The Receivership and Insolvency (E) Task Force met via conference call Feb. 23, 2015. The following Task Force members participated: Dave Jones, Chair, represented by John Finston (CA); Anne Melissa Dowling represented by Jon E. Arsenault (CT); Kevin M. McCarty represented by Mary Schwantes (FL); Nick Gerhart represented by Jim Armstrong (IA); TBD represented by Kevin Baldwin (IL); Stephen W. Robertson represented by Cindy Donovan (IN); Ken Selzer represented by Ken Abitz (KS); James J. Donelon represented by Arlene Knighten (LA); Annette E. Flood represented by James Gerber (MI); John M. Huff represented by John Rehagen (MO); Wayne Goodwin represented by Sara Gosnell (NC); Bruce R. Range represented by Justin Schrader (NE); John G. Franchini represented by Loretta Trujillo (NM); John D. Doak represented by Donna Wilson (OK); Teresa D. Miller represented by Joe DiMemmo and Laura Lyon Slaymaker (PA); David Mattax represented by James Kennedy (TX); Todd E. Kiser represented by Brett J. Barratt (UT); and Mike Kreidler represented by Bill Michels (WA).

1. **Adopted its Nov. 25, 2014, and Nov. 17, 2014, Minutes**

Ms. Wilson made a motion, seconded by Ms. Donovan to adopt the Task Force’s Nov. 25 (Attachment One-A) and Nov. 17, 2014, minutes (see NAIC Proceedings – Fall 2014, Receivership and Insolvency (E) Task Force). The motion passed unanimously.

2. **Reappointed its Working Groups’ Membership**


3. **Discussed Comments Received on Draft Guaranty Fund Expense Guidance**

Mr. Finston said draft guaranty fund expense guidance was exposed for a 60-day public comment period subsequent to the 2014 Fall National Meeting. He said the issues in the draft originated through discussions at the Receivership Financial Analysis (E) Working Group in the context of its discussion with the states on specific receiverships. The Receivership Financial Analysis (E) Working Group meets in regulator-to-regulator session pursuant to paragraph 3 (specific companies, entities or individuals, including, but not limited to, collaborative financial and market conduct examinations and analysis) of the NAIC Policy Statement on Open Meetings. The Receivership Financial Analysis Working Group referred the draft to the Task Force for open discussion.

Mr. Finston said the issues outlined in the draft focus on three principles. The first principle is not charging fixed costs of the guaranty funds to specific receiverships. The guidance states the expectation would be that fixed operational costs that are not related to receiverships should not be imposed on receiverships. The second principle identifies the need for better transparency in the reporting of guaranty fund expenses to the receiver and the need to find solutions to minimize expenses. The draft includes expectations for better classification of expenses, providing better detail and explanation of expenses to the receiver including consistent guidelines for reporting and working toward solutions to minimize expenses. The third principle is the reasonableness of travel costs included within guaranty fund expenses as compared to the expense limitation the states allow for reimbursement. Prior to referring these issues to the Task Force, the Working Group members discussed these principles with a few guaranty association members to essentially clarify the regulators’ understanding of guaranty fund expenses.

Mr. Finston said comment letters were received from Insurance Regulatory Consulting Group (IRCG), International Association of Insurance Receivers (IAIR), National Conference of Insurance Guaranty Funds (NCIGF), National Organization of Life and Health Insurance Guaranty Associations (NOLHGA), and Tennessee Insurance Guaranty Association (TIGA) (Attachment One-C).
Doug Hartz (IRCG) said he is interested in this topic in relation to the international arena. He said he is working to convince other countries that guaranty associations are crucial to the insurance markets. He said the guaranty fund system is an area where industry and the regulators have worked together very well.

Roger Schmelzer (NCIGF) summarized the NCIGF comment letter. He said he believes everyone wants effective and efficient liquidation proceedings that are consistent with state laws and put the policyholders first. The NCIGF will continue to work toward that goal. He said the NCIGF does not agree with the expectations in the guidance draft.

Peter Gallanis (NOLHGA) said he agreed with the comments of Mr. Schmelzer. He said NOLHGA and member guaranty associations for many years have been proud and honored to work with receivers and regulators to make this process better for consumers and will continue to do that.

Larry Ahern (TIGA) summarized TIGA’s comment letter. He said TIGA disagrees with the underlying conclusion that fixed costs should not be charged to the receivership because the effect would be to impose an unfair higher indirect cost on the insurance industry. He said TIGA agrees costs should be reasonable, but defining what is reasonable may be more difficult.

Bart Boles (IAIR) said that, due to IAIR’s diverse membership, the IAIR could not make comments that benefit only one part of its membership; however, the IAIR plans to be engaged in future discussions on this matter.

Mr. Finston said the principles and expectations recognize that some fixed costs may not be appropriate to allocate to specific receiverships. This does not mean other indirect costs should not be allocated and recovered. For example, he said the Federal Deposit Insurance Corporation (FDIC) has base costs for running the FDIC that are not allocated to an individual receivership, which is analogous to what the principles try to address. He said this issue will be discussed again at the Spring National Meeting.

