CHAPTER 12

South Carolina Investments Laws

Editor’s Note

2002 Act No. 319, Section 4, provides as follows:

“This act takes effect upon approval by the Governor and applies to investment transactions as follows:

“(1) An investment held as an admitted asset by an insurer on the effective date of this chapter which qualified as an admitted asset immediately before the effective date of this chapter remains qualified as an admitted asset pursuant to this chapter.

“(2) Each specific transaction constituting an investment practice of the type described in this chapter that lawfully was entered into by an insurer and was in effect on the effective date of this chapter continues to be permitted by this chapter until its expiration or termination under its terms.”

ARTICLE 1

General Provisions

**SECTION 38‑12‑10.** Short title.

This chapter may be cited as the “Investments of Insurers Act”.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Editor’s Note

2002 Act No. 319, Section 1, provides as follows:

“The legislative intent of this chapter is to protect the interests of the insured in this State by promoting insurer solvency and financial strength, to be accomplished through the application of investment standards that facilitate a reasonable balance of the following objectives:

“(1) preserving principal;

“(2) assuring reasonable diversification as to type of investment, issuer, and credit quality; and

“(3) allowing insurers to allocate investments in a manner consistent with principles of prudent investment management to achieve a return adequate to meeting obligations to insureds and financial strength sufficient to cover reasonably foreseeable contingencies.”

**SECTION 38‑12‑20.** Scope of chapter.

This chapter applies to all domestic insurers. Foreign insurers and United States branches of alien insurers transacting an insurance business in this State shall maintain investments of the same general type and character as specified for domestic insurers, except that investments of substantially the same quality as those specified in this chapter, authorized by the law of the insurer’s state of domicile, or state of entry if an alien insurer, may be recognized as eligible investments for purposes of this chapter by the director or his designee in the sound exercise of his discretion. This chapter does not apply to separate accounts of an insurer except to the extent provided by Chapter 67 of this title.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142, 1167, 1177.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑30.** Definitions.

As used in this chapter:

(1) “Acceptable collateral” means:

(a) cash, cash equivalents, letters of credit, or direct obligations of, or securities that are fully guaranteed as to principal and interest by the government of the United States, an agency of the United States, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation in respect to securities lending transactions, repurchase transactions, and reverse repurchase transactions and for the purpose of calculating counterparty exposure amount; and

(b) sovereign debt rated 1 by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO as to foreign securities lending transactions.

(2) “Acceptable private mortgage insurance” means insurance written by a private insurer protecting a mortgage lender against loss occasioned by a mortgage loan default and issued by a licensed mortgage insurance company, with a SVO 1 designation or a rating issued by a nationally recognized statistical rating organization equivalent to a SVO 1 designation, that covers losses to an eighty percent loan‑to‑value ratio.

(3) “Accident and health insurance” means protection that provides payment of benefits for covered sickness or accidental injury, excluding credit insurance, disability insurance, accidental death and dismemberment insurance, and long‑term care insurance.

(4) “Accident and health insurer” means a licensed life or health insurer or health service corporation whose insurance premiums and required statutory reserves for accident and health insurance are at least ninety‑five percent of total premium consideration or total statutory required reserves, respectively.

(5) “Admitted asset” means an asset that is identified specifically as an admitted asset within the NAIC accounting manual or is not identified specifically as a nonadmitted asset within the NAIC accounting manual, excluding assets of separate accounts because the investments and investment practices of separate accounts are not subject to the provisions of this chapter.

(6) “Affiliate” means, in respect to a person, another person that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the person.

(7) “Asset‑backed security” means a security or other instrument, excluding a mutual fund, evidencing an interest in or the right to receive payments from or payable from distributions on an asset, a pool of assets, or specifically divisible cash flows that are transferred legally to a trust or another special purpose bankruptcy‑remote business entity, on the following conditions:

(a) the trust or other business entity is established for the sole purpose of acquiring specific types of assets or rights to cash flows, issuing securities and other instruments representing an interest in or right to receive cash flows from those assets or rights, and engaging in activities required to service the assets or rights and any credit enhancement or support features held by the trust or other business entity; and

(b) the sole assets of the trust or other business entity are interest bearing obligations or other contractual obligations representing the right to receive payment from the cash flows from the assets or rights. The existence of credit enhancements such as letters of credit or guarantees or support features such as swap agreements do not cause a security or other instrument to be ineligible as an asset‑backed security.

(8) “Business entity” means a sole proprietorship, corporation, limited liability company, association, general or limited partnership, joint stock company, joint venture, mutual fund, bank, trust, real estate investment trust, joint tenancy, or other similar form of business organization, whether organized for‑profit or not‑for‑profit.

(9) “Cap” means an agreement obligating the seller to make payments to the buyer, with each payment based on the amount by which a reference price or level or the performance or value of one or more underlying interests exceeds a predetermined number, sometimes called the “strike rate” or “strike price”.

(10) “Capital and surplus” means the sum of the capital and surplus of the insurer required to be shown on the statutory financial statement of the insurer filed most recently with the director.

(11) “Cash equivalents” means highly rated, highly liquid, and readily marketable obligations that are convertible readily into known amounts of cash without penalty and have a remaining term to maturity of one year or less. For purposes of this definition, “highly rated” means an investment rated “P‑1” by Moody’s Investors Service, Incorporated, or “A‑1” by the Standard and Poor’s Division of The McGraw Hill Companies, Incorporated, or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO.

(12) “Class one bond mutual fund” means a mutual fund that is qualified for investment using the bond class one reserve factor of the SVO procedures manual.

(13) “Class one money market mutual fund” means a money market mutual fund that is qualified for investment using the bond class one reserve factor of the SVO procedures manual.

(14) “Collar” means an agreement to receive payments as the buyer of an option, cap, or floor and to make payments as the seller of a different option, cap, or floor.

(15) “Commercial mortgage loan” means a mortgage loan other than a residential mortgage loan.

(16) “Construction loan” means a loan of less than three years in term, made for financing the cost of construction of a building or other improvement to real estate, that is secured by the real estate.

(17) “Control” means the possession, directly or indirectly, by a person of the power to direct or cause the direction of the management and policies of another 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 a person, directly or indirectly, owns, controls, or holds with the power to vote or holds proxies representing ten percent or more of the voting securities of another person. This presumption may be rebutted by a showing that control does not exist in fact. The director may determine, after furnishing all interested persons notice and an opportunity to be heard and making specific findings of fact to support the determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

(18) “Counterparty” means the business entity that is the other party to an investment practices transaction with the insurer or, as to a securities lending transaction, the custodian bank or agent, if any, acting on behalf of the insurer.

(19)(a) “Counterparty exposure” or “counterparty exposure amount” means for an over‑the‑counter derivative instrument:

(i) not entered into pursuant to a written master agreement that provides for netting of payments owed by the respective parties:

(A) the market value of the over‑the‑counter derivative instrument if the liquidation of the derivative instrument would result in a final cash payment to the insurer; or

(B) zero if the liquidation of the derivative instrument would not result in a final cash payment to the insurer; and

(ii) entered into pursuant to a written master agreement that provides for netting of payments owed by the respective parties, if the domiciliary jurisdiction of the counterparty is either within the United States or within a foreign jurisdiction listed as eligible for netting in the SVO procedures manual, the greater of:

(A) zero; and

(B) the net sum payable to the insurer in connection with all derivative instruments subject to the written master agreement upon their liquidation if the counterparty defaults pursuant to the master agreement, assuming there are no conditions precedent to the obligations of the counterparty to make the payment and no setoff of amounts payable pursuant to any other instrument or agreement.

(b) For purposes of this definition, “market value” or the “net sum payable” is determined at the end of the most recent quarter of the fiscal year of the insurer and must be reduced by the market value of acceptable collateral held by the insurer or a custodian or escrow agent on behalf of the insurer.

(20) “Credit tenant loan” has the same meaning as it has in the SVO procedures manual.

(21)(a) “Derivative instrument” means an agreement, option, or instrument, or a series or combination of any of them:

(i) to make or take delivery of, assume, or relinquish a specified amount of one or more underlying interests, or to make a cash settlement instead of it; or

(ii) that has a price, performance, value, or cash flow based primarily upon the actual or expected price, yield, level, performance, value, or cash flow of one or more underlying interests.

(b) For purposes of this definition “derivative instrument” includes options, warrants not attached to another financial instrument purchased by the insurer, caps, floors, collars, swaps, forwards, futures, and other substantially similar agreements, options, or instruments, or a series or combination of any of them. “Derivative instrument” does not include collateralized mortgage obligations, other asset‑backed securities, principal‑protected structured securities, floating rate securities, or instruments in which an insurer otherwise is authorized to invest or that an insurer otherwise is authorized to receive pursuant to this chapter, other than pursuant to Section 38‑12‑300 or 38‑12‑510, and any debt obligations of the insurer.

(22) “Derivative transaction” means a transaction involving the use of one or more derivative instruments. For purposes of Sections 38‑12‑300 and 38‑12‑510, dollar roll transactions, repurchase transactions, reverse repurchase transactions, and securities lending transactions are not considered derivative transactions.

(23) “Direct” or “directly,” when used in connection with an obligation, means that the designated obligor is primarily liable on the instrument representing the obligation.

(24) “Dollar roll transaction” means two simultaneous transactions with different settlement dates no more than ninety‑six days apart, so that in the transaction with the earlier settlement date an insurer sells to a counterparty, and in the other transaction the insurer is obligated to purchase from the same counterparty, substantially similar securities of the following types:

(a) asset‑backed securities issued, assumed, or guaranteed by the Government National Mortgage Association, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation, or their respective successors; and

(b) other asset‑backed securities referred to in Section 106 of Title I of the Secondary Mortgage Market Enhancement Act of 1984 (15 U.S.C. Section 77r‑1), as amended.

(25) “Domestic jurisdiction” means the United States, Canada, or a state, province, or political subdivision of them.

(26) “Equity interest” means any of the following that are not rated credit instruments:

(a) common stock;

(b) preferred stock;

(c) trust certificate;

(d) equity investment in an investment company other than a money market mutual fund or a class one bond mutual fund;

(e) investment in a common trust fund of a bank regulated by a federal or state agency;

(f) an ownership interest in minerals, oil, or gas, the rights to which have been separated from the underlying fee interest in the real estate where the minerals, oil, or gas are located;

(g) instruments which are mandatorily, or at the option of the issuer, convertible to equity;

(h) limited partnership interests and those general partnership interests authorized by Section 38‑12‑60(A)(4);

(i) member interests in limited liability companies;

(j) warrants or other rights to acquire equity interests that are created by the owner or issuer of the equity to be acquired; or

(k) instruments that would be rated credit instruments except for the provisions of item (73)(b).

(27) “Equivalent securities” means securities that are identical to the:

(a) loaned securities in all features including the amount of the loaned securities, except as to certificate number if held in physical form, but if a different security is exchanged for a loaned security by recapitalization, merger, consolidation, or other corporate action, the different security is considered to be the loaned security, in a securities lending transaction;

(b) purchased securities in all features including the amount of the purchased securities, except as to the certificate number if held in physical form, in a repurchase transaction; or

(c) sold securities in all features including the amount of the sold securities, except as to the certificate number if held in physical form, in a reverse repurchase transaction.

(28) “Floor” means an agreement obligating the seller to make payments to the buyer in which each payment is based on the amount by which a predetermined number, sometimes called the floor rate or price, exceeds a reference price, level, performance, or value of one or more underlying interests.

(29) “Foreign currency” means a currency other than that of a domestic jurisdiction.

(30)(a) “Foreign investment” or “foreign investment practice” means an investment or investment practice in a foreign jurisdiction, an investment practice with a person domiciled in a foreign jurisdiction, or an investment in a person, real estate, or asset domiciled in a foreign jurisdiction. An investment or investment practice is not considered to be foreign if the issuing person, counterparty, qualified primary credit source, or qualified guarantor is a domestic jurisdiction or a person domiciled in a domestic jurisdiction, unless the:

(i) counterparty or the issuing person is a shell business entity; and

(ii) investment or investment practice is not assumed, accepted, guaranteed, or insured or otherwise backed by a domestic jurisdiction or a person domiciled in a domestic jurisdiction that is not a shell business entity.

(b) For purposes of this definition:

(i) “Shell business entity” means a business entity having no economic substance, except as a vehicle for owning interests in assets issued, owned, or previously owned by a person domiciled in a foreign jurisdiction.

(ii) “Qualified guarantor” means a guarantor against which an insurer has a direct claim for full and timely payment, evidenced by a contractual right for which an enforcement action may be brought in a domestic jurisdiction.

(iii) “Qualified primary credit source” means the credit source to which an insurer looks for payment as to an investment and against which an insurer has a direct claim for full and timely payment, evidenced by a contractual right for which an enforcement action may be brought in a domestic jurisdiction.

(31) “Foreign jurisdiction” means a jurisdiction other than a domestic jurisdiction.

(32) “Forward” means an agreement, other than a future, to make or take delivery in the future of, or effect a cash settlement based on the actual or expected price, level, performance, or value of, one or more underlying interests. “Forward” does not mean spot transactions effected within customary settlement periods, when issued purchases, or other similar cash market transactions.

(33) “Future” means an agreement traded on a qualified exchange or qualified foreign exchange to make or take delivery of, or effect a cash settlement based on the actual or expected price, level, performance, or value of, one or more underlying interests. “Future” includes an insurance future.

(34) “Futures exchange” means a qualified foreign exchange or an exchange, contract market, or board of trade on which trading in futures is conducted that the Commodities Futures Trading Commission or its successor has authorized for futures trading in the United States.

(35) “Government money market mutual fund” means a money market mutual fund that at all times:

(a) invests only in obligations issued, guaranteed, or insured by the federal government of the United States or collateralized repurchase agreements composed of these obligations; and

(b) qualifies for investment without a reserve pursuant to the SVO procedures manual.

(36) “Government sponsored enterprise” means a:

(a) governmental agency; or

(b) corporation, limited liability company, association, partnership, joint stock company, joint venture, trust, or other entity or instrumentality organized pursuant to the laws of a domestic jurisdiction to accomplish a public policy or other governmental purpose.

(37) “Guaranteed or insured”, when used in connection with an obligation acquired pursuant to this chapter, means that the guarantor or insurer has agreed to:

(a) perform or insure the obligation of the obligor or purchase the obligation; or

(b) be obligated unconditionally until the obligation is repaid to maintain in the obligor a minimum net worth, fixed charge coverage, stockholders’ equity, or sufficient liquidity to enable the obligor to pay the obligation in full.

(38) “Hedging transaction” means a derivative transaction that is entered into and maintained to reduce the:

(a) risk of a change in the value, yield, price, cash flow, or quantity of assets or liabilities, or a portfolio of assets or liabilities or both, that an insurer has acquired or incurred or anticipates acquiring or incurring; or

(b) currency exchange rate risk related to assets or liabilities, or a portfolio of assets or liabilities, or both of them, that an insurer has acquired or incurred or anticipates acquiring or incurring.

(39) “High grade investment” means a rated credit instrument rated 1, 2, P1, P2, PFS1, or PFS2 by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO.

(40) “Income”, as to a security, means interest, accrual of discount, dividends, or other distributions, such as rights, tax credits, assessment credits, warrants, and distributions in kind.

(41) “Income generation transaction” means a derivative transaction that is intended to generate income or enhance return. A derivative transaction that is entered into as a hedging transaction or a replication transaction is not an income generation transaction.

(42) “Initial margin” means the amount of cash, securities, or other consideration initially required to be deposited to establish a futures position.

(43) “Insurance future” means a future relating to an index or pool that is based on insurance‑related items.

(44) “Insurance futures option” means an option on an insurance future.

(45) “Investment company” means an investment company as defined in Section 3(a) of the Investment Company Act of 1940 (15 U.S.C. Section 80a‑1 et seq.), as amended, and a person described in Section 3(c) of that act.

(46) “Investment company series” means an investment portfolio of an investment company organized as a series company to which portfolio assets of the investment company have been allocated specifically.

(47) “Investment practices” means transactions of the types described in Sections 38‑12‑280, 38‑12‑300, 38‑12‑490, and 38‑12‑510.

(48) “Investment affiliate” means a subsidiary of an insurer or a direct or indirect subsidiary of the insurer’s parent company (parent) that is engaged or organized to engage exclusively in the ownership and management of assets authorized as investments for the insurer, if the affiliate agrees to limit its investment in any asset so that its investments will not cause the amount of the total investment of the insurer to exceed the investment limitations or avoid other provisions of this chapter applicable to the insurer. As used in this item, the total investment of the insurer includes:

(a) direct investment by the insurer in an asset;

(b) the insurer’s proportionate share of an investment in an asset by an investment affiliate of the insurer, calculated by multiplying the amount of the subsidiary’s investment by the percentage of the insurer’s ownership interest in the subsidiary; and

(c) the insurer’s proportionate share of an investment in an asset by an investment affiliate of the insurer other than a subsidiary of the insurer, calculated by multiplying the amount of the investment affiliate’s investment by a fraction, the numerator of which must be the aggregate amount of investments held and investment practices engaged in by the investment affiliate on behalf of the insurer and the denominator of which must be the aggregate amount of investments held and investment practices engaged in by the investment affiliate on behalf of all insurance company subsidiaries of the parent.

