WEST VIRGINIA CODE CHAPTER 33 ARTICLE 32

WV Legislature

§33-32-1. Purpose and short title.

The purpose of this act is to regulate the formation and operation of risk retention groups and purchasing groups in this state formed pursuant to the provisions of the federal liability risk retention act of 1986, hereinafter referred to as "RRA 1986." This article may be referred to as the "Risk Retention Act of West Virginia."

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§33-32-2. Definitions.

As used in this article, the term:

(a) "Commissioner" means the Insurance Commissioner of the State of West Virginia or the commissioner, director or superintendent of insurance in any other state.

(b) "Completed operations liability" means liability arising out of the installation, maintenance or repair of any product at a site which is now owned or controlled by:

(1) Any person who performs that work; or

(2) Any person who hires an independent contractor to perform that work; but shall include liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability.

(c) "Domicile" for purposes of determining the state in which a purchasing group is domiciled, means:

(1) For a corporation, the state in which the purchasing group is incorporated; and

(2) For an unincorporated entity, the state of its principal place of business.

(d) "Hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able:

(1) To meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or

(2) To pay other obligations in the normal course of business.

(e) "Insurance" means primary insurance, excess insurance,

reinsurance, surplus lines insurance and any other arrangement for shifting and distributing risk which is determined to be insurance under the laws of this state.

(f) "Liability" means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property or other damage or loss to such other persons resulting from or arising out of:

(1) Any business (whether profit or nonprofit), trade, product, services (including professional services), premises or operations;

(2) Any activity of any state or local government, or any agency or political subdivision thereof; or

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(3) Does not include personal risk liability and an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act.

(g) "Personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in subsection (f);

(h) "Plan of operation" or a "feasibility study" means an analysis which presents the expected activities and results of a risk retention group including at a minimum:

(1) Information sufficient to verify that its members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar or common business, trade, product services, premises or operations;

(2) For each state in which the risk retention group intends to operate, the coverages, deductibles, coverage limits, rates and rating classification systems for each line of insurance the group intends to offer;

(3) Historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that this experience is reasonably available;

(4) Pro forma financial statements and projections;

(5) Appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;

(6) Identification of management, underwriting procedures, managerial oversight methods, investment policies and reinsurance agreements;

(7) Identification of each state in which the risk retention group has obtained, or sought to obtain, a charter and license, and a description of the risk retention group's status in each such state; and

(8) Such other matters as may be prescribed by the commissioner for liability insurance companies authorized by the insurance laws of the state in which the risk retention group is chartered.

(i) "Product liability" means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of such a person when the incident giving rise to the claim occurred.

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(j) "Purchasing group" means any group which:

(1) Has as one of its purposes the purchase of liability insurance on a group basis;

(2) Purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subsection (j)(3) of this section;

(3) Is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises or operations; and

(4) Is domiciled in any state.

(k) "Risk retention group" means any corporation or other

limited liability association formed under the laws of any state: (1) Whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;

(2) Which is organized for the primary purpose of conducting the activity described under subdivision (1), subsection (k) of this section;

(3) Which: (A) Is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state; or

(B) Before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands, and, before such date, had certified to the Insurance Commissioner of at least one state that it satisfied the capitalization requirements of such state, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability as such terms were defined in the product liability risk retention act of 1981 before the date of the enactment of the risk retention act of 1986;

(4) Which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;

(5) Which: (A) Has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group; or

(B) Has as its sole owner an organization which has as: (i) Its members only persons who comprise the membership of the risk retention group; and

(ii) Its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;

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(6) Whose members are engaged in businesses or activities similar or related with respect to the liability of which such members are exposed by virtue of any related, similar, or common business trade, product, services, premises or operations;

(7) Whose activities do not include the provision of insurance other than:

(A) Liability insurance for assuming and spreading all or any portion of the liability of its group members; and

(B) Reinsurance with respect to the liability of any other risk retention group or any members of such other group which is engaged in businesses or activities so that such group or member meets the reinsurance requirement set forth herein, from membership in the risk retention group which provides such reinsurance; and

(8) The name of which includes the phrase "Risk Retention Group."

