

## NOLHGA AND NCIGF'S PROPOSED CHANGES TO NCOIL'S INSURER DIVISION MODEL ACT AND REASONING FOR SUCH CHANGES

**March 9, 2021**

The National Organization of Life & Health Insurance Guaranty Associations ("NOLHGA") and the National Conference of Insurance Guaranty Funds ("NCIGF") propose the attached changes to NCOIL's Insurer Division Model Act (the "Insurer Division Model") currently under consideration by NCOIL's Financial Services & Multi-Lines Issues Committee. The Insurer Division Model would permit an insurer, with approval of its domestic commissioner, to divide into either: 1) the dividing insurer and one or more new insurers; or 2) two or more new insurers. While NCIGF and NOLHGA remain neutral on whether insurer division statutes should be adopted, the organizations offer the proposed changes to the Insurer Division Model to achieve what they understand is the universally agreed upon principle that consumer protection of the guaranty systems should not be lost because of an insurance company division. NOLHGA and NCIGF believe that focusing on two drafting issues can better preserve guaranty system protection.

The proposed changes are designed to accomplish two things:

- 1) Ensure that the continuity of guaranty system protection is mandatory to receive approval of a proposed plan of division; and

**Explanatory note:** The current draft of the Insurer Division Model provides that the continuation of guaranty system protection is one of three requirements that, if satisfied, *mandates* approval of a division. It does not make it clear that discretionary approval is not permitted where this standard has not been satisfied. The proposed change to Section 7(e) has been drafted to clarify that point.

- 2) Place the responsibility to show that eligibility for guaranty system protection is maintained as a result of a division on the sponsor of a plan of division.

**Explanatory note:** In order to ensure that the standard is addressed meaningfully in the insurer division review process, it must be incumbent on a sponsor of a division plan to include in the plan of division evidence establishing that the division will not result in any policyholders losing their eligibility for guaranty association or guaranty fund coverage. The new Section 4(a)(8) has been added to address this concern.

The proposed additions of Subsections 4(a)(8)(A) and 4(a)(8)(B) are designed to provide a standard of proof a sponsor must satisfy, assuming a plan of division is required to include evidence that no policyholder will lose guaranty system eligibility under the plan. These standards of proof are technical in nature and have been reviewed and approved by both

NOLHGA and NCIGF as the minimum showing required to ensure that policyholders impacted by an insurer division will remain eligible for guaranty system protection after the division occurs. Finally, the proposed change to Section 7(b)(2) is included to cross-reference the standards outlined in the new Subsections 4(a)(8)(A) and 4(a)(8)(B).

Thank you for considering our perspective on the proposed Insurer Division Model, and we look forward to working with you as this important work stream moves forward.

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## National Council of Insurance Legislators (NCOIL)

### Insurer Division Model Act

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*\*Sponsored by Sen. Matt Lesser (CT)*

*\*Discussion Draft as of August 25, 2020.*

*\*To be ~~introduced and~~ discussed during the Financial Services & Multi-Lines Issues Committee on December 10, 2020, ~~September 26, 2020~~.*

*\*This Model will be discussed alongside Colorado HB 1091.*

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#### Section 1. Title

This act shall be known and may be cited as the “Insurer Division Act.”

**Section 2. Definitions.**

(a) As used in this act, the following words and phrases have the meanings given to them in this section unless the context clearly indicates otherwise:

“Dividing insurer” means a domestic insurer that approves a plan of division pursuant to section 5 or 6.

“Divide” or “division” means a transaction in which an insurer divides into two or more resulting insurers in the manner authorized by this act or a similar law of another jurisdiction.

“Domiciliary jurisdiction” means the jurisdiction in which an insurer is domiciled.

“Liability” includes any liability or obligation of any kind, character, or description, whether known or unknown, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, determined, determinable, or otherwise.

“New insurer” means an insurer that is created by a division.

“Property” includes all property, whether real, personal or mixed, or tangible or intangible, or any right or interest therein, including rights under contracts and other binding agreements.

“Resulting insurer” means the dividing insurer, if it survives a division, or a new insurer.

