

NHSCA – SCIC Model Act *

(closely based upon 1995 NAIC Model)

*SCIC formal action to endorse this model is pending. SCIC has participated in the drafting of this bill.

SERVICE CONTRACTS ACT

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Section 1. Scope and Purpose

A. The purposes of this Act is to create a legal framework within which service contracts are defined, may be sold and are regulated in this state. It declares that service contracts, as defined, are not insurance and not otherwise subject to the insurance code. It adds significant consumer protections and eliminates unnecessary administration.

B. The following are exempt from this Act:

- (1) Warranties;
- (2) Maintenance agreements;
- (3) Warranties, service contracts or maintenance agreements offered by public utilities on their transmission devices to the extent they are regulated by [insert name of state agency that regulates public utilities];
- (4) Service contracts sold or offered for sale to persons other than consumers; and

- (5) Service contracts on tangible property where the tangible property for which the service contract is sold has a purchase price of one hundred dollars (\$100) or less, exclusive of sales tax.

- C. Motor vehicle manufacturer's service contracts on the motor vehicle manufacturer's products need only comply with sections 3F, 5A, 5D – 5L, 6, and 10, as applicable, of this Act.

- D. The types of agreements referred to in subsections B and C of this section, and service contracts governed pursuant to this {chapter} are not insurance and do not have to comply with any provision of the insurance law of this state.

Section 2. Definitions

As used in this Act:

- A. "Administrator" means the person who is responsible for the administration of the service contracts or the service contracts plan or who is responsible for any submission required by the Act.

- B. "Commissioner" means the commissioner of insurance of this state.

- C. "Consumer" means a natural person who buys other than for purposes of resale any tangible personal property that is distributed in commerce and that is normally used for personal, family or household purposes and not for business or research purposes.

- D. "Maintenance agreement" means a contract of limited duration that provides for scheduled maintenance only and does not include repair or replacement.

- E. "Motor Vehicle Manufacturer" means a person that:
 - (1) Manufactures or produces motor vehicles and sells motor vehicles under its own name or label;
 - (2) Is a wholly owned subsidiary of the person who manufactures or produces motor vehicles;
 - (3) Is a corporation which owns 100 percent of the person who manufactures or produces motor vehicles;

- (4) Does not manufacture or produce motor vehicles, but sells motor vehicles under the trade name or label of another person who manufactures or produces motor vehicles;
 - (5) Manufactures or produces motor vehicles and sells such motor vehicles under the trade name or label of another person who manufactures or produces motor vehicles; or
 - (6) Does not manufacture or produce motor vehicles but, pursuant to a written contract, licenses the use of its trade name or label to another person who manufactures or produces motor vehicles that sells motor vehicles under the licensor's trade name or label.
- F. "Non-original manufacturer's parts" means replacement parts not made for or by the original manufacturer of the property, commonly referred to as "after market parts."
- G. "Person" means an individual, partnership, corporation, incorporated or unincorporated association, joint stock company, reciprocal, syndicate or any similar entity or combination of entities acting in concert.
- H. "Premium" means the consideration paid to an insurer for a reimbursement insurance policy.
- I. "Provider" means a person who is contractually obligated to the service contract holder under the terms of the service contract.
- J. "Provider fee" means the consideration paid for a service contract.
- K. "Reimbursement insurance policy" means a policy of insurance issued to a provider to either provide reimbursement to the provider under the terms of the insured service contracts issued or sold by the provider or, in the event of the provider's non-performance, to pay on behalf of the provider all covered contractual obligations incurred by the provider under the terms of the insured service contracts issued or sold by the provider.
- L. "Service contract" means a contract or agreement for a separately stated consideration for a specific duration to perform the service, repair, replacement or maintenance of property or indemnification for service, repair, replacement or maintenance, for the operational or structural failure of any motor vehicle, residential or other property due to a defect in materials, workmanship, inherent defect or normal wear and tear, with or without additional provisions for incidental payment of indemnity under limited circumstances, including, but not limited to, towing, rental and emergency road service and road hazard protection.

Service contracts may provide for the service, repair, replacement, or maintenance of property for damage resulting from power surges or interruption and accidental damage from handling. Service contracts are not insurance in this state or otherwise regulated under the insurance code.

- M. “Service contract holder” or “contract holder” means a person who is the purchaser or holder of a service contract.
- N. “Warranty” means a warranty made solely by the manufacturer, importer or seller of property or services without consideration, that is not negotiated or separated from the sale of the product and is incidental to the sale of the product, that guarantees indemnity for defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as repair or replacement of the property or repetition of services.

