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National Council of Insurance Legislators (NCOIL)

Online Marketplace Guarantees Model Act

**Sponsored by Rep. Brian Lampton (OH)*

**Draft as of June 18, 2024. To be discussed by the NCOIL Property & Casualty Insurance Committee on July 20, 2024.*

Table of Contents

Section 1.	Title, Scope and Purposes
Section 2.	Definitions
Section 3.	Requirements For Doing Business
Section 4.	Online Marketplace Guarantees
Section 5.	Reimbursement Insurance Policy
Section 6.	Consumer Protection Disclosures
Section 7.	Prohibited Acts
Section 8.	Enforcement Provisions
Section 9.	Authority to Develop Regulations
Section 10.	Separability Provision

Section 1. Title, Scope and Purposes

A. This Act shall be known and cited as the Online Marketplace Guarantees Act.

B. The purposes of this Act are to:

- (1) Create a legal framework within which an online marketplace or its affiliates may offer or sell an online marketplace guarantee in this state;
- (2) Protect consumers by promoting transparency, fairness and accountability related to online marketplace guarantees and placing the risk of innovation on the online marketplace providers rather than consumers;
- (3) Encourage innovation in the marketing and development of more economical and effective means of providing an online marketplace guarantee; and
- (4) Permit and encourage fair and effective competition among different providers.

Drafting Note: States wishing to allow providers to obtain insurance policies providing group or blanket liability insurance coverage, business interruption or similar coverages to platform users may add language to expressly allow such coverage within the scope of this Act.

Section 2. Definitions

As used in this Act:

A. [“Commissioner” means the commissioner of insurance of this state.]

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term “commissioner” appears. If the state desires that online marketplace guarantees should instead be regulated by the state attorney general, a state should add language referencing to that effect to ensure the appropriate assignment of responsibilities.

B. “Online marketplace” means a person that meets each of the following criteria:

(1) Provides an online application, software, website, system or other medium through which a service is advertised or is offered to the public as available in this state.

(2) Provides, directly or indirectly, or maintains a platform for services by performing any of the following:

(a) Transmitting or otherwise communicating the offer or acceptance of a transaction between two platform users.

(b) Owning or operating the electronic infrastructure or technology that brings two or more platform users together.

(3) If engaged in the sale or offering of online marketplace guarantees, does so only in a manner that is ancillary to the conduct of its primary legitimate business or activity.

(4) Is not a local or state governmental entity or vendor.

C. “Online marketplace guarantee” means a contract or agreement issued in connection with an online marketplace, whether or not for a separate consideration, to guarantee a platform user’s obligation to repair, replace or indemnify another platform user for any damages or loss of income arising out of use of the online marketplace, with or without additional provision for incidental payment of indemnity.

D. “Platform contract holder” means a platform user who is the beneficiary or holder of an online marketplace guarantee.

E. “Platform user” means a user of an online marketplace who is subject to the online marketplace’s terms of service.

F. “Person” means an individual, partnership, corporation, incorporated or unincorporated association, joint stock company, reciprocal, syndicate or any similar entity or combination of entities acting in concert.

G. “Provider” means (i) an online marketplace or (ii) an affiliate or representative of an online marketplace, who issues, makes, provides, sells or offers to sell as well as administers, either directly or through a third party, an online marketplace guarantee.

H. “Reimbursement insurance policy” means a policy of insurance issued to a provider and pursuant to which the insurer agrees, for the benefit of platform contract holders, to discharge all of the obligations and liabilities of the provider under the terms of the online marketplace guarantee in the event of non-performance by the provider.

I. “Separate consideration” means a separately stated consideration paid to a provider for an online marketplace guarantee that is paid at the voluntary election of the person purchasing the online marketplace guarantee. Separate consideration does not include a revenue sharing agreement between the provider and platform user or any consideration collected by the online marketplace that is primarily related to the underlying service provided by the online marketplace.

Section 3. Requirements For Doing Business

A. An online marketplace guarantee shall not be issued, sold or offered for sale in this state unless the provider has:

- (1) If sold for separate consideration, provided an electronic or written record of the purchase of the online marketplace guarantee to the platform contract holder;
- (2) Made the online marketplace guarantee terms available on the provider’s website; and
- (3) Complied with this Act.

B. All providers of online marketplace guarantees sold or offered in this state shall file a registration with the commissioner on a form and at a fee prescribed by the commissioner.

C. To ensure the faithful performance of a provider’s obligations to its platform contract holders, each provider who is obligated to a platform contract holder shall comply with at least one of the following requirements:

- (1) Insure all online marketplace guarantees under a reimbursement insurance policy issued by an insurer authorized to transact insurance in this state or issued pursuant to [insert code section permitting surplus lines business].
- (2) For at least 30 days in any 90-day period, maintain a market capitalization of at least \$200 million on a securities exchange registered as a national securities exchange or a securities market regulated under the Securities Exchange Act of 1934 (15 U.S.C. §§ 78 et seq.), as amended, as reported by such exchange at the close of each trading day.
- (3) Maintain a net cash balance or net worth of at least \$50 million. Upon request, the provider or provider’s parent company shall provide the commissioner with financial statements to support such net cash balance or net worth. Financial statements may include, but are not limited to (i) a Form 10-K or Form S-1 filed with the U.S. Securities and Exchange Commission (“SEC”) within the last calendar year, including any amendments thereto, or (ii) a copy of the company’s audited financial statements with a reporting date within the last calendar year. If the provider’s parent company’s financial statements are provided to meet the provider’s financial stability requirement, then the

parent company shall agree to guarantee the obligations of the provider relating to online marketplace guarantees sold by the provider in this state.

