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COMMITTEE REPORT

March 4, 2009

**H. 3438**

Introduced by Reps. Brady and Sandifer

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Read the first time February 4, 2009.

**THE COMMITTEE ON**

**LABOR, COMMERCE AND INDUSTRY**

To whom was referred a Bill (H. 3438) to amend the Code of Laws of South Carolina, 1976, by adding Sections 38‑9‑225 and 38‑9‑230 so as to enact provisions requiring certain insurers to file a Statement of Actuarial Opinion, etc., respectfully

**REPORT:**

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

WILLIAM E. SANDIFER for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTIONS 38‑9‑225 AND 38‑9‑230 SO AS TO ENACT PROVISIONS REQUIRING CERTAIN INSURERS TO FILE A STATEMENT OF ACTUARIAL OPINION AND ACTUARIAL OPINION SUMMARY ANNUALLY AND PROVIDE FOR THE CONFIDENTIALITY OF THESE DOCUMENTS; TO AMEND SECTION 38‑5‑120, RELATING TO THE REVOCATION OR SUSPENSION OF LICENSE OF AN INSURER AND ITS OFFICERS AND AGENTS FOR THE PUBLICATION OF THE NOTICE, SO AS TO PROVIDE A PROCEDURE FOR AN AGGRIEVED INSURER TO REQUEST A HEARING BEFORE THE DIRECTOR OR HIS DESIGNEE AND PROVIDE RECOURSE THROUGH JUDICIAL REVIEW; TO AMEND SECTION 38‑9‑330, RELATING TO THE DEFINITION OF “COMPANY ACTION LEVEL EVENT”, SO AS TO REDEFINE THE TERM; AND TO AMEND SECTION 38‑21‑95, RELATING TO APPROVAL FOR ACQUISITION OF A DOMESTIC INSURER BY A CONTROLLING PRODUCER IN ANOTHER STATE, SO AS TO DELETE THE APPLICABILITY TO FOREIGN PRODUCERS AND CORRECT INCORRECT REFERENCES.

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

SECTION 1. Article 1, Chapter 9, Title 38 of the 1976 Code is amended by adding:

“Section 38‑9‑225. (A) Each property and casualty insurance company doing business in this State, unless otherwise exempted by the director or his designee, shall submit annually the opinion of an actuary entitled ‘Statement of Actuarial Opinion’. This opinion must be filed in accordance with the appropriate NAIC Property and Casualty Annual Statement Instructions.

(B)(1) Each property and casualty insurance company domiciled in this State that is required to submit a statement of Actuarial Opinion shall submit annually an Actuarial Opinion Summary, written by the company’s Appointed Actuary. This Actuarial Opinion Summary must be filed in accordance with the appropriate NAIC Property and Casualty Annual Statement Instructions and must be considered as a document supporting the Actuarial Opinion required in subsection (A).

(2) A company licensed but not domiciled in this State shall provide the Actuarial Opinion Summary upon request.

(C)(1) An Actuarial Report and underlying workpapers as required by the appropriate NAIC Property and Casualty Annual Statement Instructions must be prepared to support each Actuarial Opinion.

(2) If the insurance company fails to provide a supporting Actuarial Report or workpapers, or both, at the request of the director or his designee or the director or his designee determines that the supporting Actuarial Report or workpapers provided by the insurer is otherwise unacceptable to the director or his designee, the director or his designee may engage a qualified actuary at the expense of the insurer to review the opinion and the basis for the opinion and prepare the supporting Actuarial Report or workpapers, or both.

(D) The Appointed Actuary is not liable for damages to a person, other than the insurer and the director or his designee, for any act, error, omission, decision, or conduct with respect to the actuary’s opinion, except in cases of fraud or wilful misconduct on the part of the Appointed Actuary.

Section 38‑9‑230. (A) The Statement of Actuarial Opinion must be provided with the Annual Statement in accordance with the appropriate NAIC Property and Casualty Annual Statement Instructions and must be treated as a public document.

