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TO: Sen. Anne Cummings, Chair, Senate Committee on Finance
Rep. William J. Lippert, Chair, House Committee on Health Care

FROM: Michael S. Pieciak, Commissioner of Financial Regulation

SUBJECT: Progress of Rulemaking Required by Act 54 of 2019

DATE: February 15, 2020

Dear Senator Cummings and Representative Lippert:

Please accept this memorandum updating your committees on the progress of rulemaking required by Act 54 of 2019.

As you know, Act 54 was enacted in response to numerous issues encountered by educators and their families in 2018 when the Vermont Education Health Initiative, which provides Vermont school districts with health care plans for school employees, transitioned to high-deductible health plans compatible with health reimbursement arrangements (HRAs), flexible spending accounts (FSAs), health savings accounts (HSAs). Due to a lack of administrative capacity, the third-party administrator (TPA) for approximately 80% of school HRA, FSA, and HSA plans at that time was effectively unable to enroll new members, process claims in a timely manner, or provide adequate customer service. Although administration of these plans has since been taken over by another TPA, issues related to reimbursement and account reconciliation stemming from the first TPA's tenure continue to affect members.

To lessen the chance of these and similar problems in the future, Act 54 requires the Department of Financial Regulation (Department) to adopt rules to license and regulate entities administering or proposing to administer HRAs, FSAs, HSAs, and similar tax-advantaged accounts for health-related expenses to the extent permissible under the Employee Retirement Income Security Act of 1974 (ERISA).

Accordingly, this memorandum begins with a discussion of the permissible scope of state regulation under ERISA.

Preemption Analysis

ERISA establishes a comprehensive federal regulatory scheme for employee benefit plans and, importantly, preempts any and all state laws that "relate to" any employee benefit plans—including health plans. 29 U.S.C. § 1144(a). Because the statutory language does not provide substantial guidance on how preemption acts upon state laws, it has been the subject of copious litigation, including more than 20 cases before the U.S. Supreme Court.

Subject to ERISA's "savings clause," 29 U.S.C. § 1144(b)(2)(A), which specifically saves state laws regulating insurance from preemption, ERISA preempts two broad categories of state laws:

- 1) State laws that act immediately and exclusively on self-funded employee benefit plans, commonly referred to as "ERISA plans," because ERISA plans are exempt from state regulation under ERISA's "deemer clause," 29 U.S.C. § 1144(b)(2)(B). *See California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).
- 2) State laws that govern a central matter of ERISA plan administration or that have acute, albeit indirect, economic effects that force an ERISA plan to adopt a certain scheme of substantive coverage. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 683 (1995).

State laws of general applicability that have merely an indirect economic influence on ERISA plans do not "relate to" them and usually will not be preempted. *See District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 n.1 (1992). However, the Supreme Court's 2016 decision in *Gobeille v. Liberty Mutual Insurance* narrowed the permissible scope of state regulations that have indirect economic influence on ERISA plans. *Gobeille* involved a generally applicable Vermont law requiring all group health plans, including ERISA plans and their TPAs, to report claims to the State's all-payer claims database. While the State asserted that the law did not impose any material costs on ERISA plans, the Court ultimately concluded that reporting was a core obligation under ERISA, and preemption was necessary to prevent states from imposing a state-by-state patchwork of reporting requirements on ERISA plans.

As a practical matter, whether a state law is preempted by ERISA depends greatly on the entity and activity being regulated and the nature of the regulation. In this regard, it is important to highlight that preemption operates differently with respect to HRAs, FSAs, and HSAs. On the one hand, HRA and FSA plans established and maintained by private employers are generally ERISA plans, which are not subject to state regulation. *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 371 n.6 (2002) (state insurance statute preempted to the extent it applied to self-funded plans). On the other hand, HSAs, which are established and funded by employees, as well as plans covering governmental employees, employees of publicly financed hospitals and educational institutions, or employees of a specific church, are not ERISA plans and thus may be freely regulated by states.

It is not altogether clear to what extent a state law or regulation that affected TPAs that administer HRAs, FSAs, and HSAs would be deemed preempted. Because ERISA does not directly address whether states may regulate TPAs that contract with ERISA plans to provide services such as claims processing, customer service, and eligibility maintenance, it appears likely that preemption would depend on the extent that the regulation applied to the TPA's activities with respect to HRA and FSA plans, and on the burdens imposed.

Prior to the Supreme Court's 1995 *Travelers* decision (cited above), the weight of case law on the issue was that such laws were preempted by ERISA. *Travelers*, however, opened the door to generally applicable state regulations that impose an indirect economic burden on ERISA plans, so long as they do not bind plan administrators to any particular choice or preclude uniform

administrative practices. Thus, a generally applicable regulatory scheme for TPAs that is not unduly burdensome appears to raise relatively slight preemption risk. However, this risk is at least somewhat heightened by the decision in *Gobeille*, where the Supreme Court appeared to take a more skeptical view of state regulations that impose incidental economic burdens on ERISA plans.

Planned Regulation & Timeframe

The Department's planned regulation will be modeled on the National Association of Insurance Commissioners (NAIC) model law for registration and regulation of TPAs, which is attached as Appendix 1. The Department anticipates modeling its regulation on "Version 2" in the NAIC Model. Among other things, the NAIC model requires TPAs to become licensed with the Department, maintain books and records of all transactions, and hold all funds for the payment of claims in a fiduciary capacity. The Department believes that this type of regulation substantially lessens the risk of a repeat of the events of 2018.

The Department proposes to craft a regulation that mitigates preemption risk in several ways, without expressly excluding ERISA plans. It will instead include a provision stating that nothing in the regulation is intended to or should be construed to be in conflict with federal law. The Department will also limit the scope of the regulation to TPAs operating in Vermont that contract with HRA, FSA, or HSA plans. Finally, the Department's regulation will not require specific contractual provisions for TPA services, which could interfere with nationally uniform ERISA plan administration.

The Department intends to file a proposed rule no later than March 1, 2020 and hopes to complete the rulemaking process by July 1, 2020 after a public hearing and taking input from stakeholders.

Please do not hesitate to contact me or Jill Rickard, DFR's Director of Policy, with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael S. Pieciak".

Michael S. Pieciak
Commissioner
Department of Financial Regulation

REGISTRATION AND REGULATION OF THIRD PARTY ADMINISTRATORS (TPAs)

(An NAIC Guideline)

This Guideline, offered in two versions, is a revision of the Third Party Administrator Statute, which was first adopted by the NAIC as a model law in 1977 and which had been most recently amended in 2001. Version 1 of the Guideline expands the scope of the prior model by adding workers' compensation and stop-loss coverages. Version 2 of the Guideline omits workers' compensation, which makes it similar in scope to the prior model, with the difference being in those states where stop-loss insurance was defined as liability insurance and not as health insurance.

A state's best use of the Guideline will depend on whether it currently has a TPA law and/or whether it wants to have a TPA law that extends to the handling of workers' compensation claims:

- For a state that wishes to enact a TPA law that extends to workers' compensation, Version 1 should be an excellent starting point. Study the language carefully to make whatever amendments may be necessary on account of state-specific issues with workers' compensation, agent licensing and adjuster licensing statutes. The adjuster licensing statutes will probably require an especially careful examination to have a good "mesh" and to avoid duplicative requirements, while workers' compensation statutes will need to be studied to determine whether the provisions of this document regarding the rights of employers to involve themselves in claims handling or disputes are in agreement. While part of a possible response to conflicts could be to change adjuster licensing or workers' compensation laws to match this document, it is not the purpose of the Guideline to call for changes to other statutes. Although drafting notes will provide assistance in this regard, one should not skim over sections without drafting notes. There are more state-to-state differences than can be easily summarized by drafting notes.
- A state that already has a TPA law, but that wants to extend it to workers' compensation, will also find Version 1 to be an excellent reference. The advice for such a state is again to review this document carefully, looking to see where it differs from the state's current law and carefully noting where the changes proposed in this document may conflict with the state's other statutes.
- A state with or without a current TPA law, that wants to have a TPA law that does not extend to workers' compensation, is advised to consider Version 2. Version 2 is essentially the same as Version 1, but with provisions and language related to workers' compensation removed. This law still includes stop-loss and other refinements made to the previous NAIC model. Admittedly, the motivation for a state to make changes to its existing laws is likely to depend on whether it has identified a reason that it needs to "fix" its current laws. Absent the identification of any practical problems, states may assign a lower priority to the improvements contained in this document.

In addition to numerous editorial changes, some of the substantive changes to what was previously in the 2001 NAIC model law are as follow:

- (a) The language of the 2001 model required individuals adjusting life and health claims to be licensed as TPAs, even though it is clear that it was never the intent of the drafters or the states that adopted the model to implement a licensure requirement for employees of TPAs or insurers adjusting life and health claims. In addition, the licensing provisions in the 2001 model allowed an individual to become licensed to act as a full-fledged TPA. While the Guideline has language to allow previously licensed individuals to be "grandfathered," it provides that only business entities can be newly licensed as TPAs. As a practical matter, licensure requirements are not cleanly met by an individual.
- (b) The 2001 model exempted licensed insurers operating as TPAs from all requirements of the Act. The Guidelines maintain this exemption for lines other than workers' compensation. For workers' compensation, while Version 1 exempts insurers from licensure requirements and from audit and reporting requirements when they handle workers' compensation claims for an employer that is not their policyholder, it subjects such insurer/TPAs to many other operational requirements of the Act for workers' compensation.
- (c) The Guideline adds cease & desist orders to those actions available to the commissioner and also addresses concerns that the 2001 model may have been deficient with regard to due process.
- (d) The Guideline extends the life & health scope of the 2001 model to so-called "stop-loss" insurance. This may be viewed a clarification in states where stop-loss is already considered to be health insurance and cannot be written as liability insurance, but it will be a modest expansion in other states.
- (e) Version 1 extends the scope of the 2001 model to workers' compensation insurance. One should note, however, that various provisions of the model applying to life & health are not uniformly extended to workers' compensation. There is an extensive new section dealing with workers' compensation contracts between insurers and TPAs, and between TPAs and insured employers.

- (f) Version 1 will not allow a TPA to agree with an employer to have the employer adjust its own workers' compensation claims, and an employer cannot avoid this prohibition by simply licensing an affiliated business entity as a TPA in order to handle its own workers' compensation claims.
- (g) Version 1 exempts payments made by employers to TPAs for handling workers' compensation claims under a large deductible contract from premium taxes.
- (h) The account-related provisions in the 2001 model were substantially revised. Most notably, the Guideline deletes the requirement that accounts administered by the TPA must be in the name of the insurance company, as long as claims trust funds held by the TPA are not commingled with premium trust funds.

THIRD PARTY ADMINISTRATOR ACT
(NAIC Guideline Version 1)

Drafting Note: This “version 1” guideline includes workers’ compensation, while the “version 2” guideline excludes workers’ compensation. A state that intends to adopt a TPA law should start with the version that is appropriate for its needs.

