

ACT 349

S.B. NO. 1525

A Bill for an Act Relating to Insurance.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:1-216 and to read as follows:

**“§431:1-216 General business practice.** General business practice means an established measure or model practiced or used at least three times in one calendar year in the general business community.”

SECTION 2. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:3-217 and to read as follows:

**“§431:3-217 Discretionary refusal, suspension or revocation provisions.** After a hearing the commissioner may suspend, revoke, or refuse to extend an insurer’s certificate of authority, in addition to other grounds in this code, if the insurer:

- (1) Knowingly fails to comply with or, in the case of a reciprocal insurer, if the attorney fails to comply with, or violates any provision of this code other than those for violation of which refusal, suspension or revocation is mandatory;
- (2) Knowingly fails to comply with any proper order of the commissioner;
- (3) Is found by the commissioner upon examination, or other evidence, to be in unsound condition or in a condition as to render its further proceedings in this State hazardous to the public or to its policyholders in this State;
- (4) Refuses to remove or discharge a director or officer who has been convicted of any crime involving fraud or dishonesty;

- (5) Commits or performs with a frequency as to indicate a general business practice any act which compels claimants under policies either to accept less than the amount due them or to bring suit against it to secure full payment of the amount due;
- (6) Is affiliated with and under the same general management, interlocking directorate, or ownership as another insurer which transacts insurance other than reinsurance in this State without having a certificate of authority therefor, except as is permitted by this code;
- (7) Refuses to be examined, or if its directors, officers, employees, or representatives refuse to submit to examination or give testimony concerning its affairs, or to produce its accounts, records, and files for examination by the commissioner when required by this code, or refuses to perform any legal obligation relative to the examination;
- (8) Fails to pay any final judgment rendered against it upon any policy, bond, recognizance, or undertaking issued or guaranteed by it, within sixty days after the judgment became final or within sixty days after time for taking an appeal has expired or within sixty days after dismissal of an appeal before final determination, whichever date is the later; or
- (9) Fails to file its annual statement when due or within any extension of time which the commissioner may for good cause have granted."

SECTION 3. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:6-321 and to read as follows:

**"§431:6-321 Hedging transactions.** (a) A domestic insurer may effect or maintain bona fide hedging transactions pertaining to securities otherwise eligible for investment under this part including, but not limited to:

- (1) Financial futures contracts, warrants, options, calls, and other rights to purchase, and
- (2) Puts and other rights to require another person to purchase the securities.

(b) The contracts, options, calls, puts, and rights shall be traded on a commodity exchange regulated under the Commodity Exchange Act, as amended, on a securities exchange, or on an over-the-counter market regulated under the Securities Exchange Act of 1934, as amended.

(c) For purposes of this section, a bona fide hedging transaction means a purchase or sale of a contract, warrant, option, call, put, or right entered into for the purpose of:

- (1) Minimizing interest rate risks in respect to interest obligations on insurance policies or contracts supported by securities held by the insurer, or
- (2) Offsetting changes in the market values or yield rates of securities held by the insurer."

SECTION 4. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:6-322 and to read as follows:

**"§431:6-322 Common trust funds, mutual funds.** An insurer may invest in:

- (1) A bank's common trust fund as defined in the United States Internal Revenue Code of 1954, Section 584; and

- (2) The securities of any open-end management type investment company or investment trust registered with the federal Securities and Exchange Commission under the Investment Company Act of 1940, as amended, if the investment company or trust, other than one of which as a subsidiary of the insurer is investment adviser or principal underwriter, has a new value of not less than \$25,000,000 as of the date of investment by the insurer."

SECTION 5. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:6-323 and to read as follows:

**"§431:6-323 Separate accounts.** (a) A life insurer, after adoption of a resolution by its board of directors and certification thereof to the commissioner, may allocate to one or more separate accounts, in accordance with the terms of a written agreement or a contract on a variable basis, amounts which are paid to the insurer, in connection with a pension, retirement or profit sharing plan, or in connection with a contract on a variable basis, whether on an individual or group basis, and which amounts are to be applied to purchase retirement benefits in fixed or in variable dollar amounts, or both, or to provide benefits in accordance with a contract on a variable basis.

The income, if any, and gains or losses realized or unrealized on each account may be credited to or charged against the amount allocated to the account in accordance with the agreement, without regard to the other income, gains or losses of the insurer. The commissioner may prescribe reasonable limitations on charges against and permissible deductions from the investment experience credited to life insurance contracts on a variable basis. Notwithstanding any other provision in the insurer's articles of incorporation or in this code, the amounts allocated to the accounts and accumulations thereon may be invested and reinvested in any class of loans and investments specified in the agreement, or, with respect to life insurance contracts on a variable basis, as prescribed by the commissioner, and the loans and investments shall not be considered in applying any limitation in this article. The commissioner, with respect to separate accounts for life insurance on a variable basis, may establish reasonable standards for procedures to be used in changing investment policy and provisions to safeguard the rights of insured persons and beneficiaries.

(b) Contract on a variable basis means a contract issued by an insurer providing for the dollar amount of benefits or other contractual payments or values thereunder to vary so as to reflect investment results of a segregated portfolio of investments or of a designated account in which amounts received in connection with the contract have been placed and other contracts as may be approved by the commissioner.

(c) Notwithstanding any other provision of law, a life insurer, if necessary to comply with the Investment Company Act of 1940, with respect to any account or any portion thereof, may:

- (1) Exercise the voting rights of the stock or shares or interest in accordance with instructions from the persons having the beneficial interests in the account ratably according to their respective interests in the account, or
- (2) Establish a committee for the account, the members of which may be directors or officers or other employees of the insurer, persons having no relationship to the insurer, or any combination thereof, who may be elected to membership by the vote of

the persons having the beneficial interests in the account ratably according to their respective interests in the account. The committee alone, in conjunction with others, or by delegation to the insurer or any other person, as investment manager or investment adviser, may authorize purchases and sales of investments for the account if, as long as the life insurer or any subsidiary or affiliate of the life insurer is the investment manager or investment adviser of the account, the investments of the account are eligible under this section. If compliance with the Investment Company Act of 1940 involves only a portion of the account, the insurer may establish a committee for only that portion, and its members may be elected by the vote of the persons having the beneficial interests in the portion. A committee for only a portion of the account may be given the further power to require the subdivision of the account into two accounts so that the portion of the account with respect to which the committee is acting shall constitute a separate account. If the committee so requires, the insurer shall segregate, from the account being so subdivided, a portion of each asset held with respect to the reserve liabilities of the account. That portion shall be in the same proportion to the total of the asset as the reserve liability for the portion of the account with respect to which the committee is acting bears to the total reserve liability of the account; and notwithstanding any other provision of law, the assets so segregated shall be transferred to a separate account with respect to which the committee shall act.

