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CHAPTER 21.

INSURANCE HOLDING COMPANY REGULATORY ACT

**SECTION 38‑21‑10.** Definitions.

In this chapter, unless the context otherwise requires:

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

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

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

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

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

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

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

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

HISTORY: Former 1976 Code Section 38‑21‑10 [1947 (45) 322; 1952 Code Section 37‑851; 1962 Code Section 37‑851] recodified as Section 38‑37‑10 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑10 [1962 Code Section 37‑1400; 1971 (57) 351; 1986 Act No. 426, Section 1] recodified as Section 38‑21‑10 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 561; 2000 Act No. 259, Section 3; 2001 Act No. 82, Section 8, eff July 20, 2001.

**SECTION 38‑21‑20.** Authority of insurers to organize or acquire subsidiaries.

A domestic insurer, either by itself or in cooperation with one or more persons, may organize or acquire one or more subsidiaries engaged in the following kinds of business:

(1) Any kind of insurance business authorized by the jurisdiction in which it is incorporated;

(2) Acting as an insurance broker or as an insurance agent for its parent or for any of its parent's insurer subsidiaries;

(3) Investing, reinvesting, or trading in securities for its own account, that of its parent, any subsidiary of its parent, or any affiliate or subsidiary;

(4) Management of an investment company subject to or registered pursuant to the Investment Company Act of 1940, as amended, including related sales and services;

(5) Acting as a broker‑dealer subject to or registered pursuant to the Securities Exchange Act of 1934, as amended;

(6) Rendering investment advice to governments, government agencies, corporations, or other organizations or groups;

(7) Rendering other services related to the operations of an insurance business, including, but not limited to, actuarial, loss prevention, safety engineering, data processing, accounting, claims, appraisal, and collection services;

(8) Ownership and management of assets which the parent corporation could itself own or manage;

(9) Acting as administrative agent for a governmental instrumentality which is performing an insurance function;

(10) Financing of insurance premiums, agents, and other forms of consumer financing;

(11) Any other business activity determined by the director or his designee to be reasonably ancillary to an insurance business; or

(12) Owning a corporation or corporations engaged or organized to engage exclusively in one or more of the businesses specified in this section.

HISTORY: Former 1976 Code Section 38‑21‑20 [1947 (45) 322; 1952 Code Section 37‑852; 1962 Code Section 37‑852] recodified as Section 38‑37‑20 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑20 [1962 Code Section 37‑1401; 1971 (57) 351] recodified as Section 38‑21‑20 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 562.

**SECTION 38‑21‑30.** Authority of insurers to invest in securities of subsidiaries.

In addition to investment in common stock, preferred stock, debt obligations, and other securities permitted under this title, a domestic insurer may also:

(1) Invest, in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries, amounts which do not exceed the lesser of ten percent of the insurer's assets or fifty percent of the insurer's surplus as regards policyholders if, after these investments, the insurer's surplus as regards policyholders must be reasonable in relation to the insurer's outstanding liabilities and adequate to meet its financial needs. In calculating the amount of the investments, investments in domestic or foreign insurance subsidiaries must be excluded, and there must be included (a) total net monies or other consideration expended and obligations assumed in the acquisition or formation of a subsidiary, including all organizational expenses and contributions to capital and surplus of the subsidiary whether or not represented by the purchase of capital stock or issuance of other securities, and (b) all amounts expended in acquiring additional common stock, preferred stock, debt obligations, and other securities and all contributions to the capital or surplus of a subsidiary after its acquisition or formation;

(2) Invest any amount in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries engaged or organized to engage exclusively in the ownership and management of assets authorized as investments for the insurer if each subsidiary agrees to limit its investments in any asset so that the investments will not cause the total investment of the insurer to exceed any of the investment limitations specified in item (1) or in the investment laws or regulations of this State. For the purpose of this item, "the total investment of the insurer" includes (a) any direct investment by the insurer in an asset, and (b) the insurer's proportionate share of any investment in an asset by a subsidiary of the insurer, which must be calculated by multiplying the amount of the subsidiary's investment by the percentage of the ownership of the subsidiary;

(3) With the approval of the director or his designee, invest any greater amount in common stock, preferred stock, debt obligations, or other securities of one or more subsidiaries if after such investment the insurer's surplus as regards policyholders will be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

HISTORY: Former 1976 Code Section 38‑21‑30 [1947 (45) 322; 1952 Code Section 37‑853; 1962 Code Section 37‑853] recodified as Section 38‑37‑30 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑30 [1962 Code Section 37‑1402; 1971 (57) 351; 1986 Act No. 426, Section 2] recodified as Section 38‑21‑30 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 563.

**SECTION 38‑21‑40.** Investments in securities of subsidiaries are not subject to other restrictions.

Investments in common stock, preferred stock, debt obligations, or other securities of subsidiaries made pursuant to Section 38‑21‑30 are not subject to any other investment restrictions or prohibitions contained in this title.

HISTORY: Former 1976 Code Section 38‑21‑40 [1947 (45) 322; 1952 Code Section 37‑854; 1962 Code Section 37‑854] recodified as Section 38‑37‑40 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑40 [1962 Code Section 37‑1403; 1971 (57) 351] recodified as Section 38‑21‑40 by 1987 Act No. 155, Section 1.

**SECTION 38‑21‑50.** Determining compliance with provision authorizing investments in securities of subsidiaries; disposition of investments upon ceasing to control subsidiary.

Whether an investment meets the applicable requirements of Section 38‑21‑30 is to be determined before the investment is made by calculating the applicable investment limitations as though the investment had already been made, taking into account the then outstanding principal balance on all previous investments in debt obligations, and the value of all previous investments in equity securities as of the day they were made, net of any return of capital invested, not including dividends.

If an insurer ceases to control a subsidiary, it must dispose of any investment made pursuant to Section 38‑21‑30 within three years from the time of the cessation of control or within such further time that the director or his designee may prescribe unless, at any time after the investment has been made, the investment has met the requirements for investment under any other section of this title and the insurer has notified the director or his designee.

HISTORY: Former 1976 Code Section 38‑21‑50 [1947 (45) 322; 1952 Code Section 37‑855; 1962 Code Section 37‑855] recodified as Section 38‑37‑50 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑50 [1962 Code Section 37‑1404; 1971 (57) 351; 1986 Act No. 426, Section 3] recodified as Section 38‑21‑50 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 564.

**SECTION 38‑21‑60.** Statement required by person seeking to acquire control of insurer.

No person other than the issuer may make a tender offer for or a request or invitation for tenders of, or enter into any agreement to exchange securities for, seek to acquire or acquire, in the open market or otherwise, any voting security of a domestic insurer if, after the consummation thereof, the person would, directly or indirectly, or by conversion or by exercise of any right to acquire, be in control of the insurer, and no person may enter into an agreement to merge with or otherwise to acquire control of a domestic insurer unless, at the time the offer, request, or invitation is made or the agreement is entered into, or prior to the acquisition of the securities if no offer or agreement is involved, the person has filed with the department a statement containing the information required by this section and the offer, request, invitation, agreement, or acquisition has been approved by the director or his designee in the manner hereinafter prescribed.

For purposes of this section, a domestic insurer includes any other person controlling a domestic insurer unless the other person as determined by the director or his designee is either directly or through its affiliates primarily engaged in business other than the business of insurance. As used in this section, "person" does not include any securities broker holding, in the usual and customary brokers' function, less than twenty percent of the voting securities of an insurance company or of any person which controls an insurance company.

