

PROTECTED CELL COMPANY MODEL ACT

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Section 1. Short Title

This Act may be cited as the “Protected Cell Company Act.”

Section 2. Purpose

This Act is adopted to provide a basis for the creation of protected cells by a domestic insurer as one means of accessing alternative sources of capital and achieving the benefits of insurance securitization. Investors in fully funded insurance securitization transactions provide funds that are available to pay the insurer’s insurance obligations or to repay the investors or both. The creation of protected cells is intended to be a means to achieve more efficiencies in conducting insurance securitizations.

Drafting Note: Under the terms of the typical debt instrument underlying an insurance securitization transaction, prepaid principal is repaid to the investor on a specified maturity date with interest, unless a trigger event occurs. The insurance securitization proceeds secure both the protected cell company’s insurance obligations if a trigger event occurs, as well as the protected cell company’s obligation to repay the insurance securitization investors if a trigger event does not occur. Insurance securitization transactions have been performed through alien companies in order to utilize efficiencies available to alien companies that are not currently available to domestic companies. This Act is adopted in order to create more efficiency in conducting insurance securitization, to allow domestic protected cell companies easier access to alternative sources of capital, and to promote the benefits of insurance securitization generally.

Section 3. Definitions

For the purposes of this Act, the following terms shall have the following meanings:

- A. “Domestic insurer” means an insurer domiciled in the State of [insert state].
- B. “Fair value” of an asset (or liability) means the amount at which that asset (or liability) could be bought (or incurred) or sold (or settled) in a current transaction between willing parties, that is, other than in a forced or liquidation sale. Quoted market prices in active markets are the best evidence of fair value and shall be used as the basis for the measurement, if available. If a quoted market price is available, the fair value is the product of the number of trading units times market price. If quoted market prices are not available, the estimate of fair value shall be based on the best information available. The estimate of fair value shall consider prices for similar assets and liabilities and the results of valuation techniques to the extent available in the circumstances. Examples of valuation techniques include the present value of estimated expected future cash flows using a discount rate commensurate with the risks involved, option-pricing models, matrix pricing, option-adjusted spread models, and fundamental analysis. Valuation techniques for measuring financial assets and liabilities and servicing assets and liabilities shall be consistent with the objective of measuring fair value. Those techniques shall incorporate assumptions that market participants would use in their estimates of values, future revenues, and future expenses, including assumptions about interest rates, default, prepayment, and volatility. In measuring financial liabilities and servicing liabilities at fair value by discounting estimated future cash flows, an objective is to use discount rates at which those liabilities could be settled in an arm’s-length transaction. Estimates of expected future cash flows, if used to estimate fair value, shall be the best estimate based on reasonable and supportable assumptions and projections. All available evidence shall be considered in developing estimates of expected future cash flows. The weight given to the evidence shall be commensurate with the extent to which the evidence can

be verified objectively. If a range is estimated for either the amount or timing of possible cash flows, the likelihood of possible outcomes shall be considered in determining the best estimate of future cash flows.

- C. “Fully funded” means that, with respect to any exposure attributed to a protected cell, the fair value of the protected cell assets, on the date on which the insurance securitization is effected, equals or exceeds the maximum possible exposure attributable to the protected cell with respect to such exposures.
- D. “General account” means the assets and liabilities of a protected cell company other than protected cell assets and protected cell liabilities.
- E. “Indemnity trigger” means a transaction term by which relief of the issuer’s obligation to repay investors is triggered by its incurring a specified level of losses under its insurance or reinsurance contracts.
- F. “Non-indemnity trigger” means a transaction term by which relief of the issuer’s obligation to repay investors is triggered solely by some event or condition other than the individual protected cell company incurring a specified level of losses under its insurance or reinsurance contracts.
- G. “Protected cell” means an identified pool of assets and liabilities of a protected cell company segregated and insulated by means of this Act from the remainder of the protected cell company’s assets and liabilities.

Drafting Note: This term is meant to reference identification of statutorily segregated assets and liabilities through the accounting function. By attributing certain assets and liabilities to a protected cell on the protected cell company’s books and records, and otherwise complying with the provisions of this Act, the protected cell company will receive statutory insulation of those assets and liabilities from the protected cell company’s other assets and liabilities not identified in the accounting records as attributable to the protected cell.

- H. “Protected cell account” means a specifically identified bank or custodial account established by a protected cell company for the purpose of segregating the protected cell assets of one protected cell from the protected cell assets of other protected cells and from the assets of the protected cell company’s general account.

Drafting Note: This term is meant to reference a custodial account established to hold and invest protected cell assets, such that protected cell assets are also distinct and identifiable from the assets of the general account.

- I. “Protected cell assets” means all assets, contract rights and general intangibles, identified with and attributable to a specific protected cell of a protected cell company.
- J. “Protected cell company” means a domestic insurer that has one or more protected cells.
- K. “Protected cell company insurance securitization” means the issuance of debt instruments, the proceeds from which support the exposures attributed to the protected cell, by a protected cell company where repayment of principal or interest, or both, to investors pursuant to the transaction terms is contingent upon the occurrence or nonoccurrence of an event with respect to which the protected cell company is exposed to loss under insurance or reinsurance contracts it has issued.
- L. “Protected cell liabilities” means all liabilities and other obligations identified with and attributable to a specific protected cell of a protected cell company.

Section 4. Establishment of Protected Cells

- A. A protected cell company may establish one or more protected cells with the prior written approval of the commissioner of a plan of operation or amendments thereto submitted by the protected cell company with respect to each protected cell in connection with an insurance securitization. Upon the written approval of the commissioner of the plan of operation, which shall include, but not be limited to, the specific business objectives and investment guidelines of the protected cell, the protected cell company may, in accordance with the approved plan of operation, attribute to the protected cell insurance obligations with respect to its insurance business and obligations relating to the insurance securitization and assets to fund the obligations. A protected cell shall have its own distinct name or designation, which shall include the words “protected cell.” The protected cell company shall transfer all assets attributable to a protected cell to one or more separately established and identified protected cell accounts bearing the name or designation of that protected cell. Protected cell assets shall be held in the protected cell accounts for the purpose of satisfying the obligations of that protected cell.

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term “commissioner” appears.

