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COMMITTEE REPORT

May 14, 2009

**S. 323**

Introduced by Senator Thomas

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Read the first time April 21, 2009.

**THE COMMITTEE ON**

**LABOR, COMMERCE AND INDUSTRY**

To whom was referred a Bill (S. 323) to amend Section 38‑90‑20, as amended, Code of Laws of South Carolina, 1976, relating to licensing of a captive insurance company, so as to prohibit, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

WILLIAM E. SANDIFER for Committee.

**A** **BILL**

TO AMEND SECTION 38‑90‑20, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO LICENSING OF A CAPTIVE INSURANCE COMPANY, SO AS TO PROHIBIT A CAPTIVE INSURANCE COMPANY FROM WRITING WORKERS’ COMPENSATION INSURANCE ON A DIRECT BASIS, AND TO AUTHORIZE AN ADDITIONAL PROCESSING FEE FOR AN APPLICATION TO BE CHARGED AS DETERMINED APPROPRIATE BY THE DIRECTOR OR HIS DESIGNEE GIVEN THE NATURE OF THE APPLICATION BEING INVESTIGATED; TO AMEND SECTION 38‑90‑40, AS AMENDED, RELATING TO CAPITALIZATION REQUIREMENTS FOR CAPTIVE INSURANCE COMPANIES, SO AS TO AUTHORIZE A REDUCTION IN REQUIRED TRUST FUNDS FOR A BRANCH CAPTIVE INSURANCE COMPANY THAT POSTS SECURITY FOR LOSS RESERVES ON BRANCH BUSINESS TO A FRONT COMPANY; TO AMEND SECTION 38‑90‑55, RELATING TO INCORPORATION OF A CAPTIVE REINSURANCE COMPANY, SO AS TO CHANGE MANDATORY TO PRECATORY CONSIDERATION BY THE DIRECTOR OF FACTORS IN ARRIVING AT A FINDING; TO AMEND SECTION 38‑90‑60, AS AMENDED, RELATING TO INCORPORATION OPTIONS AND REQUIREMENTS OF CERTAIN TYPE OF CAPTIVE INSURANCE COMPANIES, SO AS TO CHANGE MANDATORY TO PRECATORY CONSIDERATION BY THE DIRECTOR OF FACTORS IN ARRIVING AT A FINDING; TO AMEND SECTION 38‑90‑70, AS AMENDED, RELATING TO REPORTS REQUIRED TO BE SUBMITTED BY A CAPTIVE INSURANCE COMPANY TO THE DIRECTOR, SO AS TO AUTHORIZE THE DIRECTOR TO GRANT AN EXTENSION OR WAIVE THE REQUIREMENTS OF THIS SECTION; TO AMEND SECTION 38‑90‑75, RELATING TO DISCOUNTING OF LOSS AND LOSS ADJUSTMENT EXPENSE RESERVES, SO AS TO PROVIDE THE SECTION APPLIES TO A CAPTIVE INSURANCE COMPANY, DELETE THE MANNER IN WHICH THE RESERVES WERE DISCOUNTED, AND PROVIDE THAT THIS PROCESS MAY BE ACCOMPLISHED WITH PRIOR WRITTEN APPROVAL BY THE DIRECTOR; TO AMEND SECTION 38‑90‑80, AS AMENDED, RELATING TO INSPECTIONS AND EXAMINATIONS OF A CAPTIVE INSURANCE COMPANY, SO AS TO INCREASE FROM THREE TO FIVE YEARS THE INTERVAL OF THE INSPECTIONS AND EXAMINATIONS AND AUTHORIZE THE DIRECTOR TO WAIVE THE REQUIREMENT FOR A VISIT TO CERTAIN COMPANIES; TO AMEND SECTION 38‑90‑90, RELATING TO SUSPENSION OR REVOCATION OF THE LICENSE OF A CAPTIVE INSURANCE COMPANY, SO AS TO AUTHORIZE THE DIRECTOR TO IMPOSE A FINE INSTEAD OF REVOKING OR SUSPENDING A LICENSE; TO AMEND SECTION 38‑90‑130, RELATING TO THE PROHIBITION OF A CAPTIVE INSURANCE COMPANY FROM PARTICIPATING IN A PLAN, POOL, ASSOCIATION, OR GUARANTY OR INSOLVENCY FUND, SO AS TO AUTHORIZE A COMPANY TO PARTICIPATE IN A POOL FOR THE PURPOSE OF COMMERCIAL RISK SHARING UNDER CERTAIN CIRCUMSTANCES; TO AMEND SECTION 38‑90‑180, AS AMENDED, RELATING TO THE APPLICABILITY OF CERTAIN PROVISIONS TO CAPTIVE INSURANCE COMPANIES, SO AS TO MAKE THE PROVISIONS OF CHAPTERS 26 AND 27 APPLICABLE TO CAPTIVE INSURANCE COMPANIES; TO AMEND SECTION 38‑90‑440, AS AMENDED, RELATING TO LICENSING OF A SPECIAL PURPOSE FINANCIAL CAPTIVE INSURANCE COMPANY, SO AS TO PROVIDE THE BASIS FOR CALCULATING A PROCESSING FEE, AND CLARIFY THAT SIX THOUSAND DOLLARS BASED ON A MINIMUM FEE OF TWELVE THOUSAND DOLLARS IS PAYABLE UPON FILING OF THE APPLICATION; TO AMEND SECTION 38‑90‑450, AS AMENDED, RELATING TO THE ORGANIZATION REQUIREMENTS OF A SPECIAL PURPOSE FINANCIAL CAPTIVE, SO AS TO CHANGE FROM MANDATORY TO PRECATORY CONSIDERATION BY THE DIRECTOR WHEN ISSUING A CERTIFICATE; AND TO AMEND SECTION 38‑90‑560, RELATING TO EXAMINATIONS BY THE DIRECTOR OF A SPECIAL PURPOSE FINANCIAL CAPTIVE INSURANCE COMPANY, SO AS TO INCREASE FROM THREE TO FIVE YEARS THE INTERVAL THAT A COMPANY MUST BE INSPECTED AND DELETE THE AUTHORITY OF THE DIRECTOR TO ENLARGE THE PERIOD OF INSPECTION UNDER CERTAIN CIRCUMSTANCES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 38‑90‑20(A) of the 1976 Code, as last amended by Act 73 of 2003, is further amended to read:

“(A) A captive insurance company, when permitted by its articles of incorporation, articles of organization, operating agreement, or charter, may apply to the director for a license to ~~do~~ provide any and all insurance, except workers’ compensation insurance written on a direct basis, authorized by this title; however:

(1) a pure captive insurance company may not insure any risks other than those of its parent, affiliated companies, controlled unaffiliated business, or a combination of them;

(2) an association captive insurance company may not insure any risks other than those of the member organizations of its association and their affiliated companies;

(3) an industrial insured captive insurance company may not insure any risks other than those of the industrial insureds that comprise the industrial insured group and their affiliated companies;

(4) in general, a special purpose captive insurance company only may insure the risks of its parent. Notwithstanding any other provisions of this chapter, a special purpose captive insurance company may provide insurance or reinsurance, or both, for risks as approved by the director;

(5) a captive insurance company may not provide personal motor vehicle or homeowner’s insurance coverage ~~or any component of these coverages~~ written on a direct basis;

(6) a captive insurance company may not accept or cede reinsurance except as provided in Section 38‑90‑110.”

SECTION 2. Section 38‑90‑20(D)(1) of the 1976 Code, as last amended by Act 73 of 2003, is further amended to read:

“(1) A captive insurance company shall pay to the department a nonrefundable fee of two hundred dollars for processing its application for license. In addition, the director may retain legal, financial, and examination services from outside the department to examine and investigate the application, the reasonable cost of which may be charged against the applicant or the director may use internal resources to examine and investigate the application for a fee of two thousand four hundred dollars or such other amount that is determined to be appropriate by the director or his designee given the nature of the application being investigated.”

