WEST VIRGINIA CODE: §33-2-9

§33-2-9. Examination of insurers, agents, brokers and solicitors; access to books, records, etc.

(a) The purpose of this section is to provide an effective and efficient system for examining the activities, operations, financial condition and affairs of all persons transacting the business of insurance in this state and all persons otherwise subject to the jurisdiction of the commissioner. The provisions of this section are intended to enable the commissioner to adopt a flexible system of examinations which directs resources as may be considered appropriate and necessary for the administration of the insurance and insurance-related laws of this state.

(b) For purposes of this section, the following definitions shall apply:

(1) "Commissioner" means the Commissioner of Insurance of this state;

(2) "Company" or "insurance company" means any person engaging in or proposing or attempting to engage in any transaction or kind of insurance or surety business and any person or group of persons who may otherwise be subject to the administrative, regulatory or taxing authority of the commissioner, including, but not limited to, any domestic or foreign stock company, mutual company, mutual protective association, farmers mutual fire companies, fraternal benefit society, reciprocal or interinsurance exchange, nonprofit medical care corporation, nonprofit health care corporation, nonprofit hospital service association, nonprofit dental care corporation, health maintenance organization, captive insurance company, risk retention group or other insurer regardless of the type of coverage written, benefits provided or guarantees made by each;

(3) "Department" means the Department of Insurance of this state; and

(4) "Examiners" means the Commissioner of Insurance or any individual or firm having been authorized by the commissioner to conduct an examination pursuant to this section, including, but not limited to, the commissioner's deputies, other employees, appointed examiners or other appointed individuals or firms who are not employees of the Department of Insurance.

(c) The commissioner or his or her examiners may conduct an examination under this section of any company as often as the commissioner in his or her discretion considers appropriate. The commissioner or his or her examiners shall at least once every five years visit each domestic insurer and thoroughly examine its financial condition and methods of doing business and ascertain whether it has complied with all the laws and regulations of this state. The commissioner may also examine the affairs of any insurer applying for a license to transact any insurance business in this state.

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(d) The commissioner or his or her examiners shall, at a minimum, conduct an examination of every foreign or alien insurer licensed in this state not less frequently than once every five years. The examination of an alien insurer may be limited to its United States business: Provided, That in lieu of an examination under this section of any foreign or alien insurer licensed in this state, the commissioner may accept an examination report on the company as prepared by the insurance department for the company's state of domicile or port-of-entry state until January 1, 1994. Thereafter, the reports may only be accepted if:

(1) The insurance department was at the time of the examination accredited under the National Association of Insurance Commissioners' Financial Regulation Standards and Accreditation Program; or

(2) The examination is performed under the supervision of an accredited insurance department or with the participation of one or more examiners who are employed by an accredited state insurance department and who, after a review of the examination work papers and report, state under oath that the examination was performed in a manner consistent with the standards and procedures required by their insurance department.

(e) In scheduling and determining the nature, scope and frequency of examinations conducted pursuant to this section, the commissioner may consider such matters as the results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, reports of independent certified public accountants and other criteria as set forth in the examiners' handbook adopted by the National Association of Insurance Commissioners and in effect when the commissioner exercises discretion under this section.

(f) For purposes of completing an examination of any company under this section, the commissioner may examine or investigate any person, or the business of any person, insofar as the examination or investigation is, in the sole discretion of the commissioner, necessary or material to the examination of the company.

(g) The commissioner may also cause to be examined, at the times as he or she considers necessary, the books, records, papers, documents, correspondence and methods of doing business of any agent, broker, excess lines broker or solicitor licensed by this state. For these purposes, the commissioner or his or her examiners shall have free access to all books, records, papers, documents and correspondence of all the agents, brokers, excess lines brokers and solicitors wherever the books, records, papers, documents and records are situate. The commissioner may revoke the license of any agent, broker, excess lines broker or solicitor who refuses to submit to the examination.

(h) In addition to conducting an examination, the commissioner or his or her examiners may, as the commissioner considers necessary, analyze or review any phase of the operations or methods of doing business of an insurer, agent, broker, excess lines broker, solicitor or other individual or corporation transacting or attempting to transact an insurance business in the State of West Virginia. The commissioner may use the full resources provided by this section in carrying out these responsibilities, including any personnel and equipment provided by

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this section as the commissioner considers necessary.