(d) The investments and liabilities of the account shall at all times be clearly identifiable and distinguishable from the other investments and liabilities of the insurer. A sale, transfer, or exchange of investments shall not be made between any of the separate accounts or between any other investment account of the company and one or more of the separate accounts, except for the purpose of:

- (1) Conducting the business of the account in accordance with subsection (b), or
- (2) Making adjustments necessitated by the contract for mortality experience adjustment, and then only if the transfers are made by a transfer of cash or by a transfer of securities having a valuation which can readily be determined in the market place. The commissioner may require for domestic life insurers that a transfer of cash or investments from a separate account or accounts to the company be approved in advance of the transfer. The commissioner may prescribe reasonable limitations on charges against and permissible deductions from separate accounts for life insurance contracts on a variable basis.

(e) As used in this section, Investment Company Act of 1940 means the Act of Congress approved August 22, 1940, entitled Investment Company Act of 1940 as amended from time to time, or any similar statute enacted in substitution therefor.

(f) The commissioner may adopt rules pursuant to chapter 91."

SECTION 6. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:6-324 and to read as follows:

**"§431:6-324 Subsidiaries.** (a) Any domestic insurer, either by itself or in cooperation with one or more persons, may organize or acquire one or more subsidiaries subject to the limitations of this section.

(b) In addition to investments in common stock, preferred stock, debt obligations, and other securities permitted under all other sections of this article, a domestic insurer also may do one or more of the following:

- (1) Invest, in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries, amounts which do not exceed the lesser of five per cent of the insurer's assets or fifty per cent of the insurer's surplus as regards policyholders. However, after the investments, the insurer's surplus as regards policyholders shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs. In calculating the amount of the investments, there shall be included:
  - (A) Total net monies or other consideration expended and obligations assumed in the acquisition or formation of a subsidiary, including all organizational expenses and contributions to capital and surplus of the subsidiary, whether or not represented by the purchase of capital stock or issuance of other securities, and
  - (B) All amounts expended in acquiring additional common stock, preferred stock, debt obligations, and other securities and all contributions to the capital or surplus, of a subsidiary subsequent to its acquisition or formation;
- (2) If the insurer's total liabilities, as calculated for National Association of Insurance Commissioners' annual statement purposes, are less than ten per cent of assets, invest any amount in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries. However, after the investment the insurer's surplus as regards policyholders, considering the investment as if it were a disallowed asset, shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs;
- (3) Invest any amount in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries; provided that each subsidiary agrees to limit its investments in any asset so that the investments will not cause the amount of the total investment of the insurer to exceed any of the investment limitations specified in item (1) or in this article applicable to the insurer. For the purpose of this subsection, the total investment of the insurer shall include:
  - (A) Any direct investment by the insurer in an asset, and
  - (B) The insurer's proportionate share of any investment of an asset by any subsidiary of the insurer, which shall be calculated by multiplying the amount of the subsidiary's investment by the percentage of the insurer's ownership of the subsidiary;
- (4) With the approval of the commissioner, invest any amount in common stock, preferred stock, debt obligations, or other securities of one or more subsidiaries, provided that after the investment the insurer's surplus as regards policyholders, shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs; or

- (5) Invest any amount in the common stock, preferred stock, debt obligations, or other securities of any subsidiary exclusively engaged in holding title to, or holding title to and managing or developing real or personal property, if after considering as a disallowed asset so much of the investment as is represented by subsidiary assets which if held directly by the insurer would be considered as a disallowed asset, the insurer's surplus as regards policyholders shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(c) Investments in common stock, preferred stock, debt obligations, or other securities of subsidiaries made pursuant to subsection (b) shall not be subject to any of the otherwise applicable restrictions or prohibitions contained in this article applicable to the investment of insurers.

(d) Whether any investment pursuant to subsection (b) meets the applicable requirements is to be determined immediately after the investment is made, taking into account the then outstanding principal balance on all previous investments in debt obligations, and the value of all previous investments in equity securities as of the date they were made.

(e) If an insurer ceases to control a subsidiary, it shall dispose of any investment therein made pursuant to this section within three years from the time of the cessation of control or within such further times as the commissioner may prescribe, unless at any time after the investment has been made, the investment has met the requirements for investment under any other section of this article, and the insurer has notified the commissioner thereof.

(f) In addition to the above subsection, any insurer acquiring or disposing of any subsidiary, must also comply with article 11 of this code."

SECTION 7. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:10C-202 and to read as follows:

**"§431:10C-202 Making of motor vehicle insurance rates.** (a) All premium rates for motor vehicle insurance shall be made in accordance with the following provisions:

- (1) Rates shall not be excessive, inadequate, or unfairly discriminatory;
- (2) Due consideration shall be given to:
  - (A) Past and prospective loss experience in this State, catastrophe hazards, if any, reasonable margin for profit, and contingencies, dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers;
  - (B) Reasonable margin for profit from and contingencies in the administration of motor vehicle insurance sold;
  - (C) Past and prospective expenses in the sale and administration of motor vehicle insurance;
  - (D) Investment income from reserves, unearned insurance premiums, and other unearned proceeds received on account of motor vehicle insurance sold, and all other factors that may be deemed relevant, such as but not limited to types of vehicles, occupations, and involvement in past accidents, provided they are established to have a probable effect upon losses or expense, or rates; and
  - (E) Optionally, to past or prospective loss, sales, and administrative costs experience in the nation or regionally, whenever the consideration will serve to reduce rates;