Having no further business, the Receivership and Insolvency (E) Task Force adjourned.
December 1, 2014 Version

GUARANTY ASSOCIATION FOR TITLE INSURANCE

Title insurance Guaranty Association-Title Insurance Consumer Protection Fund Guideline

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Section 1. Title

This Act may be cited as the "[State] Title Insurance Guaranty Association-Title Insurance Consumer Protection Fund."

Section 2. Purpose

The purpose of this Act is to provide a mechanism for continuation of coverage, payment of covered claims under certain insurance policies, to avoid excessive delay in payment and avoid financial loss to policyholders because of insolvency of a title insurer and provide an association to assess the cost of such protection.

Section 3. Scope

This Act applies to all title insurers authorized to transact insurance in this state.

Section 4. Definitions

A. "Association" means the title insurance guaranty association.

B. "Authorized to transact insurance" means a title insurer as defined in [insert appropriate citation to the insurance code].

C. "Commissioner" means the chief regulatory insurance official of this state, whether referred to as Director, Superintendent, Commissioner, or other similar title.

D. "Covered claim" means an unpaid claim of an insured covered under and not in excess of the applicable limits of a title insurance policy insuring land located in this state issued by an insolvent insurer. Subject to applicable policy limits, the association's liability for covered claims shall not exceed $300,000.00 per claim The total amount that may be recovered from the association by a claimant for all covered claims shall not exceed $600,000. "Covered claim" does not include supplementary payment obligations, including but not limited to adjustment fees and expenses, escrow or other closing protection claims nor does it include punitive, exemplary, extra-contractual or bad-faith damages awarded by a court judgment against an insurer. "Covered claim" does not include any first or third party claim by or against an insured whose net worth on December 31 of the year preceding the date the insurer becomes insolvent exceeds $25,000,000; provided the insured’s net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its affiliates as calculated on a consolidated basis, and the insured has not applied for or consented to appointment of a receiver, trustee or liquidator for all or substantially all of its assets, filed a voluntary bankruptcy petition or a proceeding under state law to reorganize or receive protection under any insolvency law. The amount of a covered claim shall be reduced by the
amount or other benefit that an insured recovers from any person, including an agent, regardless of whether an assignment is taken.

Drafting Note: States which desire to include additional claims in the fund may omit one or more of the exclusions from this definition.

F. "Insolvent insurer" means:

(1) An insurer authorized to transact business in this state at the time the policy was issued or an insurer that subsequently assumes such policy under an assumption agreement;

(2) Against which an Order of liquidation with a finding of insolvency has been entered after the effective date of this Act by a court or administrative agency of competent jurisdiction in the insurer's state of domicile, or of this state under [insert state liquidation law citation]; and

(3) Which Order of liquidation has not been stayed or been the subject of a writ of supersedes or other comparable Order.

G. "Insured" means a person entitled to payment for insured loss under a policy issued by the insolvent title insurance company on title to real property located in this state.

H. "Member insurer" means any person who is authorized to transact title insurance in this state.

Drafting Note: Some states may authorize property and casualty insurers to transact title insurance. Other states may limit the transaction of title insurance to monoline title insurers.

I. "Net direct title premium" means direct gross premiums written in this State on insurance policies to which this Act applies.

J. "Person" means any individual, corporation, partnership, association, trust or voluntary organization.

K. "Policy" means a title insurance policy, or assumption certificate whose subject of coverage or protection is title to real property located in this state; and "Title Policy" means any written instrument or contract by means of which title insurance liability is assumed by a title insurer.

L. "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.
M. “Servicing facility” means a person or persons delegated by the board of directors to settle or compromise claims and to expend association assets to pay claims.

Section 5. Organization of Association

There is hereby created a nonprofit legal entity to be known as the [State] Title Insurance Guaranty Association. All member insurers shall maintain membership in the association as a condition of their authority to transact title insurance in this state. The association may take any appropriate form of legal entity available under the laws of this state, including, but not limited to, a corporation or receivership association as approved by the commissioner.

Section 6. Board of Directors

A. The board of directors of the association shall consist of not less than five (5), nor more than eleven (11) persons serving terms as established in the plan of operation. In addition to the voting members of the board, the commissioner or his designated representative shall be an ex-officio non-voting member of the board. The members of the board shall be selected by member insurers subject to the approval of the commissioner and shall have as a majority of its members, persons who are employed by member insurers. 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.

B. In approving selections to the board, the commissioner shall consider, among other things, whether all member insurers are fairly represented.

C. Members of the board of directors shall not receive compensation for serving as members of the board or any committees thereof, but may be reimbursed from the administrative account for actual expenses incurred by them as members of the board of directors.

Section 7. Powers and Duties of the Association

A. The association shall:

(1) Be obligated to the extent of the amount of covered claims not resolved, whether reported or not, prior to the determination of insolvency, except that the association shall not be obligated as to policies which have been replaced by another title insurance policy issued by a solvent authorized title insurer. In no event shall the association be obligated for an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises;

Drafting note: The phrase “not resolved” includes claims that are unpaid or otherwise unresolved by the member insurer as of the insolvency determination date, including claims that may not have been
asserted but exist due to a defect in title or other event covered under the terms of the title policy issued by the insolvent member insurer. If another title insurance company assumes or otherwise issues a replacement policy there should be no covered claims under the original, now insolvent, title insurance company policy. States may want to cut off claims by requiring the association, or the Commissioner as liquidator, to cancel title insurance policies after five years. Alternatively, as reflected in this guideline, states may not want to have a guaranty fund claim cut off.