(i) Examinations made pursuant to this section shall be conducted in the following manner:

(1) Upon determining that an examination should be conducted, the commissioner or his or her designee shall issue an examination warrant appointing one or more examiners to perform the examination and instructing them as to the scope of the examination. The appointment of any examiners pursuant to this section by the commissioner shall not be subject to the requirements of article three, chapter five-a of this code, except that the contracts and agreements shall be approved as to form and conformity with applicable law by the Attorney General. In conducting the examination, the examiner shall observe those guidelines and procedures set forth in the examiners' handbook adopted by the National Association of Insurance Commissioners. The commissioner may also employ any other guidelines or procedures as the commissioner may consider appropriate;

(2) Every company or person from whom information is sought, its officers, directors and agents shall provide to the examiners appointed under subdivision (1) of this subsection timely, convenient and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents and any or all computer or other recordings relating to the property, assets, business and affairs of the company being examined. The officers, directors, employees and agents of the company or person shall facilitate the examination and aid in the examination so far as it is in their power to do so;

(3) The refusal of any company, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the examiners shall be grounds for suspension, revocation, refusal or nonrenewal of any license or authority held by the company to engage in an insurance or other business subject to the commissioner's jurisdiction. Any proceedings for suspension, revocation, refusal or nonrenewal of any license or authority shall be conducted pursuant to section eleven of this article;

(4) The commissioner or his or her examiners shall have the power to issue subpoenas, to administer oaths and to examine under oath any person as to any matter pertinent to the examination, analysis or review. The subpoenas shall be enforced pursuant to the provisions of section six of this article;

(5) When making an examination, analysis or review under this section, the commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants, professionals or specialists with training or experience in reinsurance, investments or information systems or other professionals and specialists as examiners, the cost of which shall be borne by the company which is the subject of the examination, analysis or review or, in the commissioner's discretion, paid from the Commissioner's Examination Revolving Fund. The commissioner may recover costs paid from the Commissioner's Examination Revolving Fund pursuant to this subdivision from the company upon which the examination, analysis or review is conducted unless the subject of the examination, analysis or review is an individual described in subdivision (2), subsection (q) of this section;

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(6) Nothing contained in this section may be construed to limit the commissioner's authority to terminate or suspend any examination, analysis or review in order to pursue other legal or regulatory action pursuant to the insurance laws of this state. The commissioner or his or her examiners may at any time testify and offer other proper evidence as to information secured during the course of an examination, analysis or review whether or not a written report of the examination has at that time either been made, served or filed in the commissioner's office;

(7) Nothing contained in this section may be construed to limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or company workpapers or other documents or any other information discovered or developed during the course of any examination, analysis or review in the furtherance of any legal or regulatory action which the commissioner may, in his or her sole discretion, consider appropriate. An examination report, when filed, shall be admissible in evidence in any action or proceeding brought by the commissioner against an insurance company, its officers or agents and shall be prima facie evidence of the facts stated therein.

(j) Examination reports prepared pursuant to the provisions of this section shall comply with the following requirements:

(1) All examination reports shall be comprised of only facts appearing upon the books, records or other documents of the company, its agents or other persons examined or as ascertained from the testimony of its officers or agents or other persons examined concerning its affairs and any conclusions and recommendations the examiners find reasonably warranted from the facts;

(2) No later than sixty days following completion of the examination the examiner in charge shall file with the commissioner a verified written report of examination under oath. Upon receipt of the verified report, the commissioner shall transmit the report to the company examined, together with a notice which shall afford the company examined a reasonable opportunity of not more than thirty days to make a written submission or rebuttal with respect to any matters contained in the examination report;

(3) Within thirty days of the end of the period allowed for the receipt of written submissions or rebuttals the commissioner shall fully consider and review the report, together with any written submissions or rebuttals and any relevant portions of the examiner's workpapers and enter an order:

(A) Adopting the examination report as filed or with modification or corrections. If the examination report reveals that the company is operating in violation of any law, rule or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure the violation; or

(B) Rejecting the examination report with directions to the examiners to reopen the examination for purposes of obtaining additional data, documentation or information and

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refiling pursuant to subdivision (2) of this subsection; or

(C) Calling for an investigatory hearing with no less than twenty days' notice to the company for purposes of obtaining additional documentation, data, information and testimony;

(4) All orders entered pursuant to this subsection shall be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, relevant examiner workpapers and any written submissions or rebuttals. Any order issued pursuant to paragraph (A), subdivision (3) of this subsection shall be considered a final administrative decision and may be appealed pursuant to section fourteen of this article and shall be served upon the company by certified mail, together with a copy of the adopted examination report. Within thirty days of the issuance of the adopted report the company shall file affidavits executed by each of its directors stating under oath that they have received a copy of the adopted report and related orders.