- (3) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any insurer or group with respect to any class of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable; and
  - (4) Risks may be grouped by classifications for the establishing of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. The standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.
- (b) Except to the extent necessary to meet the provisions of subsection (a)(4), uniformity among insurers in any matters within the scope of this section is neither required nor prohibited.
- (c) The commissioner shall be prohibited from setting, maintaining, or in any way fixing the rates charged by motor vehicle insurers for motor vehicle insurance issued in conformity with this article as either no-fault insurance or as optional additional insurance except as provided in part IV of this article. Each insurer licensed to underwrite no-fault insurance in the State shall establish its own rate schedule. The commissioner, however, shall monitor and survey the several companies' rate making methods and systems. The commissioner shall require of each insurer and of each self-insurer any and all information, data, internal memoranda, studies, and audits the commissioner deems desirable for the purpose of evaluation, comparison, and study of the methods and schedules.
- (d) Notwithstanding subsection (c), commencing on December 16, 1985 and ending on December 31, 1988, all insurers of any motor vehicle shall provide a ten per cent reduction off premium charges each insurer assesses for each new and renewal policy for no-fault benefits and medical payment coverage for any motor vehicle which is equipped with seat belt assemblies as required under any federal motor vehicle safety standard issued pursuant to Public Law 89-563, the federal National Traffic and Motor Vehicle Safety Act of 1966, as amended, or which is so equipped even if not required to be under any federal motor vehicle standard.
- (e) Notwithstanding subsection (c), and in addition to all other premium reductions required under this section, commencing on October 1, 1986 and ending on September 30, 1989, all insurers of any motor vehicle shall provide a 1.5 per cent reduction for bodily injury liability, property damage liability, no-fault benefits, uninsured motorist, and underinsured motorist coverages, and a 0.75 per cent reduction for collision coverage off premium charges each insurer assesses for each new and renewal policy, based on the anticipated effects of section 281-78. Commencing on October 1, 1989 and ending on September 30, 1990, at the discretion of and as determined by the commissioner, based on the difference between the actual and anticipated effects of section 281-78, all insurers of any motor vehicle shall provide a refund or credit to each insured at the time of renewal of a no-fault policy.
- (f) Notwithstanding any other law to the contrary, no insurer shall agree, combine, or conspire with any other private insurer or enter into, become a member of, or participate in any understanding, pool, or trust to fix, control, or maintain, directly or indirectly, motor vehicle insurance rates. Any violation of this section shall subject the insurer and each of its officers and employees involved to the penalties of chapter 480 without

benefit of any exemption otherwise permitted by section 480-11; provided that this subsection shall not apply to advisory organizations referred to in section 431:14-111 which are not involved in rate making under this article."

SECTION 8. Chapter 431, Hawaii Revised Statutes, is amended by adding a new article to be designated Article 11 and to read as follows:

**"ARTICLE 11. INSURANCE HOLDING COMPANY SYSTEM**

**§431:11-101 Scope and purpose.** (a) This article applies to all persons doing an insurance business in this State unless specifically exempted under subsection (b).

(b) The commissioner may exempt:

- (1) Any class of insurers from any provision of this article, when the commissioner deems the exemption consistent with the purposes of this article and in the public interest; or
- (2) Upon request of the person required to supply information or perform an act, that person from any provision of this article, when the commissioner deems the exception consistent with the purposes of this article and in the public interest.

(c) The purposes of this article include:

- (1) Exercising surveillance over the acquisition of a domestic insurer, to ensure that in the process of making it part of an insurance holding company system, the interests of policyholders, shareholders, and the public are not harmed;
- (2) Providing the regulatory monitoring of those intercorporate relationships and transactions among affiliates within an insurance holding company system that may affect the solidity of insurers;
- (3) Controlling the payment of dividends that might affect the solidity of insurers; and
- (4) Providing, in appropriate cases, recoupment of dividends paid.

**§431:11-102 Definitions.** As used in this article, unless the context shall otherwise require:

"Affiliate" (including affiliate of, or person affiliated with, a specific person) means a person that, directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

"Control" (including controlling, controlled by, and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person.

- (1) Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten per cent or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by section 431:11-105(i) that control does not exist in fact.
- (2) The commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making



specific findings of fact to support the commissioner's determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

"Insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer.

"Insurer" shall have the same meaning as set forth in article 1, except that it shall not include:

- (1) Agencies, authorities, or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state;
- (2) Fraternal benefit societies;
- (3) Nonprofit medical and hospital service associations; or
- (4) Unauthorized insurers.

"Person" means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, and any similar entity or any combination of the foregoing acting in concert, but shall not include any joint venture partnership exclusively engaged in owning, managing, leasing, or developing real or tangible personal property, or a securities broker performing only the usual and customary broker's function.

"Security holder" of a specified person means one who owns any security of the person, including common stock, preferred stock, debt obligations, and any other security convertible into or evidencing the right to acquire any of the foregoing.

"Subsidiary of a specified person" means an affiliate controlled by the person directly or indirectly through one or more intermediaries.

"Voting security" shall include any security convertible into or evidencing a right to acquire a voting security.

**§431:11-103 Subsidiaries of insurers.** (a) Any domestic insurer, either by itself or in cooperation with one or more persons, may organize or acquire one or more subsidiaries engaged in the following kinds of business:

- (1) Any kind of insurance business authorized by the jurisdiction in which it is incorporated;
- (2) Acting as an insurance broker or as an insurance agent for its parent or for any of its parent's insurer subsidiaries;
- (3) Investing, reinvesting, or trading in securities for its own account, that of its parent, any subsidiary of its parent, or any affiliate or subsidiary;
- (4) Management of any investment company subject to or registered pursuant to the Investment Company Act of 1940, as amended, including related sales and services;
- (5) Acting as a broker/dealer subject to or registered pursuant to the Securities Exchange Act of 1934, as amended;
- (6) Rendering investment advice to governments, government agencies, corporations, or other organizations or groups;
- (7) Rendering other services related to the operations of an insurance business including, but not limited to, actuarial, loss prevention, safety engineering, data processing, accounting, claims, appraisal, and collection services;
- (8) Ownership and management of assets which the parent corporation could itself own or manage; provided that the aggregate

investment by the insurer and its subsidiaries acquired or organized pursuant to this paragraph shall not exceed the limitations applicable to the investments by the insurer;

- (9) Acting as administrative agent for a governmental instrumentality which is performing an insurance function;
- (10) Financing of insurance premiums, agents, and other forms of consumer financing;
- (11) Any other business activity determined by the commissioner to be reasonably ancillary to an insurance business; and
- (12) Owning a corporation or corporations engaged or organized to engage exclusively in one or more of the businesses specified in this section.