SECTION 3. Section 38‑90‑40(E) of the 1976 Code, as last amended by Act 332 of 2006, is further amended to read:

“(E) In the case of a branch captive insurance company, as security for the payment of liabilities attributable to branch operations, the director shall require that a trust fund, funded by an irrevocable letter of credit or other acceptable asset, be established and maintained in the United States for the benefit of United States policyholders and United States ceding insurers under insurance policies issued or reinsurance contracts issued or assumed, by the branch captive insurance company through its branch operations. The amount of the security may be no less than the capital and surplus required by this chapter and the reserves on these insurance policies or reinsurance contracts, including reserves for losses, allocated loss adjustment expenses, incurred but not reported losses and unearned premiums with regard to business written through branch operations; however, the director may permit a branch captive insurance company that is required to post security for loss reserves on branch business by its reinsurer or front company to reduce the funds in the trust account required by this section by the same amount so long as the security remains posted with the reinsurer or front company. If the form of security selected is a letter of credit, the letter of credit must be established by, or issued or confirmed by, a bank chartered in this State or a member bank of the Federal Reserve System.”

SECTION 4. Section 38‑90‑55(C) of the 1976 Code, as added by Act 58 of 2001, is amended to read:

“(C) Before the articles of incorporation are transmitted to the Secretary of State, the incorporators shall petition the director to issue a certificate finding that the establishment and maintenance of the proposed corporation promotes the general good of this State. In arriving at this finding the director ~~shall~~ may consider:

(1) the character, reputation, financial standing, and purposes of the incorporators;

(2) the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors; and

(3) other factors the director considers advisable.”

SECTION 5. Section 38‑90‑60(D), (F), and (G) of the 1976 Code, as last amended by Act 73 of 2003 and Act 291 of 2004, are further amended to read:

“(D) In the case of a captive insurance company formed as a corporation, a nonprofit corporation, or a limited liability company, before the articles of incorporation or articles of organization are transmitted to the Secretary of State, the incorporators or organizers shall petition the director to issue a certificate setting forth a finding that the establishment and maintenance of the proposed entity will promote the general good of the State. In arriving at this finding the director ~~shall~~ may consider:

(1) the character, reputation, financial standing, and purposes of the incorporators or organizers;

(2) the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors or managers; and

(3) other aspects as the director considers advisable.

(F) In the case of a captive insurance company formed as a reciprocal insurer, the organizers shall petition the director to issue a certificate setting forth the director’s finding that the establishment and maintenance of the proposed association will promote the general good of the State. In arriving at this finding the director ~~shall~~ may consider:

(1) the character, reputation, financial standing, and purposes of the incorporators or organizers;

(2) the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors or managers; and

(3) other aspects the director considers advisable.

(G) In the case of a captive insurance company licensed as a branch captive insurance company, the alien captive insurance company shall petition the director to issue a certificate setting forth the director’s finding that~~, after considering the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors or managers of the alien captive insurance company,~~ the licensing and maintenance of the branch operations will promote the general good of the State. In arriving at this finding, the director or his designee may consider the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors or managers of the alien captive insurance company and other aspects the director considers advisable. The alien captive insurance company may register to do business in this State after the director’s certificate has been issued.”

SECTION 6. Section 38‑90‑70(A) of the 1976 Code is amended to read:

“(A) A captive insurance company may not be required to make an annual report except as provided in this chapter. The director has the authority to waive or grant an extension to the requirements of this section.”

SECTION 7. Section 38‑90‑75 of the 1976 Code, as added by Act 58 of 2001, is amended to read:

“Section 38‑90‑75. (A) A ~~sponsored~~ captive insurance company ~~and a captive reinsurance company~~ may discount its loss and loss adjustment expense reserves ~~at treasury rates applied to the applicable payments projected through the use of the expected payment pattern associated with the reserves~~ with prior written approval by the director or his designee.

(B) A ~~sponsored~~ captive insurance company ~~and a captive reinsurance company~~ shall file annually an actuarial opinion on loss and loss adjustment expense reserves provided by an independent actuary. The actuary may not be an employee of the captive company or its affiliates.

(C) The director may disallow the discounting of loss and loss adjustment expense reserves if a ~~sponsored~~ captive insurance company ~~or a captive reinsurance company~~ violates a provision of this title.”

