NCIGF POST-ASSESSMENT PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION MODEL ACT

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Section 1. Title

This Act shall be known as the [state] Insurance Guaranty Association Act.

Section 2. Scope

This Act shall apply to all kinds of direct insurance, but shall not be applicable to the following:

1) Life, annuity, health or disability insurance;

2) Mortgage guaranty, financial guaranty or other forms of insurance offering protection against investment risks;

3) Fidelity or surety bonds, or any other bonding obligations;

4) Credit insurance, vendors' single interest insurance, or collateral protection insurance or any similar insurance protecting the interests of a creditor arising out of a creditor-debtor transaction.

5) Other than coverages that may be set forth in a cybersecurity insurance policy, insurance of warranties or service contracts, including insurance that provides for the repair, replacement, or service of goods or property, or indemnification for repair, replacement or service, for the operational or structural failure of the goods or property due to a defect in materials, workmanship or normal wear and tear, or provides reimbursement for the liability incurred by the issuer of agreements or service contracts that provide such benefits;

Drafting note: The objective of this change is to resolve any ambiguity with regard to the coverage of cybersecurity insurance. Whether any change is needed in this Scope section to confirm this coverage, given the nature of coverages and services typically provided in cybersecurity insurance policies, should be evaluated based on local caselaw and product definitions. This revision may not be necessary in all states.

6) Title insurance;

7) Ocean marine insurance;

8) Any transaction or combination of transactions between a person (including affiliates of such person) and an insurer (including affiliates of such insurer) which involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk; or

9) Any insurance provided by or guaranteed by government.

Drafting Note: Those states, the insurance codes of which do not adequately define ocean marine insurance, may wish to add the following to Section 3. Definitions: "Ocean marine insurance" includes any form of insurance, regardless of the name, label, or marketing designation of the insurance policy, which insures against maritime perils or risks and other related perils or risks, which are usually insured against by traditional marine insurance, such as hull and machinery, marine builders risk, and marine protection and indemnity. Such perils and risk insured against include without limitation loss, damage, or expense or legal liability of the insured for loss, damage, or expense arising out of or incident to ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft, or instrumentality in use in ocean or inland waterways for commercial purposes, including liability of the insured for personal injury, illness, or death or for loss or damage to the property of the insured or another person.

Section 3. Definitions

As used in this Act:

1) "Account" means any one of the three accounts created by Section 6.

2) "Affiliate" means a person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person.

3) “Affiliate of the insolvent insurer” means a person who directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with an insolvent insurer on December 31 of the year next proceeding the date the insurer becomes an insolvent insurer

4) "Association" means the [state] Insurance Guaranty Association created under Section 6.

5) “Association similar to the Association” means any guaranty association, security fund or other insolvency mechanism which affords protection similar to that of the Association. The term also shall include any property/casualty insolvency mechanism which obtains assessments or other contributions from insurers on a pre-insolvency basis.

6) “Claimant” means any insured making a first party claim or any person instituting a liability claim, provided that no person who is an affiliate of the insolvent insurer may be a claimant.

7) “Commissioner” means the Commissioner of Insurance of this State.

8) “Control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact.

9) (a) “Covered claim” means an unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this Act applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Act and:

(i) The claimant or insured is a resident of this state at the time of the insured event; provided that for entities other than an individual, the residence of a claimant,

insured or policyholder is the state in which its principal place of business is located at the time of the insured event; or

(ii) the claim is a first party claim for damage to property with a permanent location in this state.

Drafting Note: Coverage issues for cybersecurity insurance is most likely addressed in scope section of this act. States may evaluate whether further clarification is appropriate or advisable.

