COMMITTEE REPORT

January 24, 2019

**S. 75**

Introduced by Senator Cromer

S. Printed 1/24/19--S. [SEC 1/25/19 11:59 AM]

Read the first time January 8, 2019.

**THE COMMITTEE ON BANKING AND INSURANCE**

To whom was referred a Bill (S. 75) to amend the Code of Laws of South Carolina, 1976, by adding Article 9 to Chapter 13, Title 38 so as to require an insurer or an insurance group to, etc., respectfully

**REPORT:**

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

RONNIE W. CROMER for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 9 TO CHAPTER 13, TITLE 38 SO AS TO REQUIRE AN INSURER OR AN INSURANCE GROUP TO SUBMIT A CORPORATE GOVERNANCE ANNUAL DISCLOSURE AND ESTABLISH CERTAIN REQUIREMENTS FOR THE DISCLOSURE, TO DEFINE NECESSARY TERMS, TO AUTHORIZE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE TO PROMULGATE REGULATIONS RELATED TO THE DISCLOSURE, TO PROVIDE CERTAIN CONFIDENTIALITY REQUIREMENTS FOR INFORMATION SUBMITTED TO THE DIRECTOR AND TO PROHIBIT THE DIRECTOR OR A PERSON WHO RECEIVES INFORMATION RELATED TO THE ANNUAL DISCLOSURE FROM TESTIFYING IN A PRIVATE CIVIL ACTION CONCERNING THE CONFIDENTIAL INFORMATION, TO AUTHORIZE THE DIRECTOR TO RETAIN THIRD PARTY CONSULTANTS AND PRESCRIBE CERTAIN RULES FOR THE CONSULTANTS, TO PROVIDE A PENALTY FOR AN INSURER WHO FAILS TO FILE THE CORPORATE GOVERNANCE ANNUAL DISCLOSURE, AND TO SET AN EFFECTIVE DATE; BY ADDING SECTION 38‑21‑295 SO AS TO AUTHORIZE THE DIRECTOR TO ACT AS THE GROUP‑WIDE SUPERVISOR FOR AN INTERNATIONALLY ACTIVE INSURANCE GROUP UNDER CERTAIN CIRCUMSTANCES, TO ESTABLISH A PROCEDURE FOR THE DIRECTOR TO DETERMINE WHETHER HE MAY ACT AS THE GROUP‑WIDE SUPERVISOR OR ACKNOWLEDGE ANOTHER REGULATORY OFFICIAL TO ACT AS THE GROUP‑WIDE SUPERVISOR, TO AUTHORIZE THE DIRECTOR TO ENGAGE IN CERTAIN ACTIVITIES AS GROUP‑WIDE SUPERVISOR, AND TO AUTHORIZE THE DIRECTOR TO PROMULGATE REGULATIONS; AND TO AMEND SECTION 38‑21‑10 SO AS TO DEFINE THE TERMS “DIRECTOR”, “GROUP‑WIDE SUPERVISOR”, AND “INTERNATIONALLY ACTIVE INSURANCE GROUP”.

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

SECTION 1. Chapter 13, Title 38 is amended by adding:

“Article 9

Corporate Governance Annual Disclosure

Section 38‑13‑1000. (A) The purpose of this article is to:

(1) provide the director a summary of an insurer’s or insurance group’s corporate governance structure, policies, and practices to permit the director to gain and maintain an understanding of the insurer’s corporate governance framework;

(2) outline the requirements for completing a corporate governance annual disclosure and submitting the disclosure to the director; and

(3) provide for the confidential treatment of the corporate governance annual disclosure and related information that will contain confidential and sensitive information related to an insurer or insurance group’s internal operations and proprietary and trade secret information which, if made public, could potentially cause the insurer or insurance group competitive harm or disadvantage.

(B) Nothing in this article may be construed to prescribe or impose corporate governance standards and internal procedures beyond what is required under applicable state corporate law. Notwithstanding the foregoing, nothing in this article may be construed to limit the director’s authority or the rights or obligations of third parties, pursuant to Section 38‑13‑10, et seq.

(C) The requirements of this article apply to all insurers domiciled in this State and do not apply to risk retention groups or captive insurance companies.