(49) “Investment strategy” means the techniques and methods used by an insurer to meet its investment objectives, such as active bond portfolio management, passive bond portfolio management, interest rate anticipation, growth investing, and value investing.

(50) “Letter of credit” means a clean, irrevocable, and unconditional letter of credit issued or confirmed by, and payable and presentable at, a financial institution on the list of financial institutions meeting the standards for issuing letters of credit pursuant to the SVO procedures manual. A letter of credit must have an expiration date beyond the term of the subject transaction to constitute acceptable collateral for the purposes of Sections 38‑12‑280 and 38‑12‑490.

(51) “Limited liability company” means a business organization, excluding partnerships and ordinary business corporations, organized or operating pursuant to the laws of the United States or a state of the United States that limits the personal liability of investors to the equity investment of the investor in the business entity.

(52) “Lower grade investment” means a rated credit instrument rated 4, 5, 6, P4, P5, P6, PFS4, PFS5, or PFS6 by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO.

(53) “Market value” means:

(a) the amount of cash or a letter of credit; or

(b) the price of a security or derivative instrument on any date obtained from a generally recognized source or the most recent quotation from the source or, to the extent no generally recognized source exists, the price for the security or derivative instrument as determined pursuant to the terms of the instrument or in good faith by the parties to a transaction, plus accrued but unpaid income on the security or derivative instrument to the extent that income is not included in the price as of the date that market value is determined.

(54) “Medium grade investment” means a rated credit instrument that at the time of acquisition by the insurer is rated 3, P3 or PSF3 by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO.

(55) “Money market mutual fund” means a mutual fund that meets the conditions of 17 Code of Federal Regulations Par. 270.2a‑7, pursuant to the Investment Company Act of 1940 (15 U.S.C. Sections 80a‑1 et seq.) as amended.

(56) “Mortgage loan” means an obligation secured by a mortgage, deed of trust, trust deed, or other consensual lien on real estate.

(57) “Multilateral development bank” means an international development organization of which the United States is a member.

(58) “Mutual fund” means an investment company or, in the case of an investment company that is organized as a series company, an investment company series, that, in either case, is registered with the United States Securities and Exchange Commission pursuant to the Investment Company Act of 1940 (15 U.S.C. Section 80a‑1 et seq.), as amended.

(59) “NAIC” means the National Association of Insurance Commissioners.

(60) “NAIC accounting manual” means the NAIC “Accounting Practices and Procedures Manual”, as amended, or any successor publication.

(61) “Obligation” means a bond, note, debenture, trust certificate including an equipment trust certificate, production payment, negotiable bank certificate of deposit, bankers’ acceptance, asset‑backed security, credit tenant loan, loan secured by financing a net lease or net leases, and other evidence of indebtedness for the payment of money, or participations, certificates, or other evidences of an interest in any of them, whether constituting a general obligation of the issuer or payable only out of certain revenues or certain funds pledged or otherwise dedicated for payment.

(62) “Option” means an agreement giving the buyer the right to buy or receive, (a “call option”), sell or deliver, (a “put option”), enter into, extend, or terminate or effect a cash settlement based on the actual or expected price, spread, level, performance, or value of one or more underlying interests, including without limitation, an option to purchase or sell a swap at a given price and time or at a series of prices and times. “Option” includes an insurance futures option.

(63) “Over‑the‑counter derivative instrument” means a derivative instrument entered into with a counterparty other than through a qualified exchange or futures exchange or cleared through a qualified clearinghouse.

(64) “Person” means an individual, a business entity, a multilateral development bank, or a government or quasi‑governmental body, such as a political subdivision or a government sponsored enterprise.

(65) “Policyholder obligations” means those liabilities of the insurer to or for its policyholders arising out of its policies and to its creditors and includes the liabilities required to be included in the insurer’s annual statement including, but not limited to, the unearned premium reserve, reserves required by applicable mortality or morbidity tables, and claim or loss reserves including incurred but not reported claims. “Policyholder obligations” does not include that portion of the insurer’s capital or guaranty fund, or that portion of its surplus, in excess of the minimum capital or guaranty fund, and surplus required by law for the insurer, or the Asset Valuation Reserve.

(66) “Potential exposure” means:

(a) the amount of initial margin required for a futures position; or

(b) as to swaps, collars, and forwards, one‑half of one percent times the notional amount times the square root of the remaining years to maturity.

(67) “Preferred stock” means preferred, preference, or guaranteed stock of a business entity authorized to issue the stock, that has a preference in liquidation over the common stock of the business entity.

(68) “Qualified bank” means:

(a) a national bank, state‑chartered bank, or trust company that is at all times capitalized adequately as determined by standards adopted by United States banking regulators and that is either regulated by state banking laws or is a member of the Federal Reserve System; or

(b) a bank or trust company incorporated or organized pursuant to the laws of a country other than the United States that is regulated as a bank or trust company by that country’s government or an agency of it and that is at all times capitalized adequately as determined by the standards adopted by international banking authorities.

(69) “Qualified business entity” means a business entity that is:

(a) an issuer of obligations or preferred stock that are rated 1 or 2 by the SVO or an issuer of obligations, preferred stock, or derivative instruments that are rated the equivalent of 1 or 2 by the SVO or by a nationally recognized statistical rating organization recognized by the SVO;

(b) a primary dealer in United States government securities, that is recognized by the Federal Reserve Bank of New York; or

(c) with respect to investment practices under Section 38‑12‑280, an affiliate of an entity that is a qualified business entity pursuant to this item, provided that the affiliate’s obligation pursuant to its agreement with the insurer are guaranteed by a qualified business entity that meets the requirements of subitem (a) or (b).

(70) “Qualified clearinghouse” means a clearinghouse subject to the rules of a qualified exchange or a qualified foreign exchange that provides clearing services, including acting as a counterparty to each of the parties to a transaction so that the parties no longer have credit risk to each other.

(71) “Qualified exchange” means:

(a) a securities exchange registered as a national securities exchange, or a securities market regulated pursuant to the Securities Exchange Act of 1934 (15 U.S.C. Section 78 et seq.);

(b) a board of trade or commodities exchange designated as a contract market by the Commodity Futures Trading Commission (CFTC) or a successor of it;

(c) Private Offerings, Resales and Trading through Automated Linkages (PORTAL);

(d) a designated offshore securities market as defined in Securities Exchange Commission Regulation S, 17 C.F.R. Part 230, as amended; or

(e) a qualified foreign exchange.

(72) “Qualified foreign exchange” means a foreign exchange, board of trade, or contract market located outside the United States, its territories, or possessions:

(a) that has received regulatory comparability relief pursuant to CFTC Rule 30.10, as provided in Appendix C to Part 30 of the CFTC’s Regulations, 17 C.F.R. Part 30;

(b) that is, or its members are, subject to the jurisdiction of a foreign futures authority that has received regulatory comparability relief under CFTC Rule 30.10, as provided in Appendix C to Part 30 of the CFTC’s Regulations, 17 C.F.R. Part 30, as to futures transactions in the jurisdiction where the exchange, board of trade, or contract market is located; or

(c) upon which foreign stock index futures contracts are listed that are the subject of no‑action relief issued by the CFTC’s Office of General Counsel, provided that an exchange, board of trade, or contract market that qualifies as a “qualified foreign exchange” pursuant to this item only is a “qualified foreign exchange” only as to foreign stock index futures contracts that are the subject of no‑action relief.

(73)(a) “Rated credit instrument” means an obligation or other instrument that gives its holder a contractual right to receive cash or another rated credit instrument from another entity, and that:

(i) is rated by the SVO or a nationally recognized statistical rating organization recognized by the SVO;

(ii) is issued, guaranteed, or insured by an entity that is rated by, or another obligation or other instrument of such entity is rated by, the SVO or a nationally recognized statistical rating organization recognized by the SVO, in the case of an obligation or other instrument with a maturity of three hundred ninety‑seven days or less;

(iii) has been issued, assumed, accepted, guaranteed, or insured by a qualified bank, in the case of an obligation or other instrument with a maturity of ninety days or less;

(iv) is a share of a class one bond mutual fund; or

(v) is a share of a money market mutual fund.

(b) “Rated credit instrument” does not mean:

(i) an obligation or other instrument that is mandatorily, or at the option of the issuer, convertible to an equity interest; or

(ii) a security that has a par value and whose terms provide that the issuer’s net obligation to repay all or part of the par value is determined by reference to the performance of an equity, a commodity, a foreign currency, or an index of equities, commodities, foreign currencies, or combinations of them.

(74)(a) “Real estate” means:

(i) real property;

(ii) interests in real property, such as leaseholds, minerals, and oil and gas that have not been separated from the underlying fee interest;

(iii) improvements and fixtures located on or in real property; and

(iv) the seller’s equity in a contract providing for a deed of real estate.

(b) As to a mortgage on a leasehold estate, “real estate” includes the leasehold estate only if it has an unexpired term, including renewal options exercisable at the option of the lessee, extending beyond the scheduled maturity date of the obligation that is secured by a mortgage on the leasehold estate by a period equal to at least twenty percent of the original term of the obligation or ten years, whichever is greater.

(75) “Replication transaction” means a derivative transaction or combination of derivative transactions that is entered into separately or in conjunction with other permissible investments held or acquired by the insurer in order to replicate the investment characteristics of otherwise permissible investments or operate as a substitute for cash market transactions, or for both reasons. A derivative transaction that is entered into by the insurer as a hedging transaction or an income generation transaction authorized pursuant to this chapter is not a replication transaction.

(76) “Repurchase transaction” means a transaction in which an insurer purchases securities from a counterparty that is obligated to repurchase the purchased securities or equivalent securities from the insurer at a specified price, within a specified period of time or upon demand.

(77) “Required liabilities” means total liabilities required to be reported on the statutory financial statement of the insurer most recently required to be filed with the director.

(78) “Residential mortgage loan” means a loan primarily secured by a mortgage on real estate improved with a one‑to‑four family residence.

(79) “Reverse repurchase transaction” means a transaction in which an insurer sells securities to a qualified bank or a qualified business entity or a bank or a business entity whose obligations with respect to the transaction are guaranteed by a qualified bank or a qualified business entity and the insurer is obligated to repurchase the sold securities or equivalent securities from the bank or business entity at a specified price, within a specified period of time or upon demand.

(80) “Secured location” means the contiguous real estate owned by one person.

(81) “Securities lending transaction” means a transaction in which securities are loaned by an insurer or its custodian bank or agent to a qualified bank or a qualified business entity or a bank or a business entity whose obligations with respect to the transaction are guaranteed by a qualified bank or a qualified business entity that is obligated to return the loaned securities or equivalent securities to the insurer, its custodian bank, or agent, within a specified period of time or upon demand.

(82) “Series company” means an investment company that is organized as a series company, as defined in Rule 18f‑2(a) adopted under the Investment Company Act of 1940 (15 U.S.C. Section 80a‑1 et seq., as amended).

(83) “Sinking fund stock” means preferred stock that:

(a) is subject to a mandatory sinking fund or similar arrangement that provides for the redemption, or open market purchase, of the entire issue over a period not longer than forty years from the date of acquisition; and

(b) provides for mandatory sinking fund installments, or open market purchases, commencing not more than ten and one‑half years from the date of issue, with the sinking fund installments providing for the purchase or redemption, on a cumulative basis commencing ten years from the date of issue, of at least two and one‑half percent each year of the original number of shares of that issue of preferred stock.

(84)(A) “Special rated credit instrument” means a rated credit instrument that is:

(1) an instrument that is structured so that, if it is held until retired by or on behalf of the issuer, its rate of return based on its purchase cost and any cash flow stream possible under the structure of the transaction may become negative due to reasons other than the credit risk associated with the issuer of the instrument. However, a rated credit instrument is not a special rated credit instrument pursuant to this item if it is:

(a) a share in a class one bond mutual fund;

(b) an instrument, other than an asset‑backed security, with payments of par value fixed as to amount and timing, or callable but payable only at par or greater, and interest or dividend cash flows that are based on either a fixed or variable rate determined by reference to a specified rate or index;

(c) an instrument, other than an asset‑backed security, that has a par value and is purchased at a price not greater than one hundred ten percent of par;

(d) an instrument, including an asset‑backed security, whose rate of return would become negative only as a result of a prepayment due to casualty, condemnation, or economic obsolescence of collateral or change of law;

(e) an asset‑backed security that relies on collateral that meets the requirements of subsubsubitem (b), the par value of which collateral may:

(i) not be paid sooner than one‑half of the remaining term to maturity from the date of acquisition;

(ii) be paid before maturity only at a premium sufficient to provide a yield to maturity for the investment, considering the amount prepaid and reinvestment rates at the time of early repayment, at least equal to the yield to maturity of the initial investment; or

(iii) be paid before maturity at a premium at least equal to the yield of a Treasury issue of comparable remaining life; or

(f) an asset‑backed security that relies on cash flows from assets that are not prepayable at any time at par, but is not governed otherwise by subsubsubitem (e), if the asset‑backed security has a par value reflecting principal payments to be received if held until retired by or on behalf of the issuer and is purchased at a price not greater than one hundred five percent of the par amount;

(2) An asset‑backed security that:

(a) relies on cash flows from assets that are prepayable at par at any time;

(b) does not make payments of par that are fixed as to amount and timing; and

(c) has a negative rate of return at the time of acquisition if a prepayment threshold assumption is used with the prepayment threshold assumption defined as:

(i) two times the prepayment expectation reported by a recognized, publicly available source as being the median of expectations contributed by broker dealers or other entities, except insurers, engaged in the business of selling or evaluating those securities or assets. The prepayment expectation used in this calculation must be, at the insurer’s election, the prepayment expectation for pass‑through securities of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or for other assets of the same type as the assets that underlie the asset‑backed security, in either case with a gross weighted average coupon comparable to the gross weighted average coupon of the assets that underlie the asset‑backed security; or

(ii) another prepayment threshold assumption specified by the director by regulation promulgated pursuant to Section 12‑38‑90.

(B) For purposes of subsubitem (2), if the asset‑backed security is purchased in combination with one or more other asset‑backed securities that are supported by identical underlying collateral, the insurer may calculate the rate of return for these specific combined asset‑backed securities in combination. The insurer shall maintain documentation demonstrating that the securities were acquired and continue to be held in combination.

(85) “State” means a state, territory, or possession of the United States of America, the District of Columbia, or the Commonwealth of Puerto Rico.

(86) “Substantially similar securities” means securities that meet all criteria for substantially similar securities specified in the NAIC accounting manual, and in an amount that constitutes good delivery form as determined by “The Bond Market Association”.

(87) “SVO” means the Securities Valuation Office of the NAIC or any successor office established by the NAIC.

(88) “SVO procedures manual” means the “Purposes and Procedures of the Securities Valuation Office”, as amended, or any successor publication.

(89) “Swap” means an agreement to exchange or to net payments at one or more times based on the actual or expected price, yield, level, performance or value of one or more underlying interests.

(90) “Underlying interest” means the assets, liabilities, or other interests, or a combination of them, underlying a derivative instrument such as any one or more securities, currencies, rates, indices, commodities, or derivative instruments that are or relate to investments or investment practices that an insurer is permitted to acquire or engage in pursuant to this chapter.

(91) “Unrestricted surplus” means the amount by which total admitted assets exceed one hundred twenty‑five percent of the insurer’s required liabilities.

(92) “Warrant” means an instrument that gives the holder the right to purchase an underlying financial instrument at a given price and time or at a series of prices and times outlined in the warrant agreement.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1121, 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 153, 167, 171.

**SECTION 38‑12‑40.** Insurer acquisitions, holdings or investments.

(A) Insurers may acquire, hold, or invest in investments or engage in investment practices as provided in this chapter or as is not prohibited otherwise by this title including, without limitation, investments permitted pursuant to Chapter 21 of this title. Investments not conforming to this chapter are not admitted assets unless they are acquired pursuant to other authority of this title.

(B) Subject to subsection (C), an insurer may not acquire or hold an investment as an admitted asset unless at the time of acquisition it is:

(1) eligible for the payment or accrual of interest or discount, whether in cash, securities, or other forms of income, or eligible to receive dividends or other distributions, or is otherwise income producing; or

(2) acquired pursuant to Sections 38‑12‑270(C), 38‑12‑280, 38‑12‑300, 38‑12‑320, 38‑12‑480(C), 38‑12‑490, 38‑12‑510, 38‑12‑520, or other sections of this title.