HISTORY: Former 1976 Code Section 38‑21‑60 [1947 (45) 322; 1952 Code Section 37‑856; 1962 Code Section 37‑856] recodified as Section 38‑37‑60 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑60 [1962 Code Section 37‑1405; 1971 (57) 351; 1986 Act No. 426, Section 4] recodified as Section 38‑21‑60 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 565.

**SECTION 38‑21‑70.** Contents of statement; amendment.

The statement to be filed with the department, as prescribed in Section 38‑21‑60, must be made under oath or affirmation and shall contain the following information:

(1) The name and address of each person by whom or on whose behalf the merger or other acquisition of control referred to in Section 38‑21‑60 is to be effected, hereinafter called "acquiring party", and

(a) If the acquiring party is an individual, his principal occupation and all offices and positions held during the past five years and any conviction of crimes other than minor traffic violations during the past ten years;

(b) If the acquiring party is not an individual, a report of the nature of its business operations during the past five years or for any lesser period as the acquiring party and any predecessors have been in existence; an informative description of the business intended to be done by the acquiring party and its subsidiaries; and a list of all individuals who are or who have been selected to become directors or executive officers of the acquiring party or who perform or will perform functions appropriate to these positions. The list shall include for each of these individuals the information required by subitem (a) of this section.

(2) The source, nature, and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a description of any transaction in which funds were or are to be obtained for this purpose, and the identity of persons furnishing the consideration. Where a source of the consideration is a loan made in the lender's ordinary course of business, the identity of the lender must remain confidential, if the person filing the statement so requests.

(3) Fully audited financial information as to the earnings and financial condition for the preceding five fiscal years of each acquiring party or for any lesser period as the acquiring party and any of its predecessors have been in existence.

(4) Unaudited financial information of the earnings and financial condition of each acquiring party as of a date within ninety days prior to filing the statement.

(5) Any plans or proposals which each acquiring party may have to liquidate the insurer, to sell its assets or merge or consolidate it with any person, or to make any other material change in its business or corporate structure or management.

(6) The number of shares of any security referred to in Section 38‑21‑60 which each acquiring party proposes to acquire and the terms of the offer, request, invitation, agreement, or acquisition referred to in Section 38‑21‑60 and a statement as to the method by which the fairness of the proposal was arrived.

(7) The amount of each class of any security referred to in Section 38‑21‑60 which is beneficially owned or concerning which there is a right to acquire beneficial ownership by each acquiring party.

(8) A full description of any contracts, arrangements, or understandings with respect to any security referred to in Section 38‑21‑60 in which an acquiring party is involved, including, but not limited to, transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of division of losses or profits, or the giving or withholding of proxies. The description shall identify the persons with whom the contracts, arrangements, or understandings have been entered into.

(9) A description of the purchase of any security referred to in Section 38‑21‑60 during the twelve calendar months preceding the filing of the statement, by any acquiring party, including the dates of purchase, names of the purchasers, and consideration paid or agreed to be paid.

(10) A description of any recommendations to purchase any security referred to in Section 38‑21‑60 made during the twelve calendar months preceding the filing of the statement by any acquiring party, or by anyone based upon interviews or at the suggestion of the acquiring party.

(11) Copies of all tender offers for, requests or invitations for tenders of, exchange offers for, and agreements to acquire or exchange any securities referred to in Section 38‑21‑60, if distributed, of additional soliciting material relating thereto.

(12) The terms of any agreement, contract, or understanding made with any broker‑dealer as to solicitation of securities referred to in Section 38‑21‑60 for tender, and the amount of any fees, commissions, or other compensation to be paid the broker‑dealers.

(13) Any additional information the director may by regulation prescribe as necessary or appropriate for the protection of policyholders of the insurer or in the public interest.

If the person required to file the statement referred to in Section 38‑21‑60 is a partnership, limited partnership, syndicate, or other group, the director or his designee may require that the information called for by this section be given with respect to each partner of the partnership or limited partnership, each member of the syndicate or group, and each person who controls the partner or member. If this partner, member, or person is a corporation or the person required to file the statement referred to in Section 38‑21‑60 is a corporation, the director or his designee may require that the information called for by this section be given with respect to the corporation, each officer and director of the corporation, and each person who is directly or indirectly the beneficial owner of more than ten percent of the outstanding voting securities of the corporation.

If any material change occurs in the facts set forth in the statement filed with the department and sent to the insurer pursuant to this section, an amendment setting forth the change, together with copies of all documents and other material relevant to the change, must be filed with the department and sent to the insurer within two business days after the person learns of the change.

HISTORY: Former 1976 Code Section 38‑21‑70 [1947 (45) 322; 1952 Code Section 37‑857; 1962 Code Section 37‑857] recodified as Section 38‑37‑70 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑70 [1962 Code Section 37‑1406; 1971 (57) 351; 1986 Act No. 426, Section 5] recodified as Section 38‑21‑70 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 566.

**SECTION 38‑21‑80.** Use of certain documents required by other laws in furnishing information called for in statement.

If any offer, request, invitation, agreement, or acquisition referred to in Section 38‑21‑60 is proposed to be made by means of a registration statement under the Securities Act of 1933 or in circumstances requiring the disclosure of similar information under the Securities Exchange Act of 1934, or under a state law requiring similar registration or disclosure, the person required to file the statement referred to in Section 38‑21‑60 may utilize these documents in furnishing the information called for by that statement.

HISTORY: Former 1976 Code Section 38‑29‑80 [1962 Code Section 37‑1407; 1971 (57) 351; 1986 Act No. 426, Section 5A] recodified as Section 38‑21‑80 by 1987 Act No. 155, Section 1.

**SECTION 38‑21‑90.** Approval of Commissioner of acquisition of control; hearing.

(A) The director or his designee shall approve a merger or other acquisition of control in Section 38‑21‑60 unless, after a public hearing, he finds that:

(1) After the change of control the domestic insurer referred to in Section 38‑21‑60 is not able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed.

(2) The effect of the merger or other acquisition of control would substantially lessen competition in insurance in this State or tend to create a monopoly. In applying the competitive standard in this item:

(a) The information requirements and standards of Section 38‑21‑125(C) and (D) apply.

(b) The merger or other acquisition must not be approved if the director or his designee finds that at least one of the situations in Section 38‑21‑125(D) exists.

(c) The director or his designee may condition the approval of the merger or other acquisition on the removal of the basis of disapproval within a specified period of time.

(3) The financial condition of the acquiring party might jeopardize the financial stability of the insurer or prejudice the interest of its policyholders.

(4) The plans or proposals which the acquiring party has to liquidate the insurer, sell its assets, or consolidate or merge it with a person or to make another material change in its business or corporate structure or management are unfair and unreasonable to policyholders of the insurer and not in the public interest.

(5) The competence, experience, and integrity of those persons who would control the operation of the insurer are such that it is not in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control.

(6) The acquisition is likely to be hazardous or prejudicial to the insurance‑buying public.