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Section 1. Definitions

For purposes of this Act:

- A. “Affiliate or affiliated” means a person who directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, another specified person.
- B. “Business entity” means a corporation, association, partnership, limited liability company or other legal entity.
- C. “Collateral” means funds, letters of credit or any item with economic value owned by the payor but held by an insurer or TPA in case it needs to be used to fulfill premium or loss reimbursement obligations in accordance with a contract between the insurer or TPA and the payor. “Collateral” shall include anticipated loss prepayments made prior to the payment of losses, pursuant to arrangements where reimbursement is not due until after losses have been paid.
- D. “Commissioner” means the Commissioner of Insurance of this state.
- E. “Control” (including the terms “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by [insert appropriate reference to state law regulating holding companies] that control does not exist in fact. The commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support the determination that control exists in fact, notwithstanding the absence of a presumption to that effect.

- F. “GAAP” means United States generally accepted accounting principles consistently applied.
- G. “Home state” means the United States jurisdiction that has adopted this Act or a substantially similar law governing TPAs and that has granted the TPA a home state TPA license.
- H. “Insurer” means an entity licensed in a United States jurisdiction to provide life, annuity, health or stop-loss coverage as an insurance company, health maintenance organization, fraternal benefit society or prepaid hospital or medical care plan.

Drafting Note: States that license multiple employer welfare arrangements (MEWAs) or workers’ compensation self-insurance groups, or that authorize employee leasing companies or professional employer organizations (PEOs) to provide employee welfare benefits on a self-funded basis, will want to include these entities in the list of entities that are included in the definition of insurer for purposes of this Act, but only to the extent of their license or authorization. It is not the intention of this drafting note to include employee leasing companies or PEOs authorized to self-insure workers’ compensation within the definition of “insurer.” Rather, this Act contemplates that such an entity, when authorized as a workers’ compensation self-insurer, will be considered to be a “workers’ compensation self-insurer,” which is a term that is already defined under this Act.

- I. “Insurance producer” means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance.

Drafting Note: States that use different terminology such as “agent” and/or “broker” should make appropriate adjustments to this language. In states that do not license business entities as insurance producers, use the following definition:

- I. “Insurance producer” means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, and also includes a business entity whose primary activities are the sales, solicitation and negotiation of insurance.
- J. “Master services agreement” means a written agreement between an insurer and a TPA that specifies standards for the handling of workers’ compensation claims and the handling of funds belonging to the insurer or policyholder in connection therewith.
- K. “Nonresident TPA” means a TPA whose home state is any jurisdiction other than this state.
- L. “Payor” means an insurer, a workers’ compensation self-insurer, or an employer administering its employee benefit plan or the employee benefit plan of an affiliated employer under common management and control.
- M. “Person” means an individual or a business entity.
- N. “Stop-loss insurance” means insurance protecting an employer or other person responsible for an otherwise self-insured health or life benefit plan against obligations under the plan, but “stop-loss insurance” does not include reinsurance written for an insurance company.

Drafting Note: The inclusion of the stop-loss definition and the inclusion of stop-loss throughout this law are not necessary in states where stop-loss is clearly stipulated to be health insurance and cannot be interpreted to be liability insurance or some other form of insurance. In such states, references to stop-loss may be deleted or – if retained – viewed as a clarification (as stop-loss is considered to be liability insurance in some states).

- O. “Third party administrator” or “TPA” means a person who directly or indirectly underwrites, collects charges, collateral or premiums from, or adjusts or settles claims on residents of this state, in connection with life, annuity, health, stop-loss or workers’ compensation coverage, except that a person shall not be considered a TPA if that person’s only actions that would otherwise cause it to be considered a TPA are among the following:
 - (1) A person working for a TPA to the extent that the person’s activities are subject to the supervision and control of the TPA;
 - (2) An employer administering its employee benefit plan or the employee benefit plan of an affiliated employer under common management and control, except that workers’ compensation shall not be considered as an “employee benefit plan;”

- (3) The administration of a bona fide employee benefit plan established by an employer or an employee organization, or both, for which the insurance laws of this state are preempted pursuant to the Employee Retirement Income Security Act of 1974, as the act existed on [*an appropriate recent date should be selected*];
- (4) A workers' compensation self-insurer that has been approved by [agency responsible for the approval of workers' compensation self-insurance] or an employer otherwise authorized by law to administer its workers' compensation obligations to its employees or co-employees, while administering workers' compensation benefits for its employees or co-employees;
- (5) A union administering a benefit plan on behalf of its members;
- (6) An insurer administering insurance coverage for its policyholders, subscribers or certificate holders, or those of an affiliated insurer under common management and control;
- (7) An insurer directly or indirectly underwriting, collecting charges, collateral or premiums from, or adjusting or settling claims for life, annuity, health or stop-loss insurance on behalf of a client that is not a policyholder, subscriber or certificate holder, and that has its United States headquarters or principal location of business in a jurisdiction in which the insurer is licensed to write that coverage;
- (8) An insurer directly or indirectly underwriting, collecting charges, collateral or premiums, or adjusting or settling claims for life, annuity, health or stop-loss insurance, provided that the insurer is licensed in this state to write that line of insurance coverage;
- (9) An insurance producer selling insurance or engaged in related activities within the scope of the producer's license, except that this shall not include the adjusting or settling of workers' compensation claims;
- (10) A creditor acting on behalf of its debtors with respect to insurance covering a debt between the creditor and its debtors;
- (11) A trust and its trustees and agents acting pursuant to such trust established in conformity with 29 U.S.C. Section 186;
- (12) A trust exempt from taxation under Section 501(a) of the Internal Revenue Code and its trustees acting pursuant to such trust, or a custodian and the custodian's agents acting pursuant to a custodian account which meets the requirements of Section 401(f) of the Internal Revenue Code;
- (13) A credit union or a financial institution that is subject to supervision or examination by federal or state banking authorities, or a mortgage lender, when collecting or remitting premiums to licensed insurance producers or to limited lines producers or authorized payors in connection with loan payments;
- (14) A credit card issuing company advancing or collecting insurance premiums or charges from its credit card holders who have authorized collection;
- (15) An individual adjusting or settling claims in the normal course of that individual's practice or employment as an attorney at law and who does not collect charges or premiums in connection with insurance coverage;
- (16) A person licensed as a managing general agent in this state when acting within the scope of that license; or
- (17) A business entity licensed pursuant to [insert statutory reference] to adjust workers' compensation loss claims, but only if that entity does not receive or manage funds from employers or other persons whose workers' compensation claims are being adjusted and does not manage or control related funds of the payor that is ultimately responsible for the claims.

Drafting Note: The above exception to the definition of “third party administrator” and “TPA” should be included if the state licenses adjusting firms to handle workers’ compensation or other claims that would fall under the scope of this act. The drafting shown is for a state that licenses firms to adjust workers’ compensation claims, but not other types of claims subject to this act. If the state also licenses firms to adjust life, health or stop-loss claims, then this wording should be amended accordingly. If the state licenses individuals but not business entities to adjust claims, the state should consider whether to include an exemption for business entities that do not handle client funds and whose only TPA activities are claims adjustment performed by licensed adjusters.

- (18) A business entity that is affiliated with a licensed insurer while acting as a TPA for the direct and assumed insurance business of an affiliated insurer;
 - (19) A person providing network access services or the re-pricing of charges of participating providers for medical care rendered persons covered under workers’ compensation, including related case management or credentialing services, as long as such person does not manage or control related funds of the payor that is ultimately responsible for the workers’ compensation claims, and as long as such person does not engage in advising or determining whether a workers’ injury is eligible for workers’ compensation coverage.
- P. “Underwrites” or “underwriting” means, but is not limited to, the acceptance of employer or individual applications for coverage of individuals and the overall planning and coordination of a benefits program.
- Q. “Uniform Application” means the current version of the NAIC Uniform Application for Third Party Administrators.
- R. “Workers’ compensation” means a government-mandated or authorized system of medical and disability benefits applying to workers and their dependents or other beneficiaries, and which arise from on-the-job injuries or disease. Workers’ compensation does not include indemnification of an employer under excess workers’ compensation policies, when that employer has been approved by the responsible government agency to self-insure its responsibility to provide benefits.
- S. “Workers’ compensation self-insurer” means an employer or co-employer approved by [agency responsible for the approval of workers’ compensation self-insurance] or otherwise authorized by law to assume primary financial responsibility for the payment of workers’ compensation benefits to its employees or co-employees, instead of transferring this primary financial responsibility to an insurer in exchange for an insurance premium, whether the payment of such benefits is administered by the employer, co-employer or a TPA.

Section 2. Licensing Necessary

- A. No person shall act as a TPA in this state unless that person is licensed as a TPA pursuant to this Act or unless the TPA is exempted from this Act’s licensing requirement pursuant to subsection B of this section or subsections G or H of section 15 of this Act. This prohibition shall not apply to a person while employed by, or when operating under contract to, a TPA that is licensed pursuant to this Act, or exempted from this Act’s licensing requirements pursuant to subsection B of this section or subsections G or H of section 15 of this Act. The authority granted to a TPA pursuant to this Act does not exempt its employees from the licensing requirements of [reference to adjuster licensing act].

Drafting Note: The last sentence of the preceding subsection should be deleted in states that do not require the licensing of adjusters for any of the lines of insurance falling within the scope of this Act.

- B. An insurer that also operates as a TPA for workers’ compensation in this state shall be exempt from sections 13 through 16 of this Act if it is licensed to write workers’ compensation insurance in this state.

Section 3. Workers' Compensation; Agreement with an Affiliated TPA

If an agreement between a TPA and an insurer would result in the expectation that more than thirty percent of the workers' compensation claim costs to be adjusted by the TPA in this state would be for employees or co-employees of the TPA or its affiliates, then the TPA and the insurer must submit the agreement to the [*agency responsible for the approval of workers' compensation self-insurance*] for prior approval and the agreement may not take effect until it has been approved. In considering the proposed agreement for approval or disapproval, the [*agency responsible for the approval of workers' compensation self-insurance*] shall apply the same standards that are applied to consider approval of the claims-handling activities of workers' compensation self-insurers in this state. To determine the expectation of claim costs, the TPA and the insurer shall use the [*rates or loss costs*] published by the state's designated workers' compensation advisory organization.

Drafting Note: The reference in the last sentence of this paragraph should be fitted to the state's workers' compensation rate regulatory structure.

Section 4. Payment to a TPA

If an insurer utilizes the services of a TPA, any premiums or charges for insurance paid to the TPA by or on behalf of the insured party, or any collateral furnished to the TPA by or on behalf of the insured party, shall be deemed to have been received by the insurer, and the return of collateral or the payment of return premiums or claim payments forwarded by the insurer to the TPA shall not be deemed to have been paid to the insured party or claimant until the payments are received by the insured party or claimant. Nothing in this section limits any right of the insurer against the TPA resulting from the failure of the TPA to make payments to the insurer, insured parties or claimants.