(b) In addition to investments in common stock, preferred stock, debt obligations, and other securities permitted under article 6, a domestic insurer may also:

- (1) Invest in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries, amounts which do not exceed the lesser of ten per cent of the insurer's assets or fifty per cent of the insurer's surplus as regards policyholders; provided that after the investments, the insurer's surplus as regards policyholders will be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs. In calculating the amount of the investments, investments in domestic or foreign insurance subsidiaries shall be excluded, and there shall be included:
  - (A) Total net monies or other consideration expended and obligations assumed in the acquisition or formation of a subsidiary, including all organizational expenses and contributions to capital and surplus of the subsidiary whether or not represented by the purchase of capital stock or issuance of other securities, and
  - (B) All amounts expended in acquiring additional common stock, preferred stock, debt obligations, and other securities and all contributions to the capital or surplus of a subsidiary subsequent to its acquisition or formation;
- (2) Invest any amount in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries engaged or organized to engage exclusively in the ownership and management of assets authorized as investments for the insurer; provided that each subsidiary agrees to limit its investments in any asset so that the investments will not cause the amount of the total investment of the insurer to exceed any of the investment limitations specified in item (1) or in article 6. For the purpose of this subsection, the total investment of the insurer shall include:
  - (A) Any direct investment by the insurer in an asset, and
  - (B) The insurer's proportionate share of any investment in an asset by any subsidiary of the insurer, which shall be calculated by multiplying the amount of the subsidiary's investment by the percentage of the ownership of the subsidiary; and
- (3) With the approval of the commissioner, invest any greater amount in common stock, preferred stock, debt obligations, or other securities of one or more subsidiaries; provided that after the investment the insurer's surplus as regards policyholders will

be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(c) Investments in common stock, preferred stock, debt obligations, or other securities of subsidiaries made pursuant to subsection (b) shall not be subject to any of the otherwise applicable restrictions or prohibitions contained in this code applicable to investments of insurers.

(d) Whether any investment pursuant to subsection (b) meets the applicable requirements thereof is to be determined before the investment is made, by calculating the applicable investment limitations as though the investment had already been made, taking into account the then outstanding principal balance on all previous investments in debt obligations, and the value of all previous investments in equity securities as of the day they were made, net of any return of capital invested, not including dividends.

(e) If an insurer ceases to control a subsidiary, it shall dispose of any investment therein made pursuant to this section within three years from the time of the cessation of control or within such further time as the commissioner may prescribe, unless at any time after the investment shall have been made, the investment shall have met the requirements for investment under any other section of this code, and the insurer has notified the commissioner thereof.

**§431:11-104 Acquisition of control or merger with domestic insurer. (a)**

No person other than the issuer shall make a tender offer or request or invitation for tenders, or enter into any agreement to exchange securities, or seek to acquire, or acquire, in the open market or otherwise, any voting security of a domestic insurer if, after the consummation thereof, the person, directly or indirectly (by conversion or by exercise of any right to acquire), would be in control of the insurer. No person shall enter into an agreement to merge with or otherwise to acquire control of a domestic insurer or any person controlling a domestic insurer unless, at the time any offer, request, or invitation is made or any agreement is entered into, or prior to the acquisition of the securities if no offer or agreement is involved, the person has filed with the commissioner and has sent to the insurer, and the insurer has sent to its shareholders, a statement containing the information required by subsection (b) and the offer, request, invitation, agreement, or acquisition has been approved by the commissioner in the manner hereinafter prescribed.

(b) The statement to be filed with the commissioner hereunder shall be made under oath or affirmation and shall contain the following information:

(1) The name and address of each person by whom or on whose behalf the merger or other acquisition of control referred to in subsection (a) is to be effected (hereinafter called "acquiring party"), and

(A) If the person is an individual, the principal occupation and all offices and positions held by the individual during the past five years, and any conviction of crimes other than minor traffic violations during the past ten years; or

(B) If the person is not an individual, a report of the nature of its business operations during the past five years or for such lesser period as the person and any predecessors thereof shall have been in existence; an informative description of the business intended to be done by the person and the person's subsidiaries; and a list of all individuals who are or who have been selected to become

directors or executive officers of such person, or who perform or will perform functions appropriate to the positions. The list shall include for each individual the information required by subsection (A);

- (2) The source, nature, and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a description of any transaction wherein funds were or are to be obtained for any purpose (including any pledge of the insurer's stock, or the stock of any of its subsidiaries or controlling affiliates), and the identity of persons furnishing the consideration; provided that where a source of the consideration is a loan made in the lender's ordinary course of business, the identity of the lender shall remain confidential, if the person filing the statement requests confidentiality;
- (3) Fully audited financial information as to the earnings and financial condition of each acquiring party for the preceding five fiscal years (or for the lesser period as the acquiring party and any predecessors thereof shall have been in existence), and similar unaudited information as of a date not earlier than ninety days prior to the filing of the statement;
- (4) Any plans or proposals which each acquiring party may have to liquidate the insurer, to sell its assets or merge or consolidate it with any person, or to make any other material change in its business or corporate structure or management;
- (5) The number of shares of any security referred to in subsection (a) which each acquiring party proposes to acquire, and the terms of the offer, request, invitation, agreement, or acquisition referred to in subsection (a), and a statement as to the method by which the fairness of the proposal was arrived at;
- (6) The amount of each class of any security referred to in subsection (a) which is beneficially owned or concerning which there is a right to acquire beneficial ownership by each acquiring party;
- (7) A full description of any contracts, arrangements, or understandings with respect to any security referred to in subsection (a) in which any acquiring party is involved, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies. The description shall identify the persons with whom the contracts, arrangements, or understandings have been entered into;
- (8) A description of the purchase of any security referred to in subsection (a) during the twelve calendar months preceding the filing of the statement, by any acquiring party, including the dates of purchase, names of the purchasers, and considerations paid or agreed to be paid therefore;
- (9) A description of any recommendations to purchase any security referred to in subsection (a) made during the twelve calendar months preceding the filing of the statement, by any acquiring party, or by anyone based upon interviews or at the suggestion of such acquiring party;
- (10) Copies of all tender offers, requests, or invitation for tenders, or exchange offers for, and agreements to acquire or exchange any securities referred to in subsection (a), and (if distributed) of additional soliciting material relating thereto;

- (11) The term of any agreement, contract, or understanding made with or proposed to be made with any broker/dealer as to solicitation of securities referred to in subsection (a) for tender, and the amount of any fees, commissions or other compensation to be paid to broker/dealers with regard thereto; and
- (12) Any additional information as the commissioner may by rule or regulation prescribe as necessary or appropriate for the protection of policyholders of the insurer or in the public interest.

