Comments on May 2024 Draft White Paper on Restructuring Mechanisms

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Mostly, this version looks good. Just a few comments.

(1) I do not think we should be hesitant or apologetic about our use of the word "runoff." It is not only appropriate but necessary to say things like the following:

- *For some insurance companies, runoff business remains embedded with the core business without the ability to segregate the runoff business.... There are even runoff specialists that have developed within the insurance industry that specialize in handling these old blocks of business.*

- *reinsurers and insurers were looking for new solutions that provide legal and economic finality to runoff insurance risks to improve the efficient allocation of capital and management resources to runoff and on-going insurance operations. Company efficiencies that are obtained through restructuring transactions include the segregation and transfer of runoff books of business .... Restructuring transactions also create other company efficiencies, such as better allocation of specialized management resources currently being occupied with the oversight of disparate discontinued and on-going businesses and rationalize and facilitate the runoff of discontinued lines of business. Experience outside the US, including in the UK, has shown that prudent allocation of reserves and management of runoff books of business reduces volatility and improves capital efficiency with benefits for reinsurers and policyholders of both runoff and on-going books of business. Furthermore, runoff experts bring focused expertise to managing runoffs compared to on-going enterprises.*

There is general agreement on all these points, including general agreement on what we talk about when we talk about runoff, so there is no need to weaken these points and distract the reader by jamming in the gratuitous disclaimer "Please note that the NAIC has yet to finalize a definition on this matter and is only included within this paper to provide some basis for comprehension."

Any disagreement about when "runoff" begins and ends, or what is and is not included, is only at the margin and leads down rabbit holes that do not need to be explored in this White Paper. A precise definition is only needed if uncertainty at the margins either carries significant legal consequences or risks significant confusion, and we have not reached that point. I would either simply delete the sentence quoted in the preceding paragraph, or if we need to address the point at all, replace that sentence with a footnote along the following lines: "It should be noted that the term 'runoff' can be defined in different ways. For example, it is sometimes used to refer to policies with 'tail' liabilities but no further premium collections, but in some lines of business, such as long-term care, companies will continue to collect renewal premium on runoff books of business. However, a formal definition that can be strictly applied for legal or accounting purposes is not necessary for purposes of this white paper."

(2) In the first full paragraph on Page 2, we say: "Because the robust procedures used in the UK are seen as a means to utilize IBT in the US, the procedures are discussed in Section 2 of this white paper." Isn't "model" a better term, perhaps along the following lines?: "Because the robust procedures used in the UK are seen as a model that can be used as a starting point for states developing their own IBT frameworks, the UK procedures are discussed in Section 2 of this white paper."

(3) If we want to avoid a discussion of a discussion, change the last sentence in the second paragraph on Page 4 to: "Therefore, this white paper includes a discussion of a UK case which considered consumer protection issues," or "... which analyzed consumer protection issues."

(4) On Page 4, there's a claim that there have been 300 Part VII transfers without a single failure, which seems too good to be true and Temporary Footnote 6 asks for substantiation. Didn't we acknowledge that there must have been at least one failure when we discuss the *Allianz* case on Pages 17 and 18?

(5) At the top of Page 10, I do not understand the description of the Connecticut process. The description on Page 10 seems to specifically contemplate a surviving company and a divested company, while the description on Page 9 treats both (or all) of the "resulting insurers" equally, which is the typical structure as I understand it. If what we're trying to say is that as a practical matter one company will typically have continuity of operations and the other company will be spun off, I think we need to make that point explicitly. It's also interesting that as pure "division" like the statute contemplates isn't listed as an option – even if the divested company will not merge into any existing company (Option 3), there seems to be a need to set up a shell company "for a split second as a pass through." And it would seem as though the split-second existence of a domestic insurer is more useful as a pass-through to an unaffiliated **foreign** insurer. If it's going to be an unaffiliated domestic company, why won't it remain in existence as the surviving company in the merger? (I know from experience that many plain-vanilla acquisitions are legally structured as mergers or chains of mergers, but I don't really know why. I assume there are tax and/or liability reasons and not merely to churn fees.)

