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Indicates New Matter

AMENDED

May 4, 2017

**S. 254**

Introduced by Senator Cromer

S. Printed 5/4/17--H.

Read the first time March 13, 2017.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE “OWN RISK AND SOLVENCY ASSESSMENT ACT” BY ADDING ARTICLE 8 TO CHAPTER 13, TITLE 38 SO AS TO EXPRESS THE PURPOSE OF THIS ACT, TO DEFINE NECESSARY TERMS, TO REQUIRE AN INSURER TO MAINTAIN A RISK MANAGEMENT FRAMEWORK FOR CERTAIN PURPOSES, TO REQUIRE AN INSURER OR INSURANCE GROUP OF WHICH AN INSURER IS A MEMBER TO CONDUCT AN OWN RISK AND SOLVENCY ASSESSMENT (ORSA) ON NO LESS THAN AN ANNUAL BASIS, TO REQUIRE AN INSURER OR INSURANCE GROUP TO SUBMIT AN ORSA REPORT TO THE DIRECTOR OF THE DEPARTMENT OF INSURANCE AND TO DESCRIBE WHAT THE REPORT MUST CONTAIN, TO PROVIDE EXEMPTIONS FROM THE REPORTING PROVISIONS IN CERTAIN CIRCUMSTANCES AND TO ALLOW AN INSURER TO APPLY FOR A WAIVER UNDER CERTAIN CIRCUMSTANCES, TO ESTABLISH THAT THE ORSA REPORT BE PREPARED IN A MANNER CONSISTENT WITH THE ORSA GUIDANCE MANUAL, TO PROVIDE THAT ALL DOCUMENTS, MATERIALS, AND INFORMATION CREATED UNDER THE OWN RISK AND SOLVENCY ASSESSMENT ACT ARE CONFIDENTIAL, TO PROHIBIT THE DIRECTOR OR ANYONE WHO RECEIVES ORSA‑RELATED INFORMATION FROM TESTIFYING IN A PRIVATE CIVIL ACTION CONCERNING THE CONFIDENTIAL INFORMATION, TO PERMIT THE DIRECTOR TO TAKE CERTAIN ACTIONS CONCERNING HIS REGULATORY DUTIES, TO PROVIDE A PENALTY FOR AN INSURER WHO FAILS TO FILE THE ORSA SUMMARY REPORT, AND TO SET AN EFFECTIVE DATE FOR THE PROVISIONS OF THIS ACT; AND TO AMEND SECTION 38‑21‑10, AS AMENDED, RELATING TO DEFINED TERMS FOR THE INSURANCE HOLDING COMPANY REGULATORY ACT, SO AS TO DEFINE THE TERM “SUPERVISORY COLLEGE”.

Amend Title To Conform

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

SECTION 1. Chapter 13, Title 38 of the 1976 Code is amended by adding:

“Article 8

Own Risk and Solvency Assessment

Section 38‑13‑810. (A) The purpose of this act is to provide the requirements for maintaining a risk management framework and completing an Own Risk and Solvency Assessment (ORSA) and provide guidance and instructions for filing an ORSA Summary Report with the insurance director of this State.

(B) The requirements of this article apply to all insurers domiciled in this State unless exempt pursuant to Section 38‑13‑860.

(C) The General Assembly finds and declares that an ORSA Summary Report contains confidential and sensitive information related to an insurer or insurance group’s identification of risks material and relevant to the insurer or insurance group filing the report. This information includes proprietary and trade secret information that has the potential for harm and competitive disadvantage to the insurer or insurance group if the information is made public. It is the intent of the General Assembly that:

(1) an ORSA Summary Report, including all documents, materials, or other information related to its preparation, is a confidential document filed with the director and only may be shared as stated in this article;

(2) an ORSA Summary Report will be used to assist the director in the performance of his duties; and

(3) in no event may an ORSA Summary Report and its accompanying documents be subject to public disclosure.

(D) Nothing in this section prohibits an order from a court of competent jurisdiction requiring an insurance company that is subject to this article to produce an ORSA Summary Report.

Section 38‑13‑820. For purposes of this article, the term:

(1) ‘Director’ means the Director of the Department of Insurance.