Section 5. Maintenance of Information

- A. A TPA shall maintain and make available to the payor complete books and records of all transactions performed on behalf of the payor. The books and records shall be maintained in accordance with prudent standards of insurance record keeping and shall be maintained for a period of not less than five (5) years from the date of their creation.
- B. The commissioner shall have access to books and records maintained by a TPA for the purposes of examination, audit and inspection. Any documents, materials or other information in the possession or control of the commissioner that are furnished by a TPA, payor, insurance producer or an employee or agent thereof acting on behalf of the TPA, payor or insurance producer, or obtained by the commissioner in an investigation shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the commissioner is authorized to use such documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties.
- C. Neither the commissioner nor any person who receives documents, materials or other information while acting under the authority of the commissioner shall be permitted or required to testify in any private civil action concerning confidential documents, materials, or information subject to Subsection B of this section.
- D. In order to assist in the performance of his or her duties, the commissioner:
 - (1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection B of this section, with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners, its affiliates or subsidiaries and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material or other information;
 - (2) May receive documents, materials or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners, its affiliates or subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

- (3) [OPTIONAL] May enter into agreements governing sharing and use of information consistent with this subsection.

Drafting Note: The language in Subsection D(1) assumes the recipient has the authority to protect the applicable confidentiality or privilege, but does not address the verification of that authority, which would presumably occur in the context of a broader information sharing agreement.

- E. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in Subsection D of this section.
- F. Nothing in this Act shall prohibit the commissioner from releasing final, adjudicated actions including for cause terminations that are open to public inspection pursuant to [insert appropriate reference to state law] to a database or other clearinghouse service maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries.
- G. Notwithstanding any contractual agreements between the payor and the TPA that operate to the contrary, the TPA shall retain the right to sufficient continuing access to books and records to permit the TPA to fulfill all of its contractual obligations to insured parties, claimants, and the payor.
- H. In the event the payor or the TPA cancel their agreement; notwithstanding the provisions of Subsection A of this section, the TPA may, by written agreement with the payor, transfer all records to a new TPA rather than retain them for five (5) years. In such cases, the new TPA shall acknowledge, in writing, that it is responsible for retaining the records of the prior TPA as required in Subsection A of this section.

Section 6. Approval of Advertising

A TPA that advertises on behalf of its client may only use advertising that has been approved in writing by the client in advance of its use. A TPA that mentions any current or former client in its advertising must obtain the client's prior written consent.

Section 7. Responsibilities of the Payor and TPA

- A. No TPA shall act as such without a written agreement between the TPA and the payor. A copy of the agreement shall be retained by the TPA for the duration of the agreement and for five (5) years thereafter. The agreement shall contain all provisions required by this section, except insofar as the TPA does not perform all of the functions referenced in this section.
- B. A payor that utilizes the services of a TPA shall retain responsibility for the benefits, premium rates, collateral and reimbursement procedures, underwriting criteria and claims payment procedures applicable to the coverage and for securing reinsurance or stop-loss insurance, if any. The rules pertaining to these matters, to the extent that they are relevant to the duties of the TPA, shall be agreed to in writing by the payor and the TPA.
- C. An insurer utilizing the services of a TPA is responsible for the acts of the TPA and is responsible for providing the TPA's books and records relevant to the insurer to the commissioner upon request.
- D. The written agreement between the TPA and the payor shall provide that communications between the TPA and claimants shall avoid deceptive statements with regard to the responsibilities of the TPA, payor and any insurer with regard to claims or premiums.
 - (1) If the TPA is also an insurer, then communications with claimants shall be designed to avoid the impression that coverage provided for the claimants is pursuant to insurance written by the insurer or an affiliated insurer.
 - (2) For workers' compensation coverage, if the TPA is employed by an insurer or by a large deductible policyholder, then communications with claimants shall be designed to avoid the impression that coverage provided to the claimants is pursuant to self-insurance by an employer or other entity, even when the amounts payable by the employer or other entity are a function of the claims paid on its behalf.

- E. In the event of a dispute between the payor and the TPA regarding which of them is to fulfill a lawful obligation with respect to a policy, certificate or claim subject to the written agreement, the payor shall fulfill such obligation.
- F. For workers' compensation, the TPA shall establish and maintain means for the payor to identify a responsible person with the TPA when the payor is contacted by a claimant or a representative of a claimant, or by the insurance department or industrial commission. Upon request, the payor shall provide this information to a claimant, a representative of a claimant, or to the insurance department or industrial commission.
- G. The payor has the duty to provide for competent administration of its programs administered by a TPA and within the scope of this Act.
- H. When a TPA administers benefits in connection with life, annuity, health and employee benefit stop-loss coverage for more than one hundred (100) certificate holders, subscribers, claimants or policyholders on behalf of an insurer, the insurer shall, at least semiannually, conduct a review of the operations of the TPA. At least one such review shall include an on-site audit of the operations of the TPA. The cost of such reviews or audits shall be borne by the insurer and not reimbursed by the TPA. The requirements of this subsection shall not apply when the TPA and the insurer are affiliated.

Section 8. Premium Collection and Payment of Claims

- A. All insurance charges, premiums, collateral and loss reimbursements collected by a TPA on behalf of or for a payor, the return of premiums or collateral received from a payor, and any funds held by the TPA for the payment of claims, shall be held by the TPA in a fiduciary capacity. Funds shall be immediately remitted to the person entitled to them or shall be deposited promptly in a fiduciary account established and maintained by the TPA in a federally insured financial institution. The TPA shall render a periodic accounting to the payor detailing all transactions performed by the TPA pertaining to the business of the payor, and the written agreement between the payor and the TPA shall include the specifications of this reporting.
- B. The TPA shall keep copies of all records of any fiduciary account maintained or controlled by the TPA, and, upon request of a payor, shall furnish the payor with copies of the records pertaining to the deposits and withdrawals made on behalf of the payor. If funds deposited in a fiduciary account have been collected on behalf of or for more than one payor, or for the payment of claims associated with more than one policy, the TPA shall keep records clearly recording the deposits in and withdrawals from the account on behalf of each payor and relating to each policyholder.
- C. The TPA shall not pay any claim by withdrawals from a fiduciary account in which premiums or charges, other than collateral or loss reimbursements for workers' compensation, are deposited. Withdrawals from a fiduciary account shall be made as provided in the written agreement between the TPA and the payor, and only for the following purposes:
 - (1) Remittance to a payor entitled to remittance;
 - (2) Deposit in an account maintained in the name of the payor;
 - (3) Transfer to and deposit in a claims-paying account, with claims to be paid as provided in Subsection D of this section;
 - (4) Payment to a group policyholder for remittance to the payor entitled to such remittance;
 - (5) Payment to the TPA of its earned commissions, fees or charges;
 - (6) Remittance of return premium to the person or persons entitled to such return premium; and
 - (7) Payment to other service providers as authorized by the payor.

D. All claims paid by the TPA from funds collected on behalf of or for a payor shall be paid only as authorized by the payor. Payments from an account maintained or controlled by the TPA for purposes including the payment of claims may be made only for the following purposes:

- (1) Payment of valid claims;
- (2) Payment of expenses associated with claims handling to the TPA or to other service providers approved by the payor;
- (3) Remittance to the payor, or transfer to a successor TPA as directed by the payor, for the purpose of paying claims and associated expenses; and
- (4) Return of funds held as collateral or prepayment, to the person entitled to those funds, upon a determination by the payor that those funds are no longer necessary to secure or facilitate the payment of claims and associated expenses.

Section 9. Compensation to the TPA

- A. A TPA shall not enter into an agreement or understanding with a payor or, with regard to workers' compensation, a payor, employer or co-employer in which the effect is to make the amount of the TPA's commissions, fees, or charges contingent upon savings effected in the payment of losses covered by the payor's obligations. This provision shall not prohibit a TPA from receiving performance-based compensation for providing hospital or other auditing services, from providing managed care or related services, or from being compensated for subrogation expenses.
- B. A payor shall not enter into an agreement with a TPA in violation of this section.
- C. This section shall not prevent the compensation of a TPA from being based on premiums or charges collected or the number of claims paid or processed.

Section 10. Disclosure of Charges and Fees

- A. When a TPA collects funds, the reason for collection of each item shall be identified to the insured party and each item shall be shown separately from any premium. Additional charges may not be made for services to the extent the services have been already paid for by the payor.
- B. The TPA shall disclose to the payor all charges, fees and commissions that the TPA receives arising from services it provides for the payor, including any fees or commissions paid by payors providing reinsurance or stop-loss insurance.

Section 11. Workers' Compensation; Agreements and Communication between Employers, TPAs and Insurers

No TPA shall enter into any agreement with any employer or co-employer, except a workers' compensation self-insurer, for the adjustment or handling of workers' compensation claims for its employees or co-employees that are residents of this state, or accept compensation of any kind for the adjustment or handling of workers' compensation claims for employees or co-employees that are residents of this state, unless it has a master services agreement applying to such claims with the insurer responsible for the payment of claims attributable to the employer or co-employer. This section does not apply when the employer or co-employer is an insurer.

- A. The following provisions apply to master services agreements:
 - (1) The insurer may have more than one master services agreement with a given TPA, but it must be unambiguous which master services agreement applies for a given claim.
 - (2) The provisions of this Act shall prevail in the case of any conflicts between it and the master services agreement.

- (3) The provisions of the master services agreement shall prevail in the case of any conflicts between it and a contract or agreement between the TPA and the employer or co-employer.
 - (4) The provisions of this Act shall prevail in the case of any conflicts between it and the contract or agreement between the TPA and the employer or co-employer.
 - (5) The master services agreement shall address any conversion of collateral held by the TPA on behalf of the insurer and shall address other details of funds management.
 - (6) If the TPA receives funds directly from the employer or co-employer for claims or claims handling expense, then the master services agreement must provide for uninterrupted claims handling in the event that the employer or co-employer stops paying the TPA for any reason.
 - (7) Each insurer and TPA must maintain copies of all master services agreements to which they are a party. These agreements shall be made available for inspection by the insurance department or the industrial commission upon request, but these agreements shall be treated as proprietary and this availability shall not be used to disclose an agreement to a third party without the permission of all parties to the agreement.
 - (8) The insurer may terminate the obligation and the ability of the TPA to settle claims on its behalf for an employer or co-employer at any time upon advance notice to the TPA and to the employer or co-employer.
 - (9) The master services agreement must make provisions for statistical reporting as required by law or regulation, and must make provision for statistical reporting and records management in the event of termination of the TPA's responsibility for the handling of an employer or co-employer, or in the event of termination of the master services agreement.
- B. Subject to other provisions of this Act, contracts or agreements between a TPA and an employer or co-employer relating to workers' compensation for the employer's or co-employer's employees or co-employees may have the TPA paid or paid in part by the employer or co-employer. The following provisions apply to such funds and to reimbursements made through the conversion of collateral held by an TPA relating to a employer or co-employer:
- (1) When a TPA enters into a contract or agreement with an employer or co-employer relating to workers' compensation for the employer's or co-employer' employees, the TPA shall disclose to the employer or co-employer any charges, fees or commissions that it receives as compensation for such work from any insurer.
 - (2) The master services agreement may authorize the TPA to handle receipts and payments on behalf of the insurer relating to premium, collateral, and reimbursement for loss payments and expenses arising out of the adjusting of claims.
 - (3) Payments by the employer or co-employer to the TPA for its claims adjusting services under a large deductible policy, if made directly to the TPA and not by the insurer to the TPA, and if the insurer does not assume a risk that such payments may be higher than an expected amount, do not need to be reported by the insurer as premium on its Annual Statement. All other payments, other than collateral, made by the employer or co-employer to a TPA relating to coverage under a large deductible policy must be reported by the TPA to the insurer and reported by the insurer as premium on its Annual Statement. For purposes of this section, a large deductible policy is considered to be any workers' compensation deductible policy approved by the Commissioner with a per-accident deductible of no less than one hundred thousand dollars and, if applicable, an aggregate deductible of no less than two hundred fifty thousand dollars, provided that both such deductibles must be retained by the employer or co-employer and not insured or reinsured in any fashion by any insurer not affiliated with the employer or co-employer.