“Transfer” includes:

- (A) an assignment;
- (B) an assumption;
- (C) a conveyance;
- (D) a sale;
- (E) a lease;
- (F) an encumbrance, including a mortgage or security interest;
- (G) a gift; and
- (H) a transfer by operation of law.

(b) As used in this act, the following words and phrases have the meanings given to them in the cited provisions of the law of this state:

“Admitted insurer.” [Citation.]

“Capital.” [Citation.]

“Commissioner.” [Citation.]

“Domestic insurer.” [Citation.]

“Person.” [Citation.]

“Policy.” [Citation.]

“Record.” [Citation.]

“Sign” or “signature.” [Citation.]

“Surplus.” [Citation.]

**Section 3. Division authorized.**

(a) By complying with this act, a domestic insurer may divide, with the prior approval of the commissioner, into:

- (1) the dividing insurer and one or more new insurers; or
- (2) two or more new insurers.

(b) A new insurer created by the division of a domestic insurer may be domiciled in a jurisdiction other than this state if:

- (1) a division of an insurer is authorized by the law of the domiciliary jurisdiction of the new insurer; and
- (2) the division of the domestic insurer is approved in accordance with any applicable provisions of the law of the domiciliary jurisdiction of the new insurer.

(c) A new insurer created by the division of an insurer domiciled under the law of a jurisdiction other than this state may be a domestic insurer if the division is approved in accordance with the applicable provisions of this act.

**Section 4. Plan of division.**

(a) A domestic insurer may become a dividing insurer under this act by approving a plan of division. The plan must be in a record and include:

- (1) The name of the dividing insurer.
- (2) A statement as to whether the dividing insurer will survive the division.
- (3) The name of each new insurer and its domiciliary jurisdiction.
- (4) The manner of:
  - (A) If the dividing insurer survives the division and it is desired:
    - (i) Canceling some, but less than all, of the shares in the dividing insurer.
    - (ii) Converting some, but less than all, of the shares in the dividing insurer into shares, securities, obligations, money, other property, rights to acquire shares or securities, or any combination of the foregoing.
  - (B) If the dividing insurer does not survive the division, canceling or converting the shares in the dividing insurer into shares, securities, obligations, money, other property, rights to acquire shares or securities, or any combination of the foregoing.
  - (C) Allocating between or among the resulting insurers the capital, surplus, and other property of the dividing insurer that will not be owned by all of the resulting insurers as tenants in common pursuant to section 10 and those policies and other liabilities of the dividing association as to which not all of the resulting insurers will be liable jointly and severally pursuant to section 11.
  - (D) Distributing the shares in the new insurer or insurers to the dividing insurer or some or all of its shareholders.
- (5) The proposed articles of incorporation and bylaws for each new insurer.
- (6) If the dividing insurer will survive the division, any proposed amendments to its articles of incorporation or bylaws.
- (7) The other terms and conditions of the division.
- ~~(7)~~(8) Evidence that as a result of the division, and any associated merger under section 12, no policyholder will lose eligibility for guaranty fund or guaranty association coverage in the policyholder's state of residence with respect to policies allocated to any new insurer or to be assumed by any other insurer as a

result of a merger under section 12, which shall require:

(A) for any division involving policies of property or casualty insurance, proof that the laws of each state where any of the dividing insurer's insurance policies are to be allocated to any resulting insurer, or to be assumed by the surviving entity as a result of a merger under section 12, extend eligibility for guaranty fund coverage to residents of the state who hold policies affected by the division only to the extent such policies were eligible to be covered by the guaranty fund in the state prior to the effective date of the division; or

~~(A)~~(B) for any division involving life insurance policies, annuity contracts or [accident and sickness or health insurance as defined in appropriate state licensing statutes] policies, proof that that each resulting insurer and the surviving entity of any merger under section 12 will be licensed in each state, and for each line of business, where the dividing insurer had at any time prior to the effective time of the division been licensed to the extent that any of the dividing insurer's insurance policies in such state that were eligible for protection by that state's guaranty association prior to the effective time of the division are to be allocated to a resulting insurer or to be assumed by the surviving entity as a result of the merger under section 12.