(2) ‘Insurance group’ means insurers and affiliates included within an insurance holding company system.

(3) ‘Insurer’ has the same meaning as set forth in Section 38‑1‑20, except the term does not include agencies, authorities, or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state.

(4) ‘Own Risk and Solvency Assessment’ or ‘ORSA’ means a confidential internal assessment, appropriate to the nature, scale, and complexity of an insurer or insurance group, conducted by that insurer or insurance group of the material and relevant risks associated with the insurer or insurance group’s current business plan, and the sufficiency of capital resources to support those risks.

(5) ‘ORSA Guidance Manual’ means the current version of the Own Risk and Solvency Assessment Guidance Manual developed and adopted by the National Association of Insurance Commissioners (NAIC) and as amended from time to time. A change in the ORSA Guidance Manual is effective on January first of the following calendar year in which the changes have been adopted by the NAIC.

(6) ‘ORSA Summary Report’ means a confidential high‑level summary of an insurer or insurance group’s ORSA.

Section 38‑13‑830. An insurer shall maintain a risk management framework to assist the insurer with identifying, assessing, monitoring, managing, and reporting on its material and relevant risks. This requirement may be satisfied if the insurance group of which the insurer is a member maintains a risk management framework applicable to the operations of the insurer.

Section 38‑13‑840. Subject to Section 38‑13‑860, an insurer, or the insurance group of which the insurer is a member, regularly shall conduct an ORSA consistent with a process comparable to the ORSA Guidance Manual. The ORSA must be conducted no less than annually but also when significant changes to the risk profile of the insurer or the insurance group of which the insurer is a member occur.

Section 38‑13‑850. (A) Upon the director’s request, and no more than once each year, an insurer shall submit to the director an ORSA Summary Report or a combination of reports that contain the information described in the ORSA Guidance Manual, applicable to the insurer and/or the insurance group of which it is a member. Notwithstanding a request from the director, if the insurer is a member of an insurance group, the insurer shall submit the reports required by this subsection if the director is the lead state director of the insurance group as determined by the procedures within the Financial Analysis Handbook adopted by the National Association of Insurance Commissioners.

(B) The reports must include a signature of the insurer or insurance group’s chief risk officer or other executive having responsibility for the oversight of the insurer’s enterprise risk management process attesting to the best of his belief and knowledge that the insurer applies the enterprise risk management process described in the ORSA Summary Report and that a copy of the report has been provided to the insurer’s board of directors or other appropriate committees.

(C) An insurer may comply with subsection (A) by providing the most recent and substantially similar reports provided by the insurer or another member of an insurance group of which the insurer is a member to the commissioner of another state or to a supervisor or regulator of a foreign jurisdiction, if that report provides information that is comparable to the information described in the ORSA Guidance Manual. A report in a language other than English must be accompanied by a translation of that report into the English language.

Section 38‑13‑860. (A) An insurer is exempt from the requirements of this article if the:

(1) insurer has annual direct written and unaffiliated assumed premiums, including international direct and assumed premium but excluding premiums reinsured with the Federal Crop Insurance Corporation and Federal Flood Program, of less than five hundred million dollars; and

(2) insurance group of which the insurer is a member has annual direct written and unaffiliated assumed premiums including international direct and assumed premiums, but excluding premiums reinsured with the Federal Crop Insurance Corporation and Federal Flood Program, of less than one billion dollars.

(B) If an insurer qualifies for exemption pursuant to item (1) of subsection (A), but the insurance group of which the insurer is a member does not qualify for exemption pursuant to item (2) of subsection (A), the ORSA Summary Report that is required pursuant to Section 38‑13‑850 must include every insurer within the insurance group. This requirement may be satisfied by the submission of more than one ORSA Summary Report for a combination of insurers provided the combination of reports includes every insurer within the insurance group.

(C) If an insurer does not qualify for exemption pursuant to item (1) of subsection (A), but the insurance group of which it is a member qualifies for exemption pursuant to item (2) of subsection (A), the only ORSA Summary Report that may be required pursuant Section 38‑13‑850 is the report applicable to that insurer.