Drafting Note: The definition of large deductible in Subsection B(2) should be made consistent with the minimum standards for large deductible approval otherwise contemplated in state law.

- (4) Any payments made by the employer or co-employer to the TPA, that are not collateral and are not reimbursement for claims or claim adjusting expenses, and are attributable to workers' compensation for employees or co-employee that are residents of this state, shall be reported by the insurer as premium on its Annual Statement. For purposes of this paragraph, conversion of collateral to satisfy an obligation of the employer or co-employer shall be considered a payment.
- C. The TPA must retain copies of all contracts, agreements and amendments thereto between the TPA and an employer or co-employer relating to claims covered by the insurer under a statutory workers' compensation policy. Upon request, the TPA must promptly provide the insurer with a copy of any contract, agreement or amendment thereto between the TPA and an employer or co-employer relating to claims covered by the insurer under a statutory workers' compensation policy. The insurer and the TPA shall make all such agreements in their possession available for inspection by the insurance department or the industrial commission upon request, but these agreements shall be treated as proprietary and this availability shall not be used to disclose an agreement to a third party without the permission of all parties to the agreement.
- D. If provision for such cancellation is contained in the insurance policy, an insurer may cancel the policy for nonpayment if the employer fails to pay the TPA for services relating to claims that are the ultimate responsibility of the insurer. The endorsement addressing the use of the TPA and the employer's or co-employer's obligation to pay the TPA may provide that the employer or co-employer is also obligated to pay the insurer for any amounts that the insurer pays the TPA should the employer or co-employer not pay the TPA on a timely basis.
- E. No contract between an employer and a TPA may provide or allow administration of claims by the employer or co-employer unless self-administration of claims by the employer or co-employer has either been approved by the *[agency responsible for approval of workers' compensation self-insurance]* or the employer or co-employer is otherwise authorized by law to administer its own claims in this state.
- F. No contract or agreement between an employer and a TPA or an insurer may give the employer the right to deny a claim. If an employer recommends that a TPA deny a claim, then the TPA may do so if such action is consistent with the claims handling standards provided by the insurer.

Drafting Note: Subsection F should be amended as necessary in those states that give the employer specific rights to dispute or deny workers' compensation claims. The section is not intended to reduce the rights of the employer to less than it would otherwise have under state law.

- G. An insurer shall not permit a TPA to delegate authority to an employer or co-employer in violation of this section.
- H. A contract or an agreement between an employer and a TPA may give the employer the right to have amounts paid that otherwise may be disputed by the insurer or the TPA. In the event that a contract or agreement has this provision, the insurer must be given a copy of the contract or advised of the existence of these provisions on a timely basis after the contract or agreement is entered into or amended to include a provision of this nature, except when the insurer has already given the TPA or the policyholder written permission for this arrangement. This subsection shall not be interpreted, however, to give this right to an employer absent a provision in the contract or agreement between it and the TPA, and it shall not be interpreted as meaning that the insurer that has not already given permission cannot refuse to accept such provisions within a reasonable time after their receipt by the insurer.
- I. When a contract or agreement exists between the TPA and the employer, there must be an endorsement attached to each related statutory workers' compensation policy to indicate the existence of that contract or agreement. If applicable, the endorsement must recognize the obligations of the policyholder to pay the TPA. If applicable, this endorsement must recognize the obligation of the employer or co-employer to reimburse the insurer if the insurer pays the TPA to assure continued claims services in the event of the employer's or co-employer's failure to pay. In addition, the endorsement shall provide that, in the event that the insurer terminates the TPA's role in handling claims for the employer, the employer or co-employer shall have the ability to cancel the policy without a short rate penalty if it replaces its insurance with another insurer, but using the same TPA.

Section 12. Delivery of Materials to Covered Individuals

Any policies, certificates, booklets, termination notices or other written communications delivered by the payor to the TPA for delivery to insured parties or covered individuals shall be delivered by the TPA promptly after receipt of instructions from the payor to deliver them.

Section 13. Home State TPA License

A. If a TPA is incorporated in this state or this state is its principal place of business within the United States, then the TPA may designate this state as its home state and apply to this state for licensure as a TPA. If neither the state in which a TPA is incorporated nor the state that is its principal place of business have adopted this Act or a substantially similar law governing TPAs, and if the TPA has not designated any other state that has adopted this Act or a substantially similar law governing TPAs as its home state, then the TPA may apply for licensure to this state as its home state.

B. A TPA applying to this state as its home state shall apply for licensure using the Uniform Application and designate an individual as the TPA's contact person for department communications.

Drafting Note: The contact person requirement in subsection B and the related part of the notification requirement in subsection J are recommended options for those states with computer systems or licensing and filing procedures for which the designation of a "responsible person" is necessary.

C. If a TPA designates this state as its home state because neither its state of incorporation nor the state that is its principal place of business within the United States have adopted this Act or a substantially similar law governing TPAs, but if one or both of these other jurisdictions have licensed the TPA, then the commissioner may consult with that state or states and may give due consideration to any relevant findings made by that state or states in order to avoid an unnecessarily duplicative review of the application.

D. The Uniform Application shall include or be accompanied by the following information and documents:

(1) All basic organizational documents of the applicant, including any articles of incorporation, articles of association, partnership agreement, trade name certificate, trust agreement, shareholder agreement and other applicable documents and all amendments to such documents;

(2) The bylaws, rules, regulations or similar documents regulating the internal affairs of the applicant;

(3) NAIC Biographical Affidavit for the individuals who are responsible for the conduct of affairs of the applicant; including all members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholders or member holding directly or indirectly ten percent (10%) or more of the voting stock, voting securities or voting interest of the applicant; and any other person who exercises control or influence over the affairs of the applicant;

(4) Audited annual financial statements or reports for the two (2) most recent fiscal years that prove that the applicant has a positive net worth. If the applicant has been in existence for less than two (2) fiscal years, the Uniform Application shall include financial statements or reports, certified by an officer of the applicant and prepared in accordance with GAAP, for any completed fiscal years, and for any month during the current fiscal year for which such financial statements or reports have been completed. An audited financial/annual report prepared on a consolidated basis shall include a columnar consolidating or combining worksheet that shall be filed with the report and include the following: a) amounts shown on the consolidated audited financial report shall be shown on the worksheet; b) amounts for each entity shall be stated separately, and c) explanations of consolidating and eliminating entries shall be included. The applicant shall also include such other information as the commissioner may require to review the current financial condition of the applicant.

(5) A statement describing the business plan including information on staffing levels and activities proposed in this state and nationwide. The plan shall provide details setting forth the applicant's capability for providing a sufficient number of experienced and qualified personnel in the areas of claims processing, record keeping and underwriting; and

- (6) Such other pertinent information as may be required by the commissioner.
- E. A TPA licensed or applying for licensure under this section shall make available for inspection by the commissioner copies of all contracts with payors or other persons utilizing the services of the TPA.
- F. A TPA licensed or applying for licensure under this section shall produce its accounts, records and files for examination, and make its officers available to give information with respect to its affairs, as often as reasonably required by the commissioner.
- G. The commissioner may refuse to issue a license if the commissioner determines that the TPA or any individual responsible for the conduct of affairs of the TPA is not competent, trustworthy, financially responsible or of good personal and business reputation, or has had an insurance or a TPA certificate of authority or license denied or revoked for cause by any jurisdiction, or if the commissioner determines that any of the grounds set forth in Section 15 of this Act exists with respect to the TPA.
- H. A license issued under this section shall remain valid, unless surrendered, suspended or revoked by the commissioner, for so long as the TPA continues in business in this state and remains in compliance with this Act.
- I. An individual may not qualify for licensure under this section, except that an individual previously licensed as a TPA with this state as its home state shall retain that license, unless surrendered, suspended or revoked by the commissioner, for so long as the TPA continues in business in this state and remains in substantial compliance with this Act.

Drafting Note: The “grandfather” provision in Subsection I addresses situations where states amending their TPA Act may already have individuals licensed under their current TPA law. The old TPA model allowed (and ostensibly required) individuals fulfilling TPA functions to be licensed as TPAs. It was never the intent of the previous drafting to require that every individual employed by a TPA to be individually licensed, although it arguably may have been intended that an individual could form a TPA without incorporating and get a license for that operation. This subsection can be removed in states that have an existing TPA law, but where all current licensees qualify as “business entities.” States that are newly adopting a TPA law can also delete this subsection, as no entity could have previously held a license as a TPA.

- J. A TPA licensed or applying for licensure under this section shall notify the commissioner within thirty days of any material change in its ownership, control, contact person for the TPA or other fact or circumstance affecting its qualification for a license in this state. The commissioner shall report any such changes to (insert name of the appropriate electronic database).
- K. A TPA licensed or applying for a license under this section that administers or will administer governmental or church self-insured plans in this state or any other state shall maintain a surety bond for the use and benefit of the commissioner and the insurance regulatory authority of any additional state in which the TPA is authorized to conduct business and cover individuals and persons who have remitted premiums or insurance charges or other monies to the TPA in the course of the TPA’s business in the greater of the following amounts:
 - (1) \$100,000; or
 - (2) Ten percent (10%) of the aggregate total amount of self-funded coverage under church plans or governmental plans handled in this state and all additional states in which the TPA is authorized to conduct business.

Section 14. Registration Requirement

A person who is not required to be licensed as a TPA under this Act and who directly or indirectly underwrites, collects charges or premiums from, or adjusts or settles claims on residents of this state, only in connection with life, annuity or health coverage provided by a self-funded plan other than a governmental or church plan, shall register with the commissioner annually, verifying its status as herein described. This section shall not apply to an insurer or to an individual performing these actions as an employee of an insurer. This section shall also not apply to a person performing these actions under contract to or as an employee of a TPA.

