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COMMITTEE REPORT

February 23, 2011

**H. 3414**

Introduced by Reps. Sandifer, Toole, Bowers, Hayes and Erickson

S. Printed 2/23/11--H. [SEC 2/24/11 3:10 PM]

Read the first time January 25, 2011.

**THE COMMITTEE ON**

**LABOR, COMMERCE AND INDUSTRY**

To whom was referred a Bill (H. 3414) to amend the Code of Laws of South Carolina, 1976, by adding Section 38‑90‑213 so as to provide certain features and requirements concerning a protected cell, 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 SECTION 38‑90‑213 SO AS TO PROVIDE CERTAIN FEATURES AND REQUIREMENTS CONCERNING A PROTECTED CELL; BY ADDING SECTION 38‑90‑215 SO AS TO PERMIT THE FORMATION OF A PROTECTED CELL AND TO PROVIDE REQUIREMENTS FOR ITS CREATION, OWNERSHIP AND OPERATION; BY ADDING SECTION 38‑90‑457 SO AS TO PROVIDE FOR THE FORMATION OF A PROTECTED CELL OF A SPECIAL PURPOSE FINANCIAL CAPTIVE; TO AMEND SECTION 33‑9‑100, RELATING TO ARTICLES OF DOMESTICATION FOR A FOREIGN CORPORATION, SO AS TO CHANGE THE WORD ‘STATE’ TO ‘JURISDICTION’; TO AMEND SECTION 38‑90‑180, AS AMENDED, RELATING TO APPLICABILITY OF PROVISIONS RELATING TO INSURANCE REORGANIZATIONS, RECEIVERSHIPS, INJUNCTIONS, AND SPONSORED CAPTIVE INSURANCE COMPANY ASSETS AND CAPITAL PROVISIONS, SO AS TO PROVIDE FOR THE APPLICABILITY OF THE TERMS AND CONDITIONS OF CHAPTERS 26 AND 27, TITLE 38, TO A CAPTIVE INSURANCE COMPANY AND A PROTECTED CELL OF THIS COMPANY, AND TO PROVIDE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE MAY OBTAIN PERMISSION OF THE CIRCUIT COURT TO CONSERVE, REHABILITATE, OR LIQUIDATE ONE OR MORE PROTECTED CELLS, INDEPENDENTLY, WITHOUT CAUSING OR OTHERWISE EFFECTING CERTAIN ACTIONS, TO PROVIDE A DIRECTOR MAY NOT SEEK TO HAVE A SPONSORED CAPTIVE INSURANCE COMPANY DECLARED INSOLVENT IF AT LEAST ONE OF ITS PROTECTED CELLS REMAINS SOLVENT, AND TO PROVIDE THIS SECTION DOES NOT PREVENT THE DIRECTOR FROM TAKING CERTAIN ACTIONS TO THE CONSERVATION OR REHABILITATION OF A SPONSORED CAPTIVE INSURANCE COMPANY IN CERTAIN CIRCUMSTANCES; TO AMEND SECTION 38‑90‑210, RELATING TO FORMATION OF A SPONSORED CAPTIVE INSURANCE COMPANY AND ESTABLISHING PROTECTED CELLS, SO AS TO ADD CONDITIONS UNDER WHICH A SPONSORED CAPTIVE INSURANCE COMPANY MAY ESTABLISH AND MAINTAIN ONE OR MORE PROTECTED CELLS TO INSURE RISKS OF ONE OR MORE OF ITS PARTICIPANTS; TO AMEND SECTION 38‑90‑220, AS AMENDED, RELATING TO REQUIREMENTS APPLICABLE TO SPONSORS, SO AS TO PROVIDE THE DIRECTOR MAY APPROVE AN ADDITIONAL ENTITY UNDER CERTAIN CONDITIONS; TO AMEND SECTION 38‑90‑230, AS AMENDED, RELATING TO PARTICIPANTS IN SPONSORED CAPTIVE INSURANCE COMPANIES, SO AS TO PROVIDE THE PARTICIPANT WHOSE RISKS ARE INSURED THROUGH CERTAIN PROTECTED CELL ENTITIES, THE SPONSOR, OR THE SPONSORED CAPTIVE INSURANCE COMPANY MUST BE THE OWNER OF THAT PROTECTED CELL ENTITY UNLESS OTHERWISE APPROVED BY THE DIRECTOR; TO AMEND SECTION 38‑90‑235, RELATING TO TERMS, CONDITIONS, AND EXCEPTIONS FOR PROTECTED CELL INSURANCE COMPANIES APPLICABLE TO SPONSORED CAPTIVE INSURANCE COMPANIES, SO AS TO PROVIDE FOR THE LAW THAT GOVERNS IN THE EVENT OF A CONFLICT; AND TO AMEND SECTION 38‑90‑485, RELATING TO THE EFFECT OF THE CREATION, NAMING, AND MANAGEMENT OF ASSETS OF A PROTECTED CELL, SO AS TO PROVIDE AN EXCEPTION FOR CERTAIN PROTECTED CELLS.