(D) An insurer that does not qualify for exemption pursuant to subsection (A) may apply to the director for a waiver from the requirements of this article based upon unique circumstances. In deciding whether to grant the insurer’s request for waiver, the director may consider the type and volume of business written, ownership and organizational structure, and any other factor the director considers relevant to the insurer or insurance group of which the insurer is a member. If the insurer is part of an insurance group with insurers domiciled in more than one state, the director shall coordinate with the lead state commissioner and with the other domiciliary commissioners in considering whether to grant the insurer’s request for a waiver.

(E) Notwithstanding the exemptions stated in this section, the director may require an insurer to maintain a risk management framework, conduct an ORSA, and file an ORSA Summary Report: (1) based on unique circumstances including, but not limited to, the type and volume of business written, ownership, and organizational structure, federal agency requests, and international supervisor requests;

(2) if the insurer has risk‑based capital for a company action level event as set forth in Section 38‑9‑330, meets one or more of the standards of an insurer deemed to be in hazardous financial condition as defined in Section 38‑5‑120 or otherwise exhibits qualities of a troubled insurer as determined by the director.

(F) If an insurer that qualifies for an exemption pursuant to subsection (A) subsequently no longer qualifies for that exemption due to premium changes as reflected in the insurer’s most recent annual statement or in the most recent annual statements of the insurers within the insurance group of which the insurer is a member, the insurer has one year following the year the threshold is exceeded to comply with the requirements of this article.

Section 38‑13‑870. (A) The ORSA Summary Report must be prepared consistent with the ORSA Guidance Manual, subject to the requirements of subsection (B). Documentation and supporting information must be maintained and made available upon examination or upon request by the director.

(B) The review of the ORSA Summary Report and additional requests for information must be made using similar procedures currently used in the analysis and examination of multistate or global insurers and insurance groups.

Section 38‑13‑880. (A) Documents, materials, or other information, including the ORSA Summary Report, in the possession or control of the department that are obtained by, created by, or disclosed to the director or another person under this article, are recognized by this State as being proprietary and to contain trade secrets. All such documents, materials, or other information are confidential by law and privileged, are not subject to Section 30‑4‑10, subpoena, discovery, and are not admissible as evidence in a private civil action. However, the director is authorized to use the documents, materials, or other information in furtherance of a regulatory or legal action brought as a part of the director’s official duties. The director may not otherwise make the documents, materials, or other information public without the prior written consent of the insurer.

(B) The director or a person who received documents, materials, or other ORSA‑related information, through examination or otherwise, while acting under the authority of the director or with whom such documents, materials, or other information are shared pursuant to this article may not be permitted or required to testify in a private civil action concerning confidential documents, materials, or information subject to subsection (A).

(C) To assist in the performance of his regulatory duties, the director:

(1) may, upon request, share documents, materials, or other ORSA‑related information, including the confidential and privileged documents, materials, or information subject to subsection (A), including proprietary and trade secret documents and materials with other state, federal, and international financial regulatory agencies, including members of a supervisory college as defined in Section 38‑21‑10(10), with the NAIC and with any third‑party consultants designated by the director, provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the ORSA‑related documents, materials or other information and has verified in writing the legal authority to maintain confidentiality;

(2) may receive documents, materials, or other ORSA‑related information, including otherwise confidential and privileged documents, materials, or information, including proprietary and trade‑secret information or documents, from regulatory officials of other foreign or domestic jurisdictions, including members of a supervisory college as defined in Section 38‑21‑10(10) and from the NAIC, and shall maintain as confidential or privileged any documents, materials, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(3) shall enter into a written agreement with the NAIC or a third‑party consultant governing sharing and use of information provided pursuant to this article, consistent with this subsection that:

(a) specifies procedures and protocols regarding the confidentiality and security of information shared with the NAIC or a third‑party consultant pursuant to this article, including procedures and protocols for sharing by the NAIC with other state regulators from states in which the insurance group has domiciled insurers, provided, the agreement must provide that the recipient agrees in writing to maintain the confidentiality and privileged status of the ORSA‑related documents, materials, or other information and has verified in writing the legal authority to maintain confidentiality;

(b) specifies that ownership of information shared with the NAIC or a third‑party consultant pursuant to this article remains with the director and that the NAIC’s or a third‑party consultant’s use of the information is subject to the direction of the director;