Section 15. Nonresident TPA License

- A. Unless a TPA has obtained a license in this state under Section 13, any TPA who performs TPA duties in this state shall obtain a nonresident TPA license in accordance with this section by filing with the commissioner the Uniform Application, accompanied by a letter of certification. In lieu of requiring a TPA to file a letter of certification with the Uniform Application, the commissioner may verify the nonresident TPA's home state certificate of authority or license status through an electronic database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries.
- B. A TPA shall not be eligible for a nonresident TPA license under this section if it does not hold a home state certificate of authority or license in a state that has adopted this Act or that applies substantially similar provisions as are contained in this Act to that TPA. If the Act in the TPA's home state does not extend to stop-loss and workers' compensation insurance, but if the home state otherwise applies substantially similar provisions as are contained in this Act to that TPA, then that omission shall not operate to disqualify the TPA from receiving a Nonresident TPA license in this state.
- C. Except as provided in Subsection B of this section and in section 17, the commissioner shall issue a nonresident TPA license to the TPA promptly upon receipt of a complete application.
- D. Unless notified by the commissioner that the commissioner is able to verify the nonresident TPA's home state certificate of authority or license status through an electronic database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries, each nonresident TPA shall annually file a statement that its home state TPA certificate of authority or license remains in force and has not been revoked or suspended by its home state during the preceding year.
- E. At the time of filing the statement required under Subsection D of this section or, if the commissioner has notified the nonresident TPA that the commissioner is able to verify the nonresident TPA's home state certificate of authority or license status through an electronic database, on an annual date determined by the commissioner, the nonresident TPA shall pay a filing fee as required by the commissioner.

Drafting Note: The filing of the statement or time set for payment of the fee should be after September 1 so that it follows the nonresident TPA's annual renewal of its home state certificate of authority or license.

- F. A TPA licensed or applying for licensure under this section shall produce its accounts, records and files for examination, and make its officers available to give information with respect to its affairs, as often as reasonably required by the commissioner.
- G. A nonresident TPA licensed in its home state is not required to hold a nonresident TPA license in this state if the TPA's duties in this state are limited to the administration of group policies or plans of insurance and no more than one hundred (100) certificate holders for all such plans reside in this state.
- H. A nonresident TPA licensed in its home state is not required to hold a nonresident TPA license in this state if the TPA's duties in this state are limited to the administration of workers' compensation claims and the TPA administers less than twenty-five workers' compensation claims per calendar year in this state. This exemption shall continue to apply to a nonresident TPA exempted by this subsection until ninety days after the date that it has had twenty-five claims reported to it during a calendar year by employees whose claimed injury or disease arose from employment in this state. A TPA with a current nonresident TPA license shall be eligible for this exemption at its next renewal date following a calendar year in which it has had less than twenty-five claims reported to it during that calendar year by employees whose claimed injury or disease arose from employment in this state. The exemption described in this subsection shall not apply, however, to a TPA with a client that is an employer principally based in this state, or that has a professional employer organization as a client that is responsible for the workers' compensation obligations of a client that is principally located in this state.

Section 16. Annual Report and Filing Fee

- A. Each TPA licensed under Section 13 shall file an annual report for the preceding calendar year with the commissioner on or before July 1 of each year, or within such extension of time as the commissioner for good cause may grant. The annual report shall include an audited financial statement performed by an independent certified public accountant. An audited financial/annual report prepared on a consolidated basis shall include a columnar consolidating or combining worksheet that shall be filed with the report and include the following: a) amounts shown on the consolidated audited financial report shall be shown on the worksheet; b) amounts for each entity shall be stated separately, and c) explanations of consolidating and eliminating entries shall be included. The report shall be in the form and contain such matters as the commissioner prescribes and shall be verified by at least two (2) officers of the TPA.
- B. The annual report shall include the complete names and addresses of all payors with which the TPA had agreements during the preceding fiscal year.
- C. At the time of filing its annual report, the TPA shall pay a filing fee as required by the commissioner.
- D. The commissioner shall review the most recently filed annual report of each TPA on or before September 1 of each year. Upon completion of its review, the commissioner shall either:
 - (1) Issue a certification to the TPA that the annual report shows that the TPA has a positive net worth as evidenced by audited financial statements and is currently licensed and in good standing, or noting any deficiencies found in that annual report and financial statements; or
 - (2) Update any electronic database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries, indicating that the annual report shows that the TPA has a positive net worth as evidenced by audited financial statements and complies with existing law, or noting any deficiencies found in the annual report.

Section 17. Grounds for Denial, Suspension or Revocation of Licensure

- A. The commissioner shall, deny, suspend or revoke the license of a TPA, or shall issue a cease and desist order should the TPA not have a license if, after notice and opportunity for hearing, the commissioner finds that the TPA:
 - (1) Is in an unsound financial condition;
 - (2) Is using such methods or practices in the conduct of its business so as to render its further transaction of business in this state hazardous or injurious to insured persons or the public; or
 - (3) Has failed to pay any judgment rendered against it in this state within sixty (60) days after the judgment has become final.
- B. The commissioner may deny, suspend or revoke the license of a TPA, or may issue a cease and desist order should the TPA not have a license if, after notice and opportunity for hearing, the commissioner finds that the TPA:
 - (1) Has violated any lawful rule or order of the commissioner or any provision of the insurance laws of this state;

- (2) Has refused to be examined or to produce its accounts, records and files for examination, or if any individual responsible for the conduct of affairs of the TPA, including members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent (10%) or more of the voting stock, voting securities or voting interest of the TPA; and any other person who exercises control or influence over the affairs of the TPA; has refused to give information with respect to its affairs or has refused to perform any other legal obligation as to an examination, when required by the commissioner;
 - (3) Has, without just cause, refused to pay proper claims or perform services arising under its contracts or has, without just cause, caused covered individuals to accept less than the amount due them or caused covered individuals to employ attorneys or bring suit against the TPA or a payor which it represents to secure full payment or settlement of such claims;
 - (4) Is required pursuant to this Act to have a license and fails at any time to meet any qualification for which issuance of a license could have been refused had the failure then existed and been known to the commissioner, unless the commissioner issued a license with knowledge of the ground for disqualification and had the authority to waive it;
 - (5) If any of the individuals responsible for the conduct of its affairs, including members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent (10%) or more of its voting stock, voting securities or voting interest; and any other person who exercises control or influence over its affairs; has been convicted of, or has entered a plea of guilty or *nolo contendere* to, a felony without regard to whether adjudication was withheld;
 - (6) Is under suspension or revocation in another state; or
 - (7) Has failed to file a timely annual report pursuant to Section 16, if a resident TPA, or a timely statement and filing fee, as applicable, pursuant to Sections 15D and E, if a nonresident TPA. This requirement does not apply to a TPA that is an insurer exempted pursuant to Section 2B.
- C. (1) The commissioner, in his or her discretion, without advance notice, and before a hearing, may issue an order immediately suspending the license of a TPA, or may issue a cease and desist order should the TPA not have a license, if the commissioner finds that one or more of the following circumstances exist:
- (a) The TPA is insolvent or impaired;
 - (b) A proceeding for receivership, conservatorship, rehabilitation or other delinquency proceeding regarding the TPA has been commenced in any state; or
 - (c) The financial condition or business practices of the TPA otherwise pose an imminent threat to the public health, safety or welfare of the residents of this state.
- (2) At the time an order has been issued by the commissioner in accordance with Paragraph (1) of this subsection, the commissioner shall serve notice to the TPA that the TPA may request a hearing within ten business days after the receipt of the order. If a hearing is requested, the commissioner shall schedule a hearing within ten business days after receipt of the request. If a hearing is not requested and the commissioner orders none, the order shall remain in effect until modified or vacated by the commissioner.
- D. If the commissioner finds that one or more grounds exist for the suspension or revocation of a license issued under this part, or for a cease and desist order, the commissioner may, in lieu of or in addition to the suspension, revocation or cease and desist order, impose a fine upon the TPA.

Drafting Note: States with disciplinary provisions of general applicability for regulated insurance entities may wish to incorporate such provisions by reference and should revise the provisions of this section to the extent inconsistent with the state's general statutory scheme.

Section 18. Effective Date

Drafting Note: If a TPA act was already in effect, but is now being amended to include workers' compensation and stop-loss insurance, it will be necessary to include a prospective effective date for this extension that does not affect the applicability of the Act to other types of coverage.

THIRD PARTY ADMINISTRATOR ACT
(NAIC Guideline Version 2)

Drafting Note: This “version 2” guideline excludes workers’ compensation, while the “version 1” guideline includes workers’ compensation. A state that intends to adopt a TPA law should start with the version that is appropriate for its needs.

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Section 1. Definitions

For purposes of this Act:

- A. “Affiliate or affiliated” means a person who directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, another specified person.
- B. “Business entity” means a corporation, association, partnership, limited liability company or other legal entity.
- C. “Collateral” means funds, letters of credit or any item with economic value owned by the payor but held by an insurer or TPA in case it needs to be used to fulfill premium or loss reimbursement obligations in accordance with a contract between the insurer or TPA and the payor. “Collateral” shall include anticipated loss prepayments made prior to the payment of losses, pursuant to arrangements where reimbursement is not due until after losses have been paid.
- D. “Commissioner” means the Commissioner of Insurance of this state.
- E. “Control” (including the terms “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by [insert appropriate reference to state law regulating holding companies] that control does not exist in fact. The commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support the determination that control exists in fact, notwithstanding the absence of a presumption to that effect.

- F. “GAAP” means United States generally accepted accounting principles consistently applied.
- G. “Home state” means the United States jurisdiction that has adopted this Act or a substantially similar law governing TPAs and that has granted the TPA a home state TPA license.
- H. “Insurer” means an entity licensed in a United States jurisdiction to provide life, annuity, health or stop-loss coverage as an insurance company, health maintenance organization, fraternal benefit society or prepaid hospital or medical care plan.

Drafting Note: States that license multiple employer welfare arrangements (MEWAs) or that authorize employee leasing companies or professional employer organizations (PEOs) to provide employee welfare benefits on a self-funded basis, will want to include these entities in the list of entities that are included in the definition of insurer for purposes of this Act, but only to the extent of their license or authorization.

- I. “Insurance producer” means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance.

Drafting Note: States that use different terminology such as “agent” and/or “broker” should make appropriate adjustments to this language. In states that do not license business entities as insurance producers, use the following definition:

- [I. “Insurance producer” means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, and also includes a business entity whose primary activities are the sales, solicitation and negotiation of insurance.]
- J. “Nonresident TPA” means a TPA whose home state is any jurisdiction other than this state.
- K. “Payor” means an insurer or an employer administering its employee benefit plan or the employee benefit plan of an affiliated employer under common management and control.
- L. “Person” means an individual or a business entity.
- M. “Stop-loss insurance” means insurance protecting an employer or other person responsible for an otherwise self-insured health or life benefit plan against obligations under the plan, but “stop-loss insurance” does not include reinsurance written for an insurance company.

Drafting Note: The inclusion of the stop-loss definition and the inclusion of stop-loss throughout this law are not necessary in states where stop-loss is clearly stipulated to be health insurance and cannot be interpreted to be liability insurance or some other form of insurance. In such states, references to stop-loss may be deleted or – if retained – viewed as a clarification (as stop-loss is considered to be liability insurance in some states).

