



National Association of Insurance Commissioners

Risk Retention and Purchasing Group Handbook



NAIC

Risk Retention and

Purchasing Group Handbook

2020



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NAIC Executive Office
444 North Capitol Street, NW
Suite 700
Washington, DC 20001
202.471.3990

NAIC Central Office
1100 Walnut Street
Suite 1500
Kansas City, MO 64106
816.842.3600

NAIC Capital Markets
& Investment Analysis Office
One New York Plaza, Suite 4210
New York, NY 10004
212.398.9000

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RISK RETENTION AND PURCHASING GROUP HANDBOOK

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SECTION I

PURPOSE OF THE HANDBOOK AND BACKGROUND OF THE LIABILITY RISK RETENTION ACT OF 1986 (LRRRA)

A. PURPOSE

The purpose of the Risk Retention and Purchasing Group Handbook (Handbook) is to explore in some detail the provisions and requirements of the Liability Risk Retention Act of 1986 15 U.S.C. §3901 et seq. (LRRRA) (Appendix A) and the NAIC Model Risk Retention Act (Model Act) (Appendix B), and to discuss issues that have arisen or can be expected to arise under the LRRRA. The question of which aspects of state laws have been preempted by the LRRRA and which have not is the overall issue that has given rise to many of the other issues. The Handbook will attempt to explain the various approaches that the states have taken in dealing with these issues.

The NAIC, in this Handbook, does not take a position as to the ultimate legality or utility of different state approaches to interpretation of the LRRRA or their regulation of risk retention activities, but attempts to objectively discuss the issues and the ramifications of the different approaches in order to allow the regulator to choose intelligently among various alternatives. The guidance offered in this Handbook is advisory only and is not intended to prescribe mandatory regulatory procedures. The guidance also is not intended to be all inclusive; rather, it suggests possible approaches and concepts in order to assist regulators in arriving at a workable approach to dealing with the operations of the risk retention industry in a manner consistent with the LRRRA.

The Handbook also includes, as appendices, background information and materials, as well as uniform registration forms (Appendices D and E) that the NAIC encourages regulators to utilize. The process of refining the standard forms first adopted by the NAIC in December 1989 and amended in June 1991 continues. The states will be furnished with any modified versions of these standard forms as they are adopted by the NAIC.

This Handbook will be revised as necessary to incorporate new developments and to provide additional guidance and information. The Risk Retention Working Group, of the Property and Casualty Insurance (C) Committee, is charged with the responsibility of considering and recommending to the members of the NAIC revisions to this Handbook.

B. BACKGROUND

The federal LRRRA, which was enacted by Congress in 1986, amended and expanded the Product Liability Risk Retention Act of 1981. The purpose of the LRRRA is to increase the availability of commercial liability insurance which became severely restricted in the market crisis of the mid-1980s. (As used in this Handbook, “commercial liability” means exposures due to business (profit or nonprofit), trade, product, services (including professional services), premises, or operations. It also includes exposures of state and local governments, their agencies, or political subdivisions. However, it excludes exposures arising from personal, family, or household responsibilities or activities and an employer’s liability as to its employees, other than under the Federal Employers’ Liability Act, 45 U.S.C. § 51 et seq. See U.S.C. § 3901(a)(2) and (3)). The LRRRA attempts to accomplish its purpose by two mechanisms: (1) the Risk Retention Group (RRG) and (2) the Purchasing Group (PG).

An RRG is a risk-bearing entity that must be chartered and licensed as an insurance company in one state. The LRRRA requires that the primary purpose of the group be to assume and spread the

commercial liability risk of its members. Once the group has obtained a license, it may operate in all states without the necessity of a license and is regulated almost exclusively by the domiciliary commissioner. Non-domiciliary commissioners may require RRGs to comply with the following state laws or requirements:

- Unfair claim settlement practices laws;
- Laws requiring the payment, on a nondiscriminatory basis, of applicable premium and other taxes (See Section 3902(a)(1)(B) of the LRRRA);
- Laws requiring participation in a residual market mechanism for liability insurance (See Section 3902(a)(1)(C) of the LRRRA);
- The RRG must register with and designate the insurance commissioner as its agent for the purpose of receiving service of legal documents or process;
- Laws regarding deceptive, false or fraudulent acts or practices (See Section 3902(a)(1)(G) of the LRRRA);
- Laws requiring RRGs to provide a notice specified in Section 3902(a)(1)(I) of the LRRRA cautioning that the policy is written by an RRG and as such may not be subject to all state insurance laws and that guaranty fund protection does not apply.

Further, non-domiciliary commissioners are granted authority to monitor the financial solvency of RRGs and to examine RRGs under certain circumstances. The non-domiciliary commissioners can:

- Require the RRG to submit to an examination to determine the RRG's financial condition if the domiciliary commissioner has not begun or has refused to initiate an examination of the RRG. The examination shall be coordinated with the domiciliary commissioner to avoid unjustified duplication and unjustified repetition. Section 3902(a)(1)(E) LRRRA.
- Require the RRG to comply with a lawful order issued in a delinquency proceeding if there has been a finding of financial impairment. Section 3902(a)(1)(F)(i) LRRRA.
- Require the RRG to comply with a lawful order issued in a voluntary dissolution proceeding. See 3902(a)(1)(F)(ii) LRRRA.
- Require the RRG to comply with an injunction issued by a court of competent jurisdiction alleging the RRG is in hazardous financial condition or is financially impaired. Section 3902(a)(1)(H) LRRRA.

The LRRRA requires that the RRG be owned by its insureds and requires the insureds to have similar or related liability exposure. The only type of coverage an RRG is permitted to write is commercial liability insurance for its members and reinsurance with respect to the liability of any other risk retention group (or any members of another risk retention group) which is engaged in businesses or activities so that the group or member meets the requirement for membership in the risk retention group which provides the reinsurance.

A PG may purchase only commercial liability insurance for its members. The members of a PG must share a commonality of purpose and risk. The LRRRA requires a PG to be "domiciled" in one state, but also requires that the insurer providing coverage to the group must be an admitted insurer, an eligible surplus lines insurer, or a risk retention group registered or operating in the state where the PG is "located."

With regard to preemption of state laws, the approach taken in the LRRRA in connection with RRGs is different than the approach taken in connection with PGs. Under Section 3902 of the LRRRA, with the exception of the domiciliary state, RRGs are exempt from all state laws, rules, regulations, or orders that would make unlawful, or would regulate, directly or indirectly, the operation of an RRG, except as provided in the LRRRA. The domiciliary state regulates the formation and operation of the RRG. As mentioned previously, any other state may impose those

certain requirements upon RRGs provided by the LRRRA, including compliance with unfair claim settlement practices laws, payment of taxes, limited financial reporting, and registration requirements. Financial examinations of an RRG initiated by other states are prohibited, unless the domiciliary commissioner has failed or refused to examine the group, but any such examination should be coordinated to avoid unjustified duplication and repetition.

In contrast, Section 3903 of the LRRRA does not contain a similar broad exemption from state laws for PG mechanisms but, rather, exempts them only from specified state laws, rules and regulations. All state laws not specifically preempted regarding PG and PG insurers remain intact. State laws preempted are primarily prohibitions and limitations in regard to the purchase of group liability coverage, e.g., fictitious group statutes. Countersignature requirements also are preempted. Controversy has arisen over the permitted authority of the nondomiciliary commissioner. Regulators continue to have authority over insurers of purchasing groups pursuant to applicable state law.

To date, several federal courts have interpreted the authority of states over PGs and their insurers, ruling that the preemptions of state law contained in the LRRRA in regard to PGs are narrow. These cases are discussed in detail in Section IV of this Handbook.

State insurance regulators seek to ensure, to the extent permitted by the LRRRA, that the risk retention industry operates in a manner which is beneficial, not only to those who obtain their commercial liability insurance in this alternate insurance market, but also to those third-party claimants. One aspect of concern is with financial failures which can affect these risk retention mechanisms just as they affect the conventional insurance market, but may prove more likely in the absence or attenuation of regulation. As emphasized in the report of the U.S. House of Representatives Subcommittee on Oversight and Examinations of the Committee on Energy and Commerce, entitled *Failed Promises (the Dingell Report)*, state regulators must be ever vigilant in financial solvency regulation. RRGs and PG insurers are no exception. Since the LRRRA was enacted in 1986, RRGs and insurers that write coverage for PGs have experienced their share of financial failures.

As with all insurance company insolvencies, the causes leading to the financial failures vary. Even in the best regulatory environment insolvencies cannot be totally prevented. The regulatory oversight of the financial solvency of an insurer is generally the responsibility of the domiciliary state, but that oversight is enhanced by the ability of any state to examine a nondomiciliary admitted insurer. However, given the long-tail coverage that many risk retention mechanisms provide and the LRRRA's preemption of nondomiciliary state laws enacted to preserve solvency, state regulators are concerned that a disproportionate number of financial difficulties involving insurers operating under the LRRRA may occur. RRG failures can affect residents of states where, if not for the LRRRA, the RRGs could not legally write business.

SECTION II
REGULATION OF
RISK RETENTION GROUPS AND PURCHASING GROUPS

A. NOTICE AND REGISTRATION

1. NOTICE

The LRRRA requires that RRGs submit notice to the insurance commissioner of each nondomiciliary state in which it intends to do business, before it may offer insurance in such state, a copy of its business plan, including any revisions to such plan. In addition, each nondomiciliary state may require the RRG to register with and designate the state insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process. A purpose of the notice is to make each state aware of proposed operations within its territory so that each state may apply all laws not preempted by the LRRRA to RRGs. Another purpose of the notice and registration with respect to RRGs is to recognize such groups as licensed by a foreign domicile in accordance with the LRRRA.

The LRRRA requires that PGs provide notice to each state in which they intend to do business, upon being qualified by a state of domicile. Such notice shall identify the state of domicile of the PG, the lines of business offered, the insurer providing coverage, and the PG's principal place of business. In addition, the PG must register with and designate the state insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process. This notice and registration must occur prior to the commencement of business. The purpose of the notice is to make each state aware of proposed operations within its territory so that each state may apply all laws not preempted by the LRRRA to qualified PGs, insurers of PGs and other entities or persons ancillary to the insurance operations of such groups.

(a) RISK RETENTION GROUPS

(i) Domiciliary State

The laws and regulations of the domiciliary state, with respect to RRGs, have not been preempted and such states may require, from RRGs seeking to become chartered and licensed in those states, any documents required of a traditional insurance company organized in that state. Many states have captive laws that provide different requirements for licensure of captive risk retention groups. See Appendix F for a compendium of state captive laws. Before a license is issued, the domiciliary state should also verify that an RRG applicant meets all of the criteria necessary under the LRRRA for status as an RRG. This includes the requirement either that members own the RRG and have liability risks that are similar or related, or that the RRG be solely owned by an organization which has as its members only persons who comprise the membership of the RRG and as its owners only persons who comprise the membership of the RRG and is organized primarily for the purpose of providing liability insurance to its member insureds.

Section 3902(d)(1) of the LRRRA requires RRGs to submit a plan of operation or feasibility study to the insurance commissioner of the domiciliary state before it may offer insurance in any state. The plan of operation or feasibility study shall include the coverages, deductibles, coverage limits, rates and rating classification systems for each line of commercial liability insurance the group intends to offer. If the group intends to offer any additional kinds of commercial liability insurance, it must submit revisions to such plan or study to the domiciliary state.

The domiciliary state should recognize that many RRGs write in other states and the insurance regulatory agencies of other states rely on the accuracy and completeness of the domiciliary state's review of each RRG's application. This is especially important with regard to the group's plan of operation and feasibility study, and any amendments thereto, copies of which will be submitted to the non- domiciliary states by any group intending to do business in those states.

In accordance with the LRRRA, the domiciliary state should verify that any RRG that applies for a license submits a plan of operation or feasibility study that contains at least the following:

- information sufficient to verify that its members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar or common business, trade, product, services, premises or operations; and
- for each state in which it intends to operate, the coverages, deductibles, coverage limits, rates and rating classification systems for each line of commercial liability insurance the group intends to offer.

Pursuant to the NAIC Model Risk Retention Act, the domiciliary state should also verify submission of the following:

- historical and expected loss experience of proposed members and national experience of similar exposures to the extent that this experience is reasonably available;
- pro forma financial statements and projections;
- appropriate opinions by a qualified independent casualty actuary, including a determination of minimum premium participation levels required to commence operation and to prevent a hazardous financial condition;
- identification of management, underwriting and claim procedures, marketing methods, managerial oversight methods, investment policies and reinsurance agreements;
- identification of each state in which the RRG has obtained, or sought to obtain, a charter and license and a description of its status in each such state;

- compliance with corporate governance standards;
- subsequent material revisions to the plan of operation or feasibility study; and
- such other matters as may be prescribed by the insurance commissioner of the domiciliary state in which the RRG is applying for a license.

The Model Risk Retention Act states: “[T]he risk retention group shall submit a copy of any material revision to its plan of operation or feasibility study required by Section 3B of this Act within 30 days of the date of the approval of such revision by the commissioner of its chartering [domiciliary] state, or if no such approval is required, within 30 days of filing.”

A domiciliary state should recognize that, due to the preemption of many state laws with respect to RRGs, non-domiciliary states depend on the domiciliary state to perform background checks on directors, officers and key management personnel of an RRG to ensure the competency, character and integrity of the insurer’s management. As the lead regulator, the domiciliary state can help satisfy the legitimate concerns of non-domiciliary states with respect to the directors, officers and management of an RRG by conducting these background checks. Such action by the domiciliary state eliminates the need for redundant regulatory functions and is consistent with both the letter and intent of the LRRRA.

Domiciliary states, as a best practice or by statute may require that every application form for insurance from a risk retention group, every certificate issued by a risk retention group, and every policy (on its front and declaration pages) issued by a risk retention group, contain twelve (12) point bold type the following notice (See Appendix I):

The policy for which you are applying is issued by a risk retention group. The risk retention group may not be subject to all of the insurance laws and regulations of your state of domicile. State insurance insolvency guaranty funds are not available for risk retention groups.

State law should be checked to determine if this or similar language is required by the domestic state.

(ii) **Non-Domiciliary State**

Section 3902(d)(2) of the LRRRA requires that any RRG which intends to do business in a non-domiciliary state submit to the insurance commissioner of that state a copy of the group’s plan of operation or feasibility study (including the identity of the state in which it is chartered and its principal place of business), with any revisions, as filed with the domiciliary state if the RRG intends to offer additional kinds of

liability insurance or changes the designation of the state in which it is domiciled. The plan or study must be filed before the group offers insurance in such state. The NAIC Model Risk Retention Act requires the submission of any material changes to the plan of operation or feasibility study at the same time it is submitted to the domiciliary state.

If not included in a plan of operation or feasibility study, an RRG may be asked by the non-domiciliary state to file a copy of its latest annual financial statement in order for the insurance commissioner of that state to assess the financial condition of the RRG. In the event the RRG has been granted a license in its domiciliary state subsequent to the prior year-end (and thus does not have an annual financial statement to file) the RRG should submit the interim financial statement filed with the domiciliary state when applying for its license. In addition, RRGs may be required to comply with certain non-domiciliary states' laws such as unfair claims settlement practices, laws applicable to registration of the RRG with the non-domiciliary state (so long as these laws are consistent with and not preempted by the LRRRA) and appointment of the commissioner of that state to receive service of process, and may require the following notice be provided in 10 point type, in any insurance policy issued by the RRG:

“NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group.”

Due to the preemption of many state laws with respect to RRGs, non-domiciliary states rely on the accuracy and completeness of the domiciliary state's review of an RRG's application. [See (i) above.] With respect to the management of an RRG, the NAIC Notice and Registration form provides information as to the identity of officers, directors and key management personnel of RRGs. Non-domiciliary states should consider contacting the domiciliary state for confirmation as to the extent and results of the background checks performed on these individuals in lieu of subjecting such individuals to a check on a state-by-state basis, which may be subject to challenge and/or criticism by RRGs. It is in the interest of both regulators and RRGs to avoid utilizing scarce resources for overlapping regulation. However, a non-domiciliary state is not precluded from requesting information that it believes necessary to determine compliance with any law not preempted by the LRRRA.

(b) PURCHASING GROUPS

Section 3903(d) of the LRRRA requires that a PG which intends to do business in any state, prior to doing such business, furnish notice of its intention to the insurance commissioner of that state. The notice must include:

- the identity of the state in which the group is domiciled;

- identification of the lines and classifications of liability insurance which the PG intends to purchase;
- the identity of the insurance company from which the group intends to purchase insurance and the domicile of such company; and
- the location of the principal place of business of the group.

In addition, any state which has adopted the NAIC Model Risk Retention Act may require a PG to:

- identify all other states in which the group intends to do business;
- specify the method by which and the person or persons, if any, through whom insurance will be offered to its members whose risks are resident or located in the state; and
- provide any other information necessary to verify its continuing qualification as a PG.

The PG must notify the insurance commissioner of each state in which it is doing business of any subsequent changes in any of the items provided in the notice of intent.

The notice provisions regarding PGs are designed to require that PGs provide adequate information to the insurance commissioner so that an evaluation can be made as to whether a PG is: (a) a PG as defined in the LRRRA; (b) operating in a manner and purchasing commercial liability insurance coverage consistent with the laws of the state; and (c) utilizing an insurer that meets the qualifications to do business in that state.

States have broad regulatory authority over a PG via the regulation of the PG's insurers [see subsection (B)(2) of this Section] and its agents or brokers [see subsection (C) of this Section]. The NAIC Notice and Registration form provides information as to the identity of officers, directors and key management personnel of PGs. Background checks of a PG's officers, directors or managers that are involved in the soliciting, negotiating, or procuring of insurance for compensation can generally be accomplished through the application of state agent/broker licensing requirements or other laws which regulate insurance activities. States may be challenged if information is required on directors, officers and managers of PGs to the extent such information is not requested of other entities that purchase insurance on a group basis. However, a state is not precluded from requesting information necessary to determine compliance with any law not preempted by the LRRRA.

**(c) CHALLENGES TO NON-DOMICILIARY STATES' REQUIREMENTS
CASE LAW**

RRGs and purchasing groups have challenged non-domiciliary states establishing requirements as preempted by the LRRRA.

In *Nat'l Risk Retention Assoc. v. Brown*, 927 F. Supp. 195 (M.D. La. 1996), National Risk Retention Association and risk retention groups chartered outside of Louisiana, but which sought to provide coverage in Louisiana, brought suit alleging the insurance commissioner was enforcing provisions of Louisiana law, namely in regard to formation and operation of risk retention groups, that had been preempted by the federal Liability Risk Retention Act. The Court found that Louisiana law which required RRGs chartered in another state to comply with the minimum capital and bond requirements for Louisiana chartered RRGs was preempted by the federal Act. The Court further found that the Louisiana statute which required a risk retention group to submit its plan of operation annually along with a \$1,000 fee to cover the cost of examination was preempted by § 3902(d)(2) of the federal Act which required submission of the group's plan of operation to the state's insurance commissioner only before it is licensed or registered in that state or when revisions to the plan are made. Finally, the Court held that the state's application requirement, fee and policy form review requirement were preempted by the federal Act since the Act set forth the documents which are to be submitted to the state in which it intends to do business but is not chartered. The requirements set forth under Louisiana law were broader than that allowed under the Act, were discriminatory and were preempted. *Nat'l Risk Retention Assoc. v. Brown*, 927 F. Supp. 195 (M.D. La. 1996).

In addition, courts have held that states may not charge an additional regulatory fee for RRGs. In *Attorney's Liab. Assurance Society, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001), risk retention groups chartered in Vermont sought declaratory and injunctive relief alleging the regulatory fee assessed by the Michigan Office of Insurance was preempted by the LRRRA. Michigan required that non-resident risk retention groups pay an additional regulatory fee of one-half percent on direct business for a risk located within Michigan. The fee was in addition to the two percent premium tax paid by risk retention groups.

The commissioner argued the entities in question did not qualify as risk retention groups because they offered insurance beyond that which may be offered by RRGs and that even if the groups did qualify as RRGs, Michigan's fee was not preempted based on the federal Act § 3902(a)(1)(B) which allowed a non-domiciliary state to require a risk retention group to pay, on a non-discriminatory basis, applicable premium and other taxes which were levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the state. One plaintiff offered coverage for wrongful employment practices and the other offered coverage for wrongful management of employee benefit plans. The commissioner argued these types of insurance fell outside the liability insurance authorized by the Act because the Act provided liability insurance that did not include personal risk liability and employer's liability with respect to its employees other than legal liability under the Federal Employer's Liability Act. However, the LRRRA also provided a risk retention group is one whose primary activity consists of assuming and spreading the liability exposure of its group members. Therefore, the plaintiffs alleged that writing coverage outside the scope of the Act did not necessarily bar a group from qualifying as a risk retention group. The Act further provided to qualify as a risk retention group, the entity must be one whose activities did not include the provision of insurance other than liability insurance for assuming or spreading all or any portion of the similar or

related liability exposure of its group members. After analyzing the legislative history of the Act, the Court found Congress meant only to exclude workers' compensation coverage and therefore, the plaintiffs qualified as RRGs based on the coverage they offered.

After determining the plaintiffs were in fact, RRGs under the LRRRA, the Court held the regulatory fee was preempted by the Act. The fee's purpose was to regulate non-resident risk retention groups which non-domiciliary states were prevented from doing under the federal Act. The amount of monitoring done by Michigan was not enough to justify a regulatory fee above what non-resident risk retention groups paid in premium taxes. *Attorney's Liab. Assurance Society, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001).

However, at least one court has held that the LRRRA does not preempt all state regulatory authority over forms and rates of insurers providing coverage through purchasing groups. In *Ins. Co. of State of Penn. v. Corcoran*, the insurer sought to provide professional liability coverage for a nurse practitioners' purchasing group on a nationwide basis. The insurer intended to use a nationwide policy form and charge uniform nationwide rates. The New York superintendent of insurance advised insurers writing or planning to write policies for purchasing groups in New York that the Liability Risk Retention Act did not relieve insurers of their obligation to comply with policy form and rate approval requirements of New York. The insurer argued the Federal Act preempted all state regulation that would impair the creation or operation of risk purchasing groups. The Court held the Act only preempts state laws that prohibit insurers from offering purchasing groups advantages based on their loss and experience but did not preempt all state regulatory authority over policy forms and rates. *Ins. Co. of State of Penn. v. Corcoran*, 850 F.2d 88 (2nd Cir. 1988).

2. REGISTRATION - SERVICE OF PROCESS

(a) RISK RETENTION GROUPS

Section 3902(a)(1)(D) of the LRRRA provides that any state may require that an RRG doing business in the state register with and designate the insurance commissioner of each state in which it does business as the group's agent for the purpose of receiving service of legal documents or process. Registration is not the same as admission or company licensing; it is not intended to provide non-domiciliary states with any regulatory powers over RRGs other than that provided in the LRRRA. It is not within a state's authority to use the processing of a registration to bar RRGs seeking to lawfully operate in a state, nor can a state declare a "moratorium" on the filing of RRG registrations. However, an incomplete registration filed by an RRG in a state requiring registration or a registration that reflects an RRG is not qualified, may be viewed by that state as nonregistration.

The designation of the commissioner or other state official as service agent facilitates the service of legal process against an RRG which may not otherwise have an ongoing presence in the state but which is doing business in that jurisdiction. The language in this section, when read in conjunction with the entire LRRRA, should not be construed to limit any documentation or other information a state may reasonably request to verify compliance with the LRRRA or to effect service of process.