(B) The public hearing referred to in subsection (A) must be held within thirty days after the statement required by Section 38‑21‑60 is filed, and at least twenty days' notice must be given by the director or his designee to the person filing the statement, to the insurer, and to other persons designated by the director or his designee. The director or his designee shall make a determination within thirty days after the conclusion of the hearing. At the hearing, the person filing the statement, the insurer, a person to whom notice of hearing was sent, and other persons whose interests are affected may present evidence, examine and cross‑examine witnesses, and offer oral and written arguments and are entitled to conduct discovery proceedings in the same manner allowed in the Circuit Courts of this State. Discovery proceedings must be concluded not later than three days before the public hearing.

(C) The director may retain at the acquiring person's expense attorneys, actuaries, accountants, and other experts not otherwise a part of the department's staff reasonably necessary to assist the director or his designee in reviewing the proposed acquisition of control.

HISTORY: Former 1976 Code Section 38‑29‑90 [1962 Code Section 37‑1408; 1971 (57) 351; 1986 Act No. 426, Section 6] recodified as Section 38‑21‑90 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 13; 1993 Act No. 181, Section 567.

**SECTION 38‑21‑95.** Approval for acquisition of domestic insurer by controlling producer; conditions and requirements.

(A) An acquisition of a domestic insurer, whether a member of a holding company system or not, by a controlling producer may not be approved by the director or his designee unless the acquiring party demonstrates, to the satisfaction of the 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) places business on behalf of an insured with a licensed insurer;

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

(3) 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 controlling producer may not be approved unless the following requirements are met:

(1) A controlled insurer may not accept business from a controlling producer and a controlling producer 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 a provision:

(a) 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) 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) 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 must be fixed so that premiums or installments of it collected must be remitted no later than ninety days after the effective date of any policy placed with the controlled insurer under this contract;

(d) that all funds collected for the controlled insurer's account 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) that the controlling producer shall maintain separately identifiable records of business written for the controlled insurer;

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

(g) 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 must be the same as those applicable to comparable business placed with the controlled insurer by a producer other than the controlling producer;

(h) 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 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) 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 that compensation 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. 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) 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 may not accept business from the controlling producer if the limit is reached. The controlling producer 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) that the controlling producer may negotiate but 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 these automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured, and commission schedules.

(2) Each controlled insurer shall have an audit committee of the board of directors composed of independent directors. The audit committee shall 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 director or his designee to review the adequacy of the controlled insurer's loss reserves.

(3)(a) In addition to another required loss reserve certification, the controlled insurer shall file annually, on April first of each year, with the director or his designee an opinion of an independent casualty actuary, or other independent loss reserve specialist acceptable to the 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.

(b) The controlled insurer shall report annually to the director or his designee the amount of commissions paid to the controlling producer, the percentage 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) The controlling producer, 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) If the director or his designee believes that the controlling producer or other person has not materially complied with this section, or regulation or order promulgated pursuant to the provisions of this section, after notice and opportunity to be heard, the director or his designee may order the controlling producer to cease placing business with the controlled insurer.

(b) If it was found that because of the material noncompliance that the controlled insurer or any policyholder of it has suffered any loss or damage, the 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 Chapter 27, Title 38, and the receiver appointed under that order believes that the controlling producer or another person has not materially complied with this section, or regulation or order promulgated under it, and the controlled insurer suffered any loss or damage 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 affects the right of the director or his designee to impose other penalties provided for in the insurance law.

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

HISTORY: 1993 Act No. 70, Section 3; 2009 Act No. 27, Section 4, eff June 2, 2009.

**SECTION 38‑21‑100.** Certain transactions exempt from Sections 38‑21‑60 to 38‑21‑120.

The provisions of Sections 38‑21‑60 to 38‑21‑120 do not apply to:

(1) Any transaction which is subject to Article 9 of Chapter 19 dealing with the merger or consolidation of two or more insurers.

(2) Any offer, request, invitation, agreement, or acquisition which the director or his designee by order exempts as (a) not having been made or entered into for the purpose and not having the effect of changing or influencing the control of a domestic insurer, or (b) as otherwise not comprehended within the purposes of Sections 38‑21‑60 through 38‑21‑120.

HISTORY: Former 1976 Code Section 38‑29‑110 [1962 Code Section 37‑1409; 1971 (57) 351; 1986 Act No. 426, Section 7] recodified as Section 38‑21‑100 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 568.

**SECTION 38‑21‑110.** Violations of Sections 38‑21‑60 to 38‑21‑120.

The following are violations of Sections 38‑21‑60 to 38‑21‑120:

(1) The failure to file any statement, amendment, or other material required to be filed pursuant to Section 38‑21‑60 or 38‑21‑70; or

(2) The effectuation or any attempt to effectuate an acquisition or control of, or merger with, a domestic insurer unless the director or his designee has given his approval.

HISTORY: Former 1976 Code Section 38‑29‑120 [1962 Code Section 37‑1410; 1971 (57) 351] recodified as Section 38‑21‑110 by 1987 Act No. 155, Section 1; 1993 Act No. 181,Section 569.

**SECTION 38‑21‑120.** Jurisdiction of courts; service of process.

The courts of this State, including Administrative Law Judge Division as provided by law, are vested with jurisdiction over each person not resident, domiciled, or authorized to do business in this State who files a statement with the department under this chapter and over all actions involving the person arising out of violations of Sections 38‑21‑60 through 38‑21‑120. This person must be considered to have performed acts equivalent to and constituting an appointment by him of the director to be his true and lawful attorney upon whom all lawful process may be served in any action, suit, or proceeding arising out of violations of Sections 38‑21‑60 through 38‑21‑120. Copies of all lawful process must be served on the director and transmitted by registered or certified mail by the director or his designee to the person at his last known address.

HISTORY: Former 1976 Code Section 38‑29‑130 [1962 Code Section 37‑1411; 1971 (57) 351] recodified as Section 38‑21‑120 by 1987 Act No. 155, Section 1; 1993 Act No. 181,Section 570.

**SECTION 38‑21‑125.** Acquisitions of insurers not covered by the Insurance Holding Company Regulatory Act.

(A) For purposes of this section:

(1) "Acquisition" means an agreement, arrangement, or activity the consummation of which results in a person directly or indirectly acquiring the control of another person and includes, but is not limited to, the acquisition of voting securities, the acquisition of assets, bulk reinsurance, and mergers.

(2) An "involved insurer" includes an insurer which acquires or is acquired, is affiliated with an acquirer or acquired, or is the result of a merger.

(B)(1) Except as exempted in item (2), this section applies to an acquisition in which there is a change in control of an insurer authorized to do business in this State.

(2) This section does not apply to:

(a) an acquisition subject to approval or disapproval by the director or his designee pursuant to Section 38‑21‑60;

(b) a purchase of securities solely for investment purposes so long as the securities are not used by voting or otherwise to cause or attempt to cause the substantial lessening of competition in an insurance market in this State. If a purchase of securities results in a presumption of control under Section 38‑21‑10(2), it is not solely for investment purposes unless the commissioner of the insurer's state of domicile accepts a disclaimer of control or affirmatively finds that control does not exist, and the disclaimer action or affirmative finding is communicated by the domiciliary commissioner to the director of or his designee;

(c) the acquisition of a person by another person when both persons are neither directly nor through affiliates primarily engaged in the business of insurance if preacquisition notification is filed with the department in accordance with subsection (C)(1) thirty days before the proposed effective date of the acquisition. However, preacquisition notification is not required for exclusion from this section if the acquisition would be excluded by other provisions of this subsection;

(d) the acquisition of already affiliated persons;

(e) an acquisition if, as an immediate result of the acquisition:

(i) In any market the combined market share of the involved insurers does not exceed five percent of total market.