- N. “Third party administrator” or “TPA” means a person who directly or indirectly underwrites, collects charges, collateral or premiums from, or adjusts or settles claims on residents of this state, in connection with life, annuity, health or stop-loss coverage, except that a person shall not be considered a TPA if that person’s only actions that would otherwise cause it to be considered a TPA are among the following:
 - (1) A person working for a TPA to the extent that the person’s activities are subject to the supervision and control of the TPA;
 - (2) An employer administering its employee benefit plan or the employee benefit plan of an affiliated employer under common management and control;
 - (3) The administration of a bona fide employee benefit plan established by an employer or an employee organization, or both, for which the insurance laws of this state are preempted pursuant to the Employee Retirement Income Security Act of 1974, as the act existed on [*an appropriate recent date should be selected*];
 - (4) A union administering a benefit plan on behalf of its members;
 - (5) An insurer administering insurance coverage for its policyholders, subscribers or certificate holders, or those of an affiliated insurer under common management and control;

- (6) An insurer directly or indirectly underwriting, collecting charges, collateral or premiums from, or adjusting or settling claims on behalf of a client that is not a policyholder, subscriber or certificate holder, and that has its United States headquarters or principal location of business in a jurisdiction in which the insurer is licensed to write that coverage;
 - (7) An insurer directly or indirectly underwriting, collecting charges, collateral or premiums, or adjusting or settling claims, provided that the insurer is licensed in this state to write that line of insurance coverage;
 - (8) An insurance producer selling insurance or engaged in related activities within the scope of the producer's license;
 - (9) A creditor acting on behalf of its debtors with respect to insurance covering a debt between the creditor and its debtors;
 - (10) A trust and its trustees and agents acting pursuant to such trust established in conformity with 29 U.S.C. Section 186;
 - (11) A trust exempt from taxation under Section 501(a) of the Internal Revenue Code and its trustees acting pursuant to such trust, or a custodian and the custodian's agents acting pursuant to a custodian account which meets the requirements of Section 401(f) of the Internal Revenue Code;
 - (12) A credit union or a financial institution that is subject to supervision or examination by federal or state banking authorities, or a mortgage lender, when collecting or remitting premiums to licensed insurance producers or to limited lines producers or authorized payors in connection with loan payments;
 - (13) A credit card issuing company advancing or collecting insurance premiums or charges from its credit card holders who have authorized collection;
 - (14) An individual adjusting or settling claims in the normal course of that individual's practice or employment as an attorney at law and who does not collect charges or premiums in connection with insurance coverage;
 - (15) A person licensed as a managing general agent in this state when acting within the scope of that license; or
 - (16) A business entity that is affiliated with a licensed insurer while acting as a TPA for the direct and assumed insurance business of an affiliated insurer;
- O. "Underwrites" or "underwriting" means, but is not limited to, the acceptance of employer or individual applications for coverage of individuals and the overall planning and coordination of a benefits program.
- P. "Uniform Application" means the current version of the NAIC Uniform Application for Third Party Administrators.

Section 2. Licensing Necessary

No person shall act as a TPA in this state unless that person is licensed as a TPA pursuant to this Act or unless the TPA is exempted from this Act's licensing requirement pursuant to subsection G of section 13 of this Act. This prohibition shall not apply to a person while employed by, or when operating under contract to, a TPA that is licensed pursuant to this Act, or exempted from this Act's licensing requirements pursuant to subsection G of section 13 of this Act.

Section 3. Payment to a TPA

If an insurer utilizes the services of a TPA, any premiums or charges for insurance paid to the TPA by or on behalf of the insured party, or any collateral furnished to the TPA by or on behalf of the insured party, shall be deemed to have been received by the insurer, and the return of collateral or the payment of return premiums or claim payments forwarded by the insurer to the TPA shall not be deemed to have been paid to the insured party or claimant until the payments are received by the insured party or claimant. Nothing in this section limits any right of the insurer against the TPA resulting from the failure of the TPA to make payments to the insurer, insured parties or claimants.

Section 4. Maintenance of Information

- A. A TPA shall maintain and make available to the payor complete books and records of all transactions performed on behalf of the payor. The books and records shall be maintained in accordance with prudent standards of insurance record keeping and shall be maintained for a period of not less than five (5) years from the date of their creation.
- B. The commissioner shall have access to books and records maintained by a TPA for the purposes of examination, audit and inspection. Any documents, materials or other information in the possession or control of the commissioner that are furnished by a TPA, payor, insurance producer or an employee or agent thereof acting on behalf of the TPA, payor or insurance producer, or obtained by the commissioner in an investigation shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the commissioner is authorized to use such documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties.
- C. Neither the commissioner nor any person who receives documents, materials or other information while acting under the authority of the commissioner shall be permitted or required to testify in any private civil action concerning confidential documents, materials, or information subject to Subsection B of this section.
- D. In order to assist in the performance of his or her duties, the commissioner:
 - (1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection B of this section, with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners, its affiliates or subsidiaries and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material or other information;
 - (2) May receive documents, materials or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners, its affiliates or subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and
 - (3) **[OPTIONAL]** May enter into agreements governing sharing and use of information consistent with this subsection.
- E. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in Subsection D of this section.

Drafting Note: The language in Subsection D(1) assumes the recipient has the authority to protect the applicable confidentiality or privilege, but does not address the verification of that authority, which would presumably occur in the context of a broader information sharing agreement.

- F. Nothing in this Act shall prohibit the commissioner from releasing final, adjudicated actions including for cause terminations that are open to public inspection pursuant to [insert appropriate reference to state law] to a database or other clearinghouse service maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries.
- G. Notwithstanding any contractual agreements between the payor and the TPA that operate to the contrary, the TPA shall retain the right to sufficient continuing access to books and records to permit the TPA to fulfill all of its contractual obligations to insured parties, claimants, and the payor.
- H. In the event the payor or the TPA cancel their agreement; notwithstanding the provisions of Subsection A of this section, the TPA may, by written agreement with the payor, transfer all records to a new TPA rather than retain them for five (5) years. In such cases, the new TPA shall acknowledge, in writing, that it is responsible for retaining the records of the prior TPA as required in Subsection A of this section.

Section 5. Approval of Advertising

A TPA that advertises on behalf of its client may only use advertising that has been approved in writing by the client in advance of its use. A TPA that mentions any current or former client in its advertising must obtain the client's prior written consent.

Section 6. Responsibilities of the Payor and TPA

- A. No TPA shall act as such without a written agreement between the TPA and the payor. A copy of the agreement shall be retained by the TPA for the duration of the agreement and for five (5) years thereafter. The agreement shall contain all provisions required by this section, except insofar as the TPA does not perform all of the functions referenced in this section.
- B. A payor that utilizes the services of a TPA shall retain responsibility for the benefits, premium rates, collateral and reimbursement procedures, underwriting criteria and claims payment procedures applicable to the coverage and for securing reinsurance or stop-loss insurance, if any. The rules pertaining to these matters, to the extent that they are relevant to the duties of the TPA, shall be agreed to in writing by the payor and the TPA.
- C. An insurer utilizing the services of a TPA is responsible for the acts of the TPA and is responsible for providing the TPA's books and records relevant to the insurer to the commissioner upon request.
- D. The written agreement between the TPA and the payor shall provide that communications between the TPA and claimants shall avoid deceptive statements with regard to the responsibilities of the TPA, payor and any insurer with regard to claims or premiums.
- E. In the event of a dispute between the payor and the TPA regarding which of them is to fulfill a lawful obligation with respect to a policy, certificate or claim subject to the written agreement, the payor shall fulfill such obligation.
- F. The payor has the duty to provide for competent administration of its programs administered by a TPA and within the scope of this Act.
- G. When a TPA administers benefits in connection with life, annuity, health and employee benefit stop-loss coverage for more than one hundred (100) certificate holders, subscribers, claimants or policyholders on behalf of an insurer, the insurer shall, at least semiannually, conduct a review of the operations of the TPA. At least one such review shall include an on-site audit of the operations of the TPA. The cost of such reviews or audits shall be borne by the insurer and not reimbursed by the TPA. The requirements of this subsection shall not apply when the TPA and the insurer are affiliated.

Section 7. Premium Collection and Payment of Claims

- A. All insurance charges, premiums, collateral and loss reimbursements collected by a TPA on behalf of or for a payor, the return of premiums or collateral received from a payor, and any funds held by the TPA for the payment of claims, shall be held by the TPA in a fiduciary capacity. Funds shall be immediately remitted to the person entitled to them or shall be deposited promptly in a fiduciary account established and maintained by the TPA in a federally insured financial institution. The TPA shall render a periodic accounting to the payor detailing all transactions performed by the TPA pertaining to the business of the payor, and the written agreement between the payor and the TPA shall include the specifications of this reporting.
- B. The TPA shall keep copies of all records of any fiduciary account maintained or controlled by the TPA, and, upon request of a payor, shall furnish the payor with copies of the records pertaining to the deposits and withdrawals made on behalf of the payor. If funds deposited in a fiduciary account have been collected on behalf of or for more than one payor, or for the payment of claims associated with more than one policy, the TPA shall keep records clearly recording the deposits in and withdrawals from the account on behalf of each payor and relating to each policyholder.
- C. The TPA shall not pay any claim by withdrawals from a fiduciary account in which premiums or charges are deposited. Withdrawals from a fiduciary account shall be made as provided in the written agreement between the TPA and the payor, and only for the following purposes:
 - (1) Remittance to a payor entitled to remittance;
 - (2) Deposit in an account maintained in the name of the payor;
 - (3) Transfer to and deposit in a claims-paying account, with claims to be paid as provided in Subsection D of this section;
 - (4) Payment to a group policyholder for remittance to the payor entitled to such remittance;
 - (5) Payment to the TPA of its earned commissions, fees or charges;
 - (6) Remittance of return premium to the person or persons entitled to such return premium; and
 - (7) Payment to other service providers as authorized by the payor.
- D. All claims paid by the TPA from funds collected on behalf of or for a payor shall be paid only as authorized by the payor. Payments from an account maintained or controlled by the TPA for purposes including the payment of claims may be made only for the following purposes:
 - (1) Payment of valid claims;
 - (2) Payment of expenses associated with claims handling to the TPA or to other service providers approved by the payor;
 - (3) Remittance to the payor, or transfer to a successor TPA as directed by the payor, for the purpose of paying claims and associated expenses; and
 - (4) Return of funds held as collateral or prepayment, to the person entitled to those funds, upon a determination by the payor that those funds are no longer necessary to secure or facilitate the payment of claims and associated expenses.

Section 8. Compensation to the TPA

- A. A TPA shall not enter into an agreement or understanding with a payor in which the effect is to make the amount of the TPA's commissions, fees, or charges contingent upon savings effected in the payment of losses covered by the payor's obligations. This provision shall not prohibit a TPA from receiving performance-based compensation for providing hospital or other auditing services, from providing managed care or related services, or from being compensated for subrogation expenses.

- B. A payor shall not enter into an agreement with a TPA in violation of this section.
- C. This section shall not prevent the compensation of a TPA from being based on premiums or charges collected or the number of claims paid or processed.