(b) PURCHASING GROUPS

Section 3903(e) of the LRRRA requires that, in each state in which a PG does business, the PG register with and designate the insurance commissioner as the group's agent for the purpose of receiving service of legal documents or process. The designation facilitates the service of legal process against a PG which may not otherwise have an ongoing presence in the state but which is doing business in that jurisdiction. The language of this subsection, when read in conjunction with the entire LRRRA, should not be construed to limit any documentation or other information a state may reasonably request. The registration requirement does not apply to the few PGs qualifying for an exemption under the provisions of Section 3903(e) of the LRRRA.

3. NOTICE AND REGISTRATION FORMS

Each state may require the use of notice and registration forms which RRGs and PGs shall submit in order to do business in that particular state. These forms should provide for the submission of documents and information consistent with the LRRRA and applicable state law, along with other reasonable information necessary to verify that the entities qualify as RRGs or PGs and are, or will be, in compliance with all applicable laws.

It is recommended that states adopt the model registration forms which have been developed by the NAIC in order to facilitate compliance and promote uniformity. Such forms are included as Appendices D and E. Any amendments to the forms will be furnished to NAIC members.

Completed NAIC registration forms contain personal information, including names and social security numbers, or information which may be deemed confidential under state law. Regulators should develop information security protocols to safeguard the retention and destruction of this personal information. Regulators may refer to the NAIC *Standards for Safeguarding Consumer Information Model Regulation (#673)* for further guidance with respect to information security. There may be additional state-specific and federal laws and regulations regarding record retention and confidentiality, including the federal Fair Credit Reporting Act and the Federal Trade Commission regulations.

4. REGISTRATION AND OTHER FEES

The LRRRA enumerates the powers of non-domiciliary states when they are dealing with risk retention groups from other jurisdictions. The relevant portion of the LRRRA for purposes of determining whether states can charge registration and other fees provides as follows: "any State may require [a risk retention group] to pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers..." 3902 (a)(1)(B). This language used in the LRRRA does not specifically mention or authorize non-domiciliary states to charge "fees."

Most courts draw a distinction between "taxes" and "fees." It is likely that any court reviewing a state law assessment to determine whether it is a tax or a fee preempted under the LRRRA would apply federal common law principles. Under federal common law principles, the distinction between a tax and a fee is usually determined by the purpose for the assessment and power to impose it. Generally, taxes raise revenue, are

involuntary and may be, but are not always, based on the income or volume of business conducted by the taxpayer in the jurisdiction. Fees, on the other hand, are charged for a particular governmental service that directly benefits the payer, are voluntary (i.e. one can choose whether to use the service) and are collected to compensate the governmental entity providing the services. The distinctions listed above are not exclusive and whether a given assessment is a tax or a fee is not always obvious.

The Court in the case of *NRRA v. Brown* found that the LRRRA does not authorize a non-domiciliary state to charge fees. The Court in that case held that non-domiciliary states could not assess annual, application or policy form review fees against a risk retention group domiciled in another state. Moreover, in *Attorney's Liab. Assurance Society, Inc. v. Fitzgerald* the Court held that an additional regulatory fee imposed on non-resident risk retention groups was not justified. Given the language in the LRRRA and the holdings of these cases, states are urged to have counsel review their state law assessment provisions to determine their permissibility under the LRRRA. Even if the assessment is considered to be a tax it must be levied on a nondiscriminatory basis to be permitted under the LRRRA.

B. FINANCIAL CONDITION

1. RISK RETENTION GROUPS

The financial condition requirements of the domiciliary state with regard to RRGs are not preempted by the LRRRA and states may apply all such requirements, including financial condition examinations, to such groups.

Section 3902(d)(3) of the LRRRA requires that an RRG submit to the insurance commissioner of each state in which it is doing business a copy of the annual financial statement as filed with the group's domiciliary state. States should be aware that many states where RRGs are chartered as captive insurers in conformity with NAIC accreditation standards, permit RRGs to use Generally Accepted Accounting Principles rather than Statutory Accounting Principles to report on their financial conditions, with notations required in footnote one.

The filing is an ongoing requirement which must be complied with on an annual basis and is generally due to non-domiciliary states upon filing with the domiciliary state. The annual financial statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by an actuary or loss reserve specialist who is qualified in accordance with the criteria established by the NAIC in the annual statement instructions.

A state which has adopted the NAIC Model Risk Retention Act also requires that an RRG submit:

- a copy of each examination of the RRG as certified by the commissioner or official conducting the examination;
- upon request by the insurance commissioner, a copy of any information or document pertaining to any outside audit performed with respect to the RRG; and
- any other information as may be required to verify its continuing qualification as an RRG.

The Risk Retention (C) Working Group reviewed a statement of voluntary dissolution for risk retention groups (Form 16b) (attached as Appendix G) in December 2011 and developed the following recommendations:

- It should be mandatory for a risk retention group electing to voluntarily dissolve to complete Form 16b and provide it to the domestic regulator;
- The domestic regulator should promptly communicate the information contained in the completed Form 16b to all other states in which that risk retention group is registered. I-SITE may be used, but email to the chief examiner is the recommended mode of communication;
- The domestic states should share the Form 16b with non-domestic regulators confidentially via email. Some states may need to either receive a confirmation email that the material can be accepted confidentially before they send it or invoke the global confidentiality agreement; and
- The risk retention group should complete and file the form with the domestic regulator as soon as possible.

2. PURCHASING GROUP INSURERS

Insurers of PGs are not exempt from applicable state financial condition requirements. In regard to PG insurers that are licensed in the state in which it is providing coverage to group members, such state may apply its financial condition requirements. If the insurer is not authorized in a state in which it is providing coverage to PG members, that state may apply its unauthorized insurer or surplus and excess line laws. (See Section IV of this Handbook.)

C. AGENT/BROKER LICENSING

A state may require that a person acting, or offering to act, as an agent or broker for an RRG, a PG or any such group's members, obtain a license from that state, except that a state may not impose a residency requirement. For a purchasing group using a surplus lines insurer, a state must allow a non-resident agent to obtain a license in order to place the coverage without using a resident surplus lines broker. In this regard, many states may authorize and require the issuance of a limited license to non-residents for the specific purpose of doing business with, or on behalf of, RRGs, PGs, or any of their members.

Some states may recognize the authority of directors, officers or employees of RRGs or insurers of PGs to market and solicit insurance directly on behalf of the insurer without being licensed as insurance agents. Furthermore, some states permit a purchaser of insurance to directly procure insurance without the use of a licensed agent or broker. A state cannot require that an insurance policy issued to an RRG member, a PG or a PG member be countersigned by an agent or broker residing in that state.

D. APPLICATION OF STATE FINANCIAL RESPONSIBILITY LAWS

1. FINANCIAL RESPONSIBILITY REQUIREMENTS

State financial responsibility requirements, as referred to in the LRRRA, consist of those provisions established by state or local government as a condition for obtaining a license or undertaking specified activities. These standards are generally established to provide protection for loss resulting from injury to third parties or damage to their property occurring as a result of the activity for which the state has required a demonstration of financial responsibility. For example, many states require that an acceptable proof of financial responsibility be demonstrated by any person or entity registering a motor vehicle. If the registered vehicle is involved in an accident which results in an injury to another person or damage to his or her property, the registrant of the vehicle will have already demonstrated a source of minimum financial means to respond for potential monetary reimbursement to the injured party.

Often, state laws provide that financial responsibility can be demonstrated by coverage provided by a liability insurance policy and that the coverage be provided by an authorized insurer subject to the regulatory authority of that state's insurance department and protected by the insolvency guaranty fund of that state in the event of an insurer insolvency. In other instances, especially when insurance coverage in a particular area may not be readily available, coverage from either an authorized or an unauthorized insurer may be an acceptable demonstration of financial responsibility.

Section 3905(d) of the LRRRA provides:

Subject to the provisions of Section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

It is evident from this provision that the LRRRA does not preempt, but leaves with the states, the authority to apply existing financial responsibility standards or to set new financial responsibility standards so long as those standards do not discriminate against risk retention groups within the meaning of the LRRRA. There have been conflicting court rulings upon what is considered prohibited discrimination in this regard. Some courts have ruled that a financial responsibility law which eliminates all risk retention groups from providing the required coverage is discriminatory, while other courts have concluded that, if the state has a valid reason for excluding unlicensed insurers as a category of acceptable providers of such coverage, then risk retention groups may be excluded as a category of acceptable providers of financial responsibility coverage. These cases are discussed in section 2 below. The language of Sections 3902(a)(4) and 3905(d) of the LRRRA, case law summarized in section 2 below, and positions taken by other states should be carefully considered when determining whether financial responsibility statutes can be satisfied with insurance provided by an RRG and when amending existing statutes or enacting new ones.

2. CASE LAW ON FINANCIAL RESPONSIBILITY REQUIREMENTS

(a) CHARTER RISK RETENTION GROUP v. ROLKA

In *Charter Risk Retention Group Insurance Company v. Rolka*, 796 F.Supp. 154 (M.D. Pa. 1992), Charter filed a declaratory judgment action against several Pennsylvania Public Utility Commissioners who had issued orders to show cause requiring 16 limousine companies with Charter policies to establish why they should not be required to obtain insurance coverage from an insurer licensed in Pennsylvania. Certain Pennsylvania laws required private carrier utilities to obtain insurance from an insurer “authorized to do business within the Commonwealth.” [See, 66 PA.C.S. § 512 and 52 PA.C.S. § 32.11.] Charter claimed that its federal civil rights were violated because the requirement of obtaining evidence of financial responsibility from a licensed insurer was preempted by the LRRRA as discriminatory in violation of LRRRA Section 3902(a)(4).

The Court denied a defense motion to dismiss, finding that Charter stated a valid legal claim by alleging that it was being discriminated against through the state law which requires evidence of financial responsibility to be provided by a licensed insurer. The Court interpreted LRRRA Section 3905(d) as only permitting states to reject RRGs as evidence of financial responsibility if a particular RRG failed to meet the conditions of financial responsibility since any other reading would allow states to reject all evidence of financial responsibility provided by RRGs, which the Court held would state a claim for violation of the anti-discrimination provision in LRRRA Section 3905(d). *Charter Risk Retention Group*, 796 F.Supp. at 159 n. 6.

Following denial of the motion to dismiss, the defendants decided to settle the case. The result of the settlement agreement was a court order under which the defendants were enjoined from enforcing the financial responsibility requirements against Charter or any of its members on the grounds that these Pennsylvania laws were preempted by the LRRRA to the extent that they may be construed to require Charter to be licensed by the Pennsylvania Insurance Department in order to provide its members with the insurance coverage mandated by those laws. The Court agreed that the order does not exempt Charter from complying with the LRRRA or applicable Pennsylvania law that is not preempted by the LRRRA. In addition, the defendants were ordered to pay Charter \$10,000 in attorneys’ fees and costs.

The Court’s order does not enjoin Pennsylvania from excluding insurance from a particular RRG as acceptable evidence of financial responsibility for a state license or permit. Rather, it effectively prohibits Pennsylvania from requiring an RRG to be licensed for this purpose.

This unpublished order was effective November 13, 1992. On November 25, 1992, Charter was ordered into rehabilitation by the courts of its domicile, Nebraska, due to its poor financial condition. On December 3, 1992, Charter was ordered into liquidation.

(b) MEARS TRANSPORTATION GROUP v. STATE OF FLORIDA

In *Mears Transp. Group v. State*, 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1960 (1995), a passenger transportation company and risk retention group challenged validity of a Florida statute which required owners and operators of for-hire transportation vehicles to provide proof of financial responsibility in part by maintaining insurance purchased from an insurer which was a member of the Florida Insurance Guaranty Association. The transportation company and risk retention group alleged the statute was preempted by the Liability Risk Retention Act as a state law which unfairly discriminated against RRGs. Since RRGs were not members of the Florida Insurance Guaranty Association, for-hire transportation companies could not obtain coverage from RRGs and therefore, the statute plainly discriminated against RRGs. The Court held that the Florida Financial Responsibility statute was the type of law that Congress expressly excepted from the preemption provisions of the Liability Risk Retention Act. The Act set forth specific areas which were not subject to preemption, in particular §3905(d), which provided that subject to the title relating to discrimination, nothing in the Act shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility where the state has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. The Act further stated that such means may include or exclude insurance coverage obtained from an admitted insurance company, risk retention group or any other source. The Court found that the Florida statute was not discriminatory because it did not single out risk retention groups for preclusion. In addition, the statute's preclusion was narrow since it only applied to owners and operators of for-hire vehicles and only to the first \$30,000 in coverage. Finally, the Court found the financial responsibility requirements were a legitimate and rational exercise of the state's traditional authority to act in the public interest and designed to provide members of the public injured in for-hire vehicles with the protection of the state insurance guaranty fund. *Mears Transp. Group v. State*, 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1960 (1995).

(c) AMERICAN INTER FIDELITY EXCHANGE, A RISK RETENTION GROUP v. DAWSON

American Inter Fidelity Exchange, a Risk Retention Group v. Dawson, No. 87-74 (E.D. Ky.), involved a claim by American Inter Fidelity Exchange (AIFE), a Risk Retention Group, that LRRRA preempted a Kentucky statute requiring motor carriers to have evidence of financial responsibility in the form of liability insurance issued by an insurer authorized to do business in Kentucky in order to hold a certificate of public convenience and necessity. The defendants were the state official who headed the agency which regulates motor carriers and the commissioner of insurance.

The defendants moved for summary judgment on the ground that the requirement of evidence of financial responsibility in the form of liability insurance issued by an authorized insurer is a nondiscriminatory measure within the state's police power to protect its citizens from loss or damage caused by motor carriers operating in the state. At a hearing on the motion, the Court questioned whether AIFE was qualified financially to hold a certificate of authority in Kentucky.

Upon learning that AIFE did not have sufficient capital and surplus to obtain a certificate of authority to do business in Kentucky, the Court suggested that if AIFE could meet the financial qualifications to be authorized to do business in Kentucky, it should be allowed to provide evidence of financial responsibility for motor carriers in Kentucky and urged the parties to pursue a settlement agreement along those lines.

This resulted in an agreed order approved by the commissioner of insurance in which AIFE agreed to maintain surplus of \$2 million, comply with Kentucky's motor vehicle no-fault insurance law, and meet other conditions. Based on this agreed order, the Court dismissed the case, but retained it on the docket to monitor the parties' compliance with the agreed order. On March 23, 1994, AIFE was placed into rehabilitation by an order of Marion Circuit Court of Indiana due to a reported insolvency as of December 31, 1993.

The advantage of arrangements of this type is that the state has clarified its authority over an RRG providing evidence of financial responsibility for persons holding licenses or permits in the state. The disadvantage of these arrangements is that they require special oversight and there is the potential for court monitoring of the activities of the parties to the case, which could become unwieldy.

States should be cautious in relying on the *AIFE* order to support any position or action taken against an RRG. The order was the result of a settlement between the parties and no legal precedent resulted from the case. RRGs and states are under no obligation to settle cases in this manner, and RRGs and states may not be willing to settle cases in this manner.

(d) GARAGE SERVICES AND EQUIPMENT DEALERS LIABILITY ASSOCIATION OF AMERICA, INC. v. HOLMES

In *Garage Serv. & Equip. Dealers Liab. Assoc. of Am. v. Homes*, 867 F. Supp. 1301 (E.D. Ky. 1994), a risk purchasing group and propane dealers brought action against Kentucky state officials alleging that a Kentucky regulation which provided that licensed propane dealers may only demonstrate financial responsibility for licensure purposes by means of liability insurance purchased from an insurance company authorized to do business in Kentucky was preempted by the Liability Risk Retention Act. Garage Services purchased insurance from an insurer not authorized in Kentucky but which allegedly had capital and surplus in excess of Kentucky's requirements for an authorized carrier. Section 3903(a)(8) of the LRA provides: "except as provided in this section and section 3905 of this title, a purchasing group is exempt from any state law, rule, regulation, or order to the extent that such law or order would... (8) otherwise discriminate against a purchasing group or its members." According to the Court, Section 3905(d) of the Act specifically authorizes the state to specify acceptable means of demonstrating financial responsibility as a condition for obtaining a license or permit to undertake specific activities.

The Court held Kentucky could regulate the financial responsibility standards for propane dealers who wished to purchase their liability insurance through purchasing groups. The court found no discrimination because the regulation did not single out purchasing groups for discrimination and applied equally to all

insurers, purchasing groups and risk retention groups. The regulation was aimed at protecting the public and was the type of regulation Congress exempted from preemption. *Garage Serv. & Equip. Dealers Liab. Assoc. of Am. v. Homes*, 867 F. Supp. 1301 (E.D. Ky. 1994)

(e) **YELLOW CAB COOPERATIVE, INC., BEFORE THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

In an administrative decision and order dated September 2, 1992, the California Public Utilities Commission (PUC) denied the application of the Yellow Cab Cooperative, Inc., for acceptance of its Chariots of Hire Risk Retention Group (COHRRG) insurance policy as adequate proof of financial responsibility in connection with its charter-party carrier licenses. The application for a rehearing was also denied by the PUC.

The subject California financial responsibility law requires a policy of insurance issued by a company licensed to write insurance in California or by nonadmitted insurers subject to the excess lines laws. The California PUC determined that the insurance issued by COHRRG to Yellow Cab is not adequate proof of financial security because it does not meet the statutory criteria. A non-domiciliary risk retention group is not licensed as an insurance company by the California Department of Insurance and it does not operate in California on a surplus lines basis. The California PUC concluded that the LRA does not preempt the subject California statute because Section 3905(d) reserves to states the power to determine the adequacy of proof of financial security.

The PUC analyzed the *Rolka* decision (See Section II(D)(2)(a) of this Handbook) but did not consider it to be binding on it as the decision was only an interim ruling. The fact that the parties in *Rolka* subsequently entered into a settlement agreement based upon the interim ruling does not alter this conclusion. Yellow Cab petitioned the Supreme Court of the state of California for a writ of review but the writ was denied without opinion.

(f) **OPHTHALMIC MUTUAL INSURANCE COMPANY (a Risk Retention Group) v. MUSSER**

Ophthalmic Mut. Ins. Co. v. Musser, 143 F.3d 1062 (7th Cir. 1998) relates to a Wisconsin law requiring licensee corporations, including health care providers, to offer proof of financial responsibility to do business in the state. Health care providers were obligated to maintain professional liability insurance coverage with an insurer authorized to do business in the state. The Wisconsin Office of the Commissioner of Insurance contacted all Wisconsin health care providers and informed them that any medical malpractice insurance must be obtained from an insurer licensed in Wisconsin in order to comply with the financial responsibility requirements. The plaintiff, a risk retention group chartered and licensed under the state of Vermont to write insurance liability coverage for ophthalmologists, brought suit after ophthalmologists it insured in Wisconsin cancelled their coverage. The Court held the financial responsibility requirement was not preempted by the Liability Risk Retention Act because it fell within the preemption exception of § 3905(d) which provides that state statutes which relate to proof of financial responsibility as a condition of obtaining a license are not preempted. The proof may include coverage from an admitted insurer and may

exclude risk retention groups. The Court held the financial responsibility statute was precisely the type of statute that Congress envisioned to be exempted from preemption. *Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998).

(g) NATIONAL WARRANTY INSURANCE COMPANY, RRG v. GREENFIELD

The Oregon Service Contract Act prohibited all RRGs from selling reimbursement insurance policies to automobile dealers to cover their liability on motor vehicle service contracts. In *Nat'l Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000), the plaintiff sought declaration that the Service Contract Act was prohibited by the federal Liability Risk Retention Act or that the phrase “authorized insurer” in the Service Contract Act must be read to include RRGs. The Service Contract Act provided that an automobile dealer could not sell a service contract on a motor vehicle unless that dealer was registered with the Department of Consumer and Business Services. In order to register, a dealer needed to establish financial responsibility by proving that it either had a net worth of \$100 million or that it had a reimbursement policy issued by an “authorized insurer.” An authorized insurer needed to obtain a certificate of authority and could only obtain a certificate of authority if it was a member of the Oregon Insurance Guaranty Association. RRGs were expressly prohibited from participation in guaranty associations under the LRRRA. Relying on the legislative history of the Act and the meaning of the term “discrimination” under the Act, the Court held Oregon could not exclude coverage from all RRGs. However, the Court stated Oregon could exclude coverage from a particular RRG if it could show that the RRG was financially unsound or was otherwise dangerous to those who rely on insurance purchased pursuant to the Oregon Service Contract Act. *Nat'l Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000).

E. LIABILITY INSURANCE UNDER THE LRRRA

The term “liability” is defined in Section 3901(a)(2) of the LRRRA, as follows:

(A)...legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of—

(i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations, or

(ii) any activity of any state or local government, or any agency or political subdivision thereof; and

(B) does not include personal risk liability and an employer’s liability with respect to its employees other than legal liability under the Federal Employers’ Liability Act (45 U.S.C. 51 et seq.);

“Insurance” is defined in Section 3901(a)(1) to be: “...primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable State or Federal law.”

Liability insurance is the only type of insurance coverage that can be written by a risk retention group and purchased on a group basis by a purchasing group under the LRRRA. Furthermore, the LRRRA limits the liability coverage that can be provided or purchased to commercial liability lines, and excludes personal lines insurance as well as workers’ compensation insurance.

The definition of “liability” contained in the LRRRA is not necessarily the same as the definition of “liability” under state laws. This is recognized in Section 3901(b), which provides as follows:

(b) Nothing in this chapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State, and the definitions of liability, personal risk liability, and insurance under any State law shall not be applied for the purposes of this chapter, including recognition or qualification of risk retention groups or purchasing groups.

Thus, a state clearly cannot apply its statutory definitions of “liability” and “insurance” for purposes of the LRRRA. However, instances have arisen where states have reached different conclusions as to whether certain insurance coverages constitute liability insurance under the LRRRA, particularly regarding coverages where the liability is predicated upon contract rather than tort. For example, some RRGs and PGs offer insurance which reimburses warrantors for obligations assumed under warranties that are voluntarily issued. Some states contend that this insurance falls outside of the scope of the LRRRA while others recognize this as liability insurance permitted under the provisions of the LRRRA.

Case law involving the issue of whether warranty insurance is within the scope of the LRRRA involved HOW Insurance Company, a Risk Retention Group, which is an RRG formed under the Product Liability Risk Retention Act of 1981 (PLRRA), the predecessor to the LRRRA. See *Home Warranty Corp., et al., v. Elliott*, 572 F.Supp. 1059 (D. Delaware, 1983). The risk retention group sought a temporary restraining order and preliminary injunction based on the Delaware Insurance Commissioner’s refusal to allow it to operate its homeowners’ warranty insurance program as a risk retention group under the Products Liability Risk Retention Act. The Home Warranty Corporation operated a Home Owners Warranty (HOW) insurance program which offered coverage against builder default in the first two years of the policy and offered coverage for major structural defects in its third through tenth years of coverage. In this case, the Court found the builder of new homes was a manufacturer and the new home a product under the Act. The major structural defect coverage during the third through tenth years was considered product liability risk exposure under the Act and the first two years did not constitute an assumption and spreading of product liability exposure because HOW reserved the right to seek reimbursement from the builder for amounts paid to the homeowner. In the subsequent case *Home Warranty Corp., v. Elliott*, 585 F.Supp. 443 (D. Delaware, 1984), the commissioner did not contest that HOW’s primary activity consisted of assuming and spreading the product liability risk of its group members and that HOW was a risk retention group under the Act. The question the Court addressed was whether a risk retention group could, without subjecting the program to state regulation, provide coverage which was not product liability coverage in and of itself but which was necessary to the viability or an integral part of an insurance program to provide product liability coverage. The Court found the inclusion of ancillary provisions necessary to the viability of the program did not render the program subject to state regulation.)