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

SECTION 1. Article 1, Chapter 90, Title 38 of the 1976 Code is amended by adding:

“Section 38‑90‑213. (A)(1) Except with respect to protected cells formed pursuant to Section 38‑90‑215, the creation of a protected cell does not create, with respect to that protected cell, a legal person separate from the sponsored captive insurance company.

(2) Notwithstanding the provision of item (1), a protected cell must have its own distinct name or designation that includes the words ‘protected cell’. The sponsored captive insurance company shall transfer all assets attributable to the protected cell to one or more separately established and identified protected cell accounts bearing the name or designation of that protected cell.

(3) Subject to the provisions of Section 38‑90‑215, although it is not a separate legal person, the property of a sponsored captive insurance company in a protected cell is subject to orders of a court by name as it would have been if the protected cell were a separate legal person.

(4) The property of a sponsored captive insurance company in a protected cell must be served in its own name with process in all civil actions or proceedings involving or relating to the activities of that protected cell or a breach by the sponsored captive insurance company of a duty to the protected cell or to a participant in the manner described in Section 15‑9‑270.

(5) A protected cell exists only at the pleasure of the sponsored captive insurance company. At the cessation of business of a protected cell in accordance with the plan approved by the director, the sponsored captive insurance company voluntarily shall close out the protected cell account.

(B) Nothing in this section may be construed to prohibit a sponsored captive insurance company from contracting with, or arranging for, an investment advisor, commodity trading advisor, or other third party to manage the assets of a protected cell, if all remuneration, expenses, and other compensation of the third party advisor or manager are payable from the assets of that protected cell and not from the assets of other protected cells or the assets of the sponsored captive insurance company’s general account, unless approved by the director.

(C) Creditors with respect to a protected cell are not entitled to have recourse against the protected cell assets of other protected cells or the assets of the sponsored captive insurance company’s general account. If an obligation of a sponsored captive insurance company relates only to the general account, the obligation of the sponsored captive insurance company extends only to that creditor, with respect to that obligation, and is entitled to have recourse only to the assets of the sponsored captive insurance company’s general account.

(D) The assets of the protected cell may not be used to pay expenses or claims other than those attributable to the protected cell. Protected cell assets are available only to creditors of the sponsored captive insurance company that are creditors only with respect to that protected cell and, accordingly, are entitled, in conformity with this article, to have recourse to the protected cell assets attributable to that protected cell and absolutely are protected from the creditors of the sponsored captive insurance company that are not creditors with respect to that protected cell and who, accordingly, are not entitled to have recourse to the protected cell assets attributable to that protected cell. If an obligation of a sponsored captive insurance company to a person or participant arises from a participant contract or is otherwise incurred with respect to a protected cell:

(1) that obligation of the sponsored captive insurance company extends only to the protected cell assets attributable to that protected cell, and the person or participant, with respect to that obligation, is entitled to have recourse only to the protected cell assets attributable to that protected cell; and

(2) that obligation of the sponsored captive insurance company does not extend to the protected cell assets of another protected cell or the assets of the sponsored captive insurance company’s general account, and that person or participant, with respect to that obligation, is not entitled to have recourse to the protected cell assets of another protected cell or the assets of the sponsored captive insurance company’s general account. The sponsored captive insurance company’s capital as required by Sections 38‑90‑40 and 38‑90‑50 must be available at all times to pay expenses of or claims against the sponsored captive insurance company and may not be used to pay expenses or claims attributable to any protected cell.