- B. All attributions of assets and liabilities between a protected cell and the general account shall be in accordance with the plan of operation approved by the commissioner. No other attribution of assets or liabilities may be made by a protected cell company between the protected cell company’s general account and its protected cells. Any attribution of assets and liabilities between the general account and a protected cell, or from investors in the form of principal on a debt instrument issued by a protected cell company in connection with a protected cell company securitization shall be in cash or in readily marketable securities with established market values.
- C. The creation of a protected cell does not create, in respect of that protected cell, a legal person separate from the protected cell company. Amounts attributed to a protected cell under this Act, including assets transferred to a protected cell account, are owned by the protected cell company and the protected cell company may not be, nor hold itself out to be, a trustee with respect to those protected cell assets of that protected cell account. Notwithstanding the foregoing, the protected cell company may allow for a security interest to attach to protected cell assets or a protected cell account when in favor of a creditor of the protected cell and otherwise allowed under applicable law.
- D. This Act shall not be construed to prohibit the protected cell company from contracting with or arranging for an investment advisor, commodity trading advisor, or other third party to manage the protected cell assets of a protected cell, provided that all remuneration, expenses and other compensation of the third party advisor or manager are payable from the protected cell assets of that protected cell and not from the protected cell assets of other protected cells or the assets of the protected cell company’s general account.
- E. (1) A protected cell company shall establish administrative and accounting procedures necessary to properly identify the one or more protected cells of the protected cell company and the protected cell assets and protected cell liabilities attributable to the protected cells. It shall be the duty of the directors of a protected cell company to:
- (a) Keep protected cell assets and protected cell liabilities separate and separately identifiable from the assets and liabilities of the protected cell company’s general account and;
 - (b) Keep protected cell assets and protected cell liabilities attributable to one protected cell separate and separately identifiable from protected cell assets and protected cell liabilities attributable to other protected cells.
- (2) Notwithstanding the foregoing, if this section is violated, the remedy of tracing shall be applicable to protected cell assets when commingled with protected cell assets of other protected cells or the assets of the protected cell company’s general account. The remedy of tracing shall not be construed as an exclusive remedy.

- F. The protected cell company shall, when establishing a protected cell, attribute to the protected cell assets with a value at least equal to the reserves and other insurance liabilities attributed to that protected cell.

Section 5. Use and Operation of Protected Cells

- A. The protected cell assets of a protected cell may not be charged with liabilities arising out of any other business the protected cell company may conduct. All contracts or other documentation reflecting protected cell liabilities shall clearly indicate that only the protected cell assets are available for the satisfaction of those protected cell liabilities.
- B. The income, gains and losses, realized or unrealized, from protected cell assets and protected cell liabilities shall be credited to or charged against the protected cell without regard to other income, gains or losses of the protected cell company, including income, gains or losses of other protected cells. Amounts attributed to any protected cell and accumulations on the attributed amounts may be invested and reinvested without regard to any requirements or limitations of Section [insert reference applicable sections of the insurance code imposing limitations on insurance company investments] and the investments in a protected cell or cells shall not be taken into account in applying the investment limitations otherwise applicable to the investments of the protected cell company.
- C. Assets attributed to a protected cell shall be valued at their fair value on the date of valuation.
- D. A protected cell company shall, in respect of any of its protected cells, engage in fully funded indemnity triggered insurance securitization to support in full the protected cell exposures attributable to that protected cell. A protected cell company insurance securitization that is non-indemnity triggered shall qualify as an insurance securitization under the terms of this Act only after the commissioner, in accordance with the authority granted under Section 9 of this Act, adopts regulations addressing the methods of funding of the portion of the risk that is not indemnity based, accounting, disclosure, risk based capital treatment, and assessing risks associated with such securitizations. A protected cell company insurance securitization that is not fully funded, whether indemnity triggered or non-indemnity triggered, is prohibited. Protected cell assets may be used to pay interest or other consideration on any outstanding debt or other obligation attributable to that protected cell, and nothing in this subsection shall be construed or interpreted to prevent a protected cell company from entering into a swap agreement or other transaction for the account of the protected cell that has the effect of guaranteeing interest or other consideration.
- E. In all protected cell company insurance securitizations, the contracts or other documentation effecting the transaction shall contain provisions identifying the protected cell to which the transaction will be attributed. In addition, the contracts or other documentation shall clearly disclose that the assets of that protected cell, and only those assets, are available to pay the obligations of that protected cell. Notwithstanding the foregoing, and subject to the provisions of this Act and any other applicable law or regulation, the failure to include such language in the contracts or other documentation shall not be used as the sole basis by creditors, reinsurers or other claimants to circumvent the provisions of this Act.
- F. A protected cell company shall only be authorized to attribute to a protected cell account the insurance obligations relating to the protected cell company's general account. Under no circumstances shall a protected cell be authorized to issue insurance or reinsurance contracts directly to policyholders or reinsureds or have any obligation to the policyholders or reinsureds of the protected cell company's general account.
- G. At the cessation of business of a protected cell in accordance with the plan approved by the commissioner, the protected cell company shall voluntarily close out the protected cell account.

Section 6. Reach of Creditors and Other Claimants

- A. (1) Protected cell assets shall only be available to the creditors of the protected cell company that are creditors in respect to that protected cell and shall thereby be entitled, in conformity with the provisions of this Act, to have recourse to the protected cell assets attributable to that protected cell, and shall be absolutely protected from the creditors of the protected cell company that are not creditors in respect of that protected cell and who, accordingly, shall not be entitled to have recourse to the protected cell assets attributable to that protected cell. Creditors with respect to a protected cell shall not be entitled to have recourse against the protected cell assets of other protected cells or the assets of the protected cell company's general account.
- (2) Protected cell assets shall only be available to creditors of a protected cell company after all protected cell liabilities have been extinguished or otherwise provided for in accordance with the plan of operation relating to that protected cell.
- B. When an obligation of a protected cell company to a person arises from a transaction, or is otherwise imposed, in respect of a protected cell:
 - (1) That obligation of the protected cell company shall extend only to the protected cell assets attributable to that protected cell, and the person shall, with respect to that obligation, be entitled to have recourse only to the protected cell assets attributable to that protected cell; and
 - (2) That obligation of the protected cell company shall not extend to the protected cell assets of any other protected cell or the assets of the protected cell company's general account, and that person shall not, with respect to that obligation, be entitled to have recourse to the protected cell assets of any other protected cell or the assets of the protected cell company's general account.
- C. When an obligation of a protected cell company relates solely to the general account, the obligation of the protected cell company shall extend only to, and that creditor shall, with respect to that obligation, be entitled to have recourse only to, the assets of the protected cell company's general account.
- D. The activities, assets, and obligations relating to a protected cell are not subject to the provisions of Section [insert applicable sections of the insurance code addressing life and health and property and casualty guaranty or insolvency funds], and neither a protected cell nor a protected cell company shall be assessed by or otherwise be required to contribute to any guaranty fund or guaranty association in this state with respect to the activities, assets, or obligations of a protected cell. Nothing in this subsection shall affect the activities or obligations of an insurer's general account.
- E. In no event shall the establishment of one or more protected cells alone constitute or be deemed to be a fraudulent conveyance, an intent by the protected cell company to defraud creditors, or the carrying out of business by the protected cell company for any other fraudulent purpose.