The decisions rendered in the cases involving the Delaware Commissioner were favorable to HOW and permitted the RRG to continue offering warranty insurance. In the later Delaware case, the Court found that although part of the coverage offered by HOW was not product liability insurance, an RRG program could provide ancillary coverage necessary to the viability of the program without subjecting the program, or any part of it, to state regulation. It should be noted that this decision is based upon the PLRRA, whose definition of a “risk retention group” differs from the one contained in the LRRA.

Another case involving the HOW company was *Home Warranty Corp. v. Caldwell* 777 F.2d 1455 (11th Cir., 1985) reh. Dn. 794 F.2d 687 (1986), cert. den. 107 S.Ct. 183 (1986). This case involved whether a homeowner’s warranty program assumed or distributed a product liability risk; whether that was its primary activity; and whether it assumed or distributed this risk on behalf of its members pursuant to the Product Liability Risk Retention Act preempting regulation by the Georgia insurance commissioner. The Homeowner’s Warranty Program (HOW) involved a ten year new home protection plan consisting of a one-year builder warranty against defects in material and workmanship; a two-year builder warranty regarding plumbing, electrical, heating and cooling systems; an insurance policy covering the builder’s performance under his warranty and insurance against major structural defects not covered by the express builder’s warranty arising in the third through tenth years after purchase of the new home. The Homebuilder made the warranties to the purchaser. HOW issued a certificate of insurance to the purchaser underwriting the warranties for the first two years and insured the home against the described structural defects. All claims were made by the purchaser directly against HOW and benefits were paid directly to the home purchaser. All deductibles were paid by the home purchaser and the purchaser was required to assign to HOW his rights under other insurance policies held by the purchaser. The cost of the program was initially paid by the builder but then was passed on to the purchaser in the purchase price of the home. HOW incorporated and chartered in Delaware as an insurance company authorized to do business. The Delaware commissioner, however, indicated he was unsure as to whether HOW was a risk retention group under the Federal Act. Following a series of court cases (*see, Home Warranty v. Elliot*, above), it was determined that HOW was a risk retention group under the Act. Thereafter, the Georgia insurance commissioner issued a cease and desist order on HOW’s activities in Georgia. Although the Court found that the HOW policies were not product liability insurance as defined in many jurisdictions prior to the Act, the HOW policies did fall within the broader definition of product liability under the Act. Relying on the judgment in *HOW v. Elliot* (above) the Court found that even though the first two years of the program were not assuming and spreading risk, the years three through ten sufficiently constituted insuring products liability risk to satisfy the primary activity requirement. *Home Warranty Corp. v. Caldwell*, 777 F.2d 1455 (11th Cir.1985) (*cert. denied* 107 S. Ct. 183 (1986)).

In *Nat’l Home Ins. Co. v. King*, 291 F. Supp. 2d 518 (E.D. Ky. 2003), also a case involving a home warranty contract, the Court similarly found the warranty contract to be an insurance contract. National Home Insurance Company was a risk retention group selected by the Home Buyers Warranty Corporation to insure new home warranties issued in Kentucky. National Home was a Colorado RRG created pursuant to the Liability Risk Retention Act. This matter arose out of a claim by home buyers pursuant to the warranty provisions of the policy for alleged construction defects. The warranty agreement included an arbitration provision. The homeowners filed suit against National Home for its failure to adjust the claim. National Home then filed a petition to compel arbitration under the warranty contract. Kentucky statutes prohibited arbitration agreements in insurance contracts. The issue before the Court was whether the home-warranty policy between the builder and the insurer where the homeowner was a third party beneficiary was a contract of insurance. The Court examined the language of the policy, the elements of the policy which were typical of an insurance policy, and the purchase of reinsurance

finding the warranty agreement was an insurance contract. The Court further held the LRRRA did not preempt the Kentucky statute prohibiting the enforcement of an arbitration clause because the purpose of the Act was to remove barriers to the formation and operation of RRGs and prohibiting the enforcement of an arbitration clause did not make unlawful the formation or operation of a risk retention group and did not offend the nondiscriminatory principles underlying the Liability Risk Retention Act. *Nat'l Home Ins. Co. v. King*, 291 F. Supp. 2d 518 (E.D. Ky. 2003).

Another federal district court also addressed the issue of what constitutes “liability insurance” as contemplated by the LRRRA in *Attorneys’ Liability Assurance Society, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001) (“ALAS”). In ALAS, a non-domiciliary state regulator asserted that a properly chartered RRG did not provide “liability insurance” as defined under the LRRRA.

Specifically, one plaintiff RRG offered an “Attorneys’ Employment Practices Policy” which provided coverage for “wrongful employment practices,” such as alleged discrimination, sexual harassment, or wrongful termination. Another plaintiff RRG offered a “Commercial Liability Policy,” which provided coverage for “Employment Benefits Liability,” such as wrongful management of employee benefit plans or negligent advice.

The non-domiciliary state regulator argued that these types of insurance were outside the scope of the LRRRA's definition of “liability insurance” because the LRRRA excludes “personal risk liability and an employer’s liability with respect to its employees other than legal liability under the Federal Employers’ Liability Act.” See 15 U.S.C. § 3901(a)(2)(B).

Based upon congressional intent behind the enactment of the LRRRA, the Court held that the RRGs provided “liability insurance” as contemplated by the LRRRA. The Court reasoned that Congress intended for RRGs to provide broad liability coverage, and the regulator's interpretation of the statute would exclude a large portion of needed liability coverage. Instead, the Court held that § 3901 (a)(2)(B) only intended to exclude workers’ compensation coverage. Such intent is evidenced by the express reference to the Federal Employers’ Liability Act, which covers personal injuries for railroad workers in interstate commerce. Moreover, employment practices liability lawsuits and insurance coverage have changed since the enactment of the LRRRA. At the time of enactment, employment liability claims were covered under general liability policies, which did not begin to exclude employment liability claims until the early 1990s when employment claims began to rise rapidly. See ALAS, 174 F. Supp.2d at 630-32.

In *Auto Dealers Risk Retention Group v. Poizner*, Civ. 07-2660 (E.D. Cal. 2008), the California insurance commissioner issued a cease-and-desist order against a Montana-domiciled risk retention group seeking to provide stop-loss insurance for member automobile dealers that maintained self-funded employee benefit plans. Auto Dealers provided notice to the California Department of Insurance and commenced doing business in California. California issued a denial of the registration notice, alleging stop-loss insurance did not qualify as liability insurance pursuant to the Liability Risk Retention Act. California then issued a cease-and-desist order to stop the transaction of insurance in California. Auto Dealers filed an action seeking a temporary restraining order to stay enforcement of the cease-and-desist letter. The Court granted the temporary restraining order. The Court found questions remained as to whether California had the authority to issue the cease-and-desist order, risk retention group qualification and whether California may have been able to challenge the status of the RRG in a state or federal court of competent jurisdiction.

This matter was later settled and dismissed. The risk retention group agreed to cease doing business in California. Under the doctrine of *stare decisis*, a settled case does not constitute precedent that should normally be followed in other cases involving the same problem; however, this settlement is illustrative of the application of the described facts to the LRRRA as stipulated by the parties and therefore is included in this Handbook.

There has been no additional litigation on the issue of what constitutes liability insurance under the LRRRA since the foregoing cases were decided. Some states have not recognized the authority of PGs to purchase coverage that they contend do not constitute liability coverage.

Most insurance coverages offered by RRGs and PGs are easily discernible as either being liability insurance or not under the LRRRA. Other coverages that raise questions should be carefully reviewed. When analyzing a coverage, states should review existing case law. Since there is a scarcity of case law on this issue, states can look to the legislative history (Congressional Record or committee reports) of the LRRRA to try and ascertain congressional intent. *Home Warranty Corp. v. Caldwell* contains a comprehensive legislative history of the PLRRA and the evolution of products liability law. State laws whose language does not differ materially from the LRRRA can be looked to in order to provide an understanding of the issues. However, any conclusions made by states on what constitutes liability insurance under the LRRRA must ultimately rely upon the meaning of the language contained in that Act.

Even if a particular kind of insurance is liability insurance within the meaning of the LRRRA, states must consider whether the coverage would constitute a prohibited coverage within the meaning of Section 3905(c) of the LRRRA. Prohibited coverages cannot be written by a risk retention group or obtained by a purchasing group. [See following Section II(F).]

F. PROHIBITED POLICY COVERAGE

Section 3905 (c) of the LRRRA provides:

The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.

This provision is intended to prohibit RRGs and insurers of PGs from providing insurance coverage which cannot be provided by insurers that are fully subject to state regulation. For example, where it has been determined by state statute or by the state's highest court that it is a violation of public policy for strike insurance or indemnity of punitive damages to be covered, such coverage may not be provided by an RRG or by an insurer of a PG.

It is important to note that the foregoing provision does not preclude a state from applying in connection with insurers of PGs other state laws, regulations or other requirements pertaining to permissible or prohibited policy form provisions. For example, states may require a PG insurer to file amendatory endorsements that apply to policyholders in that state in conformance with that state's specific requirements. PGs and insurers of PGs are subject to all state laws except those specifically preempted and enumerated in the LRRRA, none of which restrict the ability of a state to regulate the contents of insurance policies issued in its jurisdiction, for example, in terms of governing standards for claims-made policies or legal defense cost treatment.

SECTION III

REGULATION OF RISK RETENTION GROUPS

A. GENERAL CONCEPTS

The LRRRA contemplates that an RRG should be primarily regulated by only one state—its state of domicile. The LRRRA requires that an RRG be a licensed (admitted) insurer in its state of domicile. While RRGs may be licensed (admitted) insurers in other states, most RRGs operate on a registered (unlicensed) basis in other states. In addition to being required to be licensed as an insurer in the domiciliary state, due to the provisions of the LRRRA, RRGs are subject to a number of restrictions which are not applicable to insurers generally.

The state of domicile has the primary regulatory responsibility relative to regulation of an RRG. Other states in which the RRG operates have limited authority as set forth in the LRRRA. Due to the limited authority of nondomiciliary states over RRGs, other states to a large extent rely on the domiciliary state to exercise general oversight and responsibility in the areas of licensing, solvency, rates and marketing. These areas are discussed in the following sections.

B. CHARTERING STANDARDS

An RRG must meet the chartering standards of its state of domicile. In some states, RRGs are chartered under captive laws. These laws may provide for standards that differ from those applicable to conventional property/casualty insurers. Domiciliary states that license RRGs are subject to NAIC Accreditation standards Parts A, B and C. There are several additional requirements of the LRRRA that must be met in order to qualify as an RRG which are set forth in the definition of an RRG. Among these requirements are the following:

- The RRG must be owned by its insureds, all of whom must be members of the group, or the RRG must have as its sole owner an organization which has as its members only persons who comprise the membership of the RRG and which has as its owners only persons who comprise membership of the RRG and who are provided insurance by the RRG;
- All members of the RRG must be engaged in businesses or activities which are similar or related with respect to liability exposure;
- The RRG can only offer commercial liability insurance and reinsurance of other RRGs (or members thereof) having similar direct risk exposures; and
- The words “Risk Retention Group” must be in the name of the insurer.

In reviewing the application of the RRG, the state of domicile should consider that the insurer will be operating in other states having limited regulatory authority and these states will be looking to the state of domicile to review, among other things, the following:

1. MANAGEMENT EXPERTISE

Because the market conditions and practices vary widely in different areas of the country, the state of domicile should consider the underwriting and claims experience of the management of the RRG in the geographical areas in which it will be operating. Such factors may include claim frequency, size of damage awards and settlement practices.

2. REINSURANCE ARRANGEMENTS

The nature and quality of an RRG's reinsurance are crucial to financial condition. Moreover, the laws as well as the volume of litigation and the magnitude of damage awards in some jurisdictions may require different reinsurance limits and provisions than those normally required in the state of domicile.

Some states may have adopted the "Reinsurance Guidelines for Risk Retention Groups Licensed as Captive Insurers" which was adopted by the Risk Retention Group (E) Task Force on March 29, 2008. See Appendix H)

3. ABILITY TO PROVIDE SERVICE

The state of domicile should consider the RRG's ability to provide geographically widespread services including underwriting, claims handling, response to consumer questions and consumer complaint handling.

The state of domicile may wish to consult with the states in which it knows that the insurer will be doing business as an RRG to determine if there are special considerations that should be afforded due to local market conditions.

The state of domicile should inform the NAIC, on the form adopted by the NAIC (see Appendix C for the NAIC forms), of the licensing of an insurer that intends to do business as an RRG.

C. SOLVENCY REGULATION

The state of domicile should carefully review the financial condition of RRGs doing business in other states, recognizing that the other states will be heavily dependent on such review.

To the extent that its laws allow, the state of domicile should require that an insurer licensed as an RRG file its financial statements on the NAIC's Property and Casualty Annual Statement Blank by March 1 of each year and provide the NAIC a copy of the Blank in both hard copy and either via internet or by other electronic means specified by the NAIC. An RRG is required to file an annual financial statement with each state in which it operates, if required by the other state. The annual financial statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves by an actuary or loss reserve specialist who is qualified in accordance with the criteria established by the NAIC in the annual statement instructions. RRGs should submit risk based capital report information to their state of domicile.

A nondomiciliary state can seek to enjoin in state or federal court an RRG from operating within its jurisdiction for solvency reasons if it can show that the RRG is in hazardous financial condition or is financially impaired. Hazardous financial condition, as defined by the LRRRA, means that based upon its present or reasonably anticipated financial condition an RRG is unlikely to be able to meet obligations to policyholders with respect to known claims and reasonably anticipated claims or to pay its other obligations in the normal course of business. Therefore, hazardous financial condition can take place prior to the more advanced stages of impairment or insolvency.

Each state in which an RRG operates should reach a conclusion as to whether the RRG is in hazardous financial condition as defined by the LRRRA. In reaching such a conclusion, in some

instances, states have applied their respective minimum financial standards as a benchmark. In addition, the slow paying of claims in comparison to other insurers or inadequate rate levels, as well as other factors, may be an indication of the inability to meet obligations in the normal course of business.

While the minimum capital and surplus requirements are determined by the domiciliary state, the admissibility of the assets and the determination of liabilities of an RRG may not necessarily be restricted to the state of domicile. Each state may make its own determination as to the liquidity, availability and collectability of the assets of an RRG and the appropriate valuation of its liabilities. However, this approach has not been tested in the courts as a basis for obtaining a court order on the grounds of a solvency concern.

An RRG generally is subject to a limited amount of insurance regulation outside of its domiciliary state. Therefore, it may be prudent for nondomiciliary states to evaluate the chartering standards in the jurisdiction in which an RRG is domiciled when the state receives notice that the RRG intends to offer insurance in the nondomiciliary state. Factors regarding the chartering standards to evaluate include, but are not limited to: (1) requirements for formation; (2) minimum capitalization requirements; (3) reserves, solvency, and liquidity requirements; (4) whether the domicile has existing legislation in place pertaining to RRGs; (5) filing and financial reporting requirements; and (6) possible exemptions from certain requirements.

Most domiciliary states have captive laws in place for the formation of insurance companies. RRGs find states with captive laws attractive for various reasons. Generally, states with captive laws have minimum capitalization requirements for the formation of RRGs as captives which differ from those applicable to traditional insurers, not only in the amount of capital required but in the nature of the capital required. For example, some states may permit letters of credit to be used to meet capital and surplus requirements. The states also may or may not require rate and form approval for RRGs.

Appendix F includes all states that have captive laws. Nearly 75% of the RRGs currently formed are domiciled in states with captive laws, although not in all cases as captive insurers. Formation as a captive insurer is consistent with the legislative history of the LRRRA.

RRGs may not provide all the information necessary for nondomiciliary states to properly determine the financial condition of the insurer. In these cases, if the RRG does not voluntarily supply requested information, the state in which the RRG operates should contact the state of domicile to obtain this information.

The LRRRA requires that RRGs provide a copy of the group's annual CPA audited financial statements to each state in which it does business. However, the LRRRA is silent as to the form (statutory accounting principles or generally accepted accounting principles basis) and timing of the audit report. The laws of the state of domicile determine the type and timing of the report that must be submitted by an RRG.

The statutory examination authority of the state of domicile applies to RRGs. Any state in which an RRG operates may conduct an examination of the RRG if the state of domicile refuses or fails to do so, and provided that any such examination is coordinated to avoid unjustified duplication or repetition.

In a case involving solvency regulation and a non-domiciliary state's rights under the LRRRA, *National Home Insurance Co. v. State Corporation Commission*, 838 F.Supp. 1104 (E.D. Va. 1993), the Colorado domiciled RRG (NHIC) brought suit against the Virginia State Corporation Commission (SCC) to enjoin enforcement of the SCC's order stopping the RRG from writing any new business in Virginia. The SCC issued that order on the basis of the insolvency reported by

NHIC as of 12/31/92. When the SCC order was issued, NHIC and the Colorado Department of Insurance had entered into a stipulation agreement which placed NHIC under the supervision of Colorado while it attempted to correct the insolvency.

The Court dismissed NHIC's request for an injunction against the SCC, finding that, among other things, the LRRRA does not completely preempt state authority to regulate RRGs and that the Virginia Bureau of Insurance did not conduct an examination in reviewing information developed as a result of the chartering state's examination or otherwise publicly available information. Other issues, such as whether the SCC acted in its judicial capacity and whether the SCC's order was properly issued under Virginia law and the LRRRA, were left for resolution by Virginia courts.

In a subsequent ruling concerning the same actions by the SCC against NHIC, the Virginia Supreme Court reversed the order of the State Corporation Commission and vacated the injunction on the grounds that the State Corporation Commission is not a court of competent jurisdiction within the meaning of the LRRRA because it was not independent of the regulatory agency with jurisdiction over RRGs. The Court dismissed the proceeding with leave to the Bureau of Insurance to request the issuance of an injunction in a court of competent jurisdiction. *Nat'l Home Ins. Co. v. Commonwealth*, 44 S.E.2d 711 (Va. 1994).

D. RATE REGULATION

The state of domicile has the primary responsibility for the regulation of the rates charged by an RRG. The state of domicile should recognize that no other state has the authority to disapprove the rates being charged and may want to ask for input from the other states in the review of the rates. However, a state may use inadequate rates as a basis for a court action alleging hazardous financial condition. In any case, the state of domicile should expand its review of rates to include those being charged in all states, not just the state of domicile.

Nondomiciliary states do not have the ability to require RRGs to file rates for approval. However, rates must be included in a group's plan of operation or feasibility study and, after review, the nondomiciliary state may be able to determine whether the RRG will become financially impaired or in hazardous financial condition if the rates are inadequate.

E. POLICY FORM REGULATION

The state of domicile has the primary responsibility for the regulation of the policy forms utilized by an RRG. An RRG is, however, subject to the form and coverage requirements of the motor vehicle no-fault and financial responsibility laws of each state in which it operates and may not write a coverage prohibited in its registered states. With respect to all other coverages, the state of domicile may want to consult with the other states in which an RRG operates as to special policy form considerations. Nondomiciliary states should review the forms to determine if there are any coverages prohibited by that state's laws.

F. MARKETING

The state of domicile has the primary responsibility to ensure RRGs are lawfully marketing their insurance coverage. Under the LRRRA, an RRG may be enjoined by a federal or state court if it solicits or sells insurance to any person who is not eligible for membership in the RRG. All available media, including Internet websites, should be considered when determining an RRG's compliance with this marketing limitation. Any state may require an individual acting as an agent or broker (producer) for the solicitation, negotiation or sale of insurance for an RRG to obtain a license from that state as long as the state does not impose any requirement which discriminates against a nonresident agent or broker.

An example of a website disclaimer follows:

This electronic information is published by XXXXXXXXXXXXXXX, a risk retention group, for educational purposes only and is not intended to be a solicitation or sale of insurance to any person not eligible for membership. Risk retention groups operate under the federal Liability Risk Retention Act of 1986 and provide insurance for the common liability risk exposure of eligible group members. Different state laws may apply.

Policies issued by a risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for risk retention groups. This electronic information is intended solely to provide general information and is not intended to constitute legal advice. If legal advice is desired or needed, an attorney should be consulted.

The LRRRA permits non-domiciliary states to require the policy form of an RRG to contain the following language in 10-point type:

NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group.

Domiciliary states, as a best practice or by statute may require that every application form for insurance from a risk retention group, every certificate issued by a risk retention group, and every policy (on its front and declaration pages) issued by a risk retention group, contain in 12-point bold type the following notice (See Appendix I):

The policy for which you are applying is issued by a risk retention group. The risk retention group may not be subject to all of the insurance laws and regulations of your state of domicile. State insurance insolvency guaranty funds are not available for risk retention groups.

G. RISK RETENTION GROUP AS REINSURER

Under Section 3901(a)(4)(G) of the LRRRA, an RRG cannot engage in any activities which result in its provision of insurance other than the following:

“(i) liability insurance for assuming and spreading all or any portion of the similar or related liability exposure of its group members; and

(ii) reinsurance with respect to the similar or related liability exposure of any other risk retention group (or any member of such other group) which is engaged in businesses or activities so that such group (or member) meets the requirement described in subparagraph (F) for membership in the risk retention group which provides such reinsurance...”

Some states permit RRGs to reinsure policies that are issued by an admitted (licensed) insurance company as the ceding insurer, which then cedes to an RRG as reinsurer all or a substantial

portion of the risk assumed under those policies. Other states have taken the position that the LRRRA does not permit RRGs to enter into reinsurance arrangements with admitted (licensed) ceding insurers.

New NAIC models concerning reinsurance have recently been adopted, whose applicability to RRGs has not been determined. At the 2011 Fall National Meeting, the NAIC adopted revisions to the Credit for Reinsurance Model Law (# 785) and Model Regulation (#786).

H. OTHER ISSUES

1. GUARANTY FUNDS

The LRRRA provides that RRGs cannot be members of guaranty funds. Therefore there is no guaranty fund for protection for RRG members.

2. RESIDUAL MARKET MECHANISMS

Each state can make its own determination as to an RRG's participation in a state's residual market mechanisms. However, participation of an RRG in an assigned risk plan could violate the LRRRA if risks are assigned that are not allowed under the definition of an RRG. Furthermore, it should be noted that an RRG may only insure its members; therefore any assigned risk would need to become an insured and a member.

3. PREMIUM TAXES

Each state is responsible for determining the rate and collection mechanism of premium taxes from RRGs. Some states impose a rate of taxation equal to that levied on authorized insurers while other states impose the rate placed on surplus lines business.

4. DISCRIMINATION AGAINST RRGs

Most cases involving discrimination against RRGs have dealt with the issue of state law financial responsibility requirements which require evidence of financial responsibility for some license or permit to be provided by an authorized insurer (see Section IID). In *Preferred Physician Mut. Risk Retention Group v. Pataki*, risk retention groups organized in Missouri and registered to provide medical malpractice insurance in New York filed suit alleging the New York Excess Insurance Law, which established a mechanism to provide excess insurance coverage to hospital-affiliated physicians, was preempted by the Liability Risk Retention Act. Excess liability coverage under the law was provided through a pool for physicians or dentists who had individual insurance from an insurer licensed in the state. The plaintiffs argued that the Excess Insurance Law was indirect regulation of RRGs in violation of the LRRRA. The Court found it was unclear whether the Excess Insurance Law regulated or discriminated unfairly against RRGs in violation of the Act and remanded the case to determine whether the law did discriminate. The Court found that although there was an economic impact on non-domiciliary RRGs, the impact was not clearly developed. The Court also found there was a material factual dispute as to whether the Excess Insurance Law was enacted with discriminatory intent and remanded the case back to the district court to determine this, as well as whether there was a discriminatory impact. *Preferred Physician Mut. Risk Retention Group v. Pataki*, 85 F.3d 913 (2nd Cir. 1996). See, also, *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154 (M.D. Pa. 1992) (discussed in Section 2D of this Handbook).

