



DATE: January 17, 2025

SUBJECT: NCOIL Online Marketplace Guarantees Model Act

This memo is intended to briefly address whether the "online marketplace guarantee" as defined in the proposed Online Marketplace Guarantees Model Act ("the Act") being developed by the National Council of Insurance Legislators (NCOIL) would be considered insurance under Wisconsin law. As outlined below, the Wisconsin Office of the Commissioner of Insurance (OCI) would consider an "online marketplace guarantee" to be insurance.<sup>1</sup>

While Wisconsin statutes do not provide a definition of "insurance," Wisconsin courts have weighed in on numerous occasions to address the matter. The prevailing definition from Wisconsin caselaw defines "insurance" as "a contract that shifts the risk of loss in exchange for premium." *Nat'l Motorist Ass'n v. Office of the Comm'r of Ins.*, 2002 WI App 308, P14 (Wis. Ct. App. 2002); referencing *Hillegrass v. Landwehr*, 176 Wis. 2d 76, 81 (Wis. 1993) (Whether the contract is one of indemnity or liability, the critical element in both definitions is a contractual shifting of risk in exchange for premiums.) Accordingly, when analyzing whether a contract is insurance, OCI looks for a transfer of risk in exchange for premium.

Under the Act, an "online marketplace guarantee" is defined as:

[A] contract or agreement issued in connection with an online marketplace, whether or not for 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.

This definition and other provisions in the Act permit an online platform provider to assume the obligation to repair, replace, or indemnify one platform user through a contract/guarantee for damages caused by another arising out of the use of the marketplace in exchange for a fee. It is the view of OCI that this is insurance based on the transfer of risk in which the online platform provider is assuming the obligation to cover a platform user's damaged property in exchange for a fee.

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<sup>1</sup> This position is limited to OCI's view of the "online marketplace guarantee" under the Act and is not intended to express our position or views of any current company or practice, which we have not independently investigated.