~~(8)~~(9) Any other provision required by:

- (A) the laws of this state;
- (B) the articles of incorporation or bylaws of the dividing insurer.

~~(9)~~(10) If one or more of the resulting insurers will be a party to a merger under section 12, a statement to that effect, including whether

- (A) a new insurer that will not be a surviving party to the merger will need to hold a certificate of authority, accreditation, or other authorization under the laws of the state of domicile of the surviving party to the merger; and
- (B) the merger under section 12 is required to meet the standard set forth in section 7(b)(2).

(b) It is not necessary for a plan of division to list each individual policy or other liability, and each item of capital, surplus, or other property of the dividing insurer to be allocated to a resulting insurer so long as the policies and other liabilities, and capital, surplus, and other property are described in a reasonable manner.

(c) A plan may refer to facts ascertainable outside of the plan if the manner in which the facts will operate on the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event,

determination, or action is within the control of the dividing insurer or a resulting insurer.

**Section 5. Approval of division by dividing insurer.**

- (a) Except as provided in section 5(b) or section 6, the plan of division of a dividing insurer must be approved:
  - (1) in accordance with the requirements, if any, in its articles of incorporation and bylaws for approval of a division;
  - (2) if its articles of incorporation and bylaws do not provide for approval of a division, in accordance with the requirements, if any, in its articles of incorporation and bylaws for approval of a merger requiring approval by a vote of the shareholders of the dividing insurer.
- (b) Approval of a division by a dividing insurer is subject to the following transitional rules:
  - (1) If a provision of the articles of incorporation or bylaws of the dividing insurer was adopted before [*the date of enactment of this act*] and requires for the proposal or adoption of a plan of merger a specific number or percentage of votes of directors or shareholders or other special procedures, then a plan of division may not be proposed or adopted by the directors or shareholders without that number or percentage of votes or compliance with the other special procedures.
  - (2) If a provision of any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, indenture, or other contract relating to indebtedness, or a provision of any other type of contract other than an insurance policy, annuity, or reinsurance treaty, that was issued, incurred or executed by the dividing insurer before [*the date of enactment of this act*], requires the consent of the obligee to a merger of the dividing insurer or treats such a merger as a default, then the provision applies to a division of the dividing insurer as if it were a merger.
  - (3) When a provision described in section 5(b)(1) or (2) has been amended after the applicable date, the provision ceases to be subject to the respective paragraph and thereafter applies only in accordance with its express terms.

**Section 6. Division without shareholder approval.**

Unless otherwise restricted by its articles of incorporation or bylaws, a plan of division of a dividing insurer does not require the approval of the shareholders of the dividing insurer if:

- (1) the plan does not amend in any respect the provisions of the articles of incorporation or bylaws of the dividing insurer, except amendments that may be



made without the approval of the shareholders; and

(2) either:

(A) the dividing insurer survives the division and all the shares and other equity securities, if any, of all of the new insurers are owned solely by the dividing insurer; or

(B) the dividing insurer has only one class of shares outstanding and the shares and other equity securities, if any, of each new insurer are distributed pro rata to the shareholders of the dividing insurer.

### Section 7. Regulatory approval of division.

(a) Prior to approving a division, the commissioner may hold a hearing on the terms and conditions of the proposed division after such notice as, under the circumstances, the commissioner considers appropriate. A hearing must be held if the dividing insurer so requests. In determining the appropriate notice of a hearing that should be given, the commissioner may require that the dividing insurer submit a policyholder notification plan. The commissioner may retain such independent experts as the commissioner considers appropriate. All expenses incurred by the commissioner in connection with the proceedings under this section, including expenses for the services of any attorneys, actuaries, accountants and other experts not otherwise a part of the commissioner's staff as may be reasonably necessary to assist the commissioner in reviewing the proposed division must be paid by the dividing insurer. The expenses may be allocated in the plan of division in the same manner as any other liability.