5. NONADMITTED & REINSURANCE REFORM ACT OF 2010 (NRRA)

The Nonadmitted & Reinsurance Reform Act of 2010 (NRRA) was enacted into law on July 21, 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. RRGs are exempted from the definition of nonadmitted insurers under the NRRA.

SECTION IV

PURCHASING GROUP AND PURCHASING GROUP INSURER ISSUES

A. INTRODUCTION

A purchasing group (PG) is a group domiciled in any state that has one of its purposes the purchase of liability insurance on a group basis for its members; and which purchases such insurance only for its members and only to cover their similar or related liability exposure. The purchasing group member's liability exposure so insured must arise out of a similar or common business, trade, product, services, premises or operations.

B. PURCHASING GROUP EXEMPTIONS FROM STATE LAWS

The LRRRA's approach as to the preemption of state laws for PGs is quite different from its approach with respect to the preemption from state laws for risk retention groups. As to risk retention groups, Section 3 of the LRRRA broadly preempts state laws and enumerates specific laws that the states may enforce. As to PGs, Section 2 of the LRRRA expressly preempts PGs only from those state laws that are enumerated. Many states have therefore characterized the preemption of state laws applicable to PGs as a limited preemption. The scope of the exemptions from state law apply to the provision of liability coverage, insurance related and management services.

Under the LRRRA, a PG is only exempt from any state law, rule, regulation, or order that would:

- prohibit the establishment of a PG;
- make it unlawful for an insurer to provide or offer to provide liability insurance on a basis that provided to a purchasing group or its members advantages based on their loss and expense experience that are not afforded to other persons with respect to rates, policy forms, coverages, or other matters;
- prohibit a PG or its members from purchasing insurance on a group basis which provides a purchasing group or its members advantages based on their loss and expense experience that are not afforded to other persons with respect to rates, policy forms, coverage, or other matters;
- prohibit a PG from obtaining group liability insurance because it has not been in existence for a minimum period of time or because any member has not belonged to the PG for a minimum period;
- require that a PG have a certain legal form, a minimum number of members, common ownership or affiliation;
- require that a certain percentage of the members of a PG must obtain group liability insurance;
- require that a local agent or broker countersign a policy issued to a PG or any of its members; or
- otherwise discriminate against a PG or its members.

Many of the state laws that are preempted are those that prohibit or limit the creation of groups primarily or solely for the purchase of liability insurance on a group basis.

PGs formed prior to 1986, under the Product Liability Risk Retention Act of 1981 (the predecessor to the LRRRA), are exempted by the LRRRA from registration and designation of state insurance regulators for service of process requirements.

C. PURCHASING GROUP'S INSURER REQUIREMENTS

The LRRRA requires that a PG be "domiciled" in one state but also requires that the insurer providing coverage to the PG must be an admitted (licensed) or eligible surplus (excess) lines insurer in the state where the group is "located." Most states have taken the position that the PG is "located" wherever it has members, or where it does most of its business, regardless of domicile and, therefore, that the insurer must be admitted or comply with surplus lines laws in each state where insured members reside.

Other states have interpreted the word "located" to be synonymous with "domiciled" and only require that the insurer be admitted or authorized in the PG's domiciliary state. States taking this position should determine whether the PG insurer is admitted or surplus lines eligible in the state in which the PG is domiciled.

Several states have been involved in litigation that has influenced how other states regulate PGs as to their placement of insurance with insurers. In the case of *Frontier Insurance Company, Inc. et al. v. William D. Hager, Commissioner of Insurance of the State of Iowa*, #F87-645-E (U.S. District Court for the Southern District of Iowa, 1988), the Federal District Court of Iowa agreed with the Commissioner that the PG was located in each state that it had members. This ruling was partially reversed, however, in an appeal of a companion case, *Swanco Insurance Company v. Hager*, 879 F.2d 353 (8th Cir. 1989), *cert. denied*, 493 U.S. 1057, 110 S. Ct. 866, 107 L.Ed.2d 950 (1990). The Eighth Circuit Court of Appeals determined that the PG was located only in the domiciliary state but that each state in which the PG had members was permitted to apply all laws and regulations not specifically preempted by the LRRRA. The effect of the decision was to continue to permit Iowa to impose its licensing and surplus lines requirements on the carrier providing coverage to group members. The Court stated, "Allowing nondomiciliary states to enforce their licensing and regulatory laws not preempted by Section 4(a) burdens an insurer of a purchasing group no more than any other insurer desiring to market its policies in several states." Accordingly, each state may impose requirements that the insurer be admitted or surplus lines eligible, and meet seasoning requirements. In addition, the agents/brokers of the surplus lines insurer may be required to file affidavits and information for tax purposes.

In the case of *Florida Department of Insurance v. National Amusement Purchasing Group*, 905 F.2d 361 (11th Cir. 1990), the Court followed the *Swanco v. Hager* decision and held that the LRRRA did not preempt the states' rights to regulate the insurers of PGs. The Florida Department of Insurance asserted that pursuant to its statutes, a PG could only purchase coverage on risks located in Florida from: 1) an RRG that is certified or licensed in one of the states of the United States; 2) an authorized insurer; or 3) an eligible surplus lines insurer. Because the PG's insurer, Bel-Aire Insurance Company, was none of the three, Florida asserted that the defendants were transacting insurance business in Florida in violation of the Florida Insurance Code. The Court upheld the authority of the Florida Department of Insurance to require that the PG insurer, as to Florida risks, be admitted or be an eligible surplus lines insurer in Florida.

The above decisions affirm the rights of states to regulate in this area and, therefore, protect policyholders in their jurisdictions.

D. APPLICATION OF EXCESS AND SURPLUS LINES LAWS TO PURCHASING GROUP INSURERS

The LRRRA requires that purchasing groups use licensed agents or brokers when purchasing insurance from eligible surplus line insurers; therefore, direct procurement is not permitted. Many states have excess and surplus lines laws that govern how insurance policies covering risks in the state may be procured from unauthorized insurers. The application of these laws to those insurers providing coverage to PGs was upheld by the *Swanco* case.

Some states have modified the method of obtaining declinations from authorized insurers and/or have simplified the procedures with respect to the submission of the affidavit by the broker and/or excess lines broker. The filing of the modified affidavits is the responsibility of the agent/broker placing the business, unless the state's law provides otherwise.

The Nonadmitted & Reinsurance Reform Act of 2010 (NRRRA) was enacted into law on July 21, 2010 as part of the Dodd-Frank Act. The NRRRA allows a state to enforce its surplus lines laws and require surplus lines taxes only if the insured's home state is that state. However the NRRRA does not address group insurance. Moreover, states have adopted different approaches to what constitutes the insured's home state under the NRRRA. Some have defined home state, in the case of a group policy, as i) when the group policyholder pays 100% of the premium from its own funds, then the insured's home state is the home state of the group policyholder; or ii) when the group policyholder does not pay 100% of the premium from its own funds, then the home state is that of each group member.

E. PURCHASING GROUPS' INSURER POLICY FORMS AND RATES

In the case of *Insurance Company of the State of Pennsylvania v. Corcoran*, 850 F.2d 88 (2d Cir. 1988), a New York licensed insurer challenged the authority of the superintendent of insurance to impose New York form and rate filing requirements upon the insurer's insurance policies covering New York members of a nationwide PG. The United States District Court ruled in favor of New York and dismissed the case and the Second Circuit Court of Appeals affirmed. The Court ruled that Section 3903 of the LRRRA does not exempt an admitted (licensed) insurance company that provides coverage to PGs from state policy form and rate filing requirements mandated upon an admitted (licensed) insurance company, appropriately adjusted in light of a group approach. The Court of Appeals concluded, instead of total preemption, "Congress, ...selected particularized means to that end in conscious recognition that a considerable area of state regulation would remain intact." When applying form and rate filing requirements, states should recognize that a group approach can have certain benefits for members of a PG. For example, a PG may have better than average loss experience that can result from the group's membership standards or from risk management education provided to the members of the PG. Therefore, an insurer can justify charging a lower premium to a PG than it would an individual insured based upon the experience of the PG.

The NAIC Model Risk Retention Act, which has been adopted by many states, provides that no PG may purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole; however, coverage may provide for a deductible or self-insured retention applicable to individual members.

As a result of the court decisions discussed in items C, D and E above, the states have been sustained in their position that the LRRRA has effected a limited preemption of state laws in the PG area.

F. OTHER ISSUES

1. LICENSING OF AGENTS OR BROKERS FOR PURCHASING GROUPS

States may require that PGs use licensed agents or brokers when purchasing liability insurance. When purchasing insurance from eligible surplus lines insurers, the LRRRA requires that purchasing groups use licensed agents or brokers. However, the LRRRA provides that states may not discriminate against nonresident agents or brokers. Therefore, some states have amended their producer licensing laws to remove statutory requirements that nonresident agents or brokers who procure insurance for PGs and their members reside in the state.

2. JURISDICTIONAL ISSUE

Section 4(g) of the LRRRA addresses state powers to enforce state laws specifying that, “[n]othing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.”

However, the Seventh Circuit Court of Appeals in the case of *John J. Dillon v. Ted Allen Combs, and Medical Liability Purchasing Group, Inc.*, 895 F.2d 1175 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 670, 112 L.Ed.2d 633 (1991), determined that federal jurisdiction was improper for claims made by the Indiana commissioner and the department of insurance alleging violations of the LRRRA and state law. The Court found that there was no federal question jurisdiction because Congress did not create a private right of action and where actions in state courts under state law provided authority to enforce the law. Indiana took the position that the PG and its president violated state law and Section 4(f) of the LRRRA by soliciting medical malpractice insurance without using a licensed agent or broker acting pursuant to Indiana’s surplus lines laws. The president of the PG held a license to sell insurance in Indiana and he tried to become licensed to sell insurance on a surplus lines basis, but Indiana turned him down because it had an assigned risk pool for medical malpractice insurance that accepted all applicants. The Court, in remanding the case to the lower court and directing that the complaint be dismissed, made it clear that the states have the power to enforce their own statutes, if they have not been preempted by the LRRRA, in their own courts.

3. HOMOGENEITY REQUIREMENT OF PURCHASING GROUPS

The LRRRA’s definition of “purchasing group” in Section 3901(a)(5) makes references to required elements of homogeneity. These are, in subparagraph (B), that the insurance a PG purchases for its members only covers the group members’ “similar or related liability exposure” as described in subparagraph (C). Subparagraph (C) states that the PG shall be composed of “...members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations.”

G. PREMIUM TAXES

A state may require premium taxes or fees to be paid on PG business on either an admitted basis or a surplus lines basis. The basis that is applied to policies written for members of PGs is dependent upon whether the insurer is admitted in the state and if the state law provides for surplus lines taxes. See discussion in Section IV.D above regarding the NRRRA.

The NAIC has adopted a revised reporting format for use by insurers in reporting business written for PGs on its annual statement. Schedule T of the Property and Casualty Annual Statement

Blank requires premiums written for PGs to be allocated to each state in which members of the group are located in amounts equal to the premiums charged for all members located in that state.

SECTION V

NAIC AND STATE ACTIVITY RELATED TO RISK RETENTION ISSUES

The Property and Casualty Insurance (C) Committee continues to monitor developments involving the LRRRA and responds to proposed changes where appropriate. When issues arise, the Property and Casualty Insurance (C) Committee appoints a working group to assist in analyzing the issues as it has in the past. When no Risk Retention (C) Working Group is appointed, issues related to risk retention groups and purchasing groups should be brought to the attention of the Property and Casualty Insurance (C) Committee.

The first NAIC Risk Retention (C) Working Group, formed in December 1986, was charged with drafting model legislation to implement the LRRRA. To date, 48 states and the District of Columbia have adopted the Model Risk Retention Act in a uniform and substantially similar manner, while two states have enacted similar or related legislation or regulations (Appendix B). In addition to adopting risk retention legislation, states have also assigned individual(s) to monitor and administer the LRRRA in their jurisdiction (Appendix C).

Uniform forms for registration of RRGs and PGs were adopted in December 1989 and revised in June 1991. Use of these uniform forms (Appendices D and E) by nondomiciliary states for the registration of RRGs and PGs seeking to operate in their states is strongly encouraged.

The NAIC Risk Retention (C) Working Group was formed again in 2005 following the Government Accountability Office (GAO) report *Common Regulatory Standards and Greater Member Protections Are Needed (GAO-05-536)*. Following deliberations, the Working Group developed corporate governance standard guidelines applicable to risk retention groups, which were adopted by the Property and Casualty (C) Committee in June 2007 and referred to the Financial Condition (E) Committee for consideration to include the standards in the Property/Casualty Annual Statement Instructions. At that time, the Risk Retention Group (E) Task Force found that the Annual Statement Instructions were not the proper place for this guidance; instead, it should be incorporated into a model law or regulation so that a state insurance department could compel the RRG to comply with these requirements.

The Risk Retention (C) Working Group was charged in 2010 and worked in 2011 to include corporate governance standards in the Model Risk Retention Act (#705). The Financial Regulation Standards and Accreditation (F) Committee is considering making the corporate governance standards part of the NAIC's accreditation program which, if adopted, will likely become effective in 2017.

In 2005, the Financial Condition (E) Committee likewise formed a Risk Retention Group (E) Task Force to coordinate enhanced financial regulation of captive risk retention groups utilizing the NAIC accreditation process. As part of those efforts, in March 2008, the Risk Retention Group (E) Task Force adopted reinsurance guidelines for risk retention groups (Appendix H).

In June 2006, the Risk Retention (C) Working Group decided that domiciliary states can require risk retention groups to disclose in 12 point bold type a notice explaining that risk retention groups may not be subject to all laws and regulations of the state of domicile (Appendix I).

At the 2008 Winter National Meeting, the Financial Condition (E) Committee adopted Part A: Laws and Regulations standards for risk retention groups effective Jan. 1, 2011. The Risk Retention Group (E) Task Force's deliberations on the Part A standards took approximately five years. During that time, some of the NAIC model laws and regulations were revised, but the revisions were not reviewed by the Task Force

until 2009 and 2010. The Committee adopted the Task Force's recommendations that the Part A standards which changed since the initial review were applicable to captive RRGs.

The Property and Casualty Actuarial Opinion Model Law (#745), which became part of an accreditation standard for traditional insurers effective Jan. 1, 2010, and required the filing of an Actuarial Opinion Summary, was determined to be applicable to RRG insurers as well. The 2001 and 2006 revisions to the Annual Financial Reporting Model Regulation (#205), which are currently applicable for traditional insurers, provide additional guidelines on certified public accountants, auditor independence, corporate governance, and internal control over financial reporting and has been determined to be applicable to RRG insurers.

States should also be aware that all RRGs are required to complete the NAIC Annual Statement Blank for Property and Casualty Insurers; however, many risk retention groups report on a Generally Accepted Accounting Principles (GAAP) basis, and provide a reconciliation footnote to Statutory Accounting Practices (SAP). Further, insurers are required to disclose and report the amount of direct written premium for PGs on Schedule T of the NAIC Annual Statement Blank for property/casualty insurers.

For persons interested in additional information about the history of RRGs and PGs, the NAIC Model Risk Retention Act contains a legislative history and a case law summary.

LIABILITY RISK RETENTION ACT OF 1986

15 USC 3901-3906 (1981, as amended 1986)

Sec.

3901. DEFINITIONS.

3902. RISK RETENTION GROUPS.

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- (b) Scope of Exemptions.
- (c) Licensing of Agents or Brokers for Risk Retention Groups.
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- (a) State Motor Vehicle No-Fault and Motor Vehicle Financial Responsibility Laws.
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3906. INJUNCTIVE ORDERS ISSUED BY UNITED STATES DISTRICT COURTS.

§ 3901 DEFINITIONS

- (a) As used in this chapter --
- (1) “insurance” means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable State or Federal law;
 - (2) “liability” --
 - (A) means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to the property, or other damage or loss to such other persons resulting from or arising out of --
 - (i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations, or
 - (ii) any activity of any State or local government, or any agency or political subdivision thereof; and
 - (B) does not include personal risk liability and an employer’s liability with respect to its employees other than legal liability under the Federal Employers’ Liability Act (45 U.S.C. 51 et seq.);
 - (3) “personal risk liability” means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in paragraphs (2)(A) and (2)(B);
 - (4) “risk retention group” means any corporation or other limited liability association --
 - (A) whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;
 - (B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);
 - (C) which --
 - (i) is chartered or licensed as a liability insurance company under the laws of a State and authorized to engage in the business of insurance under the laws of such State; or
 - (ii) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or Cayman Islands and, before such date, had certified to the insurance commissioner of at least one State that it satisfied the capitalization requirements of such State, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide

insurance to cover product liability or completed operations liability (as such terms were defined in this section before the date of the enactment of the Risk Retention Act of 1986);

- (D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;
 - (E) which --
 - (i) has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group; or
 - (ii) has as its sole owner an organization which has as --
 - (I) its members only persons who comprise the membership of the risk retention group; and
 - (II) its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;
 - (F) whose members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;
 - (G) whose activities do not include the provision of insurance other than --
 - (i) liability insurance for assuming and spreading all or any portion of the similar or related liability exposure of its group members; and
 - (ii) reinsurance with respect to the similar or related liability exposure of any other risk retention group (or any member of such other group) which is engaged in businesses or activities so that such group (or member) meets the requirement described in subparagraph (F) for membership in the risk retention group which provides such reinsurance; and
 - (H) the name of which includes the phrase “Risk Retention Group.”
- (5) “purchasing group” means any group which --
- (A) has as one of its purposes the purchase of liability insurance on a group basis;
 - (B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);
 - (C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by

virtue of any related, similar, or common business, trade, product, services, premises, or operations; and

- (D) is domiciled in any State;
- (6) “State” means any State of the United States or the District of Columbia; and
- (7) “hazardous financial condition” means that, based on its present or reasonably anticipated financial condition, a risk retention group is unlikely to be able --
 - (A) to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
 - (B) to pay other obligations in the normal course of business.
- (b) Nothing in this chapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State, and the definitions of liability, personal risk liability, and insurance under any State law shall not be applied for the purposes of this chapter, including recognition or qualification of risk retention groups or purchasing groups.

§ 3902 RISK RETENTION GROUPS

- (a) Exemptions from State laws, rules, regulations, or orders

Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would --

- (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may required such a group to --
 - (A) comply with the unfair claim settlement practices law of the State;
 - (B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;
 - (C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;
 - (D) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process;
 - (E) submit to an examination by the Sate insurance commissioner in any State in which the group is doing business to determine the group’s financial condition, if --
 - (i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

- (ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;
- (F) comply with a lawful order issued --
 - (i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or
 - (ii) in a voluntary dissolution proceeding;
- (G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in the subparagraph, such injunction must be obtained from court of competent jurisdiction;
- (H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and
- (I) provide the following notice, in 10 point type, in any insurance policy led by such group:

“NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group.”

- (2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;
 - (3) require an insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that State; or
 - (4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.
- (b) Scope of exemptions

The exemptions specified in subsection (a) of this section apply to laws governing the insurance business pertaining to --

- (1) liability insurance coverage provided by a risk retention group for --
 - (A) such group; or
 - (B) any person who is a member of such group;
- (2) the sale of liability insurance coverage for a risk retention group; and

- (3) the provision of --
 - (A) insurance related services;
 - (B) management, operations, and investment activities; or
 - (C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance.

Licensing of agents or brokers for risk retention groups

- (c) A State may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.
- (d) Documents for submission to State insurance commissioners

Each risk retention group shall submit --

- (1) to the insurance commissioner of the State in which it is chartered --
 - (A) before it may offer insurance in any State, a plan of operation or a feasibility study which includes the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer; and
 - (B) revisions of such plan or study if the group intends to offer any additional lines of liability insurance;
- (2) to the insurance commissioner of each State in which it intends to do business, before it may offer insurance in such State --
 - (A) a copy of such plan or study (which shall include the name of the State in which it is chartered and its principal place of business); and
 - (B) a copy of any revisions to such plan or study, as provided in paragraph (1)(B) (which shall include any change in the designation of the State in which it is chartered); and
- (3) to the insurance commissioner of each State in which it is doing business, a copy of the group's annual financial statement submitted to the State in which the group is chartered as an insurance company, which statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by --
 - (A) a member of the American Academy of Actuaries, or
 - (B) a qualified loss reserve specialist.

(e) Power of courts to enjoin conduct

Nothing in this section shall be construed to affect the authority of any Federal or State court to enjoin --

- (1) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; or
- (2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

(f) State powers to enforce State laws

- (1) Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2) nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter.
- (2) If a State seeks an injunction regarding the conduct described in paragraphs (1) and (2) of subsection (e) of this section, such injunction must be obtained from a Federal or State court of competent jurisdiction.

(g) States' authority to sue

Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

(h) State authority to regulate or prohibit ownership interests in risk retention groups

Nothing in this chapter shall be construed to affect the authority of any State to regulate or prohibit the ownership interest in a risk retention group by an insurance company in that State, other than in the case of ownership interest in a risk retention group whose members are insurance companies.

§ 3903 PURCHASING GROUPS

(a) Exemptions from State laws, rules, regulations, or orders

Except as provided in this section and section 3095 of this title, a purchasing group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation or order would --

- (1) prohibit the establishment of a purchasing group;
- (2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;
- (3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;

- (4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;
 - (5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;
 - (6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;
 - (7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State; or
 - (8) otherwise discriminate against a purchasing group or any of its members.
- (b) Scope of exemptions

The exemptions specified in subsection (a) of this section apply to --

- (1) liability insurance, provided to --
 - (A) a purchasing group; or
 - (B) any person who is a member of a purchasing group; and
- (2) the provision of --
 - (A) liability coverage;
 - (B) insurance related services; or
 - (C) management services;

to a purchasing group or member of the group.

Licensing of agents or brokers for purchasing groups

- (c) A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.
- (d) Notice to State insurance commissioners of intent to do business
 - (1) A purchasing group which intends to do business in any State shall furnish notice of such intention to the insurance commissioner of such State. Such notice --
 - (A) shall identify the State in which such group is domiciled;
 - (B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;
 - (C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(D) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such State as to any subsequent charges in any of the items provided in such notice.

(e) Designation of agent for service of documents and process

A purchasing group shall register with and designate the State insurance commissioner of each State in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group --

(1) which --

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after September 25, 1981; in any State of the United States;

(2) which --

(A) before September 25, 1981, purchased insurance from an insurance carrier licensed in any State; and

(B) since September 25, 1981, purchases its insurance from an insurance carrier licensed in any State;

(3) which was a purchasing group under the requirements of this chapter before October 27, 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this chapter as in effect before October 27, 1986.

(f) Purchases of insurance through licensed agents or brokers acting pursuant to surplus lines laws

A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State.

(g) State powers to enforce State laws

Nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.

(h) States' authority to sue

Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

- (a) Ownership interests of members in risk retention groups

The ownership interests of members in a risk retention group shall be --

- (1) considered to be exempted securities for purposes of section 77e of this title and for purposes of section 78l of this title; and
- (2) considered to be securities for purposes of the provisions of section 77q of this title and the provisions of section 78j of this title.

- (b) Investment companies

A risk retention group shall not be considered to be an investment company for purposes of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

- (c) State blue sky laws

The ownership interests of members in a risk retention group shall not be considered securities for purposes of any State blue sky law.

