

# WEST VIRGINIA CODE: §33-27-3A

## **§33-27-3a. Acquisitions Involving Insurers Not Otherwise Covered; definitions; scope; pre-acquisition notification and waiting period; competitive standard; orders and penalties.**

(a) Definitions. -- The following definitions apply to only this section:

(1) "Acquisition" means any agreement, arrangement or activity the consummation of which results in a person acquiring directly or indirectly 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 either acquires or is acquired, is affiliated with an acquirer or acquired, or is the result of a merger.

(b) Scope. - (1) Except as exempted in subdivision (2) of this subsection, this section applies to any 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 the following:

(A) 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 any insurance market in this state. If a purchase of securities results in a presumption of control pursuant to subsection (c), section two of this article, 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 commissioner of this state;

(B) 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 pre-acquisition notification is filed with the commissioner pursuant to subdivision (1), subsection (c) of this section thirty days prior to the proposed effective date of the acquisition. However, such pre-acquisition notification is not required for exclusion from this section if the acquisition would otherwise be excluded from this section by any other paragraph of this subdivision;

(C) The acquisition of already affiliated persons;

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

(i) In no market would the combined market share of the involved insurers exceed five percent of the total market;

- (ii) There would be no increase in any market share; or
- (iii) In no market would:
  - (I) The combined market share of the involved insurers exceed twelve percent of the total market; and
  - (II) The market share increase by more than two percent of the total market.

For the purpose of this paragraph, 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; and

(E) An acquisition for which a pre-acquisition notification would be required pursuant to this section due solely to the resulting effect on the ocean marine insurance line of business;

(F) An acquisition of an insurer whose domiciliary commissioner affirmatively finds that the insurer is in failing condition; there is a lack of feasible alternative to improving such condition; the public benefits of improving the insurers condition through the acquisition exceed the public benefits that would arise from not lessening competition; and the findings are communicated by the domiciliary commissioner to the commissioner of this state.

(c) Pre-acquisition notification and waiting period. -- An acquisition covered by subsection (b) of this section may be subject to an order pursuant to subsection (e) of this section unless the acquiring person files a pre-acquisition notification and the waiting period has expired. The acquired person may file a pre-acquisition notification. The commissioner shall give confidential treatment to information submitted under this subsection in the same manner as provided in section seven of this article.

(1) The pre-acquisition notification shall be in such form and contain such information as prescribed by the National Association of Insurance Commissioners relating to those markets that, under paragraph (D), subdivision (2), subsection (b) of this section, cause the acquisition not to be exempted from the provisions of this section. The commissioner may require such additional material and information as deemed necessary to determine whether the proposed acquisition, if consummated, would violate the competitive standard of subsection (d) of this section. 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 such person indicating his or her ability to render an informed opinion.

(2) The waiting period required shall begin on the date of receipt of the commissioner of a pre-acquisition notification and shall end on the earlier of the thirtieth day after the date of receipt, or termination of the waiting period by the commissioner. Prior to the end of the waiting period, the commissioner on a one-time basis may require the submission of additional needed information relevant to the proposed acquisition, in which event the

waiting period shall end on the earlier of the thirtieth day after receipt of the additional information by the commissioner or termination of the waiting period by the commissioner.

(d) Competitive Standard. -- (1) The commissioner may enter an order under subdivision (1), subsection (e) of this section, with respect to an acquisition if there is substantial evidence that the effect of the acquisition may be substantially to lessen competition in any 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) of this section.

(2) In determining whether a proposed acquisition would violate the competitive standard of subdivision (1) of this subsection, the commissioner shall consider the following:

(A) Any acquisition covered under subsection (b) of this section involving two or more insurers competing in the same market is *prima facie* evidence of 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%      10%

15%      1% or more

(ii) Or, 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 in 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 subdivision one of this subsection. For the purpose of this item, the insurer with the largest share of the market shall be deemed to be Insurer A;

(B) There is a significant trend toward increased concentration when the aggregate market share of any 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 a period of time extending from any base year five to ten years prior to the acquisition up to the time of the acquisition. Any acquisition or merger covered under subsection (b) of this section involving two (2) or more insurers competing in the same market is *prima facie* evidence of violation of the competitive standard in subdivision (1) of this subsection if:

- (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 large insurers showing the requisite increase in the market share; and
- (iii) Another involved insurer's market is two percent or more;

(C) For the purposes of subdivision (2), subsection (d) of this section:

- (i) The term "insurer" includes any company or group of companies under common management, ownership or control;
- (ii) The term "market" means the relevant product and geographical markets. In determining the relevant product and geographical markets, the commissioner shall give due consideration to, among other things, 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, such line being 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 violation of the competitive standard rests upon the commissioner.

(D) Even though an acquisition is not *prima facie* violative of the competitive standard under paragraphs (A) and (B), subdivision (2) of this subsection, the commissioner may establish the requisite anticompetitive effect based upon other substantial evidence. Even though an acquisition is *prima facie* violative of the competitive standard under paragraphs (A) and (B), subdivision (2) of this subsection, a party may establish the absence of the requisite anticompetitive effect based upon other substantial evidence. Relevant factors in making a determination under this paragraph include, but are not limited to, the following: market shares, volatility of ranking of market leaders, number of competitors, concentration, trend of concentration in the industry, and ease of entry and exit into the market.

(3) An order may not be entered under subdivision (1), subsection (e) of this section if:

(A) The acquisition will yield substantial economies of scale or economies in resource

utilization that cannot be feasibly achieved in any other way, and the public benefits which would arise from such economies exceed the public benefits which would arise from not lessening competition; or

(B) The acquisition will 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) Orders and Penalties. -- (1)(A) If an acquisition violates the standards of this section, the commissioner may enter an order:

(i) Requiring an involved insurer to cease and desist from 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) Such an order shall not be entered unless:

(i) There is a hearing;

(ii) Notice of the hearing is issued prior to the end of the waiting period and not less than fifteen days prior to the hearing; and

(iii) The hearing is concluded and the order is issued no later than sixty days after the date of the filing of the preacquisition notification with the commissioner.

(C) Every order issued pursuant to this subsection shall be accompanied by a written decision of the commissioner setting forth findings of fact and conclusions of law.

(D) An order pursuant to this subsection does not apply if the acquisition is not consummated.

(2) Any person who violates a cease and desist order of the commissioner under subdivision one of this subsection and while the order is in effect may, after notice and hearing and upon order of the commissioner, be subject at the discretion of the commissioner to one or more of the following:

(A) A monetary penalty of not more than \$10,000 for every day of violation; or

(B) Suspension or revocation of the person's license.

(3) Any insurer or other person who fails to make any filing required by this section, and who also fails to demonstrate a good faith effort to comply with any filing requirement, shall be subject to a fine of not more than \$50,000.

(f) Inapplicable Provisions. Subsections (b) and (c), section eight of this article and section ten of this article do not apply to acquisitions covered under subsection (b) of this section.

WV Legislature