(b) The commissioner must approve a division, and any associated merger under section 12, if the commissioner finds that

(1) *[insert standard for approval of a merger of insurers under the state's existing law]*;

(2) the dividing insurer has established in its plan under section 4(a)(8) that as a result of the division, and any associated merger under section 12, no policyholder will lose applicable guaranty association coverage in the policyholder's state of residence with respect to policies allocated to one or more new insurers or assumed by another insurer pursuant to any associated merger under section 12; and

(3) the division and any such merger do not involve a *[voidable transaction]* *[fraudulent transfer]* under *[cite appropriate state statute]*.

(c) When determining if the standards set forth in section 7(b) have been satisfied, the

commissioner may consider all property proposed to be allocated to a resulting insurer, including without limitation, reinsurance agreements, parental guarantees, support or keep well agreements, or capital maintenance or contingent capital agreements, and the financial condition of the surviving insurer in a merger under section 12.

(d) When determining if the standard set forth in section 7(b)(3) has been satisfied, the commissioner must:

- (1) only consider the application of [*cite state voidable transactions act or fraudulent transfer act*] to a dividing insurer that survives the division;
- (2) treat each resulting insurer as a debtor;
- (3) treat the liabilities allocated to a resulting insurer as liabilities incurred by a debtor;
- (4) treat each resulting insurer as not having received reasonably equivalent value in exchange for incurring its obligations; and
- (5) treat property allocated to a resulting insurer as “remaining assets” as that term is used in [*cite state voidable transactions act or fraudulent transfer act*].

(e) The commissioner may not approve a division of a dividing insurer unless the commissioner:

- (1) makes the finding required by in Section 7(b)(2); and
- ~~(6)~~(2) also issues to each new insurer a certificate of authority, accreditation or other authorization, as necessary, to do an insurance business in this state pursuant to [*cite appropriate provision of state law*]. In the case of a new insurer that will be a non-surviving party to a merger pursuant to section 12, the commissioner may waive the application of this subsection or issue a certificate of authority, accreditation or other authorization to the new insurer that is deemed effective immediately prior to the merger.

~~(e)~~(f) If the commissioner approves the plan of division, the commissioner must issue an order accompanied by findings of fact and conclusions of law.

~~(f)~~(g) Except for the plan of division and any materials incorporated by reference into or otherwise made a part of the plan, all information, documents, materials and copies thereof submitted to, obtained by or disclosed to the commissioner or any other person in the course of the commissioner’s review and approval of a division under this section are confidential [*and subject to the provisions of [cite any applicable provision of the state’s law on confidentiality of proceedings before the commissioner]*].

### **Section 8. Amendment or abandonment of plan of division.**

(a) A plan of division of a dividing insurer may be amended in accordance with any procedures set forth in the plan or, if no such procedures are set forth in the plan, in the

manner determined by the directors of the dividing insurer, except that a shareholder that was entitled to vote on or consent to approval of the division is entitled to vote on or consent to any amendment of the plan that will change:

- (1) The amount or kind of shares, securities, obligations, money, other property, rights to acquire shares or securities, or any combination of the foregoing, to be received by any of the shareholders of the dividing insurer under the plan.
  - (2) The articles of incorporation or bylaws of any of the resulting insurers that will be in effect immediately after the division becomes effective, except for changes that do not require approval of the shareholders of the resulting insurer under other applicable law.
  - (3) Any other terms or conditions of the plan, if the change would adversely affect the shareholder in any material respect.
- (b) After a plan of division has been approved by a dividing insurer and before articles of division become effective, the plan may be abandoned without action by the shareholders in accordance with any procedures set forth in the plan or, if no such procedures are set forth in the plan, in the manner determined by the directors of the dividing insurer.
- (c) If a plan of division is abandoned after articles of division under section 9 have been delivered to the Secretary of State for filing and before the articles of division become effective, articles of abandonment, signed by the dividing insurer, must be delivered to the Secretary of State for filing before the time the articles of division become effective. The articles of abandonment take effect on filing, and the division is abandoned and does not become effective.
- (d) A dividing insurer may not amend or abandon a plan of division after the division has become effective.