Section 38‑13‑1010. For the purposes of this article:

(1) ‘Corporate governance annual disclosure’ or ‘CGAD’ means a confidential report filed by an insurer or insurance group made in accordance with the requirements of this article.

(2) ‘Director’ means the Director of the Department of Insurance or his designee.

(3) ‘Insurance group’ means insurers and affiliates included within an insurance holding company system as defined in Section 38-21-10.

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

(5) ‘NAIC’ means the National Association of Insurance Commissioners.

(6) ‘ORSA summary report’ means the report filed in accordance with Article 8 of this chapter.

Section 38‑13‑1020. (A) An insurer or the insurance group of which the insurer is a member must submit to the director a Corporate Governance Annual Disclosure (CGAD) that contains the information required pursuant to the provisions of this article no later than June first of each calendar year. Notwithstanding a request from the director, if the insurer is a member of an insurance group, the insurer shall submit the report to the director of the lead state for the insurance group in accordance with the laws of the lead state, as determined by the procedures outlined in the most recent Financial Analysis Handbook adopted by the NAIC.

(B) The CGAD must include a signature of the insurer’s or insurance group’s chief executive officer or corporate secretary attesting to the best of that individual’s belief and knowledge that the insurer has implemented the corporate governance practices and that a copy of the disclosure has been provided to the insurer’s board of directors of the appropriate committee thereof.

(C) An insurer not required to submit a CGAD under this section shall do so upon the director’s request.

(D) For purposes of completing the CGAD, the insurer or insurance group may provide information regarding corporate governance at the ultimate controlling parent level, an intermediate holding company level and the individual legal entity level, depending upon how the insurer or insurance group has structured its system of corporate governance. The insurer or insurance group is encouraged to make the CGAD disclosures at the level at which the insurer’s or insurance group’s risk appetite is determined, or at the level at which the earnings, capital, liquidity, operations, and reputation of the insurer are overseen collectively and at which the supervision of those factors are coordinated and exercised, or the level at which legal liability for failure of general corporate governance duties would be placed. If the insurer or insurance group determines the level of reporting based on these criteria, it shall indicate which of the three criteria was used to determine the level of reporting and explain any subsequent changes in the level of reporting.

(E) The review of the CGAD and any additional requests for information must be made through the lead state as determined by the procedures within the most recent Financial Analysis Handbook.

(F) Insurers providing information substantially similar to the information required by this article in other documents provided to the director, including proxy statements filed in conjunction with Form B requirements or other state or federal filings provided to this department, are not required to duplicate that information in the CGAD, but are required to cross reference the document in which the information is included.

Section 38‑13‑1030. The director may, upon notice and opportunity for all interested persons to be heard, issue such rules, regulations, and orders necessary to carry out the provisions of this article.

Section 38‑13‑1040. (A) The insurer or insurance group has discretion over the responses to the CGAD inquiries, provided the CGAD shall contain the material information necessary to permit the director to gain an understanding of the insurer’s or group’s corporate governance structure, policies, and practices. The director may request additional information that he deems material and necessary to provide him with a clear understanding of the corporate governance policies the reporting or information system or controls implementing those policies.

(B) The CGAD must be prepared consistent with the Corporate Governance Annual Disclosure Model Regulation, Regulation 69‑80. Documentation and supporting information must be maintained and made available upon examination or upon request of the director.

Section 38‑13‑1050. (A) Documents, materials, or other information including the CGAD in the possession or control of the Department of Insurance that are obtained by, created by, or disclosed to the director or any other person under this article, are recognized by this State as being proprietary and containing trade secrets. All such documents, materials, or other information are confidential by law and privileged, are not subject to disclosure under the South Carolina Freedom of Information Act, Section 30‑4‑10, et seq. and are not subject to subpoena, to discovery or admissible into evidence in a private civil action. However, the director is authorized to use the documents, materials, or other information in furtherance of regulatory or legal action brought as a part of the director’s official duties. The director shall not otherwise make the documents, materials, or other information public without the prior written consent of the insurer. Nothing in this section may be construed to require written consent of the insurer before the director may share or receive confidential documents, materials, or other CGAD‑related information to assist in the performance of the director’s duties.

