Consumer Organizations' and NAIC Consumer Representatives' Comments to the

NAIC Mortgage Guaranty Insurance (E) Working Group

On the May 11, 2023 Exposure Draft of the Mortgage Guaranty Insurance Model Act

May 26, 2023

The undersigned NAIC consumer representatives and consumer organizations strenuously oppose the new provision eliminating a private right of action for violations of the act. While different from the "no private right of action" provision in the prior draft of the model law, the latest version of "no private right of action" in the May 11, 2023 exposure draft remains unwarranted and profoundly anti-consumer.

We also object to the watering-down of essential consumer protections.

A Private Right of Action is Necessary and Justified for Violations of Sections 8 (Advertising), 11A (Prohibition of Captive Reinsurance), 12 F (Nondiscrimination), 16 (Conflict of Interest), 18A (Inducements), 18B (Compensation for Placement), 18C (Rebates), 18F (Educational Materials) and 19 (Rescission)

The current NAIC mortgage guaranty insurance model act – adopted many years prior to the 2008 financial crisis – contains no provision limiting any consumer's right of action against the insurance company for violations of the act. It is unclear what rationale or basis or changes in the market exist to support the new "no private right of action" provision.

The current model includes, in Section 13, anti-rebating and anti-kickback provisions to protect consumers from collusion among mortgage insurers and lenders – practices that harm consumers. Despite these anti-kickback provisions in the model law, some insurance regulators not only failed to stop kickback schemes, such as captive reinsurance, but approved these anti-consumer schemes. Private rights of action garnered some relief for consumers who suffered losses because of the prohibited kickback schemes.

Historical experience demonstrates that regulatory oversight alone failed to protect mortgage guaranty insurance consumers and private rights of action helped address regulatory and market failures to provide some redress for harmed consumers. It is illogical that regulators would now insert a provision eliminating a private right of action for consumer redress in the revised model.

Industry's sole argument for the "no private right of action" is the ephemeral chestnut of "potential frivolous litigation." While we have pointed to justified litigation, industry has offered no examples of "frivolous litigation." We have previously pointed out that while industry wants to prevent consumers from going to court for protection against and redress from abusive mortgage guaranty insurer practices, the insurers themselves have no qualms about going to court against consumers. It would be an unfair double standard for regulators to endorse a "no private right of action" by consumers while leaving insurers' access to the courts untouched.

The addition of the "no private right of action" provision is unprecedented. There is no other personal line of insurance with such an anti-consumer provision. There is certainly no such provision in any of the NAIC model laws for lines of insurance that, like mortgage guaranty insurance, are subject to reverse competition – not for consumer credit insurance and not for title insurance.[1] Lines of insurance subject to reverse competition demand greater consumer protection tools, not fewer.

It would not be objectionable to limit the private right of action to only those provisions of the model for which consumer harm can be directly demonstrated and which avoid any provisions that would interfere with regulatory oversight of mortgage guaranty insurer solvency. A private right of action for violations of Sections 8, 11A, 12F, 16, 18A, 18B, 18C, 18F and 19 will not interfere with regulatory oversight of mortgage guaranty financial condition or market conduct – just as private rights of action for any other personal line of insurance complement regulatory oversight of insurers' market conduct in those other lines of insurance.

The revised "no private right of action" language – "neither creates a private right of action for violation of its provisions nor may it be construed to curtail a private right of action which would otherwise exist in the absence of the Act" – is very broad and could be interpreted to have the same effect as simply stating no private right of action. For example, the revised model now includes "limitations" on rebates, commissions and inducements instead of outright prohibitions. It is unclear what or how any other state laws specifically reference any of these prohibited practices and, consequently, how a private right of action would otherwise exist in the absence of the law. If a private right of action otherwise exists, it is likely because there is a federal law governing the behavior of mortgage insurers and state law will not usurp those private rights of action regardless of whether the new mortgage guaranty insurance model mentions "otherwise existing" private rights of action.

[1] "Reverse competition means competition among insurers that regularly takes the form of insurers vying with each other for the favor of persons who control, or may control, the placement of the insurance with insurers. Reverse competition tends to increase insurance premiums or prevent the lowering of premiums in order that greater compensation may be paid to persons for such business as a means of obtaining the placement of business. In these situations, the competitive pressure to obtain business by paying higher compensation to these persons overwhelms any downward pressures consumers may exert on the price of insurance, thus causing prices to rise or remain higher than they would otherwise." NAIC Credit Personal Property Model Act, 3X.

Watering Down of Important Consumer Protections

Section 18A is significantly weakened from a consumer protection standpoint. The model upends a fundamental anti-competitive practice – no inducements by insurers for the steering of business to the insurer – and makes such inducements permissible if included in the policy and subject to the Unfair Trade Practices Act. This is precisely the wrong way to regulate a line of business subject to reverse competition in which the insurers compete not for individual consumers, but for the lenders who select the mortgage guaranty insurer and steer the borrowers to those insurers. It was reverse competition in mortgage guaranty insurance markets that generated a variety of inducement mechanisms to secure business from lenders leading up to the financial crisis of 2008. It was reverse competition that compromised mortgage guaranty insurers' risk management practices.

The recent revisions to the UFTA model act attempt to encourage risk mitigation efforts by insurers without conflicting with anti-rebate concerns. There is no risk mitigation associated with an inducement. Section 18A should be revised to delete the proposed addition at the beginning of the paragraph to clearly prohibit inducements.

The change to Section 18C – permitting rebates if set forth in the policy and subject to the UTPA – is also bewildering. The draft section states:

> Rebates: Unless set force (sic) in the policy and subject to the [state equivalent of the Unfair Trade Practice Act (Model #880)], a Mortgage Guaranty Insurance company shall not quote any rate or premium charge to a person that is different than that currently available to others for the same type of coverage. The amount by which a premium charge is less than that called for by the current schedule of premium charges is an unlawful rebate.

There is simply no way for a "rebate" as set out in the first phrase (set forth in the policy and subject the UTPA) to comply with the remaining portion of the paragraph. If the "rebate" is set forth in the filed rates, it is not a "rebate," but a rate discount. If the "rebate" is available to all for the same type of coverage, it is not a "rebate," but a rate discount. Further, reaching to the recent revisions of the NAIC UTPA model does not help; those recent revisions were intend to promote loss prevention and loss mitigation efforts without conflicting with anti-rebating prohibitions. If the "rebate" is set out in the policy form, then the UTPA is inapplicable because rebates are not policy form provisions approved by the regulator.

Private mortgage insurers do not engage in risk mitigation with borrowers – lenders and mortgage services are the entities that do such activities. While private mortgage insurers may engage in risk mitigation with lenders and servicers – because the mortgage insurance is for the benefit of the mortgage owner – there is no rationale for providing a "rebate" to lenders or services and such activity would clearly be a prohibited inducement or rebate.

Please contact Birny Birny at birny@cej-online.org if you have any questions or would like additional information.

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