### **Section 9. Articles of division; effectiveness.**

- (a) If a plan of division is approved as provided in this act, articles of division must be signed and delivered to the Secretary of State for filing. The articles of division must be signed by the dividing insurer or by the insurer that is dividing under the law of another jurisdiction if a new insurer is domiciled in this state. The order of the commissioner approving and authorizing the proposed division, as well as the approval of the regulatory authority in any other jurisdiction where a new insurer is domiciled, must be delivered to the Secretary of State for filing along with the articles of division.
- (b) Articles of division must contain all of the following:
- (1) The name of the insurer that is dividing.
  - (2) A statement as to whether the insurer that is dividing will survive the division.

- (3) The name of each new insurer created by the division and its domiciliary jurisdiction.
  - (4) If the articles of division are not to be effective on filing, the later date or date and time on which they will become effective, which must not be later than ninety days after the date of filing.
  - (5) A statement that the division was approved by either:
    - (A) the dividing insurer in accordance with this act; or
    - (B) an insurer domiciled in another jurisdiction in accordance with the law of that jurisdiction.
  - (6) If the dividing insurer survives the division, any amendment to its articles of incorporation approved as part of the plan of division.
  - (7) For each new insurer created by the division that will be a domestic insurer, its articles of incorporation as an attachment.
  - (8) The capital, surplus, and other property and policies and other liabilities of the dividing insurer that are to be allocated to each resulting insurer, but it is not necessary to list in the articles of division each item of capital, surplus, or other property, and each policy or other liability of the dividing insurer to be allocated to a resulting insurer so long as the capital, surplus, and other property, and policies and other liabilities are described in a reasonable manner.
  - (9) If one or more of the resulting insurers is a party to a merger under section 12, a statement to that effect.
- (c) The articles of incorporation of each new insurer must satisfy the requirements of the law of this state, except that they do not need to be signed and may omit any provision that is not required to be included in a restatement of the articles of incorporation.
- (d) Articles of division are effective on the date and time of their filing by the Secretary of State or the later date and time specified in the articles of division. The division is effective when the articles of division are effective.

**Section 10. Effect of division.**

- (a) When a division becomes effective, all of the following apply:
  - (1) If the dividing insurer is to survive the division:
    - (A) It continues to exist.

- (B) Its articles of incorporation, if any, are amended as provided in the articles of division.
  - (C) Its bylaws are amended to the extent provided in the plan of division.
- (2) If the dividing insurer is not to survive the division, the separate existence of the dividing insurer ceases.
- (3) With respect to each new insurer, all of the following apply:
- (A) It comes into existence.
  - (B) Any capital, surplus, and other property allocated to it vests in the new insurer without reversion or impairment, and the division is not a transfer of any of that property.
  - (C) Its articles of incorporation and bylaws are effective.
- (4) Capital, surplus, and other property of the dividing insurer:
- (A) That is allocated by the plan of division either:
    - (i) vests in the new insurers as provided in the plan of division; or
    - (ii) remains vested in the dividing insurer.
  - (B) That is not allocated by the plan of division:
    - (i) remains vested in the dividing insurer, if the dividing insurer survives the division; or
    - (ii) is allocated to and vests equally in the resulting insurers as tenants in common, if the dividing insurer does not survive the division.
  - (C) Vests as provided in this paragraph without transfer, reversion or impairment.
- (5) A resulting insurer to which a cause of action is allocated as provided in section 10(a)(4) may be substituted or added in any pending action or proceeding to which the dividing insurer is a party at the effective time of the division.
- (6) The policies and other liabilities of the dividing insurer are allocated between or among the resulting insurers as provided in section 11 and the resulting insurers to which policies or other liabilities are allocated are liable for those policies and other liabilities as successors to the dividing insurer, and not by transfer, whether directly

or indirectly.

- (7) The shares in the dividing insurer that are to be converted or canceled in the division are converted or canceled, and the holders of those shares are entitled only to the rights provided to them under the plan of division and to any appraisal rights they may have pursuant to section 13.
- (b) Except as provided in the articles of incorporation or bylaws of the dividing insurer, the division does not give rise to any rights that a shareholder, director, or third party would have upon a dissolution, liquidation or winding up of the dividing insurer.
- (c) The allocation to a new insurer of capital, surplus, or other property that is collateral covered by an effective financing statement is not effective until a new financing statement naming the new insurer as a debtor is effective under Article 9 of the Uniform Commercial Code – Secured Transactions.
- (d) Unless otherwise provided in the plan of division, the shares and any equity securities of each new insurer must be distributed to:
- (1) the dividing insurer, if it survives the division; or
  - (2) the holders of the common shares of the dividing insurer that do not assert appraisal rights, pro rata, if the dividing insurer does not survive the division.