(E) Notwithstanding another provision of law, a sponsored captive insurance company may allow for a security interest in accordance with applicable law to attach to protected cell assets or a protected cell account when in favor of a creditor of the protected cell to the extent those protected cell assets are not required at all times to support the risk, but without otherwise affecting the discharge of liabilities under any participant contract, or as otherwise approved by the director.

(F) A sponsored captive insurance company shall establish administrative and accounting procedures necessary to properly identify the one or more protected cells of the sponsored captive insurance company and the protected cell assets and protected cell liabilities to each protected cell. A sponsored captive insurance company shall keep protected cell assets and protected cell liabilities:

(1) separate and separately identifiable from the assets and liabilities of the sponsored captive insurance company’s general account; and

(2) attributable to one protected cell separate and separately identifiable from protected cell assets and protected cell liabilities attributable to other protected cells.

(G) All contracts or other documentation reflecting protected cell liabilities clearly must indicate that only the protected cell assets are available for the satisfaction of those protected cell liabilities. Each participant contract must contain provisions identifying the protected cell to which the transaction is attributed. In addition, each participant contract clearly must disclose that the assets of that protected cell, and only those assets, are available to pay the obligations of that protected cell.

(H) Notwithstanding the provisions of subsection (G) and subject to the provisions of this article and another applicable law or regulation, the failure to include this language in a participant contract may not be used as the sole basis by creditors, insureds or reinsureds, insurers or reinsurers, or other claimants to circumvent the provisions of this section.

Section 38‑90‑215. (A) Notwithstanding another provision of this title, the protected cell or protected cells of a sponsored captive insurance company may be formed as separate corporations or limited liability companies. The provisions of this article and Chapter 10 of this title applicable to protected cells of a sponsored captive insurance company apply to protected cells incorporated or organized as separate legal entities but only to the extent these provisions are not contrary to this section.

(B) To form a protected cell as a separate legal entity, the following applies:

(1) The name of the protected cell entity must include the words ‘protected cell company’ or ‘protected cell corporation’.

(2) The articles of incorporation or articles of organization must refer to the sponsored captive insurance company for which it is a protected cell entity and must state that the protected cell entity is incorporated or organized for the limited purposes authorized by the sponsored captive insurance company’s license. A copy of the prior written approval of the director to add the protected cell entity, required by Section 38‑90‑210(B)(8), must be attached to and filed with the articles of incorporation or articles of organization.

(3) A protected cell entity may be owned, in whole or in part, by the sponsored captive insurance company. Ownership and management rights in a protected cell entity may be divided between the sponsored captive insurance company and one or more participants upon the terms and conditions approved by the director. Neither the sponsored captive insurance company’s nor any participant’s ownership interest in a protected cell entity may be transferred, except as authorized by the director.

(4) Amounts attributed to a protected cell entity pursuant to this section, including assets transferred to the protected cell entity’s accounts and its capital and surplus, are owned by the protected cell entity.

(5) Upon cessation of business of the protected cell entity in accordance with the plan approved by the director, the protected cell entity shall dissolve and wind up its affairs.

(6) A protected cell entity formed pursuant to the provisions of this section has the privileges of and is subject to the provisions of law applicable to its formation, as well as the applicable provisions contained in this article. If a conflict occurs between a provision of the applicable law and a provision of this article, the latter controls.

(7) All remuneration, expenses, and other compensation of third parties are payable only from the assets of the protected cell entity affected by the contract and not from the assets of other protected cells, protected cell entities, or the assets of the sponsored captive insurance company’s general account, unless approved by the director.

(C) The director is vested with regulatory authority over a protected cell entity to the same extent as if the separately formed protected cell entity were incorporated or organized as a captive insurance company. The director, by rule, regulation, or order, may require conditions upon the sponsored captive insurance company and its separately formed protected cell entity or entities as the director considers advisable.”

