May 29, 2015

By Electronic Mail

NAIC Receivership & Insolvency (E) Task Force
c/o Jane M. Koenigsman, Life/Health Financial Analysis Manager
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

Re: Life and Health Insurance Guaranty Association Coverage of Factored Benefits Under Structured Settlement Annuities; ACLI Receivership Committee Proposals for Possible Future Clarification of Sections 3.A(5) and 3.B(2) of the NAIC Life and Health Insurance Guaranty Association Model Act (the “Model Act”)

Ladies and Gentlemen:

In connection with its ongoing consideration of life and health insurance guaranty association ("Guaranty Association") coverage of structured settlements, including the issue of coverage of factored benefits under structured settlement annuities ("SSAs"), the Receivership & Insolvency (E) Task Force (the "RITF") has requested comments on possible clarification of the Model Act, including the ACLI Receivership Committee’s March 24, 2015 drafts of potential amendments to Sections 3.A and 3.B Model Act. As counsel to the National Structured Settlements Trade Association ("NSSTA") I have been asked to respond to the RITF’s request by providing the following comments:

NSSTA agrees with the ACLI Receivership Committee that factored benefits under structured settlement annuities should not be eligible for Guaranty Association coverage. NSSTA’s views were (and still are) summarized in the following “policy recommendations” from its December 13, 2013 presentation to the RITF:

• Guaranty Associations should not be expected – and under the Model Act they do not appear to be required – to cover factored benefits [under SSAs]. [Structured settlement factoring] . . . companies are arbitrageur investors. They commonly cite (and exaggerate) the risk of annuity issuer insolvency as a justification for factoring – even in cases in which a payee’s annuity benefits would be within Guaranty Association coverage limits if the annuity issuer were to become insolvent. Factoring companies (and their assignees) have no right to be protected against that risk by Guaranty Associations.
• Guaranty Association coverage should be available (subject to statutory limits) for SSA benefits that have not been factored. In cases in which a structured settlement payee has factored some but not all of his or her benefits, Guaranty Association coverage should be available insofar as possible to protect the un-factored benefits.

• While Guaranty Associations are, and should be, under no obligation to cover factored benefits, they should not be precluded from doing so in cases in which it would be impractical to distinguish between factored and un-factored benefits or in which failure to cover factored benefits could harm payees.

NSSTA does not believe that under statutes based on the current Model Act, Guaranty Associations are obligated to provide coverage for factored SSA benefits. NSSTA would have no objection, however, to appropriately focused amendments that would confirm the inapplicability of Guaranty Association coverage to factored SSA benefits (without implying that coverage could be applicable under the current statute). Any such amendments should recognize how structured settlement factoring transactions work.

What structured settlement factoring companies and related assignees/investors (hereinafter collectively referred to as “Factoring Investors”) acquire from structured settlement payees is contractual rights to receive future payments, or portions of future payments, under structured settlement agreements funded by SSAs. Factoring Investors do not acquire SSAs, and in most cases they do not acquire rights to receive all of the future payments under SSAs. They do not become the owners or assignees of SSAs, and they do not necessarily become the payees or beneficiaries of SSAs (at least as the term “beneficiary” is used in the Model Act). A Factoring Investor often is authorized to receive the full amount of a future payment that has been partially factored – and then is required to send the un-factored portion to the settlement recipient.

The ACLI Receivership Committee’s suggested addition to Section 3.A(5) of the Model Act would deny Guaranty Association coverage to –

(c) A person who becomes the owner, payee, assignee, or beneficiary of a contract pursuant to a transaction defined under 26 U.S.C. § 5891(c)(3)(A), regardless of whether the transaction occurred before or after the effective date of the referenced section of the Internal Revenue Code.