#### **Section 11. Allocation of liabilities in division.**

- (a) Except as provided in this section, when a division becomes effective, a resulting insurer is responsible:
- (1) Individually for the policies and other liabilities the resulting insurer issues, undertakes, or incurs in its own name after the division.
  - (2) Individually for the policies and other liabilities of the dividing insurer that are allocated to or remain the liability of that resulting insurer to the extent specified in the plan of division.
  - (3) Jointly and severally with the other resulting insurers for the policies and other liabilities of the dividing insurer that are not allocated by the plan of division.
  - (4) Only as provided in this subsection (a), and not for any other policies or other liabilities under a common law doctrine of successor liability or any other theory of liability applicable to transferees or assignees of property.
- (b) If a division breaches an obligation of the dividing insurer, all of the resulting insurers are liable, jointly and severally, for the breach, but the validity and effectiveness of the

division are not affected thereby.

(c) A direct or indirect allocation of capital, surplus, or other property, or policies or other liabilities in a division is not a distribution for purposes of the [*cite state business corporation law*].

(d) Liens, security interests and other charges on the capital, surplus, or other property of the dividing insurer are not impaired by the division, notwithstanding any otherwise enforceable allocation of policies or other liabilities of the dividing insurer.

(e) If the dividing insurer is bound by a security agreement governed by Article 9 of the Uniform Commercial Code - Secured Transactions as enacted in any jurisdiction and the security agreement provides that the security interest attaches to after-acquired collateral, each resulting insurer is bound by the security agreement.

(f) Except as provided in the plan of division and specifically approved by the commissioner, an allocation of a policy or other liability does not:

(1) Affect the rights under other law of a policyholder or creditor owed payment on the policy, payment of any other type of liability, or performance of the obligation that creates the liability, except that those rights are available only against a resulting insurer responsible for the policy, liability, or obligation under this section.

(2) Release or reduce the obligation of a reinsurer, surety, or guarantor of the policy, liability, or obligation.

## **Section 12. Simultaneous merger.**

A new insurer may be a party to a merger with a domestic insurer or an existing insurer domiciled in another jurisdiction that is admitted, accredited, or otherwise authorized as necessary to do an insurance business in this state, as required by the law of this state. A merger authorized by this section takes effect simultaneously with the division. The new insurer is deemed to exist before the effectiveness of the merger, but solely for the purpose of being a party to the merger. The insurance policies, annuities, and reinsurance treaties allocated to the new insurer pursuant to the plan of division become the obligations of the survivor of the merger simultaneously with the effectiveness of the division and merger under this section. The plan of merger is deemed to have been approved by the new insurer if the plan is approved by the dividing insurer in connection with its approval of the plan of division. The articles of merger that are delivered to the Secretary of State for filing must state that the merger was approved by the new insurer under this section.

## **Section 13. Appraisal rights.**

A shareholder of a dividing insurer is entitled to appraisal rights as provided in [*cite appraisal rights provision of the state's business corporation law*] in connection with a division, other than

one approved under section 6.

**Section. 14. Guaranty associations.**

References in [*cite state property and casualty insurance guaranty association statute*] to an "insolvent insurer" are deemed to include an insurer that

- (1) divides under this act or a similar law of another jurisdiction, or is created in such a division;
- (2) holds or is allocated the policy obligations of an insurer that held a certificate of authority to transact insurance in this state either at the time a policy was issued or when an insured event occurred, by reason of the division, if the division was approved:
  - (A) in a jurisdiction that allows a division; and
  - (B) by an insurance regulator having jurisdiction over the division; and
- (3) against which a final order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction in the resulting insurer's state of domicile.

**Section 15. Regulations.**

The commissioner may adopt regulations that are necessary to administer this act.

**Section 16. Effective date.**

This act takes effect \_\_\_\_\_.