

July 30, 2019

Commissioner David Altmaier
Florida Office of Insurance Regulation
Chairman, NAIC Group Capital Calculation (E) Working Group
via email to ddaveline@naic.org & lfelice@naic.org

Re: August 3, 2019 Working Group Discussion of Group Capital Calculation Confidentiality

Dear Commissioner Altmaier:

On behalf of a coalition of ten companies (Athene Holding Ltd., Brighthouse Financial, Global Atlantic Financial Group, Jackson National, Lincoln Financial, National Life Group, Pacific Life, Protective Life, Reinsurance Group of America, and Transamerica; collectively “the Coalition”), we write in advance of the August 3, 2019 Group Capital Calculation Working Group (GCCWG) meeting to provide our Coalition’s initial thoughts on the need for significant confidentiality protections once the Group Capital Calculation (GCC) becomes final. The Coalition greatly appreciates the opportunity to engage with the GCCWG and interested stakeholders regarding the confidentiality issue.

Initially, we want to make clear that the Coalition continues to strenuously urge the GCCWG to create a GCC that is faithful to the legal entity rules that NAIC has itself adopted through rigorous processes, and which state legislatures have in large part adopted in law. State regulators should avoid creating a complex and costly “dual system,” with one set of solvency measures at the legal entity level and a somewhat different set of measures at the group level. Moreover, we believe that international regulators may misunderstand the import of a GCC that disregards current capital rules (such as those for XXX/AXXX captives). Some will likely ask why the NAIC feels the need to reassess capital measures that insurers hold in accordance with state laws.

A. Broad Confidentiality Protections Are Necessary

The GCC for each group should receive the highest level of confidentiality permitted by law. The GCCWG has repeatedly made clear that the GCC is not intended to create a new capital requirement or standard. Instead, it is merely designed to be “one tool in the toolbox” for regulators to assess how capital at the group level might impact regulated insurance companies. Thus, we see no legitimate reason for regulators, the NAIC, insurers or other entities to be able to disclose any particular group’s GCC for any non-regulatory purpose.

We believe that on-top adjustments being considered by the GCCWG increase the risk of harmful disclosure. As we have previously pointed out in comment letters and conversations with GCCWG members, on-top adjustments in the GCC create “winners” and “losers.” The “winners” would benefit from an optical windfall, while the perceived financial strength of the “losers” will be undermined.

“Winners” could then attempt to use the GCC as a competitive weapon by disclosing their own results, implicitly opening non-disclosing groups to criticism and scrutiny from interested parties. For example, if a company were to disclose its GCC to rating agencies, analysts, or the general public, it would likely prompt those entities to pressure other groups to disclose their own GCC ratios. This would be unfair to insurers that have done nothing untoward, but which are nonetheless among the “losers.”

Therefore, disclosure of any group’s GCC outside the regulatory community would foster a competitive imbalance, undermining the NAIC’s stated mission of “facilitating...an effective and efficient marketplace for insurance products.”¹ We therefore urge the GCCWG to adopt strict confidentiality protections that would preclude disclosure of any group’s GCC outside the regulatory community, whether by regulators, insurers, insurance groups or others.

B. Proposed Holding Company Act Amendments To Ensure GCC Confidentiality

We believe that the NAIC Model Insurance Holding Company System Regulatory Act (“Holding Company Act”) is likely to be the preferred place to address GCC confidentiality as well as a prohibition on disclosure of the GCC and resulting Group Capital Ratio. Our reasons include that the Holding Company Act: (1) is referenced within the NAIC’s May 29, 2019 GCC report; (2) is the only model act that addresses both an insurer and other members of an insurance group; and (3) already includes authority for a regulator to examine non-insurer members of an insurance holding company system. To this end, we are providing our preliminary thoughts regarding possible changes to Section 8 (Confidentiality) of the Holding Company Act.

Our proposed language draws from and strengthens confidentiality provisions in other NAIC models. One such model is the RBC for Insurers Model Act, which includes a specific prohibition on public disclosure/advertising of RBC ratios. Because the NAIC describes the GCC as an “RBC aggregation methodology” and incorporates the RBC throughout the calculation, incorporating confidentiality provisions from the RBC Model Act seems logical.

Another model from which we propose to borrow language is the ORSA Model Act. Given the sensitivity of ORSA information, the ORSA model includes an enhanced level of confidentiality protection. The GCC is likely to be at least as commercially sensitive as ORSA.

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In conclusion, the Coalition respectfully submits that, because the GCC may deviate from how available and required capital is calculated under legal entity rules and thus would

¹ The U.S. National State-Based System of Insurance Financial Regulation and the Solvency Modernization Initiative, NAIC Solvency Modernization Initiative (E) Task Force, August 14, 2013.

almost certainly lead to confusion and misunderstanding by non-regulatory stakeholders, the most robust possible confidentiality protections are warranted.

The Coalition appreciates the opportunity to provide a summary of its position on confidentiality in advance of the National Meeting. We look forward to engaging with the GCCWG on this important issue.