(b) "Covered claim" shall not include:

(i) any amount awarded as punitive or exemplary damages;

(ii) any amount sought as a return of premium under any retrospective rating plan;

(iii) any amount due any reinsurer, insurer, insurance pool, underwriting association, health maintenance organization, hospital plan corporation, professional health service corporation or self-insurer as subrogation recoveries, reinsurance recoveries, contribution, indemnification or otherwise. No such claim for any amount due any reinsurer, insurer, insurance pool, underwriting association, health maintenance organization, hospital plan corporation or self-insurer may be asserted against a person insured under a policy issued by an insolvent insurer other than to the extent such claim exceeds the Association obligation limitations set forth in Section ____ of this Act.

Drafting Note: Fund counsel should review applicable case law in their states to determine if this revised language is necessary or advisable.

Drafting Note: Funds may want to consider characterizing this amendment as "clarifying" or "technical".

<u>Option A – Exclude only first party claims</u>

(iv) any first party claim by an insured whose net worth exceeds $10 million on December 31 of the year next preceding the date the insurer becomes an insolvent insurer; provided that an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis;

Option B – Exclude both first- and third-party claims

(iv) any first party claim by an insured whose net worth exceeds $10 million on December 31 of the year next preceding the date the insurer becomes an insolvent insurer; provided that an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis;

(v) any third party claim relating to a policy of an insured whose net worth exceeds $25 million on December 31 of the year next preceding the date the insurer becomes an insolvent insurer; provided that an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis; and further provided, however, that this exclusion shall not apply to third party claims against the insured where the insured has applied for or consented to the appointment of a receiver, trustee, or liquidator for all or a substantial part of its assets, filed a voluntary petition in bankruptcy, filed a petition or an answer seeking a reorganization or arrangement with creditors or to take advantage of any insolvency law, or if an order, judgment, or decree is entered by a court of competent jurisdiction, on the application of a creditor, adjudicating the insured bankrupt or insolvent or approving a petition seeking reorganization of the insured or of all or substantial part of its assets;

Drafting Note: Jurisdictional circumstances may warrant consideration whether a carve out from subparagraph (e) for workers' compensation claims, PIP claims, no-fault claims and any other claims for ongoing medical payments to third parties is appropriate. If administrative consideration suggests that an unacceptable interruption in claims payments would occur, such a carve out may be warranted.

(vi) any claim that would otherwise be a covered claim, but is an obligation to or on behalf of a person who has a net worth greater than that allowed by the insurance guaranty association law of the state of residence of the claimant at the time specified by such law, and which association has denied coverage to that claimant on that basis.

(vii) any first party claims by an insured which is an affiliate of the insolvent insurer.

(viii) any fee or other amount relating to goods or services sought by or on behalf of any attorney or other provider of goods or services retained by the insolvent insurer or an insured prior to the date it was determined to be insolvent.

(ix) any fee or other amount sought by or on behalf of any attorney or other provider of goods or services retained by any insured or claimant in connection with the assertion or prosecution of any clam, covered or otherwise, against the Association;

(x) any claims for interest.

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

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

Drafting Note: Drafters may want to consider this option for cyber security insurance:

"cybersecurity insurance" , for purposes of this Act, includes first and third party coverage, in a policy or endorsement, written on a direct, admitted basis for losses and loss mitigation arising out of or relating to data privacy breaches, unauthorized information network security intrusions, computer viruses, ransomware, cyber extortion, identity theft, and similar exposures.

10) "Insolvent insurer" means an insurer licensed to transact insurance in this state, either at the time the policy was issued or when the insured event occurred, and against whom a final order of liquidation has been entered after the

effective date of this Act with a finding of insolvency by a court of competent jurisdiction in the insurer's state of domicile.

Drafting Note: "Final order" as used in this section means an order which has not been stayed. States in which the "final order" language does not accurately reflect whether or not the order is subject to a stay should substitute appropriate language consistent with the statutes or rules of the state to convey the intended meaning.

11) "Insured" means any name insured, any additional insured, any vendor, lessor, or any other party identified as an insured under the policy.

(a) "Member insurer" means any person who:

(i) writes any kind of insurance to which this Act applies under Section __, including the exchange of reciprocal or inter-insurance contracts; and

(ii) is licensed to transact insurance in this state (except at option of state).