(ii) There is not an increase in a market share, or in any market the combined market share of the involved insurers does not exceed twelve percent of the total market, and the market share does not increase by more than two percent of the total market. For the purpose of this subitem a market means direct written insurance premium in this State for a line of business as contained in the annual statement required to be filed by insurers licensed to do business in this State;

(f) an acquisition for which a preacquisition notification would be required pursuant to this section due solely to the resulting effect on the ocean marine insurance line of business;

(g) an acquisition of an insurer whose domiciliary commissioner affirmatively finds that:

(i) The insurer is in failing condition.

(ii) There is a lack of feasible alternatives to improving the condition.

(iii) The public benefits of improving the insurer's condition through the acquisition exceed the public benefits that would arise from not lessening competition.

(iv) The findings are communicated by the domiciliary commissioner to the director of or his designee.

(C)(1) An acquisition covered by subsection (B) may be subject to an order pursuant to subsection (E) unless the acquiring person files a preacquisition notification and the waiting period has expired. The acquired person may file a preacquisition notification. The director or his designee shall give confidential treatment to information submitted under subsection (C) in the same manner provided in Section 38‑21‑290.

(2) The preacquisition notification must be in a form and contain information prescribed by the National Association of Insurance Commissioners relating to those markets which, under subsection B(2)(e), cause the acquisition not to be exempted from the provisions of this section. The director or his designee may require additional material and information necessary to determine whether the proposed acquisition, if consummated, violates the competitive standard of subsection (D). The required information may include an opinion of an economist as to the competitive impact of the acquisition in this State accompanied by a summary of the education and experience of the person indicating ability to render an informed opinion.

(3) The required waiting period begins on the date of receipt of the department of a preacquisition notification and ends on the earlier of the thirtieth day after the date of receipt or termination of the waiting period by the Director or his designee. Before the end of the waiting period, the director or his designee on a one‑time basis may require the submission of additional needed information relevant to the proposed acquisition. If he does, the waiting period ends on the earlier of the thirtieth day after receipt of the additional information by the department or termination of the waiting period by the director or his designee.

(D)(1) The director or his designee may enter an order under subsection (E) (1) with respect to an acquisition if there is substantial evidence that the effect of the acquisition may be to lessen competition substantially in a line of insurance in this State or tend to create a monopoly or if the insurer fails to file adequate information in compliance with subsection (C).

(2) In determining whether a proposed acquisition violates the competitive standard of item (1), the director or his designee shall consider the following:

(a) An acquisition covered under subsection (B) involving two or more insurers competing in the same market is prima facie evidence of a violation of the competitive standards:

(i) if the market is highly concentrated and the involved insurers possess the following shares of the market:

Insurer A Insurer B

4% 4% or more

10% 2% or more

15% 1% or more

(ii) if the market is not highly concentrated and the involved insurers possess the following shares of the market:

Insurer A Insurer B

5% 5% or more

10% 4% or more

15% 3% or more

19% 1% or more

A highly concentrated market is one of which the share of the four largest insurers is seventy‑five percent or more of the market. Percentages not shown in the tables are interpolated proportionately to the percentages that are shown. If more than two insurers are involved, exceeding the total of the two columns in the table is prima facie evidence of violation of the competitive standard in item (1). For the purpose of this item, the insurer with the largest share of the market is Insurer A.

(b) It must be determined whether there is a significant trend toward increased concentration in the market. The trend exists when the aggregate market share of a grouping of the largest insurers in the market, from the two largest to the eight largest, has increased by seven percent or more of the market over time extending from a base year five to ten years before the acquisition up to the time of the acquisition. An acquisition or merger covered under subsection (B) involving two or more insurers competing in the same market is prima facie evidence of a violation of the competitive standard in item (1) if all of the following exist:

(i) There is a significant trend toward increased concentration in the market.

(ii) One of the insurers involved is one of the insurers in a grouping of the large insurers showing the requisite increase in the market share.

(iii) Another involved insurer's market is two percent or more.

(c) Even though an acquisition is not prima facie violative of the competitive standard under this item, the director or his designee may establish the requisite anticompetitive effect based upon other substantial evidence. Even though an acquisition is prima facie violative of the competitive standard under this item, a party may establish the absence of the requisite anticompetitive effect based upon other substantial evidence. Relevant factors in making a determination include, but are not limited to: market shares, volatility of the ranking of market leaders, number of competitors, concentration, trend of concentration in the industry, and ease of entry and exit into the market.

(d) For the purpose of this item:

(i) "Insurer" includes a company or group of companies under common management, ownership, or control.

(ii) "Market" means the relevant product and geographical markets. In determining the relevant product and geographical markets the director or his designee shall give due consideration to the definitions or guidelines, if any, promulgated by the National Association of Insurance Commissioners and to information, if any, submitted by parties to the acquisition. In the absence of sufficient information to the contrary, the relevant product market is assumed to be the direct written insurance premium for a line of business. The line is that used in the annual statement required to be filed by insurers doing business in this State, and the relevant geographical market is assumed to be this State.

(iii) The burden of showing prima facie evidence of a violation of the competitive standard rests upon the director or his designee.

(3) An order must not be entered under subsection (E)(1) if the acquisition will:

(a) yield substantial economies of scale or economies in resource utilization that cannot be achieved feasibly in another way, and the public benefits which would arise from the economies exceed the public benefits which would arise from not lessening competition; or

(b) substantially increase the availability of insurance, and the public benefits of the increase exceed the public benefits which would arise from not lessening competition.

(E)(1)(a) If an acquisition violates the standards of this section, the director or his designee may enter an order:

(i) requiring an involved insurer to stop doing business in this State with respect to the line or lines of insurance involved in the violation; or

(ii) denying the application of an acquired or acquiring insurer for a license to do business in this State.

(b) An order must not be entered unless all of the following exist:

(i) There is a hearing.

(ii) Notice of the hearing is issued before the end of the waiting period and not less than fifteen days before the hearing.

(iii) The hearing is concluded and the order is issued no later than sixty days after the end of the waiting period. An order must be accompanied by a written decision of the director or his designee setting forth his findings of fact and conclusions of law.

(c) An order does not become final earlier than thirty days after it is issued. Before it becomes final the involved insurer may submit a plan to remedy the anticompetitive impact of the acquisition within a reasonable time. Based upon the plan or other information, the director or his designee shall specify the conditions, if any, under the time period during which the aspects of the acquisition causing a violation of the standards of this section would be remedied and the order vacated or modified.

(d) An order does not apply if the acquisition is not consummated.

(2) A person who violates an order under item (1), while the order is in effect, after notice and hearing, and upon order of the director or his designee, is subject at his discretion to one or more of the following:

(a) monetary penalty of not more than ten thousand dollars for each day of violation;

(b) suspension or revocation of license.

(3) An insurer or other person who fails to make a filing required by this section and who fails to demonstrate a good faith effort to comply with a filing requirement is subject to a fine of not more than fifty thousand dollars.

(F) Sections 38‑21‑320, 38‑21‑330, and 38‑21‑350 do not apply to acquisitions under subsection (B).

HISTORY: 1991 Act No. 13, Section 2; 1993 Act No. 181, Section 571.