SECTION 2. Article 3, Chapter 90, Title 38 of the 1976 Code is amended by adding:

“Section 38‑90‑457. (A) Notwithstanding another provision of this title, the protected cell or protected cells of the SPFC may be formed as separate corporations or limited liability companies. The provisions of this article and Chapter 10 of this title applicable to protected cells of the SPFC apply to protected cells incorporated or organized as separate legal entities but only to the extent these provisions are not contrary to this section.

(B) To form a protected cell as a separate legal entity, the following applies:

(1) The name of the protected cell entity must include the words ‘protected cell company’ or ‘protected cell corporation’.

(2) The articles of incorporation or articles of organization must refer to the SPFC for which it is a protected cell entity and must state that the protected cell entity is incorporated or organized for the limited purposes authorized by the SPFC’s license and as set forth in any order or orders of the director relative to the SPFC. A copy of the prior written approval of the director to add the protected cell entity, required by Section 38‑90‑480(C), must be attached to and filed with the articles of incorporation or articles of organization.

(3) A protected cell entity may be owned, in whole or in part, by the SPFC. Ownership and management rights in a protected cell entity may be divided between the SPFC and the protected cell entity’s counterparty upon the terms and conditions approved by the director. Neither the SPFC’s nor the counterparty’s ownership interest in a protected cell entity may be transferred, except as authorized by the director.

(4) Amounts attributed to a protected cell entity pursuant to this section, including assets transferred to the protected cell entity’s accounts and its capital and surplus, are owned by the protected cell entity.

(5) Upon cessation of business of the protected cell entity in accordance with the plan approved by the director, the protected cell entity shall dissolve and wind up its affairs.

(6) A protected cell entity formed pursuant to the provisions of this section has the privileges of and is subject to the provisions of law applicable to its formation, as well as the applicable provisions contained in this article. If a conflict occurs between a provision of the applicable law and a provision of this article, the latter controls. Nothing contained in this section with respect to a protected cell entity abrogates limits, or rescinds in any way the authority of the Securities Commissioner pursuant to the provisions of Title 35.

(7) All remuneration, expenses, and other compensation of third parties are payable only from the assets of the protected cell entity affected by the contract and not from the assets of other protected cells, protected cell entities, or the assets of the SPFC’s general account, unless approved by the director.

(C) The director is vested with regulatory authority over a protected cell entity to the same extent as if the separately formed protected cell entity were incorporated or organized as a SPFC. The director, by rule, regulation, or order, may require conditions upon the SPFC and its separately formed protected cell entity or entities as the director considers advisable.”

SECTION 3. Section 33‑9‑100(b) and (c) of the 1976 Code are amended to read:

“(b) A foreign corporation that becomes a domestic corporation ~~must~~ shall file, within five business days with the ~~state~~ jurisdiction where previously incorporated, articles of dissolution or the equivalent or other appropriate filing authorized by the law of that ~~state~~ jurisdiction.

(c) The articles of domestication shall certify:

(1) the date and jurisdiction of each ~~state~~ jurisdiction where the corporation has been incorporated before the filing of the articles of domestication;

(2) the name of the corporation immediately before the filing of the articles of domestication, as well as the corporate name to be used pursuant to Section 33‑4‑101;

(3) that the corporation shall file, within five business days with the ~~state~~ jurisdiction where previously incorporated, articles of dissolution or the equivalent, or ~~such~~ other appropriate filing as authorized by the law of ~~such state~~ that jurisdiction;

(4) that articles of domestication do not contain a provision that would require action by one or more separate voting groups on a proposed amendment pursuant to Section 33‑10‑104;

(5) that the filing of the articles of domestication has been authorized by a majority of the votes cast by all shareholders entitled to vote on the proposal, unless a greater vote is required by the articles of incorporation or other charter documents existing immediately before the filing of the articles of incorporation; and

(6) that the articles of dissolution or their equivalent or other appropriate filing as authorized by the law of the ~~state~~ jurisdiction where the corporation was previously incorporated, must be filed within five business days after these articles of domestication are filed.”