(C) An insurer may acquire or hold as admitted assets investments that otherwise do not qualify as provided in this chapter if the insurer has not acquired them for the purpose of circumventing a limitation contained in this chapter, if the insurer complies with the provisions of Sections 38‑12‑60 and 38‑12‑80 as to the investments and the insurer acquires the investments:

(1) as payment on account of existing indebtedness or in connection with the refinancing, restructuring, or workout of existing indebtedness, if taken to protect the insurer’s interest in that investment;

(2) as realization on collateral for an obligation;

(3) in connection with an otherwise qualified investment or investment practice, as interest on or a dividend or other distribution related to the investment or investment practice, or in connection with the refinancing of the investment, in each case for no additional or only nominal consideration;

(4) under a lawful and bona fide agreement of recapitalization or voluntary or involuntary reorganization in connection with an investment held by the insurer; or

(5) under a bulk reinsurance, merger, or consolidation transaction approved by the director if the assets constitute admissible investments for the ceding, merged, or consolidated companies.

(D) An investment or portion of an investment acquired by an insurer pursuant to subsection (C) becomes a nonadmitted asset three years, or five years in the case of mortgage loans and real estate, from the date of its acquisition, unless within that period the investment has become a qualified investment pursuant to a provision of this chapter other than subsection (C). An investment acquired pursuant to an agreement of bulk reinsurance, merger, or consolidation may be qualified for a longer period if provided in the plan for reinsurance, merger, or consolidation as approved by the director. The director may extend the period for admissibility for an additional reasonable period, upon application by the insurer and a showing that the nonadmission of an asset held pursuant to subsection (C) would injure materially the interests of the insurer.

(E) Except as otherwise provided in subsections (F) and (H), an investment qualifies pursuant to this chapter if, on the date the insurer committed to acquire the investment or on the date of its acquisition, it would have qualified pursuant to this chapter. For purposes of determining its compliance with the limitations contained in this chapter, an insurer shall give appropriate recognition to any commitments to acquire investments.

(F)(1) An investment held as an admitted asset by an insurer on the effective date of this chapter which qualified as an admitted asset immediately before the effective date of this chapter remains qualified as an admitted asset pursuant to this chapter.

(2) Each specific transaction constituting an investment practice of the type described in this chapter that lawfully was entered into by an insurer and was in effect on the effective date of this chapter continues to be permitted by this chapter until its expiration or termination under its terms.

(G) Unless otherwise specified, an investment limitation computed on the basis of the admitted assets or capital and surplus of an insurer must relate to the amount required to be shown on the statutory balance sheet most recently required to be filed by the insurer with the director. For purposes of determining its compliance with any limitation pursuant to this chapter based upon admitted assets, the insurer shall deduct from the amount of its admitted assets the amount of the liability recorded on the statutory balance sheet for:

(1) the return of acceptable collateral received in a reverse repurchase transaction or a securities lending transaction;

(2) cash received in a dollar roll transaction; and

(3) the amount reported as borrowed money in the most recently filed financial statement to the extent not included in items (1) and (2).

(H) An investment qualified, in whole or in part, for acquisition or holding as an admitted asset may be qualified or requalified at the time of acquisition or a later date, in whole or in part, pursuant to another section, if the relevant conditions contained in the other section are satisfied at the time of qualification or requalification.

(I) An insurer shall maintain documentation demonstrating that the insurer acquired investments and engaged in investment practices in accordance with this chapter, and specifying the section of this chapter pursuant to which the insurer acquired the investments or engaged in the investment practices.

(J) An insurer may not enter into an agreement to purchase securities in advance of their issuance for resale to the public as part of a distribution of the securities by the issuer or otherwise guarantee the distribution, except that an insurer may acquire privately placed securities with registration rights.

(K) Notwithstanding the provisions of this chapter, the director, for good cause, may require an insurer to nonadmit, limit, dispose of, withdraw from, or discontinue an investment or investment practice. The authority of the director under this subsection is in addition to any other authority of the director.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑50.** Board of director responsibilities; adoption of written investment plan; review of portfolio; records of authorizations.

(A) Within three months after the effective date of this chapter, the board of directors of an insurer shall adopt a written plan for acquiring and holding investments and for engaging in investment practices that specifies guidelines as to the quality, maturity, and diversification of investments and other specifications including investment strategies intended to assure that the investments and investment practices are appropriate for the business conducted by the insurer, its liquidity needs and its capital and surplus. The board shall review and assess the insurer’s technical investment and administrative capabilities and expertise before adopting a written plan concerning an investment strategy or investment practice.

(B) Investments acquired and held and investment practices engaged in pursuant to this chapter must be acquired and held under the supervision and direction of the board of directors of the insurer or a committee of the board charged with the responsibility to direct its investments. The board of directors or a committee of the board charged with the responsibility to direct its investments shall evidence by formal resolution, at least annually, that it has determined whether all investments have been made in accordance with delegations, standards, limitations, and investment objectives prescribed by the board or a committee of the board charged with the responsibility to direct its investments.

(C) On not less than a quarterly basis, and more often if considered appropriate, the board of directors or committee of the board of directors of an insurer shall:

(1) receive and review a summary report on the insurer’s investment portfolio, its investment activities, and investment practices engaged in pursuant to delegated authority so as to determine whether the investment activity of the insurer is consistent with its written plan; and

(2) review and revise, as appropriate, the written plan.

(D) In discharging its duties pursuant to this section, the board of directors shall require that records of authorizations or approvals, other documentation as the board may require, and reports of action taken pursuant to authority delegated under the plan referred to in subsection (A) must be made available on a regular basis to the board of directors.

(E) The directors of an insurer shall perform their duties pursuant to this section in good faith and with that degree of care that ordinarily prudent individuals in like positions would use under similar circumstances.

(F) If an insurer does not have a board of directors, all references to the board of directors in this chapter are considered to be references to the governing body of the insurer having authority equivalent to that of a board of directors.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑60.** Prohibited actions of insurer.

(A) An insurer, directly or indirectly, may not:

(1) invest in an obligation or security or make a guarantee for the benefit of or in favor of an officer or director of the insurer, except as provided in Section 38‑12‑70;

(2) invest in an obligation or security, make a guarantee for the benefit of or in favor of, or make other investments in a business entity of which ten percent or more of the voting securities or equity interests are owned directly or indirectly by or for the benefit of one or more officers or directors of the insurer, except as authorized in Chapter 21 of this title or as provided in Section 38‑12‑70;

(3) engage on its own behalf or through one or more affiliates in a transaction or series of transactions designed to evade the prohibitions of this chapter;

(4) invest in a partnership as a general partner, except that an insurer may make an investment as a general partner:

(a) if all other partners in the partnership are subsidiaries or other insurance company affiliates of the insurer;

(b) for the purpose of:

(i) meeting cash calls committed to before the effective date of this chapter;

(ii) completing those specific projects or activities of the partnership in which the insurer was a general partner as of the effective date of this chapter that had been undertaken as of that date; or

(iii) making capital improvements to property owned by the partnership on the effective date of this chapter if the insurer was a general partner as of that date; or

(c) in accordance with Section 38‑12‑40(C); or

(5) invest in or lend its funds upon the security of shares of its own stock, except as authorized by other provisions of this title, except that those shares must not be admitted assets of the insurer.

(B) This section does not prohibit a subsidiary or other affiliate of the insurer from becoming a general partner.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑70.** Direct or indirect financial interest prohibited; loans to officers or directors.

(A)(1) Except as provided in subsection (B), unless an insurer has notified the director in writing of its intention to enter into the transaction at least thirty days before entering into it, or a shorter period as the director may permit, and the director has not disapproved the transaction within the time period, the insurer may not, directly or indirectly:

(a) make a loan to or other investment in an officer or director of the insurer or a person in which the officer or director has any direct or indirect financial interest;

(b) make a guarantee for the benefit of or in favor of an officer or director of the insurer or a person in which the officer or director has any direct or indirect financial interest; or

(c) enter into an agreement for the purchase or sale of property from or to an officer or director of the insurer or a person in which the officer or director has any direct or indirect financial interest.

(2) For purposes of this section, an officer or director is not considered to have a financial interest by reason of an interest that is held directly or indirectly through the ownership of equity interests representing less than two percent of all outstanding equity interests issued by a person that is a party to the transaction, or for the sole reason of the position of that individual as a director or officer of a person that is a party to the transaction.

(3) This subsection does not permit an investment that is prohibited by Section 38‑12‑60.

(4) This subsection does not apply to a transaction between an insurer and its subsidiaries or affiliates that is entered into in compliance with Chapter 21 of this title other than a transaction between an insurer and its officer or director.

(B) An insurer, without the previous written approval of the director, may make:

(1) policy loans in accordance with the terms of the policy or contract and Section 38‑12‑310;

(2) advances to officers or directors for expenses reasonably expected to be incurred in the ordinary course of the insurer’s business or guarantees associated with credit or charge cards issued or credit extended for the purpose of financing these expenses;

(3) loans secured by the principal residence of an existing or new officer of the insurer made in connection with the officer’s relocation at the request of the insurer, if the loans comply with the requirements of Section 38‑12‑270 or 38‑12‑480 and the terms and conditions otherwise are the same as those generally available from unaffiliated third parties;

(4) secured loans to an existing or new officer of the insurer made in connection with the officer’s relocation at the request of the insurer, if the loans:

(a) do not have a term exceeding two years;

(b) are required to finance mortgage loans outstanding at the same time on the previous and new residences of the officer;

(c) do not exceed an amount equal to the equity of the officer in the previous residence; and

(d) are required to be fully repaid upon the earlier of the end of the two‑ year period or the sale of the previous residence; and

(5) loans and advances to officers or directors made in compliance with state or federal law specifically related to the loans and advances by a regulated noninsurance subsidiary or affiliate of the insurer in the ordinary course of business and on terms no more favorable than available to other customers of the entity.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1134, 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 162 to 165, 167, 176.

**SECTION 38‑12‑80.** Asset valuation.

For purposes of this chapter, the value or amount of an investment acquired or held, or an investment practice engaged in pursuant to this chapter, unless otherwise specified in this title, must be the value at which assets of an insurer are required to be reported for statutory accounting purposes as determined in accordance with procedures prescribed in published accounting and valuation standards of the NAIC.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1140, 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑90.** Regulations.

The director, in accordance with Section 38‑3‑110, may promulgate regulations implementing the provisions of this chapter.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

ARTICLE 2

Life And Health Insurers

**SECTION 38‑12‑210.** Scope of article.

This article applies to the investments and investment practices of life and health insurers, and other companies whose investments and investment practices are regulated as if they were life and health insurers under this title, subject to the provisions of Section 38‑12‑20.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑220.** Restrictions on investments.

(A)(1) Except as otherwise provided in this chapter, an insurer may not acquire, directly or indirectly through an investment affiliate, an investment pursuant to this chapter if as a result of and after giving effect to the investment the insurer holds more than three percent of its admitted assets in investments of all kinds issued, assumed, accepted, insured, or guaranteed by a single person.

(2) This three percent limitation does not apply to the aggregate amounts insured by a single financial guaranty insurer with the highest generic rating issued by a nationally recognized statistical rating organization.

(3) Asset‑backed securities are not subject to the limitations of item (1), however, except as permitted by item (4), an insurer may not acquire an asset‑backed security if as a result of and after giving effect to the investment, the aggregate amount of asset‑backed securities secured by or evidencing an interest in a single asset or single pool of assets held by a trust or other business entity then held by the insurer exceeds three percent of its admitted assets.

(4) An investment by an insurer in mortgage related securities, as defined by the Secondary Mortgage Market Enhancement Act of 1984 (United States Public Law 98‑440) [12 U.S.C. Sections 24, 1451, 1454 et seq.], that is backed by a single pool of mortgages and made pursuant to the authority of that act, may not exceed five percent of its admitted assets.

(B) An insurer may not acquire, directly or indirectly through an investment affiliate, an investment pursuant to Section 38‑12‑230, 38‑12‑260, or 38‑12‑290 or counterparty exposure pursuant to Section 38‑12‑300(4) if as a result of and after giving effect to the investment the aggregate amount of:

(1) medium and lower grade investments then held by the insurer exceed twenty percent of its admitted assets;

(2) lower grade investments then held by the insurer exceed ten percent of its admitted assets;

(3) investments rated five or six by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO then held by the insurer exceed three percent of its admitted assets;

(4) investments rated six by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO then held by the insurer exceed one percent of its admitted assets; or

(5) medium and lower grade investments then held by the insurer that receive as cash income less than the equivalent yield for Treasury issues with a comparative average life, exceed one percent of its admitted assets;

(6) medium and lower grade investments issued, assumed, guaranteed, accepted, or insured by any one person or, as to asset‑backed securities secured by or evidencing an interest in a single asset or pool of assets, then held by the insurer exceed one percent of its admitted assets; or

(7) lower grade investments issued, assumed, guaranteed, accepted, or insured by any one person or, as to asset‑backed securities secured by or evidencing an interest in a single asset or pool of assets, then held by the insurer exceed one‑half of one percent of its admitted assets.

(C) An insurer that attains or exceeds the limit of any one rating category in subsection (B) may acquire investments in other rating categories subject to the specific and multi‑category limits applicable to those investments.

(D)(1) An insurer may not, directly or indirectly through an investment affiliate, acquire a Canadian investment or engage in a Canadian investment practice authorized by this chapter if as a result of and after giving effect to the investment the aggregate amount of these investments then held by the insurer exceeds forty percent of its admitted assets, or if the aggregate amount of Canadian investments not acquired pursuant to Section 38‑12‑230(A)(2) then held by the insurer exceeds twenty‑five percent of its admitted assets.

(2) An insurer that is authorized to do business in Canada or that has outstanding insurance, annuity, or reinsurance contracts on lives or risks resident or located in Canada and denominated in Canadian currency, is subject to the limitations of item (1) as increased by the greater of:

(a) the amount the insurer is required by Canadian law to invest in Canada or to be denominated in Canadian currency; or

(b) one hundred fifteen percent of the amount of its reserves and other obligations pursuant to contracts on lives or risks resident or located in Canada.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑230.** Rated credit instruments; federally backed mortgages.

(A) An insurer may acquire rated credit instruments, subject to the limitation of subsection (B) of this section, as follows:

(1) Subject to the limitation of Section 38‑12‑220(B),but not subject to the limitations of Section 38‑12‑220(A)(1), (2), and (3), an insurer may acquire rated credit instruments issued, assumed, guaranteed, or insured by the United States or a government‑sponsored enterprise of the United States, if the instruments of the government‑sponsored enterprise are assumed, guaranteed, or insured by the United States or are otherwise backed or supported by the full faith and credit of the United States.

(2) Subject to the limitations of Section 38‑12‑220(B), but not subject to the limitations of Section 38‑12‑220(A), an insurer may acquire rated credit instruments issued, assumed, guaranteed, or insured by Canada or a government‑ sponsored enterprise of Canada, if the instruments of the government‑ sponsored enterprise are assumed, guaranteed, or insured by Canada or are backed or supported otherwise by the full faith and credit of Canada. An insurer may not acquire an instrument pursuant to this subsection if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer pursuant to this subsection exceeds forty percent of its admitted assets.

(3)(a) Subject to the limitations of Section 38‑12‑220(B), but not subject to the limitations of Section 38‑12‑220(A), an insurer may acquire rated credit instruments, excluding asset‑backed securities:

(i) issued by a government money market mutual fund, a class one money market mutual fund, a class one bond mutual fund, or a multilateral development bank; or

(ii) issued, assumed, guaranteed, or insured by a government‑sponsored enterprise of the United States other than those eligible pursuant to subsection (A)(1) of this section, or a state, if the instruments are general obligations of the state;

(b) An insurer may not acquire an instrument of any one fund, enterprise, entity, or state pursuant to this subsection if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer in any one fund, enterprise, entity, or state pursuant to this subsection exceeds ten percent of its admitted assets.

(4) Subject to the limitations of Section 38‑12‑220, an insurer may acquire preferred stocks that are not foreign investments and that meet the requirements of rated credit instruments if as a result of and after giving effect to the investment, the aggregate amount of preferred stocks then held by the insurer pursuant to this subsection:

(a) does not exceed twenty percent of its admitted assets; and

(b) that are not sinking fund stocks or rated P1 or P2 by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO does not exceed ten percent of its admitted assets.

(5) Subject to the limitations of Section 38‑12‑220, in addition to those investments eligible pursuant to items (1), (2), (3), and (4) of this subsection, an insurer may acquire rated credit instruments that are not foreign investments.

(B) An insurer may not acquire special rated credit instruments pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of special rated credit instruments then held by the insurer exceeds five percent of its admitted assets. The director may identify, by regulation, certain special rated credit instruments that are exempt from the provisions of this subsection.

(C) Obligations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and other mortgage‑backed or mortgage‑related securities as defined in Section 106 of Title I of SMMEA (15 U.S.C. Section 77r‑1) may be invested in to the same extent as permitted pursuant to subsection (A)(1), whether or not they are rated credit instruments authorized in that subsection.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑240.** Investment pools; qualification requirements; pooling agreements.