**SECTION 38‑21‑130.** Registration of members of insurance holding company systems.

Every insurer authorized to do business in this State which is a member of an insurance holding company system shall register with the department, except a foreign insurer subject to registration requirements and standards adopted by statute or regulation in the jurisdiction of its domicile which are substantially similar to those contained in this chapter.

Any insurer which is subject to registration under this chapter shall register within fifteen days after it becomes subject to registration, and annually thereafter by March first of each year for the previous calendar year, unless the director or his designee for good cause shown extends the time for registration, and then within the extended time. The director or his designee may require any authorized insurer which is a member of a holding company system which is not subject to registration under this section to furnish a copy of the registration statement or other information filed by the insurance company with the insurance regulatory authority of its domiciliary jurisdiction.

HISTORY: Former 1976 Code Section 38‑29‑140 [1962 Code Section 37‑1412; 1971 (57) 351; Section 1. 1986 Act No. 426, Section 8] recodified as Section 38‑21‑130 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 572.

**SECTION 38‑21‑140.** Registration statement.

Every insurer subject to registration shall file the registration statement on a form prescribed by the director or his designee which must contain the following current information:

(1) capital structure, general financial condition, ownership, and management of the insurer and a person controlling the insurer;

(2) identity and relationship of every member of the insurance holding company system;

(3) the following agreements in force and transactions currently outstanding or which have occurred during the last calendar year between the insurer and its affiliates:

(a) loans, other investments, or purchases, sales, or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;

(b) purchases, sales, or exchanges of assets;

(c) transactions not in the ordinary course of business;

(d) guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;

(e) management agreements, service contracts, and cost‑sharing arrangements;

(f) reinsurance agreements;

(g) dividends and other distributions to shareholders;

(h) consolidated tax allocation agreements.

(4) pledge of the insurer's stock, including stock of a subsidiary or controlling affiliate, for a loan made to a member of the insurance holding company system;

(5) other matters concerning transactions between registered insurers and affiliates included in registration forms adopted or approved by the director or his designee.

HISTORY: Former 1976 Code Section 38‑29‑150 [1962 Code Section 37‑1413; 1971 (57) 351; 1986 Act No. 426, Section 9] recodified as Section 38‑21‑140 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 14; 1993 Act No. 181, Section 573.

**SECTION 38‑21‑150.** Summary outlining changes since previous registration statement required.

All registration statements shall contain a summary outlining all items in the current registration statement representing changes from the prior registration statement.

HISTORY: Former 1976 Code Section 38‑29‑155 [1986 Act No. 426, Section 10] recodified as Section 38‑21‑150 by 1987 Act No. 155, Section 1.

**SECTION 38‑21‑160.** Information which need not be disclosed in registration statement.

No information need be disclosed on the registration statement filed pursuant to Section 38‑21‑140 if the information is not material for the purposes of this chapter. Unless the department by regulation or by order of the director or his designee provides otherwise, sales, purchases, exchanges, loans or extension of credit, or investments involving one‑half of one percent or less of an insurer's admitted assets as of the previous December thirty‑first are not considered material for purposes of Sections 38‑21‑140 through 38‑21‑240.

HISTORY: Former 1976 Code Section 38‑29‑160 [1962 Code Section 37‑1414; 1971 (57) 351] recodified as Section 38‑21‑160 by 1987 Act No. 155, Section 1; 1993 Act No. 181,Section 574.

**SECTION 38‑21‑170.** Dividends and distributions must be reported.

(A) Subject to Section 38‑21‑270, each registered insurer shall report to the department all dividends and other distributions to shareholders within five business days following the declaration of it and at least fifteen days before the payment of it. The department promptly shall consider this report as information, and these considerations must include the factors as provided in Section 38‑21‑260. If an insurer's surplus as regards policyholders is determined by the department not to be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the department shall have the authority, within the fifteen‑day period before payment of it, to limit the amount of the dividends or distributions.

(B) No dividend or other distribution may be declared or paid at any time when the surplus of the insurer is less than the surplus required by law for the kinds of business authorized to be transacted by such insurer, nor when the payment of a dividend or other distribution would reduce its surplus to less than such amount.

(C) Except in the case of share dividends, surplus for determining whether dividends or other distributions may be declared shall not include surplus arising from unrealized appreciation in value, or revaluation of assets, or from unrealized profits upon investments.

(D) No dividend or other distribution may be declared or paid contrary to any restriction contained in the insurer's articles of incorporation.

(E) Notwithstanding any other provision of law, the insurer may declare, conditional upon the department's approval, a dividend or other distribution to shareholders from surplus, and such declaration confers no rights until the department:

(1) has approved the payment of the dividend or distribution; or

(2) has not disapproved the payment within fifteen days after receiving notice of the declaration.

HISTORY: Former 1976 Code Section 38‑29‑165 [1986 Act No. 426, Section 11] recodified, 1987 Act No. 155, Section 1; 1993 Act No. 70, Section 4; 1993 Act No. 181, Section 575; 2002 Act No. 228, Section 3, eff May 1, 2002; 2003 Act No. 73, Section 3, eff June 25, 2003.

**SECTION 38‑21‑180.** Information from persons within insurance holding company.

Any persons within an insurance holding company subject to registration are required to provide complete and accurate information to an insurer, where such information is reasonably necessary to enable the insurer to comply with the provisions of this chapter.

HISTORY: Former 1976 Code Section 38‑29‑170 [1962 Code Section 37‑1415; 1971 (57) 351; 1986 Act No. 426, Section 12] recodified as Section 38‑21‑180 by 1987 Act No. 155, Section 1.

**SECTION 38‑21‑190.** Termination of registration.

The director or his designee shall terminate the registration of an insurer that is no longer a member of an insurance holding company system.

HISTORY: Former 1976 Code Section 38‑29‑180 [1962 Code Section 37‑1416; 1971 (57) 351] recodified as Section 38‑21‑190 by 1987 Act No. 155, Section 1; 1993 Act No. 181,Section 576.

**SECTION 38‑21‑200.** Filing of consolidated or individual registration statements by affiliated insurers.

The director or his designee may require or allow two or more affiliated insurers subject to registration to file a consolidated registration statement.

HISTORY: Former 1976 Code Section 38‑29‑190 [1962 Code Section 37‑1417; 1971 (57) 351; 1986 Act No. 426, Section 13] recodified as Section 38‑21‑200 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 577.

**SECTION 38‑21‑210.** Filing of registration statement on behalf of affiliated insurer.

The director or his designee may allow an insurer which is authorized to do business in this State and which is part of an insurance holding company system to register on behalf of an affiliated insurer which is required to register under Section 38‑21‑130 and to file all information and material required to be filed under Sections 38‑21‑130 through 38‑21‑240.

HISTORY: Former 1976 Code Section 38‑21‑210 [1947 (45) 322; 1952 Code Section 37‑871; 1962 Code Section 37‑871] recodified as Section 38‑37‑210 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑200 [1962 Code Section 37‑1418; 1971 (57) 351] recodified as Section 38‑21‑210 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 578.