Section 7. Conservation, Rehabilitation or Liquidation of Protected Cell Companies

- A. Notwithstanding any contrary provision in the insurance code of this state, the regulations promulgated under the insurance code of this state, or any other applicable law or regulation, upon any order of conservation, rehabilitation or liquidation of a protected cell company, the receiver shall be bound to deal with the protected cell company's assets and liabilities, including protected cell assets and protected cell liabilities, in accordance with the requirements set forth in this Act.
- B. With respect to amounts recoverable under a protected cell company insurance securitization, the amount recoverable by the receiver shall not be reduced or diminished as a result of the entry of an order of conservation, rehabilitation or liquidation with respect to the protected cell company notwithstanding any provisions to the contrary in the contracts or other documentation governing the protected cell company insurance securitization.

Drafting note: A number of states require a liquidator to cancel policies within a pre-specified time period in the event of a liquidation. While reviewing the Plan of Operation, commissioners should consider the termination provisions, if any, of the securitization instruments in the event of the cancellation of all of the insurance policies underlying the securitization in order to assess whether any portion of the risk premium relating to those underlying policies should equitably be returned to the estate of the general account.

Section 8. No Transaction of an Insurance Business

A protected cell company insurance securitization shall not be deemed to be an insurance or reinsurance contract. An investor in a protected cell company insurance securitization shall not, by sole means of this investment, be deemed to be transacting an insurance business in this state. The underwriters or selling agents (and their partners, directors, officers, members, managers, employees, agents, representatives and advisors) involved in a protected cell company insurance securitization shall not be deemed to be conducting an insurance or reinsurance agency, brokerage, intermediary, advisory or consulting business by virtue of their activities in connection therewith.

Section 9. Authority to Adopt Regulations

The commissioner may promulgate regulations necessary to effectuate the purposes of this Act.

Section 10. Effective Date

This Act shall become effective on [insert date].

Chronological Summary of Action (all references are to the Proceedings of the NAIC).

1999 Proc. 3rd Quarter 24-25, 26, 194, 332-336 (adopted).

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This chart is intended to provide readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings related to the NAIC model. Such guidance provides readers with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state's activity in this area and has determined whether the citation most appropriately fits in the Model Adoption column or Related State Activity column based on the definitions listed below. The NAIC's interpretation may or may not be shared by the individual states or by interested readers.

This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Nor does this state page reflect a determination as to whether a state meets any applicable accreditation standards. Every effort has been made to provide correct and accurate summaries to assist readers in locating useful information. Readers should consult state law for further details and for the most current information.

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KEY:

MODEL ADOPTION: States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

RELATED STATE ACTIVITY: Examples of Related State Activity include but are not limited to: older versions of the NAIC model, statutes or regulations addressing the same subject matter, or other administrative guidance such as bulletins and notices. States that have citations identified in this column **only** (and nothing listed in the Model Adoption column) have **not** adopted the most recent version of the NAIC model in a **substantially similar manner**.

NO CURRENT ACTIVITY: No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama		ALA. ADMIN. CODE r. 27-31B-22 (2016).
Alaska	NO CURRENT ACTIVITY	
American Samoa	NO CURRENT ACTIVITY	
Arizona		ARIZ. REV. STAT. ANN. § 20-1098.05 (2003/2005) (Protected cell captives).
Arkansas	ARK. CODE ANN. §§ 23-63-1701 to 23-63-1709 (2001).	
California	NO CURRENT ACTIVITY	
Colorado	NO CURRENT ACTIVITY	
Connecticut	NO CURRENT ACTIVITY	
Delaware		DEL. CODE ANN. tit. 18, §§ 6931 to 6934 (2005) (Protected cell captives).
District of Columbia		D.C. CODE §§ 31-3931.01 to 3931.05 (2014).
Florida	NO CURRENT ACTIVITY	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Georgia	NO CURRENT ACTIVITY	
Guam	NO CURRENT ACTIVITY	
Hawaii	NO CURRENT ACTIVITY	
Idaho	NO CURRENT ACTIVITY	
Illinois	215 ILL. COMP. STAT. §§ 5/179A-1 to 5/179A-40 (1999/2001).	
Indiana	NO CURRENT ACTIVITY	
Iowa	IOWA CODE §§ 521G.1 to 521G.10 (2000).	
Kansas	NO CURRENT ACTIVITY	
Kentucky	NO CURRENT ACTIVITY	
Louisiana	NO CURRENT ACTIVITY	
Maine	NO CURRENT ACTIVITY	
Maryland	NO CURRENT ACTIVITY	
Massachusetts	NO CURRENT ACTIVITY	
Michigan	NO CURRENT ACTIVITY	
Minnesota	NO CURRENT ACTIVITY	
Mississippi	NO CURRENT ACTIVITY	
Missouri	NO CURRENT ACTIVITY	
Montana		MONT. CODE ANN. §§ 33-28-301 to 33-28-303 (2003/2013) (Protected cells of a sponsored captive).
Nebraska	NO CURRENT ACTIVITY	
Nevada	NO CURRENT ACTIVITY	
New Hampshire	NO CURRENT ACTIVITY	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
New Jersey	NO CURRENT ACTIVITY	
New Mexico	NO CURRENT ACTIVITY	
New York	NO CURRENT ACTIVITY	
North Carolina	N.C. GEN. STAT. §§ 58-10-75 to 58-10-110 (2001).	N.C. GEN. STAT §§ 58-10-510 to 58-10-525 (2013). N.C. GEN. STAT. §§ 58-10-335 to 58-10-496.
North Dakota	NO CURRENT ACTIVITY	
Northern Marianas	NO CURRENT ACTIVITY	
Ohio	NO CURRENT ACTIVITY	
Oklahoma		OKLA. STAT. tit 36, §§ 6470.29 to 6470.31.1 (2004/2013) (Protected cells of a sponsored captive).
Oregon	NO CURRENT ACTIVITY	
Pennsylvania	NO CURRENT ACTIVITY	
Puerto Rico	NO CURRENT ACTIVITY	
Rhode Island	R.I. GEN. LAWS §§ 27-64-1 to 27-64-12 (1999/2001).	
South Carolina	S.C. CODE ANN. §§ 38-10-10 to 38-10-80 (2000).	
South Dakota		S.D. CODIFIED LAWS § 58-46-27 (2013).
Tennessee		TENN. CODE ANN. §§56-13-201 to 56-13-207 (2011/2013).
Texas		BULLETIN dated 8/14/06 (2006).
Utah		UTAH CODE ANN. §§ 31A-36-401 to 31A-36-403 (2003) (Sponsored captives only).