SECTION 4. Section 38‑90‑180 of the 1976 Code, as last amended by Act 28 of 2009, is further amended to read:

“Section 38‑90‑180. (A) Except as otherwise provided in this section, the terms and conditions ~~set forth~~ provided for in Chapters 26 and 27 of this title pertaining to insurance reorganizations, receiverships, and injunctions apply in full to captive insurance companies formed or licensed ~~under~~ pursuant to the provisions of this chapter or each of a sponsored captive insurance company’s protected cells, independently, or both, without causing or otherwise effecting a conservation, rehabilitation, receivership, or liquidation of the sponsored captive insurance company or another protected cell.

(B) In the case of a sponsored captive insurance company:

(1) the assets of the protected cell may not be used to pay expenses or claims other than those attributable to the protected cell; ~~and~~

(2) its capital and surplus at all times must be available to pay expenses of or claims against the sponsored captive insurance company and may not be used to pay expenses or claims attributable to a protected cell~~.~~;

(3) notwithstanding the provisions of Chapters 26 and 27 of this title or other laws of this State:

(a) the director may apply by petition to the circuit court for an order authorizing the director to conserve, rehabilitate, or liquidate one or more protected cells, independently, without causing or otherwise effecting a conservation, rehabilitation, receivership, or liquidation of the sponsored captive insurance company generally or another of its protected cells;

(b) a court’s order for relief pursuant to Chapters 26 and 27 of this title may be made in respect of one or more protected cells by name, rather than the sponsored captive insurance company generally; and

(c) the director may not seek to have a sponsored captive insurance company declared insolvent as long as at least one of its protected cells remains solvent.

(C) The provisions of subsection (B) do not prohibit the director from taking action permitted pursuant to the provisions of Chapter 26 or 27 with respect only to the conservation or rehabilitation of a sponsored captive insurance company, provided the director would have had sufficient grounds to seek to declare the sponsored captive insurance company insolvent, subject to and without otherwise affecting the provisions of subsection (B)(3)(c).”

SECTION 5. Section 38‑90‑210(B) of the 1976 Code is amended to read:

“(B) A sponsored captive insurance company formed or licensed ~~under~~ provided by this chapter may establish and maintain one or more protected cells to insure risks of one or more participants, subject to the following conditions:

(1) the shareholders of a sponsored captive insurance company must be limited to its participants and sponsors;

(2) each protected cell must be accounted for separately on the books and records of the sponsored captive insurance company to reflect the financial condition and results of operations of the protected cell, net income or loss, dividends or other distributions to participants, and other factors may be provided in the participant contract or required by the director;

(3) amounts attributed to a protected cell pursuant to this chapter, including assets transferred to a protected cell account, are owned by the sponsored captive insurance company, and the sponsored captive insurance company may not be, or may not hold itself out to be, a trustee with respect to those protected cell assets of that protected cell account;

(4) all attributions of assets and liabilities between a protected cell and the general account of the sponsored captive insurance company must be in accordance with the plan of operation approved by the director. Other attributions of assets or liabilities may not be made by a sponsored captive insurance company between its general account and its protected cell or cells. The sponsored captive insurance company shall attribute all insurance obligations, assets, and liabilities relating to a participant contract to a particular protected cell;

(5) the assets of a protected cell must not be chargeable with liabilities arising out of any other protected cell or insurance business the sponsored captive insurance company may conduct;

~~(4)~~(6) ~~no~~ a sale, an exchange, or other transfer of assets may not be made by the sponsored captive insurance company between or among any of its protected cells without the consent of the director and each other protected ~~cells~~ cell which is a party to a sale, an exchange, or other transfer;

~~(5)~~(7) ~~no~~ a sale, an exchange, transfer of assets, dividend, or distribution may not be made from a protected cell to a sponsor or participant without the director’s approval and ~~in no event may~~ the approval may not be given if the sale, exchange, transfer, dividend, or distribution would result in insolvency or impairment with respect to a protected cell;

~~(6)~~(8) a sponsored captive insurance company annually shall file with the director financial reports the director requires, which shall include, but are not limited to, accounting statements detailing the financial experience of each protected cell;

~~(7)~~(9) a sponsored captive insurance company shall notify the director in writing within ten business days of a protected cell that is insolvent or otherwise unable to meet its claim or expense obligations;

~~(8)~~(10) ~~no~~ a participant contract shall not take effect without the director’s prior written approval, and the addition of each new protected cell and withdrawal of any participant of any existing protected cell constitutes a change in the business plan requiring the director’s prior written approval.”