Section 3. Requirements For Doing Business

- A. A provider may, but is not required to, appoint an administrator or other designee to be responsible for any or all of the administration of service contracts and compliance with this Act.
- B. Service contracts shall not be issued, sold or offered for sale in this state unless the provider has:
 - (1) Provided a receipt for, or other written evidence of, the purchase of the service contract to the contract holder; and
 - (2) Provided a copy of the service contract to the service contract holder within a reasonable period of time from the date of purchase.
- C. Each provider of service contracts sold in this state shall file a registration with the Commissioner consisting of their name, full corporate address, telephone number and contact person and designate a person in this state for service of process. Each provider shall pay to the Commissioner a fee in the amount of six hundred dollars (\$600) upon initial registration and every three years thereafter. Said registration need only be updated by written notification to the Commissioner if material changes occur in the registration on file.
- D. In order to assure the faithful performance of a provider’s obligations to its contract holders, each provider shall be responsible for complying with the requirements of one of the following three subdivisions:

- (1) Insure all service contracts under a reimbursement insurance policy issued by an insurer licensed, registered, or otherwise authorized to do business in this state, and either:

(a) at the time the policy is filed with the commissioner, and continuously thereafter, (i) maintain surplus as to policyholders and paid-in capital of at least fifteen million dollars (\$15,000,000) and (ii) annually file copies of the insurer's financial statements, its NAIC Annual Statement, and the actuarial certification required by and filed in the insurer's state of domicile; or

(b) at the time the policy is filed with the commissioner, and continuously thereafter, (i) maintain surplus as to policyholders and paid-in capital of less than fifteen million dollars (\$15,000,000) but at least equal to ten million dollars (\$10,000,000), (ii) demonstrate to the satisfaction of the commissioner that the company maintains a ratio of net written premiums, wherever written, to surplus as to policyholders and paid-in capital of not greater than 3 to 1, and (iii) annually files copies of the insurer's financial statements, its NAIC Annual Statement, and the actuarial certification required by and filed in the insurer's state of domicile; or

- (2) (a) Maintain a funded reserve account for its obligations under its contracts issued and outstanding in this state. The reserves shall not be less than forty percent (40%) of gross consideration received, less claims paid, on the sale of the service contract for all in-force contracts. The reserve account shall be subject to examination and review by the commissioner; and

(b) Place in trust with the commissioner a financial security deposit, having a value of not less than five percent (5%) of the gross consideration received, less claims paid, on the sale of the service contract for all service contracts issued and in force, but not less than \$25,000.00, consisting of one of the following:

- (i) A surety bond issued by an authorized surety;
- (ii) Securities of the type eligible for deposit by authorized insurers in this state;
- (iii) Cash;
- (iv) A letter of credit issued by a qualified financial institution;
or

- (v) Another form of security prescribed by regulations issued by the Commissioner;

or

- (3) (a) Maintain, or together with its parent company maintain, a net worth or stockholders' equity of \$100 million; and

- (b) Upon request, provide the Commissioner with a copy of the provider's or the provider's parent company's most recent Form 10-K or Form 20-F filed with the Securities and Exchange Commission (SEC) within the last calendar year, or if the company does not file with the SEC, a copy of the company's financial statements, which shows a net worth of the provider or its parent company of at least \$100 million. If the provider's parent company's Form 10-K, Form 20-F, or financial statements are filed to meet the provider's financial stability requirement, then the parent company shall agree to guarantee the obligations of the provider relating to service contracts sold by the provider in this state.

E. Except for the requirements specified in Section 3C and 3D, above, no other financial security requirements shall be required by the commissioner for service contract providers.

F. Service contracts shall require the provider to permit the service contract holder to return the service contract within 20 days of the date the service contract was mailed to the service contract holder or within 10 days of delivery if the service contract is delivered to the service contract holder at the time of sale or within a longer time period permitted under the service contract. Upon return of the service contract to the provider within the applicable time period, if no claim has been made under the service contract prior to its return to the provider, the service contract is void and the provider shall refund to the service contract holder, or credit the account of the service contract holder, with the full purchase price of the service contract. The right to void the service contract provided in this subsection is not transferable and shall apply only to the original service contract purchaser, and only if no claim has been made prior to its return to the provider. A 10 percent penalty per month shall be added to a refund that is not paid or credited within 45 days after return of the service contract to the provider.

G. Premium Taxes:

- (1) Provider fees collected on service contracts shall not be subject to premium taxes.

- (2) Premiums for reimbursement insurance policies shall be subject to applicable taxes.
- H. Except for the registration requirements in Section 3C, providers and related service contract sellers, administrators, and other persons marketing, selling or offering to sell service contracts are exempt from any licensing requirements of this state.
- I. The marketing, sale, offering for sale, issuance, making, proposing to make and administration of service contracts by providers and related service contract sellers, administrators, and other persons shall be exempt from all other provisions of this state's insurance law.