(c) prohibits the NAIC or third‑party consultant from storing the information in a permanent database after the underlying analysis is completed;

(d) requires prompt notice to be given to an insurer whose confidential information in the possession of the NAIC or a third‑party consultant pursuant to this article is subject to a request or subpoena to the NAIC or a third‑party consultant for disclosure or production;

(e) requires the NAIC or a third‑party consultant to consent to intervention by an insurer in a judicial or administrative action in which the NAIC or a third‑party consultant may be required to disclose confidential information about the insurer shared with the NAIC or a third‑party consultant pursuant to this article; and

(f) provides for the insurer’s written consent in the case of an agreement involving a third‑party consultant.

(D) The sharing of information and documents by the director pursuant to this article does not constitute a delegation of regulatory authority or rulemaking. The director is solely responsible for the administration, execution, and enforcement of the provisions of this article.

(E) No waiver of an applicable privilege or claim of confidentiality in the documents, proprietary, and trade‑secret materials or other ORSA‑related information may occur as a result of disclosure of this ORSA‑related information or documents to the director under this section or as a result of sharing authorized in this article.

(F) Documents, materials, or other information in the possession or control of the NAIC or a third‑party consultant pursuant to this article are:

(1) confidential by law and privileged;

(2) not subject to Section 30‑4‑10;

(3) not subject to subpoena; and

(4) not subject to discovery or admissible as evidence in a private civil action.

Section 38‑13‑890. An insurer who, without just cause, fails to timely file the ORSA Summary Report shall, after notice and hearing, pay a penalty of one thousand dollars for each day’s delay, to be recovered by the director. The penalty funds recovered must be paid into the General Revenue Fund of this State. The maximum penalty under this section is thirty thousand dollars. The director may reduce the penalty if the insurer demonstrates to the director that the imposition of the penalty would constitute a financial hardship to the insurer.

Section 38‑13‑900. The requirements of this act become effective on January 1, 2018. The first filing of an ORSA Summary Report must take place in 2018 pursuant to Section 38‑13‑850.”

SECTION 2. Section 38‑21‑10 of the 1976 Code, as last amended by Act 2 of 2015, is further amended to read:

“Section 38‑21‑10. In this chapter, unless the context otherwise requires:

(1) An ‘affiliate’ of, or person ‘affiliated’ with, a specific person means a person who directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the person specified.

(2) The term ‘control’ (including the terms ‘controlling’,’controlled by’, and ‘under common control with’) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control is presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by Section 38‑21‑220 that control does not exist in fact. The director or his designee may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support his determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

(3) An ‘insurance holding company system’ consists of two or more affiliated persons, one or more of which is an insurer.

(4) The term ‘insurer’ has the same meaning as set forth in Section 38‑1‑20 except that it does not include (a) agencies, authorities, or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state or (b) nonprofit medical and hospital service associations.

(5) A ‘person’ means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity, or any combination of the foregoing acting in concert.

(6) A ‘securityholder’ of a specified person is one who owns any security of that person, including common stock, preferred stock, debt obligations, and any other security convertible into or evidencing the right to acquire any of the foregoing.

(7) A ‘subsidiary’ of a specified person is an affiliate controlled by that person directly or indirectly through one or more intermediaries.

(8) The term ‘voting security’ includes any security convertible into or evidencing a right to acquire a voting security.

(9) ‘Enterprise risk’ means an activity, circumstance, event, or series of events involving one or more affiliates of an insurer that, if not remedied promptly, likely is to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer’s risk‑based capital to fall into company action level as provided in Section 38‑9‑330 or would cause the insurer to be in hazardous financial condition as provided in Section 38‑5‑120.

(10) A ‘supervisory college’ is a meeting or joint meeting of insurance regulators or supervisors with company officials where the topic of discussion is regulatory oversight of one specific insurance group that is writing significant amounts of insurance in other jurisdictions. It may involve detailed discussions about financial data, corporate governance, and enterprise risk management functions. Supervisory colleges are intended to facilitate the oversight of internationally active insurance companies at the group level.”

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. This act takes effect on January 1, 2018.

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