(k) Hearings conducted pursuant to this section shall be subject to the following requirements:

(1) Any hearing conducted pursuant to this section by the commissioner or the commissioner's authorized representative shall be conducted as a nonadversarial, confidential investigatory proceeding as necessary for the resolution of any inconsistencies, discrepancies or disputed issues apparent upon the face of the filed examination report or raised by or as a result of the commissioner's review of relevant workpapers or by the written submission or rebuttal of the company. Within twenty days of the conclusion of any hearing, the commissioner shall enter an order pursuant to paragraph (A), subdivision (3), subsection (j) of this section;

(2) The commissioner may not appoint an examiner as an authorized representative to conduct the hearing. The hearing shall proceed expeditiously with discovery by the company limited to the examiner's workpapers which tend to substantiate any assertions set forth in any written submission or rebuttal. The commissioner or the commissioner's representative may issue subpoenas for the attendance of any witnesses or the production of any documents considered relevant to the investigation whether under the control of the commissioner, the company or other persons. The documents produced shall be included in the record and testimony taken by the commissioner or the commissioner's representative shall be under oath and preserved for the record. Nothing contained in this section shall require the commissioner to disclose any information or records which would indicate or show the existence or content of any investigation or activity of a criminal justice agency;

(3) The hearing shall proceed with the commissioner or the commissioner's representative posing questions to the persons subpoenaed. Thereafter, the company and the department may present testimony relevant to the investigation. Cross-examination may be conducted only by the commissioner or the commissioner's representative. The company and the commissioner shall be permitted to make closing statements and may be represented by counsel of their choice.

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(l) Adoption of the examination report shall be subject to the following requirements:

(1) Upon the adoption of the examination report under paragraph (A), subdivision (3), subsection (j) of this section, the commissioner may continue to hold the content of the examination report as private and confidential information for a period of ninety days except to the extent provided in subdivision (6), subsection (i) of this section. Thereafter, the commissioner may open the report for public inspection so long as no court of competent jurisdiction has stayed its publication;

(2) Nothing contained in this section may prevent or be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results or any matter relating thereto or the results of any analysis or review to the insurance department of this or any other state or country or to law-enforcement officials of this or any other state or agency of the federal government at any time, so long as the agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this section;

(3) In the event the commissioner determines that regulatory action is appropriate as a result of any examination, analysis or review, he or she may initiate any proceedings or actions as provided by law;

(4) All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination, analysis or review made under this section must be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person, except to the extent provided in subdivision (5), subsection (i) of this section. Access may also be granted in accordance with section nineteen of this article. The parties must agree in writing prior to receiving the information to provide to it the same confidential treatment as required by this section unless the prior written consent of the company to which it pertains has been obtained.

(m) The commissioner may require any examiner to furnish a bond in such amount as commissioner may determine to be appropriate and the bond shall be approved, filed and premium paid, with suitable proof submitted to the commissioner, prior to commencement of employment by the commissioner. No examiner may be appointed by the commissioner if the examiner, either directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a pecuniary interest in any person subject to examination under this section. This section shall not be construed to automatically preclude an examiner from being:

(1) A policyholder or claimant under an insurance policy;

(2) A grantor of a mortgage or similar instrument on the examiner's residence to a regulated entity if done under customary terms and in the ordinary course of business;

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(3) An investment owner in shares of regulated diversified investment companies; or

(4) A settlor or beneficiary of a "blind trust" into which any otherwise impermissible holdings have been placed;

(5) Notwithstanding the requirements of this subsection, the commissioner may retain, from time to time, on an individual basis qualified actuaries, certified public accountants or other similar individuals who are independently practicing their professions even though these persons may, from time to time, be similarly employed or retained by persons subject to examination under this section.