SECTION 6. Section 38‑90‑220 of the 1976 Code, as last amended by Act 58 of 2001, is further amended to read:

“Section 38‑90‑220. A sponsor of a sponsored captive insurance company must be an insurer licensed pursuant to the laws of a state, an insurance holding company that controls an insurer licensed pursuant to the laws of any state and subject to registration pursuant to the insurance holding company system laws of the state of domicile of the insurer, a reinsurer authorized or approved pursuant to the laws of a state, ~~or~~ a captive insurance company formed or licensed pursuant to this chapter, or another entity approved by the director in the exercise of his discretion after finding that approval of the entity as a sponsor is consistent with the purposes of this chapter. A risk retention group may not be either a sponsor or a participant of a sponsored captive insurance company. The business written by a sponsored captive insurance company with respect to each protected cell must be:

(1) fronted by an insurance company licensed pursuant to the laws of:

(a) any state; or

(b) any jurisdiction if the insurance company is a wholly owned subsidiary of an insurance company licensed pursuant to the laws of any state;

(2) reinsured by a reinsurer authorized or approved by this State; or

(3) secured by a trust fund in the United States for the benefit of policyholders and claimants funded by an irrevocable letter of credit or other asset acceptable to the director. The amount of security provided by the trust fund may not be less than the reserves associated with those liabilities, including reserves for losses, allocated loss adjustment expenses, incurred but unreported losses, and unearned premiums for business written through the participant’s protected cell. The director may require the sponsored captive to increase the funding of a trust established pursuant to this item. If the form of security in the trust is a letter of credit, the letter of credit must be established, issued, or confirmed by a bank chartered in this State, a member of the federal reserve system, or a bank chartered by another state if that state‑chartered bank is acceptable to the director. A trust and trust instrument maintained pursuant to this item must be in a form and upon terms approved by the director.”

SECTION 7. Section 38‑90‑230(C) of the 1976 Code is amended to read:

“(C) A participant need not be a shareholder of the sponsored captive insurance company or an affiliate of the company. Notwithstanding the provisions of this subsection, the participant whose risks are insured through a protected cell entity formed pursuant to Section 38‑90‑215, the sponsor, or the sponsored captive insurance company, must be the owner of that protected cell entity, unless otherwise approved by the director.”

SECTION 8. Section 38‑90‑235(A) of the 1976 Code, as added by Act 58 of 2001, is amended to read:

“(A) Except as otherwise provided in this chapter, the terms and conditions provided in Chapter 10 relating to a protected cell insurance company apply in full to a sponsored captive insurance company. If a conflict occurs between a provision of Chapter 10 and a provision of this article, the latter controls.”

SECTION 9. Section 38‑90‑485(A)(1), (2), and (3) of the 1976 Code, as added by Act 332 of 2006, is amended to read:

“(1) Except with respect to protected cells formed pursuant to Section 38‑90‑457, the creation of a protected cell does not create, with respect to that protected cell, a legal person separate from the SPFC.

(2) Notwithstanding the provision of item (1), a protected cell must have its own distinct name or designation that includes the words ‘protected cell’. The SPFC shall transfer all assets attributable to the protected cell to one or more separately established and identified protected cell accounts bearing the name or designation of that protected cell.

(3) Subject to the provisions of Section 38‑90‑457, although it is not a separate legal person, the property of the SPFC in a protected cell is subject to orders of a court by name as it would have been if the protected cell were a separate legal person.”

SECTION 10. This act takes effect upon approval by the Governor.

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