(A) An insurer may acquire investments in investment pools that invest only in:

(1) obligations that are rated 1 or 2 by the SVO or have an equivalent of a SVO 1 or 2 rating, or in the absence of a 1 or 2 rating or equivalent rating the issuer has outstanding obligations with a SVO 1 or 2 or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO and have a remaining maturity of:

(a) three hundred ninety‑seven days or less or a put which entitles the holder to receive the principal amount of the obligation that may be exercised through maturity at specified intervals not exceeding three hundred ninety‑seven days; or

(b) three years or less and a floating interest rate that resets no less frequently than quarterly on the basis of a current short‑term index, such as federal funds, prime rate, Treasury bills, London InterBank Offered Rate (LIBOR) or commercial paper, and is subject to no maximum limit, if the obligations do not have an interest rate that varies inversely to market interest rate changes;

(2) government money market mutual funds or class one money market mutual funds; or

(3) securities lending, repurchase transactions, and reverse repurchase transactions that meet all the requirements of Section 38‑12‑280, except the quantitative limitations of Section 38‑12‑280(4); or

(4) invest only in investments that an insurer may acquire pursuant to this chapter, if the insurer’s proportionate interest in the amount invested in these investments, when combined with the amounts of the investments made directly or indirectly through an investment affiliate or other insurer investment pool permitted pursuant to this item does not exceed the applicable limits of this chapter for those investments.

(B) For an investment in an investment pool to be qualified pursuant to this chapter, the investment pool may not:

(1) acquire securities issued, assumed, guaranteed, or insured by the insurer or an affiliate of the insurer;

(2) borrow or incur indebtedness for borrowed money, except for securities lending and reverse repurchase transactions that meet the requirements of Section 38‑12‑280, except the quantitative limitations of Section 38‑12‑280(4); or

(3) acquire an investment if as a result of and after giving effect to the transaction the aggregate value of securities then loaned or sold to, purchased from, or invested in any one business entity pursuant to this section exceed ten percent of the total assets of the investment pool.

(C) The limitations of Section 38‑12‑220(A) do not apply to an investment by an insurer in an investment pool, except that an insurer may not acquire an investment in an investment pool pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer pursuant to this section:

(a) in all investment pools that invest in investments permitted pursuant to subsection (A)(4) exceeds twenty‑five percent of its admitted assets; or

(b) in all investment pools exceeds thirty‑five percent of its admitted assets.

(D) For an investment in an investment pool to be qualified pursuant to this chapter, the manager of the investment pool must:

(1) be organized under the laws of the United States or one of its states or the District of Columbia and designated as the pool manager in a pooling agreement;

(2) be the insurer, an affiliated insurer, or a business entity affiliated with the insurer, a qualified bank, a business entity registered under the Investment Advisors Act of 1940 (15 U.S.C. Sections 80a‑1 et seq., as amended), or any other similar applicable state statute, or, in the case of a reciprocal insurer or interinsurance exchange, its attorney‑in‑fact, or in the case of a United States branch of an alien insurer, its United States manager or an affiliate or subsidiary of its United States manager;

(3) compile and maintain, or cause to be compiled and maintained, detailed accounting records including:

(a) the cash receipts and disbursements reflecting the proportionate investment of each participant in the investment pool;

(b) a complete description of all underlying assets of the investment pool including amount, interest rate, maturity date, if any, and other appropriate designations; and

(c) other records that allow third parties to verify the investment of each participant in the investment pool on a daily basis; and

(4) maintain the assets of the investment pool in one or more accounts, in the name of or on behalf of the investment pool either under a custody agreement or a trust agreement with a qualified bank or at the principal office of the pool manager. The applicable agreement must:

(a) state and recognize the claims and rights of each participant;

(b) acknowledge that the underlying assets of the investment pool are held for the sole benefit of each participant in proportion to the aggregate amount of its investments in the investment pool; and

(c) contain an agreement that the underlying assets of the investment pool must not be commingled with the general assets of the qualified bank or any other person.

(E) The pooling agreement for each investment pool must be in writing and must provide that:

(1) an insurer and its affiliated insurers or, in the case of an investment pool investing only in investments permitted under subsections (A)(1), (2), and (3) the insurer and its subsidiaries, affiliates, or any pension or profit sharing plan of the insurer, its subsidiaries and affiliates, or, in the case of a United States branch of an alien insurer, affiliates or subsidiaries of its United States manager, shall hold one hundred percent of the interests in the investment pool at all times;

(2) the underlying assets of the investment pool must not be commingled with the general assets of the pool manager or any other person;

(3) in proportion to the aggregate amount of the interest of each participant in the investment pool:

(a) each participant owns an undivided interest in the underlying assets or the investment pool; and

(b) the underlying assets of the investment pool are held for the sole benefit of each participant;

(4) a participant, or his trustee, receiver, conservator, or other successor‑in‑interest, if a participant is insolvent, bankrupt, or in receivership, may withdraw all or a portion of its investment from the investment pool pursuant to the terms of the pooling agreement;

(5) withdrawals may be made on demand without penalty or other assessment on any business day, but settlement of funds must occur within a reasonable and customary period after the date on which the withdrawal is made, not to exceed ten business days. Distributions pursuant to this item must be calculated in each case net of all fees and expenses of the investment pool then applicable. The pooling agreement must provide that the pool manager shall distribute to a participant, at the discretion of the pool manager:

(a) the then fair market value of the participant’s pro rata share of each underlying asset of the investment pool, in cash;

(b) a pro rata share of each underlying asset, in kind; or

(c) a pro rata share in each underlying asset, in a combination of cash and in‑kind distributions; and

(6) the pool manager shall make the records of the investment pool available for inspection by the director.

(F) Except for the formation of an investment pool, transactions between a domestic insurer and an affiliated insurer investment pool are not subject to the requirements of Section 38‑21‑250.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑250.** Equity interests in domestic business entities; percentage of assets limitation; short sales.

(A) Subject to the limitations of Section 38‑12‑220, an insurer may acquire directly, or through an investment affiliate, equity interests in business entities organized pursuant to the laws of any domestic jurisdiction.

(B) An insurer may not acquire directly, or through an investment affiliate, an investment pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer pursuant to this section exceeds twenty percent of its admitted assets, or, except for mutual funds, the amount of equity interests then held by the insurer that are not listed on a qualified exchange exceeds five percent of its admitted assets. An accident and health insurer is not subject to this section but is subject to the same aggregate limitation on equity interests as a property and casualty insurer pursuant to Section 38‑12‑460 and also to the provisions of Section 38‑12‑420.

(C) An insurer may not acquire pursuant to this section investments that the insurer may acquire pursuant to Section 38‑12‑270 or pursuant to Chapter 21 of this title.

(D) An insurer may not short sell an equity interest unless the insurer covers the short sale by owning the equity interest or an unrestricted right to the equity interest exercisable within six months of the short sale.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑260.** Tangible personal property; valuation; limitations.

(A)(1) Subject to the limitations of Section 38‑12‑220, an insurer may acquire tangible personal property or equity interests in tangible personal property, located or used wholly or in part within a domestic jurisdiction, directly or indirectly through:

(a) limited partnership interests or general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(b) joint ventures;

(c) stock of an investment affiliate;

(d) membership interests in a limited liability company;

(e) trust certificates; or

(f) other similar instruments.

(2) Investments acquired pursuant to item (1) are eligible only if:

(a) the property is subject to a lease or other agreement with a person whose rated credit instruments in the amount of the purchase price of the personal property the insurer could then acquire pursuant to Section 38‑12‑230; and

(b) the lease or other agreement provides the insurer the right to receive rental, purchase, or other fixed payments for the use or purchase of the property, and the aggregate value of the payments, together with the estimated residual value of the property at the end of its useful life and the estimated tax benefits to the insurer resulting from ownership of the property, are adequate to return the cost of the insurer’s investment in the property plus a return considered adequate by the insurer.

(B) The insurer shall compute the amount of each investment pursuant to this section on the basis of the out‑of‑pocket purchase price and applicable related expenses paid by the insurer for the investment, net of each borrowing made to finance the purchase price and expenses to the extent the borrowing is without recourse to the insurer.

(C) An insurer may not acquire, directly or indirectly through an investment affiliate, an investment pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of all investments then held by the insurer pursuant to this section exceeds:

(1) two percent of its admitted assets; or

(2) one‑half of one percent of its admitted assets as to a single item of tangible personal property.

(D) For purposes of determining compliance with the limitations of Section 38‑12‑220, investments acquired by an insurer pursuant to this section must be aggregated with those acquired pursuant to Section 38‑12‑230, and each lessee of the property pursuant to a lease referred to in this section is considered the issuer of an obligation in the amount of the investment of the insurer in the property determined as provided in subsection (B).

(E) Nothing in this section applies to tangible personal property lease arrangements between an insurer and its subsidiaries and affiliates pursuant to a cost sharing arrangement or agreement permitted pursuant to Chapter 21 of this title.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑270.** Mortgage loans; real estate.

(A)(1) In connection with mortgage loans, an insurer:

(a) may acquire obligations secured by mortgages on real estate situated within a domestic jurisdiction, subject to the limitations of Section 38‑12‑220, either directly or indirectly through:

(i) limited partnership interests and general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(ii) joint ventures;

(iii) stock of an investment affiliate;

(iv) membership interests in a limited liability company;

(v) trust certificates; or

(vi) other similar instruments; and

(b) may not acquire a mortgage loan secured by other than a first lien pursuant to this item unless the insurer is the holder of the first lien. The obligations held by the insurer and obligations with an equal lien priority, at the time of acquisition of the obligation, may not exceed:

(i) ninety percent of the fair market value of the real estate, if the mortgage loan is secured by a purchase money mortgage or like security received by the insurer upon disposition of the real estate;

(ii) eighty percent of the fair market value of the real estate, if the mortgage loan requires immediate scheduled payment in periodic installments of principal and interest over an amortization period of thirty years or less, and periodic payments are required at least annually. Each periodic payment must be sufficient to ensure that at all times the outstanding principal balance of the mortgage loan is not greater than the outstanding principal balance that would be outstanding pursuant to a mortgage loan with the same original principal balance and the same interest rate and requiring equal payments of principal and interest with the same frequency over the same amortization period. Mortgage loans that otherwise are permitted pursuant to this subsection may provide for a payment of the principal balance before the end of the period of amortization of the loan. For residential mortgage loans, the eighty percent limitation may be increased to ninety‑seven percent if acceptable private mortgage insurance has been obtained; or

(iii) seventy‑five percent of the fair market value of the real estate for mortgage loans that do not meet the requirements of subsubitems (i) or (ii).

(2) For purposes of item (1), the amount of an obligation required to be included in the calculation of the loan‑to‑value ratio may be reduced to the extent the obligation is insured by the Federal Housing Administration or guaranteed by the Administrator of Veterans Affairs, or their successors.

(3)(a) Subject to the limitations of Section 38‑12‑220, an insurer may acquire obligations secured by a second mortgage on real estate situated within a domestic jurisdiction, in addition to that which is authorized under item (1), either directly or indirectly through:

(i) limited partnership interests and general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(ii) joint ventures;

(iii) stock of an investment affiliate;

(iv) membership interests in a limited liability company;

(v) trust certificates; or

(vi) other similar instruments.

(b) The obligation held by the insurer must be the sole second lien priority obligation and, at the time of acquisition of the obligation, may not exceed seventy percent of the amount by which the fair market value of the real estate exceeds the amount outstanding under the first mortgage.

(4) A mortgage loan that is held by an insurer pursuant to Section 38‑12‑40(F) or acquired pursuant to this section and is restructured in a manner that meets the requirements of a restructured mortgage loan in accordance with the NAIC accounting manual continues to qualify as a mortgage loan pursuant to this chapter.

(5) Subject to the limitations of Section 38‑12‑220, a credit lease transaction that does not qualify for investment pursuant to Section 38‑12‑230 is exempt from the provisions of item (1) if:

(a) the loan amortizes over the initial fixed lease term in an amount at least sufficient so that the loan balance at the end of the lease term does not exceed the original appraised value of the real estate;

(b) the lease payments cover or exceed the total debt service over the life of the loan;

(c) a tenant or its affiliated entity whose rated credit instruments have a SVO 1 or 2 designation or a comparable rating from a nationally recognized statistical rating organization recognized by the SVO has a full faith and credit obligation to make the lease payments;

(d) the insurer holds or is the beneficial holder of a first lien mortgage on the real estate;

(e) the expenses of the real estate are passed through to the tenant, excluding exterior, structural, parking, and heating, ventilation, and air conditioning replacement expenses, unless annual escrow contributions, from cash flows derived from the lease payments, cover the expense shortfall; and

(f) there is a perfected assignment of the rents due pursuant to the lease to or for the benefit of the insurer.

(B)(1) Subject to the limitations of Section 38‑12‑220 an insurer may acquire, manage, and dispose of real estate situated in a domestic jurisdiction, either directly or indirectly, through:

(a) limited partnership interests and general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(b) joint ventures;

(c) stock of an investment affiliate;

(d) membership interests in a limited liability company;

(e) trust certificates; or

(f) other similar instruments.

(2) The real estate must be income producing or intended for improvement or development for investment purposes under an existing program, in which case the real estate is considered to be income producing. The real estate may be subject to mortgages, liens, or other encumbrances, the amount of which must be deducted from the amount of the investment of the insurer in the real estate to the extent that the obligations secured by the mortgages, liens, or encumbrances are without recourse to the insurer for purposes of determining compliance with items (2) and (3) of subsection (D).

(C) An insurer may acquire, manage, and dispose of real estate for the convenient accommodation of the business operations, including home office, branch office, and field office operations of the insurer or its affiliates.

(1) Real estate acquired pursuant to this subsection may include excess space for rent to others, if the excess space when valued at its fair market value, would otherwise be a permitted investment pursuant to subsection (B) and is so qualified by the insurer.

(2) The real estate acquired pursuant to this subsection may be subject to one or more mortgages, liens, or other encumbrances, the amount of which must be deducted from the amount of the investment of the insurer in the real estate to the extent that the obligations secured by the mortgages, liens, or encumbrances are without recourse to the insurer for purposes of determining compliance with subsection (D)(4).

(3) For purposes of this subsection, business operations do not include that portion of real estate used for the direct provision of health care services by an accident and health insurer for its insureds, other than employees of the insurer and its affiliates and their families. An insurer may acquire real estate used for these purposes pursuant to subsection (B).

(D) An insurer may not acquire:

(1) an investment pursuant to subsection (A) if as a result of and after giving effect to the investment the aggregate amount of all investments then held by the insurer pursuant to subsection (A) exceeds:

(a) one percent of its admitted assets in mortgage loans covering any one secured location;

(b) one quarter of one percent of its admitted assets in construction loans covering any one secured location; or

(c) two percent of its admitted assets in construction loans in the aggregate;

(2) an investment pursuant to subsection (B) if as a result of and after giving effect to the investment and any outstanding guarantees made by the insurer in connection with the investment the aggregate amount of investments then held by the insurer pursuant to subsection (B), plus the guarantees then outstanding, exceeds:

(a) one percent of its admitted assets in any one parcel or group of contiguous parcels of real estate, except that this limitation does not apply to that portion of real estate used for the direct provision of health care services by an accident and health insurer for its insureds, such as hospitals, medical clinics, medical professional buildings, or other health facilities used for the purpose of providing health services; or

(b) fifteen percent of its admitted assets in the aggregate, but not more than five percent of its admitted assets as to properties that are to be improved or developed;

(3) an investment pursuant to subsection (A) or (B) if as a result of and after giving effect to the investment and any guarantees made by the insurer in connection with the investment the aggregate amount of all investments then held by the insurer pursuant to subsections (A) and (B), plus the guarantees then outstanding, exceeds forty‑five percent of its admitted assets. An insurer may exceed this limitation by not more than thirty percent of its admitted assets if:

(a) this increased amount is invested only in residential mortgage loans;

(b) the insurer has no more than ten percent of its admitted assets invested in mortgage loans other than residential mortgage loans;

(c) the loan‑to‑value ratio of each residential mortgage loan does not exceed sixty percent at the time the mortgage loan is qualified pursuant to this increased authority and the fair market value is supported by an independent appraisal no more than two years old;

(d) a single mortgage loan qualified pursuant to this increased authority may not exceed one‑half of one percent of its admitted assets;

(e) the insurer files with the director, and receives approval for, a plan that is designed to result in a portfolio of residential mortgage loans that is sufficiently geographically diversified; and

(f) the insurer agrees to file annually with the director records that demonstrate that its portfolio of residential mortgage loans is geographically diversified in accordance with the plan; or

(4) real estate pursuant to subsection (C) if as a result of and after giving effect to the acquisition the aggregate amount of real estate then held by the insurer pursuant to subsection (C) exceeds ten percent of its admitted assets. Additional amounts of real estate may be acquired, with the permission of the director, pursuant to subsection (C). The limitations of Section 38‑12‑220 do not apply to an insurer’s acquisition of real estate pursuant to subsection (C).

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑280.** Securities lending, repurchase, reverse repurchase, and dollar roll transactions.