(B) Neither the director nor any person who received documents, materials, or other CGAD‑related information, through examination or otherwise, while acting under the authority of the director, or with whom such documents, materials, or other information are shared may be permitted or required to testify in a private civil action covering any confidential documents, materials, or information submitted pursuant to this article.

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

(1) upon request, share documents, materials, or other CGAD‑related information including the confidential and privileged documents, materials, or information, including proprietary and trade secret documents and materials with other state, federal, and international financial regulatory agencies including members of any supervisory college as defined in Section 38‑21‑285 with the NAIC and with third party consultants pursuant to Section 38‑13‑1060, provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the CGAD‑related documents, material, or other information and has certified in writing the legal authority to maintain confidentiality; and

(2) receive documents, materials, or other CGAD‑related information, including otherwise confidential and privileged documents, materials or information, including proprietary and trade secret information or documents, from regulatory officials of other state, federal and international financial regulatory agencies, including members of any supervisory college as defined in Section 38‑21‑285 and from the NAIC, and shall maintain as confidential or privileged any documents, materials, or information received with notice of the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the documents, materials, or information.

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

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

Section 38‑13‑1060. (A) The director may retain, at the insurer’s expense, third party consultants, including attorneys, actuaries, accountants, and other experts not otherwise a part of the director’s staff as may be reasonably necessary to assist the director in reviewing the CGAD and related information or the insurer’s compliance.

(B) Any persons retained are under the direction and control of the director and shall act in a purely advisory capacity.

(C) The NAIC and third‑party consultants are subject to the same confidentiality standards and requirements as the director.

(D) As part of the retention process, a third‑party consultant shall verify to the director, with notice to the insurer, that it is free of a conflict of interest and that it has internal procedures in place to monitor compliance with a conflict and to comply with the confidentiality standards and requirements of this article.

(E) A written agreement with the NAIC or a third‑party consultant governing sharing and the use of information provided pursuant to this article shall contain the following provisions and expressly require the written consent of the insurer prior to making public information provided pursuant to this article:

(1) specific procedures and protocols for maintaining the confidentiality and security of CGAD‑related information shared with the NAIC or a third party consultant;

(2) procedures and protocols for sharing by the NAIC only with other state regulators from states in which the insurance group has domiciled insurers. The agreement shall provide that the recipient agrees in writing to maintain the confidentiality and privileged status of the CGAD‑related documents, materials, or other information and has certified in writing the legal authority to maintain confidentiality;

(3) a provision specifying that ownership of the CGAD‑related information shared with other NAIC or a third‑party consultant remains with the Department of Insurance and the NAIC’s or third‑party consultant’s use of the information is subject to the direction of the director;

(4) a provision that prohibits the NAIC or a third‑party consultant from storing the information shared pursuant to this article in a permanent database after the underlying analysis is completed;

(5) a provision requiring the NAIC or third‑party consultant to provide prompt notice to the director and to the insurer or insurance group regarding any subpoena, request for disclosure, or request for production of the insurer’s CGAD‑related information; and

(6) a requirement that the NAIC or a third‑party consultant to consent to intervention by an insurer in any judicial or administrative action in which the NAIC or third‑party consultant may be required to disclose confidential information about the insurer shared with the NAIC or a third‑party consultant.

Section 38‑13‑1070. Any insurer who, without just cause, fails to timely file the CGAD shall, after notice and an opportunity for a hearing, pay a penalty of one thousand dollars for each day’s delay, to be recovered by the director. The penalty funds recovered must be paid into the general fund of this State. The maximum penalty under this section is twenty thousand dollars. The director may reduce the penalty if the insurer demonstrates to the director that the imposition of the penalty would constitute a financial hardship to the insurer.

Section 38‑13‑1080. The requirements of this article become effective on January 1, 2020. The first filing of the corporate governance annual disclosure must take place on June 1, 2020.”

SECTION 2. Chapter 21, Title 38 of the 1976 Code is amended by adding:

“Section 38‑21‑295. (A) The director is authorized to act as the group‑wide supervisor for an internationally active insurance group in accordance with the provisions of this section. However, the director may otherwise acknowledge another regulatory official as the group‑wide supervisor where the internationally active insurance group:

(1) does not have substantial insurance operations within the United States;

(2) has substantial insurance operations in the United States but not in South Carolina; or

(3) has substantial insurance operations in the United States and South Carolina, but the director has determined that another regulatory official is the appropriate group‑wide supervisor pursuant to the factors set forth in this section.