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Vermont		VT. STAT. ANN. tit. 8, § 6021 (1999) (Captives only); § 6034 (2009).
Virgin Islands	V.I. CODE ANN. tit. 22, §§ 1431 to 1437 (2001).	
Virginia	NO CURRENT ACTIVITY	
Washington	NO CURRENT ACTIVITY	
West Virginia		W. VA. CODE §§ 33-31A-1 to 33-31A-9 (2004) (Protected cells of a sponsored captive).
Wisconsin	NO CURRENT ACTIVITY	
Wyoming	NO CURRENT ACTIVITY	

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Proceedings Citations

Cited to the Proceedings of the NAIC

Section 1. Short Title

Section 2. Purpose

When discussion began on a charge to discuss special purpose reinsurance vehicles, the idea of protected cells (i.e., separate account) was raised as a concept that might solve issues of tax and capitalization that had been raised. An interested party noted that a protected cell presumably would be taxed simply as part of the overall entity such that the overall insurer and its capitalization would be considered when examining the treatment of interest distributions. He thought that the protected cell methodology might solve the tax problem. The chair asked whether there were any issues regarding the interaction of federal bankruptcy rules and state insurance insolvency regulations. An interested party stated that if the protected cell were within an insurance company, there would be no federal bankruptcy considerations, as any insolvency would be dealt with under state insurance insolvency laws. **1998 Proc. 4th Quarter 276.**

An interested party asked whether the current states' insolvency laws would interact with protected cell legislation in such a way as to breach a protected cell. A regulator agreed that there was a valid concern as to whether a protected cell was really bankruptcy protected from the rest of an insurer. The interested party replied that there was a potential problem with a ceding company taking credit through insurance with a cell. **1998 Proc. 4th Quarter 276–277.**

The working group developing a position on special purpose reinsurance vehicles assigned a number of projects to help understand the issues facing the group. One group looked at tax issues. An interested party reported that the main impediments were the basic taxation of the special purpose reinsurance vehicle (SPRV) or protected cell, the taxation of investors and the deductibility for income tax purposes of reinsurance paid. He noted that offshore SPRVs were generally pass-through entities formed in jurisdictions such that they are not taxed, whereas U.S. insurers were taxable entities under the Internal Revenue Code. He stated that the formation of a protected cell would mitigate this problem because the protected cell would not have a separate existence for tax purposes. **1998 Proc. 4th Quarter 249.**

The working group reviewed a first draft of protected cell legislation based on a proposal discussed in one state for some time. An interested party stated that the purpose of the draft was to create a regulatory framework to allow property/casualty insurers to create protected cells to fund insurance liabilities through insurance securitization. **1999 Proc. 1st Quarter 211.**

The working group discussed the purpose clause, Section 2 of the Act, at length prior to its adoption. One option put forward was to delete the purpose section entirely. However the chair believed it was important to include information regarding the collateralization requirement. An interested party noted that the wording needed to be carefully reviewed because a protected cell remained part of the entire company. Another interested party stated that the description of a securitization reflected what was currently in vogue and suggested that one would not wish to make the legislation limiting by only allowing what was currently being done in the marketplace. Another observer suggested that the use of the words “debt instrument” would be limiting as it would be possible to have a derivatives obligation that was fully collateralized even though this would not generally be referred to as debt. The references to debt instrument were removed and the sentence generalized. Another commenter expressed concern with the words “specified contracts of insurance” in the purpose and said that this could defeat some of the more generalized securitizations that might occur in the future. **1999 Proc. 2nd Quarter 177.**

A regulator asked whether states were allowing dual triggers under regular reinsurance contracts. He stated that it may be that this was an issue that U.S. regulators had not yet addressed. An interested party responded that the group should not prohibit protected cells from doing business that the general account could do. Another responded that he believed the group was trying to encourage the development of the securitization market and asked why the group would wish to make securitizations more restrictive than in the reinsurance arena. **1999 Proc. 2nd Quarter 178.**

At the next meeting of the working group, a revised purpose clause drafted by interested parties was discussed. There were questions as to whether the deletion of the examples in the old purpose clause might prevent a full understanding of the Act by legislators who had not previously come across insurance securitizations. A regulator suggested that the example be put in a drafting note for Section 2. **1999 Proc. 2nd Quarter 174.**

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Proceedings Citations

Cited to the Proceedings of the NAIC

Section 2 (cont.)