§ 3905 CLARIFICATION CONCERNING PERMISSIBLE STATE AUTHORITY

- (a) State motor vehicle no-fault and motor vehicle financial responsibility laws

Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.

- (b) Applicability of exemptions

The exemptions provided under this chapter shall apply only to the provision of liability insurance by a risk retention group or the purchase of liability insurance by a purchasing group, and nothing in this chapter shall be construed to permit the provision or purchase of any other line of insurance by any such group.

- (c) Prohibited insurance policy coverage

The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.

- (d) State authority to specify acceptable means of establishing financial responsibility

Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

§ 3906 INJUNCTIVE ORDERS ISSUED BY UNITED STATES DISTRICT COURTS

Any district court of the United States may issue an order enjoining a risk retention group from soliciting or selling insurance, or operating, in any State (or in all States) or in any territory or possession of the United States upon a finding of such court that such group is in hazardous financial condition. Such order shall be binding on such group, its officers, agents, and employees, and on any other person acting in active concert with any such officer, agent, or employee, if such other person has actual notice of such order.

(Pub.L. 97-45, § 7, as added Pub.L. 99-563, § 9, Oct. 27, 1986, 100 Stat. 3176).

Legislative History. For legislative history and purpose of Pub.L. 99-563, see 1986 U.S. Code Cong. and Adm. News, p. 5303.

Sec. 10 PL 99-563

MODEL RISK RETENTION ACT**Table of Contents**

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Section 1. Purpose

The purpose of this Act is to regulate the formation and/or operation of risk retention groups and purchasing groups in this State formed pursuant to the provisions of the federal Liability Risk Retention Act of 1986 (“RRA 1986”), to the extent permitted by such law.

Section 2. Definitions

As used in this Act

- A. “Commissioner” [director, superintendent] means the insurance commissioner [director, superintendent] of [insert name of state] or the commissioner, director or superintendent of insurance in any other state;
- B. “Completed operations liability” means liability arising out of the installation, maintenance or repair of any product at a site which is not owned or controlled by
 - (1) Any person who performs that work; or
 - (2) Any person who hires an independent contractor to perform that work; but shall include liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability;

Drafting Note: The definition of “completed operations liability” is taken from the definition in the Product Liability Risk Retention Act of 1981 (Product Liability RRA 1981) Section 2(a)(1). A purpose of RRA 1986 was to expand the permissible coverage offered by risk retention groups from product liability and completed operations to general liability insurance, as further defined in RRA 1986. Some risk retention groups that were chartered under the Product Liability RRA 1981 are “grandfathered” by RRA 1986 to the extent that they can continue to provide product liability and completed operations coverage if they meet the criteria established by RRA 1986. The definitions relating to product liability and completed operations coverage, therefore, are relevant to any such groups which may continue to so operate.

- C. “Domicile”, for purposes of determining the state in which a purchasing group is domiciled, means
- (1) For a corporation, the state in which the purchasing group is incorporated; and
 - (2) For an unincorporated entity, the state of its principal place of business;
- D. “Hazardous financial condition” means that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able
- (1) To meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
 - (2) To pay other obligations in the normal course of business;

Drafting Note: The definition of “hazardous financial condition” stipulates that a regulator, in looking at the financial condition of a risk retention group, can base his conclusions on reasonable expectations of future performance. In determining the present or reasonably anticipated financial condition of a risk retention group, the commissioner may utilize all relevant financial tests, ratios and other factors used in determining the financial condition of authorized insurers, including an analysis of actuarial soundness of rates charged.

- E. “Insurance” means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under the laws of this state;

Drafting Note: Definition taken from RRA 1986 Section 2(a)(1).

- F. “Liability”
- (1) Means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of
 - (a) Any business (whether profit or nonprofit), trade, product, services (including professional services), premises or operations; or
 - (b) Any activity of any state or local government, or any agency or political subdivision thereof; and

Drafting Note: A state may specify acceptable means for managing the liability of the state or its local governments, or any agency or political subdivision thereof, by including or excluding insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source; or through a broker, agent, purchasing group, or any other person. Similarly, a state may specify acceptable means of demonstrating financial responsibility as a condition for obtaining a license or permit to undertake specified activities pursuant to Section 6(d), RRA 1986.

- (2) Does not include personal risk liability and an employer’s liability with respect to its employees other than legal liability under the Federal Employers’ Liability Act (45 U.S.C. 51 et seq.);
- G. “Personal risk liability” means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in Subsection F;

- H. “Plan of operation” or “feasibility study” means an analysis which presents the expected activities and results of a risk retention group including, at a minimum;
- (1) Information sufficient to verify that its members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar or common business, trade, product, services, premises or operations;
 - (2) For each state in which it intends to operate, the coverages, deductibles, coverage limits, rates and rating classification systems for each line of insurance the group intends to offer;
 - (3) Historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that this experience is reasonably available;
 - (4) Pro forma financial statements and projections;
 - (5) Appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;
 - (6) Identification of management, underwriting and claims procedures, marketing methods, managerial oversight methods, investment policies and reinsurance agreements;
 - (7) Identification of each state in which the risk retention group has obtained, or sought to obtain, a charter and license, and a description of its status in each such state; and
 - (8) Such other matters as may be prescribed by the commissioner of the state in which the risk retention group is chartered for liability insurance companies authorized by the insurance laws of that state;
- I. “Product liability” means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of such a person when the incident giving rise to the claim occurred;

Drafting Note: The definition of “product liability” is identical to that contained in Product Liability RRA 1981, Section 2(a)(3), for a “grandfathered” risk retention group. See Drafting Note following Subsection 2B of this Act.

- J. “Purchasing group” means any group which
- (1) Has as one of its purposes the purchase of liability insurance on a group basis;
 - (2) Purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in Paragraph (3);

- (3) Is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and
- (4) Is domiciled in any state;

Drafting Note: The Product Liability RRA 1981 contained a very loose definition of “purchasing group.” RRA 1986 offers a more restrictive definition of those groups that can qualify as “purchasing groups.” A purchasing group must only offer liability insurance to its group members, and the insurance must cover their similar or related liability exposure. Further, the group members must have businesses or activities that are similar or related with respect to the liability to which group members are exposed. Finally, the purchasing group must be domiciled in one of the states of the United States, i.e., it cannot be domiciled offshore.

K. “Risk retention group” means any corporation or other limited liability association:

- (1) Whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;
- (2) Which is organized for the primary purpose of conducting the activity described under Paragraph (1);
- (3) Which
 - (a) Is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state; or
 - (b) Before January 1, 1985 was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before such date, had certified to the insurance commissioner of at least one state that it satisfied the capitalization requirements of such state, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since that date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as such terms were defined in the Product Liability Risk Retention Act of 1981 before the date of the enactment of the Liability Risk Retention Act of 1986);
- (4) Which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;
- (5) Which
 - (a) Has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group; or
 - (b) Has as its sole owner an organization which has as
 - (i) Its members only persons who comprise the membership of the risk retention group; and

- (ii) Its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;
- (6) Whose members are engaged in businesses or activities similar or related with respect to the liability of which such members are exposed by virtue of any related, similar or common business trade, product, services, premises or operations;
- (7) Whose activities do not include the provision of insurance other than
 - (a) Liability insurance for assuming and spreading all or any portion of the liability of its group members; and
 - (b) Reinsurance with respect to the liability of any other risk retention group (or any members of such other group) which is engaged in businesses or activities so that the group or member meets the requirement described in Paragraph 6 from membership in the risk retention group which provides such reinsurance; and
- (8) The name of which includes the phrase “Risk Retention Group;”

Drafting Note: RRA 1986 changes the definition of “risk retention group” by further restricting the permissible membership and its activities. A risk retention group must be chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of one of the fifty states unless it qualifies under the “grandfather” provision of Subsection K(3)(b). In that event, it may only continue to provide product liability or completed operation coverage.

Each of the members of the group must have an “ownership interest” in the group. In addition, all owners must be provided insurance by the group. One purpose of this requirement is to prevent participation by third parties which may not be interested in the specific insurance problems of group members but merely may be interested in making a profit. The single exception to this requirement is when the sole member and sole owner of the organization is an entity consisting of persons, each of whom is a member of the risk retention group and is provided insurance by the group.

The members “who are also the owners” are required to be engaged in businesses or activities “similar or related with respect to the liability to which they are exposed by virtue of any related, similar, or common business, trade, product, services, premises or operation.” This restriction is for the purpose of requiring substantial identity among the members (who are also the owners and insureds) in regard to the nature of the risks faced.

A risk retention group may not provide insurance other than liability insurance. Further, it can only provide reinsurance to another risk retention group if all of that group’s members would qualify for membership in the risk retention group offering the reinsurance. This provision was designed to restrict a risk retention group to only reinsuring its own risks or the similar risks of similarly situated businesses. For example, a risk retention group whose membership consists of grocery store owners, could not reinsure a risk retention group whose membership consists of hazardous waste transporters.

The risk retention group must be chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of one of the fifty states unless it qualifies under the “grandfather” provision of Subsection K(3)(b).

- L. “State” means any state of the United States or the District of Columbia.

Section 3. Risk Retention Groups Chartered in this State

- A. (1) A risk retention group shall, pursuant to the provisions of Section [insert appropriate reference to Insurance Law], be chartered and licensed to write only liability insurance pursuant to this Act and, except as provided elsewhere in this Act, must comply with all of the laws, rules, regulations and requirements applicable to insurers chartered and licensed in this state and with Section 4 of this Act to the extent such requirements are not a limitation on laws, rules, regulations or requirements of this state.
- (2) Notwithstanding any other provision to the contrary, all risk retention groups chartered in this state shall file with the department and the National Association of Insurance Commissioners (NAIC), an annual statement in a form prescribed by the NAIC and in diskette form, if required by the Commissioner and completed in accordance with its instructions and the NAIC Accounting Practices and Procedures Manual.
- B. Before it may offer insurance in any state, each risk retention group shall also submit for approval to the insurance commissioner of this state a plan of operation or feasibility study. The risk retention group shall submit an appropriate revision in the event of any subsequent material change in any item of the plan of operation or feasibility study, within ten (10) days of any such change. The group shall not offer any additional kinds of liability insurance, in this state or in any other state, until a revision of the plan or study is approved by the commissioner.
- C. At the time of filing its application for charter, the risk retention group shall provide to the commissioner in summary form the following information: the identity of the initial members of the group, the identity of those individuals who organized the group or who will provide administrative services or otherwise influence or control the activities of the group, the amount and nature of initial capitalization, the coverages to be afforded, and the states in which the group intends to operate. Upon receipt of this information, the commissioner shall forward the information to the National Association of Insurance Commissioners. Providing notification to the NAIC is in addition to and shall not be sufficient to satisfy the requirements of Section 4 or any other sections of this Act.
- D. Governance Standards For Risk Retention Groups - Within a year of the effective date of this Act, existing risk retention groups shall be in compliance with the following Governance Standards. New risk retention groups shall be in compliance with the standards at the time of licensure.
- (1) Board of Directors – The “board of directors” or “board” as used in this section, means the governing body of the risk retention group elected by the shareholders or members to establish policy, elect or appoint officers and committees, and make other governing decisions. “Director” as used in this section, means a natural person designated in the articles of the risk retention group, or designated, elected or appointed by any other manner, name or title to act as a director.
- (a) Independent Directors The board of directors of the risk retention group shall have a majority of independent directors. If the risk retention group is a reciprocal, then the attorney-in-fact would be required to adhere to the same standards regarding independence of

operation and governance as imposed on the risk retention group's board of directors/subscribers advisory committee under these standards; and, to the extent permissible under state law, service providers of a reciprocal risk retention group should contract with the risk retention group and not the attorney-in-fact.

- (i) No director qualifies as “independent” unless the board of directors affirmatively determines that the director has no “material relationship” with the risk retention group. Each risk retention group shall disclose these determinations to its domestic regulator, at least annually. For this purpose, any person that is a direct or indirect owner of or subscriber in the risk retention group (or is an officer, director and/or employee of such an owner and insured, unless some other position of such officer, director and/or employee constitutes a “material relationship”), as contemplated by Section 3901(a)(4)(E)(ii) of the Liability Risk Retention Act, is considered to be “independent.”
- (b) “Material relationship” of a person with the risk retention group includes, but is not limited to:
 - (i) The receipt in any one 12-month period of compensation or payment of any other item of value by such person, a member of such person's immediate family or any business with which such person is affiliated from the risk retention group or a consultant or service provider to the risk retention group is greater than or equal to five percent (5%) of the risk retention group's gross written premium for such 12-month period or two percent (2%) of its surplus, whichever is greater, as measured at the end of any fiscal quarter falling in such a 12-month period. Such person or immediate family member of such person is not independent until one year after his/her compensation from the risk retention group falls below the threshold.
 - (ii) A relationship with an auditor as follows: a director or an immediate family member of a director who is affiliated with or employed in a professional capacity by a present or former internal or external auditor of the risk retention group is not independent until one year after the end of the affiliation, employment or auditing relationship.
 - (iii) A relationship with a related entity as follows: a director or immediate family member of a director who is employed as an executive officer of another company where any of the risk retention group's present executives serve on that other company's board of directors is not independent until one year after the end of such service or the employment relationship.

- (2) **Service Provider Contracts** The term of any material service provider contract with the risk retention group shall not exceed five (5) years. Any such contract, or its renewal, shall require the approval of the majority of the risk retention group's independent directors. The risk retention group's board of directors shall have the right to terminate any service provider, audit or actuarial contracts at any time for cause after providing adequate notice as defined in the contract. The service provider contract is deemed material if the amount to be paid for such contract is greater than or equal to five percent (5%) of the risk retention group's annual gross written premium or two percent (2%) of its surplus, whichever is greater.
- (a) For purposes of this standard, "service providers" shall include captive managers, auditors, accountants, actuaries, investment advisors, lawyers, managing general underwriters or other party responsible for underwriting, determination of rates, collection of premium, adjusting and settling claims and/or the preparation of financial statements. Any reference to 'lawyers' in the prior sentences does not include defense counsel retained by the risk retention group to defend claims, unless the amount of fees paid to such lawyers are 'material' as referenced in Section (1)(B) above.
- (b) No service provider contract meeting the definition of "material relationship" contained in Section (1)(B) shall be entered into unless the risk retention group has notified the Commissioner in writing of its intention to enter into such transaction at least 30 days prior thereto and the Commissioner has not disapproved it within such period.

Drafting note: For the sake of clarity, the domestic Commissioner's authority is included in this subpart. Some states may prefer the Commissioner's authority as included in this subpart be enacted in Section 11 "Administrative and Procedural Authority Regarding Risk Retention Groups and Purchasing Groups."

- (3) **Written Policy** The risk retention group's board of directors shall adopt a written policy in the plan of operation as approved by the board that requires the board to:
- (a) assure that all owner/insureds of the risk retention group receive evidence of ownership interest;
- (b) develop a set of governance standards applicable to the risk retention group;
- (c) oversee the evaluation of the risk retention group's management including but not limited to the performance of the captive manager, managing general underwriter or other party or parties responsible for underwriting, determination of rates, collection of premium, adjusting or settling claims or the preparation of financial statements;
- (d) review and approve the amount to be paid for all material service providers; and
- (e) review and approve, at least annually:

- (i) risk retention group's goals and objectives relevant to the compensation of officers and service providers;
 - (ii) the officers' and service providers' performance in light of those goals the and objectives; and,
 - (iii) the continued engagement of the officers and material service providers.
- (4) Audit Committee The risk retention group shall have an audit committee composed of at least three independent board members as defined in Section (1). A non-independent board member may participate in the activities of the audit committee, if invited by the members, but cannot be a member of such committee.
- (a) The audit committee shall have a written charter that defines the committee's purpose, which, at a minimum, must be to:
 - (i) assist board oversight of (1) the integrity of the financial statements, (2) the compliance with legal and regulatory requirements, and (3) the qualifications, independence and performance of the independent auditor and actuary;
 - (ii) discuss the annual audited financial statements and quarterly financial statements with management;
 - (iii) discuss the annual audited financial statements with its independent auditor and, if advisable, discuss its quarterly financial statements with its independent auditor;
 - (iv) discuss policies with respect to risk assessment and risk management;
 - (v) meet separately and periodically, either directly or through a designated representative of the committee, with management and independent auditors;
 - (vi) review with the independent auditor any audit problems or difficulties and management's response;
 - (vii) set clear hiring policies of the risk retention group as to the hiring of employees or former employees of the independent auditor;
 - (viii) require the external auditor to rotate the lead (or coordinating) audit partner having primary responsibility for the risk retention group's audit as well as the audit partner responsible for reviewing that audit so that neither individual performs audit services for more than five (5) consecutive fiscal years; and
 - (ix) report regularly to the board of directors.

- (b) The domestic regulator may waive the requirement to establish an audit committee composed of independent board members if the risk retention group is able to demonstrate to the domestic regulator that it is impracticable to do so and the risk retention group's board of directors itself is otherwise able to accomplish the purposes of an audit committee, as described in Section (4)(a).

Drafting Note: As an alternative to subsection four "Audit Committee", the state may substitute the NAIC audit provisions applicable to traditional insurers.

Drafting Note: As an alternative to Section 4(b), the state may substitute "If an audit committee is not designated by the insurer, the insurer's entire board of directors shall constitute the audit committee."

- (5) **Governance Standards** The board of directors shall adopt and disclose governance standards, where "disclose" means making such information available through electronic (e.g., posting such information on the risk retention group's website) or other means, and providing such information to members/insureds upon request, which shall include:
 - (a) a process by which the directors are elected by the owner/insureds;
 - (b) director qualification standards;
 - (c) director responsibilities;
 - (d) director access to management and, as necessary and appropriate, independent advisors;
 - (e) director compensation;
 - (f) director orientation and continuing education;
 - (g) the policies and procedures that are followed for management succession; and
 - (h) the policies and procedures that are followed for annual performance evaluation of the board.
- (6) **Business Conduct and Ethics** The board of directors shall adopt and disclose a code of business conduct and ethics for directors, officers and employees and promptly disclose to the board of directors any waivers of the code for directors or executive officers, which should include the following topics:
 - (a) conflicts of interest;
 - (b) matters covered under the corporate opportunities doctrine under the state of domicile;
 - (c) confidentiality;
 - (d) fair dealing;
 - (e) protection and proper use of risk retention group assets;
 - (f) compliance with all applicable laws, rules and regulations; and

- (g) requiring the reporting of any illegal or unethical behavior which affects the operation of the risk retention group.
- (7) Reporting Non-Compliance The captive manager, president or chief executive officer of the risk retention group shall promptly notify the domestic regulator in writing if either becomes aware of any material non-compliance with any of these governance standards.

Drafting Note: RRA 1986 allows for the chartering state to apply the full range of its insurance laws to a risk retention group wishing to charter in that state, except for requiring participation in the guaranty fund. The language of this section is derived from Product Liability RRA 1981 Section 3(a)(1) (which was not amended by RRA 1986 as it relates to this issue). The function of the office of the National Association of Insurance Commissioners shall be solely to provide administrative services for its member states and territories. Although RRA 1986 specifically requires that the phrase “Risk Retention Group” be included in the name, the chartering state is not precluded from prohibiting the use of deceptive or misleading words, designations or phrases in the name. Further, a state may require a risk retention group it charters and licenses to locate books and records or administrative functions within that state to the same extent it imposes those requirements on its domestic insurers.

Section 4. Risk Retention Groups Not Chartered in this State

Risk retention groups chartered and licensed in states other than this state and seeking to do business as a risk retention group in this state shall comply with the laws of this state as follows:

Drafting Note: RRA of 1986 exempts a risk retention group from any state law regarding its operation in a state in which it is not domiciled except those laws referred to in RRA 1986. The state of domicile, however, retains under that section the full authority to regulate the formation and operation of the group.

However, if a risk retention group fails to qualify under the definitional requirement of RRA 1986, it will not benefit from this exemption from state law. The commissioner, therefore, would be authorized to apply any of the laws that may be preempted by RRA 1986 because the group will not qualify for the preemption.

A. Notice of Operations and Designation of Commissioner as Agent.

- (1) Before offering insurance in this state, a risk retention group shall submit to the commissioner on a form prescribed by the NAIC:
 - (a) A statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, charter date, its principal place of business, and such other information, including information on its membership, as the commissioner of this state may require to verify that the risk retention group is qualified under Section 2K of this Act;

Drafting Note: The commissioner may need to take appropriate action in order to preserve the confidentiality of any proprietary or other confidential information, such as lists identifying the specific members of the group and their location.

- (b) A copy of its plan of operations or feasibility study and revisions of such plan or study submitted to the state in which the risk retention group is chartered and licensed; provided, however, that the provision relating to the submission of a plan of operation or feasibility study shall not apply with respect to any line or classification of liability insurance which:
 - (i) Was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986; and

- (ii) Was offered before that date by any risk retention group which had been chartered and operating for not less than three (3) years before that date; and
- (2) The risk retention group shall submit a copy of any material revision to its plan of operation or feasibility study required by Section 3B of this Act within 30 days of the date of the approval of such revision by the commissioner of its chartering state, or if no such approval is required, within 30 days of filing.

Drafting Note: The plan of operations or feasibility study required under this provision is that submitted to and accepted by the chartering state.

- (3) The risk retention group shall submit a statement of registration, for which a filing fee shall be determined by the commissioner, which designates the commissioner as its agent for the purpose of receiving service of legal documents or process.
- B. Financial Condition. Any risk retention group doing business in this state shall submit to the commissioner:
- (1) A copy of the group's financial statement submitted to the state in which the risk retention group is chartered and licensed which shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a qualified loss reserve specialist (under criteria established by the National Association of Insurance Commissioners);
 - (2) A copy of each examination of the risk retention group as certified by the commissioner or public official conducting the examination;
 - (3) Upon request by the commissioner, a copy of any information or document pertaining to any outside audit performed with respect to the risk retention group; and
 - (4) Such information as may be required to verify its continuing qualification as a risk retention group under Section 2K.

Drafting Note: RRA 1986 also added the opportunity for a state to require that a risk retention group submit a notice of operations and financial condition. The purpose of this provision is to require a risk retention group to give the commissioner of any state in which it intends to operate adequate notice of its intended activity and financial condition so that the commissioner can take appropriate action if the possibility of a potential insolvency or commercial abuse exists.

C. Taxation.

- (1) Each risk retention group shall be liable for the payment of premium taxes and taxes on premiums of direct business for risks resident or located within this state, and shall report to the commissioner the net premiums written for risks resident or located within this state. The risk retention group shall be subject to taxation, and any applicable fines and penalties related thereto, on the same basis as a foreign admitted insurer.
- (2) To the extent licensed agents or brokers are utilized pursuant to Section 12 of this Act, they shall report to the commissioner the premiums for direct business for risks resident or located within this state which the licensees

have placed with or on behalf of a risk retention group not chartered in this state.

- (3) To the extent that insurance agents or brokers are utilized pursuant to Section 12 of this Act, each agent or broker shall keep a complete and separate record of all policies procured from each risk retention group, which record shall be open to examination by the commissioner, as provided in [insert appropriate reference to Insurance Law]. These records shall, for each policy and each kind of insurance provided thereunder, include the following:
- (a) The limit of liability;
 - (b) The time period covered;
 - (c) The effective date;
 - (d) The name of the risk retention group which issued the policy;
 - (e) The gross premium charged; and
 - (f) The amount of return premiums, if any.

Drafting Note: RRA 1986 does not specify which premium tax rate will be applied. The NAIC has recommended applying the rate for foreign admitted insurers; some states, however, may apply the surplus lines rate.

- D. Compliance with Unfair Claims Settlement Practices Law. Any risk retention group, its agents and representatives shall comply with the Unfair Claims Settlement Practices Act of this state, [insert section of the Insurance Code].