Section 4. Online Marketplace Guarantees

A. Online marketplace guarantees do not constitute insurance and are not required to comply with any provision of the insurance laws of this state other than as expressly made applicable in this Chapter, provided the provider has registered with the commissioner as required by Section 3 of this Act.

B. The following activities by a provider or a provider's representative do not constitute the transaction of insurance and are likewise exempt from any licensing requirements under [cite to state insurance code]:

Drafting Note: The intent of this model is to exclude the transaction of online marketplace guarantees and these related activities from any state licensing requirements for insurance carriers or intermediaries that would otherwise apply

(1) Marketing, providing, selling or offering to sell online marketplace guarantees in compliance with this Act.

(2) Determining amounts payable under online marketplace guarantees, including, with respect to claims made by platform contract holders, (i) investigating, negotiating or administering settlement of claims, or (ii) applying the factual circumstances of the claim to the online marketplace guarantee's terms.

(3) Collecting separate consideration in connection with online marketplace guarantees.

C. A provider may (i) charge separate consideration for an online marketplace guarantee and (ii) provide varying levels of service and functionality depending on whether a platform user has paid separate consideration. Any separate consideration collected for online marketplace guarantees shall not be subject to premium taxes.

D. Nothing in this Act shall be construed to limit a provider's rights to seek recourse from a platform user to the extent of any contractual obligation by any means permitted under an online marketplace's terms of service.

E. An online marketplace guarantee may set a minimum threshold amount of damages that limit amounts payable to a platform contract holder provided that such minimum threshold amount is disclosed pursuant to Section 6.F of this Act.

Section 5. Reimbursement Insurance Policy

A. Reimbursement insurance policies insuring online marketplace guarantees sold or offered in this state shall clearly state that, upon failure of the provider to perform under the online marketplace guarantee, the insurer that issued the policy shall pay on behalf of the provider any sums the provider is obligated to pay according to such online marketplace guarantee.

B. A reimbursement insurance policy shall be subject to the laws and regulations governing termination and non-renewal of insurance policies in this state or with [citation to specific statute]. The termination of a reimbursement insurance policy shall not reduce the issuer's responsibility for online marketplace guarantees issued by providers prior to the effective date of the termination.

C. For purposes of [insert citation to the law that obligates an insurer for the acts of its agents, including the collection of moneys not forwarded] a provider is considered to be the agent of the insurer which issued the reimbursement insurance policy. The insurer retains the right to seek indemnification or subrogation from the provider if the insurer pays or is obligated to pay sums to the platform contract holder that the provider was obligated to pay under the online marketplace guarantee. This Act does not prevent or limit the insurer's right in this regard.

Section 6. Consumer Protection Disclosures

A. Online marketplace guarantees issued, sold or offered for sale in this state shall be written in clear, understandable language and conspicuously disclose the requirements in this section, as applicable.

B. Online marketplace guarantees insured under a reimbursement insurance policy pursuant to Section 3.C(1) of this Act shall contain a statement in substantially the following form:
“Obligations of the provider under this online marketplace guarantee are guaranteed under a reimbursement insurance policy. If the provider fails to pay or provide service on a claim within one hundred and eighty (180) days after proof of loss has been filed, the platform contract holder is entitled to make a claim directly against the insurance company subject to the terms of the policy.”

C. Online marketplace guarantees not insured under a reimbursement insurance policy pursuant to Section 3.C(1) of this Act shall contain a statement in substantially the following form:
“Obligations of the provider under this online marketplace guarantee are not covered under a reimbursement insurance policy and are backed only by the provider (issuer).”

D. Online marketplace guarantees shall identify each provider obligated to provide payment for claims under the contract or otherwise involved in the contract's issuance or sale.

E. If sold for separate consideration, online marketplace guarantees shall conspicuously state the total purchase price and the terms under which the online marketplace guarantee is sold prior to the sale.

F. Online marketplace guarantees shall conspicuously state the existence and amount of any damage recovery minimum threshold.

G. Online marketplace guarantees shall specify the services to be provided and any limitations, exceptions or exclusions.

H. Online marketplace guarantees shall state any terms, restrictions or conditions, including conditions governing transferability or conditions governing termination of the online marketplace guarantees by the platform contract holder. The provider of the online marketplace

guarantee shall mail or email a written notice to the platform contract holder within thirty (30) days of the date of termination.

I. Online marketplace guarantees sold for separate consideration shall clearly and conspicuously state, at the time of sale, the applicable cancellation and refund policy.

J. Online marketplace guarantees shall include a statement in substantially the following form: “This agreement is not an insurance contract.”

Section 7. Prohibited Acts

A. A provider shall not make, permit or cause to be made any false or misleading statement, or deliberately omit any material statement that would be considered misleading if omitted, in connection with the sale, offer to sell or advertisement of an online marketplace guarantee.

B. If an online marketplace guarantee is offered for separate consideration, a provider shall not require the purchase of an online marketplace guarantee as a condition of the use of the online marketplace’s platform.

Section 8. Enforcement Provisions

A. When necessary or appropriate to enforce the provisions of this Act and the commissioner’s regulations and orders, and to protect platform contract holders in this state, the commissioner may take action under [insert citation to general enforcement power of commissioner].

B. A person aggrieved by an order issued under this Section 8 may request a hearing before the commissioner pursuant to [insert citation to statutes concerning hearings before the commissioner]. Pending such hearing and the decision by the commissioner, the commissioner shall suspend the effective date of any such order.

Section 9. Authority to Develop Regulations

The commissioner may promulgate regulations that are not inconsistent with and are necessary to administer and enforce the provisions of this Act, including regulations related to recordkeeping by providers.

Section 10. Separability Provision

If any provision of this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of this Act, and the application of the provision to any person or circumstances other than those as to which it is held invalid, shall not be affected.