(b) an insurer shall cease to be a member insurer effective on the day following the termination or expiration of its license to transact the kinds of insurance to which this Act applies, however the insurer shall remain liable as a member insurer for any and all obligations, including obligations for assessments levied prior to the termination or expiration of the insurer's license and assessments levied after the termination or expiration, which relate to any insurer which became an insolvent insurer prior to the termination or expiration of such insurer's license.

12) "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which this Act applies, less return premiums thereon and dividends paid or credit to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

13) "Person" means any individual or legal entity, including governmental entities.

Drafting Note: In determining whether this definition of person is appropriate in a particular jurisdiction, fund managers and counsel should consider other applicable definitions of person embodied in state codes and case history interpreting existing definitions as applied to the guaranty association.

14) "Self-insurer" means a person that covers its liability through a qualified individual or group self-insurance program, or any other formal program created for the specific purpose of covering liabilities typically covered by insurance.

Section 4. Creation of the Association

There is created a nonprofit unincorporated legal entity to be known as the [state] Insurance Guaranty Association. All insurers defined as member insurers in Section ____ shall be and remain members of the Association as a condition of their authority to transact insurance in this state. The Association shall perform its functions under a plan of operation established and approved under Section __ and shall exercise its powers through a board of directors established under Section __. For purposes of administration and assessment, the Association shall be divided into _____ separate accounts: _____.

Section 5. Board of Directors

(1) The board of directors of the Association shall consist of not less than _____ (__) nor more than _____ (__) persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the Commissioner. Vacancies on the board shall be filled for the remaining period of the term by a majority vote of the remaining board members subject to the approval of the Commissioner. If no members are selected within sixty (60) days after the effective date of this Act, the Commissioner may appoint the initial members of the board of directors.

(2) In approving selections to the board, the Commissioner shall consider among other things whether all member insurers are fairly represented.

(3) Members of the board of directors may be reimbursed from the assets of the Association for expenses incurred by them as members of the board of directors.

Section 6. Powers and Duties of the Association

1) The Association shall:

a) be obligated to pay covered claims existing prior to the order of liquidation arising within thirty days after the order of liquidation or before the policy expiration date if less than thirty days after the order of liquidation, or before the insured replaces the policy or causes its cancellation, if he does so within thirty days of the order of liquidation. Such obligation shall be satisfied by paying to the claimant an amount as follows:

i) the full amount of a covered claim for benefits under a workers' compensation insurance coverage;

ii) an amount not exceeding $10,000 per policy for a covered claim for the return of unearned premium;

iii) an amount not exceeding $300,000 per claim for all other covered claims; provided, that for purposes of this limitation, all claims of any kind whatsoever arising out of, or related to, bodily injury or death to any one person shall constitute a single claim, regardless of the number of claims made, or the number of claimants;

iv) In no event shall the Association be obligated to pay an amount in excess of $300,000 for all first- and third-party claims under a policy or endorsement providing or that is found to provide cybersecurity insurance coverage and arising out of or related to a single insured event, regardless of the number of claims made or the number of claimants;

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. Notwithstanding any other provisions of this Act, a covered claim shall not include a claim filed with the Association after the earlier of: (i) twenty-five months after the date of the order of liquidation, or (ii) the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. *[Optional: The requirement of filing within twenty-five months after the date of the order of liquidation shall not apply to claims by injured employees for workers compensation benefits where the basis for the claim is an occupational illness that does not manifest itself within the 25 month period.] A "covered claim" shall not include any claim filed with the Association or a liquidator for protection afforded under the insured's policy for incurred-but-not-reported losses.* The Association shall pay only that amount of each unearned premium which is in excess of $_____.