Internal Revenue Code (“IRC”) § 5891(c)(3)(A) defines the term “structured settlement factoring transaction” to mean “a transfer of structured settlement payment rights (including portions of structured settlement payments) made for consideration by means of sale, assignment, pledge, or other form of encumbrance or alienation for consideration.” By referring generally to transactions within the broad IRC definition of “structured settlement factoring transaction,” proposed Section 3.A(5)(c) of the Model Act should apply to all of the transactions that can make factored SSA benefits ineligible for Guaranty Association coverage; but the limiting reference to a “person who becomes the owner, payee, assignee or beneficiary of an SSA” could imply that coverage is available for a Factoring Investor that does not become the “owner, payee, assignee, or beneficiary” of an SSA. To remedy that problem NSSTA suggests the following alternative version of proposed Section 3.A(5)(c):

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A person who acquires rights to receive payments through a structured settlement factoring transaction as defined in 26 U.S.C. Section 5891(c)(3)(A), regardless of whether the transaction occurred before or after such section became effective.

The ACLI Receivership Committee’s suggested addition to Section 3.B(2) of the Model Act could be read to imply that Guaranty Association coverage is not available for any “benefits payable under a structured settlement annuity” that have been the subject of a factoring transaction – even if the transferee (i.e., the Factoring Investor) is authorized to keep only part of each payment and is required to send the balance to the structured settlement recipient. That concern could be addressed if proposed Section 3.B(2)(n) were revised to read as follows:

Structured settlement annuity benefits to which a payee (or beneficiary) has transferred his or her rights in a structured settlement factoring transaction as defined in 26 U.S.C. Section 5891(c)(3)(A), regardless of whether the transaction occurred before or after such section became effective.

Although NSSTA agrees with the substance of the proposed Drafting Note that accompanies the ACLI Receivership Committee’s proposals, the wording could be improved in some respects. NSSTA’s suggestions for improvements are shown in the attached marked version of the proposed Drafting Note.

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NSSTA appreciates the opportunity to offer the above comments and recommendations, which should not be read to imply that there is any substantive disagreement between NSSTA and the ACLI Receivership Committee concerning Guaranty Association coverage of factored benefits under SSAs. Based on discussions that began as long ago as 2008, NSSTA believes that its views on the subject and the views of the ACLI Receivership Committee are closely aligned. NSSTA will be glad to work with the ACLI Receivership Committee and other interested parties in refining the Committee’s March 24, 2015 drafts if and when the RITF wishes to proceed with them.

Please let me know if you have any questions or if NSSTA otherwise can be of assistance to the RITF in its continuing consideration of Guaranty Association coverage of factored benefits under SSAs.

Sincerely,

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cc: ACLI Receivership Committee  
    National Organization of Life and Health Insurance Guaranty Associations  
    National Structured Settlements Trade Association
Proposed Drafting Note re Proposed Model Act Sections 3.A(5) and 3.B(2) –
Marked to Show Changes Suggested by NSSTA

Drafting Note: The exclusion from covered persons in Section 3.A(5)(c) of those persons who have purchased structured settlement annuity benefits from the original structured settlement annuity payee his or her rights to receive structured settlement annuity benefits, as well as and the corresponding exclusion of such benefits from covered benefits under Section 3.B(2)(n), reinforce the notion recognize that the protections afforded by guaranty associations are intended for insurance consumers, such as the original payees of structured settlement annuities. Guaranty association protection is not designed to does not extend to sophisticated investors who purchase acquire rights to receive structured settlements annuity benefits in the secondary market. These exclusions, however, do not apply to structured settlement annuity benefits that are transferred to children, present or former spouses or other dependents as part of any domestic relations settlements or orders, or to other non-investors transferees (including donees) who do not remit acquire rights to receive structured settlement annuity benefits without providing any monetary consideration for such benefits. These clarifications, therefore, Thus, Sections 3.A(5)(c) and 3.B(2)(n) ensure clarify that guaranty association coverage is preserved to protecteds structured settlement annuity benefits that are retained by the to which the original payee and his or her dependents family members retain the rights.