(l) "State" means any state of the United States or the District of Columbia.

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§33-32-3. Charter and license requirements for domestic groups.

(a) A risk retention group shall, pursuant to the provisions of article five of this chapter, be chartered and licensed to write only liability insurance pursuant to this article and, except as provided elsewhere in this article, shall comply with all of the laws, rules and requirements applicable to insurers chartered and licensed in this state and with section four of this article, to the extent such requirements are not a limitation on laws, rules or requirements of this state.

(b) Notwithstanding any other provision of this chapter to the contrary, all risk retention groups chartered in this state shall file with the commissioner and the national association of Insurance Commissioners, an annual statement on a form prescribed by the national association of Insurance Commissioners and in diskette form, if required by the commissioner and completed in accordance with the national association of Insurance Commissioners' instructions and the national association of Insurance Commissioners accounting practices and procedures manual.

(c) Before it may offer insurance in any state, each risk retention group shall also submit for approval by the Insurance Commissioner of this state a plan of operation or feasibility study. The risk retention group shall submit an appropriate revision of such plan or study, in the event of any subsequent material change in any item of the plan of operation or feasibility study, within ten days of any such change. The risk retention group shall not offer any additional kinds of liability insurance, in this state or in any other state, until a revision of the plan or study is approved by the commissioner.

(d) At the time of filing its application for a charter, the risk retention group shall provide to the commissioner in summary form the following information: The identity of the initial members of the group, the identity of those individuals who organized the group or who will provide administrative services or otherwise influence or control the activities of the group, the amount and nature of initial capitalization, the coverages to be afforded, and the states in which the group intends to operate. Upon receipt of this information, the commissioner shall forward the information to the national association of Insurance Commissioners. Providing notification to the national association of Insurance Commissioners is in addition to and shall not be sufficient to satisfy the requirements of section four or any other sections of this article.

(e) Risk retention groups are subject to the provisions of article thirty-three, article thirty-four, article thirty-seven and article thirty-nine of this chapter.

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§33-32-4. Risk retention groups not chartered in this state.

(a) Risk retention groups chartered in states other than this state and seeking to do business as a risk retention group in this state must observe and abide by the laws of this state.

(b) Before offering insurance in this state, a risk retention group shall submit the following information to the commissioner on a form prescribed by the national association of Insurance Commissioners:

(1) A statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, date of chartering, its principal place of business, and any other information including information on its membership, as the commissioner of this state may require to verify that the risk retention group is qualified under this article;

(2) A copy of its plan of operations or a feasibility study and revisions of such plan or study submitted to its state of domicile: Provided, That the provision relating to the submission of a plan of operation or a feasibility study shall not apply with respect to any line or classification of liability insurance which (A) was defined in the federal product liability risk retention act of 1981 before October 27, 1986, and (B) was offered before that date by any risk retention group which had been chartered and operating for not less than three years before such date;

(3) A statement of registration which designates the commissioner as its agent for the purpose of receiving service of legal documents or process; and

(4) A risk retention group that has been chartered and operating in any state and has previously filed an annual financial statement as required by this section with its state of domicile, must submit a copy of the most recent annual statement with the registration form required by this subsection.

(c) The risk retention group shall submit a copy of any revision to its plan of operation or feasibility study required by section three of this article at the same time that the revision is submitted to the commissioner of its chartering state.

(d) A risk retention group shall not commence offering insurance in this state prior to receiving a certificate of registration from the commissioner.

(e) Any risk retention group registered in this state shall submit to the commissioner:

(1) Annually a copy of the group's financial statement submitted to its state of domicile, which shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American academy of actuaries or a qualified loss reserve specialist pursuant to criteria established by the national association of Insurance Commissioners);

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(2) A copy of each examination of the risk retention group as certified by the commissioner or public official conducting the examination;

(3) Upon request by the commissioner, a copy of any audit performed with respect to the risk retention group; and

(4) Any information as may be required to verify its continuing qualification as a risk retention group under this article.