Comment: *The optional language concerning workers compensation benefits is included for consideration in jurisdictions where the use of a 25-month bar date may be inappropriate in view of the latent nature of some occupational diseases which do not manifest themselves within this shortened period. The language in this provision referring to claims for incurred-but-not-reported losses has been inserted to expressly include the existing intent of this provision and make it clear that "policyholder protection" proofs of claim, while valid to preserve rights against the estate of the Insolvent insurer under the Insurers Rehabilitation and Liquidation Act, are* ***not*** *valid to preserve rights against the Association.*

Drafting Note: Because of its potential impact on guaranty association coverage, it is recommended that the legislation include an appropriate provision stating that the bar date only applies to claims in liquidation estates commencing after its effective date.

Any obligation of the Association to defend an insured on a covered claim shall cease upon the Association's (i) payment, by settlement releasing the insured or on a judgment, of an amount equal to the lesser of the Association's covered claim obligation limit or the applicable policy limit or (ii) tender of such amount.

Notwithstanding any other provisions of this Act, except in the case of a claim for benefits under workers' compensation coverage, any obligation of the Association to or on behalf of an insured and its affiliates on covered claims shall cease when $10,000,000 shall have been paid in the aggregate by the Association and any one or more Associations similar to the Association of any other state or states, to or on behalf of that insured, its affiliates, and additional insureds on covered claims or allowed claims arising under the policy or policies of any one insolvent insurer.

If the Association determines that there may be more than one claimant having a covered claim or allowed claim against the Association or any Associations similar to the Association in other states, under the policy or policies of any one insolvent insurer, the Association may establish a plan to allocate amounts payable by the Association in such manner as the Association in its discretion deems equitable.

b) be deemed the insurer only to the extent of its obligation on the covered claims and to such extent, subject to the limitations provided in this article, shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent, including but not limited to, the right to pursue and retain salvage and subrogation recoverable on paid covered claim obligations. The association shall not be deemed the insolvent insurer for any purpose relating to the issue of whether the association is amenable to the personal jurisdiction of the courts of any state.

Drafting note: The provision set out in this subsection 6(1)(b) is intended to be a clarification of the existing law in this state of the extent to which an association shall be deemed the insurer and concerning the nature of the contacts of the association outside of [designate state].

c) allocate claims paid and expenses incurred among the three accounts separately, and assess member insurers separately for each account, amounts necessary to pay the obligations of the Association under Section _____ subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency and other expenses authorized by this

Act. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the calendar year preceding the assessment on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the calendar year preceding the assessment on the kinds of insurance in the account. Each member insurer shall be notified of the assessment not later than thirty days before it is due. No member insurer may be assessed in any one year on any account an amount greater than two percent of that member insurer's net direct written premiums for the calendar year preceding the assessment on the kinds of insurance in the account. Subject to this stated assessment limit, insurers may be subject to a minimum assessment determined by the Board, not to exceed $XX in any one year. If the maximum assessment, together with the other assets of the Association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be pro-rated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association shall pay claims in any order which it deems reasonable, including the payment of claims as such are received from the claimants or in groups or categories of claims. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance; provided, however, that during the period of deferment, no dividends shall be paid to shareholders or policyholders. Deferred assessments shall be paid when such payment will not reduce capital or surplus below required minimums. Such payments shall be refunded to those companies receiving larger assessments by virtue of such deferment, or at the election of any such company, credited against future assessments. Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer if they are chargeable to the account for which the assessment is made.

Drafting Note: The minimum assessment in subsection 6(1)(c) was intentionally left blank because the minimum assessment amount will likely vary between states. A minimum threshold of $1000 is suggested.

d) investigate claims brought against the Association and adjust, compromise, settle and pay covered claims to the extent of the Association's obligation and deny all other claims. The Association shall have the right to appoint and to direct legal counsel retained under liability insurance policies for the defense of covered claims and to appoint and direct other service providers for covered services

e) not be bound by any settlement, release, compromise, waiver or judgment executed or entered within twelve months prior to an order of liquidation and shall have the right to assert all defenses available to the Association including, but not limited to, defenses applicable to determining and enforcing its statutory rights and obligations to any such claim. The Association shall be bound by any settlement, release, compromise, waiver or judgment executed or entered into more than one year prior to an order of liquidation; provided, however, such claim is a covered claim and such settlement or judgment was not a result of fraud, collusion, default, or failure to defend. Further, as to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend, the Association either on its own behalf or on behalf of an insured may apply to have such judgment, order, decision, verdict or finding set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend such claim on the merits.

f) handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but such designation may be declined by a member insurer.

g) reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association and shall pay the other expenses of the Association authorized by this Act.

h) establish procedures for requesting financial information from insureds and claimants on a confidential basis for purposes of applying sections concerning the net worth of first and third party claimants, subject to such information being shared with any other Association similar to the Association and the Liquidator for the insolvent company on the same confidential basis. If the insured or claimant refuses to provide the requested financial information and an auditor's certification of the same where requested and available, the Association may deem the net worth of the insured or claimant to be in excess of [insert proper amount] at the relevant time.

2) The Association may:

a) employ or retain such persons as are necessary to handle claims, provide covered policy benefits and services, and perform other duties of the Association;

b) borrow funds necessary to affect the purposes of this Act in accord with the plan of operation;

c) sue or be sued, and such power to sue includes the power and right to intervene as a party before any court in this state that has jurisdiction over an insolvent insurer as defined by this Act;

d) negotiate and become a party to such contracts as are necessary to carry out the purpose of this Act;

e) bring an action against any third party administrator, agent, attorney or other representative of the insolvent insurer to obtain custody and control of all files, records, and electronic data ("claims information") related to an insolvent company that are appropriate or necessary for the Association, or a similar association in other states, to carry out its duties under this Act. In such a suit, the Association shall have the absolute right through emergency equitable relief to obtain custody and control of all such claims information in the custody or control of such third party administrator, agent, attorney or other representative of the insolvent insurer, regardless of where such claims information may be physically located. In bringing such an action, the Association shall not be subject to any defense, lien (possessory or otherwise) or other legal or equitable ground whatsoever for refusal to surrender such claims information that might be asserted against the Liquidator of the insolvent insurers. To the extent that litigation is required for the Association to obtain custody of the claims information requested and it results in the relinquishment of claims information to the Association after refusal to provide the same in response to a written demand, the court shall award the Association its costs, expenses and reasonable attorney's fees incurred in bringing the action. The provisions of this section shall have no effect on the rights and remedies that the custodian of such claims information may have against the insolvent insurers, so long as such rights and remedies do not conflict with the rights of the Association to custody and control of the claims information under this Act.

f) perform such other acts as are necessary or proper to effectuate the purpose of this Act;

g) refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities, if at the end of any calendar year, the board of directors finds that the assets of the Association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year.

h) Subject to approval by the Commissioner, provide claims handling services to any "run-off insurer" provided the association expenses related thereto are fully reimbursed. There shall be no liability on the part of, and no cause of action of any nature shall arise against any member insurer, the Association or its agents or employees, the board of directors, or any person serving as a representative of any director for any action taken or any failure to act by them in the performance of their activities under this paragraph h. For purposes of this Paragraph h, "run off insurer" means a property and casualty insurer that has:

(a) Total Adjusted Capital under Risk Based Capital requirements in an amount less than the Authorized Control Level RBC as defined in Section _____as of the date specified in [applicable law] for filing of the annual financial statement and has indicated that it will cease writing new insurance policies, either as part of its corrective action plan or pursuant to being placed under regulatory control; or

(b) Total Adjusted Capital under Risk Based Capital requirements in an amount less than the Mandatory Control Level RBC as defined in Section _____ as of the date specified in [applicable law] for the filing of the annual financial statement and that has not been placed into liquidation under Section _____.

Drafting note: A companion run off transparency statute would call for annual claims handling review. In states where the companion statute is adopted guaranty funds engaged in these activities would be subject to this review. It is not intended that the normal statutory defenses applicable to guaranty fund handling of "covered claims" would apply to run-off claim handling nor is it intended that guaranty fund assets would be used for run-off claim or expense payment.