(2) Have no liability for the alleged bad faith of the insolvent insurer in the handling of any claim prior to the determination of insolvency or for any exemplary or punitive damages;

(3) Investigate claims made against the policies of an insolvent insurer and adjust, negotiate, resolve, settle and pay covered claims to the extent of the association's obligation and deny all other claims. 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 Board of Directors, but the designation of such insurer may be declined by the member insurer; and

(4) 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 covered claims and expenses, including loss adjustment expenses, and receivership expenses for the coming year if, at the end of any calendar year, the board of directors finds that the assets of the association in the fund exceed the liabilities of that account.

B. The association may subject to approval by the board of directors:

(1) Employ or retain persons or companies as servicing facilities necessary to handle claims and perform other duties of the association;

(2) Review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to in order to determine the extent to which such settlements, releases and judgments may be properly contested;

(3) Borrow funds necessary to affect the purposes of this article in accordance with the plan of operation;

(4) Sue or be sued and intervene in any court or arbitration forum having jurisdiction over an insolvent member insurer;

(5) Negotiate and become a party to contracts necessary to carry out the purpose of this Act; including, assumption or reinsurance agreements relating to the title policies of an insolvent insurer;
(6) The association may take actions as provided in subsections A and B of this section prior to an insurer being declared insolvent by a court, where an insurer is potentially unable to fulfill its contractual obligations or is determined to be impaired; and

(7) Perform other acts necessary or proper to effectuate the purpose of this Act.

C. If the association fails to act within a reasonable time, the commissioner shall assume the powers and duties of the board of the association and cause it to act as appropriate.

Section 8. Plan of Operation

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 the approval in writing by the commissioner. If, at any time, the association fails to submit suitable amendments to the plan, the commissioner shall, after notice and hearing, adopt rules necessary or advisable to effectuate the provisions of this Act. The rules shall continue in force until modified by the commissioner or superseded by a plan or amendments submitted by the association and approved by the commissioner.

B. All member insurers shall comply with the plan of operation, subject to the provisions of this Act.

C. The plan of operation, among other things, shall establish procedures for conducting the business of the association, for handling its assets, for keeping records and for the conduct of other activities necessary for execution of the powers and duties of the association.

D. The plan of operation may provide that any and all powers and duties of the association, except those under Section 6 and 7 of this Act that are to be performed by the Board, be delegated to a corporation, association or other organization which performs or will perform functions similar to those of the association, or its equivalent, in two (2) or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid by the association for its costs incurred in performance of such functions.

Section 9. Duties and Powers of Commissioner

A. The commissioner shall:

(1) Serve on the association a copy of any complaint seeking an order of liquidation with a finding of insolvency against a member insurer domiciled in this state at
the same time that such complaint is filed with a court of competent jurisdiction; and

(2) Notify the association of the existence of an insolvent insurer not later than three (3) days after receipt of notice of the determination of the insolvency; and upon request of the board of directors, provide the association with a statement of the reported direct premiums written for the [insert time period] of each member insurer.

B. The commissioner may:

(1) 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 civil penalty on any member insurer which fails to pay an assessment when due. The civil penalty shall not exceed five percent of the unpaid assessment per month, except that no civil penalty shall be less than one hundred dollars ($100) a month; and

(2) Revoke the designation of any servicing facility if the commissioner finds claims are being handled unsatisfactorily.

Section 10. Coordination Among Guaranty Associations

A. The association may join one or more organizations of other state title guaranty associations of similar purposes, to further the purposes and administer the powers and duties of the association. The association may designate one or more of these organizations to act as a liaison for the association and to the extent which the association authorizes, to bind the association in agreements or settlements with the receiver of the insolvent insurer or his or her designated representative.

B. The association, in cooperation with other obligated or potentially obligated guaranty associations, or their designated representatives, shall make all reasonable efforts to coordinate and cooperate with the receiver, or his or her designated representative, in the most efficient and uniform manner.

Section 11. Effect of Paid Claims

A. 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 seeking the protection of this Act shall cooperate with the association to the same extent as he would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against an insured 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. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the association do not operate to reduce the liability of the insured to the receiver, liquidator, or statutory successor for unpaid assessments.

B. The court having jurisdiction shall grant such claims assigned pursuant to Subsection A of this section and the expenses of the association or similar organization in another state the same priority as the claims and expenses of policyholders. The association may make application to the receivership court for reimbursement of such reasonable claims and expenses and upon proper showing to the court for reimbursement of such amounts the court shall order appropriate reimbursement of reasonable claims and expenses to be made.

C. The receiver for the insolvent insurer shall, each time a request for funds is submitted to the association but not less than once every six months within the time set by the receivership court, file with the commissioner or liquidator court of the insolvent insurer, a statement of the covered claims paid, reserves for unpaid claims, claims expense incurred, and the balance of funds then in the possession of the receiver.