Sincerely,

Athene Holding Ltd.

Brighthouse Financial

Global Atlantic Financial Group

Jackson National

Lincoln Financial

National Life Group

Pacific Life

Protective Life

Reinsurance Group of America

Transamerica

Model 440 – Insurance Holding Company System Regulation Act

Recommended RevisionsSection 8. Confidential Treatment; Prohibition on Announcements

- A. Documents, materials or other information in the possession or control of the Department of Insurance that are obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to Section 6 and all information reported or provided to the Department of Insurance pursuant to Section 3B(12) and (13), Section 4, Section 5 and Section 7.1 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 the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties, but shall seek to maintain the confidentiality of such documents during the course of any such regulatory or legal action. The commissioner shall maintain the confidentiality of the group capital calculation and Group Capital Ratio. With respect to all other documents, materials or other information covered by this paragraph, the commissioner will not otherwise make such the documents, materials or other information public without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interest of policyholders, shareholders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part in such manner as may be deemed appropriate.
- B. Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner or with whom such documents, materials or other information are shared pursuant to this Act shall be permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to Subsection A.
- C. In order to assist in the performance of the commissioner's duties, the commissioner:
- (1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection A, with other state, federal and international regulatory agencies, with the NAIC and its affiliates and subsidiaries, with any third-party consultants, and with state, federal, and international law enforcement authorities, including members of any supervisory college described in Section 7, provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the document, material or other information, and has verified in writing the legal authority to maintain confidentiality.
 - (2) Notwithstanding paragraph (1) above, the commissioner may only share confidential and privileged documents, material, or information reported pursuant to Section 4L with commissioners of states having statutes or regulations substantially similar to Subsection A and who have agreed in writing not to disclose such information.
 - (3) May receive documents, materials or information, including otherwise confidential and privileged documents, materials or information from the NAIC and its affiliates and 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

- (4) Shall enter into written agreements with the NAIC ~~and any third-party consultant~~ governing sharing and use of information provided pursuant to this Act consistent with this subsection that shall:
 - (i) ~~Specify~~ procedures and protocols regarding the confidentiality and security of information shared with the NAIC ~~and its affiliates and subsidiaries~~ or a ~~third-party consultant~~ pursuant to this Act, including procedures and protocols for sharing by the NAIC with other state, federal or international regulators. The agreement shall provide that the recipient agrees in writing to maintain the confidentiality and privileges status of the documents, materials or other information and has verified in writing the legal authority to maintain confidentiality;
 - (ii) ~~Specify~~ that ownership of information shared with the NAIC ~~and its affiliates and subsidiaries~~ or a ~~third-party consultant~~ pursuant to this Act remains with the commissioner and the NAIC's ~~or a third-party consultant's~~ use of the information is subject to the direction of the commissioner;
 - ~~(iii)~~ Prohibit the NAIC or third-party consultant from storing the information shared pursuant to this Act in a permanent database after the underlying analysis is completed;
 - ~~(iii)~~(iv) Require prompt notice to be given to an insurer whose confidential information in the possession of the NAIC or a third-party consultant pursuant to this Act is subject to a request or subpoena to the NAIC or a third-party consultant for disclosure or production; and
 - (v) Require the NAIC ~~and its affiliates and subsidiaries~~ or a third-party consultant to consent to intervention by an insurer in any judicial or administrative action in which the NAIC ~~and its affiliates and subsidiaries~~ or a third-party consultant may be required to disclose confidential information about the insurer shared with the NAIC ~~and its affiliates and subsidiaries~~ or a third-party consultant pursuant to this Act; and
 - ~~(iv)~~(vi) In the case of an agreement involving a third-party consultant, provide for the insurer's written consent.
- D. The sharing of information by the commissioner pursuant to this Act shall not constitute a delegation of regulatory authority or rulemaking, and the commissioner is solely responsible for the administration, execution and enforcement of the provisions of this Act.
- E. No waiver of any applicable privilege or claim of confidentiality in the documents, ~~proprietary and trade-secret~~ 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 C.
- F. Documents, materials or other information in the possession or control of the NAIC ~~or third-party consultants~~ pursuant to this Act 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.
- G. It is the judgment of the legislature that the group capital calculation and resulting Group Capital Ratio is a regulatory tool for assessing group risks and capital adequacy, and is not intended as a means to rank insurers or insurer groups generally. Therefore, except as otherwise may be required under the provisions of

this Act, the making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing an assertion, representation or statement with regard to the group capital calculation or Group Capital Ratio of any insurer or any insurer group, or of any component derived in the calculation, by any insurer, agent, broker or other person engaged in any manner in the insurance business would be misleading and is therefore prohibited; provided, however, that if any materially false statement with respect to the group capital calculation or resulting Group Capital Ratio or an inappropriate comparison of any other amount to an insurer's or insurance group's group capital calculation or resulting Group Capital Ratio is published in any written publication and the insurer is able to demonstrate to the commissioner with substantial proof the falsity of such statement, or the inappropriateness, as the case may be, then the insurer may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.