Section 4. Required Disclosures – Reimbursement Insurance Policy

- A. Reimbursement insurance policies insuring service contracts issued, sold or offered for sale in this state shall state that the insurer that issued the reimbursement insurance policy shall either reimburse or pay on behalf of the provider any covered sums the provider is legally obligated to pay or, in the event of the provider's non-performance, shall provide the service which the provider is legally obligated to perform according to the provider's contractual obligations under the service contracts issued or sold by the provider.
- B. In the event covered service is not provided by the service contract provider within 60 days of proof of loss by the service contract holder, the contract holder is entitled to apply directly to the reimbursement insurance company.

Section 5. Required Disclosure – Service Contracts

- A. Service contracts marketed, sold, offered for sale, issued, made, proposed to be made, or administered in this state shall be written, printed, or typed in clear, understandable language that is easy to read, and shall disclose the requirements set forth in this section, as applicable.
- B. Service contracts insured under a reimbursement insurance policy pursuant to Section 3D(1) of this Act shall contain a statement in substantially the following form: "Obligations of the provider under this service contract are insured under a service contract reimbursement insurance policy." The service contract shall also state the name and address of the insurer.
- C. Service contracts not insured under a reimbursement insurance policy pursuant to Section 3D(1) of this Act shall contain a statement in substantially the following form: "Obligations of the provider under this service contract are backed by the full faith and credit of the provider."

- D. Service contracts shall state the name and address of the provider, and shall identify any administrator if different from the provider, the service contract seller, and the service contract holder to the extent that the name of the service contract holder has been furnished by the service contract holder. The identities of such parties are not required to be preprinted on the service contract and may be added to the service contract at the time of sale.
- E. Service contracts shall state the total purchase price and the terms under which service contract is sold. The purchase price is not required to be pre-printed on the service contract and may be negotiated at the time of sale with the service contract holder.
- F. Service contracts shall state the existence of any deductible amount, if applicable.
- G. Service contracts shall specify the merchandise and services to be provided and any limitations, exceptions, or exclusions
- H. Service contracts covering automobiles shall state whether the use of the non-original manufacturers' parts is allowed.
- I. Service contracts shall state any restrictions governing the transferability of the service contract, if applicable.
- J. Service contracts shall state the terms, restrictions or conditions governing cancellation of the service contract prior to the termination or expiration date of the service contract by either the provider or the service contract holder. The provider of the service contract shall mail a written notice to the contract holder at the last known address of the service contract holder contained in the records of the provider at least five (5) days prior to cancellation by the provider. Prior notice is not required if the reason for cancellation is nonpayment of the provider fee, a material misrepresentation by the service contract holder to the provider, or a substantial breach of duties by the service contract holder relating to the covered product or its use. The notice shall state the effective date of the cancellation and the reason for the cancellation.
- K. Service contracts shall set forth all of the obligations and duties of the service contract holder, such as the duty to protect against any further damage and any requirement to follow owner's manual.
- L. Service contracts shall state whether or not the service contract provides for or excludes consequential damages or pre-existing conditions, if applicable. Service contracts may, but are not required to, cover damage resulting from rust, corrosion or damage caused by a noncovered part or system.,.

- M. If prior approval of repair work is required, a service contract shall state the procedure for obtaining prior approval and for making a claim, including a toll-free telephone number for claim service and a procedure for obtaining emergency repairs performed outside of normal business hours.

Section 6. Prohibited Acts

- A. A provider shall not use in its name the words insurance, casualty, surety, mutual or any other words descriptive of the insurance, casualty or surety business; or a name deceptively similar to the name or description of any insurance or surety corporation, or to the name of any other provider. The word “guaranty” or similar word may be used by a provider. This section shall not apply to a company that was using any of the prohibited language in its name prior to the effective date of this Act. However, a company using the prohibited language in its name shall include in its service contracts a statement in substantially the following form: "This agreement is not an insurance contract."
- B. A provider or its representative shall not in its service contracts or literature make, permit or cause to be made any false or misleading statement, or deliberately omit any material statement that would be considered misleading if omitted.
- C. A person, such as a bank, savings and loan association, lending institution, manufacturer, or seller of any product, shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property.

Section 7. Record keeping Requirements

- A. Books and Records:
 - (1) The provider shall keep accurate accounts, books, and records concerning transactions regulated under this Act.
 - (2) The provider’s accounts, books, and records shall include the following:
 - (a) Copies of each type of service contracts sold;
 - (b) The name and address of each service contract holder to the extent that the name and address have been furnished by the service contract holder;
 - (c) In the case of new, retail consumer products, a list of the locations where service contracts are marketed, sold, or offered for sale; and
 - (d) Written claims files which shall contain at least the dates and

description of claims related to the service contracts.