(f) The commissioner shall promulgate rules pursuant to the provisions of chapter twenty-nine-a of this code regarding all fees to be submitted with the filings required by this section.

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§33-32-5. Tax on premiums collected.

(a) Each risk retention group shall pay to the commissioner, annually on March 1, a tax at the rate of two percent of the taxable premiums on policies or contracts of insurance covering property or risks in this state and on risk and property situated elsewhere upon which no premium tax is otherwise paid during the previous year. Each risk retention group is also subject to the additional premium taxes levied by sections fourteen-a and fourteen-d, article three of this chapter.

(b) The taxes provided for in this section constitute all taxes collectible under the laws of this state from any risk retention group, and no other premium tax or other taxes shall be levied or collected from any risk retention group by the state or any county, city or municipality within this state, except ad valorem taxes. Each risk retention group shall be subject to the same interests, additions, fines and penalties for nonpayment as are generally applicable to insurers.

(c) To the extent that a risk retention group uses insurance agents, each agent shall keep a complete and separate record of all policies procured from each risk retention group. The record shall be open to examination by the commissioner, as provided in section nine, article two of this chapter. These records shall, for each policy and each kind of insurance provided under the policy, include the following:

(1) The limit of liability;

(2) The time period covered;

(3) The effective date;

(4) The name of the risk retention group which issued the policy;

(5) The gross premium charged; and

(6) The amount of return premiums, if any.

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§33-32-6. Compliance with unfair claims settlement practices law.

Any risk retention group, its agents and representatives, shall comply with the laws of this state, as set forth in chapter thirty-three of this code, regarding unfair claims settlement practices act of this state.

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§33-32-7. Prohibitive, deceptive, false, or fraudulent practices.

Any risk retention group shall comply with the laws of this state, as provided in chapter thirty-three of this code, regarding prohibitive, deceptive, false or fraudulent acts or practices. However, if the commissioner seeks an injunction regarding such conduct, the injunction must be obtained from a court of competent jurisdiction.

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§33-32-8. Examination regarding financial condition.

Any risk retention group must submit to an examination by the commissioner to determine its financial condition if the commissioner of the jurisdiction in which the group is chartered has not initiated an examination or does not initiate an examination within sixty days after a request by the commissioner of this state. Any such examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner. The risk retention group shall be subject to the provisions of section nine, article two of this chapter in regard to the expense and conduct of the examination. Any such examination shall be conducted in accordance with the national association of Insurance Commissioners examiners handbook.

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§33-32-9. Notice to purchasers.

Every application form for insurance from a risk retention group and any policy issued by a risk retention group shall contain in ten-point type on the front page and the declaration page, the following notice:

NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and rules of your state. State insurance insolvency guaranty funds are not available for your risk retention group.

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§33-32-10. Prohibited acts regarding solicitation or sale.

The following acts by a risk retention group are hereby prohibited:

(1) The solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; and

(2) The solicitation or sale of insurance by, or operation of, a risk retention group that is in a hazardous financial condition or is financially impaired.

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§33-32-11. Prohibition on ownership by an insurance company.

No risk retention group shall be allowed to do business in this state if an insurance company is directly or indirectly a member or owner of such risk retention group, other than in the case of a risk retention group all of whose members are insurance companies.

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§33-32-12. Prohibited coverage.

No risk retention group may offer insurance policy coverage prohibited by chapter thirty-three of this code or ruled unlawful by the highest court of this state.

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§33-32-13. Delinquency proceedings.

A risk retention group not chartered in this state and doing business in this state must comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by a state Insurance Commissioner if there has been a finding of financial impairment after an examination under section four of this article.

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§33-32-14. Compulsory associations.

(a) A risk retention group shall not be permitted to join or contribute financially to any insurance insolvency guaranty fund, or similar mechanism, in this state, nor shall any risk retention group, or its insureds, or claimants against its insureds, receive any benefit from any such fund for claims arising out of the operations of such risk retention group.