If the person required to file the statement referred to in subsection (a) is a partnership, limited partnership, or other group, the commissioner may require that the information called for by items (1) through (12) shall be given with respect to each partner of the partnership or limited partnership, each member of the group, and each person who controls such partner or member. If any partner, member, or person is a corporation or the person required to file the statement referred to in subsection (a) is a corporation, the commissioner may require that the information called for by items (1) through (12) shall be given with respect to the corporation, each officer and director of the corporation, and each person who is directly or indirectly the beneficial owner of more than ten per cent of the outstanding voting securities of the corporation.

If any material change occurs in the facts set forth in the statement filed with the commissioner and sent to the insurer pursuant to this section, an amendment setting forth the change, together with copies of all documents and other material relevant to the change, shall be filed with the commissioner and sent to the insurer within two business days after the person learns of the change. The insurer shall send the amendment to its shareholders.

(c) If any offer, request, invitation, agreement or acquisition referred to in subsection (a) is proposed to be made by means of a registration statement under the Securities Act of 1933 or in circumstances requiring the disclosure of similar information under the Securities Exchange Act of 1934, or under a state law requiring similar registration or disclosure, the person required to file the statement referred to in subsection (a) may utilize the documents in furnishing the information called for by that statement.

- (d) (1) The commissioner shall approve any merger or other acquisition of control referred to in subsection (a) unless, after a public hearing thereon, the commissioner finds that:
  - (A) After the change of control, the domestic insurer referred to in subsection (a) would not be able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed;
  - (B) The effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this State or tend to create a monopoly therein;
  - (C) The financial condition of any acquiring party might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders;
  - (D) The plans or proposals which the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest;
  - (E) The competence, experience, and integrity of those persons who would control the operation of the insurer would

not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control; or

(F) The acquisition is likely to be hazardous or prejudicial to the insurance buying public.

(2) The public hearing referred to in item (1) shall be held within thirty days after the statement required by subsection (a) is filed, and at least twenty days notice thereof shall be given by the commissioner to the person filing the statement. Not less than seven days notice of the public hearing shall be given by the person filing the statement to the insurer and to any other persons as may be designated by the commissioner. The insurer shall give notice to its security holders. The commissioner shall make a determination within thirty days after the conclusion of the hearing. At the hearing, the person filing the statement, the insurer, any person to whom notice of hearing was sent, and any other person whose interest may be affected thereby shall have the right to present evidence, examine and cross examine witnesses, and offer oral and written arguments and in connection therewith shall be entitled to conduct discovery proceedings in the same manner as is presently allowed in chapter 91. All discovery proceedings shall be concluded not later than three days prior to the commencement of the public hearing.

(3) The commissioner may retain at the acquiring person's expense any attorneys, actuaries, accountants, and other experts not otherwise a part of the commissioner's staff as may be reasonably necessary to assist the commissioner in reviewing the proposed acquisition of control.

(e) All statements, amendments, or other material filed pursuant to subsections (a) or (b), and all notices of public hearings held pursuant to subsection (d), shall be mailed by the insurer to its shareholders within five business days after the insurer has received the statements, amendments, other material, or notices. The expenses of mailing shall be borne by the person making the filing. As security for the payment of the expenses, the person shall file with the commissioner an acceptable bond or other deposit in an amount to be determined by the commissioner.

(f) The provisions of this subsection shall not apply to:

(1) Any transaction which is subject to the provisions of article 4, dealing with the merger or consolidation of two or more insurers; or

(2) Any offer, request, invitation, agreement, or acquisition which the commissioner by order shall exempt therefrom as:

(A) Not having been made or entered into for the purpose of, and not having the effect of, changing or influencing the control of a domestic insurer; or

(B) Not otherwise comprehended within the purposes of this section.

(g) The following shall be violations of this article:

(1) The failure to file any statement, amendment, or other material required to be filed pursuant to subsections (a) or (b); or

(2) The effectuation or any attempt to effectuate an acquisition of, control of, or merger with, a domestic insurer unless approval is given by the commissioner.

(h) The courts of this State are hereby vested with jurisdiction over every person not resident, domiciled or authorized to do business in this

State who files a statement with the commissioner under this section, and overall actions involving the person arising out of violations of this article. Each person shall be deemed to have performed acts equivalent to and constituting an appointment by the person of the commissioner to be the person's true and lawful attorney upon whom may be served all lawful process in any action, suit, or proceeding arising out of violations of this article. Copies of all lawful process shall be served on the commissioner and transmitted by registered or certified mail by the commissioner to the person at the person's last known address.

**§431:11-105 Registration of insurers.** (a) Every insurer who is authorized to do business in this State and who is a member of an insurance holding company system shall register with the commissioner, except a foreign insurer subject to registration requirements and standards adopted by statute or regulation in the jurisdiction of its domicile which are substantially similar to those contained in this section and section 431:11-106(a)(1). The insurer shall file a copy of the registration statement and summary of its registration statement as required by subsections (b) and (c) with the National Association of Insurance Commissioners. The insurer also shall file a copy of the summary of its registration statement as required by subsection (c) in each state in which that insurer is authorized to do business if requested by the commissioner of that state. Any insurer who is subject to registration under this section shall register within fifteen days after it becomes subject to registration, and annually thereafter by March 15 of each year for the previous calendar year, unless the commissioner for good cause shown extends the time for registration, and then within the extended time. The commissioner may require any insurer who is a member of a holding company system who is not subject to registration under this section to furnish a copy of the registration statement or other information filed by the insurance company with the insurance regulatory authority of domiciliary jurisdiction.

(b) Every insurer subject to registration shall file the registration statement on a form prescribed by the National Association of Insurance Commissioners, which shall contain the following current information:

- (1) The capital structure, general financial condition, ownership, and management of the insurer and any person controlling the insurer;
- (2) The identity and relationship of every member of the insurance holding company system;
- (3) The following agreements in force, and transactions currently outstanding or which have occurred during the last calendar year between such insurer and its affiliates:
  - (A) Loans, other investments, or purchases, sales or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;
  - (B) Purchases, sales, or exchange of assets;
  - (C) Transactions not in the ordinary course of business;
  - (D) Guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;
  - (E) All management agreements, service contracts and all cost-sharing arrangements;
  - (F) Reinsurance agreements;
  - (G) Dividends and other distributions to shareholders; and

(H) Consolidated tax allocation agreements;

- (4) Any pledge of the insurer's stock, including stock of any subsidiary or controlling affiliate, for a loan made to any member of the insurance holding company system; and
- (5) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the commissioner.

