WEST VIRGINIA CODE: §33-27-5

§33-27-5. Standards; adequacy of surplus; dividends and other distributions; notice of amendments or modifications; management of domestic insurers subject to registration.

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

(1) The terms shall be fair and reasonable;

(2) Agreements for cost-sharing services and management shall include such provisions as required by rule;

(3) Charges or fees for services performed shall be reasonable;

(4) Expenses incurred and payment received shall be allocated to the insurer in conformity with customary insurance accounting practices consistently applied;

(5) The books, accounts and records of each party to all such transactions shall 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;

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

(7) If an insurer subject to this article is deemed by the commissioner to be in a hazardous financial condition as defined by §33-34-3a of this code or a condition that would be grounds for supervision, conservation, or a delinquency proceeding, then the commissioner may require the insurer to secure and maintain either a deposit, held by the commissioner, or a bond, as determined by the insurer at the insurer's discretion, for the protection of the insurer for the duration of the contract(s) or agreement(s), or the existence of the condition for which the commissioner required the deposit or the bond.

In determining whether a deposit or a bond is required, the commissioner should consider whether concerns exist with respect to the affiliated person's ability to fulfill the contract(s) or agreement(s) if the insurer were to be put into liquidation. Once the insurer is deemed to be in a hazardous financial condition or a condition that would be grounds for supervision, conservation, or a delinquency proceeding, and a deposit or bond is necessary, the commissioner has discretion to determine the amount of the deposit or bond, not to exceed the value of the contract(s) or agreement(s) in any one year, and whether such deposit or bond should be required for a single contract, multiple contracts, or a contract only with a

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specific person(s);

(8) All records and data of the insurer held by an affiliate are and remain the property of the insurer, are subject to control of the insurer, are identifiable, and are segregated or readily capable of segregation, at no additional cost to the insurer, from all other persons' records and data. This includes all records and data that are otherwise the property of the insurer, in whatever form maintained, including, but not limited to, claims and claim files, policyholder lists, application files, litigation files, premium records, rate books, underwriting manuals, personnel records, financial records, or similar records within the possession, custody, or control of the affiliate. At the request of the insurer, the affiliate shall provide that the receiver can obtain a complete set of all records of any type that pertain to the insurer's business; obtain access to the operating systems on which the data is maintained; obtain the software that runs those systems either through assumption of licensing agreements or otherwise; and restrict the use of the data by the affiliate if it is not operating the insurer's business. The affiliate shall provide a waiver of any landlord lien or other encumbrance to give the insurer access to all records and data in the event of the affiliate's default under a lease or other agreement; and

(9) Premiums or other funds belonging to the insurer that are collected by or held by an affiliate are the exclusive property of the insurer and are subject to the control of the insurer. Any right of offset in the event an insurer is placed into receivership shall be subject to §33-10-1 *et seq*. of this code.

(b) Adequacy of surplus. — For purposes of this article, in determining whether an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to meet its financial needs, the following factors, among others, shall be 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 insurer's insured risks;

(5) The nature and extent of the insurer's reinsurance program;

(6) The quality, diversification, and liquidity of the insurer's 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;

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(9) The adequacy of the insurer's reserves; and

(10) The quality and liquidity of investments in affiliates. The commissioner may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in his or her judgment such investment so warrants.

(c) Dividends and other distributions. — (1) No domestic insurer may pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until:

(A) Thirty days after the commissioner has received notice of the declaration thereof and has not within that period disapproved such payment; or

(B) The commissioner has approved that payment within the 30-day period.

(2) For purposes of this section, an extraordinary dividend or distribution includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions made within the preceding 12 months exceeds the lesser of:

(A) Ten percent of such insurer's surplus as regards policyholders as of December 31, next preceding; or

(B) The net gain from operations of such insurer, if such insurer is a life insurer, or the net income, if the insurer is not a life insurer, not including realized capital gains, for the 12-month period ending December 31, next preceding, but shall not include pro rata distributions of any class of the insurer's own securities.

(3) In determining whether a dividend or distribution is extraordinary for purposes of this subsection, an insurer other than a life insurer may carry forward net income from the previous two calendar years that has not already been paid out as dividends. This carry-forward shall be computed by taking the net income from the second and third preceding calendar years, not including realized capital gains, less dividends paid in the second and immediate preceding calendar years.

(4) Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution which is conditional upon the commissioner's approval, and the declaration shall confer no rights upon shareholders until:

(A) The commissioner has approved the payment of such dividend or distribution; or

(B) The commissioner has not disapproved such payment within the 30-day period referred to above.

(d) The following transactions involving a domestic insurer and any person in its insurance holding company system, including amendments or modifications of affiliate agreements previously filed pursuant to this section, that are subject to any materiality standards

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contained in subdivisions (1) through (7) of this subsection, may not be entered into unless the insurer has notified the commissioner in writing of its intention to enter into the transaction at least 30 days prior thereto, or such shorter period as the commissioner may permit, and the commissioner has not disapproved it within that period: *Provided*, That nothing contained in this subsection shall be deemed to authorize or permit any transactions which, in the case of an insurer not a member of the same holding company system, would be otherwise contrary to law. The notice for amendments or modifications shall include the reasons for the change and the financial impact on the domestic insurer. Informal notice shall be reported, within 30 days after a termination of a previously filed agreement, to the commissioner for determination of the type of filing required, if any.