3) Suits involving the Association

a) except for actions by member insurers aggrieved by final actions or decisions of the Association pursuant to [appropriate citation in state act for provision similar to Section 7(3)(h) of this model], all actions relating to or arising out of this Act against the Association must be brought in the courts in this state. Such courts shall have exclusive jurisdiction over all actions relating to or arising out of this Act against the Association.

b) exclusive venue in any action by or against the Association is in [designate appropriate court]. The Association may, at the option of the Association, waive such venue as to specific actions.

c) in any lawsuit contesting the applicability of sections [the first party claims exclusion] or [the third party exclusion and/or reimbursement provision] where the insured or claimant has declined to provide financial information under the procedure provided in the plan of operation pursuant to section [insert] of this Act, the insured or claimant shall bear the burden of proof concerning its net worth at the relevant time. If the insured or claimant fails to prove that its net worth at the relevant time was less than the applicable amount, the court shall award the Association its full costs, expenses and reasonable attorney's fees in contesting in claim.

Drafting note: Because of the potential impact on guaranty association coverage, it is recommended that the legislation include an appropriate provision clearly stating that the any newly enacted net worth provision applies only to legislation estates commencing after its effective date. If only the new administrative provisions are being added to a pre-existing net worth exemption, it would be possible to apply them to all outstanding claims.

[Optional Section 6(4)

4) a) In the event a natural disaster such as an earthquake, windstorm or fire results in covered claim obligations currently payable by the Association in excess of its capacity to pay from current funds and current assessments under Section 6(1)(c), the Association, in its sole discretion, may by resolution request the _____ Agency to issue bonds pursuant to _____, in such amounts as the Association may determine to provide funds for the payment of covered claims and expenses related thereto. In the event such bonds are issued, the Association shall have the authority to annually assess member insurers for amounts necessary to pay the principal of, and interest on such bonds. Assessments collected pursuant to this authority shall be collected under the same procedures as provided in Section 6(1)(c) and, notwithstanding the two percent limit in Section 6(1)(c) _____, shall be limited to an additional _____ percent of the annual net direct written premium in this state of each member insurer for the calendar year preceding the assessment. Assessments collected pursuant to this authority may only be used for servicing the bond obligations provided for in this Section and shall be pledged for that purpose.

b) in addition to the assessments provided for in this Section, the Association in its discretion, and after considering other obligations of the Association, may utilize current funds of the Association, assessments made under 6(1)(c) and advances or dividends received from the liquidators of insolvent insurers to pay the principal and interest on any bonds issued at the board's request.

c) assessments under this Section shall be payable in 12 monthly installments with the first installment being due and payable at the end of the month after an assessment is levied, and subsequent installments being due not later than the end of each succeeding month.

d) in order to assure that insurers paying assessments levied under this Section continue to charge rates that are neither inadequate nor excessive, within 90 days after being notified of such assessments, each insurer that is to be assessed pursuant to this Section shall make a rate filing for lines of business additionally assessed under this Section. If the filing reflects a rate change that, as a percentage, is equal to the difference between the rate of such assessment and the rate of the previous year's assessment under this Section, the filing shall consist of a certification so stating and shall be deemed approved when made. Any rate change of a different percentage shall be subject to the standards and procedures of [Cite appropriate statutory authority for provisions on filing and approval of rates].

***Comment**: This provision should only be considered by those states that have a substantial threat of natural disasters which could result in a rash of insolvencies. Any association intending to consider this provision should first consult with experienced bond counsel in its state to identify an appropriate state agency or bonding authority to act as vehicle for issuing the bonds. That agency or authority's statute will also have to be amended to specifically authorize these types of bonds and to cross-reference this provision in the guaranty association law. It is possible that in some situations a new bonding authority may have to be created for this purpose. Regardless of the vehicle used, it is important that the decision-making authority on whether bonds are needed and in what amounts be retained by the association's board.*

The extent of additional assessment authority under this Section has not been specified. When considering the amount of additional authority that will be needed, a determination should be made as to the amount of funds needed to service the bonds. More specifically, consideration should be given to the amount of the bonds to be issued, interest rate and the maturity date of the bonds. The association should be able to raise sufficient funds through assessments to pay the interest and retire the bonds after some reasonable period (e.g. ten years).