(n) Personnel conducting examinations, analyses or reviews of either a domestic, foreign or alien insurer shall be compensated for each day worked at a rate set by the commissioner. The personnel shall also be reimbursed for their travel and living expenses at the rate set by the commissioner. Other individuals who are not employees of the Department of Insurance shall all be compensated for their work, travel and living expenses at rates approved by the commissioner or as otherwise provided by law. As used in this section, the costs of an examination, analysis or review means:

(1) The entire compensation for each day worked by all personnel, including those who are not employees of the Department of Insurance, the conduct of the examination, analysis or review calculated as hereinbefore provided;

(2) Travel and living expenses of all personnel, including those who are not employees of the Department of Insurance, directly engaged in the conduct of the examination, analysis or review calculated at the rates as hereinbefore provided for;

(3) All other incidental expenses incurred by or on behalf of the personnel in the conduct of any authorized examination, analysis or review.

(o) (1) All property and casualty insurers subject to the provisions of this section shall annually pay to the commissioner on or before July 1, 1991, and every July 1 thereafter an examination assessment fee of up to $5,000. $450 of this fee shall be paid to the Treasurer of the state to the credit of a special revolving fund to be known as the Commissioner's Examination Revolving Fund which is hereby established; up to $4,200 shall be paid to the Treasurer of the state to the credit of the Unfair Claims Settlement Practice Trust Fund established in section four-b, article eleven of this chapter and $350 shall be paid to the Treasurer of the state. If the trust fund has moneys in excess of $1,000,000, the examination assessment fee shall be $800 and the $5,000 fee shall only be reinstated at whatever amount the commissioner deems necessary to maintain the fund, if the fund value goes below $1,000,000. The commissioner may at his or her discretion, upon notice to the insurers subject to this subsection, increase this examination assessment fee or levy an additional examination assessment fee of $250. In no event may the total examination assessment fee, including any additional examination assessment fee levied, exceed $5,250 per insurer in any calendar year.

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(2) All insurers other than property and casualty insurers subject to the provisions of this section shall annually pay to the commissioner on or before July 1, 1991, and every July 1 thereafter an examination assessment fee of$800. $450 of this fee shall be paid to the Treasurer of the state to the credit the Commissioner's Examination Revolving Fund and $350 shall be paid to the Treasurer of the state. The commissioner may at his or her discretion, upon notice to the insurers subject to this subsection, increase this examination assessment fee or levy an additional examination assessment fee of $250. In no event may the total examination assessment fee, including any additional examination assessment fee levied, exceed $1,500 per insurer in any calendar year.

(p) The moneys collected by the commissioner from an increase or additional examination assessment fee shall be paid to the Treasurer of the state to be credited to the commissioner's Examination Revolving Fund. Any funds expended or obligated by the commissioner from the Commissioner's Examination Revolving Fund may be expended or obligated solely for defrayment of the costs of examinations, analyses or reviews of the financial affairs and business practices of insurance companies, agents, brokers, excess lines brokers, solicitors or other individuals or corporations transacting or attempting to transact an insurance business in this state made by the commissioner pursuant to this section or for the purchase of equipment and supplies, travel, education and training for the commissioner's deputies, other employees and appointed examiners necessary for the commissioner to fulfill the statutory obligations created by this section.

(q) The commissioner may require other individuals who are not employees of the Department of Insurance who have been appointed by the commissioner to conduct or participate in the examination, analysis or review of insurers, agents, brokers, excess lines brokers, solicitors or other individuals or corporations transacting or attempting to transact an insurance business in this state to:

(1) Bill and receive payments directly from the insurance company being examined, analyzed or reviewed for their work, travel and living expenses as previously provided in this section; or

(2) If an individual agent, broker or solicitor is being examined, analyzed or reviewed, bill and receive payments directly from the Commissioner's Examination Revolving Fund for their work, travel and living expenses as previously provided in this section. The commissioner may recover costs paid from the Commissioner's Examination Revolving Fund pursuant to this subdivision from the person upon whom the examination, analysis or review is conducted.

(r) The commissioner and his or her examiners shall be entitled to immunity to the following extent:

(1) No cause of action shall arise nor shall any liability be imposed against the commissioner or his or her examiners for any statements made or conduct performed in good faith while carrying out the provisions of this section;

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(2) No cause of action shall arise, nor shall any liability be imposed, against any person for the act of communicating or delivering information or data to the commissioner or his or her examiners pursuant to an examination, analysis or review made under this section if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive;

(3) The commissioner or any examiner shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this section and the party bringing the action was not substantially justified in doing so. For purposes of this section, a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated;

(4) This subsection does not abrogate or modify in any way any Constitutional immunity or common law or statutory privilege or immunity heretofore enjoyed by any person identified in subdivision (1) of this subsection.

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