(1) Sales, purchases, exchanges, loans, extensions of credit, or investments, provided 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 25 percent of surplus as regards policyholders as of December 31, next preceding;

(B) With respect to life insurers, three percent of the insurer's admitted assets as of December 31, next preceding;

(2) 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 such transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, purchase assets of, or to make investments in, any affiliate of the insurer making such loans or extensions of credit provided 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 25 percent of surplus as regards policyholders as of December 31, next preceding;

(B) With respect to life insurers, three percent of the insurer's admitted assets as of December 31, next preceding;

(3) Reinsurance agreements or modifications thereto, including:

(A) All reinsurance pooling agreements; and

(B) Agreements in which the reinsurance premium or a change in the insurer's liabilities, or the projected reinsurance premium or a change in the insurer's liabilities in any of the next three years, equals or exceeds five percent of the insurer's surplus as regards policyholders, as of December 31, 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 the assets will be transferred to one or more affiliates of the insurer;

(4) All management agreements, service contracts, tax allocation agreements, guarantees,

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and all cost-sharing arrangements;

(5) Guarantees when made by a domestic insurer: *Provided*, That a guarantee that is quantifiable as to amount is not subject to the notice requirements of this subsection unless it exceeds the lesser of one half of one percent of the insurer's admitted assets or 10 percent of surplus as regards policyholders as of December 31, next preceding: *Provided, however*, That all guarantees that are not quantifiable as to amount are subject to the notice requirements of this subsection;

(6) Direct or indirect acquisitions or investments in a person that controls the insurer or in an affiliate of the insurer in an amount which, together with its present holdings in such investments, exceeds two and one-half percent of the insurer's surplus to policyholders. Direct or indirect acquisitions or investments in subsidiaries acquired pursuant to §33-27-2a of this code or authorized under any other section of this chapter, or in non-subsidiary insurance affiliates that are subject to the provisions of this article, are exempt from this requirement; and

(7) Any material transactions, specified by rule, which the commissioner determines may adversely affect the interests of the insurer's policyholders.

(e) A domestic insurer may not enter into transactions which are part of a plan or series of like transactions with persons within the insurance 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 commissioner determines that separate transactions were entered into over any 12-month period for that purpose, he or she may exercise his or her authority under §33-27-9 of this code.

(f) The commissioner, in reviewing transactions pursuant to subsection (d) of this section, shall consider whether the transactions comply with the standards set forth in subsection (a) of this section and whether they may adversely affect the interests of policyholders.

(g) The commissioner shall be notified within 30 days of any investment of the domestic insurer in any one corporation if the total investment in that corporation by the insurance holding company system exceeds 10 percent of such corporation's voting securities.

(h) Management of domestic insurers subject to registration. — (1) Notwithstanding the control of a domestic insurer by any person, the officers and directors of the insurer shall not thereby be relieved of any obligation or liability to which they would otherwise be subject by law, and the insurer shall be managed so as to assure its separate operating identity consistent with the provisions of this article.

(2) Nothing in this section precludes a domestic insurer from having or sharing a common management or cooperatively, or jointly using personnel, property, or services with one or more other persons under arrangements meeting the standards of subsection (a) of this section.

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(3) Not less than one third of the directors of a domestic insurer, and not less than one third of the members of each committee of the board of directors of any domestic insurer, shall be persons who are not officers or employees of the insurer or of any entity controlling, controlled by, or under common control with the insurer and who are not beneficial owners of a controlling interest in the voting stock of the insurer or entity. At least one such person must be included in any quorum for the transaction of business at any meeting of the board of directors or any committee thereof.

(4) The board of directors of a domestic insurer shall establish one or more committees comprised solely of directors who are not officers or employees of the insurer or of any entity controlling, controlled by, or under common control with the insurer and who are not beneficial owners of a controlling interest in the voting stock of the insurer or any such entity. The committee or committees have responsibility for nominating candidates for director for election by shareholders or policyholders, evaluating the performance of officers deemed to be principal officers of the insurer and recommending to the board of directors the selection and compensation of the principal officers.

(5) The provisions of subdivisions (3) and (4) of this subsection do not apply to a domestic insurer if the person controlling the insurer, such as an insurer, a mutual insurance holding company, or a publicly held corporation, has a board of directors and committees thereof that meet the requirements of such subdivisions with respect to such controlling entity.

(6) An insurer may make application to the commissioner for a waiver from the requirements of this subsection, if the insurer's annual direct written and assumed premium, excluding premiums reinsured with the Federal Crop Insurance Corporation and Federal Flood Program, is less than $300 million. An insurer may also make application to the commissioner for a waiver from the requirements of this subsection based upon unique circumstances. The commissioner may consider various factors including, but not limited to, the type of business entity, volume of business written, availability of qualified board members, or the ownership or organizational structure of the entity.

(i) Supervision, seizure, conservatorship, or receivership proceedings. — (1) Any affiliate that is party to an agreement or contract with a domestic insurer that is subject to §33-27-5(d)(4) of this code shall be subject to the jurisdiction of any supervision, seizure, conservatorship, or receivership proceedings against the insurer and to the authority of any supervisor, conservator, rehabilitator, or liquidator for the insurer appointed pursuant to §33-10-1 *et seq*. and §33-34-1 *et seq*. of this code for the purpose of interpreting, enforcing, and overseeing the affiliate's obligations under the agreement or contract to perform services for the insurer that:

(A) Are an integral part of the insurer's operations, including, but not limited to, management, administrative, accounting, data processing, marketing, underwriting, claims handling, investment, or any other similar functions; or

(B) Are essential to the insurer's ability to fulfill its obligations under insurance policies.

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(2) The commissioner may require that an agreement or contract pursuant to §33-27-5(d)(4) of this code for the provision of services described in §33-27-5(i)(1)(A) and §33-27-5(i)(1)(B) of this code specify that the affiliate consents to the jurisdiction as set forth in this subsection.

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