(6) On Pages 13 and 14, and in the recommendation on Pages 20 and 21, the discussion of Model Law # 540 is out of date and needs to be reworked to reflect that as a result of that very discussion, the Model has been amended to address these issues (though the amendments still need to be enacted in the states).

(7) At the top of Page 15, the argument that "transfers of books of business ... are completely separate from assumption reinsurance statutes" because assumption reinsurance statutes deal with the novation of single policies does not pass the straight face test, because the whole purpose of assumption reinsurance is to provide a mechanism to transfer books of business. The real question is whether assumption reinsurance statutes provide the **exclusive** mechanism to transfer blocks of business, so that each affected policyholder must give at least implied consent, and if so, what happens when the laws of different states are in conflict?

(8) Similarly, on Page 15, the Virginia case is instructive, but the most important point is that there is a mechanism by which an IBT can be binding under Virginia law without policyholder consent. It is not clear to me that "the transfer would not apply to Virginia policyholders" if the Virginia Commission finds that an IBT is **not** in their best interests, an order declaring the

transaction to be ineffective in Virginia is upheld on appeal, and the companies refuse to acquiesce, arguing that their domestic law trumps Virginia law. See discussion of federalism issues on the following pages. Likewise, on Page 20, I do not see how we can declare with confidence that "unless and until guaranty association coverage can be ensured, transactions involving policies in states with anti-novation statutes will not be possible."

(9) Finally, is it premature to do proofreading? (It's difficult when the exposure draft is a PDF). Here are a few that I spotted:

Near the bottom of page 1: Need a comma in "This white paper**,** similar to the 1997 white paper, also includes a number of sections on related topics as well as multiple appendices."

We usually spell "white paper" as two words, but it's spelled "whitepaper" twice, on Pages 2 and 19.

The footnote calls are wonky. Most of them display in the PDF with stray periods in front.

Page 4: We need a comma after "failures," where we currently have a call for temporary footnote 6, because the intent is not to say that "failures providing guidance" are lacking, but to say that guidance **is** provided by the years of successful operation without any failures (assuming that this can be substantiated and is still current.

Bottom of Page 4: "A similar report is required under US **IBT** laws, but **states do not use** the word "scheme" **because it** has negative connotations in American English." (I think it's clearer if we acknowledge that these are multiple independent decisions by different states.)

Bottom of Page 5: "Of those, about 1,000 were characterized as **objections**."

Bottom of Page 6: "Commutation Plans **under the Rhode Island law** differ from Solvent **Schemes** in a number of areas including an enhanced role for the regulator, designating the independent expert as a consultant to the regulator and limiting the process" (It's not trademarked, so some other state might decide to use the term "Commutation Plan" to mean something that isn't quite identical to the Rhode Island procedure.)

Bottom of Page 7: "**None** of the plans was challenged in the state court proceedings." (Now that a third plan has been added to the list, it isn't "neither" any more.)

Next-to-last paragraph on Page 9: "(i.e., both the dividing **insurer** and ultimate resulting **insurers** must be Connecticut domestics)"

Bottom of Page 9: "There are three ways to **carry out** an insurance division in Connecticut:" (Alternatively, "effectuate" or "effect," but not "affect."

Middle of Page 13: "However, ~~it is not clear~~ the state approving the transaction does not have the power to require other states to license the resulting insurer(s) and making it a mandatory condition of approval would have the unintended consequences of giving other states (perhaps every other state) **an** absolute veto power over any IBT or CD transaction."

Bottom of Page 13: "One interpretation of the NAIC Property and Casualty Insurance **Guaranty** Association Model Act (Model # 540)* is that based on the definitions of "Covered Claim,"

"Member Insurer," "Insolvent Insurer," and "Assumed Claim Transaction" an orphan policyholder could not be covered by the state **guaranty** association.*"

Page 18, note 43: "There, a claim **originated** in Pawtucket, Rhode Island, but **involved** waste disposed near Attleboro, Massachusetts (the next town over, but across the state line)."

Top of Page 19, "asbestos-related" should be hyphenated.