(c) All registration statements shall contain a summary outlining all items in the current registration statement representing changes from the prior registration statement.

(d) No information need be disclosed on the registration statement filed pursuant to subsection (b) if the information is not material for the purposes of this section. Unless the commissioner by rule or order provides otherwise, sales, purchases, exchanges, loans or extensions of credit, investments, or guarantees involving one-half of one per cent or less of an insurer's admitted assets as of the 31st day of December next preceding shall not be deemed material for purposes of this section.

(e) Subject to section 431:11-106(b), each registered insurer shall report to the commissioner all dividends and other distributions to shareholders within fifteen business days following the declaration thereof.

(f) Any person within an insurance holding company system subject to registration shall be required to provide complete and accurate information to an insurer, where the information is reasonably necessary to enable the insurer to comply with the provisions of this article.

(g) The commissioner shall terminate the registration of any insurer which demonstrates that it no longer is a member of an insurance holding company system.

(h) The commissioner may require or allow two or more affiliated insurers subject to registration to file a consolidated registration statement.

(i) The commissioner may allow an insurer who is authorized to do business in this State and who is part of an insurance holding company system to register on behalf of any affiliated insurer who is required to register under subsection (a) and to file all information and material required to be filed under this section.

(j) The provisions of this section shall not apply to any insurer, information, or transaction if and to the extent that the commissioner by rule or order shall exempt the same from the provisions of this section.

(k) Any person may file with the commissioner a disclaimer of affiliation with any authorized insurer or a disclaimer may be filed by the insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between the person and the insurer as well as the basis for disclaiming the affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with the person unless and until the commissioner disallows the disclaimer. The commissioner shall disallow a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support the disallowance.

(l) The failure to file a registration statement or any summary of the registration statement required by this section within the time specified for such filing shall be a violation of this section.

**§431:11-106 Standards and management of an insurer within a holding company system.**



- (a) (1) Transactions within a holding company system to which an insurer subject to registration is a party shall be subject to the following standards:
  - (A) The terms shall be fair and reasonable;
  - (B) Charges or fees for services performed shall be reasonable;
  - (C) Expenses incurred and payment received shall be allocated to the insurer in conformity with customary insurance accounting practices consistently applied;
  - (D) The books, accounts, and records of each party to all transactions shall be so maintained as to clearly and accurately disclose the nature and details of the transactions including the accounting information as is necessary to support the reasonableness of the charges or fees to the respective parties; and
  - (E) 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.
- (2) The following transactions involving a domestic insurer and any person in its holding company system may not be entered into unless the insurer has notified the commissioner in writing of its intention to enter into the transaction at least thirty days prior thereto, or a shorter period as the commissioner may permit, and the commissioner has not disapproved it within that period:
  - (A) Sales, purchases, exchanges, loans, or extensions of credit, guarantees, or investments; provided that the transactions are equal to or exceed:
    - (i) with respect to nonlife insurers, the lesser of three per cent of the insurer's admitted assets or twenty-five per cent of surplus as regards policyholders each as of the 31st day of December next preceding; or
    - (ii) with respect to life insurers, three per cent of the insurer's admitted assets as of the 31st day of December next preceding;
  - (B) 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 the transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, to purchase assets of, or to make investments in, any affiliate of the insurer making the loans or extensions of credit provided the transactions are equal to or exceed:
    - (i) with respect to nonlife insurers, the lesser of three per cent of the insurer's admitted assets or twenty-five per cent of surplus as regards policyholders each as of the 31st day of December next preceding; or
    - (ii) with respect to life insurers, three per cent of the insurer's admitted assets as of the 31st day of December next preceding;
  - (C) Reinsurance agreements or modifications thereto in which the reinsurance premium or a change in the insurer's liabilities equals or exceeds five per cent of the insurer's surplus as regards policyholders, as of the 31st day of December 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;

- (D) All management agreements, service contracts and all cost-sharing arrangements; and
- (E) Any material transactions, specified by regulation, which the commissioner determines may adversely affect the interests of the insurer's policyholders.

Nothing in this section 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.

- (3) A domestic insurer may not enter into transactions, which are part of a plan or series of like transactions with persons within the holding company system, if the purpose of those separate transactions is to avoid the statutory threshold amount and thus avoid the review that would otherwise occur. If the commissioner determines that the separate transactions were entered into over any twelve month period for that purpose, the commissioner may exercise the commissioner's authority under section 431:11-111.
- (4) The commissioner, in reviewing transactions pursuant to subsection (a)(2), shall consider whether the transactions comply with the standards set forth in subsection (a)(1) and whether they may adversely affect the interests of policyholders.
- (5) The commissioner shall be notified within thirty days of any investment of the domestic insurer in any one corporation if the total investment in the corporation by the insurance holding company system exceeds ten per cent of the corporation's voting securities.
- (b) (1) No domestic insurer shall 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 the period disapproved the payment, or
  - (B) The commissioner shall have approved the payment within the thirty 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 twelve months exceeds:
  - (A) Ten per cent of such insurer's surplus as regards policyholders as of the 31st day of December next preceding; or
  - (B) The net gain from operations of a life insurer, or the net income, if the insurer is not a life insurer, not including realized capital gains, for the twelve month period ending the 31st day of December next preceding.

Extraordinary dividend or distribution shall not include pro rata distributions of any class of the insurer's own securities.

In determining whether a dividend or distribution is extraordinary, an insurer may carry forward income from the previous two calendar years that has not already been paid out as dividends.