- (3) Except as provided in Section 7B, the provider shall retain all records required to be maintained by section 7 for at least one (1) year after the specified period of coverage has expired.
 - (4) The records required under this Act may be, but are not required to be, maintained on a computer disk or other record keeping technology. If the records are maintained in other than hard copy, the records shall be capable of duplication to legible hard copy at the request of the commissioner.
- B. A provider discontinuing business in this state shall maintain its records until it furnishes the commissioner satisfactory proof that it has discharged all obligations to contract holders in this state.

Section 8. Cancellation of Reimbursement Insurance Policy

As applicable, an insurer that issued a reimbursement insurance policy shall not terminate the policy until a notice of termination in accordance with _____ [insert citation to the law that governs the termination of insurance contracts] has been mailed or delivered to the commissioner. The termination of a reimbursement insurance policy shall not reduce the issuer's responsibility for service contracts issued by providers prior to the date of the termination.

Section 9. Obligation of Reimbursement Insurance Policy Insurers

- A. Insurers issuing reimbursement insurance to providers are deemed to have received the premiums for such insurance upon the payment of provider fees by consumers for service contracts issued by such insured providers.
- B. This Act shall not prevent or limit the right of an insurer which issued a reimbursement insurance policy to seek indemnification or subrogation against a provider if the issuer pays or is obligated to pay the service contract holder sums that the provider was obligated to pay pursuant to the provisions of the service contract.

Section 10. Enforcement Provisions

- A. The commissioner may conduct examinations of providers, administrators, insurers or other persons to enforce the provisions of this Act and protect service contract holders in this state. Upon request of the commissioner, the provider shall make all accounts, books, and records concerning service contract sold by the provider available to the commissioner which are necessary to enable the commissioner to reasonably determine compliance or noncompliance with this

Act.

- B. The commissioner may take action which is necessary or appropriate to enforce the provisions of this Act and the commissioner's regulations and orders, and to protect service contract holders in this state.
- (1) If a provider has violated this Act or the commissioner's regulations or orders, the commissioner may issue an order directed to that provider to cease and desist from committing violations of this Act or the commissioner's regulations or orders; may issue an order prohibiting a service contract provider from selling or offering for sale service contracts in violation of this Act; or may issue an order imposing a civil penalty on that provider, or any combination of the foregoing, as applicable.
 - (a) A person aggrieved by an order issued under this paragraph may request a hearing before the commissioner. The hearing request shall be filed with the commissioner within 20 days of the date the commissioner's order is effective:
 - (b) If a hearing is requested, an order issued by the commissioner under this section shall be suspended from the original effective date of the order until completion of the hearing and final decision of the commissioner; and
 - (c) At the hearing, the burden shall be on the commissioner to show why the order issued pursuant to this paragraph is justified. The provisions of [insert citation to statutes concerning hearings before the commissioner] shall apply to a hearing requested under this section.
 - (2) The commissioner may bring an action in any court of competent jurisdiction for an injunction or other appropriate relief to enjoin threatened or existing violations of this Act or of the commissioner's orders or regulations. An action filed under this paragraph may also seek restitution on behalf of persons aggrieved by a violation of this Act or orders or regulations of the commissioner.
 - (3) A person who is found to have violated this Act or orders or regulation of the commissioner may be assessed a civil penalty in an amount determined by the commissioner of not more than five hundred dollars (\$500.00) per violation and no more than ten thousand dollars (\$10,000.00) in the aggregate for all violations of a similar nature. For purposes of this section, violations shall be of a similar nature if the violation consists of the same or similar course of conduct, action, or

practice, irrespective of the number of times the act, conduct, or practice which is determined to be a violation of this Act occurred.

Section 11. Separability Provision

If any provision at this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of tile Act, and the application of the provision to person or circumstances other than those as to which it is held invalid, shall not be affected.

Section 12. Effective Date

- A. Service Contracts entered into prior to January 1, 2007, and renewals thereof, may but are not required to, comply with this Act. Providers and other persons are not required to comply with this Act until January 1, 2007. A provider or other person may, but is not required to, implement the requirements of this Act prior to January 1, 2007. The failure of a provider or other person to comply with this Act or otherwise to administer a service contract plan, in the manner required by this Act prior to January 1, 2007, shall not be admissible in any court, arbitration, or alternative dispute resolution proceeding or otherwise used to prove that the action of any person or the service contract was unlawful or otherwise improper.
- B. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.