(B)(1) Documents, materials, or other information in the possession or control of the department that are considered an Actuarial Report, workpapers, or Actuarial Opinion Summary provided in support of the opinion, and any other material provided by the company to the director or his designee in connection with the Actuarial Report, workpapers, or Actuarial Opinion Summary, are confidential by law and privileged, are exempt from disclosure under applicable law, are not subject to subpoena, and are not subject to discovery or admissible in evidence in any private civil action.

(2) This provision may not be construed to limit the director or his designee’s authority to release the documents to the Actuarial Board for Counseling and Discipline so long as the material is required for the purpose of professional disciplinary proceedings and that the Actuarial Board for Counseling and Discipline establishes procedures satisfactory to the director or his designee for preserving the confidentiality of the documents, nor may this section be construed to limit the director or his designee’s authority to use the documents, materials, or other information in furtherance of a regulatory or legal action brought as part of the director or his designee’s official duties.

(C) Neither the director nor a person who received documents, materials, or other information while acting under the authority of the director is permitted or required to testify in a private civil action concerning confidential documents, materials, or information subject to subsection (B).

(D) In order to assist in the performance of the director’s duties, the director may:

(1) share documents, materials, or other information, including the confidential and privileged documents, materials, or information subject to subsection (B) with other state, federal, and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal, and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information and has the legal authority to maintain confidentiality;

(2) receive documents, materials, or information, including otherwise confidential and privileged documents, materials, or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(3) enter into agreements governing sharing and use of information consistent with subsections (B), (C), and (D).

(E) A waiver of an applicable privilege or a claim of confidentiality in the documents, materials, or information shall not occur as a result of disclosure to the director under this section or as a result of sharing as authorized in subsection (D).”

SECTION 2. Section 38‑5‑120 of the 1976 Code is amended by adding at the end:

“(D) The insurer may request a hearing on an order or a decision made by the director or his designee pursuant to the provisions of this title. The insurer or other parties must be served with notice of the hearing stating the time and place of the hearing and the grounds upon which the director based the order; the hearing must occur not less than ten days nor more than thirty days following the notice and must be conducted at the offices of the South Carolina Department of Insurance unless otherwise designated by the director. The director or his designee shall hold all hearings private unless the insurer requests a public hearing. After a hearing by the director or his designee, an order or a decision made, issued, or executed by the director or his designee is subject to review in accordance with Section 38‑3‑210 under the appellate procedures of the South Carolina Administrative Law Court, as provided by law.”

SECTION 3. Section 38‑9‑330(A) of the 1976 Code is amended to read:

“(A) A ‘Company Action Level Event’ includes any of the following events:

(1) filing of an RBC Report which indicates that Total Adjusted Capital is greater than, or equal to, Regulatory Action Level RBC, but is less than Company Action Level RBC;

(2) filing of an RBC Report which indicates that a life and health insurer has Total Adjusted Capital which is greater than, or equal to, its Company Action Level RBC, but is less than the product of its Authorized Control Level RBC and 2.5 and has a negative trend; ~~or~~

(3) filing of an RBC Report which indicates that a property and casualty insurer has Total Adjusted Capital which is greater than, or equal to, its Company Action Level RBC, but is less than the product of its Authorized Control Level RBC and 3.0 and triggers the trend test determined in accordance with the trend test calculation included in the NAIC Property and Casualty RBC instructions; or

(4) issuance of an Adjusted RBC Report that indicates the event in ~~Section 38‑9‑330(A)~~ item (1), ~~or~~ ~~(A)~~(2), or (3) of this subsection, provided that the insurer does not challenge the Adjusted RBC Report pursuant to Section 38‑9‑370. If the insurer challenges an Adjusted RBC Report, then the Company Action Level Event occurs upon notification that an administrative law judge has rejected the challenge.”