When the parent committee held a hearing on the model, the chair of the drafting group said that the model was drafted to address the charge that required the group to address impediments to the use of a domestic insurer as the issuer of a security in insurance securitization transactions. He stated that the central purpose of this model was to specifically address some of the obstacles to insurance securitizations by domestic insurers and to promote their ability to take part in these transactions. **1999 Proc. 3rd Quarter 330.**

The chair of the drafting group noted that one advantage of the protected cell concept was the lower cost of the transaction. He explained that currently, all but one insurance securitization had been conducted through an offshore single purpose entity, which was essentially an insurance company formed solely for a single transaction to take on a specific risk exposure. Since minimum capitalization requirements were relatively high in the United States, these transactions had all occurred offshore. The protected cell concept allowed an insurance company to isolate assets and a specific risk exposure in a protected cell with only a marginal risk-based capital requirement. **1999 Proc. 3rd Quarter 330.**

A regulator questioned whether existing transactions by offshore single purpose entities provided any greater security than onshore protected cells with respect to the adequacy of assets issue. The working group chair replied that there was essentially no difference because offshore single purpose entities were only marginally capitalized and this capital was immaterial compared to the risk transferred to the entity. **1999 Proc. 3rd Quarter 332.**

When presenting the model for consideration by the Executive Committee, the chair of the parent committee noted that the working group that drafted the model had a charge to examine any impediments to having a domestic insurer as an issuer of insurance linked securities. Issuance of insurance linked securities had taken place largely off shore through special purpose vehicles due to a number of statutory accounting and tax reasons. The model act was designed to enable domestic insurance companies to wall off this activity from the other activities of the company; this section was known as a protected cell. In particular, this protected cell mechanism would address a need of potential investors that their assets be isolated from the possibility of receivership and other regulatory action that might affect the rest of the company and that the assets would be, therefore, solely exposed to the risk of loss resulting from the defined triggering event, which for example may be a hurricane or an earthquake. **1999 Proc. 3rd Quarter 24.**

Section 3. Definitions

B. When the draft was being considered by the Executive Committee, the parent committee chair suggested a technical change to the model. There was a reference in the model to “market value” for the valuation of the assets in the protected cell. Codification defined that “market value” to be “fair value” so he suggested that the model be adopted with this technical change, so that the model would be consistent with codification. **1999 Proc. 3rd Quarter 24.**

C. When discussion turned to the definition of “fully funded,” an interested party commented that “exposure” was an undefined term. Another responded that he felt that this was a self-evident insurance term. There was also discussion regarding an industry suggestion to include letters of credit in the valuation of protected cell assets within the definition of “fully funded.” A regulator expressed discomfort with allowing letters of credit to be a part of protected cells’ assets. After discussion, references to letters of credit as being protected cell assets were deleted throughout the draft model act. The chair opined that the group clearly preferred to limit the consideration in securitization transactions to cash or cash equivalents. **1999 Proc. 2nd Quarter 177.**

F. Regarding the definition of “non-indemnity trigger,” there was a discussion regarding dual triggers, an indemnity trigger together with a non-indemnity trigger. One regulator said his state did not like the idea of dual triggers within securitizations. An interested party countered that there were different forms of non-indemnity triggers and stated that one of them might be regarded as a parametric trigger, e.g., a level on the Richter Scale or a hurricane’s wind strength on the Safir Scale. He contrasted this to an index trigger that might for example be a level of losses in the PCS Index. An insurance company representative noted that the use of a dual trigger had a pricing reason, in that it might provide greater comfort to investors that an individual insurer’s portfolio was not too heavily skewed away from industry average and consequently allowed the investors to provide the cover at a lower cost than they might otherwise. Another interested party agreed and also pointed out that any concerns regarding collateralization were taken care of in the protected cell. Therefore, although there

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Proceedings Citations

Cited to the Proceedings of the NAIC

Section 3F (cont.)

was basis risk in the case of a dual trigger in that it was conceivable that a company would have indemnity losses and yet not trigger the second parametric trigger, the credit risk relative to normal reinsurance was nonetheless eliminated. **1999 Proc. 2nd Quarter 177–178.**

After further discussion, the working group agreed that the model act should allow dual triggers within the wording of an indemnity trigger. This was achieved by defining the non-indemnity trigger as occurring “solely” outside of the insurer’s own loss experience, while leaving the indemnity trigger definition as a non-exclusive definition. **1999 Proc. 2nd Quarter 178.**

G. After a review of the first draft, drafting notes were added to the definitions section clarifying the definitions of protected cell and protected cell account. **1999 Proc. 1st Quarter 194.**

I. The working group looked at the definition of protected cell assets in Section 3I and noted that certain contract rights and general intangibles would not be assets for statutory accounting purposes even if in certain circumstances some of them would be assets for generally accepted accounting principles (GAAP) purposes. An interested party said that, whether allowable for statutory accounting principles (SAP) or GAAP, the assets in the protected cell would have been identified in the Plan of Operation filed with the commissioner, and the working group felt this was adequate. **1999 Proc. 2nd Quarter 174.**

K. An interested party stated that the industry interested parties group recommended adding the words “protected cell company” before the definition of insurance securitizations so that the legislation would not necessarily limit insurance securitization to only those conducted through protected cells. In addition the interested parties recommended a consistent change of the word “insurer” to “protected cell company.” **1999 Proc. 2nd Quarter 174.**

One observer questioned the use of the words “debt instruments” in the definition of protected cell company insurance securitization. He asked whether there might be forms of equity instruments that could be used in a securitization. A regulator stated that he believed it was the working group’s intent to limit the legislation at present to what might be termed “plain vanilla” debt securitizations. He stated that the Act could always be modified at a later date if equity securitizations were desirable. **1999 Proc. 2nd Quarter 174.**

Section 4. Establishment of Protected Cells

The chair of the group drafting the model presented a chart illustrating transactions among a protected cell, the general account, insurers, policyholders and investors. Using the chart, he described the various types of transactions and how they would be conducted using a protected cell for insurance securitization transactions. **1999 Proc. 1st Quarter 194, 197.**

A. The working group discussed whether it was necessary for the commissioner to approve the plan of operation of the protected cell. Since the protected cell would have obligations to both investors and the policyholders of the general account, the working group agreed that the conclusion to require commissioner approval was appropriate. **1999 Proc. 1st Quarter 212.**

An interested party emphasized that the formation of a protected cell was contingent on the commissioner’s pre-approval of the plan of operation of each protected cell so that the commissioner would be entirely comfortable with the ground rules for operational and investment activities of the protected cell. He also indicated that if issues arose in the future that were not anticipated in the NAIC model law, the commissioner would have the latitude to establish additional requirements as part of the plan. **1999 Proc. 1st Quarter 194.**

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Section 4A (cont.)

