

## **CHAPTER 26.1-26.5**

### **INSURANCE BROKER CONTROLLED INSURER**

#### **26.1-26.5-01. Definitions.**

As used in this chapter:

1. "Accredited state" means a state in which the insurance department or regulatory agency has qualified as meeting the minimum financial regulatory standards promulgated and established from time to time by the national association of insurance commissioners.
2. "Control" or "controlled" has the meaning ascribed in chapter 26.1-10.
3. "Controlled insurer" means a licensed insurer which is controlled, directly or indirectly, by an insurance broker.
4. "Controlling insurance broker" means an insurance broker who, directly or indirectly, controls an insurer.
5. "Insurance broker" means an insurance broker or brokers or any other person, firm, association, or corporation, when, for any compensation, commission, or other thing of value, such person, firm, association, or corporation acts or aids in any manner in soliciting, negotiating, or procuring the making of any insurance contract on behalf of an insured other than the person, firm, association, or corporation.
6. "Licensed insurer" or "insurer" means any person, firm, association, or corporation duly licensed to transact a property and casualty insurance business in this state. The following, inter alia, are not licensed insurers for the purposes of this chapter:
  - a. All risk retention groups as defined in the Superfund Amendments Reauthorization Act of 1986 [Pub. L. 99-499; 100 Stat. 1613] and the Risk Retention Act [15 U.S.C. 3901 et seq.] and chapter 26.1-46.
  - b. All residual market pools and joint underwriting authorities or associations.
  - c. All captive insurers. For the purposes of this chapter, captive insurers are insurance companies owned by another organization whose exclusive purpose is to insure risks of the parent organization and affiliated companies or, in the case of groups and associations, insurance organizations owned by the insureds whose exclusive purpose is to insure risks to member organizations or group members and their affiliates.

#### **26.1-26.5-02. Applicability.**

This chapter applies to licensed insurers as defined in section 26.1-26.5-01, either domiciled in this state or domiciled in a state that is not an accredited state having in effect a substantially similar law. All provisions of the Insurance Holding Company Act, to the extent they are not superseded by this chapter, continue to apply to all parties within holding company systems subject to this chapter.

#### **26.1-26.5-03. Minimum standards.**

1.
  - a. The provisions of this section apply if, in any calendar year, the aggregate amount of gross written premium on business placed with a controlled insurer by a controlling insurance broker is equal to or greater than five percent of the admitted assets of the controlled insurer, as reported in the controlled insurers' quarterly statement filed as of September thirtieth of the prior year.
  - b. Notwithstanding subdivision a, the provisions of this section do not apply if:
    - (1) The controlling insurance broker places insurance only with the controlled insurer, or only with the controlled insurer and a member or members of the controlled insurer's holding company system, or the controlled insurer's parent, affiliate, or subsidiary and receives no compensation based upon the amount of premiums written in connection with such insurance; and accepts insurance placements only from nonaffiliated insurance brokers, and not directly from insureds.

- (2) The controlled insurer, except for insurance business written through a residual market facility, accepts insurance business only from a controlling insurance broker, an insurance broker controlled by the controlled insurer, or an insurance broker that is a subsidiary of the controlled insurer.
2. A controlled insurer may not accept business from a controlling insurance broker and a controlling insurance broker may not place business with a controlled insurer unless there is a written contract between the controlling insurance broker and the insurer specifying the responsibilities of each party, which contract has been approved by the board of directors of the insurer and contains the following minimum provisions:
  - a. The controlled insurer may terminate the contract for cause, upon written notice to the controlling insurance broker. The controlled insurer shall suspend the authority of the controlling insurance broker to write business during the pendency of any dispute regarding the cause for the termination.
  - b. The controlling insurance broker 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 insurance broker.
  - c. The controlling insurance broker 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 thereof collected shall be remitted no later than ninety days after the effective date of any policy placed with the controlled insurer under this contract.
  - d. All funds collected for the controlled insurer's account must be held by the controlling insurance broker in a fiduciary capacity, in one or more appropriately identified bank accounts in banks that are members of the federal reserve system, in accordance with the provisions of the insurance law as applicable. However, funds of a controlling insurance broker not required to be licensed in this state must be maintained in compliance with the requirements of the controlling insurance broker's domiciliary jurisdiction.
  - e. The controlling insurance broker shall maintain separately identifiable records of business written for the controlled insurer.
  - f. The contract may not be assigned, in whole or in part, by the controlling insurance broker.
  - g. The controlled insurer shall provide the controlling insurance broker with its underwriting standards, rules and procedures, manuals setting forth the rates to be charged, and the conditions for the acceptance or rejection of risks. The controlling insurance broker 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 an insurance broker other than the controlling insurance broker.
  - h. The rates and terms of the controlling insurance broker'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 insurance brokers other than controlling insurance brokers. For purposes of this subdivision and subdivision 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. If the contract provides that the controlling insurance broker, on insurance business placed with the insurer, is to be compensated contingent upon the insurer's profits on that business, then such compensation may not be determined and paid until at least five years after the premiums on liability insurance are earned and at least one year after the premiums are earned on any other insurance. In no event may the commissions be paid until the adequacy of