SECTION 4. Section 38‑21‑95 of the 1976 Code is amended to read:

“Section 38‑21‑95. (A) ~~No~~ An acquisition of a domestic insurer, whether a member of a holding company system or not, by a controlling producer ~~in another state~~ may not be approved by the ~~commissioner~~ director or his designee unless the acquiring party demonstrates, to the satisfaction of the ~~commissioner~~ director or his designee compliance with the requirements contained in subsection (B) of this section. For the purposes of this section, ‘controlling producer’ means a broker that:

(1) ~~a broker or brokers in a foreign state which permits a broker to place~~ places business on behalf of an insured with a licensed insurer;

(2) ~~which~~ controls or seeks to control a domestic insurer as that term is defined in Section 38‑21‑10(2); and

(3) ~~which~~ places, in any calendar year, an aggregate amount of gross written premium with the controlled insurer which is equal to or greater than five percent of the admitted assets of the controlled insurer as reported in the insurer’s quarterly statement filed as of September thirtieth of the prior year.

(B) Approval of the acquisition of a domestic insurer, whether a member of a holding company system or not, by a ~~foreign~~ controlling producer may not be approved unless the following requirements are met:

(1) ~~Required Contract Provisions.~~ A controlled insurer ~~shall~~ may not accept business from a controlling producer and a controlling producer ~~shall~~ may not place business with a controlled insurer unless there is a written contract between the controlling producer and the controlled insurer specifying the responsibilities of each party, which contract has been approved by the board of directors of the controlled insurer and which contains ~~the following~~ a provision:

(a) ~~a provision~~ that the controlled insurer may terminate the contract for cause, upon written notice to the controlling producer. The controlled insurer shall suspend the authority of the controlling producer to write business during the pendency of any dispute regarding the cause for the termination;

(b) ~~a provision~~ that the controlling producer shall render accounts to the controlled insurer detailing all material transactions, including information necessary to support all commissions, charges, and other fees received by, or owing to, the controlling producer;

(c) ~~a provision~~ that the controlling producer shall remit all funds due under the terms of the contract to the controlled insurer on at least a monthly basis. The due date ~~shall~~ must be fixed so that premiums or installments ~~thereof~~ of it collected ~~shall~~ must be remitted no later than ninety days after the effective date of any policy placed with the controlled insurer under this contract;

(d) ~~a provision~~ that all funds collected for the controlled insurer’s account ~~shall~~ must be held by the controlling producer in a fiduciary capacity, in one or more appropriately identified bank accounts in banks that are members of the Federal Reserve System;

(e) ~~a provision~~ that the controlling producer shall maintain separately identifiable records of business written for the controlled insurer;

(f) ~~a provision~~ that the contract ~~shall~~ may not be assigned in whole or in part by the controlling producer;

(g) ~~a provision~~ that the controlled insurer shall provide the controlling producer with its underwriting standards, rules, procedures, manuals setting forth the rates to be charged, and the conditions for the acceptance or rejection of risks. The controlling producer shall adhere to the standards, rules, procedures, rates, and conditions. The standards, rules, procedures, rates, and conditions ~~shall~~ must be the same as those applicable to comparable business placed with the controlled insurer by a producer other than the controlling producer;

(h) ~~a provision~~ establishing the rates and terms of the controlling producer’s commissions, charges, or other fees and the purposes for those charges or fees. The rates of the commissions, charges, and other fees ~~shall~~ must be no greater than those applicable to comparable business placed with the controlled insurer by producers other than controlling producers. For purposes of this subitem and subitem (g), examples of ‘comparable business’ include the same lines of insurance, same kinds of insurance, same kinds of risks, similar policy limits, and similar quality of business;

(i) ~~a provision~~ that, if the contract provides that the controlling producer, on insurance business placed with the insurer, is to be compensated contingent upon the insurer’s profits on that business, then ~~such~~ that compensation ~~shall~~ must not be determined and paid until at least five years after the premiums on liability insurance are earned and at least one year after the premiums are earned on any other insurance. ~~In no event shall~~ The commissions may not be paid until the adequacy of the controlled insurer’s reserves on remaining claims has been independently verified pursuant to subsection (B)(3)(a);

(j) ~~a provision~~ limiting the controlling producer’s writings in relation to the controlled insurer’s surplus and total writings. The controlled insurer may establish a different limit for each line or subline of business. The controlled insurer shall notify the controlling producer when the applicable limit is approached and ~~shall~~ may not accept business from the controlling producer if the limit is reached. The controlling producer ~~shall~~ may not place business with the controlled insurer if it has been notified by the controlled insurer that the limit has been reached; and