An insurer may enter, directly or indirectly through an investment affiliate, into securities lending transactions that are conducted directly, through a custodian bank that is a qualified bank, or through an agent, and may enter into repurchase transactions, reverse repurchase transactions, and dollar roll transactions, subject to the following conditions:

(1) the insurer’s board of directors must adopt a written plan that specifies guidelines and objectives regarding such transactions, including:

(a) a description of how cash may be invested or used for general corporate purposes of the insurer;

(b) operational procedures to manage interest rate risk, counterparty default risk, the conditions under which proceeds from reverse repurchase transactions may be used in the ordinary course of business, and the use of acceptable collateral in a manner that reflects the liquidity needs of the transaction; and

(c) the extent to which the insurer may engage in these transactions;

(2) the insurer must enter into a written agreement for all transactions authorized in this subsection other than dollar roll transactions. The written agreement must:

(a) require each transaction to terminate no more than one year from its inception;

(b) be made with the counterparty, except that for securities lending transactions, the agreement may be:

(i) through a custodian bank that is a qualified bank; or

(ii) with an agent acting on behalf of the insurer if the:

(A) agent or the guarantor of the agent’s obligations pursuant to the agreement is a qualified bank or a qualified business entity; and

(B) agreement with the agent requires the agent to enter into separate agreements with each counterparty that are consistent with the requirements of this subsection and prohibits securities lending transactions pursuant to the agreement with the agent or its affiliates;

(3) cash received in a transaction pursuant to this subsection, if not used by the insurer for its general corporate purposes in accordance with the plan adopted by the board of directors pursuant to item (1), must be invested in accordance with this chapter and in a manner that recognizes the liquidity needs of the transaction. For so long as any transaction pursuant to this subsection remains outstanding, the insurer, its agent, or custodian, either physically or through the book entry systems of the Federal Reserve, Depository Trust Company, or other securities depositories approved by the director, shall maintain:

(a) possession of acceptable collateral for the transaction in at least the amount required pursuant to the provisions of the SVO procedures manual;

(b) a perfected security interest in the acceptable collateral; or

(c) in the case of a foreign jurisdiction, title to or rights of a secured creditor to the acceptable collateral;

(4) the limitations of Sections 38‑12‑220 and 38‑12‑290 do not apply to the counterparty exposure created by transactions pursuant to this section. For purposes of calculations made to determine compliance with this item, the insurer’s future obligation to resell securities in the case of a repurchase transaction, or to repurchase securities in the case of a reverse repurchase transaction, must not be counted. An insurer may not enter into a transaction pursuant to this subsection if as a result of and after giving effect to the transaction, the aggregate amount of:

(a) securities then loaned to, sold to, or purchased from any counterparty pursuant to this subsection exceeds five percent of its admitted assets. In calculating the amount sold to or purchased from a counterparty under repurchase or reverse repurchase transactions, effect may be given to netting provisions pursuant to a written master agreement; or

(b) all securities then loaned to, sold to, or purchased from all counterparties pursuant to this subsection exceeds forty percent of its admitted assets;

(5) in a dollar roll transaction, the insurer must receive cash in an amount at least equal to the market value of the securities transferred by the insurer in the transaction as of the transaction date.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑290.** Foreign investments.

(A) Subject to the limitations of Section 38‑12‑220, an insurer may acquire, directly or indirectly through an investment affiliate, foreign investments or engage in investment practices with persons of or in foreign jurisdictions, of substantially the same types as those that an insurer is permitted to acquire pursuant to this chapter, other than the type permitted pursuant to Section 38‑12‑240, if as a result and after giving effect to the investment the aggregate amount of foreign investments then held and foreign investment practices then engaged in by the insurer pursuant to this subsection:

(1) does not exceed twenty percent of its admitted assets; and

(2) in a single foreign jurisdiction does not exceed ten percent of its admitted assets as to a foreign jurisdiction that has a sovereign debt rating of SVO 1, or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO, or three percent of its admitted assets as to any other foreign jurisdiction.

(B) Subject to the limitations of Section 38‑12‑220, an insurer may acquire investments and engage in investment practices denominated in foreign currencies, whether or not they are foreign investments acquired or foreign investment practices engaged in pursuant to subsection (A), or additional foreign currency exposure as a result of the termination or expiration of a hedging transaction with respect to investments denominated in a foreign currency, if as a result of and after giving effect to the transaction the aggregate amount of investments then held by the insurer and investment practices then engaged in by the insurer pursuant to this subsection:

(1) denominated in foreign currencies does not exceed ten percent of its admitted assets; and

(2) denominated in foreign currency of a single foreign jurisdiction does not exceed ten percent of its admitted assets as to a foreign jurisdiction that has a sovereign debt rating of SVO 1, or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO, or three percent of its admitted assets as to any other foreign jurisdiction.

An investment is not considered denominated in a foreign currency if the acquiring insurer enters into one or more hedging transactions permitted pursuant to Section 38‑12‑300 to hedge the foreign currency exchange rate risk associated with the investment or investment practice.

(C) In addition to investments permitted by subsections (A) and (B), an insurer that is authorized to do business in a foreign jurisdiction and that has outstanding insurance, annuity, or reinsurance contracts on lives or risks resident or located in that foreign jurisdiction and denominated in foreign currency of that jurisdiction, may acquire foreign investments and engage in foreign investment practices respecting that foreign jurisdiction, and may acquire investments and engage in investment practices denominated in the currency of that jurisdiction, subject to the limitations of Section 38‑12‑220. Investments made pursuant to this subsection in obligations of foreign governments, their political subdivisions, and government sponsored enterprises are not subject to the limitations of Section 38‑12‑220 if those investments carry an SVO rating of 1 or 2 or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO. The aggregate amount of investments acquired and investment practices engaged in by the insurer pursuant to this subsection may not exceed the greater of:

(1) the amount the insurer is required by the law of the foreign jurisdiction to invest in the foreign jurisdiction; or

(2) one hundred fifteen percent of the amount of its reserves, net of reinsurance, and other obligations under the contracts on lives or risks resident or located in the foreign jurisdiction.

(D) In addition to investments permitted pursuant to subsections (A), (B), and (C), an insurer that is not authorized to do business in a foreign jurisdiction but that has outstanding insurance, annuity, or reinsurance contracts on lives or risks resident or located in that foreign jurisdiction and denominated in foreign currency of that jurisdiction, may acquire foreign investments and engage in foreign investment practices respecting that foreign jurisdiction, and may acquire investments and engage in investment practices denominated in the currency of that jurisdiction, subject to the limitations of Section 38‑12‑220. Investments made and investment practices engaged in pursuant to this subsection in obligations of foreign governments, their political subdivisions, and government sponsored enterprises are not subject to the limitations of Section 38‑12‑220 if those investments and investment practices carry a SVO rating of 1 or 2 or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO. The aggregate amount of investments acquired and investment practices then engaged in by the insurer pursuant to this subsection may not exceed one hundred five percent of the amount of its reserves, net of reinsurance, and other obligations under the contracts on lives or risks resident or located in the foreign jurisdiction.

(E) Investments acquired and investment practices engaged in by an insurer pursuant to this section must be aggregated with investments of the same types made pursuant to all other sections of this chapter, and in a similar manner, for purposes of determining compliance with the limitations, if any, contained in other sections. Investments in and investment practices engaged in with respect to obligations of foreign governments, their political subdivisions, and government sponsored enterprises of these persons, except for those exempted pursuant to subsections (C) and (D), are subject to the limitations of Section 38‑12‑220.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑300.** Derivative transactions.

(A) An insurer may engage, directly or indirectly through an investment affiliate, in derivative transactions including, without limitation, hedging transactions, income generation transactions, and replication transactions pursuant to this section, subject to the following conditions:

(1) before entering into any derivative transaction, the board of directors of the insurer must determine that the insurer directly or through an investment management subsidiary or affiliate has adequate professional personnel, technical expertise, and systems to implement investment practices involving derivative transactions and approve a derivative instruments use plan that:

(a) describes investment objectives and risk constraints, such as counterparty exposure amounts;

(b) defines permissible transactions including identification of the risks that may be hedged, the assets or liabilities that may be replicated, and permissible types of income generation transactions; and

(c) requires compliance with internal control procedures;

(2) the insurer must establish written internal control procedures that provide for:

(a) a quarterly report to the board of directors, reviewing:

(i) all derivative transactions entered into, outstanding, or closed out;

(ii) the results and effectiveness of the insurer’s implementation of its derivative instruments use plan; and

(iii) the credit risk exposure to each counterparty for over‑the‑counter derivative transactions based upon the counterparty exposure amount;

(b) a system for determining whether hedging, income generation, or replication strategies used by the insurer have been effective;

(c) a system of regular, but at least monthly, reports to management that include:

(i) a description of all derivative transactions entered into, outstanding, or closed out during the period since the last report;

(ii) the purpose of each outstanding derivative transaction;

(iii) a performance review of the derivative instruments program; and

(iv) the counterparty exposure amounts for over‑the‑counter derivative transactions;

(d) written authorizations identifying the responsibilities and limitations of authority of persons authorized to effect and maintain derivative transactions; and

(e) documentation for each transaction including:

(i) the purpose of the transaction;

(ii) the assets or liabilities to which the transaction relates;

(iii) the specific derivative instrument used in the transaction;

(iv) for over‑the‑counter derivative instrument transactions, the name of the counterparty and the counterparty exposure amount; and

(v) for exchange‑traded derivative instruments, the name of the exchange and the name of the firm that handled the transaction;

(3) whenever the derivative transactions entered into pursuant to this section are not in compliance with this section or, if continued, may create a hazardous financial condition of the insurer that affects its policyholders, creditors, or the general public, the director, after notice and an opportunity for a hearing, may order the insurer to take action that is reasonably necessary to rectify the noncompliance or hazardous financial condition or to prevent the impending hazardous financial condition from occurring;

(4) with respect to hedging transactions, an insurer shall demonstrate to the director upon request the intended hedging characteristics and effectiveness of the hedging transaction or combination of hedging transactions through cash‑flow testing, duration analysis, or other appropriate analysis. An insurer may enter into hedging transactions pursuant to this item if as a result of and after giving effect to each hedging transaction, the aggregate:

(a) statutory financial statement value of all outstanding caps, floors, warrants not attached to another financial instrument, and options other than collars purchased by the insurer pursuant to this item does not exceed seven and one‑half percent of its admitted assets;

(b) statutory financial statement value of all outstanding warrants, caps, floors, and options other than collars written by the insurer pursuant to this item does not exceed three percent of its admitted assets; and

(c) potential exposure of all outstanding collars, swaps, forwards, and futures entered into or acquired by the insurer pursuant to this item does not exceed six and one‑half percent of its admitted assets;

(5) an insurer may enter into an income generation transaction if:

(a) as a result of and after giving effect to the transaction, the aggregate statutory financial statement value of admitted assets that are then subject to call or that generate the cash flows for payments required to be made by the insurer under caps and floors sold by the insurer and then outstanding pursuant to this item, plus the statutory financial statement value of admitted assets underlying derivative instruments then subject to call sold by the insurer and outstanding pursuant to this item, plus the purchase price of assets subject to puts then outstanding pursuant to this item, does not exceed ten percent of its admitted assets; and

(b) the transaction is one of the following types and meets the other requirements specified in this subitem that are applicable to that type of transaction:

(i) sales of call options on assets, if the insurer holds or has a currently exercisable right to acquire the underlying assets during the entire period that the option is outstanding;

(ii) sales of put options on assets, if the insurer holds sufficient cash, cash equivalents, or interests in a short‑term investment pool to purchase the underlying assets upon exercise during the entire period that the option is outstanding, and has the ability to hold the underlying assets in its portfolio. If the total market value of all put options sold by the insurer exceeds two percent of the insurer’s admitted assets, the insurer shall set aside, pursuant to a custodial or escrow agreement, cash or cash equivalents having a market value equal to the amount of its put option obligations in excess of two percent of the insurer’s admitted assets during the entire period the option is outstanding;

(iii) sales of call options on derivative instruments if the insurer holds, or has a currently exercisable right to acquire, assets generating the cash flow to make any payments for which the insurer is liable pursuant to the underlying derivative instruments during the entire period that the call options are outstanding and has the ability to enter into the underlying derivative transactions for its portfolio; or

(iv) sales of caps and floors, if the insurer holds, or has a currently exercisable right to acquire, assets generating the cash flow to make any payments for which the insurer is liable pursuant to the caps and floors during the entire period that the caps and floors are outstanding;

(6) an insurer may enter into a replication transaction that complies with the requirements of the SVO procedures manual concerning replication transactions, provided that:

(a) the insurer would be authorized to invest its funds pursuant to this chapter in the asset being replicated;

(b) the asset being replicated is subject to all provisions and limitations, including quantitative limitations, on the making of the investment as specified in this chapter, as if the replication transaction constituted a direct investment by the insurer in the asset being replicated; and

(c) as a result of and after giving effect to the replication transaction, the aggregate statement value of all assets being replicated does not exceed ten percent of its admitted assets;

(7) an insurer may purchase or sell one or more derivative instruments to offset in whole or in part a derivative instrument previously purchased or sold, without regard to the quantitative limitations of this section, provided that the transaction may be recognized as an offsetting transaction in accordance with generally accepted accounting principles;

(8) each derivative instrument must be:

(a) traded on a qualified exchange;

(b) entered into with or guaranteed by a qualified bank or a qualified business entity;

(c) issued or written by or entered into with the issuer of the underlying interest on which the derivative instrument is based; or

(d) in the case of futures, traded through a broker that is registered as a futures commission merchant under the federal Commodity Exchange Act or that has received exemptive relief from registration pursuant to rule 30.10 promulgated under that act; and

(9) an insurer must include all counterparty exposure amounts in determining compliance with the limitations of Section 38‑12‑220;

(B) Pursuant to regulations promulgated pursuant to Section 38‑12‑90, the director may approve additional transactions involving the use of derivative instruments in excess of the limits of items (4), (5), and (6) or for other risk management purposes.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑310.** Life insurer loan to policyholder.

A life insurer may lend to a policyholder on the security of the cash surrender value of the policyholder’s policy a sum not exceeding the legal reserve the insurer is required to maintain on the policy.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142, 1868.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 167, 562 to 567.

**SECTION 38‑12‑320.** Exceptions to investment restrictions; assets from dividends and distributions; mergers and consolidations; protection of previous investments; time for determining qualification.

(A)(1) Pursuant to this subsection, an insurer may acquire an investment of any kind, or engage in a securities lending transaction, repurchase transaction, reverse repurchase transaction, or dollar roll transaction, that is not prohibited specifically by this chapter, without regard to the categories, conditions, standards, or other limitations of Sections 38‑12‑220 through 38‑12‑290 if, as a result of and after giving effect to the transaction, the aggregate amount of investments then held and securities lending transactions, repurchase transactions, reverse repurchase transactions, and dollar roll transactions then engaged in pursuant to this subsection does not exceed the lesser of:

(a) ten percent of its admitted assets; or

(b) seventy‑five percent of its capital and surplus;

(2) An insurer may not acquire an investment or engage in an investment practice pursuant to this subsection if as a result of and after giving effect to the transaction the aggregate amount of all investments then held by the insurer under this subsection in any one person exceeds three percent of its admitted assets.

(B) In addition to the investments acquired pursuant to subsection (A) of this section, an insurer may acquire an investment of any kind, or engage in investment practices described in Section 38‑12‑280, that are not prohibited by this chapter without regard to any limitations of Sections 38‑12‑220 through 38‑12‑290 if:

(1) the director grants prior approval;

(2) the insurer demonstrates that its investments are made in a prudent manner and that the additional amounts will be invested in a prudent manner; and

(3) as a result of and after giving effect to the transaction, the aggregate amount of investments then held by the insurer pursuant to this subsection does not exceed the greater of:

(a) twenty‑five percent of its capital and surplus; or

(b) one hundred percent of capital and surplus less ten percent of its admitted assets.

(C) This section does not permit an insurer to acquire an investment or engage in an investment practice that is prohibited pursuant to Section 38‑12‑60, or that is a derivative transaction.

(D) If any investment made or transaction entered into pursuant to any other section of this chapter exceeds the limits specified in that section, the excess portion of the investment or transaction is considered to be an investment or transaction pursuant to this section. Any loan, investment, or transaction originally made pursuant to this section which subsequently, if it were then being made, would qualify as an authorized investment or transaction pursuant to another subsection of this section or another section of this chapter shall thereafter be considered an authorized investment or transaction pursuant to that subsection or section.

(E) This chapter does not prohibit the acquisition by an insurer of additional obligations, securities, or other assets if received as a dividend or as a distribution of assets, nor does this chapter apply to securities, obligations, or other assets accepted incident to the workout, adjustment, restructuring, or similar realization of an investment or transaction when the insurer’s board of directors or a committee appointed by the board of directors considers it to be in the best interests of the insurer, if the investment or transaction had been authorized previously. This chapter does not apply to assets acquired pursuant to a lawful agreement of bulk reinsurance if the assets constituted legal and authorized investments for the ceding company. No obligation, security, or other asset acquired as authorized by this subsection is required to be qualified pursuant to any other subsection of this section or other section of this chapter, provided that all assets acquired pursuant to this subsection are subject to the applicable accounting and valuation requirements contained in this chapter.