**SECTION 38‑21‑220.** Disclaimer of affiliation.

A person may file with the department a disclaimer of affiliation with an authorized insurer or a disclaimer may be filed by an insurer or a member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between the person and the insurer as well as the basis for disclaiming this affiliation. After a disclaimer has been filed, the insurer is relieved of any duty to register or report under Sections 38‑21‑130 through 38‑21‑240 which may arise out of the insurer's relationship with that person unless and until the director or his designee disallows the disclaimer. The director or his designee may disallow the disclaimer only after furnishing all parties in interest with notice and an opportunity to be heard and after making specific findings of fact to support the disallowance.

HISTORY: Former 1976 Code Section 38‑21‑220 [1947 (45) 322; 1952 Code Section 37‑872; 1962 Code Section 37‑872] recodified as Section 38‑37‑220 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑210 [1962 Code Section 37‑1420; 1971 (57) 351] recodified as Section 38‑21‑220 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 579.

**SECTION 38‑21‑230.** Failure to file registration statement or amendment.

The failure to file a registration statement or any summary of such registration as required by this chapter within the time specified for filing constitutes a violation of these sections.

HISTORY: Former 1976 Code Section 38‑21‑230 [1947 (45) 322; 1952 Code Section 37‑873; 1962 Code Section 37‑873] recodified as Section 38‑37‑230 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑220 [1962 Code Section 37‑1421; 1971 (57) 351; 1986 Act No. 426, Section 14; recodified as Section 38‑21‑230 by 1987 Act No. 155, Section 1.

**SECTION 38‑21‑240.** Exemptions from registration statement provisions.

The provisions of Sections 38‑21‑130 to 38‑21‑240 do not apply to any insurer, information, or transaction if and to the extent that the department by regulation or the director or his designee by order exempts it from these sections.

HISTORY: Former 1976 Code Section 38‑21‑240 [1947 (45) 322; 1952 Code Section 37‑874; 1962 Code Section 37‑874] recodified as Section 38‑37‑240 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑230 [1962 Code Section 37‑1419; 1971 (57) 351] recodified as Section 38‑21‑240 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 580.

**SECTION 38‑21‑250.** Transactions between registered insurers and their affiliates.

(1) Transactions within a holding company system to which an insurer subject to registration is a party are subject to the following standards:

(i) The terms must be fair and reasonable.

(ii) Charges or fees for services performed must be reasonable.

(iii) Expenses incurred and payment received must be allocated to the insurer in conformity with customary insurance accounting practices consistently applied.

(iv) The books, accounts, and records of each party to all transactions must be so maintained as to clearly and accurately disclose the nature and details of the transactions including such accounting information as is necessary to support the reasonableness of the charges or fees to the respective parties.

(v) The insurer's surplus as regards policyholders following any dividends or distributions to shareholder affiliates must be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(2) The following transactions involving a domestic insurer and any person in its holding company system may not be entered into unless the insurer has notified the department in writing of its intention to enter into the transaction at least thirty days prior thereto, or such shorter period as the director or his designee may permit, and the director or his designee has not disapproved it within such period:

(i) sales, purchases, exchanges, loans, or extensions of credit, guarantees, or investments if the transactions are equal to or exceed:

(a) with respect to nonlife insurers, the lesser of three percent of the insurer's admitted assets or twenty‑five percent of surplus as regards policyholders;

(b) with respect to life insurers, three percent of the insurer's admitted assets, each as of the thirty‑first day of December next preceding;

(ii) loans or extensions of credit to any person who is not an affiliate, where the insurer makes the loans or extensions of credit with the agreement or understanding that the proceeds of the transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, to purchase assets of, or to make investments in, any affiliate of the insurer making the loans or extensions of credit as long as such transactions are equal to or exceed:

(a) with respect to nonlife insurers, the lesser of three percent of the insurer's admitted assets or twenty‑five percent of surplus as regards policyholders;

(b) with respect to life insurers, three percent of the insurer's admitted assets, each as of the thirty‑first day of December next preceding;

(iii) reinsurance agreements or modifications thereto in which the reinsurance premium or a change in the insurer's liabilities equals or exceeds five percent of the insurer's surplus as regards policyholders, as of the thirty‑first day of December next preceding, including those agreements which may require as consideration the transfer of assets from an insurer to a nonaffiliate, if an agreement or understanding exists between the insurer and nonaffiliate that any portion of such assets will be transferred to one or more affiliates of the insurer;

(iv) all management agreements, service contracts, and all cost‑sharing arrangements; and

(v) any material transactions, specified by regulation of the department, which the director or his designee determines may adversely affect the interests of the insurer's policyholders.

Nothing herein authorizes or permits any transactions which, in the case of an insurer, not a member of the same holding company system, would be otherwise contrary to law.

(3) A domestic insurer may not enter into transactions, which are part of a plan or series of like transactions with persons within the holding company system, if the purpose of those separate transactions is to avoid the statutory threshold amount and thus avoid the review that would occur otherwise. If the director or his designee determines that such separate transactions were entered into over any twelve‑month period for such purpose, he may exercise his authority under Section 38‑21‑340.

(4) The director or his designee, in reviewing transactions pursuant to subsection (2), shall consider whether the transactions comply with the standards set forth in subsection (1) and whether they may adversely affect the interests of policyholders.

(5) The department must be notified within thirty days of any investment of the domestic insurer in any one corporation if the total investment in the corporation by the insurance holding company system exceeds ten percent of the corporation's voting securities.

HISTORY: Former 1976 Code Section 38‑21‑250 [1947 (45) 322; 1952 Code Section 37‑875; 1962 Code Section 37‑875] recodified as Section 38‑37‑250 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑240 [1962 Section 37‑1422; 1971 (57) 251; 1986 Act No. 426, Section 15] recodified as Section 38‑21‑250 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 581.

**SECTION 38‑21‑260.** Determining adequacy of insurer's surplus.

For purposes of this chapter, in determining whether an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the following factors, among others, are considered:

(1) the size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, insurance in force, and other appropriate criteria;

(2) the extent to which the insurer's business is diversified among the several lines of insurance;

(3) the number and size of risks insured in each line of business;

(4) the extent of the geographical dispersion of the insured risks;

(5) the nature and extent of the reinsurance program;

(6) the quality, diversification, and liquidity of the investment portfolio;

(7) the recent past and projected future trend in the size of the insurer's investment portfolio;

(8) the surplus as regards policyholders maintained by other comparable insurers;

(9) the adequacy of the reserves;

(10) the source of the insurer's earnings and the extent to which the reported earnings include extraordinary items, such as surplus relief reinsurance transactions and reserve destrengthening; and

(11) The quality and liquidity of investments in affiliates.

The director or his designee may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in his judgment the investment so warrants.

HISTORY: Former 1976 Code Section 38‑21‑260 [1947 (45) 322; 1952 Code Section 37‑876; 1962 Code Section 37‑876] recodified as Section 38‑37‑260 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑250 [1962 Code Section 37‑1423; 1971 (57) 351; 1986 Act No. 426, Section 16] recodified as Section 38‑21‑260 by 1987 Act No. 155, Section 1; 1993 Act No. 70, Section 5; 1993 Act No. 181, Section 582.

**SECTION 38‑21‑270.** Notice and approval of extraordinary dividends or distributions required.

(A) No domestic insurer may pay an extraordinary dividend or make another extraordinary distribution to its shareholders until the director or his designee:

(1) has approved the payment, or

(2) has not disapproved the payment within fifteen days after receiving notice of the declaration.