Section 12. Non-Duplication of Recovery

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to first exhaust his or her rights under such policy. Any amount payable on a covered claim under this Act shall be reduced by the amount of any recovery or value thereof received under such insurance policy.

Section 13. Examination of Association; Financial Reports

The association is subject to examination and shall complete audited financial statements. The board of directors shall submit to the commissioner and its member insurers, not later than June 30 each year, a financial report for the preceding year in a form approved by the commissioner.

Section 14. Assessment Authority of Commissioner and Association

A. Making of Assessment.

(1) If the commissioner determines that a title insurance company has become insolvent, the association shall promptly estimate the amount of additional money needed to supplement the assets of the impaired title insurance company to pay all covered claims and administrative expenses.
(2) The association shall assess title insurance companies in writing an amount as determined under Part 2 of this subsection. A member insurer does not incur real or contingent liability under this Act until the association provides the member insurer with a written assessment.

B. Amount of Assessment: Proration of Payment.

(1) The association shall assess member insurers the amount necessary to pay: (1) the association's obligations under this Act and the expenses of handling covered claims subsequent to an insolvency; and (2) other expenses authorized by this Act.

(2) The assessment of each member insurer must be in the proportion that the net direct written title premiums of that company for the calendar year preceding the assessment bear to the net direct written title premiums of all member insurers for that year.

(3) The total assessment of a member insurer in a year may not exceed an amount equal to two percent of the member's net direct title premium earned for the calendar year preceding the assessment. If the maximum assessment and the association's other assets are insufficient in any one year to make all necessary payments, the money available shall be prorated and the unpaid portion shall be paid in subsequent years.

C. Notice and Payment.

(1) Not later than the 45th day before the date an assessment is due, the association shall notify member insurers.

(2) Not later than the 45th day after the date an assessment is made, the member insurer shall pay the association the amount of the assessment.

D. Exemption for Impaired Title Insurance Company. A member insurer is exempt from assessment during the period beginning on the date the commissioner designates the company as an impaired member insurer and ending on the date the commissioner determines that the company is no longer an impaired member insurer.

Drafting Note: Some states may substitute hazardous financial condition or inability to meet obligations for impaired.

E. Deferment.

(1) At the discretion of the commissioner, the association may defer in whole or in part an assessment of a member insurer that would cause the member's financial statement to show amounts of capital or surplus less than the minimum amount required for a certificate of authority in any jurisdiction in which the company is authorized to engage in the business of insurance.
(2) The member insurer shall pay the deferred assessment when payment will not reduce capital or surplus below required minimums. The payment shall be refunded to or credited against future assessments of any member insurer receiving a larger assessment because of the deferment, as elected by that member.

(3) During a period of deferment, the member insurer may not pay a dividend to shareholders or policyholders.

F. Accounting; Reports—Refund.

(1) The association shall adopt accounting procedures to show how money received from assessments or partial assessments is used.

(2) The association shall make interim accounting reports as the commissioner requires.

(3) The association shall make a final report to the commissioner showing how money received from assessments or partial assessments has been used, including a statement of any final balance of that money.

G. Use of Assessments. The association may use money from assessments to negotiate and consummate contracts of reinsurance, assumption of liabilities or replacement policies from authorized title insurers to provide for outstanding liabilities of covered claims. Assessments shall be used to pay the associations general expenses and statutory obligations.

H. Failure to Pay

(1) The association shall promptly report to the commissioner a failure of a member insurer to pay an assessment when due.

(2) On failure of a member insurer to pay an assessment when due, the commissioner may take any action as provided in section 9 B of this Act:

(3) A member insurer whose certificate of authority is canceled or surrendered is liable for any unpaid assessments made before the date of the cancellation or surrender.

I. Recovery of Assessment in Rates; Tax Credit.

(1) The surcharge on title insurance policies shall be based on historical need and include amounts sufficient to recoup a sum equal to the amounts paid to the association by the member insurers, less any amounts returned to the member insurers by the association, and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurers.

(2) Unless the commissioner determines that all amounts paid as assessments by each member insurer have been recovered under Subsection (a), for any amount not recovered the member insurer is entitled to a credit against its premium tax.
reference to state law providing for premium taxes]. The credit may be taken at a rate of 20 percent each year for five successive years following the date of assessment and, if the member insurer elects, may be taken over an additional number of years.

Drafting note: State law may not permit this tax offset, as premium taxes are for general fund purposes and assessments as provided in this Act are for a specific purpose.

(3) An amount of a tax credit allowed by this section that is unclaimed may be shown in the member insurer’s books and records as an admitted asset for all purposes, including an annual statement under [include reference to state law].

Drafting note: State law may not permit this tax offset, therefore subsections (b) and (c) may be omitted.

Section 15. Immunity and Confidentiality

A. There shall be no liability on the part of, and cause of action of any nature shall arise against, any member insurer, the association or its officers, agents or employees, the board of directors, any individual director or the commissioner or his representative for any action taken by them in the performance of their powers and duties under this Act or for failure to prevent any insolvency.

B. The meetings, activities, recommendations and decisions of the board of directors of the association as required or permitted in this article shall not be open to public inspection, nor considered public documents pursuant to [insert relevant state law]. No representative of a member insurer shall be excluded from any meeting of the board of directors, with the exception of a representative of an insolvent insurer.