(b) When a purchasing group obtains insurance covering its members' risks from an insurer not authorized in this state or a risk retention group, such risks, wherever resident or located, shall not be covered by any insurance guaranty fund or similar mechanism in this state.

(c) When a purchasing group obtains insurance covering its members' risks from an authorized insurer, only risks resident or located in this state shall be covered by the state guaranty fund subject to article twenty-six of this chapter.

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§33-32-15. Countersignatures not required.

A policy of insurance issued to a risk retention group or any member of that group shall not be required to be countersigned.

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§33-32-16. Purchasing groups; exemption from certain laws relating to the group purchase of insurance.

A purchasing group and its insurer or insurers shall be subject to all applicable laws of this state, except that a purchasing group and its insurer or insurers shall be exempt, in regard to liability insurance for the purchasing group, from any law that would:

(1) Prohibit the establishment of a purchasing group;

(2) Make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages based on their loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages or other matters;

(3) Prohibit a purchasing group or its members from purchasing insurance on a group basis described in subsection (b) of this section;

(4) Prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;

(5) Require that a purchasing group have a minimum number of members, common ownership or affiliation, or a certain legal form;

(6) Require that a certain percentage of a purchasing group obtain insurance on a group basis;

(7) Otherwise discriminate against a purchasing group or any of its members; or

(8) Require that any insurance policy issued to a purchasing group or any of its members be countersigned by an insurance agent or broker residing in this state.

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§33-32-17. Notice and registration requirements of purchasing groups.

(a) A purchasing group which intends to do business in this state shall, prior to doing business, furnish notice to the commissioner, on forms prescribed by the national association of Insurance Commissioners, which such forms shall:

(1) Identify the state in which the group is domiciled;

(2) Identify all other states in which the group intends to do business;

(3) Specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(4) Identify the insurance company or companies from which the group intends to purchase its insurance and the domicile of such company;

(5) Specify the method by which, and the person or persons, if any, through whom insurance will be offered to its members whose risks are resident or located in this state;

(6) Identify the principal place of business of the groups; and

(7) Provide any other information as may be required by the commissioner to verify that the purchasing group is qualified under this article.

(b) A purchasing group shall, within ten days, notify the commissioner of any changes in any of the items set forth in this section.

(c) The purchasing group shall register with and designate the commissioner, (or other appropriate authority), as its agent solely for the purpose of receiving service of legal documents or process: Provided, That these requirements do not apply in the case of a purchasing group which:

(1) Was domiciled before April 1, 1986, in any state of the United States; and

(2) Is domiciled on and after October 27, 1986, in any state of the United States and which:

(A) Before October 27, 1986, purchased insurance from an insurance carrier licensed in any state; and

(B) Since October 27, 1986, purchased its insurance from an insurance carrier licensed in any state;

(3) Which was a purchasing group under the requirements of the product liability risk retention act of 1981, before October 27, 1986; and

(4) Which does not purchase insurance that was not authorized for purposes of an exemption

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under that act, as in effect before October 27, 1986.

(d) Each purchasing group that is required to give notice pursuant to subsection (a) of this section shall also furnish such information as may be required by the commissioner to:

(1) Verify that the entity qualifies as a purchasing group;

(2) Determine where the purchasing group is located; and

(3) Determine appropriate tax treatment.

(e) The Insurance Commissioner shall promulgate rules pursuant to the provisions of chapter twenty-nine-a of this code regarding the amount of all registration or filing fees required by this section.

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§33-32-18. Restrictions on insurance purchased by purchasing groups.

(a) A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such state.

(b) A purchasing group which obtains liability insurance from an insurer not admitted in this state or a risk retention group shall inform each of the members of the group which has a risk resident or located in this state that the risk is not protected by an insurance insolvency guaranty fund in this state, and that the risk retention group or insurer may not be subject to all insurance laws and regulations of this state. To give notice as required by this section, the purchasing group shall ensure that each group certificate or evidence of insurance has printed or stamped in contrasting color on the front page the following statement:

THIS INSURER IS NOT LICENSED TO DO BUSINESS IN WEST VIRGINIA, AND IS NOT SUBJECT TO THE WEST VIRGINIA INSURANCE GUARANTY ACT OR TO ALL OF THE PROTECTIONS OF THE INSURANCE LAWS AND RULES OF THIS STATE.