(F) Subject to the provisions of subsection (G), if a domestic life insurance company, pursuant to a merger or consolidation, acquires an investment or transaction that was an authorized investment or transaction of the company that was merged or consolidated with the domestic life insurance company but that does not qualify as an authorized investment or transaction pursuant to this chapter at the time the merger or consolidation occurs, regardless of whether or not the investment or transaction would be authorized pursuant to any of subsections (A) through (C), then the investment or transaction is considered an authorized investment or transaction pursuant to this subsection and is not required to be applied toward the limitations contained in any of subsections (A) through (C), for a period of five years after the date on which the merger or consolidation occurs. After that period it shall no longer be an authorized investment or transaction pursuant to this subsection, unless within the five‑year period:

(1) the investment or transaction qualifies as an authorized investment or transaction pursuant to another subsection of this section or another section of this chapter including without limitation, subsections (A), (B), and (C), if the domestic life insurance company so elects; or

(2) the director authorizes the investment or transaction in the plan of merger or consolidation approved by the director; or

(3) upon request of the insurer, the director authorizes an extension of the five‑year time period; or

(4) the director approves the investment or transaction pursuant to this subsection.

The aggregate amount of a domestic life insurance company’s investments and transactions pursuant to this subsection, excluding investments and transactions authorized pursuant to items (1), (2), and (4), may not exceed twenty‑five percent of the domestic life insurance company’s capital and surplus after giving effect to such merger or consolidation.

(G) If a domestic life insurance company, pursuant to a merger or consolidation, acquires a mortgage loan, or a participation in a mortgage loan, that would have been authorized pursuant to Section 38‑12‑270, and pursuant to subsection (D) of this section as to the portion that exceeded seventy‑five percent of the value of the property, at the time the company that was merged or consolidated with such domestic life insurance company invested in the mortgage loan or the participation in the mortgage loan, then such mortgage loan or participation in the mortgage loan is authorized pursuant to Section 38‑12‑270, and pursuant to subsection (D) of this section as to the portion that exceeded seventy‑five percent of the value of the property.

(H) The director has full discretion in selecting a method for calculating values of investments and transactions that an insurer acquires through a merger or consolidation, provided that the method is consistent with any applicable provisions of this chapter and any applicable valuation method that the NAIC is currently using at the time with respect to investments and transactions. If there is a conflict between a provision of this chapter and the NAIC valuation method being used, the provision of this chapter controls.

(I) The qualification or disqualification of an investment pursuant to one subsection of this section or one section of this chapter does not prevent its qualification in whole or in part pursuant to another provision of this chapter. An investment authorized by more than one provision of this chapter is authorized pursuant to the provision the insurer elects. An investment or transaction qualified pursuant to any provision of this chapter at the time it was acquired or entered into by the insurer shall continue to be qualified pursuant to that provision. An investment or transaction may be transferred in whole or in part at the election of the insurer to the authority of any provision of this chapter pursuant to which it then qualifies, whether or not it originally qualified pursuant to that provision.

(J) Notwithstanding the provisions of the other subsections of this section or the other sections of this chapter, an insurer may acquire an investment in or enter into a transaction with a business entity in which the insurer already holds one or more investments or with which the insurer has entered into one or more transactions if the investment is acquired or the transaction is entered into in order to protect an investment or transaction previously made in or with the business entity, provided that the aggregate amount of investments and transactions so acquired and entered into may not exceed five percent of the insurer’s capital and surplus.

(K)(1) The percentage authorizations and limitations contained in any provision of this chapter apply only at the time of the original acquisition of an investment or at the time a transaction is entered into and are not applicable to the insurer or the investment or transaction after that time except as provided in subsection (I). Once any investment or transaction is qualified pursuant to any provision of this chapter, it shall remain qualified notwithstanding any refinancing, restructuring, or modification of the investment or transaction, provided that the insurer does not engage in the refinancing, restructuring, or modification of the investment or transaction for the purposes of circumventing the requirements or limitations of this chapter.

(2) The director has full discretion to value investments and transactions that an insurer holds at the time of an examination of the insurer using a method of calculating the values that the director selects in his discretion, provided that the method must be consistent with any applicable provisions of this chapter and any applicable valuation method that the NAIC is using at the time with respect to investments and transactions. If there is a conflict between such a provision of this chapter and an applicable NAIC valuation method that the NAIC is using at the time, the provision of this chapter controls.

(3) Notwithstanding items (1) and (2), if the director determines that the continued operation of an insurer may be hazardous to its policyholders, its creditors, or the general public, the director may issue an order consistent with applicable statutes requiring the insurer to limit or withdraw from certain investments or transactions or discontinue certain practices as to investments or transactions to the extent the director considers necessary.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

ARTICLE 3

Property and Casualty, Financial Guaranty, and Mortgage Guaranty Insurers

**SECTION 38‑12‑410.** Scope of article.

This article applies to the investments and investment practices of property and casualty, financial guaranty, and mortgage guaranty insurers, subject to the provisions of Section 38‑12‑20.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑420.** Asset and reserve requirements; notice of deficiency; notice to eliminate noncompliance.

(A) Each property and casualty, financial guaranty, mortgage guaranty, or accident and health insurer shall have and maintain investments and engage in investment practices of the classes described in Sections 38‑12‑430 through 38‑12‑520 subject to the limitations contained in those sections to the extent of policyholder obligations and minimum capital, or guaranty fund, and surplus less an amount equal to thirty percent of its surplus as regards policyholders. In no event may a property and casualty, financial guaranty, mortgage guaranty, or accident and health insurer have and maintain investments and investment practices of the types described in the immediately preceding sentence in an amount less than seventy percent of policyholder obligations and one hundred percent of the minimum required capital, or guaranty fund, and surplus. A property and casualty, financial guaranty, mortgage guaranty, or accident and health insurer may invest its assets in excess of those required pursuant to the two immediately preceding sentences at the discretion of the insurer without regard to any of the limitations contained in Sections 38‑12‑430 through 38‑12‑520.

(B) If a property and casualty, financial guaranty, mortgage guaranty, or accident and health insurer’s assets and reserves do not comply with subsection (A), the insurer shall notify the director immediately of the amount by which the reserve requirements exceed the annual statement value of the qualifying assets and explain the reason for the deficiency. Within thirty days of the date of the notice, the insurer shall propose a plan of action to remedy the deficiency.

(C)(1) If the director determines that a property and casualty, financial guaranty, mortgage guaranty, or accident and health insurer is not in compliance with subsection (A), the director shall require the insurer to eliminate the noncompliance within a specified time from the date the notice of the requirement is delivered to the insurer.

(2) If an insurer fails to comply with the director’s requirement described in item (1), the insurer is considered to be in hazardous financial condition, the director shall take action as authorized by law as to an insurer in hazardous financial condition.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1139, 1140, 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 167 to 169, 178 to 180.

**SECTION 38‑12‑430.** Asset limitations for insurer holdings; Canadian investments.

(A)(1) Except as otherwise provided in this chapter, an insurer may not acquire, directly or indirectly through an investment affiliate, an investment pursuant to this chapter if as a result of and after giving effect to the investment the insurer holds more than five percent of its admitted assets in investments of all kinds issued, assumed, accepted, insured, or guaranteed by a single person.

(2) This five percent limitation does not apply to the aggregate amounts insured by a single financial guaranty insurer with the highest generic rating issued by a nationally recognized statistical rating organization.

(3) Asset‑backed securities are not subject to the limitations of item (1), however, except as permitted by item (4), an insurer may not acquire an asset‑backed security if as a result of and after giving effect to the investment, the aggregate amount of asset‑backed securities secured by or evidencing an interest in a single asset or single pool of assets held by a trust or other business entity then held by the insurer exceeds five percent of its admitted assets.

(4) An investment by an insurer in mortgage related securities, as defined by the Secondary Mortgage Market Enhancement Act of 1984 (United States Public Law 98‑440) [12 U.S.C. Sections 24, 1451, 1454 et seq.], that is backed by a single pool of mortgages and made pursuant to the authority of that act, may not exceed five percent of its admitted assets.

(B) An insurer may not acquire, directly or indirectly through an investment affiliate, an investment pursuant to Section 38‑12‑440, 38‑12‑470, or 38‑12‑500 or counterparty exposure pursuant to Section 38‑12‑510(4) if as a result of and after giving effect to the investment the aggregate amount of:

(1) medium and lower grade investments then held by the insurer exceeds twenty percent of its admitted assets;

(2) lower grade investments then held by the insurer exceeds ten percent of its admitted assets;

(3) investments rated five or six by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO then held by the insurer exceeds five percent of its admitted assets;

(4) investments rated six by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO then held by the insurer exceeds one percent of its admitted assets;

(5) medium and lower grade investments then held by the insurer that receive as cash income less than the equivalent yield for Treasury issues with a comparative average life, exceeds one percent of its admitted assets;

(6) medium and lower grade investments issued, assumed, guaranteed, accepted, or insured by any one person or, as to asset‑backed securities secured by or evidencing an interest in a single asset or pool of assets, then held by the insurer exceeds one percent of its admitted assets; or

(7) lower grade investments issued, assumed, guaranteed, accepted, or insured by any one person or, as to asset‑backed securities secured by or evidencing an interest in a single asset or pool of assets, then held by the insurer exceeds one‑half of one percent of its admitted assets.

(C) An insurer that attains or exceeds the limit of any one rating category in subsection (B) may acquire investments in other rating categories subject to the specific and multi‑category limits applicable to those investments.

(D)(1) An insurer may not, directly or indirectly through an investment affiliate, acquire a Canadian investment or engage in a Canadian investment practice authorized by this chapter if as a result of and after giving effect to the investment the aggregate amount of these investments then held by the insurer exceeds forty percent of its admitted assets, or if the aggregate amount of Canadian investments not acquired pursuant to Section 38‑12‑440(A)(2) then held by the insurer exceeds twenty‑five percent of its admitted assets.

(2) An insurer that is authorized to do business in Canada or that has outstanding insurance, annuity, or reinsurance contracts on lives or risks resident or located in Canada and denominated in Canadian currency, is subject to the limitations of item (1) as increased by the greater of:

(a) the amount the insurer is required by Canadian law to invest in Canada or to be denominated in Canadian currency; or

(b) one hundred twenty‑five percent of the amount of its reserves and other obligations pursuant to contracts on lives or risks resident or located in Canada.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1140, 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑440.** Insurer acquisition of rated credit instruments; limitations.

(A) An insurer may acquire rated credit instruments, subject to the limitation of subsection (B) of this section, as follows:

(1) Subject to the limitation of Section 38‑12‑430(B),but not subject to the limitations of Section 38‑12‑430(A)(1), (2), and (3), an insurer may acquire rated credit instruments issued, assumed, guaranteed, or insured by the United States or a government‑sponsored enterprise of the United States, if the instruments of the government‑sponsored enterprise are assumed, guaranteed, or insured by the United States or are otherwise backed or supported by the full faith and credit of the United States.

(2) Subject to the limitations of Section 38‑12‑430(B), but not subject to the limitations of Section 38‑12‑430(A), an insurer may acquire rated credit instruments issued, assumed, guaranteed, or insured by Canada or a government‑ sponsored enterprise of Canada, if the instruments of the government‑ sponsored enterprise are assumed, guaranteed, or insured by Canada or are backed or supported otherwise by the full faith and credit of Canada. An insurer may not acquire an instrument pursuant to this subsection if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer pursuant to this subsection exceeds forty percent of its admitted assets.

(3)(a) Subject to the limitations of Section 38‑12‑430(B), but not subject to the limitations of Section 38‑12‑430(A), an insurer may acquire rated credit instruments, excluding asset‑backed securities:

(i) issued by a government money market mutual fund, a class one money market mutual fund, a class one bond mutual fund, or a multilateral development bank; or

(ii) issued, assumed, guaranteed, or insured by a government‑sponsored enterprise of the United States other than those eligible pursuant to subsection (A) of this section, or a state, if the instruments are general obligations of the state;

(b) An insurer may not acquire an instrument of any one fund, enterprise, entity, or state pursuant to this subsection if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer in any one fund, enterprise, entity, or state pursuant to this subsection exceeds ten percent of its admitted assets.

(4) Subject to the limitations of Section 38‑12‑430, an insurer may acquire preferred stocks that are not foreign investments and that meet the requirements of rated credit instruments if as a result of and after giving effect to the investment, the aggregate amount of preferred stocks then held by the insurer pursuant to this subsection:

(a) does not exceed twenty percent of its admitted assets; and

(b) that are not sinking fund stocks or rated P1 or P2 by the SVO or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO does not exceed ten percent of its admitted assets.

(5) Subject to the limitations of Section 38‑12‑430, in addition to those investments eligible pursuant to items (1), (2), (3), and (4) of this subsection, an insurer may acquire rated credit instruments that are not foreign investments.

(B) An insurer may not acquire special rated credit instruments pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of special rated credit instruments then held by the insurer exceeds five percent of its admitted assets. The director may identify, by regulation, certain special rated credit instruments that are exempt from the provisions of this subsection.

(C) Obligations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and other mortgage‑backed or mortgage related securities as defined in Section 106 of Title I of SMMEA (15 U.S.C. Section 77r‑1) may be invested in to the same extent as permitted pursuant to subsection (A)(1), whether or not they are rated credit instruments authorized in that subsection.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑450.** Insurer acquisition of investments in investment pools; limitations.

(A) An insurer may acquire investments in investment pools that invest only in:

(1) obligations that are rated 1 or 2 by the SVO or have an equivalent of an SVO 1 or 2 rating, or in the absence of a 1 or 2 rating or equivalent rating the issuer has outstanding obligations with a SVO 1 or 2 or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO and have a remaining maturity of:

(a) three hundred ninety‑seven days or less or a put which entitles the holder to receive the principal amount of the obligation that may be exercised through maturity at specified intervals not exceeding three hundred ninety‑seven days; or

(b) three years or less and a floating interest rate that resets no less frequently than quarterly on the basis of a current short‑term index, such as federal funds, prime rate, Treasury bills, London InterBank Offered Rate (LIBOR) or commercial paper, and is subject to no maximum limit, if the obligations do not have an interest rate that varies inversely to market interest rate changes;

(2) government money market mutual funds or class one money market mutual funds;

(3) securities lending, repurchase transactions, and reverse repurchase transactions that meet all the requirements of Section 38‑12‑490, except the quantitative limitations of Section 38‑12‑490(4); or

(4) invest only in investments that an insurer may acquire pursuant to this chapter, if the insurer’s proportionate interest in the amount invested in these investments, when combined with the amounts of the investments made directly or indirectly through an investment affiliate or other insurer investment pool permitted pursuant to this item does not exceed the applicable limits of this chapter for those investments.

(B) For an investment in an investment pool to be qualified pursuant to this chapter, the investment pool may not:

(1) acquire securities issued, assumed, guaranteed, or insured by the insurer or an affiliate of the insurer;

(2) borrow or incur indebtedness for borrowed money, except for securities lending and reverse repurchase transactions that meet the requirements of Section 38‑12‑490, except the quantitative limitations of Section 38‑12‑490(4); or

(3) acquire an investment if as a result of and after giving effect to the transaction the aggregate value of securities then loaned or sold to, purchased from, or invested in any one business entity pursuant to this section exceed ten percent of the total assets of the investment pool.

(C) The limitations of Section 38‑12‑430(A) do not apply to an investment by an insurer in an investment pool, except that an insurer may not acquire an investment in an investment pool pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer pursuant to this section:

(a) in all investment pools that invest in investments permitted pursuant to subsection (A)(4) exceeds twenty‑five percent of its admitted assets; or

(b) in all investment pools exceeds forty percent of its admitted assets.

(D) For an investment in an investment pool to be qualified pursuant to this chapter, the manager of the investment pool must:

(1) be organized under the laws of the United States or one of its states or the District of Columbia and designated as the pool manager in a pooling agreement;

(2) be the insurer, an affiliated insurer, or a business entity affiliated with the insurer, a qualified bank, a business entity registered under the Investment Advisors Act of 1940 (15 U.S.C. Sections 80a‑1 et seq., as amended), or any other similar applicable state statute, or, in the case of a reciprocal insurer or interinsurance exchange, its attorney‑in‑fact, or in the case of a United States branch of an alien insurer, its United States manager or an affiliate or subsidiary of its United States manager;

(3) compile and maintain, or cause to be compiled and maintained, detailed accounting records including:

(a) the cash receipts and disbursements reflecting the proportionate investment of each participant in the investment pool;

(b) a complete description of all underlying assets of the investment pool including amount, interest rate, maturity date, if any, and other appropriate designations; and

(c) other records that allow third parties to verify the investment of each participant in the investment pool on a daily basis; and

(4) maintain the assets of the investment pool in one or more accounts, in the name of or on behalf of the investment pool either under a custody agreement or a trust agreement with a qualified bank or at the principal office of the pool manager. The applicable agreement must:

(a) state and recognize the claims and rights of each participant;

(b) acknowledge that the underlying assets of the investment pool are held for the sole benefit of each participant in proportion to the aggregate amount of its investments in the investment pool; and

(c) contain an agreement that the underlying assets of the investment pool must not be commingled with the general assets of the qualified bank or any other person.