While the working group was completing its final review of the model prior to adoption, an interested party stated that the draft model law should not enable anything other than indemnity based and fully funded transactions, which corresponded to his understanding of the current draft of the Act. However, he noted that in Section 4 there were no standards regarding a commissioner's acceptance or rejection of the plan of operation and he encouraged the drafters to include guidance as to whether securitized insurance transactions were likely to be fully funded throughout the indemnity period. He stated that his association believed that this area needed to be expanded and there should be guidance regarding the amount of business that can be securitized. He described a situation where the general account could theoretically securitize almost all its business. **1999 Proc. 2nd Quarter 176.**

A regulator noted that under securitizations to date the trigger had been some form of catastrophe in which case it tended to be well-known whether the trigger event has occurred. He asked whether the association's concerns were that non-catastrophe business might be securitized. The interested party stated that, if a statute did not provide appropriate guidance as to how the commissioner may exercise his authority, there could be a concern regarding the improper delegation of authority. The chair asked how a protected cell transaction that was fully funded at the beginning of the transaction could become less than fully funded over the period and who was at risk if there were a market value fluctuation resulting in a diminution of value of the invested assets relative to the total exposure in the cell. An interested party replied that the general account would be providing no guarantee to the protected cell and hence in the event that no trigger event took place the risk of any diminution would lie with the original investors. If a trigger event did occur, then the diminution value would be charged against the general account as it would be unable to recover the entire amount of its securitization. **1999 Proc. 2nd Quarter 176.**

An industry trade association pledged to work on guidelines that could be used by a commissioner in evaluating the Plan of Operation filed by a protected cell company. He noted that some interested parties favored a regulation to cover this issue, but others would prefer the guidelines to be in the model act. A regulator stated that he believed that the model act should provide the broad statutory framework while regulations would provide some detail. Hence he moved that the guidelines should be established in a model regulation, and the working group agreed. **1999 Proc. 2nd Quarter 169.**

A regulator questioned whether the plan of operation of the protected cell was only required to be approved by the domiciliary commissioner. He expressed some concern that other commissioners in catastrophe-prone states did not have any authority over the type and quality of assets in the protected cell. The working group chair replied that the group felt that it would be impractical to get several commissioners to approve the plan and that the time-sensitive nature of the catastrophe reinsurance market prohibited getting every state's approval. An interested party stated that a reinsurance agreement could be put together in days versus the time it would take to get several states' approval of a protected cell plan. He added that the annual and quarterly statements filed by the protected cell would allow any state to review the type and quality of investments held by the protected cell. The regulator said that, because the plan would be approved in one state while the risk was in another, the protected cell should at least file a copy of the plan of operation with the commissioner of the states where the exposures are located. He indicated that his concern centered on the issue of whether there would be sufficient assets in the protected cell to cover the exposure. **1999 Proc. 3rd Quarter 331–332.**

B. The chair stated that he did not see a protected cell as a way of obtaining working capital, as the protected cell assets would be segregated and could not be used by the insurer as enterprise capital. Consequently, he could not understand the need to limit the percentage of securitizations in protected cells. He asked how the money within protected cells could legally be moved. An interested party noted that the statute as drafted did not allow co-mingling of assets and even if it were to occur illegally the statute recognized that equitable tracing can be used. **1999 Proc. 2nd Quarter 176.**

The group looked at Subsection B, which referred to "readily marketable securities with established market values." An interested party complained that there was no definition of readily marketable securities but another countered that there was a definition of market values. The chair replied that, whether defined or not, the term "readily marketable" had a meaning for regulators. **1999 Proc. 2nd Quarter 174.**

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Section 4 (cont.)

C. When discussing transactions between the protected cell and the general account and how those transactions should be set forth in an agreement, one issue that was not resolved was whether there could be a legally enforceable agreement between the general account and the protected cell since the draft legislation made clear that the protected cell was not a separate legal entity. A regulator opined that the objective seemed to be to achieve a legally binding segmentation of assets. **1999 Proc. 1st Quarter 212.**

D. An interested party asked whether there would be any restrictions on what assets could be attributed to a protected cell from the general account. Another responded that the protected cell was exempt from some of the invested assets laws, especially regarding concentration, and the types of assets in a protected cell would generally be specified as contractual matters between investors and the protected cell. The first commenter countered that it may, therefore, be possible for a protected cell to acquire assets that the general account might not otherwise have done. The second person agreed that this could be a problem but the securitization risk investors, who are taking on the risk of catastrophe or other trigger event, tended to be quite conservative regarding the types of invested assets that they would be likely to allow the protected cell to invest in. He also noted that the commissioner would have the authority to disapprove the plan of operation if the prospectus indicated that the protected cell would invest in inappropriate assets. **1999 Proc. 2nd Quarter 177.**

E. The chair explained the model to the parent committee at a hearing. He noted that the protected cell takes on the investment risk once the securities are issued and reiterated that the investors' primary purpose for entering the transaction was to take on the specific insurance risk that provided additional diversification for its existing portfolio. An interested party stated that the issue of the amount of risk being assumed by the protected cell company was addressed in the accounting and reporting requirements for the protected cell and the general account. After a triggering event, the general account could only take reinsurance credit up to the fair value of the assets within the protected cell. If the protected cell's assets fell below the amount being securitized, the general account would only be able to take reinsurance credit up to the fair value of the assets in the protected cell. He added that the prospectus of the protected cell and the plan of operation for the protected cell would list the type of assets that the protected cell would hold. He noted that the investors would demand high quality assets because they were not interested in the investment risk, rather they wanted the specific insurance risk discussed previously. **1999 Proc. 3rd Quarter 331.**

F. There was a discussion regarding whether Subsection F should contain exception wording "unless otherwise approved by the commissioner." The chair suggested that this would allow a transfer from the general account to the protected cell at other than market value. After discussion, it was agreed that no one could think of a circumstance why a commissioner would wish to approve such a transfer and hence the wording was deleted from the draft. **1999 Proc. 2nd Quarter 177.**