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 of the association for specific cases involving covered claims, be stayed for six (6) months and such additional time 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 those records upon the request by the board and at the expense of the board.
Section 17. Termination; Distribution of Funds

A. The commissioner shall by Order terminate the operation of the association if he or she finds, after hearing, that there is in effect a statutory or voluntary plan which:

(1) Is a permanent plan which is adequately funded or for which an adequate means of funding is provided; and

(2) Extends, or will extend to the policyholders of this state protection and benefits with respect to insolvent member insurers not substantially less favorable and effective to the policyholders than the protection provided under this Act.

B. If operation of the association is terminated or if the association has no further known obligations, the association, as soon as possible thereafter, shall distribute the balance of money and assets remaining, after discharge of the functions of the association, with respect to prior insurer insolvencies not covered by another plan, together with expenses, to the member insurers or former member insurers, pro rata upon the basis of the aggregate of such payments made by the respective insurers during the period of five (5) years next preceding the date of the Order.
Attachment Three
(Pending March 28th Meeting)
• A - Draft Guaranty Fund Expense Guidance (*Pending*)
• B - Comments Received
  o Insurance Regulatory Consulting Group (IRCG)
  o International Association of Insurance Receivers (IAIR)
  o National Organization of Life and Health Guaranty Associations (NOLHGA)
  o National Conference of Insurance Guaranty Funds (NCIGF)
  o Tennessee Insurance Guaranty Association (TIGA)
Four - B
To: Financial Condition (E) Committee Chair: Joseph Torti III, Superintendent, Rhode Island Department of Business Regulation, Division of Insurance, Vice Chair: Eric A. Cioppa, Superintendent, Maine Department of Professional & Financial Regulation Bureau of Insurance, and the Chair of the Receivership and Insolvency (E) Task Force (RITF)

Date: January 26, 2015

RE: Request for Comments on Paper Titled “receivers’ Expectations for Guaranty Fund/Association ("SGA") Dues and Expenses”

The goals of these comments will not be to persuade for the adoption of the paper titled “receivers’ Expectations for Guaranty Fund/Association (“SGA”) Dues and Expenses,” but, rather, will be to inform those considering these matters.

The national state-based systems for handling insolvent insurers have developed over decades to work remarkably well. In these decades the US economy has gone through depressions and recessions that have severely tested these systems. Those involved with the national state-based systems have learned from these testing times and any mistakes made over these decades and have improved these systems based on what has been learned.

As the international regulation of insurance shifts, to some degree, from nation-states to international treaty based organizations (see, https://www.ted.com/talks/paddy_ashdown_the_global_power_shift and https://www.ted.com/playlists/73/the_global_power_shift) the history of how the receivership community (the state departments, deputy receivers, SGAs and national SGA organizations that deal with the receiverships and resolutions of insurers) has managed to deal with organizations that cross many jurisdictions, could provide some ideas of how to deal with these more global shifts.

An observer looking only at what is covered in this SGA Expenses paper could possibly erroneously conclude that these systems are not working well or that there is a large scale problem with these expenses. The fixed costs of the SGAs, their membership dues for the applicable national organizations to which they belong, and their travel costs are matters that have been dealt with by the supervising courts of individual receiverships, by the individual SGAs and in those cases where the number of receiverships to which SGA costs may be allocated are too few, by these entities and the state departments involved with these receiverships. It may be useful to point out in a Receiver’s Handbook that there are fixed costs, membership dues for the applicable national organizations, and their travel costs of SGAs that need to be transparent so that those needing to deal with these have the information needed to do so, but it may not be the place to relay, “To minimize the need for an audit [of SGA expense] classifications, detail [SGAs should do the following].” I plan to submit more but this will have to do for now.

Respectfully submitted,
/s/
Douglas A. Hartz
Dear Jim:

I write in response to the RITF’s request for comment on the Exposure Draft – Receivers’ Expectations for Guaranty Fund/Association Dues and Expenses. While much of the document propounds many laudable values, as you know, IAIR includes members from all sectors of the receivership community, and, consequently, IAIR chooses not to express an organizational view. As always, however, we stand ready to provide any requested technical assistance.

Best,
Nancy

Nancy L. Margolis, Esq. | International Association of Insurance Receivers | 610 Freedom Business Center | Suite 110 | King of Prussia, PA 19406
January 23, 2015

Mr. Jim Mumford
First Deputy Commissioner
Division of Insurance
State of Iowa
330 East Maple Street
Des Moines, IA 50319-0065

Re: Draft Guaranty Fund Expense Guidance Document

Dear Mr. Mumford:

Thank you for considering comments from the NCIGF on the guaranty fund expense guidance document exposed for comment by the RITF.

As you know, NCIGF, along with NOLHGA, accepted your invitation to participate in the deliberations of the RFAWG Working Group that produced this material. We did not agree with many of the ideas of the working group or the assumptions on which they are based. We do not agree with much of the content of this draft either, but appreciate being included in the dialogue and being heard on these matters.

As we have previously stated, we stand ready to assist the RITF in future endeavors to promote transparency in receivership administration and more generally in furthering our shared goals to protect policy claimants of insolvent insurance companies.