- the controlled insurer's reserves on remaining claims has been independently verified pursuant to subdivision a of subsection 4.
- j. A limit on the controlling insurance broker's writings in relation to the controlled insurer's surplus and total writings. The insurer may establish a different limit for each line or subline of business. The controlled insurer shall notify the controlling insurance broker when the applicable limit is approached and may not accept business from the controlling insurance broker if the limit is reached. The controlling insurance broker may not place business with the controlled insurer if it has been notified by the controlled insurer that the limit has been reached.
  - k. The controlling insurance broker may negotiate but may not bind reinsurance on behalf of the controlled insurer on business the controlling insurance broker places with the controlled insurer, except that the controlling insurance broker may bind facultative reinsurance contracts pursuant to obligatory facultative agreements if the contract with the controlled insurer contains underwriting guidelines including, for both reinsurance assumed and ceded, a list of reinsurers with which such automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured, and commission schedules.
- 3. Every controlled insurer shall have an audit committee of the board of directors composed of independent directors. The audit committee shall annually meet with management, the insurer's independent certified public accountants, and an independent casualty actuary or other independent loss reserve specialist acceptable to the commissioner to review the adequacy of the insurer's loss reserves.
  - 4.
    - a. In addition to any other required loss reserve certification, the controlled insurer shall annually, on April first of each year, file with the commissioner an opinion of an independent casualty actuary, or such other independent loss reserve specialist acceptable to the commissioner, reporting loss ratios for each line of business written and attesting to the adequacy of loss reserves established for losses incurred and outstanding as of yearend, including incurred but not reported, on business placed by the insurance broker.
    - b. The controlled insurer shall annually report to the commissioner the amount of commissions paid to the insurance broker, the percentage such amount represents of the net premiums written, and comparable amounts and percentage paid to noncontrolling insurance brokers for placements of the same kinds of insurance.

**26.1-26.5-04. Disclosure.**

The insurance broker, prior to the effective date of the policy, shall deliver written notice to the prospective insured disclosing the relationship between the insurance broker and the controlled insurer, except that, if the business is placed through an insurance broker who is not a controlling insurance broker, the controlling insurance broker shall retain a signed commitment from the insurance broker that the insurance broker is aware of the relationship between the insurer and the insurance broker and that the insurance broker has or will notify the insured.

**26.1-26.5-05. Liability of controlling insurance broker in the event of insolvency of controlled insurer.**

If the commissioner has reason to believe that a controlling insurance broker has committed or is committing an act which could be determined to be a violation, and that the violation substantially contributed to the insolvency of a controlled insurer, the commissioner or receiver may maintain a civil action against the controlling insurance broker for all damages caused by the insurance broker's acts.

**26.1-26.5-06. Administrative penalties and actions by the commissioner.**

- 1. In addition to any other remedies provided herein, whenever it appears to the commissioner that a person has committed or is committing an act that could be determined to be a violation, the commissioner may institute a proceeding under

chapter 28-32. After the hearing, the commissioner may order any or all of the following:

- a. That the person permanently cease and desist from committing the acts found to be in violation of this chapter.
  - b. Payment of a penalty of not more than ten thousand dollars for each and every act or violation.
  - c. That the controlling insurance broker cease placing business with the controlled insurer.
2. If it is found, after hearing, that the controlling broker or any other person has not materially complied with this chapter and that the controlled insurer or any policyholder thereof has suffered any loss or damage, the commissioner may maintain a civil action or intervene in an action brought by or on behalf of the insurer or policyholder for recovery of compensatory damages for the benefit of the insurer or policyholder or other appropriate relief.
  3. If an order for liquidation or rehabilitation of the controlled insurer has been entered pursuant to chapter 26.1-06.1, and the receiver appointed under that order believes that the controlling insurance broker or any other person has not materially complied with this chapter, or any rule or order adopted hereunder, and the insurer suffered any loss or damage therefrom, the receiver may maintain a civil action for recovery of damages or other appropriate sanctions for the benefit of the insurer.
  4. Nothing contained in this section affects the right of the commissioner to impose any other penalties provided for in the insurance law.
  5. 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.

**26.1-26.5-07. Effective date.**

Within sixty days of August 1, 1993, each controlled insurer and each controlling insurance broker must comply with the provisions of sections 26.1-26.5-03 and 26.1-26.5-04.