The intent of Subsection (d) is to permit recoupment by member insurers of the additional cost of assessments under this Section without any related regulatory approval. A state enacting this Section may need to revise Subsection (d) so that it conforms to the particular state's recoupment provisions, as well as the provisions on filing and approval of rates.]

Section 7. Plan of Operation

(1) (a) The Association shall submit to the Commissioner a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable and equitable administration of the Association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the Commissioner.

(b) if the Association fails to submit a suitable plan of operation within ninety days following the effective date of this Act, or if at any time thereafter the Association fails to submit suitable amendments to the plan; the Commissioner shall, after notice and hearing, adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this Act. Such rules shall continue in force until modified by the Commissioner or superseded by a plan submitted by the Association and approved by the Commissioner.

(2) All member insurers shall comply with the plan of operation.

(3) The plan of operation shall:

(a) establish the procedures whereby all the powers and duties of the Association under Section 6 will be performed;

(b) establish procedures for handling assets of the Association;

(c) mandate that procedures be established for the disposition of liquidating dividends or other monies received from the estate of the insolvent insurer;

(d) mandate that procedures be established to designate the amount and method of reimbursing members of the board of directors under Section 5;

(e) establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the Association or its agent and a list of claims shall be periodically submitted to the Association or Association similar to the Association in another state by the receiver or liquidator;

(f) establish regular places and times for meetings of the board of directors;

(g) mandate that procedures be established for records to be kept of all financial transactions of the Association, its agents and the board of directors;

(h) provide that any member insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within thirty days after the action or decision;

(i) establish the procedures whereby selections for the board of directors will be submitted to the Commissioner;

(j) contain additional provisions necessary or proper for the execution of the powers and duties of the Association.

(4) The plan of operation may provide that any or all powers and duties of the Association, except those under Section 6(1)(d) and 6(2)(b), are delegated to a corporation, Association similar to the Association or other organization which performs or will perform functions similar to those of this Association or its equivalent in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other functions of the Association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the Commissioner, and may be made only to a corporation, association or organization which extends protection not substantially less favorable and effective than that provided by this Act.

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.

(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.

(3) Any final action or order of the Commissioner under this Act shall be subject to judicial review in a court of competent jurisdiction.

Section 9. Effect of Paid Claims

(1) Any person recovering under this Act shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association. Every insured or claimant seeking the protection of this Act shall cooperate with the Association to the same extent as such person would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer and except as provided in Subsection (2) below. In the case of an insolvent insurer operating on a plan

with assessment liability, payments of claims of the Association shall not operate to reduce the liability of the insureds to the receiver, liquidator or statutory successor for unpaid assessments.

(2) The Association shall have the right to recover from the following persons all amounts paid by the Association on behalf of such person, whether for indemnity, covered policy benefits and services, or defense or otherwise:

(a) any insured whose net worth on December 31 of the year immediately preceding the date the insurer becomes an insolvent insurer exceeds $25 million; provided that an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis; and

(b) The Association may also, at its sole discretion and without assumption of any ongoing duty to do so, pay any workers compensation claims or any third-party claims or cybersecurity insurance obligations covered by a policy or endorsement of an insolvent company on behalf of a high net worth insured as defined in Section 3(b)iv and v. In that case, the Association shall recover from the high net worth insured under this Section all amounts paid on its behalf, all allocated claim adjusted expensed related to such claims, the Association's attorney's fees, and all court costs in any action necessary to collect the fill amount to the Association's reimbursements under this Section.