Sincerely,

Roger Schmelzer
January 26, 2015

James R. Mumford  
Chair, Receivership Insolvency Task Force  
c/o National Association of Insurance Commissioners  
2301 McGee Street, Suite 800  
Kansas City, MO 64108

RE: November 17, 2014 Exposure Draft of Receivers’ Expectations for Guaranty Fund/Association Dues and Expenses (referred to as the “GA Expense Guidelines” or “Guidelines”)

Dear Mr. Mumford:

Thank you for providing us with the opportunity to comment on the draft GA Expense Guidelines. I also want to thank R-FAWG for allowing us to provide input on an earlier draft of the GA Expense Guidelines and for responding to some of our comments.

As a general matter, receivers and guaranty associations (GAs) have a shared interest in ensuring that receivership proceedings are managed efficiently, effectively, and equitably. Along these lines, both receivers and GAs have a stake in ensuring that expenses charged to a receivership estate—whether by affected GAs or receivers—are reasonable, transparent, and in furtherance of statutory duties. In the absence of expenses meeting these basic criteria, the state-based receivership and guaranty systems could be subject to possible criticism and challenge.

Given the complexity and differing circumstances (both legal and factual) of individual insolvency cases, NOLHGA and its members have worked collaboratively with receivers in the few life & health cases where there have been issues with GA expense claims to craft appropriate solutions. We believe this approach has served receivers and GAs well, and we cannot recall having differences over expense claims that have not been resolved through the good faith efforts of the parties. We also would note that historically life GA expense claims have represented a very small percentage of the overall GA coverage benefits that have been provided to policyholders.

We understand that the GA Expense Guidelines (if approved by RITF) will be included in the Receivers Handbook, which provides non-binding guidance for receivers in handling receivership matters. While we continue to have concerns with certain elements of the GA Expense Guidelines, we are willing to reserve our concerns and will continue to work with receivers based on individual circumstances to resolve any issues over GA expense claims that may arise in future cases.

Sincerely,

William P. O’Sullivan  
Senior Vice President & General Counsel
January 28, 2015

BY EMAIL TO jkoenigsman@naic.org AND U.S. MAIL

Jane Koenigsman  
Life/Health Financial Analysis Manager  
National Association of Insurance Commissioners  
1100 Walnut Street  
Suite 1500  
Kansas City, MO  64106

Re:  R-FAWG Principles Involving Guaranty Fund Expenses

Dear Ms. Koenigsman:

Thank you for allowing the Tennessee Insurance Guaranty Association (TIGA) to comment on the draft principles proposed by the Receivership Financial Analysis Working Group (R-FAWG). TIGA was not aware of the face-to-face deliberations, but wanted to comment on the draft provided by the National Conference of Insurance Guaranty Funds (NCIGF), which also is providing comment.

I have made some very specific comments below, but would like to say that many of the expectations and principles should be addressed to the 50 state legislatures and governors because the structure of the guaranty funds, which have performed very well over the years, is embedded in the laws of the various states. Uniformity and consolidation, as advocated by the National Association of Insurance Commissioners (NAIC), is also largely a matter of state law under our valued constitutional principle of federalism.

Introduction

TIGA shares your concern as to efficiency and cost effectiveness, but it believes the NAIC should focus on setting reasonable standards that take into account the diversity of state guaranty funds, which results from our federal system. In particular, your draft cites no evidence that "consolidation of operations of states with other states" would, in fact, result in reasonable expenses while continuing to serve policyholders and member companies in each state.

We applaud efforts toward uniformity and transparency such as the Uniform Data Standards (UDS) and look forward to extending this principle to the operation of receiverships themselves. In fact, We believe the principles and expectations must have an element of mutuality and reciprocity with receiverships as well as guaranty funds, in order to achieve your stated goal of ensuring that the overall administrative expenses are reasonable.
A more thorough discussion of potential issues with the R-FAWG proposal is set forth below.

**Areas of Concern**

1. **Allocation of Receivership Expenses**

   Several aspects of the proposal are based on the premise that fixed costs of operating the guaranty fund, which are not attributable to a specific receivership (i.e., not "directly relevant to the specific estate being charged"), should not be charged to receiverships but should be paid from only from assessed funds.

2. **Reasonableness of All Expenses**

   The general expenses of the fund that are charged to an estate should be properly classified and reasonable in amount. This includes such suggestions as the use of consistent travel expense limits, guidelines and per diems consistent with the state's Receiver's office for travel expenses billed to receivership estates. Specifically, it is suggested that expenses incurred to represent the fund's interests as a creditor should not be included if the actions are similar to actions that might be taken by other creditors for which the expense would not be reimbursable. In the words of the proposal:

   "This may include for example, legal fees to dispute the Receiver’s determination of a guaranty fund’s claim against the receivership or legal fees to object to an application filed by the Receiver. This would not include expense necessary for the guaranty fund to fulfill it [sic] statutory obligations to process or pay covered claims."

3. **Multi-State Consolidation of Fund Administration**

   As indicated above, the proposal suggests ways to economize on administrative expenses. However, it specifically suggests that states might consider multi-state consolidation of operations, "subject to state law."