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

- (i) The commissioner has approved the payment of the dividend or distribution; or
  - (ii) The commissioner has not disapproved the payment within the thirty day period referred to above.
- (c) (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 which they would otherwise be subject to by law. The insurer shall be managed so as to assure its separate operating identity consistent with this article.
  - (2) Nothing herein shall preclude a domestic insurer from having or sharing a common management or cooperative or joint use of personnel, property, or services with one or more other persons under arrangements meeting the standards of subsection (a)(1).
  - (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 any such entity. At least one of these persons 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 similar entity. The committee or committees shall have responsibility for recommending the selection of independent certified public accountants, reviewing the insurer's financial condition, the scope and results of the independent audit, and any internal audit, nominating candidates for director for election by shareholders or policyholders, and 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 subsections (c)(3) and (c)(4) shall not apply to a domestic insurer if the person controlling the insurer is an insurer having a board of directors and committees thereof that meet the requirements of subsections (c)(3) and (c)(4).
  - (d) 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 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;
- (9) The adequacy of the insurer's reserves; and
- (10) The quality and liquidity of investments in affiliates. The commissioner may treat any investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in the commissioner's judgment the investment so warrants.

**§431:11-107 Examination.** (a) Subject to the limitation contained in this section and in addition to the powers which the commissioner has under article 2 relating to the examination of insurers, the commissioner shall also have the power to order any insurer registered under section 431:11-105 to produce records, books, or other information papers in the possession of the insurer or its affiliates as are reasonably necessary to ascertain the financial condition of the insurer or to determine compliance with this article. In the event the insurer fails to comply with the order, the commissioner shall have the power to examine the insurer's affiliates to obtain the information.

(b) The commissioner may retain at the registered insurer's expense attorneys, actuaries, accountants, and other experts not otherwise a part of the commissioner's staff as shall be reasonably necessary to assist in the conduct of the examination under subsection (a). Any persons so retained shall be under the direction and control of the commissioner and shall act in a purely advisory capacity.

(c) Each registered insurer producing for examination records, books and papers pursuant to subsection (a) shall be liable for and shall pay the expense of the examination in accordance with article 2.

**§431:11-108 Confidential treatment.** All information, documents, and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to section 431:11-107 and all information reported pursuant to section 431:11-105 and section 431:11-106, shall be given confidential treatment, shall not be subject to subpoena, and shall not be made public by the commissioner, the National Association of Insurance Commissioners, or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interest of the policyholders, shareholders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part thereof in such manner as the commissioner may deem appropriate.

**§431:11-109 Rules and regulations.** The commissioner may, upon notice and opportunity for all interested persons to be heard, issue such rules and orders as shall be necessary to carry out the provisions of this article.

**§431:11-110 Injunctions; prohibitions against voting securities; sequestration of voting securities.** (a) Whenever it appears to the commissioner

that any insurer or any director, officer, employee, or agent thereof has committed or is about to commit a violation of this article or of any rule or order issued by the commissioner hereunder, the commissioner may apply to the circuit court of the first judicial circuit for an order enjoining the insurer or the director, officer, employee, or agent thereof from violating or continuing to violate this article or any rule or order, and for other equitable relief as the nature of the case and the interest of the insurer's policyholders, creditors, and shareholders or the public may require.

(b) No security which is the subject of any agreement or arrangement regarding acquisition, or which is acquired or to be acquired, in contravention of the provisions of this article or of any rule or order issued by the commissioner hereunder may be voted at any shareholders' meeting, or may be counted for quorum purposes, and any action of shareholders requiring the affirmative vote of a percentage of shares may be taken as though the securities were not issued and outstanding. No action taken at any such meeting shall be invalidated by the voting of the securities, unless the action would materially affect control of the insurer or unless the courts of this State have so ordered. If an insurer or the commissioner has reason to believe that any security of the insurer has been or is about to be acquired in contravention of the provisions of this article or of any rule or order issued by the commissioner hereunder the insurer or the commissioner may apply to the circuit court of the first judicial circuit to enjoin any offer, request, invitation, agreement, or acquisition made in contravention of section 431:11-104 or any rule or order issued by the commissioner thereunder to enjoin the voting of any security so acquired, to void any vote of the security already cast at any meeting of shareholders and for such other equitable relief as the nature of the case and the interest of the insurer's policyholders, creditors, and shareholders or the public may require.

(c) In any case where a person has acquired or is proposing to acquire any voting securities in violation of this article or any rule or order issued by the commissioner hereunder, the circuit court of the first judicial circuit may, on such notice as the court deems appropriate, upon the application of the insurer or the commissioner seize or sequester any voting securities of the insurer owned directly or indirectly by the person, and issue an order with respect thereto as may be appropriate to effectuate the provisions of this article.

Notwithstanding any other provisions of law, for the purposes of this article, the sites of the ownership of the securities of domestic insurers shall be deemed to be in this State.

**§431:11-111 Sanctions.** (a) Any insurer failing, without just cause, to file any registration statement as required in this article shall be required, after notice and hearing, to pay a penalty of \$100 for each day's delay, to be recovered by the commissioner and the penalty so recovered shall be paid into the general fund of this State. The maximum penalty under this subsection is \$5,000. The commissioner may reduce the penalty if the insurer demonstrates to the commissioner that the imposition of the penalty would constitute a financial hardship to the insurer.

(b) Every director or officer of an insurance holding company system who knowingly violates, participates in, or assents to, or who knowingly shall permit any of the officers or agents of the insurer to engage in any transactions or make investments which have not been properly reported or submitted pursuant to sections 431:11-105(a), 431:11-106(a)(2), or 431:11-106(b) or who violates this article, shall pay, in their individual capacity, a civil forfeiture of not more than \$5,000 per violation, after notice and

hearing before the commissioner. In determining the amount of the civil forfeiture, the commissioner shall take into account the appropriateness of the forfeiture with respect to the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(c) Whenever it appears to the commissioner that any insurer subject to this article or any director, officer, employee, or agent thereof has engaged in any transaction or entered into a contract which is subject to section 431:11-106 and which would not have been approved had the approval been requested, the commissioner may order the insurer to cease and desist immediately any further activity under that transaction or contract. After notice and hearing, the commissioner may also order the insurer to void any of the contracts and restore the status quo if that action is in the best interest of the policyholders, creditors, or the public.

(d) Whenever it appears to the commissioner that any insurer or any director, officer, employee, or agent thereof has committed a willful violation of this article, the commissioner may cause criminal proceedings to be instituted against the insurer or the responsible director, officer, employee, or agent thereof. Any insurer who willfully violates this article may be fined not more than \$5,000. Any individual who willfully violates this article may be fined in the individual's capacity not more than \$5,000, or be imprisoned for not more than one year.