Drafting Note: The provisions regarding the liability of risk retention groups to state taxation, compliance with the unfair claims settlement practices law, and registration and designation of the commissioner as agent for purpose of service of process were included in the Product Liability RRA 1981 and continued in RRA 1986.

- E. Deceptive, False, or Fraudulent Practices. Any risk retention group shall comply with the laws of this state, [insert sections of the Insurance Code], regarding deceptive, false or fraudulent acts or practices. However, if the commissioner seeks an injunction regarding such conduct, the injunction must be obtained from a court of competent jurisdiction.

Drafting Note: The provision regarding compliance with state laws regarding deceptive, false or fraudulent practices was added by RRA 1986. The chartering state retains all of its authority to deal with an unfair trade practice under all its laws generally, including its insurance law. However, the 1986 Act preempts those portions of non-chartering states' Unfair Trade Practices Acts contained in their insurance laws that relate to methods of competition and acts or practices that are unfair, if such methods, acts or practices are not also deceptive. Nonetheless, state antitrust and state unfair practice laws which apply to commerce generally are applicable and are not preempted by the federal law.

- F. Examination Regarding Financial Condition. Any risk retention group must submit to an examination by the commissioner to determine its financial condition if the commissioner of the jurisdiction in which the group is chartered and licensed has not initiated an examination or does not initiate an examination within sixty (60) days after a request by the commissioner of this state. Any such examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the NAIC's Examiner Handbook.

Drafting Note: A provision regarding submission to examination by the nondomiciliary state was included in the Product Liability RRA 1981. However, it was modified to eliminate the requirement that the commissioner had "reason to believe" the

risk retention group was in a financially impaired condition. This deletion gives the commissioner greater latitude in requiring the group to submit to an examination.

- G. Notice to Purchasers. Every application form for insurance from a risk retention group, and every policy (on its front and declaration pages) issued by a risk retention group, shall contain in ten (10) point type the following notice:

NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group.

Drafting Note: A provision regarding the notice to purchasers concerning the limitation of regulatory oversight of risk retention groups and the lack of insolvency guaranty fund protection was added by RRA 1986. The purpose is to allow the states to require minimal disclosure to consumers.

- H. Prohibited Acts Regarding Solicitation or Sale. The following acts by a risk retention group are hereby prohibited:
- (1) The solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; and
 - (2) The solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or financially impaired.

Drafting Note: The provision regarding the prohibition of solicitation or sale of insurance by the risk retention group to any person who is not eligible for membership or by a group that is in hazardous financial condition or financially impaired was included in RRA 1986 for the purpose of enhancing state regulatory authority. These provisions have not been included in state insurance codes due to the limitation on the coverages permissibly offered under the Product Liability RRA 1981. This provision is not intended to limit those acts against which a commissioner can take action but rather to expand those acts by identifying acts that would not have been violations of the law prior to the passage of RRA 1986.

- I. Prohibition on Ownership by an Insurance Company. No risk retention group shall be allowed to do business in this state if an insurance company is directly or indirectly a member or owner of such risk retention group, other than in the case of a risk retention group all of whose members are insurance companies.

Drafting Note: The prohibition on ownership by an insurance company of a risk retention group was added by RRA 1986 for the purpose of limiting the involvement of fully regulated insurance companies in risk retention groups. The states should also amend the appropriate licensing law applying to authorized insurers to include a similar prohibition. The Congress believed that this was a method to avoid the possibility that fully regulated companies would choose the Risk Retention Act as a vehicle to avoid full regulation.

- J. Prohibited Coverage. The terms of any insurance policy issued by any risk retention group shall not provide, or be construed to provide, coverage prohibited generally by statute of this state or declared unlawful by the highest court of this state whose law applies to such policy.

Drafting Note: The provision regarding prohibited coverages was added by RRA 1986 for the purpose of enabling a state to regulate the coverages that could be offered within its borders. The Congress believed that this was a matter of public policy to be determined by each state.

- K. Delinquency Proceedings. A risk retention group not chartered in this state and doing business in this state shall comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by a state insurance commissioner if there has been a finding of financial impairment after an examination under Section 4F of this Act.

- L. Penalties. A risk retention group that violates any provision of this Act will be subject to fines and penalties including revocation of its right to do business in this state, applicable to licensed insurers generally.
- M. Operation Prior to Enactment of this Act. In addition to complying with the requirements of this section, any risk retention group operating in this state prior to enactment of this Act shall, within thirty (30) days after the effective date of this Act, comply with the provision of Subsection A(1) of this section.

Drafting Note: A risk retention group which qualifies under the grandfather provision contained in Section 2K(3)(b) is exempt from Subsection M above, so long as it only offers product liability or completed operations coverage.

Section 5. Compulsory Associations

- A. No risk retention group shall be required or permitted to join or contribute financially to any insurance insolvency guaranty fund, or similar mechanism, in this state, nor shall any risk retention group, or its insureds or claimants against its insureds, receive any benefit from any such fund for claims arising under the insurance policies issued by a risk retention group.
- B. When a purchasing group obtains insurance covering its members' risks from an insurer not authorized in this state or a risk retention group, no such risks, wherever resident or located, shall be covered by any insurance guaranty fund or similar mechanism in this state.
- C. When a purchasing group obtains insurance covering its members' risks from an authorized insurer, only risks resident or located in this state shall be covered by the state guaranty fund subject to [insert appropriate reference to Insurance Law].
- D. (OPTIONAL) Notwithstanding [insert appropriate references to JUA provisions], the commissioner may require or exempt a risk retention group from participation in any mechanism established or authorized under the law of this state for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism, and such risk retention group shall submit sufficient information to the commissioner to enable the commissioner to apportion on a nondiscriminatory basis the risk retention group's proportionate share of such losses and expenses.

Drafting Note: Product Liability RRA Section 3(a)(2) specifically exempts risk retention groups from participation in the state guaranty fund. Section 3(a)(1)(C) of RRA 1986 permits a state to require that a risk retention group participate in JUAs or similar mechanisms on a nondiscriminatory basis. In making such a determination, each state should take into account the different considerations which are applicable to JUAs and to assignments under assigned risk plans, respectively, as well as to the impact on the financial condition of risk retention groups.

Section 6. Countersignatures not Required

A policy of insurance issued to a risk retention group or any member of that group shall not be required to be countersigned as otherwise provided in Section [insert reference] of the Insurance Code.

Drafting Note: Product Liability RRA Section 3(a)(3) preempts the states from requiring policies to be countersigned by resident agent or brokers. This section is optional depending on states' existing countersignature laws.

Section 7. Purchasing Groups—Exemption from Certain Laws

A purchasing group and its insurer or insurers shall be subject to all applicable laws of this state, except that a purchasing group and its insurer or insurers shall be exempt, in regard to liability insurance for the purchasing group, from any law that would:

- A. Prohibit the establishment of a purchasing group;
- B. Make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages based on their loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages or other matters;
- C. Prohibit a purchasing group or its members from purchasing insurance on a group basis described in Subsection B of this section;
- D. Prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;
- E. Require that a purchasing group must have a minimum number of members, common ownership or affiliation, or certain legal form;
- F. Require that a certain percentage of a purchasing group must obtain insurance on a group basis;
- G. Otherwise discriminate against a purchasing group or any of its members; or
- H. Require that any insurance policy issued to a purchasing group or any of its members be countersigned by an insurance agent or broker residing in this state.

Drafting Note: RRA 1986 establishes that the scope of the exemption from state law for risk retention groups is greater than that for purchasing groups. RRA 1986 in Section 3 states that a risk retention group is exempt from the laws of non-chartering states and then specifies those powers which are retained by those states. In regard to purchasing groups, however, Section 4 of RRA 1986 specifically lists those laws from which a purchasing group is exempt and which are in the nature of prohibiting or otherwise discriminating against purchasing groups. Therefore, a state can apply all other provisions of its laws to purchasing groups and persons dealing with purchasing groups. As noted in regard to risk retention groups, if a purchasing group does not meet any of the criteria specified to define it as a purchasing group, it does not benefit from any federal preemption of state law and all state laws apply.

Section 8. Notice and Registration Requirements of Purchasing Groups

- A. A purchasing group which intends to do business in this state shall, prior to doing business, furnish notice to the commissioner which shall, on forms prescribed by the NAIC:
 - (1) Identify the state in which the group is domiciled;
 - (2) Identify all other states in which the group intends to do business;
 - (3) Specify the lines and classifications of liability insurance which the purchasing group intends to purchase;
 - (4) Identify the insurance company or companies from which the group intends to purchase its insurance and the domicile of such company;

- (5) Specify the method by which, and the person or persons, if any, through whom insurance will be offered to its members whose risks are resident or located in this state;
 - (6) Identify the principal place of business of the group; and
 - (7) Provide such other information as may be required by the commissioner to verify that the purchasing group is qualified under Section 2J of this Act.
- B. A purchasing group shall, within ten (10) days, notify the commissioner of any changes in any of the items set forth in Subsection A of this section.

Drafting Note: The notice provisions regarding purchasing groups are designed to require that purchasing groups provide adequate information to the commissioner so that an evaluation can be made as to whether a purchasing group is (a) bona fide and (b) is likely to operate in a manner and to purchase insurance coverage that is consistent with the laws of the state.

- C. The purchasing group shall register with and designate the commissioner (or other appropriate authority) as its agent solely for the purpose of receiving service of legal documents or process, for which a filing fee shall be determined by the commissioner, except that such requirements shall not apply in the case of a purchasing group which only purchases insurance that was authorized under the federal Products Liability Risk Retention Act of 1981, and:
- (1) Which in any state of the United States
 - (a) Was domiciled before April 1, 1986; and
 - (b) Is domiciled on and after October 27, 1986;
 - (2) Which
 - (a) Before October 27, 1986 purchased insurance from an insurance carrier licensed in any state; and
 - (b) Since October 27, 1986 purchased its insurance from an insurance carrier licensed in any state; or
 - (3) Which was a purchasing group under the requirements of the Product Liability Risk Retention Act of 1981 before October 27, 1986.
- D. Each purchasing group that is required to give notice pursuant to Subsection A of this section shall also furnish such information as may be required by the commissioner to:
- (1) Verify that the entity qualifies as a purchasing group;
 - (2) Determine where the purchasing group is located; and
 - (3) Determine appropriate tax treatment.
- E. Any purchasing group which was doing business in this state prior to the enactment of this Act shall, within thirty (30) days after the effective date of this Act, furnish notice to the commissioner pursuant to the provisions of Subsection A of this section

and furnish such information as may be required pursuant to Subsections B and C of this section.

Drafting Note: The provision regarding registering with and designating the commissioner as legal agent is designed to allow the commissioner to take prompt legal action against the purchasing group by facilitating proper legal service of process. The purchasing groups “grandfathered” out of this registration requirement are only those that were prior to April 1986, and continue to be, domiciled in one of the United States, that purchase insurance only from U.S. carriers, that qualified as a purchasing group under the Product Liability Risk Retention Act of 1981, and that do not currently purchase insurance other than that authorized under the Product Liability RRA 1981.

Section 9. Restrictions on Insurance Purchased by Purchasing Groups

- A. A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such state.

Drafting Note: Although Section 4(f) of RRA was one of the most significant provisions dealing with regulation of insurance purchased by purchasing groups, the term “located” was not defined in the federal act.

- B. A purchasing group which obtains liability insurance from an insurer not admitted in this state or a risk retention group shall inform each of the members of the group which have a risk resident or located in this state that the risk is not protected by an insurance insolvency guaranty fund in this state, and that the risk retention group or insurer may not be subject to all insurance laws and regulations of this state.

Drafting Note: This provision, with respect to non-admitted insurers, applies only if a state requires this notice to policyholders in the state with respect to other insurers not covered by insurance insolvency guaranty funds.

- C. No purchasing group may purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole; however, coverage may provide for a deductible or self-insured retention applicable to individual members.
- D. Purchases of insurance by purchasing groups are subject to the same standards regarding aggregate limits which are applicable to all purchases of group insurance.

Drafting Note: A state may prescribe limitations with respect to aggregate limits to all purchases of group insurance, as long as such limitations are not applied in a manner which discriminates against purchasing groups.

Section 10. Purchasing Group Taxation

Premium taxes and taxes on premiums paid for coverage of risks resident or located in this state by a purchasing group or any members of the purchasing groups shall be:

- A. Imposed at the same rate and subject to the same interest, fines and penalties as that applicable to premium taxes and taxes on premiums paid for similar coverage from a similar insurance source by other insureds; and
- B. Paid first by such insurance source, and if not by such source by the agent or broker for the purchasing group, and if not by such agent or broker then by the purchasing group, and if not by such purchasing group then by each of its members.

Drafting Note: The term “insurance source” refers to admitted, licensed and authorized carriers on the one hand and non-admitted, surplus line carriers on the others. The enacting states may wish to include applicable taxing provisions of its Code.

Section 11. Administrative and Procedural Authority Regarding Risk Retention Groups and Purchasing Groups

The commissioner is authorized to make use of any of the powers established under the Insurance Code of this state to enforce the laws of this state not specifically preempted by the Risk Retention Act of 1986 including the commissioner's administrative authority to investigate, issue subpoena, conduct depositions and hearings, issue orders, impose penalties and seek injunctive relief. With regard to any investigation, administrative proceedings or litigation, the commissioner can rely on the procedural laws of this state. The injunctive authority of the commissioner, in regard to risk retention groups, is restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

Drafting Note: This provision regarding the administrative and procedural authority retained by the states under Sections 3(f) and 4(g) of RRA 1986 is designed to permit the commissioner to investigate for potential hazardous financial condition or market conduct abuses and to take appropriate action where necessary. It clarifies that no federal preemption takes place regarding the procedural and administrative authority of the commissioner.

However, RRA 1986 requires that any injunction sought by the commissioner must be obtained from a court of competent jurisdiction. See RRA 1986 Section 3(a)(1)(G), Section 3(e), and Section 3(f). However, this restriction on the injunctive authority of the commissioner does not carry over to any action that the commissioner may take under its state administrative procedural law regarding purchasing groups. Section 4 of RRA 1986, which addresses the limited preemption from state law provided to purchasing groups, does not refer to any restriction on the commissioner's injunctive authority. More specifically, the "savings clause" regarding state authority, RRA Section 4(g), makes no mention of such requirement.

Section 12. Duty of Agents or Brokers to Obtain License

A. Risk retention groups.

- (1) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance in this state from a risk retention group unless such person, firm, association or corporation is licensed as an insurance agent or broker in accordance with Section [insert appropriate reference to Insurance Law].

B. Purchasing groups.

- (1) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance in this state for a purchasing group from an authorized insurer or a risk retention group chartered in a state unless such person, firm, association or corporation is licensed as an insurance agent or broker in accordance with Section [insert appropriate reference to Insurance Law].
- (2) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance coverage in this state for any member of a purchasing group under a purchasing group's policy unless such person, firm, association or corporation is licensed as an insurance agent or broker in accordance with Section [insert appropriate reference to Insurance Law].
- (3) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance from an insurer not authorized to do business in this state on behalf of a purchasing group located in this state unless such person, firm, association or corporation is licensed as a surplus lines agent or excess line broker in accordance with [insert appropriate reference to Insurance Law].

Drafting Note: The RRA (1986) does not preempt state law with respect to licensing and regulation of agents and brokers, with the exception of the elimination of the residence requirement and of countersignature laws, as provided in Subsection C of this section, and Sections 6 and 7H of this Act.

- C. For purposes of acting as an agent or broker for a risk retention group or purchasing group pursuant to Subsections A and B of this section, the requirement of residence in this state shall not apply.
- D. Every person, firm, association or corporation licensed pursuant to the provisions of [insert appropriate references to Insurance Law], on business placed with risk retention groups or written through a purchasing group, shall inform each prospective insured of the provisions of the notice required by Subsection G of Section 4 of this Act in the case of a risk retention group and Subsection C of Section 9 of this Act in the case of a purchasing group.

Section 13. Binding Effect of Orders Issued in U.S. District Court

An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance, or operating in any state (or in all states or in any territory or possession of the United States) upon a finding that such a group is in hazardous financial or financially impaired condition shall be enforceable in the courts of the state.

Section 14. Rules and Regulations

The commissioner may establish and from time to time amend such rules relating to risk retention groups as may be necessary or desirable to carry out the provisions of the Act.

Section 15. Severability

If any clause, sentence, paragraph, section or part of this act or the application thereof to any person or circumstances, shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair or invalidate the remainder of this act, and the application thereof to other persons or circumstance, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgement shall have been rendered and to the person or circumstances involved.

Section 16. Effective Date

This Act will be effective on [insert date].

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

*1983 Proc. I 6, 35, 789-790, 795, 799-805 (adopted).
1987 Proc. I 11, 20, 744, 857-865 (amended and reprinted).
1987 Proc. II 15, 24, 774-775, 776-788 (amended).
1991 Proc. II 25, 58, 976, 992-1003 (amended and reprinted)
December 20, 2011 – adopted during Plenary Conference Call*

STATE INSURANCE DEPARTMENT

Risk Retention Group and Purchasing Group Contact Persons (Contact person information is subject to change without notice.)

This contact list will be updated annually and available on the NAIC Publications webpage.

Alabama

Risk Retention Groups:

Sean Duke
201 Monroe Street, Suite 502
Montgomery, AL 36104
(334) 241-4165 - phone
(334) 240-3194 - fax
sean.duke@insurance.alabama.gov

Purchasing Groups:

Michelle Driggers
201 Monroe Street, Suite 1760
Montgomery, AL 36104
(334) 240-7576 - phone
(334) 956-7916 - fax
frances.driggers@insurance.alabama.gov

Alaska

Risk Retention Groups:

Douglas Hartman
550 West 7th Avenue, Suite 1560
Anchorage, AK 99501-3567
(907) 269-7906 - phone
(907) 269-7912 - fax
douglas.hartman@alaska.gov

Purchasing Groups:

Jeff Bodine
P.O. Box 110805
Juneau, Alaska 99811-0805
(907) 465-4609 - phone
(907) 465-3422 - fax
jeff.bodine@alaska.gov

American Samoa

Elizabeth Perri
Insurance Commissioner's Office
Executive Office Building
American Samoa Government
Pago Pago, American Samoa 96799
(011) (684) 633-4116 - phone
(011) (684) 633-2269 - fax
elizabeth.perri@go.as.gov

Arizona

Purchasing Groups and Foreign Risk Retention Groups:

Erica Bowsher
100 N 15th Ave, Suite 261
Phoenix, AZ 85007-2630
(602) 364-3450 - phone
Erica.Bowsher@difi.az.gov

Domestic Risk Retention Groups:

Vincent Gosz
100 N 15th Ave, Suite 261
Phoenix, AZ 85007-2630
(602) 364-2008 – phone
Vincent.Gosz@difi.az.gov

Arkansas

Risk Retention Groups:

Kimberly Johnson
1 Commerce Way, Suite 505
Little Rock, AR 72202-2087
(501) 371-2680 - phone
(501) 371-2747 - fax
Kimberly.johnson@arkansas.gov

Purchasing Groups:

Seleta Yearian
1 Commerce Way, Suite 505
Little Rock, AR 72202-2087
(501) 371-2806 - phone
Seleta.yearian@arkansas.gov

California

Risk Retention and Purchasing Groups:

Dawn Withers
300 Capitol Mall, 11th Floor
Sacramento, CA 95814
(916) 492-3099 - phone
(916) 324-1883 - fax
Dawn.Withers@insurance.ca.gov

Purchasing Groups:

Pretrice Curry-Bossett
1901 Harrison Street, 6th Floor,
Oakland, CA 94612
(415) 538-4181 - phone
Pretrice.Curry-Bossett@insurance.ca.gov

Colorado

Cindy Hathaway
Colorado Division of Insurance
1560 Broadway, Suite 850
Denver, CO 80202
(303) 894-7836 - phone
(303) 894-7455 - fax
cindy.hathaway@state.co.us

Connecticut

Risk Retention Groups:

Fenhua Liu
(860) 297- 3935 - phone
(860)297-3978 - fax
Fenhua.Liu@ct.gov

Risk Purchasing Groups:

Christopher Gallo
(860) 297-3829 – phone
(860) 297–3978 - fax
christopher.gallo@ct.gov

Delaware

Jeannine Neal
841 Silver Lake Blvd.
Dover DE 19904-2465
(302) 674-7339 phone
(302) 739-7651 fax
Jeannine.neal@state.de.us

Domestic Risk Retention Groups:

David M. Lonchar, CFE
841 Silverlake Blvd
Dover, DE 19904
(302) 674-7334 - phone
(302) 739-2709 - fax
dave.lonchar@state.de.us

District of Columbia

Purchasing Groups and Foreign Risk
Retention Groups:

LuCynthia Jordan
1050 First Street, NE, Suite 801
Washington, DC 20002
(202) 442-7813 - phone
(202) 354-1084 - fax
lucynthia.jordan@dc.gov

Willie Hicks
1050 First Street, NE, Suite 801
Washington, DC 20002
(202) 442-7814 - phone
(202) 354-1084 - fax
willie.hicks@dc.gov

Kathy Alexander
1050 First Street NE, Suite 801
Washington, DC 20002
(202)-442-7819 – phone
(202) 354-1084 - fax
kathy.alexander@dc.gov

Domestic Risk Retention Groups:

Dana Sheppard
1050 First Street, NE, Suite 801
Washington, DC 20002
(202)442-7820 - phone
(202) 535-1197 - fax
dana.sheppard@dc.gov

Florida

Robert Ridenour
200 East Gaines Street
Tallahassee, FL 32399-0329
(850) 413-5227 - phone
(850) 488-2935 - fax
robert.ridenour@floiir.com

Corey Hubbard
200 East Gaines Street
Tallahassee, FL 32399-0329
(850) 413-5246 - phone
(850) 488-2935 - fax
corey.hubbard@floiir.com

Registration Process for Risk Retention:

Katherine Schwalb
200 East Gaines Street
Tallahassee, FL 32399-0329
(850) 413-2405 – phone
(850) 488-5098 – fax
Katherine.Schwalb@floiir.com

Georgia

Risk Retention and Risk Purchasing
Groups:

Tammy Brewster
Room 908 West Tower
2 Martin Luther King Jr. Drive
Atlanta, GA 30334
(404) 656-7556 - phone
(770) 344-5798 - fax
tbrewster@oci.ga.gov

Guam

Alice P. Sebastian-Cruz
 Department of Revenue and Taxation
 P.O. Box 23607,
 GMF Barrigada, Guam 96921
 1-(671) 635 - 1844 - phone
 1-(671) 633 - 2643 - fax
 alice.cruz@revtax.guam.gov

Hawaii

Domestic Risk Retention Groups:
 Andrew J. Kurata
 State of Hawaii Insurance Division
 335 Merchant Street, #213
 Honolulu, HI 96813
 (808) 586-0981 - phone
 (808) 586-0987 - fax
 captiveins@dcca.hawaii.gov

Risk Retention Groups and Purchasing
 Groups

Sally D. Bautista
 335 Merchant Street, #213
 (808) 586-7414 - phone
 (808) 586-3873 - fax
 sbautista@dcca.hawaii.gov

Idaho

Carol Anderson
 Idaho Department of Insurance
 700 West State St 3rd Floor
 PO Box 83720
 Boise, ID 83720-0043
 (208) 334-4309 - phone
 (208) 334-4398 - fax
 carol.anderson@doi.idaho.gov

Illinois

Marcy Savage
 320 W Washington St, 4th Floor
 Springfield, IL 62767-0001
 (217) 524-0016 - phone
 (217) 782-5020 - fax
 Marcy.Savage@illinois.gov