Section 9. Disclosure of Charges and Fees

- A. When a TPA collects funds, the reason for collection of each item shall be identified to the insured party and each item shall be shown separately from any premium. Additional charges may not be made for services to the extent the services have been already paid for by the payor.
- B. The TPA shall disclose to the payor all charges, fees and commissions that the TPA receives arising from services it provides for the payor, including any fees or commissions paid by payors providing reinsurance or stop-loss insurance.

Section 10. Delivery of Materials to Covered Individuals

Any policies, certificates, booklets, termination notices or other written communications delivered by the payor to the TPA for delivery to insured parties or covered individuals shall be delivered by the TPA promptly after receipt of instructions from the payor to deliver them.

Section 11. Home State TPA License

- A. If a TPA is incorporated in this state or this state is its principal place of business within the United States, then the TPA may designate this state as its home state and apply to this state for licensure as a TPA. If neither the state in which a TPA is incorporated nor the state that is its principal place of business have adopted this Act or a substantially similar law governing TPAs, and if the TPA has not designated any other state that has adopted this Act or a substantially similar law governing TPAs as its home state, then the TPA may apply for licensure to this state as its home state.
- B. A TPA applying to this state as its home state shall apply for licensure using the Uniform Application and designate an individual as the TPA's contact person for department communications.

Drafting Note: The contact person requirement in subsection B and the related part of the notification requirement in subsection J are recommended options for those states with computer systems or licensing and filing procedures for which the designation of a "responsible person" is necessary.

- C. If a TPA designates this state as its home state because neither its state of incorporation nor the state that is its principal place of business within the United States have adopted this Act or a substantially similar law governing TPAs, but if one or both of these other jurisdictions have licensed the TPA, then the commissioner may consult with that state or states and may give due consideration to any relevant findings made by that state or states in order to avoid an unnecessarily duplicative review of the application.
- D. The Uniform Application shall include or be accompanied by the following information and documents:
 - (1) All basic organizational documents of the applicant, including any articles of incorporation, articles of association, partnership agreement, trade name certificate, trust agreement, shareholder agreement and other applicable documents and all amendments to such documents;
 - (2) The bylaws, rules, regulations or similar documents regulating the internal affairs of the applicant;
 - (2) NAIC Biographical Affidavit for the individuals who are responsible for the conduct of affairs of the applicant; including all members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholders or member holding directly or indirectly ten percent (10%) or more of the voting stock, voting securities or voting interest of the applicant; and any other person who exercises control or influence over the affairs of the applicant;

- (4) Audited annual financial statements or reports for the two (2) most recent fiscal years that prove that the applicant has a positive net worth. If the applicant has been in existence for less than two (2) fiscal years, the Uniform Application shall include financial statements or reports, certified by an officer of the applicant and prepared in accordance with GAAP, for any completed fiscal years, and for any month during the current fiscal year for which such financial statements or reports have been completed. An audited financial/annual report prepared on a consolidated basis shall include a columnar consolidating or combining worksheet that shall be filed with the report and include the following: a) amounts shown on the consolidated audited financial report shall be shown on the worksheet; b) amounts for each entity shall be stated separately, and c) explanations of consolidating and eliminating entries shall be included. The applicant shall also include such other information as the commissioner may require to review the current financial condition of the applicant.
 - (5) A statement describing the business plan including information on staffing levels and activities proposed in this state and nationwide. The plan shall provide details setting forth the applicant's capability for providing a sufficient number of experienced and qualified personnel in the areas of claims processing, record keeping and underwriting; and
 - (6) Such other pertinent information as may be required by the commissioner.
- E. A TPA licensed or applying for licensure under this section shall make available for inspection by the commissioner copies of all contracts with payors or other persons utilizing the services of the TPA.
 - F. A TPA licensed or applying for licensure under this section shall produce its accounts, records and files for examination, and make its officers available to give information with respect to its affairs, as often as reasonably required by the commissioner.
 - G. The commissioner may refuse to issue a license if the commissioner determines that the TPA or any individual responsible for the conduct of affairs of the TPA is not competent, trustworthy, financially responsible or of good personal and business reputation, or has had an insurance or a TPA certificate of authority or license denied or revoked for cause by any jurisdiction, or if the commissioner determines that any of the grounds set forth in Section 15 of this Act exists with respect to the TPA.
 - H. A license issued under this section shall remain valid, unless surrendered, suspended or revoked by the commissioner, for so long as the TPA continues in business in this state and remains in compliance with this Act.
 - I. An individual may not qualify for licensure under this section, except that an individual previously licensed as a TPA with this state as its home state shall retain that license, unless surrendered, suspended or revoked by the commissioner, for so long as the TPA continues in business in this state and remains in substantial compliance with this Act.

Drafting Note: The "grandfather" provision in Subsection I addresses situations where states amending their TPA Act may already have individuals licensed under their current TPA law. The old TPA model allowed (and ostensibly required) individuals fulfilling TPA functions to be licensed as TPAs. It was never the intent of the previous drafting to require that every individual employed by a TPA to be individually licensed, although it arguably may have been intended that an individual could form a TPA without incorporating and get a license for that operation. This subsection can be removed in states that have an existing TPA law, but where all current licensees qualify as "business entities." States that are newly adopting a TPA law can also delete this subsection, as no entity could have previously held a license as a TPA.

- J. A TPA licensed or applying for licensure under this section shall notify the commissioner within thirty days of any material change in its ownership, control, contact person for the TPA or other fact or circumstance affecting its qualification for a license in this state. The commissioner shall report any such changes to (insert name of the appropriate electronic database).
- K. A TPA licensed or applying for a license under this section that administers or will administer governmental or church self-insured plans in this state or any other state shall maintain a surety bond for the use and benefit of the commissioner and the insurance regulatory authority of any additional state in which the TPA is authorized to conduct business and cover individuals and persons who have remitted premiums or insurance charges or other monies to the TPA in the course of the TPA's business in the greater of the following amounts:

- (1) \$100,000; or
- (2) Ten percent (10%) of the aggregate total amount of self-funded coverage under church plans or governmental plans handled in this state and all additional states in which the TPA is authorized to conduct business.

Section 12. Registration Requirement

A person who is not required to be licensed as a TPA under this Act and who directly or indirectly underwrites, collects charges or premiums from, or adjusts or settles claims on residents of this state, only in connection with life, annuity or health coverage provided by a self-funded plan other than a governmental or church plan, shall register with the commissioner annually, verifying its status as herein described. This section shall not apply to an insurer or to an individual performing these actions as an employee of an insurer. This section shall also not apply to a person performing these actions under contract to or as an employee of a TPA.

Section 13. Nonresident TPA License

- A. Unless a TPA has obtained a license in this state under Section 11, any TPA who performs TPA duties in this state shall obtain a nonresident TPA license in accordance with this section by filing with the commissioner the Uniform Application, accompanied by a letter of certification. In lieu of requiring a TPA to file a letter of certification with the Uniform Application, the commissioner may verify the nonresident TPA's home state certificate of authority or license status through an electronic database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries.
- B. A TPA shall not be eligible for a nonresident TPA license under this section if it does not hold a home state certificate of authority or license in a state that has adopted this Act or that applies substantially similar provisions as are contained in this Act to that TPA. If the Act in the TPA's home state does not extend to stop-loss insurance, but if the home state otherwise applies substantially similar provisions as are contained in this Act to that TPA, then that omission shall not operate to disqualify the TPA from receiving a nonresident TPA license in this state.
- C. Except as provided in Subsection B of this section and in section 15, the commissioner shall issue a nonresident TPA license to the TPA promptly upon receipt of a complete application.
- D. Unless notified by the commissioner that the commissioner is able to verify the nonresident TPA's home state certificate of authority or license status through an electronic database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries, each nonresident TPA shall annually file a statement that its home state TPA certificate of authority or license remains in force and has not been revoked or suspended by its home state during the preceding year.
- E. At the time of filing the statement required under Subsection D of this section or, if the commissioner has notified the nonresident TPA that the commissioner is able to verify the nonresident TPA's home state certificate of authority or license status through an electronic database, on an annual date determined by the commissioner, the nonresident TPA shall pay a filing fee as required by the commissioner.

Drafting Note: The filing of the statement or time set for payment of the fee should be after September 1 so that it follows the nonresident TPA's annual renewal of its home state certificate of authority or license.

- F. A TPA licensed or applying for licensure under this section shall produce its accounts, records and files for examination, and make its officers available to give information with respect to its affairs, as often as reasonably required by the commissioner.
- G. A nonresident TPA licensed in its home state is not required to hold a nonresident TPA license in this state if the TPA's duties in this state are limited to the administration of group policies or plans of insurance and no more than one hundred (100) certificate holders for all such plans reside in this state.

Section 14. Annual Report and Filing Fee

- A. Each TPA licensed under Section 11 shall file an annual report for the preceding calendar year with the commissioner on or before July 1 of each year, or within such extension of time as the commissioner for good cause may grant. The annual report shall include an audited financial statement performed by an independent certified public accountant. An audited financial/annual report prepared on a consolidated basis shall include a columnar consolidating or combining worksheet that shall be filed with the report and include the following: a) amounts shown on the consolidated audited financial report shall be shown on the worksheet; b) amounts for each entity shall be stated separately, and c) explanations of consolidating and eliminating entries shall be included. The report shall be in the form and contain such matters as the commissioner prescribes and shall be verified by at least two (2) officers of the TPA.
- B. The annual report shall include the complete names and addresses of all payors with which the TPA had agreements during the preceding fiscal year.
- C. At the time of filing its annual report, the TPA shall pay a filing fee as required by the commissioner.
- D. The commissioner shall review the most recently filed annual report of each TPA on or before September 1 of each year. Upon completion of its review, the commissioner shall either:
 - (1) Issue a certification to the TPA that the annual report shows that the TPA has a positive net worth as evidenced by audited financial statements and is currently licensed and in good standing, or noting any deficiencies found in that annual report and financial statements; or
 - (2) Update any electronic database maintained by the National Association of Insurance Commissioners, its affiliates or subsidiaries, indicating that the annual report shows that the TPA has a positive net worth as evidenced by audited financial statements and complies with existing law, or noting any deficiencies found in the annual report.