(k) ~~a provision~~ that the controlling producer may negotiate but ~~shall~~ does not bind reinsurance on behalf of the controlled insurer on business the controlling producer places with the controlled insurer, except that the controlling producer may bind facultative reinsurance contracts pursuant to obligatory facultative agreements if the contract with the controlled insurer contains underwriting guidelines including, for both reinsurance assumed and ceded, a list of reinsurers with which ~~such~~ these automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured, and commission schedules.

(2) ~~Audit Committee.~~ ~~Every~~ Each controlled insurer shall have an audit committee of the board of directors composed of independent directors. The audit committee shall ~~annually~~ meet annually with management, the controlled insurer’s independent certified public accountants, and an independent casualty actuary, or other independent loss reserve specialist acceptable to the ~~commissioner~~ director or his designee to review the adequacy of the controlled insurer’s loss reserves.

(3)(a) ~~Reporting Requirements.~~ In addition to ~~any other~~ another required loss reserve certification, the controlled insurer shall file annually, on April first of each year, ~~file~~ with the ~~commissioner~~ director or his designee an opinion of an independent casualty actuary, or ~~such~~ other independent loss reserve specialist acceptable to the ~~commissioner~~ director or his designee, reporting loss ratios for each line or subline of business written and attesting to the adequacy of loss reserves established for losses incurred and outstanding as of year‑end, including incurred but not reported losses, on business placed by the controlling producer; and

(b) The controlled insurer shall ~~annually~~ report annually to the ~~commissioner~~ director or his designee the amount of commissions paid to the controlling producer, the percentage ~~such~~ the amount represents of the net premiums written, and comparable amounts and percentages paid to noncontrolling producers for placements of the same kinds of insurance.

(4) ~~Disclosure Requirements.~~ The controlling producer, ~~prior to~~ before the effective date of the policy, shall deliver written notice to the prospective insured disclosing the relationship between the controlling producer and the controlled insurer, except that, if the business is placed through a subproducer who is not a controlling producer, the controlling producer shall retain in his records a signed commitment from the subproducer that the subproducer is aware of the relationship between the controlled insurer and the controlling producer and that the subproducer has or will notify the insured.

(5)(a) ~~Penalties.~~ If the ~~commissioner~~ director or his designee believes that the controlling producer or ~~any~~ other person has not materially complied with this section, or ~~any~~ regulation or order promulgated ~~hereunder~~ pursuant to the provisions of this section, after notice and opportunity to be heard, the ~~commissioner~~ director or his designee may order the controlling producer to cease placing business with the controlled insurer; and

(b) If it was found that because of ~~such~~ the material noncompliance that the controlled insurer or any policyholder ~~thereof~~ of it has suffered any loss or damage, the ~~commissioner~~ director or his designee may maintain a civil action or intervene in an action brought by or on behalf of the controlled insurer or policyholder for recovery of compensatory damages for the benefit of the controlled insurer or policyholder or other appropriate relief.

(c) If an order for liquidation or rehabilitation of the controlled insurer has been entered pursuant to ~~Section 38‑27‑10, et seq.~~ Chapter 27, Title 38, and the receiver appointed under that order believes that the controlling producer or ~~any other~~ another person has not materially complied with this section, or ~~any~~ regulation or order promulgated ~~hereunder~~ under it, and the controlled insurer suffered any loss or damage ~~therefrom~~ from it, the receiver may maintain a civil action for recovery of damages or other appropriate sanctions for the benefit of the controlled insurer.

(d) Nothing contained in this section ~~shall affect~~ affects the right of the ~~commissioner~~ director or his designee to impose ~~any~~ other penalties provided for in the insurance law.

(e) Nothing contained in this section is intended to or ~~shall~~ in any manner ~~alter~~ alters or ~~affect~~ affects the rights of policyholders, claimants, creditors, or other third parties.”

SECTION 5. This act takes effect upon approval by the Governor.

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