An insurance holding company system that does not otherwise qualify as an internationally active insurance group may request that the director make a determination or acknowledgment as to a group‑wide supervisor.

(B) In cooperation with other state, federal, and international regulatory agencies, the director will identify a single group‑wide supervisor for an internationally active insurance group. The director may determine that he is the appropriate group‑wide supervisor for an internationally active insurance group that conducts substantial insurance operations concentrated in this State. However, the director may acknowledge that a regulatory official from another jurisdiction is the appropriate group‑wide supervisor for the internationally active insurance group. The director shall consider the following factors when making a determination or acknowledgment:

(1) the place of domicile of the insurers within the internationally active insurance group that holds the largest share of the group’s written premiums, assets o,r liabilities;

(2) the place of domicile of the top‑tiered insurer or insurers in the insurance holding company system of the internationally active insurance group;

(3) the location of the executive offices or largest operational offices of the internationally active insurance group;

(4) whether another regulatory official is acting or is seeking to act as the group‑wide supervisor under a regulatory system that the director determines to be:

(a) substantially similar to the system of regulation provided under the laws of this State; or

(b) otherwise sufficient in terms of providing for group‑wide supervision, enterprise-risk analysis, and cooperation with other regulatory officials; and

(5) whether another regulatory official acting or seeking to act as the group‑wide supervisor provides the director with reasonably reciprocal recognition and cooperation.

However, a director identified under this section as the group‑wide supervisor may determine that it is appropriate to acknowledge another supervisor to serve as the group‑wide supervisor. The acknowledgment of the group‑wide supervisor must be made after consideration of the factors listed above, in cooperation with and subject to the acknowledgment of other regulatory officials involved with supervision of members of the internationally active insurance group, and in consultation with the internationally active insurance group.

(C) Notwithstanding another provision of law, when another regulatory official is acting as the group‑wide supervisor of an internationally active insurance group, the director shall acknowledge that regulatory official as the group‑wide supervisor. However, in the event of a material change in the internationally active insurance group that results in the internationally active insurance group’s insurers domiciled in this State holding the largest share of the group’s premiums, assets, or liabilities or this State being the place of domicile of the top‑tiered insurer or insurers in the insurance holding company system of the internationally active insurance group, the director shall make a determination or acknowledgment as to the appropriate group‑wide supervisor for such an internationally active insurance group.

(D) Pursuant to the provisions of Section 38‑21‑280, the director is authorized to collect from any insurer registered pursuant to this section all information necessary to determine whether the director may act as the group‑wide supervisor of an internationally active insurance group or if the director may acknowledge another regulatory official to act as the group‑wide supervisor. Prior to issuing a determination that an internationally active insurance group is subject to group‑wide supervision by the director, the director shall notify the insurer registered pursuant to this section and the ultimate controlling person within the internationally active insurance group. The internationally active insurance group shall have no less than thirty days to provide the director with additional information pertinent to the pending determination. The director shall publish in the State Register and on its website the identity of internationally active insurance groups that the director has determined are subject to group‑wide supervision.

(E) If the director is the group‑wide supervisor for an internationally active insurance group, the director is authorized to engage in the following group‑wide supervision activities:

(1) assess the enterprise risks within the internationally active insurance group to ensure that:

(a) the material financial condition and liquidity risks to the members of the internationally active insurance group that are engaged in the business of insurance are identified by management; and

(b) reasonable and effective mitigation measures are in place;

(2) request from any member of an internationally active insurance group subject to the director’s supervision, information necessary and appropriate to assess enterprise risk including, but not limited to, information about the members of the internationally active insurance group regarding:

(a) governance, risk assessment, and management,

(b) capital adequacy; and

(c) material intercompany transactions;

(3) coordinate and, through the authority of the regulatory officials of the jurisdictions where members of the internationally active insurance group are domiciled, compel development and implementation of reasonable measures designed to ensure that the internationally active insurance group is able to timely recognize and mitigate enterprise risks to members of such internationally active insurance groups that are engaged in the business of insurance;