SECTION 8. Section 38‑90‑80(A) of the 1976 Code is amended to read:

“(A) At least once ~~in three~~ every five years, and whenever the director determines it to be prudent, the director personally, or by a competent person appointed by the director, shall visit each captive insurance company and thoroughly inspect and examine its affairs to ascertain its financial condition, its ability to fulfill its obligations, and whether it has complied with this chapter. The director ~~upon application, in his discretion, may enlarge the three‑year period to five years, if a captive insurance company is subject to a comprehensive annual audit during that period of a scope satisfactory to the director by independent auditors approved by the director~~ may waive the requirement for a visit to the captive insurance company for pure captive insurance companies and for special purpose captive insurance companies. The expenses and charges of the examination must be paid to the State by the company or companies examined and the department shall issue its warrants for the proper charges incurred in all examinations.”

SECTION 9. Section 38‑90‑90 of the 1976 Code is amended by adding an appropriately lettered subsection to read:

“(C) Instead of suspending or revoking the license of a captive insurance company, the director may impose fines as provided for in Section 38‑2‑10.”

SECTION 10. Section 38‑90‑130 of the 1976 Code is amended to read:

“Section 38‑90‑130. A captive insurance company, including a captive insurance company organized as a reciprocal insurer under this chapter, may not join or contribute financially to a plan, pool, association, or guaranty or insolvency fund in this State, and a captive insurance company, or its insured or its parent or any affiliated company or any member organization of its association, or in the case of a captive insurance company organized as a reciprocal insurer, a subscriber of the company, may not receive a benefit from a plan, pool, association, or guaranty or insolvency fund for claims arising out of the operations of such captive insurance company. Subject to the prior written approval of the director or his designee, participation in a pool for the purpose of commercial risk sharing is not prohibited under this section.”

SECTION 11. Section 38‑90‑180(A) of the 1976 Code, as last amended by Act 291 of 2004, is further amended to read:

“(A) Except as otherwise provided in this section, the terms and conditions set forth in Chapters 26 and 27 of this title pertaining to insurance reorganizations, receiverships, and injunctions apply in full to captive insurance companies formed or licensed under this chapter.”

SECTION 12. Section 38‑90‑440(G)(1) of the 1976 Code, as last amended by Act 332 of 2006, is further amended to read:

“(1) a nonrefundable fee of two hundred dollars for processing its application for license. In addition, the director may retain legal, financial, and examination services from outside the department to examine and investigate the application, the reasonable cost of which may be charged against the applicant~~, or~~. The director also may use internal resources to examine and investigate the application ~~for a~~ based upon an hourly rate for the services performed or the usual and customary fee charged by the financial services industry for similar work subject to a minimum fee of twelve thousand dollars, ~~half~~ six thousand dollars of which is payable upon filing of the application and the remainder upon licensure~~, or both~~;”

SECTION 13. Section 38‑90‑450(E) of the 1976 Code, as added by Act 291 of 2004, is further amended to read:

“(E) Before transmitting its organizational documents to the Secretary of State, the incorporators or organizers shall petition the director to issue a certificate setting forth a finding that the establishment and maintenance of the proposed SPFC promotes the general good of the State. In arriving at this finding the director ~~shall~~ may consider:

(1) the character, reputation, financial standing, and purposes of the incorporators or organizers;

(2) the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers, directors, partners, members, manager, or organizers, as applicable;

(3) other aspects as the director considers advisable.”

SECTION 14. Section 38‑90‑560(A) of the 1976 Code, as added by Act 291 of 2004, is amended to read:

“(A) At least once every ~~three~~ five years, and ~~if~~ whenever the director determines it to be prudent, the director, or his designee, shall visit each SPFC and thoroughly inspect and examine its affairs to ascertain its financial condition, its ability to fulfill its obligations, and whether it has complied with this article. ~~The director upon application, in his discretion, may enlarge the three‑year period to five years, if a SPFC is subject to a comprehensive annual audit during that period of a scope satisfactory to the director by independent auditors approved by the director.~~ The expenses and charges of the examination must be paid to the State by the company or companies examined, and the department shall issue its warrants for the proper charges incurred in all examinations.”

SECTION 15. This act takes effect upon approval by the Governor.

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