(c) A purchasing group shall not purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole: Provided, That coverage may provide for a deductible or self-insured retention applicable to individual members.

(d) Purchases of insurance by purchasing groups are subject to the same standards regarding aggregate limits which are applicable to all purchases of group insurance.

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§33-32-19. Administrative and procedural authority regarding risk retention groups and purchasing groups.

The commissioner is authorized to make use of any of the powers established under this chapter of this code to enforce the laws of this state so long as those powers are not specifically preempted by the national product liability risk retention act of 1981, as amended by the risk retention amendments of 1986. This includes, but is not limited to, the commissioner's administrative authority to investigate, issue subpoenas, conduct depositions and hearings, issue orders, and impose penalties and seek injunctive relief. With regard to any investigation, administrative proceedings, or litigation, the commissioner can rely on the law and rules of the state. The injunctive authority of the commissioner in regard to risk retention groups is restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

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§33-32-20. Penalties.

A risk retention group which violates any provision of this Act will be subject to fines and penalties applicable to licensed insurers generally, including revocation of its license and/or the right to do business in this state.

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§33-32-21. Duty on agents or brokers to obtain license.

(a) A person, or a person working for a firm, association or corporation, shall not act or aid in any manner in soliciting, negotiating or procuring liability insurance in this state from a risk retention group unless such person, or person working for a firm, association or corporation, is licensed as an insurance agent in accordance with article twelve of this chapter.

(b) A person, or a person working for a firm, association or corporation, shall not act or aid in any manner in soliciting, negotiating or procuring liability insurance in this state for a purchasing group from an authorized insurer or a risk retention group chartered in a state unless such person, or person working for a firm, association or corporation, is licensed as an insurance agent in accordance with article twelve of this chapter.

(c) A person, or a person working for a firm, association or corporation, shall not act or aid in any manner in soliciting, negotiating or procuring liability insurance coverage in this state for any member of a purchasing group under a purchasing group's policy unless such person, or person working for a firm, association or corporation, is licensed as an insurance agent in accordance with article twelve of this chapter.

(d) A person, or a person working for a firm, association or corporation, shall not act or aid in any manner in soliciting, negotiating or procuring liability insurance from an insurer not authorized to do business in this state on behalf of a purchasing group located in this state unless such person, or person working for a firm, association or corporation, is licensed as an excess line broker in accordance with section thirteen, article twelve of this chapter.

(e) For purposes of acting as an agent for a risk retention group or purchasing group pursuant to the provisions of this section, the requirement of residence in this state shall not apply.

(f) Every person, or person working for a firm, association or corporation, licensed pursuant to the provisions of this chapter, on business placed with risk retention groups or written through a purchasing group, shall inform each prospective insured of the provisions of the notice required by section nine of this article in the case of a risk retention group and in the case of a purchasing group, the notice required by subsection (b), section eighteen of this article.

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§33-32-22. Binding effect of orders issued in United States district court.

An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance, or operating, in any state (or in all states or in any territory or possession of the United States) upon a finding that such a group is in a hazardous financial condition shall be enforceable in the courts of the state.

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§33-32-23. Rules.

The commissioner may establish and from time to time amend such rules relating to risk retention groups as may be necessary or desirable to carry out the provisions of this article.

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§33-32-24. Operation prior to enactment.

(a) In addition to complying with the requirements of this article, any risk retention group operating in this state prior to enactment of the amendments made to this article in the 1992 regular session of the Legislature shall comply with the provisions of subsection (a), section four of this article before December 31, 1992.

(b) Any purchasing group which was doing business in this state prior to enactment of the amendments made to this article in the 1992 regular session of the Legislature shall furnish notice to the commissioner pursuant to the provisions of section seventeen of this article before December 31, 1992.

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