Indiana

Risk Retention & Purchasing Groups
 Connie Wright
 311 W. Washington St, Ste 103,
 Indianapolis, IN 46204-2787
 (317) 232-1994 - phone
 (317) 232-5252 - fax
 Cowright1@idoi.in.gov

Iowa

Purchasing Groups, Advisory
 Organizations, Producer Surplus Lines:
 Jackie Russo
 Two Ruan Center
 601 Locust St. 4th Flr
 Des Moines IA 50309
 (515) 725-0690 phone
 (515) 281-3059 fax
 producer.licensing@iid.iowa.gov

Risk Retention Groups and Company

Surplus Lines:
 Chris Chepsoi
 Two Ruan Center
 601 Locust St. 4th Flr
 Des Moines IA 50309
 (515) 281-5705 phone
 (515) 281-3059 fax
 chris.chepsoi@iid.iowa.gov

Kansas

Purchasing Groups:

Marcia Kramer
 420 S.W. Ninth Street
 Topeka, KS 66612-1678
 (785) 291-3454 – phone
 (785) 291-3673 – fax
 marcia.kramer@ks.gov

Purchasing Groups and Risk Retention Groups:

James Norman
 420 S.W. Ninth Street
 Topeka, KS 66612-1678
 (785) 296-3405 – phone
 (785) 291-3673 – fax
 james.norman@ks.gov

Heather Droge
 420 SW Ninth Street
 Topeka, KS 66612-1678
 (785) 296-7839 - phone
 (785) 291-3190 - fax
 Heather.Droge@ks.gov

Kentucky

Risk Retention Groups:

Gina Metts
 Financial Standards & Examination
 Division
 500 Mero Street, 2 SE 11
 Frankfort, KY 40601
 (502) 564-6082 - phone
 (502) 564-4604 - fax
 Gina.Metts@ky.gov

Purchasing Groups:

JoAnn Bell
 500 Mero Street, 2 SE 11
 Frankfort, KY 40601
 (502) 564-6046 - phone
 (502) 564-5922 - fax
 JoAnn.Bell@ky.gov

Louisiana

Mike Boutwell
 1702 N. Third Street
 Baton Rouge, LA 70802
 (225) 342-0800 - phone
 (225) 219-9322 - fax
 mboutwell@ldi.la.gov

Arlene D. Knighten
 1702 N. Third Street
 P.O. Box 94214
 Baton Rouge, LA. 70804
 (225) 342-4484 - phone
 (225) 342-1632 - fax
 aknighten@ldi.la.gov

Maine

James C. Williams
 34 State House Station
 Augusta, ME 04333
 Overnight delivery: 76 Northern Ave.
 Gardiner, ME 04345
 (207) 624-8448 - phone
 (207) 624-8599 - fax
 James.C.Williams@maine.gov

Maryland

Risk Retention Groups:

Victoria Claros
 200 St. Paul Place, Suite 2700
 Baltimore, MD 21202
 (410) 468-2134 - phone
 (410) 468-2112 - fax
 Victoria.claros@maryland.gov

Purchasing Groups:

Geraldine Howard
 200 St. Paul Place, Suite 2700
 Baltimore, MD 21202
 (410) 468-2302 - phone
 (410) 468-2306 - fax
 Geraldine.Howard@maryland.gov

Massachusetts

Matthew Mancini
 1000 Washington Street, Suite 810, Boston,
 MA 02118-6200
 (617) 521-7459 - phone
 (617) 521-7475 - fax
 matthew.mancini@state.ma.us

Michigan

Jennifer Childs
 530 W. Allegan Street, 7th Floor
 Lansing, MI 48933
 (517) 284-8629 - phone
 (517) 284-8836 - fax
 childsj@michigan.gov

Minnesota

Risk Retention Groups:
 Nina Twardowski
 85 7th Place East, Suite 280
 St. Paul, MN 55101-2198
 (651) 539-1756 - phone
 (651) 539-1550 - fax
 Nina.Twardowski@state.mn.us

Purchasing Groups:

Eva Leonard
 85 7th Place East, Suite 280
 St. Paul, MN 55101-2198
 (651) 539-1741 - phone
 (651) 539-0100 - fax
 eva.leonard@state.mn.us

Mississippi

Risk Retention & Purchasing Groups
 Vanessa C. Miller
 501 N. West St, Suite 1001
 Jackson, MS 39201
 (601) 359-3569 - phone
 (601) 359-1951 - fax
 vanessa.miller@mid.ms.gov

Missouri

Purchasing Groups:
 Regulatory Services
 301 West High St. Rm. 530
 Jefferson City, MO 65102-0690
 (573) 526-5001 - phone
 (573) 526-3471 - fax
 Regulatory.Services@insurance.mo.gov

Risk Retention Groups:

Susan Doerhoff
 301 West High St. Rm. 530
 Jefferson City, MO 65102-0690
 (573) 751-0794 - phone
 (573) 526-3471 - fax
 Susan.doerhoff@insurance.mo.gov

Montana**Risk Retention Groups:****Financial Analysis:**

Steve Mack
 Montana State Auditor
 Commissioner of Securities and Insurance
 840 Helena Ave
 Helena, MT 59601
 (406) 444-3496 - phone
 (406) 444-3497 - fax
 SMack@mt.gov

Registration:

Tal Redpath
 840 Helena Avenue
 Helena, MT 59601
 (406) 444-0765 - phone
 (406) 444-3497 - fax
 TRedpath@mt.gov

Purchasing Groups:

Steve Matthews
 840 Helena Ave
 Helena, MT 59601
 (406) 444-4372 - phone
 SMatthews@mt.gov

Nebraska

Lori Bruss
1135 M Street, Suite 300,
Lincoln NE 68508
(402) 471- 4045 - phone
Lori.bruss@nebraska.gov

Nevada

Domestic/Captive Risk Retention Groups:

Joel Bengo
1818 E College Pkwy, Ste 103
Carson City, NV 89706-7986
(775) 687-0743 - phone
(775) 687-0787 – fax
jbengo@doi.nv.gov

Purchasing Groups & Foreign RRGs:

Kathy Kelley
1818 E. College Pkwy, Ste 103
Carson City, NV 89706
(775) 687-0753 - phone
(775) 687-0787 - fax
kskelley@doi.nv.gov

New Hampshire

Diane Cygan
21 South Fruit Street, Suite 14
Concord, NH 03301
(603) 271-2528 - phone
(603) 271-7029 - fax
Diane.cygan@ins.nh.gov

New Jersey

Carolina Chong
Department of Banking and Insurance
Office of Solvency Regulation
P.O. Box 325
Trenton, NJ 08625
(609) 940-7430 - phone
Carolina.Chong@dobi.gov

New Mexico

Risk Retention and Purchasing Groups:

Nadine Roybal
1120 Paseo De Peralta, Room 439
Santa Fe, NM 87504-1689
(505) 476-2390 - phone
(505) 827-4734 - fax
nadine.roybal2@state.nm.us

New York

Risk Retention Groups and Purchasing
Groups:

Kyn Mo
New York State Department of Financial
Services
One State Street
New York, NY 10004
(212) 480-4217 - phone
(212) 709-1570 - fax
Kyn.Mo@dfs.ny.gov

Purchasing Groups:

Ademola Oluwo
New York State Department of Financial
Services
One State Street
New York, NY 10004
(212) 480-5458 - phone
(212) 709-1570 - fax
ademola.oluwo@dfs.ny.gov

North Carolina

Foreign Risk Retention Groups
(Applications) and Purchasing Groups:
Joseph Greene
North Carolina Department of Insurance
325 N. Salisbury Street
Raleigh, NC 27603
(919) 807-6182 - phone
(919) 807-6638 - fax
Joseph.Greene@ncdoi.gov

Foreign Risk Retention Groups (Ongoing
Monitoring):
Terry Wade
North Carolina Department of Insurance
325 N. Salisbury Street
Raleigh, NC 27603
(919) 807-6621 – phone
(919) 807-6638 – fax
Terry.Wade@ncdoi.gov

Domestic Risk Retention Groups:
Kait Chase
North Carolina Department of Insurance
Captive Insurance Section
325 N. Salisbury Street
Raleigh, NC 27603
(919) 807-6163 - Phone
(919) 807-6635 - Fax
Kait.Chase@ncdoi.gov

North Dakota

Matt Fischer
600 E Boulevard , Dept 401
Bismarck, ND 58505-0320
(701) 328-9617 - phone
(701) 328-4880 - fax
mattfischer@nd.gov

N. Mariana Islands

Charlette C. Borja
PO Box 5795 CHRB
(670) 664-3000 EXT: 118 - phone
(670) 664-8074 - fax
cnmi.insurance@commerce.gov.mp

Ohio

Felisa Brown
OPRAS Division
OH Dept of Insurance
50 W. Town St. Ste 300
Columbus, OH 43215
(614) 644-3353 - phone
(614) 728-1280 - fax
felisa.brown@insurance.ohio.gov

Oklahoma

Purchasing Groups:
Jeanette Pearce
400 NE 50th St.
Oklahoma City, OK 73105
(405) 521-6651 - phone
(405) 522-3642 - fax
jeanette.pearce@oid.ok.gov

Risk Retention Groups:
Diane Carter
400 NE 50th St.
Oklahoma City, OK 73105
(405) 522-6337 - phone
(405) 522-2640 - fax
diane.carter@oid.ok.gov

Oregon

Insurance Institutions Section
Division of Financial Regulation
350 Winter Street NE Salem OR 97301
(503) 947-7982 - phone
(503) 378-4351 – fax
web.inscomp@oregon.gov

Pennsylvania

Risk Retention Groups:
 Cressinda Bybee
 1345 Strawberry Square
 Harrisburg, Pennsylvania 17120
 (717) 787-2735 - phone
 (717) 787-8557 - fax
 cbybee@pa.gov

Purchasing Groups:
 Monique Miller
 1345 Strawberry Square
 Harrisburg, Pennsylvania 17120
 (717) 783-3209 - phone
 (717) 787-8557 - fax
 monmiller@pa.gov

Puerto Rico

Glory Mar Montalvo Pagan
 Interim Director of the Division of Insurers
 and International Reinsurers
 Office of the Commissioner of Insurance
 World Plaza Building, 268 Munoz Rivera
 Avenue, San Juan PR 00918
 (787) 304-8686 - phone
 (787) 273-6082 - fax
 gmontalvo@ocs.pr.gov

Rhode Island

Risk Retention & Purchasing Groups
 Julie Savoie
 Rhode Island Insurance Division
 1511 Pontiac Ave, Bldg 69-2
 Cranston, RI 02920
 (401) 462-9566 - phone
 (401) 462-9602 - fax
 julie.savoie@dbr.ri.gov

South Carolina

Purchasing Groups:
 Stacy Johnson
 1201 Main Street, Suite 1000,
 Columbia, SC 29201
 (803) 737-6221 - phone
 (803) 737-6232 - fax
 sjohnson@doi.sc.gov

Risk Retention Groups:
 Greg Delleney
 1201 Main Street, Suite 1000
 Columbia, SC 29201
 (803) 737-6220 - phone
 (803) 737-4876 - fax
 gdelleney@doi.sc.gov

South Dakota

Risk Retention & Purchasing Groups:
 Charlene Squires Keller
 124 S Euclid Ave, 2nd Floor
 Pierre, SD 57501
 (605) 773-3563 - phone
 (605) 773-5369 - fax
 charlene.squireskeller@state.sd.us

Tennessee

Bill Huddleston
 500 James Robertson Parkway, 10th Floor
 Nashville, TN 37243
 (615)-360-4467 - phone
 (615) 532-2788 - fax
 bill.huddleston@tn.gov

Risk Retention & Purchasing Group:
 Trey Hancock
 Tennessee Department of Commerce and
 Insurance
 Financial Affairs Section
 500 James Robertson Parkway, 10th Floor
 Nashville, TN 37243
 Foreign.RRG@tn.gov
 Trey.Hancock@tn.gov

Texas

Risk Retention Groups, Surplus Lines
Insurers, Accredited/Trusteed Reinsurers:

Chris Osuna
333 Guadalupe – MC 103-CL
Austin, TX 78701
(512) 676-6396 - phone
(512) 490-1035 - fax
RegistrationTeam@tdi.texas.gov

Purchasing Groups:

333 Guadalupe – MC 103-CL
Austin, TX 78701
(512) 676-6395
RegistrationTeam@tdi.texas.gov

Utah

Jay Sueoka
3110 State Office Building
Salt Lake City, Utah 84114
(801) 538-3814 - phone
(801) 538-3829 - fax
jsueoka@utah.gov

Joe Coccimiglio
3110 State Office Building
Salt Lake City, UT 84114
(801) 538-3868 - phone
(801) 538-3829 - fax
joecoccimiglio@utah.gov

Vermont

David Provost
Department of Financial Regulation
89 Main Street
Montpelier, VT 05620-3101
(802)828-3304 - phone
(802)828-3460 - fax
david.provost@vermont.gov

Virginia

Risk Retention Groups:

Daniel Bond
Physical Address - 1300 East Main Street
Richmond, VA 23219
Mailing Address - P.O. Box 1157
Richmond, VA 23218
(804) 371-9158 - phone
(804) 371-9511 - fax
Daniel.Bond@scc.virginia.gov

Purchasing Groups:

Galang Yung
Physical Address - 1300 East Main Street
Richmond, VA 23219
Mailing Address - P.O. Box 1157
Richmond, VA 23218
(804) 371-9136 - phone
(804) 371-9511 - fax
Galang.Yung@scc.virginia.gov

Virgin Islands

N/A

Washington

Mark Durphy
P. O. Box 40255
Olympia, WA 98504-0255
5000 Capitol Blvd SE, Tumwater, WA
98501
(360) 725-7193 - phone
(360) 586-2022 - fax
markd@oic.wa.gov

West Virginia

Risk Retention Groups:

Kennith D. Crook
P.O. Box 50540
Charleston, WV 25302-0540
(304) 558-6279 x. 1109 – phone
(304) 558-1365 – fax
Kennith.D.Crook@wv.gov

Risk Purchasing Groups:

Dean E. Hastings
P.O. Box 50540
Charleston, WV 25302-0540
(304) 558-6279 x. 1149 – phone
(304) 558-1365 – fax
Dean.E.Hastings@wv.gov

Wisconsin

Risk Retention Groups:

Shasta Hoffhein
USPS - PO Box 7873
Madison, WI 53707-7873
Delivery - 125 S. Webster 2nd floor
Madison, WI 53703-3474
(608) 264-8117 – phone
(608) 264-8115 – fax
shasta.hoffhein@wisconsin.gov
ociriskpurchasing@wisconsin.gov
ociratesforms@wisconsin.gov
ocirateservice@wisconsin.gov

Purchasing Groups:

ociriskpurchasing@wisconsin.gov

Wyoming

Tammy Higgins

106 E 6th Ave
Cheyenne, WY 82002
(307) 777-6884 - phone
(307) 777-2446 - fax
tammy.higgins@wyo.gov

Doug Melvin

106 E 6th Ave
Cheyenne, WY 82002
(307) 777-5619 - phone
(307) 777-2446 - fax
doug.melvin@wyo.gov

Purchasing Groups:

Samantha Sullivant
106 E 6th Ave
Cheyenne, WY 82002
(307) 777-7318 - phone
(307) 777-2446 – fax
samantha.sullivant@wyo.gov

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

The following is the uniform registration form adopted by the NAIC. This registration form is being filed by a Risk Retention Group (RRG) operating in accordance with the Federal Liability Risk Retention Act of 1986 (LRRRA), 15 USC 3901-3906, chartered or licensed to write only liability insurance by the state of domicile listed in #1e. The registration form and supplemental documents are provided in accordance with §3902(d)(2) of the LRRRA. Under §3902 of the LRRRA, with the exception of the domiciliary state, RRGs are exempt from any state laws, rules, regulations, or orders that would make unlawful, or would regulate, directly or indirectly, the operation of an RRG, except that any state may require an RRG to comply with those laws specified in §3902(a)1(A),(B),(C) and (G) of the LRRRA. The domiciliary state regulates the formation and operation of the RRG.

Part A

STATE OF [Insert State in which the Risk
Retention Group intends to do business]

DEPARTMENT OF INSURANCE

RISK RETENTION GROUP - NOTICE AND REGISTRATION

(All Information Should Be Typed)

1a. Name of the Risk Retention Group as it appears on its Certificate of Authority:

1b. Address of the Risk Retention Group:

1c. NAIC Company Code:

1d. FEIN:

1e. State of domicile, date licensed and date chartered:

1f. Primary contact person for state of domicile to whom questions regarding the Risk Retention Group should be addressed (include name, phone number and email address):

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

2. List any other name(s) by which the Risk Retention Group is known or may be doing business in this State or any other state:

3. The Risk Retention Group is authorized to engage in the following lines and/or classifications of liability insurance under the laws of its chartering State:

4. Give a general description of the liability insurance coverages the Risk Retention Group plans to write in the state it is registering to do business in.

5. Has the Risk Retention Group's domiciliary state approved the Risk Retention Group to register and expand its writings in the state it is seeking to become registered in?

6. Ownership of the Risk Retention Group consists of one or the other of the following (check one):

a) _____ the owners of the Group are only persons who comprise the membership of the Group and who are provided insurance by the Group.

b) _____ the sole owner of the Group is: _

(Name and Address of Organization)

an organization which has as its members only persons who comprise the membership of the Group and which has as its owners only persons who comprise the membership of the Group and who are provided insurance by the Group.

7. The Risk Retention Group members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar or common business (whether profit or nonprofit), trade, product, services (including professional services), premises or operations. Give a general description of businesses or activities engaged in by the Group's members:

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

8. (a) List the name, position with the Risk Retention Group, and address of each officer and director of the Risk Retention Group: (Attach additional pages, if necessary.)

(b) Identify and give the telephone number of the officer or director of the Risk Retention Group who can be contacted for any information regarding the management of the insurance activities of the Group:

Name: _____ Telephone #: _____

9. List the name, address, and telephone number of the company responsible for managing the insurance operations of the Risk Retention Group and the company contact person's name, telephone number and email. (If none, answer none.)

Contact Person: _____ Telephone # _____

Email: _____

10. List the name(s) NPR#, and address(es) of the licensed insurance agent(s) or broker(s) who will be responsible for marketing the Risk Retention Group's insurance policies in the State of [Insert State in which the Risk Retention Group intends to do business] and the current licensing status in the State of [Insert State in which the Risk Retention Group intends to do business]: (If none, answer none. Attach additional pages, if necessary.)

<u>Name</u>	<u>NPR#</u>	<u>Address</u>	<u>License Status in State</u> <u>Registering</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

11. In accordance with the Liability Risk Retention Act, we verify the following:
- A. The Risk Retention Group is a corporation or other limited liability association whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its members.
 - B. The Risk Retention Group is organized for the primary purpose of conducting the activity described under Item "A" above.
 - C. The Risk Retention Group does not exclude any person from membership in the Group solely to provide for members of the Group a competitive advantage over such a person.
 - D. The activities of the Risk Retention Group do not include the provision of insurance other than:
 - i. liability insurance for assuming and spreading all or any portion of the similar or related liability exposure of its Group members; and
 - ii. reinsurance with respect to the similar or related liability exposure of another Risk Retention Group (or a member of such other Risk Retention Group) engaged in business or activities so that such Risk Retention Group or member meets the requirement under Item #7 above for membership in the Risk Retention Group which provides such reinsurance.
12. In accordance with the LRRRA, if the State in which the Risk Retention Group is registering requires compliance with the following laws and requirements, the RRG agrees to the following:
- A. The Risk Retention Group will comply with the unfair claim settlement practices laws of this State.
 - B. The Risk Retention Group will pay, on a non-discriminatory basis, applicable premium and other taxes which are levied on admitted insurers, surplus line insurers, brokers or policyholders under the laws of this State.
 - C. The Risk Retention Group will participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism.
 - D. The Risk Retention Group will designate the Insurance Commissioner [Director, Superintendent] of this State as its agent solely for the purpose of receiving service of legal documents or process by executing Part B of this form, attached hereto.
 - E. The Risk Retention Group will submit to examination by the Insurance Commissioner [Director, Superintendent] of this State to determine the Group's financial condition, if:
 - i. the Insurance Commissioner [Director, Superintendent] of the Group's chartering State has not begun or has refused to initiate an examination of the Group; and
 - ii. any such examination by the Insurance Commissioner [Director, Superintendent]

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

shall be coordinated to avoid unjustified duplication and unjustified repetition.

- F. The Risk Retention Group will comply with a lawful order issued in a delinquency proceeding commenced by the Insurance Commissioner [Director, Superintendent] of this State upon a finding of financial impairment, or in a voluntary dissolution proceeding.
- G. The Risk Retention Group will comply with the laws of this State regarding deceptive, false or fraudulent acts or practices, including any injunctions regarding such conduct obtained from a court of competent jurisdiction.
- H. The Risk Retention Group will comply with an injunction issued by a court of competent jurisdiction upon petition by the Insurance Commissioner [Director, Superintendent] of this State alleging that the Group is in hazardous financial condition or is financially impaired.
- I. The Risk Retention Group will provide the following notice, in at least 10-point type, in any insurance policy issued by the Group:

NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group.

- 13. In accordance with the LRRRA, the Risk Retention Group affirms that it has submitted to the Insurance Commissioner [Director, Superintendent] as part of this filing and before it has offered any insurance in this State, a copy of the plan of operation or feasibility study which it has filed with the Insurance Commissioner [Director, Superintendent] of its state of domicile. This plan or study includes the name of the State in which the Group is chartered, as well as the Group's principal place of business, and such plan of operation or feasibility study further includes the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of liability insurance the Group intends to offer. The Group has also submitted to the Insurance Commissioner [Director, Superintendent] of this State any revisions of such plan of operation or feasibility study to reflect any changes if the Group intends to offer any additional lines of liability insurance or change in the designation of the State in which it is chartered.
- 14. The Risk Retention Group will submit a copy of its annual financial statement submitted to its chartering state, to the Insurance Commissioner [Director, Superintendent] of this State. The annual financial statement shall be certified by an independent public accountant and include a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a qualified loss reserve specialist. The annual financial statement, certification and statement of opinion on loss and loss adjustment expense reserves will be submitted to the Insurance Commissioner [Director, Superintendent] of this State by the date it is required to be submitted to its chartering state.
- 15. The Risk Retention Group will not solicit or sell insurance to any person in this State who is not eligible for membership in the Group.
- 16. The Risk Retention Group will not solicit or sell insurance in this State, or otherwise operate in this State, if the Group is in hazardous financial condition or is financially impaired.

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

- 17. In accordance with the LRRRA, the terms of any insurance policy provided by the Risk Retention Group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.
- 18. To the extent required by the LRRRA, the Risk Retention Group will comply with all other applicable state laws.
- 19. The Risk Retention Group will notify the Insurance Commissioner [Director, Superintendent] as to any subsequent changes in any of the items included in this form (except for items #1f, #8 and #10).

The undersigned hereby swear and affirm that the foregoing statements and information regarding their principal, the _____ (Name of Risk Retention Group) are true and correct.

President of the Risk Retention Group

Secretary of the Risk Retention Group

State of _____)

ss:

County of _____)

Sworn before me this ____ day of _____, 20__.