**Analysis of Other Insolvency Procedures**

The NCIGF response correctly suggests that there are better ways for guaranty funds and receivers to work together on this issue, "rather than extensive debate over relatively small amounts of money."

Our concerns arise primarily from the premise common to all these suggestions: that no individual receivership should underwrite any general expenses of the fund. This premise is not entirely appropriate. It is inconsistent with the rules applicable to other insolvency proceedings and it places an undue burden on the industry by effectively increasing assessments.

To provide a basis for us to discuss and evaluate these proposals, let me review three other systems in federal law for liquidation of insolvent entities: the Bankruptcy Code, the Securities Investor Protection Act of 1970 ("SIPA") and the Federal Deposit Insurance Act ("FDIA").
1. Bankruptcy

Liquidation in bankruptcy is generally accomplished under Chapter 7 of the Bankruptcy Code. The bankruptcy court is administered in federal court in the district where the debtor is located. The bankruptcy court has nationwide jurisdiction to aid in the recovery of assets.

A Chapter 7 case does not involve the filing of a plan of reorganization or repayment as in Chapter 11 or 13. Instead, a bankruptcy trustee is appointed by an office of the Department of Justice called the "U.S. Trustee." The appointed trustee gathers and sells the debtor's nonexempt assets and uses the proceeds to pay creditors in accordance with the priorities set by the Bankruptcy Code. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, the Bankruptcy Code will allow individual debtors to keep certain "exempt" property, but the trustee will liquidate the debtor's remaining assets.

The compensation of the trustee is in two parts: First, there is a very nominal, flat fee paid for each case. Beyond that, however, the trustee is paid a graduated percentage (up to 3%) for each dollar produced in the liquidation process. This is not tied to the work of the trustee on the estate, but merely the results of that work. "It is generally understood that reasonable compensation in asset cases is intended to serve, in part, as compensation for the trustee’s work in no-asset cases." While the U.S. Trustee is a part of the Justice Department, the trustee appointed in the case is a private individual and does not have an industry of non-bankrupt entities who might be asked to contribute to his or her administrative costs.

This percentage liquidation fee is a part of a complex system for paying the expenses of the liquidation. On top of that liquidation fee, for example, there are rules allowing compensation of professionals for their services to the estate. Also, creditors and others whose efforts benefit the estate may be paid for that work. The applications for such compensation is generally policed by the U.S. Trustee.

In a commercial case, the proceeds of unencumbered property of the bankruptcy estate is distributed first to pay such fees and charges assessed against the estate.

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1 11 U.S.C. § 701 et seq.
3 The Supreme Court is currently looking at one issue arising in this system, whether the Bankruptcy Code permits compensation to an attorney for fees and costs incurred in defending an objection to a fee application. Baker Botts L.L.P. v. Asarco, L.L.C., ___ S.Ct. ____, 2014 WL 3795992 (Oct. 2, 2014). There, the law firm incurred $5 million in fees and costs defending its fee application against the debtor's attack.
5 As opposed to a consumer case, which may involve claims for domestic support obligations.
2. **SIPA**

In the late 1990s, the American Bar Association and the American Bankruptcy Institute discussed a federal system for liquidation of insurance companies. Liquidations under SIPA provided the structure that was discussed.

Although the Bankruptcy Code provides for a stockbroker liquidation proceeding, it is far more likely that a failing brokerage will find itself involved in a proceeding under SIPA, rather than a Bankruptcy Code liquidation case. Brokerage firms may be liquidated under the Bankruptcy Code if the SIPC does not file an application for a protective decree with the district court or if the district court finds that customers of the brokerage firm are not in need of protection under the SIPA.

Typically, when a brokerage firm fails, the Securities Investor Protection Corporation (SIPC) arranges the transfer of the failed brokerage's accounts to a different securities brokerage firm. If the SIPC is unable to arrange the accounts' transfer, the failed firm is liquidated. In that case, the SIPC sends investors either certificates for the stock that was lost or a check for the market value of the shares.

The essential difference between a liquidation under the Bankruptcy Code and one under SIPA is that under the Bankruptcy Code the trustee is charged with converting assets to cash as quickly as possible and, with the exception of the delivery of customer name securities, making cash distributions to customers of the debtor in satisfaction of their claims. A SIPC trustee, on the other hand, is required to distribute securities to customers to the greatest extent practicable in satisfaction of their claims against the debtor.

There is a fundamental difference in orientation between the two proceedings. There is a statutory grant of authority to a SIPC trustee to purchase securities to satisfy customer net equity claims to specified securities. The trustee is required to return customer name securities to customers of the debtor, distribute the fund of "customer property" ratably to customers and pay, with money from the SIPC fund, remaining net equity claims of customers, to the extent provided by the Act. A trustee operating under the Bankruptcy Code lacks similar resources. The Bankruptcy Code seeks to protect the filing date value of a customer's securities account by liquidating all non-customer name securities. SIPA seeks to preserve an investor's portfolio as it stood on the filing date. Under SIPA, the customer will receive securities whenever possible.