(B)(1) For purposes of this section, an extraordinary dividend or distribution includes a dividend or distribution of cash or other property whose fair market value together with that of other dividends or distributions made within the preceding twelve months:

(a) when paid from other than earned surplus exceeds the lesser of:

(i) ten percent of the insurer's surplus as regards policyholders as shown in the insurer's most recent annual statement; or

(ii) the net gain from operations for life insurers, or the net income, for nonlife insurers, not including net realized capital gains or losses as shown in the insurer's most recent annual statement;

(b) when paid from earned surplus exceeds the greater of:

(i) ten percent of the insurer's surplus as regards policyholders as shown in the insurer's most recent annual statement; or

(ii) the net gain from operations for life insurers, or the net income, for nonlife insurers, not including net realized capital gains or losses as shown in the insurer's most recent annual statement.

(2) It does not include pro rata distributions of a class of the insurer's own securities.

(C) An insurer may declare an extraordinary dividend or distribution which is conditional upon the approval of the director or his designee. The declaration confers no rights upon shareholders until the director or his designee:

(1) has approved the payment of the dividend or distribution, or

(2) has not disapproved the payment within fifteen days after receiving notice of the declaration.

HISTORY: Former 1976 Code Section 38‑21‑270 [1947 (45) 322; 1952 Code Section 37‑877; 1962 Code Section 37‑877] recodified as Section 38‑37‑270 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑260 [1962 Code Section 37‑1424; 1971 (57) 351; 1986 Act No. 426, Section 17] recodified as Section 38‑21‑270 by 1987 Act No. 155, Section 1; 1988 Act No. 370; 1991 Act No. 13, Section 15; 1993 Act No. 70, Section 6; 1993 Act No. 181, Section 583; 2002 Act No. 228, Section 4, eff May 1, 2002; 2003 Act No. 73, Section 4, eff June 25, 2003.

**SECTION 38‑21‑280.** Power of director to compel production of information.

(a) In addition to his powers relating to examinations or investigations of insurers, the director or his designee has the power to order an insurer registered under Sections 38‑21‑130 through 38‑21‑240 to produce records, books, or other information papers in the possession of the insurer or its affiliates as considered necessary to ascertain the insurer's financial condition or legality of its conduct. If the insurer fails to comply with the order, the director or his designee has, in addition to powers prescribed in Section 38‑21‑340, the power to examine the affiliates to obtain this information.

(b) The director may retain at the registered insurer's expense attorneys, actuaries, accountants, and other experts not otherwise a part of the department's staff reasonably necessary to assist in the conduct of the examination under subsection (a). Any persons so retained are under the direction and control of the director or his designee and must act in a purely advisory capacity.

(c) Each registered insurer producing for examination records, books, and papers pursuant to subsection (a) is liable for and must pay the expense of the examination.

HISTORY: Former 1976 Code Section 38‑21‑280 [1947 (45) 322; 1952 Code Section 37‑878; 1962 Code Section 37‑878] recodified as Section 38‑37‑280 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑270 [1962 Code Section 37‑1425; 1971 (57) 351; 1986 Act No. 426, Section 18] recodified as Section 38‑21‑280 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 584.

**SECTION 38‑21‑290.** Information must be kept confidential.

All information, documents, and copies thereof obtained by or disclosed to the director or any other person in the course of an examination or investigation made pursuant to Section 38‑21‑280 and all information reported pursuant to Sections 38‑21‑130 through 38‑21‑240 must be given confidential treatment and is not subject to subpoena and may not be made public by the director, the National Association of Insurance Commissioners, or any other persons, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains unless the director or his designee, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interests of policyholders, shareholders, or the public will be served by the publication thereof, in which event he may publish all or any part thereof in the manner he considers appropriate.

HISTORY: Former 1976 Code Section 38‑21‑290 [1947 (45) 322; 1952 Code Section 37‑879; 1962 Code Section 37‑879] recodified as Section 38‑37‑290 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑280 [1962 Code Section 37‑1426; 1971 (57) 351; 1986 Act No. 426, Section 19] recodified as Section 38‑21‑290 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 585.

**SECTION 38‑21‑300.** Regulations and orders of director.

The department or the director, as appropriate, may, upon notice and opportunity for all interested persons to be heard, issue regulations and orders necessary to carry out the provisions of this chapter.

HISTORY: Former 1976 Code Section 38‑21‑300 [1947 (45) 322; 1952 Code Section 37‑880; 1962 Code Section 37‑880] recodified as Section 38‑37‑300 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑290 [1962 Code Section 37‑1427; 1971 (57) 351] recodified as Section 38‑21‑300 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 586.

**SECTION 38‑21‑310.** Enjoining violations of chapter, regulations, or orders.

Whenever it appears to the director or his designee that an insurer or a director, officer, employee, or agent of it has committed or is about to commit a violation of this chapter or of any regulation by the department or order issued by the director or his designee hereunder, the director or his designee may apply to the Circuit Court for the county in which the principal office of the insurer is located or if the insurer has no such office in this State then to the Circuit Court for Richland County for an order enjoining the insurer or its director, officer, employee, or agent from violating or continuing to violate this chapter or any regulation or order and for any other equitable relief which the nature of the case and the interests of the insurer's policyholders, creditors, and shareholders or the public may require.

HISTORY: Former 1976 Code Section 38‑21‑310 [1947 (45) 322; 1952 Code Section 37‑881; 1962 Code Section 37‑881] recodified as Section 38‑37‑310 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑29‑300 [1962 Code Section 37‑1428; 1971 (57) 351] recodified as Section 38‑21‑310 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 587.

**SECTION 38‑21‑320.** Voting of securities acquired in violation of chapter, regulations, or orders may be enjoined.

No security which is the subject of an agreement or arrangement regarding acquisition, or which is acquired or to be acquired, in contravention of this chapter or of any regulation issued by the department or order issued by the director or his designee hereunder may be voted at any shareholders' meetings or may be counted for quorum purposes, and any action of shareholders requiring the affirmative vote of a percentage of shares may be taken as though these securities were not issued and outstanding. No action taken at a shareholders' meeting may be invalidated by the voting of these securities, unless the action would materially affect control of the insurer or unless the courts of this State have so ordered. If an insurer or the director or his designee has reason to believe that any security of the insurer has been or is about to be acquired in contravention of this chapter or of any regulation issued by the department or order issued by the director or his designee hereunder, the insurer or the director or his designee may apply to the Circuit Court for Richland County or to the Circuit Court for the county in which the insurer has its principal place of business to enjoin any offer, request, invitation, agreement, or acquisition made in contravention of Sections 38‑21‑60 through 38‑21‑120 or any regulation issued by the department or order issued by the director or his designee thereunder, to enjoin the voting of any security so acquired, to void any vote of the security already cast at any meeting of shareholders, and for any other equitable relief which the nature of the case and the interests of the insurer's policyholders, creditors, and shareholders or the public may require.

HISTORY: Former 1976 Code Section 38‑21‑320 [1947 (45) 322; 1952 Code Section 37‑882; 1962 Code Section 37‑882] has no comparable provisions in 1987 Act No. 155] Former 1976 Code Section 38‑29‑310 [1962 Code Section 37‑1429; 1971 (57) 351] recodified as Section 38‑21‑320 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 588.