Section 15. Grounds for Denial, Suspension or Revocation of Licensure

- A. The commissioner shall, deny, suspend or revoke the license of a TPA, or shall issue a cease and desist order should the TPA not have a license if, after notice and opportunity for hearing, the commissioner finds that the TPA:
 - (1) Is in an unsound financial condition;
 - (2) Is using such methods or practices in the conduct of its business so as to render its further transaction of business in this state hazardous or injurious to insured persons or the public; or
 - (3) Has failed to pay any judgment rendered against it in this state within sixty (60) days after the judgment has become final.
- B. The commissioner may deny, suspend or revoke the license of a TPA, or may issue a cease and desist order should the TPA not have a license if, after notice and opportunity for hearing, the commissioner finds that the TPA:
 - (1) Has violated any lawful rule or order of the commissioner or any provision of the insurance laws of this state;

- (2) Has refused to be examined or to produce its accounts, records and files for examination, or if any individual responsible for the conduct of affairs of the TPA, including members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent (10%) or more of the voting stock, voting securities or voting interest of the TPA; and any other person who exercises control or influence over the affairs of the TPA; has refused to give information with respect to its affairs or has refused to perform any other legal obligation as to an examination, when required by the commissioner;
 - (3) Has, without just cause, refused to pay proper claims or perform services arising under its contracts or has, without just cause, caused covered individuals to accept less than the amount due them or caused covered individuals to employ attorneys or bring suit against the TPA or a payor which it represents to secure full payment or settlement of such claims;
 - (4) Is required pursuant to this Act to have a license and fails at any time to meet any qualification for which issuance of a license could have been refused had the failure then existed and been known to the commissioner, unless the commissioner issued a license with knowledge of the ground for disqualification and had the authority to waive it;
 - (5) If any of the individuals responsible for the conduct of its affairs, including members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent (10%) or more of its voting stock, voting securities or voting interest; and any other person who exercises control or influence over its affairs; has been convicted of, or has entered a plea of guilty or *nolo contendere* to, a felony without regard to whether adjudication was withheld;
 - (6) Is under suspension or revocation in another state; or
 - (7) Has failed to file a timely annual report pursuant to Section 14, if a resident TPA, or a timely statement and filing fee, as applicable, pursuant to Sections 13D and E, if a nonresident TPA.
- C. (1) The commissioner, in his or her discretion, without advance notice, and before a hearing, may issue an order immediately suspending the license of a TPA, or may issue a cease and desist order should the TPA not have a license, if the commissioner finds that one or more of the following circumstances exist:
- (a) The TPA is insolvent or impaired;
 - (b) A proceeding for receivership, conservatorship, rehabilitation or other delinquency proceeding regarding the TPA has been commenced in any state; or
 - (c) The financial condition or business practices of the TPA otherwise pose an imminent threat to the public health, safety or welfare of the residents of this state.
- (2) At the time an order has been issued by the commissioner in accordance with Paragraph (1) of this subsection, the commissioner shall serve notice to the TPA that the TPA may request a hearing within ten business days after the receipt of the order. If a hearing is requested, the commissioner shall schedule a hearing within ten business days after receipt of the request. If a hearing is not requested and the commissioner orders none, the order shall remain in effect until modified or vacated by the commissioner.
- D. If the commissioner finds that one or more grounds exist for the suspension or revocation of a license issued under this part, or for a cease and desist order, the commissioner may, in lieu of or in addition to the suspension, revocation or cease and desist order, impose a fine upon the TPA.

Drafting Note: States with disciplinary provisions of general applicability for regulated insurance entities may wish to incorporate such provisions by reference and should revise the provisions of this section to the extent inconsistent with the state's general statutory scheme.

Section 16. Effective Date

Drafting Note: If a TPA act was already in effect, but is now being amended to include stop-loss insurance, it will be necessary to include a prospective effective date for this extension that does not affect the applicability of the Act to other types of coverage.

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

1977 Proc. I 26, 28, 317, 319-321 (adopted).

1991 Proc. I 9, 17-18, 608, 612-613, 620-626 (amended and reprinted).

1999 Proc. 4th Quarter 15, 107, 111, 116, 119-120 (amended).

2001 Proc. 4th Quarter 6, 90, 395, 399, 400-409 (amended and reprinted).

2011 Proc. 2nd Quarter, Vol. I 122, 220-251 (converted to guideline).

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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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REGISTRATION AND REGULATION OF THIRD PARTY ADMINISTRATORS (TPAs)
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NAIC MEMBER	RELATED STATE ACTIVITY
Alabama	NO CURRENT ACTIVITY
Alaska	ALASKA STAT. §§ 21.27.630 to 21.27.660 (1992/2009); ALASKA ADMIN. CODE tit. 3, § 23.140 (2009); BULLETIN 92-3 (1992); BULLETIN 97-6 (1997).
American Samoa	NO CURRENT ACTIVITY
Arizona	ARIZ. REV. STAT. ANN. §§ 20-485 to 20-485.12 (1977/2002).
Arkansas	ARK. CODE ANN. §§ 23-92-201 to 23-92-208 (1985/2015).
California	CAL. INS. CODE §§ 1759 to 1759.10 (1977/1984).
Colorado	NO CURRENT ACTIVITY
Connecticut	CONN. GEN. STAT. ANN. §§ 38a-720 to 38a-720n (2011); BULLETIN L-17 (2011).
Delaware	DEL. CODE ANN. tit. 18,§ 102 (1953/2013) (defines TPA, authority to adopt regulations); 18 DEL. CODE REGS. § 1406 (2003).
District of Columbia	NO CURRENT ACTIVITY
Florida	FLA. STAT. §§ 626.88 to 626.894 (1983/2014).
Georgia	GA. CODE ANN. §§ 33-23-100 to 33-23-105 (1991/2005); GA. COMP. R. & REGS. 120-2-49 (1993/1997).
Guam	NO CURRENT ACTIVITY
Hawaii	NO CURRENT ACTIVITY
Idaho	Advisory Notice 3-18-2010 (2010).
Illinois	215 ILL. COMP. STAT. 5/511.100 to 5/511.113 (1984/2013).
Indiana	760 IND. ADMIN. CODE 1-41-1 to 1-41-5 (1988/1990); IND. CODE §§ 27-1-25-1 to 27-1-25-15 (1980/2004).
Iowa	IOWA CODE §§ 510.11 to 510.23 (1989/1996); IOWA ADMIN. CODE r. 191-58.1 to 191-58.20 (2009) (based on proposed guideline).
Kansas	KAN. STAT. ANN. §§ 40-3801 to 40-3810 (1978/1997).

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NAIC MEMBER	RELATED STATE ACTIVITY
Kentucky	KY. REV. STAT. ANN. §§ 304.9-051 to 304.9-052; §§ 304.9-371 to 304.9-377 (1986).
Louisiana	LA. REV. STAT. ANN. § 22:1080 (2014) ; §§ 22:3031 to 22:3046 (1993/2004); §§ 22:1641 to 22:1651 (2008/2009) (portions of model).
Maine	ME. REV. STAT. ANN. tit. 24-A, §§ 1901 to 1912 (1990/2000).
Maryland	MD. CODE ANN., INS. §§ 8-301 to 8-322 (1991/2009); BULLETIN 24-2009 (2009).
Massachusetts	NO CURRENT ACTIVITY
Michigan	MICH. COMP. LAWS §§ 550.901 to 550.962 (1985/2002).
Minnesota	MINN. STAT. § 60A.23 sub. 8 (1967/1999); § 79A.06 (1988/2011); MINN. R. 2767.0100 to 2767.0900 (1988/1995).
Mississippi	MISS. CODE ANN. §§ 83-18-1 to 83-18-29 (1991/1997).
Missouri	MO. CODE REGS. ANN. tit. 20, §§ 200-9.500 to 200-9.800 (1994/1999); MO. REV. STAT. §§ 376.1075 to 376.1095 (1993/1999).
Montana	MONT. CODE ANN. §§ 33-17-601 to 33-17-618 (1979/1997).
Nebraska	NEB. REV. STAT. §§ 44-5801 to 44-5816 (1992/2003).
Nevada	NEV. ADMIN. CODE §§ 683A.100 to 683A.165 (1986/2003); NEV. REV. STAT. § 683A.025; §§ 683A.0805 to 683A.0893 (1977/2003).
New Hampshire	N.H. CODE ADMIN. R. ANN. INS. 2301.01 to 2301.20 (1994/2009); N.H. REV. STAT. ANN. §§ 402-H:1 to 402-H:16 (1994/1998).
New Jersey	N.J. STAT. ANN. §§ 17B:27B-1 to 17B:27B-25 (2001); N.J. ADMIN. CODE §§ 11:23-1.1 to 11:23-5.10 (2005/2014).
New Mexico	N.M. CODE R. §§ 13.4.5.1 to 13.4.5.22 (1992/1997); N.M. STAT. ANN. §§ 59A-12A-1 to 59A-12A-17 (1989/1999).
New York	OGC Opinion No. 2001-189 (2001) (TPAs need not be licensed); O.G.C. 11-2-2006 (#1) (2006).

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NAIC MEMBER	RELATED STATE ACTIVITY
North Carolina	N.C. GEN. STAT. §§ 58-47-150 to 58-47-205 (1997/2009); §§ 58-47-210 to 58-47-220 (2002) (TPA for workers' comp. self-insurers); 11 N.C. ADMIN. CODE 12.0332 (2010); 21.0101 to 21.0110 (1996); N.C. GEN. STAT. §§ 58-56-2 to 58-56-66 (1991/2009); Memorandum 6-12-2012 (2012).
North Dakota	N.D. CENT. CODE §§ 26.1-27-01 to 26.1-27-12 (1985/2005).
Northern Marianas	NO CURRENT ACTIVITY
Ohio	OHIO REV. CODE ANN. §§ 3959.01 to 3959.16; § 3959.99(1988/1997); OHIO ADMIN. CODE § 3901-8-05 (2008).
Oklahoma	OKLA. ADMIN. CODE §§ 36:1441 to 36:1452 (1983/2008); BULLETIN 3-21-2012 (2012).
Oregon	OR. REV. STAT. §§ 744.700 to 744.740 (1991/2013); OR. ADMIN. R. 836-075-0000 to 836-075-0070 (1992/2012); 836-074-0005 to 836-074-0050 (1988/2005).
Pennsylvania	40 PA. STAT. ANN. §§ 25-1001 to 25-1013 (1995).
Puerto Rico	NO CURRENT ACTIVITY
Rhode Island	R.I. GEN. LAWS §§ 27-20.7-1 to 27-20.7-16 (2002).
South Carolina	S.C. CODE ANN. §§ 38-51-10 to 38-51-120 (1988/1993).
South Dakota	S.D. CODIFIED LAWS §§ 58-29D-1 to 58-29D-34 (1993/2013).
Tennessee	TENN. CODE ANN. §§ 56-6-401 to 56-6-412 (1980/1996).

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NAIC MEMBER	RELATED STATE ACTIVITY
Texas	TEX. INS. CODE ANN. §§ 4151.001 to 4151.208 (2005/2013).
Utah	UTAH CODE ANN. §§ 31A-25-102 to 31A-25-402 (1986/2014); UTAH ADMIN. CODE r. 590-232 (2009).
Vermont	NO CURRENT ACTIVITY
Virgin Islands	V.I. CODE ANN. tit., 22 §§ 60-1520 to 60-1544 (2016).
Virginia	NO CURRENT ACTIVITY
Washington	NO CURRENT ACTIVITY
West Virginia	W. VA. CODE §§ 33-46-1 to 33-46-20 (2003).
Wisconsin	WIS. ADMIN. CODE INS. §§ 8.20 to 8.32 (1992/1997); WIS. STAT. §§ 633.01 to 633.17 (1991/1999) (portions of model).
Wyoming	WYO. CODE R. § 4 (1984).