(E) The pooling agreement for each investment pool must be in writing and must provide that:

(1) an insurer and its affiliated insurers or, in the case of an investment pool investing only in investments permitted under subsections (A)(1), (2) and (3) the insurer and its subsidiaries, affiliates, or any pension or profit sharing plan of the insurer, its subsidiaries and affiliates, or, in the case of a United States branch of an alien insurer, affiliates or subsidiaries of its United States manager, shall hold one hundred percent of the interests in the investment pool at all times;

(2) the underlying assets of the investment pool must not be commingled with the general assets of the pool manager or any other person;

(3) in proportion to the aggregate amount of the interest of each participant in the investment pool:

(a) each participant owns an undivided interest in the underlying assets or the investment pool; and

(b) the underlying assets of the investment pool are held for the sole benefit of each participant;

(4) a participant, or his trustee, receiver, conservator, or other successor‑in‑interest, if a participant is insolvent, bankrupt, or in receivership, may withdraw all or a portion of its investment from the investment pool pursuant to the terms of the pooling agreement;

(5) withdrawals may be made on demand without penalty or other assessment on any business day, but settlement of funds must occur within a reasonable and customary period after the date on which the withdrawal is made, not to exceed ten business days. Distributions pursuant to this item must be calculated in each case net of all fees and expenses of the investment pool then applicable. The pooling agreement must provide that the pool manager shall distribute to a participant, at the discretion of the pool manager:

(a) the then fair market value of the participant’s pro rata share of each underlying asset of the investment pool, in cash;

(b) a pro rata share of each underlying asset, in kind; or

(c) a pro rata share in each underlying asset, in a combination of cash and in‑kind distributions; and

(6) the pool manager shall make the records of the investment pool available for inspection by the director.

(F) Except for the formation of an investment pool, transactions between a domestic insurer and an affiliated insurer investment pool are not subject to the requirements of Section 38‑21‑250.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑460.** Equity interests in domestic business entities; limitations.

(A) Subject to the limitations of Section 38‑12‑430, an insurer may acquire directly, or through an investment affiliate, equity interests in business entities organized pursuant to the laws of any domestic jurisdiction.

(B) An insurer may not acquire directly, or through an investment affiliate, an investment pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of investments then held by the insurer pursuant to this section exceeds the greater of twenty‑five percent of its admitted assets, or one hundred percent of its surplus as regards policyholders.

(C) An insurer may not acquire pursuant to this section investments that the insurer may acquire pursuant to Section 38‑12‑480 or pursuant to Chapter 21 of this title.

(D) An insurer may not short sell an equity interest unless the insurer covers the short sale by owning the equity interest or an unrestricted right to the equity interest exercisable within six months of the short sale.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑470.** Tangible personal property; valuation; limitations.

(A)(1) Subject to the limitations of Section 38‑12‑430, an insurer may acquire tangible personal property or equity interests in tangible personal property, located or used wholly or in part within a domestic jurisdiction, directly or indirectly through:

(a) limited partnership interests or general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(b) joint ventures;

(c) stock of an investment affiliate;

(d) membership interests in a limited liability company;

(e) trust certificates; or

(f) other similar instruments.

(2) Investments acquired pursuant to item (1) are eligible only if:

(a) the property is subject to a lease or other agreement with a person whose rated credit instruments in the amount of the purchase price of the personal property the insurer could then acquire pursuant to Section 38‑12‑440; and

(b) the lease or other agreement provides the insurer the right to receive rental, purchase, or other fixed payments for the use or purchase of the property, and the aggregate value of the payments, together with the estimated residual value of the property at the end of its useful life and the estimated tax benefits to the insurer resulting from ownership of the property, are adequate to return the cost of the insurer’s investment in the property plus a return considered adequate by the insurer.

(B) The insurer shall compute the amount of each investment pursuant to this section on the basis of the out‑of‑pocket purchase price and applicable related expenses paid by the insurer for the investment, net of each borrowing made to finance the purchase price and expenses to the extent the borrowing is without recourse to the insurer.

(C) An insurer may not acquire, directly or indirectly through an investment affiliate, an investment pursuant to this section if as a result of and after giving effect to the investment the aggregate amount of all investments then held by the insurer pursuant to this section exceeds:

(1) two percent of its admitted assets; or

(2) one‑half of one percent of its admitted assets as to a single item of tangible personal property.

(D) For purposes of determining compliance with the limitations of Section 38‑12‑430, investments acquired by an insurer pursuant to this section must be aggregated with those acquired pursuant to Section 38‑12‑440, and each lessee of the property pursuant to a lease referred to in this section is considered the issuer of an obligation in the amount of the investment of the insurer in the property determined as provided in subsection (B).

(E) Nothing in this section applies to tangible personal property lease arrangements between an insurer and its subsidiaries and affiliates pursuant to a cost sharing arrangement or agreement permitted pursuant to Chapter 21 of this title.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑480.** Mortgage loans; real estate.

(A)(1) In connection with mortgage loans, an insurer:

(a) may acquire obligations secured by mortgages on real estate situated within a domestic jurisdiction, subject to the limitations of Section 38‑12‑430, either directly or indirectly through:

(i) limited partnership interests and general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(ii) joint ventures;

(iii) stock of an investment affiliate;

(iv) membership interests in a limited liability company;

(v) trust certificates; or

(vi) other similar instruments; and

(b) may not acquire a mortgage loan secured by other than a first lien pursuant to this item unless the insurer is the holder of the first lien. The obligations held by the insurer and obligations with an equal lien priority, at the time of acquisition of the obligation, may not exceed:

(i) ninety percent of the fair market value of the real estate, if the mortgage loan is secured by a purchase money mortgage or like security received by the insurer upon disposition of the real estate;

(ii) eighty percent of the fair market value of the real estate, if the mortgage loan requires immediate scheduled payment in periodic installments of principal and interest over an amortization period of thirty years or less, and periodic payments are required at least annually. Each periodic payment must be sufficient to ensure that at all times the outstanding principal balance of the mortgage loan is not greater than the outstanding principal balance that would be outstanding pursuant to a mortgage loan with the same original principal balance and the same interest rate and requiring equal payments of principal and interest with the same frequency over the same amortization period. Mortgage loans that otherwise are permitted pursuant to this subsection may provide for a payment of the principal balance before the end of the period of amortization of the loan. For residential mortgage loans, the eighty percent limitation may be increased to ninety‑seven percent if acceptable private mortgage insurance has been obtained; or

(iii) seventy‑five percent of the fair market value of the real estate for mortgage loans that do not meet the requirements of subsubitem (i) or (ii).

(2) For purposes of item (1), the amount of an obligation required to be included in the calculation of the loan‑to‑value ratio may be reduced to the extent the obligation is insured by the Federal Housing Administration or guaranteed by the Administrator of Veterans Affairs, or their successors.

(3)(a) Subject to the limitations of Section 38‑12‑430, an insurer may acquire obligations secured by a second mortgage on real estate situated within a domestic jurisdiction, in addition to that which is authorized under item (1), either directly or indirectly through:

(i) limited partnership interests and general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(ii) joint ventures;

(iii) stock of an investment affiliate;

(iv) membership interests in a limited liability company;

(v) trust certificates; or

(vi) other similar instruments.

(b) The obligation held by the insurer must be the sole second lien priority obligation and, at the time of acquisition of the obligation, may not exceed seventy percent of the amount by which the fair market value of the real estate exceeds the amount outstanding under the first mortgage.

(4) A mortgage loan that is held by an insurer pursuant to Section 38‑12‑40(F) or acquired pursuant to this section and is restructured in a manner that meets the requirements of a restructured mortgage loan in accordance with the NAIC accounting manual continues to qualify as a mortgage loan pursuant to this chapter.

(5) Subject to the limitations of Section 38‑12‑430, a credit lease transaction that does not qualify for investment pursuant to Section 38‑12‑440 is exempt from the provisions of item (1) if:

(a) the loan amortizes over the initial fixed lease term in an amount at least sufficient so that the loan balance at the end of the lease term does not exceed the original appraised value of the real estate;

(b) the lease payments cover or exceed the total debt service over the life of the loan;

(c) a tenant or its affiliated entity whose rated credit instruments have a SVO 1 or 2 designation or a comparable rating from a nationally recognized statistical rating organization recognized by the SVO has a full faith and credit obligation to make the lease payments;

(d) the insurer holds or is the beneficial holder of a first lien mortgage on the real estate;

(e) the expenses of the real estate are passed through to the tenant, excluding exterior, structural, parking, and heating, ventilation, and air conditioning replacement expenses, unless annual escrow contributions, from cash flows derived from the lease payments, cover the expense shortfall; and

(f) there is a perfected assignment of the rents due pursuant to the lease to or for the benefit of the insurer.

(B)(1) Subject to the limitations of Section 38‑12‑430, an insurer may acquire, manage, and dispose of real estate situated in a domestic jurisdiction, either directly or indirectly, through:

(a) limited partnership interests and general partnership interests not otherwise prohibited by Section 38‑12‑60(A)(4);

(b) joint ventures;

(c) stock of an investment affiliate;

(d) membership interests in a limited liability company;

(e) trust certificates; or

(f) other similar instruments.

(2) The real estate must be income producing or intended for improvement or development for investment purposes under an existing program, in which case the real estate is considered to be income producing. The real estate may be subject to mortgages, liens, or other encumbrances, the amount of which must be deducted from the amount of the investment of the insurer in the real estate to the extent that the obligations secured by the mortgages, liens, or encumbrances are without recourse to the insurer for purposes of determining compliance with items (2) and (3) of subsection (D).

(C) An insurer may acquire, manage, and dispose of real estate for the convenient accommodation of the business operations, including home office, branch office, and field office operations of the insurer or its affiliates.

(1) Real estate acquired pursuant to this subsection may include excess space for rent to others, if the excess space when valued at its fair market value, would otherwise be a permitted investment pursuant to subsection (B) and is so qualified by the insurer.

(2) The real estate acquired pursuant to this subsection may be subject to one or more mortgages, liens, or other encumbrances, the amount of which must be deducted from the amount of the investment of the insurer in the real estate to the extent that the obligations secured by the mortgages, liens, or encumbrances are without recourse to the insurer for purposes of determining compliance with subsection (D)(4).

(3) For purposes of this subsection, business operations do not include that portion of real estate used for the direct provision of health care services for its insureds, other than employees of the insurer and its affiliates and their families, by an insurer whose insurance premiums and required statutory reserves for accident and health insurance are at least ninety‑five percent of total premium consideration or total statutory required reserves, respectively. An insurer may acquire real estate used for these purposes pursuant to subsection (B).

(D) An insurer may not acquire:

(1) an investment pursuant to subsection (A) if as a result of and after giving effect to the investment the aggregate amount of all investments then held by the insurer pursuant to subsection (A) exceeds:

(a) one percent of its admitted assets in mortgage loans covering any one secured location;

(b) one quarter of one percent of its admitted assets in construction loans covering any one secured location; or

(c) one percent of its admitted assets in construction loans in the aggregate;

(2) an investment pursuant to subsection (B) if as a result of and after giving effect to the investment and any outstanding guarantees made by the insurer in connection with the investment the aggregate amount of investments then held by the insurer pursuant to subsection (B), plus the guarantees then outstanding, exceeds:

(a) one percent of its admitted assets in any one parcel or group of contiguous parcels of real estate, except that this limitation does not apply to that portion of real estate used for the direct provision of health care services by an insurer whose insurance premiums and required statutory reserves for accident and health insurance are at least ninety‑five percent of total premium consideration or total statutory required reserves, respectively, such as hospitals, medical clinics, medical professional buildings, or other health facilities used for the purpose of providing health services; or

(b) the lesser of ten percent of its admitted assets or forty percent of its surplus as regards policyholders in the aggregate, except that for an insurer whose insurance premiums and required statutory reserves for accident and health insurance are at least ninety‑five percent of total premium consideration or total statutory required reserves, respectively, this limitation must be increased to fifteen percent of its admitted assets in the aggregate;

(3) an investment pursuant to subsection (A) or (B) if as a result of and after giving effect to the investment and any guarantees made by the insurer in connection with the investment the aggregate amount of all investments then held by the insurer pursuant to subsections (A) and (B), plus the guarantees then outstanding, exceeds twenty‑five percent of its admitted assets; or

(4) real estate pursuant to subsection (C) if as a result of and after giving effect to the acquisition the aggregate amount of real estate then held by the insurer pursuant to subsection (C) exceeds ten percent of its admitted assets. Additional amounts of real estate may be acquired, with the permission of the director, pursuant to subsection (C). The limitations of Section 38‑12‑430 do not apply to an insurer’s acquisition of real estate pursuant to subsection (C).

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑490.** Securities lending, repurchase, reverse repurchase, and dollar roll transactions.

An insurer may enter, directly or indirectly through an investment affiliate, into securities lending transactions that are conducted directly, through a custodian bank that is a qualified bank, or through an agent, and may enter into repurchase transactions, reverse repurchase transactions, and dollar roll transactions, subject to the following conditions:

(1) the insurer’s board of directors must adopt a written plan that specifies guidelines and objectives regarding such transactions, including:

(a) a description of how cash may be invested or used for general corporate purposes of the insurer;

(b) operational procedures to manage interest rate risk, counterparty default risk, the conditions under which proceeds from reverse repurchase transactions may be used in the ordinary course of business, and the use of acceptable collateral in a manner that reflects the liquidity needs of the transaction; and

(c) the extent to which the insurer may engage in these transactions;

(2) the insurer must enter into a written agreement for all transactions authorized in this subsection other than dollar roll transactions. The written agreement must:

(a) require each transaction to terminate no more than one year from its inception;

(b) be made with the counterparty, except that for securities lending transactions, the agreement may be:

(i) through a custodian bank that is a qualified bank; or

(ii) with an agent acting on behalf of the insurer if the:

(A) agent or the guarantor of the agent’s obligations pursuant to the agreement is a qualified bank or a qualified business entity; and

(B) agreement with the agent requires the agent to enter into separate agreements with each counterparty that are consistent with the requirements of this subsection and prohibits securities lending transactions pursuant to the agreement with the agent or its affiliates;

(3) cash received in a transaction pursuant to this subsection, if not used by the insurer for its general corporate purposes in accordance with the plan adopted by the board of directors pursuant to item (1), must be invested in accordance with this chapter and in a manner that recognizes the liquidity needs of the transaction. For so long as any transaction pursuant to this subsection remains outstanding, the insurer, its agent, or custodian, either physically or through the book entry systems of the Federal Reserve, Depository Trust Company, or other securities depositories approved by the director, shall maintain:

(a) possession of acceptable collateral for the transaction in at least the amount required pursuant to the provisions of the SVO procedures manual;

(b) a perfected security interest in the acceptable collateral; or

(c) in the case of a foreign jurisdiction, title to or rights of a secured creditor to the acceptable collateral;

(4) the limitations of Sections 38‑12‑430 and 38‑12‑500 do not apply to the counterparty exposure created by transactions pursuant to this section. For purposes of calculations made to determine compliance with this item, the insurer’s future obligation to resell securities in the case of a repurchase transaction, or to repurchase securities in the case of a reverse repurchase transaction, must not be counted. An insurer may not enter into a transaction pursuant to this subsection if as a result of and after giving effect to the transaction, the aggregate amount of:

(a) securities then loaned to, sold to, or purchased from any counterparty pursuant to this subsection exceed five percent of its admitted assets. In calculating the amount sold to or purchased from a counterparty under repurchase or reverse repurchase transactions, effect may be given to netting provisions pursuant to a written master agreement; or

(b) all securities then loaned to, sold to, or purchased from all counterparties pursuant to this subsection exceed forty percent of its admitted assets, except this limitation does not apply to a repurchase transaction so long as the borrowing is used to meet operational liquidity requirements resulting from an officially declared catastrophe and subject to a plan approved by the director;

(5) in a dollar roll transaction, the insurer must receive cash in an amount at least equal to the market value of the securities transferred by the insurer in the transaction as of the transaction date.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑500.** Foreign investments.

(A) Subject to the limitations of Section 38‑12‑430, an insurer may acquire, directly or indirectly through an investment affiliate, foreign investments or engage in investment practices with persons of or in foreign jurisdictions, of substantially the same types as those that an insurer is permitted to acquire pursuant to this chapter, other than the type permitted pursuant to Section 38‑12‑450, if as a result and after giving effect to the investment the aggregate amount of foreign investments then held and foreign investment practices then engaged in by the insurer pursuant to this subsection:

(1) does not exceed twenty percent of its admitted assets; and

(2) in a single foreign jurisdiction does not exceed ten percent of its admitted assets as to a foreign jurisdiction that has a sovereign debt rating of SVO 1, or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO, or five percent of its admitted assets as to any other foreign jurisdiction.