A parent committee member questioned what amount of reserves a protected cell would record after an event occurred. He asked whether the reserves would be based on the actuarial opinion and accounting measurement criteria of the general account or whether the reserves would be measured separately by the protected cell. An interested party replied that the actuarial opinion of the general account would include the reserves of the protected cell and that the protected cell would record liabilities in accordance with the accounting rules required by the state law. He explained that since the protected cell could not assume business other than from the general account and the general account retained the direct risks, when the general account booked the direct losses it would record a recoverable equal to the reserve recorded by the protected cell. **1999 Proc. 3rd Quarter 331.**

Section 5. Use and Operation of Protected Cells

The chair of the group studying insurance securitizations asked about a specific situation in which a primary writer ceded insurance risk to a reinsurer that in turn ceded the business to its sponsored protected cell. He questioned whether, in the event of the insolvency of the reinsurer, the primary writer would be treated as a general creditor of the reinsurer or whether it would have a direct claim on the collateral assets of the protected cell. The interested parties initially responded that they had envisioned that the protected cell would only reinsure risk of its sponsoring company and would not directly reinsure risks of third parties. After further discussion, the interested parties concluded that this was an issue to be considered and the outcome would depend on whether the primary writer transferred the risk directly to the protected cell or transferred the risk to the

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Section 5 (cont.)

reinsurer, which then transferred the risk to its protected cell. **1998 Proc. 4th Quarter 249–250.**

When explaining the model to the parent committee at a hearing prior to its adoption, the chair noted that a key requirement for promoting U.S. based securitizations involved ensuring that the assets in the protected cell be isolated from the other business of the insurance company and that the risk transferred to the investors be limited to a specific type of insurance exposure, usually catastrophe exposure. He explained that investors demanded that the assets were isolated and risks limited because they were looking for distinctive types and categories of risks to add to their portfolios for diversification purposes. He opined that, if investors wanted to take on general insurance risk or credit risk, it would be simpler to acquire insurance stocks or high yield bonds otherwise available in the market. He stated that catastrophe bonds issued by protected cells met the objectives of investors and also provided needed additional capacity to the market. In addition to these benefits, securitization transactions through a protected cell were more attractive to the ceding insurer because the transaction was fully funded and did not involve the credit risk associated with standard catastrophe reinsurance covers. **1999 Proc. 3rd Quarter 330.**

B. An interested party explained that the subgroup looking at the protected cell topic saw two major issues: first, whether a protected cell would be taxed as a separate entity or as part of the entire group; and second, there was the consideration of debt vs. equity and the resultant ability to deduct the interest payments for tax purposes. He noted that the protected cell concept was probably better for tax purposes than the situation for special purpose vehicles as long as the entire company was taxed as a single entity. **1999 Proc. 1st Quarter 211.**

When the parent committee held a hearing, one of those members questioned whether the protected cell assets would be subject to the same investment limitations as the general account under the state investment code. The working group chair replied that the working group discussed the issue but concluded that the protected cell should be exempt from these requirements. He explained that the diversification requirements of the investment law would prevent the protected cell from having the type of portfolio that investors demanded. He added that the application of risk-based capital charges also addressed this concern. The parent committee member opined that the commissioner could promulgate regulations that limited the type and diversification of assets available to the protected cell. Another regulator added that the commissioner would not necessarily have to develop regulations, but rather could make investment limits part of the plan of operation of the protected cell before granting approval. **1999 Proc. 3rd Quarter 331.**

When the draft was being considered by the Executive Committee, the parent committee chair suggested a technical change to the model. There was a reference in the model to “market value” for the valuation of the assets in the protected cell. Codification defined that “market value” to be “fair value,” so he suggested that the model be adopted with this technical change, so that the model would be consistent with codification. **1999 Proc. 3rd Quarter 24.**

C. An interested party stated that the assets of the protected cells were required to be carried at market value and any reserves resulting from an insured event would be carried at their ultimate value. He explained that these reporting requirements ensured that the regulators were able to regularly track what assets were available to fund the liabilities. **1999 Proc. 3rd Quarter 331.**

D. The chair asked whether the draft applied solely to fully funded or pre-funded securitization transactions. An interested party responded that it did. The chair asked that this be clarified in Section 5 because he believed that insurance regulators were not ready to support uncollateralized securitization transactions that had a significant credit or counterparty risk. He stated that the idea of unfunded and uncollateralized insurance securitizations had promise but that there were too many details to work out to include it in the model draft. An interested party requested that the draft be clarified to allow fully funded derivative instruments as well as fully funded bonds. The chair indicated that he expected that the working group would add to this as it worked through the details. **1999 Proc. 1st Quarter 211.**

After further review of the draft, the working group members decided to make additional changes to clarify that only fully funded, indemnity-based transactions were authorized and that index-based transactions would be authorized only with commissioner approval. **1999 Proc. 1st Quarter 194.**

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Section 5D (cont.)

While the working group was completing its final review of the model prior to adoption, an interested party stated that the draft model law should not enable anything other than indemnity based and fully funded transactions, which corresponded to his understanding of the current draft of the Act. However, he noted that in Section 4 there were no standards regarding a commissioner's acceptance or rejection of the plan of operation and he encouraged the drafters to include guidance as to whether securitized insurance transactions were likely to be fully funded throughout the indemnity period. He stated that his association believed that this area needed to be expanded and there should be guidance regarding the amount of business that can be securitized. He described a situation where the general account could theoretically securitize almost all its business. **1999 Proc. 2nd Quarter 176.**

E. The working group discussed how investors in a bond issued from a protected cell could ensure that the proceeds from their investments were used only for the purposes for which the protected cell was created. An interested party suggested that there could be the equivalent of what in the debt markets was referred to as a debenture indenture that would bind the issuer of the bond to use the proceeds only for the stated purposes. Another interested party stated that the investors would need to agree that they would seek recourse against the designated assets in the protected cell, while also agreeing with the insurer what it could do with the assets. **1999 Proc. 1st Quarter 212.**

There was a discussion regarding Subsection E where the term "financial instrument" was used. It was suggested that perhaps this should be changed to "debt instrument" but after discussion the working group decided to use the term "contracts or other documentation" to ensure that the terminology was all-inclusive. **1999 Proc. 2nd Quarter 174.**

