent upon the face of the filed examination report or raised by or as a result of the commissioner's review of relevant workpapers or by the written submission or rebuttal of the company. Within twenty (20) days of the conclusion of any such hearing, the commissioner shall enter an order pursuant to Subsection C(1) above.
 - (a) The commissioner shall not appoint an examiner as an authorized representative to conduct the hearing. The hearing shall proceed expeditiously with discovery by the company limited to the examiner's workpapers that tend to substantiate any assertions set forth in any written submission or rebuttal. The commissioner or the commissioner's representative may issue subpoenas for the attendance of any witnesses or the production of any documents deemed relevant to the investigation whether under the control of the department, the company or other persons. The documents produced shall be included in the record and testimony taken by the commissioner or the commissioner's representative shall be under oath and preserved for the record. Nothing contained in this section shall require the department to disclose any information or records that would indicate or show the existence or content of any investigation or activity of a criminal justice agency.
 - (b) The hearing shall proceed with the commissioner or the commissioner's representative posing questions to the persons subpoenaed. Thereafter the company and the department may present testimony relevant to the investigation. Cross examination shall be conducted only by the commissioner or the commissioner's representative. The company and the department shall be permitted to make closing statements and may be represented by counsel of their choice.

E. Publication and Use

- (1) Upon the adoption of the examination report under Subsection C(1) above, the commissioner shall continue to hold the content of the examination report as private and confidential information for a period of [insert number] days except to the extent provided in Subsection B. Thereafter, the commissioner may open the report for public inspection so long as no court of competent jurisdiction has stayed its publication.

Drafting Note: The time period may correspond to the amount of time allowed for a party to seek administrative review under state law or it should at a minimum allow a company adequate time, not less than two (2) days following receipt of the adopted report to obtain an equitable stay if provided for under state law.

- (2) Nothing contained in this Code shall prevent or be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the insurance department of this or any other state or country, or to law enforcement officials of this or any other state or agency of the federal government at any time, so long as the agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this Act.
- (3) In the event the commissioner determines that regulatory action is appropriate as a result of an examination, he or she may initiate any proceedings or actions provided by law.

F. Privilege for, and Confidentiality of Ancillary Information

- (1) (a) Except as provided in Subsection E above and in this subsection, documents, materials or other information, including, but not limited to, all working papers, and copies thereof, created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this Act, or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as part of the commissioner’s official duties.
- (b) Documents, materials or other information, including, but not limited to, all working papers, and copies thereof, in the possession or control of the National Association of Insurance Commissioners and its affiliates and subsidiaries shall be confidential by law and privileged, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action if they are:
 - (i) Created, produced or obtained by or disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries in the course of the National Association of Insurance Commissioners and its affiliates and subsidiaries assisting an examination made under this Act, or assisting a commissioner in the analysis of the financial condition or market conduct of a company; or
 - (ii) Disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries under Paragraph (3) of this subsection by a commissioner.
- (c) For the purposes of Paragraph (1)(b), “Act” includes the law of another state or jurisdiction that is substantially similar to this Act.
- (2) Neither the commissioner nor any person who received the documents, material or other information while acting under the authority of the commissioner, including the National Association of Insurance Commissioners and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials or information subject to Paragraph (1).
- (3) In order to assist in the performance of the commissioner’s duties, the commissioner:
 - (a) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Paragraph (1), with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication or other information;
 - (b) May receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; ~~and~~
 - (c) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to

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

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

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

MODEL LAW ON EXAMINATIONS

(d) ~~Optional provision] And m~~May enter into agreements governing sharing and use of information consistent with this subsection.