Drafting Note: This revision would only be a consideration in states with a net worth exclusion

(c) any person who is an affiliate of the insolvent insurer.

(3) The Association and any Association similar to the Association in another state shall be recognized as claimants in the liquidation of an insolvent insurer for any amounts paid by them on covered claims obligations as determined under this Act or similar laws in other states and shall receive dividends and any other distributions at the priority set forth in [Liquidation Model Act reference]. The receiver, liquidator or statutory successor of an insolvent insurer shall be bound by determinations of covered claim eligibility under this Act and by settlements of claims made by the Association or a similar organization in another state. The court having jurisdiction shall grant such claims priority equal to that which the claimant would have been entitled in the absence of this Act against the assets of the insolvent insurer. The expenses of the Association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(4) The Association shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the Association and estimates of anticipated claims on the Association which shall preserve the rights of the Association against the assets of the insolvent insurer.

Section 10. Exhaustion of Other Coverage

(1) Any person having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury or loss that gave rise to the covered claim against the Association, shall be required first to exhaust all coverage provided by any such policy. Any amount payable on a covered claim under this Act shall be reduced by the full applicable limits stated in such other insurance policy and the Association shall receive a full credit for such stated limits, or, where there are no applicable stated limits, the claim shall be reduced by the total recovery. Notwithstanding the foregoing, no person shall be required to exhaust any right under the policy of an insolvent insurer.

a) a claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person covered under the policy of the insolvent insurer that gives rise to the covered claim shall be considered to be a claim arising from the same facts, injury or loss that gave rise to the covered claim against the Association.

b) a claim under an insurance policy shall also include, for purposes of this section:

(i) a claim against a health maintenance organization, a hospital plan corporation or a professional health service corporation; and

(ii) any amount payable by or on behalf of a self-insurer

c) to the extent that the Association's obligation is reduced by the application of this section, the liability of the person insured by the insolvent insurer's policy for the claim shall be reduced in the same amount.

(2) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first~~,~~ from the Association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the Association of the location of the property, and if it is a workers' compensation claim, he shall seek recovery first from the Association of the residence of the claimant. Any recovery under this Act shall be reduced

by the amount of recovery from any other insurance guaranty association or its equivalent.

Section 11. Prevention of Insolvencies

To aid in the detection and prevention of insurer insolvencies:

(1) The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer insolvencies.

(2) The board of directors may, upon majority vote, make recommendations to the Commissioner on matters generally related to improving or enhancing regulation for solvency.

(3) The board of directors may, at the conclusion of any domestic insurer insolvency in which the Association was obligated to pay covered claims, prepare a report on the history and causes of such insolvency, based on the information available to the Association and submit such report to the Commissioner.

Section 12. Examination of the Association

The Association shall be subject to examination and regulation by the Commissioner. The board of directors shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner.

Section 13. Tax Exemption

The Association shall be exempt from payment of all fees and all taxes levied by this state or any of its subdivisions except taxes levied on real or personal property.

Section 14. Recognition of Assessments in Rates

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Section 15. Immunity

There shall be no liability on the part of, and no cause of action of any nature shall arise against any member insurer, the Association or its agents or employees, the board of directors, or any person serving as a representative of any director, or the Commissioner or his representatives for any action taken or any failure to act by them in the performance of their powers and duties under this Act.

Section 16. Stay of Proceedings

All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this state shall subject to waiver by the Association in specific cases involving covered claims, be stayed until the last day fixed by the court for the filing of claims and such additional time thereafter as may be determined by the court from the date the insolvency is determined or an ancillary proceeding is instituted in the state whichever is later, to permit proper defense by the Association of all pending causes of action.

The liquidator, receiver, or statutory successor of an insolvent insurer covered by this Act shall permit access by the board or its authorized representative to such of the insolvent insurer's records which are necessary for the board in carrying out its functions under this Act with regard to covered claims. In addition, the liquidator, receiver or statutory successor shall provide the board or its representative with copies of such records upon the request by the board and at the expense of the board.