**SECTION 38‑21‑330.** Seizure or sequestration of securities acquired in violation of chapter, regulations, or order.

In a case where a person has acquired or is proposing to acquire voting securities in violation of this chapter, or any regulation issued by the department or order issued by the director or his designee hereunder, the Circuit Court for Richland County or the Circuit Court for the county in which the insurer has its principal place of business may, on notice which the court considers appropriate, upon the application of the insurer or the director or his designee, seize or sequester any voting securities of the insurer owned directly or indirectly by this person and issue orders appropriate to effectuate this chapter. Notwithstanding any other provision of law, for the purposes of this chapter the situs of the ownership of the securities of domestic insurers is considered to be in this State.

HISTORY: Former 1976 Code Section 38‑29‑320 [1962 Code Section 37‑1430; 1971 (57) 351] recodified as Section 38‑21‑330 by 1987 Act No. 155, Section 1; 1993 Act No. 181,Section 589.

**SECTION 38‑21‑340.** Criminal prosecutions; penalties.

(a) Any insurer failing, without just cause, to file any registration statement or summary thereof as required in this chapter is required, after notice and hearing, to pay a penalty of one thousand dollars for each day's delay, to be recovered by the director or his designee, and the penalty so recovered must be paid into the general fund of the state. The maximum penalty under this section is thirty thousand dollars. The director or his designee may reduce the penalty if the insurer demonstrates to the director or his designee that the imposition of the penalty would constitute a financial hardship to the insurer.

(b) Every director or officer of an insurance holding company system who knowingly violates, participates in, or assents to, or who knowingly permits any of the officers or agents of the insurer to engage in transactions or make investments which have not been properly reported or submitted pursuant to this chapter or which violate this chapter, shall pay, in their individual capacity, a civil forfeiture of not more than ten thousand dollars per violation, after notice and hearing before the director or his designee. In determining the amount of the civil forfeiture, the director or his designee shall take into account the appropriateness of the forfeiture with respect to the gravity of the violation, the history of previous violations, and other matters as justice may require.

(c) Whenever it appears to the director or his designee that any insurer subject to this chapter or any director, officer, employee, or agent thereof has engaged in any transaction or entered into a contract which is subject to Sections 38‑21‑250 through 38‑21‑270 and which would not have been approved had such approval been requested, the director or his designee may order the insurer to cease and desist immediately any further activity under that transaction or contract. After notice and hearing the director or his designee may also order the insurer to void any such contracts and restore the status quo if such action is in the best interest of the policyholders, creditors, or the public.

(d) Whenever it appears to the director or his designee that an insurer or a director, officer, employee, or agent of it has committed a willful violation of this chapter, the director or his designee may, in addition to other powers prescribed in this section, cause criminal proceedings to be instituted in the Circuit Court for the county in which the principal office of the insurer is located or, if the insurer has no such office in the state, then in the Circuit Court for Richland County against the insurer or the responsible director, officer, employee, or agent of it. An insurer which willfully violates this chapter may be fined not more than fifty thousand dollars. An individual who willfully violates this chapter is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed ten thousand dollars or be imprisoned for a term not to exceed two years, or both.

(e) Any officer, director, or employee of an insurance holding company system who willfully and knowingly subscribes to or makes or causes to be made any false statements or false reports or false filings with the intent to deceive the director or his designee in the performance of his duties under this chapter is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than two years or fined ten thousand dollars, or both. Any fines imposed must be paid by the officer, director, or employee in his individual capacity.

(f) Whenever it appears to the director or his designee that any insurer has committed a violation of this chapter, or that any person has committed a violation of this chapter which makes continued operation of the insurer contrary to the interests of policyholders or the public, the director or his designee may, after giving notice and an opportunity to be heard, determine to suspend, revoke, or refuse to renew such insurer's license or authority to do business in this State for such period as he finds is required for the protection of policyholders or the public. Any such determination must be accompanied by specific findings of fact and conclusions of law.

HISTORY: Former 1976 Code Section 38‑29‑330 [1962 Code Section 37‑1431; 1971 (57) 351; 1986 Act No. 426, Section 20] recodified as Section 38‑21‑340 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 590.

**SECTION 38‑21‑350.** Director may take possession of property and conduct business of insurer.

Whenever it appears to the director or his designee that a person has committed a violation of this chapter which so impairs the financial condition of a domestic insurer as to threaten insolvency or make the further transaction of business by it hazardous to its policyholders, creditors, or the public, then the director or his designee may proceed as provided in Chapter 27 of this title to take possession of the property of the insurer and to conduct its business.

HISTORY: Former 1976 Code Section 38‑29‑340 [1962 Code Section 37‑1432; 1971 (57) 351; 1986 Act No. 426, Section 21] recodified as Section 38‑21‑350 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 591.

**SECTION 38‑21‑360.** Authority of receiver to recover certain distributions and payments.

(a) If an order for liquidation or rehabilitation of a domestic insurer has been entered, the receiver appointed under the order has a right to recover on behalf of the insurer (i) from any parent corporation or holding company or person or affiliate who otherwise controlled the insurer, the amount of distributions (other than distributions of shares of the same class of stock) paid by the insurer on its capital stock, or (ii) any payment in the form of a bonus, termination settlement, or extraordinary lump sum salary adjustment made by the insurer or its subsidiary to a director, officer, or employee, where the distribution or payment pursuant to (i) or (ii) is made at any time during the one year preceding the petition for liquidation, conservation, or rehabilitation, as the case may be, subject to the limitations of subsections (b), (c), and (d).

(b) No such distribution may be recoverable if the parent or affiliate shows that when paid the distribution was lawful and reasonable and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.

(c) Any person who was a parent corporation or holding company or a person who otherwise controlled the insurer or affiliate at the time the distributions were paid is liable up to the amount of distributions or payments under subsection (a). Any person who otherwise controlled the insurer at the time the distributions were declared is liable up to the amount of distributions he would have received if they had been paid immediately. If two or more persons are liable with respect to the same distributions, they are jointly and severally liable.

(d) The maximum amount recoverable under this section is the amount needed in excess of all other available assets of the impaired or insolvent insurer to pay the contractual obligations of the impaired or insolvent insurer and to reimburse any guaranty funds.

(e) To the extent that any person liable under subsection (c) is insolvent or otherwise fails to pay claims due from it pursuant to such subsection, its parent corporation or holding company or person who otherwise controlled it at the time the distribution was paid is jointly and severally liable for any resulting deficiency in the amount recovered from the parent corporation or holding company or person who otherwise controlled it.

HISTORY: Former 1976 Code Section 38‑29‑350 [1962 Code Section 37‑1433; 1971 (57) 351; 1986 Act No. 426, Section 22] recodified as Section 38‑21‑360 by 1987 Act No. 155, Section 1.

**SECTION 38‑21‑370.** Judicial review of action, order, or decision of director.

Any action, order, or decision of the director or his designee pursuant to this chapter is subject to judicial review by the Administrative Law Judge Division as provided by law.

HISTORY: Former 1976 Code Section 38‑29‑360 [1962 Code Section 37‑1434; 1971 (57) 351; 1987 Act No. 60, Section 3] recodified as Section 38‑21‑370 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 592.

**SECTION 38‑21‑390.** Severability.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and for this purpose the provisions of this chapter are separable.

HISTORY: Former 1976 Code Section 38‑29‑380 [1962 Code Section 37‑1436; 1971 (57) 351] recodified as Section 38‑21‑390 by 1987 Act No. 155, Section 1.