(B) Subject to the limitations of Section 38‑12‑430, an insurer may acquire investments and engage in investment practices denominated in foreign currencies, whether or not they are foreign investments acquired or foreign investment practices engaged in pursuant to subsection (A), or additional foreign currency exposure as a result of the termination or expiration of a hedging transaction with respect to investments denominated in a foreign currency, if as a result of and after giving effect to the transaction the aggregate amount of investments then held by the insurer and investment practices then engaged in by the insurer pursuant to this subsection:

(1) denominated in foreign currencies does not exceed fifteen percent of its admitted assets; and

(2) denominated in foreign currency of a single foreign jurisdiction does not exceed ten percent of its admitted assets as to a foreign jurisdiction that has a sovereign debt rating of SVO 1, or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO, or five percent of its admitted assets as to any other foreign jurisdiction.

An investment is not considered denominated in a foreign currency if the acquiring insurer enters into one or more hedging transactions permitted pursuant to Section 38‑12‑510 to hedge the foreign currency exchange rate risk associated with the investment or investment practice.

(C) In addition to investments permitted by subsections (A) and (B), an insurer that is authorized to do business in a foreign jurisdiction and that has outstanding insurance, annuity, or reinsurance contracts on lives or risks resident or located in that foreign jurisdiction and denominated in foreign currency of that jurisdiction, may acquire foreign investments and engage in foreign investment practices respecting that foreign jurisdiction, and may acquire investments and engage in investment practices denominated in the currency of that jurisdiction, subject to the limitations of Section 38‑12‑430. Investments made pursuant to this subsection in obligations of foreign governments, their political subdivisions, and government sponsored enterprises are not subject to the limitations of Section 38‑12‑430 if those investments carry an SVO rating of 1 or 2 or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO. The aggregate amount of investments acquired and investment practices engaged in by the insurer pursuant to this subsection may not exceed the greater of:

(1) the amount the insurer is required by the law of the foreign jurisdiction to invest in the foreign jurisdiction; or

(2) one hundred twenty‑five percent of the amount of its reserves, net of reinsurance, and other obligations under the contracts on lives or risks resident or located in the foreign jurisdiction.

(D) In addition to investments permitted pursuant to subsections (A), (B), and (C), an insurer that is not authorized to do business in a foreign jurisdiction but that has outstanding insurance, annuity, or reinsurance contracts on lives or risks resident or located in that foreign jurisdiction and denominated in foreign currency of that jurisdiction, may acquire foreign investments and engage in foreign investment practices respecting that foreign jurisdiction, and may acquire investments and engage in investment practices denominated in the currency of that jurisdiction, subject to the limitations of Section 38‑12‑430. Investments made and investment practices engaged in pursuant to this subsection in obligations of foreign governments, their political subdivisions, and government sponsored enterprises are not subject to the limitations of Section 38‑12‑430 if those investments and investment practices carry a SVO rating of 1 or 2 or an equivalent rating by a nationally recognized statistical rating organization recognized by the SVO. The aggregate amount of investments acquired and investment practices then engaged in by the insurer pursuant to this subsection may not exceed one hundred five percent of the amount of its reserves, net of reinsurance, and other obligations under the contracts on lives or risks resident or located in the foreign jurisdiction.

(E) Investments acquired and investment practices engaged in by an insurer pursuant to this section must be aggregated with investments of the same types made pursuant to all other sections of this chapter, and in a similar manner, for purposes of determining compliance with the limitations, if any, contained in other sections. Investments in and investment practices engaged in with respect to obligations of foreign governments, their political subdivisions, and government sponsored enterprises of these persons, except for those exempted pursuant to subsections (C) and (D), are subject to the limitations of Section 38‑12‑430.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑510.** Derivative transactions.

(A) An insurer may engage, directly or indirectly through an investment affiliate, in derivative transactions including, without limitation, hedging transactions, income generation transactions, and replication transactions pursuant to this section, subject to the following conditions:

(1) before entering into any derivative transaction, the board of directors of the insurer must determine that the insurer directly or through an investment management subsidiary or affiliate has adequate professional personnel, technical expertise, and systems to implement investment practices involving derivative transactions and approve a derivative instruments use plan that:

(a) describes investment objectives and risk constraints, such as counterparty exposure amounts;

(b) defines permissible transactions including identification of the risks that may be hedged, the assets or liabilities that may be replicated, and permissible types of income generation transactions; and

(c) requires compliance with internal control procedures;

(2) the insurer must establish written internal control procedures that provide for:

(a) a quarterly report to the board of directors, reviewing:

(i) all derivative transactions entered into, outstanding, or closed out;

(ii) the results and effectiveness of the insurer’s implementation of its derivative instruments use plan; and

(iii) the credit risk exposure to each counterparty for over‑the‑counter derivative transactions based upon the counterparty exposure amount;

(b) a system for determining whether hedging, income generation, or replication strategies used by the insurer have been effective;

(c) a system of regular, but at least monthly, reports to management that include:

(i) a description of all derivative transactions entered into, outstanding, or closed out during the period since the last report;

(ii) the purpose of each outstanding derivative transaction;

(iii) a performance review of the derivative instruments program; and

(iv) the counterparty exposure amounts for over‑the‑counter derivative transactions;

(d) written authorizations identifying the responsibilities and limitations of authority of persons authorized to effect and maintain derivative transactions; and

(e) documentation for each transaction including:

(i) the purpose of the transaction;

(ii) the assets or liabilities to which the transaction relates;

(iii) the specific derivative instrument used in the transaction;

(iv) for over‑the‑counter derivative instrument transactions, the name of the counterparty and the counterparty exposure amount; and

(v) for exchange‑traded derivative instruments, the name of the exchange and the name of the firm that handled the transaction;

(3) whenever the derivative transactions entered into pursuant to this section are not in compliance with this section or, if continued, may create a hazardous financial condition of the insurer that affects its policyholders, creditors, or the general public, the director, after notice and an opportunity for a hearing, may order the insurer to take action that is reasonably necessary to rectify the noncompliance or hazardous financial condition or to prevent the impending hazardous financial condition from occurring;

(4) with respect to hedging transactions, an insurer shall demonstrate to the director, upon request, the intended hedging characteristics and effectiveness of the hedging transaction or combination of hedging transactions through cash‑flow testing, duration analysis, or other appropriate analysis. An insurer may enter into hedging transactions pursuant to this item if as a result of and after giving effect to each hedging transaction, the aggregate:

(a) statutory financial statement value of all outstanding caps, floors, warrants not attached to another financial instrument, and options other than collars purchased by the insurer pursuant to this item does not exceed seven and one‑half percent of its admitted assets;

(b) statutory financial statement value of all outstanding warrants, caps, floors, and options other than collars written by the insurer pursuant to this item does not exceed three percent of its admitted assets; and

(c) potential exposure of all outstanding collars, swaps, forwards, and futures entered into or acquired by the insurer pursuant to this item does not exceed six and one‑half percent of its admitted assets;

(5) an insurer may enter into an income generation transaction if:

(a) as a result of and after giving effect to the transaction, the aggregate statutory financial statement value of admitted assets that are then subject to call or that generate the cash flows for payments required to be made by the insurer under caps and floors sold by the insurer and then outstanding pursuant to this item, plus the statutory financial statement value of admitted assets underlying derivative instruments then subject to call sold by the insurer and outstanding pursuant to this item, plus the purchase price of assets subject to puts then outstanding pursuant to this item, does not exceed ten percent of its admitted assets; and

(b) the transaction is one of the following types and meets the other requirements specified in this subitem that are applicable to that type of transaction:

(i) sales of call options on assets, if the insurer holds or has a currently exercisable right to acquire the underlying assets during the entire period that the option is outstanding;

(ii) sales of put options on assets, if the insurer holds sufficient cash, cash equivalents, or interests in a short‑term investment pool to purchase the underlying assets upon exercise during the entire period that the option is outstanding, and has the ability to hold the underlying assets in its portfolio. If the total market value of all put options sold by the insurer exceeds two percent of the insurer’s admitted assets, the insurer shall set aside, pursuant to a custodial or escrow agreement, cash or cash equivalents having a market value equal to the amount of its put option obligations in excess of two percent of the insurer’s admitted assets during the entire period the option is outstanding;

(iii) sales of call options on derivative instruments if the insurer holds, or has a currently exercisable right to acquire, assets generating the cash flow to make any payments for which the insurer is liable pursuant to the underlying derivative instruments during the entire period that the call options are outstanding and has the ability to enter into the underlying derivative transactions for its portfolio; or

(iv) sales of caps and floors, if the insurer holds, or has a currently exercisable right to acquire, assets generating the cash flow to make any payments for which the insurer is liable pursuant to the caps and floors during the entire period that the caps and floors are outstanding;

(6) an insurer may enter into a replication transaction that complies with the requirements of the SVO procedures manual concerning replication transactions, provided that:

(a) the insurer would be authorized to invest its funds pursuant to this chapter in the asset being replicated;

(b) the asset being replicated is subject to all provisions and limitations, including quantitative limitations, on the making of the investment as specified in this chapter, as if the replication transaction constituted a direct investment by the insurer in the asset being replicated; and

(c) as a result of and after giving effect to the replication transaction, the aggregate statement value of all assets being replicated does not exceed ten percent of its admitted assets;

(7) an insurer may purchase or sell one or more derivative instruments to offset in whole or in part a derivative instrument previously purchased or sold, without regard to the quantitative limitations of this section, provided that the transaction may be recognized as an offsetting transaction in accordance with generally accepted accounting principles;

(8) each derivative instrument must be:

(a) traded on a qualified exchange;

(b) entered into with or guaranteed by a qualified bank or a qualified business entity;

(c) issued or written by or entered into with the issuer of the underlying interest on which the derivative instrument is based; or

(d) in the case of futures, traded through a broker that is registered as a futures commission merchant under the federal Commodity Exchange Act or that has received exemptive relief from registration pursuant to rule 30.10 promulgated under that act; and

(9) an insurer must include all counterparty exposure amounts in determining compliance with the limitations of Section 38‑12‑430.

(B) Pursuant to regulations promulgated pursuant to Section 38‑12‑90, the director may approve additional transactions involving the use of derivative instruments in excess of the limits of items (4), (5), and (6) or for other risk management purposes.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.

**SECTION 38‑12‑520.** Exceptions to investment restrictions; assets from dividends and distributions; mergers and consolidations; protection of previous investments; time for determining qualification.

(A) Pursuant to this subsection, an insurer may acquire an investment of any kind, or engage in a securities lending transaction, repurchase transaction, reverse repurchase transaction, or dollar roll transaction, that is not prohibited specifically by this chapter, without regard to the categories, conditions, standards, or other limitation of Sections 38‑12‑430 through 38‑12‑500 if, as a result of and after giving effect to the transaction, the aggregate amount of investments then held and securities lending transactions, repurchase transactions, reverse repurchase transactions, and dollar roll transactions then engaged in pursuant to this subsection does not exceed the greater of:

(1) its unrestricted surplus; or

(2) ten percent of its admitted assets or fifty percent of its surplus as regards policyholders, whichever is less.

(B) An insurer may not acquire an investment or engage in an investment practice pursuant to this subsection if as a result of and after giving effect to the transaction the aggregate amount of all investments then held by the insurer under this subsection in any one person exceed five percent of its admitted assets.

(C) If any investment made or transaction entered into pursuant to any other section of this chapter exceeds the limits specified in that section, the excess portion of the investment or transaction is considered to be an investment or transaction pursuant to this section. Any loan, investment, or transaction originally made pursuant to this section which subsequently, if it were then being made, would qualify as an authorized investment or transaction pursuant to another subsection of this section or another section of this chapter shall thereafter be considered an authorized investment or transaction pursuant to that subsection or section.

(D) This chapter does not prohibit the acquisition by an insurer of additional obligations, securities, or other assets if received as a dividend or as a distribution of assets, nor does this chapter apply to securities, obligations, or other assets accepted incident to the workout, adjustment, restructuring, or similar realization of an investment or transaction when the insurer’s board of directors or a committee appointed by the board of directors considers it to be in the best interests of the insurer, if the investment or transaction had been authorized previously. This chapter does not apply to assets acquired pursuant to a lawful agreement of bulk reinsurance if the assets constituted legal and authorized investments for the ceding company. No obligation, security, or other asset acquired as authorized by this subsection is required to be qualified pursuant to any other subsection of this section or other section of this chapter, provided that all assets acquired pursuant to this subsection are subject to the applicable accounting and valuation requirements contained in this chapter.

(E) Subject to the provisions of subsection (F), if a domestic property and casualty insurance company, pursuant to a merger or consolidation, acquires an investment or transaction that was an authorized investment or transaction of the company that was merged or consolidated with the domestic property and casualty insurance company but that does not qualify as an authorized investment or transaction pursuant to this chapter at the time the merger or consolidation occurs, regardless of whether or not the investment or transaction would be authorized pursuant to subsection (A) or (B), then the investment or transaction is considered an authorized investment or transaction pursuant to this subsection and is not required to be applied toward the limitations contained in subsection (A) or (B), for a period of five years after the date on which the merger or consolidation occurs. After that period it shall no longer be an authorized investment or transaction pursuant to this subsection, unless within the five‑year period:

(1) the investment or transaction qualifies as an authorized investment or transaction pursuant to another subsection of this section or another section of this chapter including without limitation, subsections (A) and (B), if the domestic property and casualty insurance company so elects; or

(2) the director authorizes the investment or transaction in the plan of merger or consolidation approved by the director; or

(3) upon request of the insurer, the director authorizes an extension of the five‑year time period; or

(4) the director approves the investment or transaction pursuant to this subsection.

The aggregate amount of a domestic insurance company’s investments and transactions pursuant to this subsection, excluding investments and transactions authorized pursuant to items (1), (2), and (4), may not exceed twenty‑five percent of the domestic insurance company’s capital and surplus after giving effect to such merger or consolidation.

(F) If a domestic insurance company, pursuant to a merger or consolidation, acquires a mortgage loan, or a participation in a mortgage loan, that would have been authorized pursuant to Section 38‑12‑480, and pursuant to subsection (C) of this section as to the portion that exceeded seventy‑five percent of the value of the property, at the time the company that was merged or consolidated with the domestic insurance company invested in the mortgage loan or participation in the mortgage loan, then such mortgage loan or participation in the mortgage loan is authorized pursuant to Section 38‑12‑480, and pursuant to subsection (C) of this section as to the portion that exceeded seventy‑five percent of the value of the property.

(G) The director has full discretion in selecting a method for calculating values of investments and transactions that an insurer acquires through a merger or consolidation, provided that the method is consistent with any applicable provisions of this chapter and any applicable valuation method that the NAIC is currently using at the time with respect to investments and transactions. If there is a conflict between a provision of this chapter and the NAIC valuation method being used, the provision of this chapter controls.

(H) The qualification or disqualification of an investment pursuant to one subsection of this section or one section of this chapter does not prevent its qualification in whole or in part pursuant to another provision of this chapter. An investment authorized by more than one provision of this chapter is authorized pursuant to the provision the insurer elects. An investment or transaction qualified pursuant to any provision of this chapter at the time it was acquired or entered into by the insurer shall continue to be qualified pursuant to that provision. An investment or transaction may be transferred in whole or in part at the election of the insurer to the authority of any provision of this chapter pursuant to which it then qualifies, whether or not it originally qualified pursuant to that provision.

(I) Notwithstanding the provisions of the other subsections of this section or other sections of this chapter, an insurer may acquire an investment in or enter into a transaction with a business entity in which the insurer already holds one or more investments or with which the insurer has entered into one or more transactions if the investment is acquired or the transaction is entered into in order to protect an investment or transaction previously made in or with the business entity, provided that the aggregate amount of investments and transactions so acquired and entered into may not exceed five percent of the insurer’s capital and surplus.

(J)(1) The percentage authorizations and limitations contained in any provision of this chapter apply only at the time of the original acquisition of an investment or at the time a transaction is entered into and are not applicable to the insurer or the investment or transaction after that time except as provided in subsection (H). Once any investment or transaction is qualified pursuant to any provision of this chapter, it shall remain qualified notwithstanding any refinancing, restructuring, or modification of the investment or transaction, provided that the insurer does not engage in the refinancing, restructuring, or modification of the investment or transaction for the purposes of circumventing the requirements or limitations of this chapter.

(2) The director has full discretion to value investments and transactions that an insurer holds at the time of an examination of the insurer using a method of calculating the values that the director selects in his discretion, provided that the method must be consistent with any applicable provisions of this chapter and any applicable valuation method that the NAIC is using at the time with respect to investments and transactions. If there is a conflict between such a provision of this chapter and an applicable NAIC valuation method that the NAIC is using at the time, the provision of this chapter controls.

(3) Notwithstanding items (1) and (2), if the director determines that the continued operation of an insurer may be hazardous to its policyholders, its creditors, or the general public, the director may issue an order consistent with applicable statutes requiring the insurer to limit or withdraw from certain investments or transactions or discontinue certain practices as to investments or transactions to the extent the director considers necessary.

HISTORY: 2002 Act No. 319, Section 2, eff June 3, 2002.

Library References

Insurance 1142.

Westlaw Topic No. 217.

C.J.S. Insurance Section 167.