The law requires that SIPA make advances to the trustee in order to satisfy claims and otherwise liquidate the business. These advances are made to satisfy customer claims in cash, to purchase securities to satisfy net equity claims in lieu of cash and to pay all necessary costs and expenses of administration and liquidation of the estate to the extent the estate of the debtor is insufficient to pay said costs and expenses. Advances on customer claims are generally capped at $500,000 per customer, with further limitations on claims for cash.

SIPA specifies that the bankruptcy court must grant reasonable compensation for the services and expenses of the trustee and the attorney for the trustee. Interim allowances are also permitted. As in

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any other bankruptcy, a person seeking allowances must file an application complying in form and content with bankruptcy practice. SIPC reviews the application and files its recommendation with respect to such allowances prior to the hearing on the application. If the allowances are to be paid by SIPC without reasonable expectation of recoupment and there is no difference between the amount applied for and the amount recommended by SIPC, the bankruptcy court must award that amount. If there is a difference, the court is still to place considerable reliance on the recommendation of SIPC. If the estate is insufficient to cover these awards as costs of administration, SIPC will advance the necessary funds to cover the costs.

Ultimately, distributions from the estate are made in the following order:

(1) to SIPC in repayment of advances made to the extent they were used to recover securities apportioned to customer property;

(2) to customers of the debtor on the basis of their net equities;

(3) to SIPC as subrogee for the claims of customers; and

(4) to SIPC in repayment of advances made by SIPC to transfer or sell customer accounts to another SIPC member firm.

3. FDIA

In some ways, the powers of the FDIC as receiver of a failed financial institution are similar to those of a bankruptcy trustee. Like a bankruptcy trustee, a receiver steps into the shoes of the insolvent institution. The receiver may liquidate the institution or transfer some or all of its assets to an acquiring institution. However, although many of the concepts central to the operation of an FDIC receivership are similar to those in the bankruptcy process, federal law grants the FDIC additional powers that lead to differences between bankruptcy and FDIC receivership law.

The FDIC’s role and responsibilities when serving as receiver are defined by specific statutory provisions contained in the Federal Deposit Insurance Act of 1950. These additional powers allow the FDIC both expedite the liquidation process for banks and thrifts in order to maintain confidence in the nation’s banking system, to maximize the cost-effectiveness of the receivership process and to preserve a strong insurance fund. The primary advantage is that the FDIC, in administering the assets and liabilities of a failed institution as its receiver, is not subject to court supervision, and its decisions are not reviewable except under very limited circumstances. A receiver has the power to allow or disallow claims. An allowed claim will be paid on a pro rata basis with other allowed claims of the same class, to the extent there are funds available in the receivership after the expenses are paid.

The priority for paying allowed claims against a failed depository institution is now determined by federal law. On August 10, 1993, a uniform distribution plan for depository institutions, the National Depositor Preference Amendment, became effective. The law gives payment priority to depositors, including the FDIC as subrogee, over general unsecured creditors. Inasmuch as most liabilities of a failed institution are deposit liabilities, the practical effect of depositor preference in most situations is to eliminate any recovery for unsecured general creditors.
Customers with uninsured deposits are sometimes issued advance payments based on the estimated recovery value of the failed bank’s assets. This provides customers with uninsured deposits some reasonable amount of liquidity protection without eliminating the incentive for large depositors to exercise market discipline. Advance dividends are based on the estimated value of the failed bank’s assets. Advance dividends usually range between 50 cents and 80 cents on the dollar of receivership claims. The FDIC does not pay advance dividends when the value of the failed institution’s assets cannot be reasonably determined at the closing.

Claims against the failed institution are paid from monies recovered by the receiver through its liquidation efforts. Under the National Depositor Preference Amendment and related statutory provisions, claims are paid in the following order of priority:

1. Administrative expenses of the receiver;
2. Deposit liability claims;
3. Other general or senior liabilities of the institution;
4. Subordinated obligations; and
5. Shareholder claims.

Conclusions

Our general disagreement with the proposed principles arises from our belief that it is not inappropriate for individual receiverships to bear a share of the "overhead" of guaranty fund operations. It is inappropriate to ask that only solvent institutions bear all of those costs (the "indirect" costs, in the terminology of the proposal). This philosophy is consistent with the approach adopted, in one form or another, by all of the federal systems summarized above.

Beyond that, we think it is inappropriate to attempt to "micro-manage" expense issues on a national basis. We certainly agree that expenses should be reasonable. However, the need for particular expenses may vary from state to state.

Finally, we disagree with the suggestion in this context that guaranty funds should consider consolidated operations. Such a decision is a dramatic departure from historical practice in our federal system and should be explored (if at all) only on a trial basis, in some areas of urgent need, after recognizing (1) that individual receiverships should bear some share of the "overhead" of guaranty fund operations and (2) that expense issues should be analyzed on a state-by-state basis.

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8 During the S&L crisis of the late 1980s, the GAO found that the FDIC’s liquidation process had estimated operating expenses of 11.2% of collections. <http://www.gao.gov/products/GGD-88-132>

9 The FDIC claim takes the position of all insured deposits.
Jane Koenigsman  
January 28, 2015  
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Thank you for allowing TIGA to comment. I would urge a more extended and thorough exploration of this very important topic.

Sincerely,

W. Davidson Broemel  
Executive Secretary

WDB01/dbw

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