(4) communicate with other state, federal, and international regulatory agencies for members within the internationally active insurance group and share relevant information subject to the confidentiality provisions of Section 38‑21‑290, through supervisory colleges as set forth in Section 38‑21‑285 or otherwise;

(5) enter into agreements with or obtain documentation from any insurer registered pursuant to this section, any member of the internationally active insurance group, and any other state, federal, and international regulatory agencies for members of the internationally active insurance group, providing the basis for or otherwise clarifying the director’s role as group‑wide supervisor, including provisions for resolving disputes with other regulatory officials. Such agreements or documentation must not serve as evidence in any proceeding that any insurer or person within an insurance holding company system not domiciled or incorporated in this State is doing business in this State or is otherwise subject to jurisdiction in this State; and

(6) other group‑wide supervision activities, consistent with the authorities and purposes enumerated, as considered necessary by the director.

(F) If the director acknowledges that another regulatory official from a jurisdiction that is not accredited by the National Association of Insurance Commissioners is the group‑wide supervisor, the director is authorized to reasonably cooperate, through supervisory colleges or otherwise, with group‑wide supervision undertaken by the group‑wide supervisor, provided that the:

(1) director’s cooperation is in compliance with the laws of this State; and

(2) regulatory official acknowledged as the group‑wide supervisor also recognizes and cooperates with the director’s activities as a group‑wide supervisor for other internationally active insurance groups where applicable. Where such recognition and cooperation is not reasonably reciprocal, the director is authorized to refuse recognition and cooperation.

(G) The director is authorized to enter into agreements with or obtain documentation from any insurer registered pursuant to this chapter, any affiliate of the insurer, and other state, federal, and international regulatory agencies for members of the internationally active insurance group, that provide the basis for or otherwise clarify a regulatory official’s role as group‑wide supervisor.

(H) The director may promulgate regulations necessary for the administration of this section.

(I) A registered insurer subject to this section is liable for and shall pay the reasonable expenses of the director’s participation in the administration of this section, including the engagement of attorneys, actuaries, and any other professionals and all reasonable travel expenses.”

SECTION 3. Section 38‑21‑10 of the 1976 Code is amended to read:

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

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

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

(3) The term ‘director’ means the Director of the South Carolina Department of Insurance or his designee.

(4) The term ‘group‑wide supervisor’ means the regulatory official authorized to engage in conducting or coordinating group‑wide supervision activities who is determined or acknowledged by the director pursuant to Section 38‑21‑295 to have sufficient significant contacts with the internationally active insurance group.

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

~~(4)~~(6) 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.

(7) The term ‘internationally active insurance group’ means an insurance holding company system that includes an insurer registered pursuant to Sections 38‑21‑143 through 38‑21‑240 and meets the following criteria:

(a) premiums written in at least three countries;

(b) the percentage of gross premiums written outside the United States is at least ten percent of the insurance holding company system’s total gross written premiums; and

(c) based on a three-year rolling average, the total assets of the insurance holding company system are at least fifty billion dollars or the total gross written premiums of the insurance holding company systems are at least ten billion dollars.

~~(5)~~(8) 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)~~(9) 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)~~(10) A ‘subsidiary’ of a specified person is an affiliate controlled by that person directly, or indirectly through one or more intermediaries.

~~(8)~~(11) The term ‘voting security’ includes any security convertible into or evidencing a right to acquire a voting security.

~~(9)~~(12) ‘Enterprise risk’ means an activity, circumstance, event, or series of events involving one or more affiliates of an insurer that, if not remedied promptly, likely is to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer’s risk‑based capital to fall into company action level as provided in Section 38‑9‑330 or would cause the insurer to be in hazardous financial condition as provided in Section 38‑5‑120.

~~(10)~~(13) A ‘supervisory college’ is a meeting or joint meeting of insurance regulators or supervisors with company officials where the topic of discussion is regulatory oversight of one specific insurance group that is writing significant amounts of insurance in other jurisdictions. It may involve detailed discussions about financial data, corporate governance, and enterprise risk management functions. Supervisory colleges are intended to facilitate the oversight of internationally active insurance companies at the group level.”

SECTION 4. This act takes effect upon approval by the Governor.

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