F. A major change in the draft presented to the working group was prepared to make clear that the protected cell may only assume business from the general account. The change was intended to ensure that the protected cell did not have all of the attributes of a stand-alone insurance company such that the IRS would deem it to be an insurance company. In addition, this would ensure that it would not be subject to regulatory requirements such as premium taxes, guaranty fund assessments, etc. **1999 Proc. 1st Quarter 211.**

Section 6. Reach of Creditors and Other Claimants

An interested party reviewed the first draft of Sections 6 and 7, which addressed the treatment of creditors and claimants and the rehabilitation and liquidation of protected cell companies. He stated that these sections were very important because they established the bankruptcy-remote nature of protected cells and clarified that the protected cell was not subject to the guaranty fund provisions of the insurance code. **1999 Proc. 1st Quarter 212.**

When the parent committee held a hearing on the model prior to its adoption, one regulator commented that she was trying to understand the concept from the perspective of the policyholder. She questioned what would happen to a policyholder/claimant if the assets in the protected cell were insufficient to cover the total claims. An interested party replied that, just as in traditional catastrophe reinsurance, there was no novation in the transfer of risk to the protected cell. The general account retained the direct risk and was responsible to the policyholders if the assets were not sufficient to cover the losses attributed to the protected cell. The regulator stated that she wasn't clear on this issue because Section 6D of the model stated that the obligations of the protected cell were not covered by the guaranty association. An interested party noted that the protected cell was very similar to reinsurance in that guaranty fund coverage also was not available for reinsurance. **1999 Proc. 3rd Quarter 332.**

The chair of the working group that drafted the model reiterated that, with respect to the adequacy of assets, the level of reporting and disclosure with protected cell transactions was much higher than with traditional catastrophe reinsurance transactions and was much greater than with offshore transactions, which had almost no disclosure. Another regulator added that, unlike traditional catastrophe covers, protected cell transactions were fully funded. He stated that, while there was some risk that the assets might not be sufficient to cover the total losses, there was no reinsurance risk because protected cells had assets segregated to cover the losses. If a big catastrophe occurred, the ability of a reinsurer to respond to that was questionable. He continued that in the case of a protected cell, there was collateral in the amount of the total exposure, which was much more than one would find in a traditional reinsurance agreement. **1999 Proc. 3rd Quarter 332.**

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Section 6 (cont.)

A. A regulator noted that the wording did not include any prioritization and recommended a new Paragraph (2) that would indicate the prioritization of payment of liabilities out of the protected cell. An interested party responded that the liabilities and obligations of the protected cell would tend to be a matter of contract and the proposed wording might muddy the waters and cause a problem for the investors. **1999 Proc. 2nd Quarter 178.**

Section 7. Conservation, Rehabilitation or Liquidation of Protected Cell Companies

During the discussion of special purpose reinsurance vehicles, the chair asked about the impediments to the use of a domestic insurer as the issuer of the security. He noted that the major impediments that he was aware of included higher capitalization requirements, the lack of enabling regulatory authority to form a protected cell or property/casualty separate account, less favorable federal income tax rules than offshore, and whether the insurer, special purpose vehicle or protected cell would be subject to all ordinary U.S. regulatory requirements. An interested party noted that an additional challenge would be to find a way to ensure that the protected cell was indeed a bankruptcy protected entity in the same way that special purpose vehicles were bankruptcy remote entities. **1998 Proc. 4th Quarter 278.**

An interested party reviewed the first draft of Section 7, which addressed the rehabilitation and liquidation of protected cell companies. He stated that this section was very important because it established the bankruptcy-remote nature of protected cells and clarified that the protected cell was not subject to the guaranty fund provisions of the insurance code. He noted that states that adopt this legislation should review their guaranty fund provisions to ensure that they will not apply to protected cells. **1999 Proc. 1st Quarter 212.**

B. A regulator questioned whether the general account's liquidator or receiver could recover any unearned premium reserve residing in the protected cell in the event of the liquidation of the general account. It was agreed that the only unearned premium reserve being considered was that of the premium in addition to the interest earnings in the protected cell and therefore the additional risk premium being paid by the general account to the protected cell. After discussion the group decided to consider adding clarifying language regarding the recoverability of unearned premium reserve by the general account in the event of liquidation. **1999 Proc. 2nd Quarter 174.**

The spokesperson for the interested parties drafting group stated that certain industry interested parties had a problem with wording in Section 7 that would obligate the protected cell to reimburse the liquidator of the general account with the unearned premium portion of the risk premium paid by the general account to the protected cell upon a liquidator canceling the underlying policies. The reason for the concern was that it might not always be possible to cancel a catastrophe bond mid-term. However, a regulator pointed out that sometimes the liquidator is obligated by statute to cancel the underlying policies, and that failure to return the unearned premium would be the equivalent of providing the bond investors with a free ride. The chair responded that this would have to be provided for in the debt instrument documents, and that perhaps there should be a provision in the Plan of Operation for the protected cell to address this issue. The working group decided to substitute a drafting note to this effect and delete what had been Section 7C. **1999 Proc. 2nd Quarter 169.**

Section 8. No Transaction of an Insurance Business

An interested party noted that Section 8 was intended to clarify that neither the insurance securitization transaction nor the investment in a protected cell should be considered the business of insurance. He stated that this was important because potential investors in a securitization transaction needed the assurance that they would not be found to be conducting an unauthorized business of insurance and thereby lose what would otherwise be contractual recourse against the protected cell. **1999 Proc. 1st Quarter 212.**

Section 9. Authority to Adopt Regulations

An industry trade association pledged to work on guidelines that could be used by a commissioner in evaluating the Plan of Operation filed by a protected cell company. He noted that some interested parties favored a regulation to cover this issue, but others would prefer the guidelines to be in the model act. A regulator stated that he believed that the model act should provide the broad statutory framework while regulations would provide some detail. Hence he moved that the guidelines

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Section 9 (cont.)

should be established in a model regulation, and the working group agreed. The working group expected to work on the regulation as soon as the model act was finished. **1999 Proc. 2nd Quarter 169.**

When the working group reported its adoption of the Protected Cell Company Model Act to its parent, the chair noted that the working group agreed to draft a model regulation to provide further guidance to commissioners on issues that should be evaluated in the plan of operation filed by the protected cell. **1999 Proc. 2nd Quarter 146.**

Section 10. Effective Date

Chronological Summary of Action

December 1999: Model adopted.

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