_____, Notary Public. My Commission Expires: _____

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

Part B

APPOINTMENT OF ATTORNEY TO ACCEPT SERVICE AND DESIGNATION

The _____ (“the Group”), a risk retention group which is chartered and licensed as a liability insurance company under the laws of the State of _____, having notified the Insurance Commissioner [Director, Superintendent] of the State of _____ of its intention to do business in this State as a risk retention group pursuant to the federal Liability Risk Retention Act of 1986, hereby appoints the Insurance Commissioner [Director, Superintendent] of the State of _____, any successor in office, and any authorized deputy its true and lawful attorney, in and for the State of _____, upon whom all legal documents or process in any proceeding against it may be served. Such service of legal documents or process shall be of the same legal force and validity as if served personally upon the Group.

The Group designates:

(Name)

(Address)

(City, Town or Village)

(State and ZIP Code)

as its officer, agent or other person to whom shall be forwarded all legal documents or process served upon the Insurance Commissioner [Director, Superintendent] of the State of _____, any successors in office, or any authorized deputy, for the Group. This designation shall continue in full force and effect until superseded by a new written designation filed with the Insurance Commissioner [Director, Superintendent].

NAIC UNIFORM RISK RETENTION GROUP REGISTRATION FORM

This appointment and designation is made pursuant to a resolution by the Group’s governing body authorizing it, and a certified copy of the resolution is attached hereto. This appointment shall be binding upon any person or corporation which as successor acquires the Group’s assets or assumes its liabilities, by merger or consolidation or otherwise.

This appointment may be withdrawn only upon a written notice of termination and, in any event, shall not be terminated by the Group or its successor so long as any contracts or liabilities or duties arising out of contracts entered into by the Group while it was doing business in this State are in effect.

IN WITNESS OF THIS APPOINTMENT AND DESIGNATION, the Group, in accordance with the resolution of its Board of Directors duly passed on _____, 20____, has affixed its corporate seal, and caused the same to be subscribed and attested in its name by its President and Secretary, at the City of _____ in the State of _____ on _____, 20____.

(Name of Risk Retention Group)

By: _____ President

_____ Secretary

State of _____)

) ss:

County of _____)

Sworn before me this _____ day of _____, 20____.

_____, Notary Public. My Commission Expires: _____

The following is the uniform registration form adopted in June 1991, by the NAIC.

Part A

STATE OF _____
DEPARTMENT OF INSURANCE
PURCHASING GROUP - NOTICE AND REGISTRATION
(All Information Should Be Typed)

1a. Name of the Purchasing Group:

1b. FEIN:

2. List any other name(s) by which the Purchasing Group is known or may be doing business in this State or any other state:

3. a) Form of organization (i.e., corporation, partnership, association) and the state in which organized:

b) Purpose(s) of organization:

4. a) The Purchasing Group is domiciled in the state of: _____

b) Address:

5. Physical address of the administrative offices of the Purchasing Group, if different from response to Item #4b above:

6. The Purchasing Group intends to purchase the following classifications of liability insurance and/or subclassifications thereof:

PURCHASING GROUP FORM

7. The Purchasing Group intends to purchase the liability insurance described in Item #6 above from the following insurance company or companies: [Give full name of company, state of domicile, NAIC code and Federal Employer Identification Number (FEIN)].

<u>Name of Company</u>	<u>State of Domicile</u>	<u>NAIC Code</u>	<u>FEIN</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

8. List the name, address and social security number (SS#) of each officer and director of the Purchasing Group: (Attach additional pages if necessary.)

<u>Name</u>	<u>Address</u>	<u>SS#</u>	<u>Position with Purchasing Group</u>
_____	_____	<i>If Requested</i>	_____
_____	_____	<i>If Requested</i>	_____
_____	_____	<i>If Requested</i>	_____
_____	_____	<i>If Requested</i>	_____

9. List the name, SS#, address and telephone number of the person within the Purchasing Group who is most knowledgeable about the Purchasing Group's insurance program, including membership criteria and coverages:

<u>Name</u>	<u>SS#</u>	<u>Address</u>	<u>Telephone #</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

10. List the name, FEIN, address and telephone number of the company that manages or administers the insurance program for the Purchasing Group, and the name, SS# and telephone number of the person responsible for the Group's insurance program: (If none, answer none.)

<u>Name</u>	<u>FEIN/SS#</u>	<u>Address</u>	<u>Telephone #</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

PURCHASING GROUP FORM

11. List the name(s), SS#(s) and address(es) of the licensed insurance agent(s), broker(s) or excess (surplus) lines broker(s) responsible for the purchase of liability insurance for the Purchasing Group and its members and the state(s) in which they are licensed: (Attach additional pages, if necessary. If none, answer none.)

<u>Name</u>	<u>SS#</u>	<u>Address</u>	<u>State(s)</u>

12. Has any person transacting business on behalf of this Purchasing Group ever:
- a) been arrested, indicted and convicted of a felony or is a felony charge currently pending against any such person? _____
 - b) had denied any application for a professional, vocational or business license? _____
 - c) had suspended or revoked any such license? _____
 - d) had withdrawn or surrendered any such application or license to avoid potential disciplinary action against licensee? _____

If the answer to any part of this question is yes, attach a supplementary statement explaining in full each such occurrence.

13. The Purchasing Group is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar or common business, trade, product, services, premises or operations. Give a general description of business or activities engaged in by Purchasing Group members:

14. The Purchasing Group purchases the liability insurance listed in Item #6 above only for its group members and only to cover their similar or related liability exposure, as described in Item #13 above.

15. The Purchasing Group has as one of its purposes the purchase of liability insurance on a group basis.

PURCHASING GROUP FORM

- 16. The Purchasing Group has designated the Insurance Commissioner [Director, Superintendent] of this State to be its agent solely for the purpose for receiving service of legal documents or process by executing Part B of this form, attached hereto.
- 17. The Purchasing Group has submitted a registration fee of \$ _____, if applicable, payable to the Insurance Commissioner [Director, Superintendent] of this State.
- 18. The Purchasing Group will not purchase any insurance policy in this State which provides coverage prohibited generally by statute of this State or declared unlawful by the highest court of this State whose law applies to such policy.
- 19. The Purchasing Group will comply with all other applicable state laws.
- 20. The Purchasing Group will notify the Insurance Commissioner [Director, Superintendent] of any subsequent changes in any of the items included in this form.

The undersigned hereby swear and affirm that the foregoing statements and information regarding their principal, the _____ are true and correct.

(Name of Purchasing Group)

President of the Purchasing Group

Secretary of the Purchasing Group

State of _____)

)ss:

County of _____)

Sworn before me this ____ day of _____, 20____.

_____, Notary Public. My Commission Expires: _____

Part B

PURCHASING GROUP FORM

APPOINTMENT OF ATTORNEY TO ACCEPT SERVICE AND DESIGNATION

The _____ (“the Group”), a purchasing group organized under the laws of the State of _____, having notified the Insurance Commissioner [Director, Superintendent] of the State of _____ of its intention to do business in this State as a purchasing group pursuant to the federal Liability Risk Retention Act of 1986, hereby appoints the Insurance Commissioner [Director, Superintendent] of the State of _____, any successor in office, and any authorized deputy its true and lawful attorney, in and for the State of _____, upon whom all legal documents or process in any proceeding against it may be served. Such service of process shall be of the same legal force and validity as if served personally upon the Group.

The Group designates:

(Name)

(Address)

(City, Town or Village)

(State and ZIP Code)

as its officer, agent or other person to whom shall be forwarded all legal documents or process served upon the Insurance Commissioner [Director, Superintendent] of the State of _____, any successors in office, or any authorized deputy, for the Group. This designation shall continue in full force and effect until superseded by a new written designation filed with the Insurance Commissioner [Director, Superintendent].

PURCHASING GROUP FORM

This appointment and designation is made pursuant to a resolution by the Group’s governing body authorizing it, and a certified copy of the resolution is attached hereto. This appointment shall be binding upon any person or corporation which as successor acquires the Group’s assets or assumes its liabilities, by merger or consolidation or otherwise.

This appointment may be withdrawn only upon a written notice of termination and, in any event, shall not be terminated by the Group or its successor so long as any contracts or liabilities or duties arising out of contracts entered into by the Group while it was doing business in this State are in effect.

IN WITNESS OF THIS APPOINTMENT AND DESIGNATION, the Group, in accordance with the resolution of its Board of Directors duly passed on _____, 20 __, has affixed its corporate seal, and caused the same to be subscribed and attested in its name by its President and Secretary, at the City of _____ in the State of _____ on _____, 20 __.

(Name of Purchasing Group)

By: _____ President
_____ Secretary

State of _____)

) ss:

County of _____)

Sworn before me this _____ day of _____, 20 __.

_____, Notary Public. My Commission Expires: _____

Survey of State Laws Relating to Risk Retention Groups						
State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
AL	Yes	Yes*	Definitions in Section 27-31B-2(14), Code of Alabama 1975; licensing requirements in Section 27-31B-3			*as an industrial insured group in an industrial insured captive
AK	No					Certificate of authority under AS 21.09.290. Risk Retention Groups formed in other states must be registered in Alaska under AS 21.96.090.
AZ	Yes	Yes	ARS 20-1098 et seq.			
AR	Yes	Yes*	Ark. Code Ann. 23-63-1601 thru 23-63-1623	Yes	Ark. Code Ann. 23-94-201 thru 23-94-206	*Yes, but only as an industrial insured captive insurance company. If you look at the definitions provisions of the captive law, specifically ACA§ 23-63-1601(13)(A), "industrial insured captive insurance company" includes companies that insure risks of industrial insureds that compose an "industrial insured group." Under subsection (14)(A)(ii), an "industrial insured group" is a group that is organized as a risk retention group. So, it appears that RRGs can be licensed only as this specific type of captive. It is specifically stated in § 23-63-1620(d) that RRGs may not be a participant of a "sponsored captive insurance company."

Survey of State Laws Relating to Risk Retention Groups						
State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
CA	No			Yes	California Insurance Code section 131 and 699 et seq.	
CO	Yes	Yes	Section 10-6-103(5), C.R.S.			
CT	Yes	Yes	Connecticut General Statute 38a-91 through 91qq			
DE	Yes	Yes	Chapter 69 of Title 18 of the Delaware Code Section 6902(9)			
DC	Yes	Yes	District of Columbia Official Code Section 31-3931.01 et seq.			
FL	Yes	No		Yes	Section 627.943, Florida Statutes	
GA	Yes	Yes	O.C.G.A. § 33-41-1 et seq.			Ga registers (but does not license) non-domestic risk retention groups. See O.C.G.A. § 33-40-3, 4.
HI	Yes	Yes	Hawaii Revised Statutes Chapter 431, Article 19			
ID	No			Yes	Title 41, Chapter 48 Idaho Code (41-4804)	
IL	Yes		Article VIIC Domestic Captive Insurance Companies (215 ILCS 5/123C-1 through 5/123C-22).	Yes	Article VIIIB 'Risk Retention Companies' (215 ILCS 5/123B-1 through 5/123B-14)	

Survey of State Laws Relating to Risk Retention Groups						
State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
IN	No			Yes	Indiana Code 27-7-10-14 allows registration of foreign RRGs. IC 27-7-10-13 requires domestic RRGs to comply with traditional law.	
IA	No			Yes	515E.3	
KS	Yes	No		Yes	K.S.A. 40-4101 through K.S.A. 40-4120	
KY	Yes	Yes	KRS 304.49-010 to KRS 304.49-230			
LA	Yes	Yes	La. R.S. 22:550.1-550.26			
ME	Yes	Yes	24-A M.R.S.A. § 6701(8)(B).	Yes	24-A M.R.S.A. § 414	Maryland Risk Retention Act Insurance Article Section 25-101 et seq.
MD	No					
MA	No			Yes	M.G.L. Ch. 176 L	
MI	Yes	Yes	Section 500.4603	Yes	Section 500.1803	No domestic RRGs currently but could be either.
MIN	No			Yes	Minn. Stat. ch. 60E	
MS	No			Yes	Miss. Code Ann. §§ 83-55-1 et seq.	
MO	Yes	No		Yes	375.1080-1105 RSMo	
MT	Yes	Yes	Title 33, chapter 28 Mont. Code A	Yes	Mont. Code Ann. 33-11-103	By definition (see 33-28-102(10)) "captive risk retention group means a captive insurance risk retention group formed under the laws of this chapter and pursuant to Title 33, chapter 11."

Survey of State Laws Relating to Risk Retention Groups						
State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
NE	Yes	No		Yes	Neb. Rev. Stat. §44-4401	
NV	Yes	Yes	NRS 695E.140			
NH	No			Yes	NH RSA 405-A	
NJ	Yes	No	N.J.S.A. 17:47B-1 et seq.	Yes	N.J.S.A. 17:47A-et seq.	
NM	Yes	Yes	59A-55-4 Risk retention groups authorized in New Mexico			
NY	Yes	No		Yes	New York Insurance Law Section 1102	
NC	Yes	No		No		NC registers but does not license risk retention groups. They acknowledge through registration that they are operating in NC.
ND	No					Please note that RRGs chartered in ND are licensed as a liability insurance company authorized by the insurance laws of ND and shall comply with all of the laws, rules, regulations, and requirements applicable to such insurers. N.D. Cent. Code Section 26.1-46-02. RRGs not chartered in ND do not have the same requirements. See N.D. Cent. Code Section 26.1-46-03
OH	No			Yes	N.D. Cent. Code Chapter 26.1-46 ORC Chapter 3960	

Survey of State Laws Relating to Risk Retention Groups

State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
OK	Yes	No		Yes	36 O.S. §§ 6451 - 6468	The Oklahoma Risk Retention Act, 36 O.S. § 6451 et seq., specifically §§ 6454, 6455 govern the chartering and licensing of risk retention groups. A risk retention group seeking to be chartered for domicile in Oklahoma must be licensed as a liability insurance company. A risk retention group chartered in another state must file specified information with OID before doing business here.
OR	No			Yes	Oregon statutes (ORS 735.300 to 735.365) address both risk retention groups and risk purchasing groups. ORS 735.300 specifically expresses the purpose of the statutes is to regulate these entities that are formed pursuant to the provisions of the federal Liability Risk Retention Act of 1986 (P.L. 99-563).	

Survey of State Laws Relating to Risk Retention Groups						
State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
PA	No			Yes	Section 1503(a) of The Insurance Company Law of 1921 P.L. 682 May 17, 1921 (40 P.S. Section 991.1503(a))	
RI	Yes	No				Rhode Island has a Risk Retention Act under which it licenses risk retention groups. The citation is R.I. Gen. Laws section 27-46-1 et seq A link to that chapter is http://www.rilin.state.ri.us/Statutes/TITLE27/27-46/INDEX.HTM
SC	Yes	Yes	Chapter 90 of Title 38 of the SC Code of Laws (38-90-10 et. seq)			
SD	Yes	No		Yes	SDCL Chapter 58-6A	
TN	Yes	Yes	Acts 2011, ch. 468, § 1	Yes	Tenn. Code Ann. § 56-45-101 through 56-45-114	The law has not been codified yet; only the citation to the public chapter is available. Acts 2011, ch. 468, § 1 allows for the licensing of captive risk retention groups. This public chapter becomes effective on September 1, 2011.
TX	No			No		Texas domestic risk retention groups are licensed as a traditional property and casualty insurance company, with limited authority for liability only.

Survey of State Laws Relating to Risk Retention Groups

State	State Has a Captive law?	License RRGs under Captive Law?	Citation	License RRGs under Traditional Law?	Citation	Notes
UT	Yes	Yes	31A-37			Utah can also form RRG's under traditional code per 31A-15 (Part 2)
VT	Yes	Yes	Title 8 V.S.A. Chapter 142			
VA	Yes	Yes	Sections 38.2-1101 - 38.2-1109	Yes	Sections 38.2-1024 - 38.2-1039.1	RRG can be licensed under either captive or traditional law.
WA	No					We have a separate law on registering risk retention groups. Laws are found at chapter 48.92 RCW and rules are at chapter 284-92 WAC
WV	Yes	Yes	W. Va. Code § 33-31-1(8) and W. Va. Code § 33-31-2(a) (Also see W. Va. Code § 33-32-1 et seq.			
WI	No			Yes	ch 618	
WY	No			Yes	<u>W.S. 26-36-104</u>	
GU	Yes	Yes	23104(3)			
PR	Yes	No		No		
VI						

**Statement of Voluntary Dissolution
Summary of Registration Status in Non-Domicile States**

This statement is submitted to the Risk Retention Group’s domestic state regulator to summarize how the Risk Retention Group has addressed its registration in other states. Limit the information to those states in which a registration has been held within the last 10 years.

Registration has been held with the states listed below:	Date of notification of cancellation of registration by this state. If cancellation is not in effect, attach explanation.	Do any policyholder obligations of the dissolving Risk Retention Group exist in this state? If yes, attach explanation.	Have all premium taxes, fees and other monetary obligations owed to this state been paid? If no, attach explanation.

I acknowledge that I am an officer of the Risk Retention Group, am authorized to execute and am executing this document on behalf of the Risk Retention Group. I hereby certify under penalty of perjury under the laws of the applicable jurisdictions that all of the foregoing, including attachments, is true and correct as of the date of signature below.

Executed at _____
Location

Date

Signature of Officer

Printed Name

Title of Officer

Risk Retention Group - Statement of Voluntary Dissolution**Summary of Registration Status in Non-domicile States**

This form should be completed by those reporting entities that are ending their existence in all states. The form is to be submitted to the domicile state when requesting dissolution or cancellation of the certificate of authority and may also be requested by non-domiciliary states when requesting cancellation of registration. The purpose of the form is to provide information about the status of all foreign registrations and any obligations that may survive in those states.

Column 1 – Registration has been held from the states listed below:

List each state from which the entity has registered during the last 10 years. Include states where a registration had been issued and surrendered within the 10 year period.

Column 2 – Date of notification of cancellation of registration by this state

Report the date of registration cancellation by this state.

Column 3 – Do any policyholder obligations of the dissolving Risk Retention Group exist in this state?

Report any kind of obligation that exists on the date of the signature on this form which is related to the policies or contracts issued by the Risk Retention Group. Include claim obligations, loss adjustment expenses, and any other unpaid charges that arise from policies or contracts written in that state or that are expected to arise from the policy or contract activities of the Risk Retention Group in that state. Estimate the amount if the actual amount is not known.

Column 4 – Have all premium taxes, fees and other monetary obligations owed to this state been paid?

Report any kind of other obligation that exists on the date of the signature on this form. Include taxes, fees, creditor obligations and any other unpaid charges that arise from that state or that are expected to arise from the operations of the Risk Retention Group in that state. Estimate the amount if the actual amount is not known.

Reinsurance Guidelines for Risk Retention Groups Licensed as Captive Insurers

- I. Permitted Reinsurance
 - A. Risk retention groups shall not receive statement credit if all policies are ceded through one hundred percent (100%) reinsurance arrangements or another lesser percentage as required in the discretion of the Commissioner; and
 - B. Credit for reinsurance will be permitted if the reinsurer complies with [insert applicable section number] of the [insert name of state's substantially similar Credit for Reinsurance Model Law]; or
 - C. Credit for reinsurance may be permitted if the reinsurer maintains an A- or higher A.M. Best rating, or other comparable rating from a nationally recognized statistical rating organization, and the reinsurer maintains a minimum policyholder surplus in an amount acceptable to the Commissioner based upon a review of the reinsurer's most recent audited financial statements; and the reinsurer is licensed and domiciled in a jurisdiction acceptable to the Commissioner; or
 - D. Credit for reinsurance may be permitted if the reinsurer satisfies all of the following requirements and any other requirements deemed necessary by the Commissioner:
 - (1) The captive manager or risk retention group licensed as a captive insurer shall file annually, on or before June 30, or at the request of the Commissioner or if the captive manager or risk retention group thinks it appropriate to file more often, the reinsurer's audited financial statements, which shall be analyzed by the Commissioner to assess the appropriateness of the reserve credit or the initial and continued financial condition of the reinsurer;
 - (2) The reinsurer shall demonstrate to the satisfaction of the Commissioner that it maintains a ratio of net written premium, wherever written, to surplus and capital of not more than 3 to 1;
 - (3) The affiliated reinsurer shall not write third-party business without obtaining prior written approval from the Commissioner;
 - (4) The reinsurer shall not use cell arrangements without obtaining prior written approval from the Commissioner;
 - (5) The reinsurer shall be licensed and domiciled in a jurisdiction acceptable to the Commissioner; and
 - (6) The reinsurer shall submit to the examination authority of the Commissioner.
- II. The Commissioner shall either require a reinsurer not domiciled in the US to include language in the reinsurance agreement that states that in the event of the reinsurer's failure to perform its obligations under the terms of its reinsurance agreement, it shall submit to the jurisdiction of any court of competent jurisdiction in the US or shall require compliance with section III below.
- III. For credit for reinsurance and solvency regulatory purposes, the Commissioner may require an approved funds-held agreement, letter of credit, trust or other acceptable collateral based on unearned premium, loss and LAE reserves, and IBNR.
- IV. Upon application, the Commissioner may waive either of the reinsurance requirements in sections I.D.(2) or I.D.(6) in circumstances where the risk retention group licensed as a captive insurer or reinsurer can demonstrate to the satisfaction of the Commissioner that the reinsurer is sufficiently capitalized based upon an annual review of the reinsurer's most recent audited financial statements, the reinsurer is licensed and domiciled in a jurisdiction satisfactory to the Commissioner, and the proposed reinsurance agreement adequately protects the risk retention group licensed as a captive insurer and its policyholders. Any such waiver should be included in

the plan of operation, or any subsequent revision or amendment of the plan, pursuant to Section 3902(d)(1) of the Federal Liability Risk Retention Act of 1986 and the plan must be submitted by the risk retention group licensed as a captive to the Commissioner of its state of domicile and each State in which the risk retention group licensed as a captive intends to do business or is currently registered. Any such waiver of a section I.D. requirement constitutes a change in the risk retention group's plan of operation in each of those states.

- V. Upon application, the Commissioner may waive the requirement in section II above that a reinsurance arrangement must satisfy either section II or III in circumstances where the risk retention group licensed as a captive insurer or reinsurer can demonstrate to the satisfaction of the Commissioner that the reinsurer is sufficiently capitalized based upon an annual review of the reinsurer's most recent audited financial statements, the reinsurer is licensed and domiciled in a jurisdiction satisfactory to the Commissioner, and the proposed reinsurance agreement adequately protects the risk retention group licensed as a captive insurer and its policyholders. Any such waiver should be disclosed in Note 1 of the risk retention group's annual statutory financial statement.
- VI. These guidelines are effective [INSERT DATE] and apply prospectively to RRGs licensed as captive insurers. An RRG's reinsurers as of January 1, 2011, are grandfathered in as acceptable without meeting the requirements in the Reinsurance Guidelines. The requirements in the Reinsurance Guidelines should be used for new reinsurers with which business is placed after January 1, 2011.
- VII. Each approved captive manager or risk retention group licensed as a captive insurer shall assess the reinsurance programs of the risk retention groups licensed as captives under their management, and within 60 days of the effective date of these guidelines, submit a written report to the Commissioner indicating whether such risk retention groups licensed as captives are in compliance with these guidelines. All risk retention groups licensed as captive insurers that fail to submit the report in a timely manner shall be examined, at the risk retention group's expense, to determine compliance with these guidelines.
- VIII. "Commissioner" refers to the commissioner of the state of domicile of the RRG licensed as a captive.

Domiciliary states, as a best practice or by statute may require that every application form for insurance from a risk retention group, every certificate issued by a risk retention group, and every policy (on its front and declaration pages) issued by a risk retention group, contain twelve (12) point bold type the following notice:

The policy for which you are applying is issued by a risk retention group. The risk retention group may not be subject to all of the insurance laws and regulations of your state of domicile. State insurance insolvency guaranty funds are not available for risk retention groups.