(e) Any officer, director, or employee of an insurance holding company system who willfully and knowingly subscribes to or makes, or causes to be made, any false statements or false reports or false filings with the intent to deceive the commissioner in the performance of the commissioner's duties under this article, upon conviction thereof, shall be imprisoned for not more than one year, or fined \$5,000, or both. Any fines imposed shall be paid by the officer, director, or employee in their individual capacity.

**§431:11-112 Receivership.** Whenever it appears to the commissioner that any person has committed a violation of this article which so impairs the financial condition of a domestic insurer as to threaten insolvency or make the further transaction of business by it hazardous to its policyholders, creditors, shareholders, or the public, then the commissioner may proceed as provided in article 15 to take possession of the property of the domestic insurer and to conduct the business thereof.

**§431:11-113 Recovery.** (a) If an order for liquidation or rehabilitation of a domestic insurer has been entered, the receiver appointed under the order shall have a right to recover on behalf of the insurer:

- (1) From any parent corporation or holding company or person or affiliate who otherwise controlled the insurer, the amount of distributions (other than distributions of shares of the same class of stock) paid by the insurer on its capital stock, or
- (2) Any payment in the form of a bonus, termination settlement, or extraordinary lump sum salary adjustment made by the insurer or its subsidiary(ies) to a director, officer, or employee.

Where the distribution or payment pursuant to items (1) or (2) is made at any time during the one year preceding the petition for liquidation, conservation or rehabilitation, as the case may be, subject to the limitations of subsections (b), (c), and (d).

(b) No distribution shall be recoverable if the parent or affiliate shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.

(c) Any person who was a parent corporation or holding company or a person who otherwise controlled the insurer or affiliate at the time the distributions were paid shall be liable up to the amount of distributions or payments under subsection (a) the person received. Any person who otherwise controlled the insurer at the time the distributions were declared shall be liable up to the amount of distributions the person would have received if they had been paid immediately. If two or more persons are liable with respect to the same distributions, they shall be jointly and severally liable.

(d) The maximum amount recoverable under this section shall be the amount needed in excess of all other available assets of the impaired or insolvent insurer to pay the contractual obligations of the impaired or insolvent insurer and to reimburse any guaranty funds.

(e) To the extent that any person liable under subsection (c) is insolvent or otherwise fails to pay claims due from it pursuant to subsection (c), its parent corporation or holding company or person who otherwise controlled it at the time the distribution was paid, shall be jointly and severally liable for any resulting deficiency in the amount recovered from the parent corporation or holding company or person who otherwise controlled it.

**§431:11-114 Revocation, suspension, or nonrenewal of insurer's license.** Whenever it appears to the commissioner that any person has committed a violation of this article which makes the continued operation of an insurer contrary to the interests of policyholders or the public, the commissioner may, after giving notice and an opportunity to be heard, determine to suspend, revoke or refuse to renew the insurer's license or authority to do business in this State for the period the commissioner finds is required for the protection of policyholders or the public. Any determination shall be accompanied by specific findings of fact and conclusions of law.

**§431:11-115 Judicial review; mandamus.** (a) Any person aggrieved by any act, determination, rule or order or any other action of the commissioner pursuant to this article may appeal therefrom to the circuit court of the first judicial circuit. The court shall conduct its review without a jury and by trial de novo, except that if all parties, including the commissioner, so stipulate, the review shall be confined to the record. Portions of the record may be introduced by stipulation into evidence in a trial de novo as to those parties so stipulating.

(b) The filing of an appeal pursuant to this section shall stay the application of any rule, order, or other action of the commissioner to the appealing party unless the court, after giving the party notice and an opportunity to be heard, determines that a stay would be detrimental to the interest of policyholders, shareholders, creditors or the public.

(c) Any person aggrieved by any failure of the commissioner to act or make a determination required by this article may petition the circuit court of the first judicial circuit for a writ in the nature of a mandamus or a peremptory mandamus directing the commissioner to act or make the determination forthwith.

**§431:11-116 Conflict with other laws.** All laws and parts of laws of this State inconsistent with this article are hereby superceded with respect to matters covered by this article.

**§431:11-117 Severability of provisions.** If any provision of this article or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this article

which can be given effect without the invalid provisions or applications, and for this purpose the provisions of this article are severable.”

SECTION 9. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:14-105 and to read as follows:

**“§431:14-105 Policy revisions which alter coverage.** All policy revisions which alter coverage in any manner shall be filed with the commissioner. After review by the commissioner, the commissioner shall determine whether a rate filing for the policy revision must be submitted in accordance with section 431:14-104.”

SECTION 10. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:15-324 and to read as follows:

**“§431:15-324 Domiciliary liquidator’s proposal to distribute assets.** (a) Within one hundred twenty days of a final determination of insolvency of an insurer by a court of competent jurisdiction of this State, the liquidator shall make application to the court for approval of a proposal, subject to the priority schedule stated in section 431:15-332, to disburse assets out of marshaled assets, from time to time as the assets become available. If the liquidator determines that there are insufficient assets to disburse, the application required by this section shall be considered satisfied by a filing by the liquidator stating the reasons for this determination.

(b) The proposal shall at least include provisions for:

- (1) Reserving amounts for the payment of expenses of administration and the payment of claims of secured creditors, to the extent of the value of the security held, and claims falling within the priorities established in section 431:15-332, classes 1, 2 and 3;
- (2) Disbursement of the assets marshalled to date and subsequent disbursement of assets as they become available;
- (3) Equitable allocation of disbursements to each of the classes entitled thereto;
- (4) The securing by the liquidator from each of the classes entitled to disbursements pursuant to this section of an agreement to return to the liquidator such assets, together with income earned on assets previously disbursed, as may be required to pay claims of secured creditors and claims falling within the priorities established in section 431:15-332 in accordance with the priorities. No bond shall be required of any of the classes; and
- (5) A full report to be made by each class to the liquidator accounting for all assets so disbursed to the class, all disbursements made therefrom, any interest earned by the class on the assets and any other matter as the court may direct.

(c) The liquidator’s proposal shall provide for disbursements to the guaranty funds or associations in amounts estimated at least equal to the claim payments made or to be made thereby for which the funds or associations could assert a claim against the liquidator, and shall provide further that if the assets available for disbursement from time to time do not equal the amount of the claim payments made or to be made by the fund or association then disbursements shall be in the amount of available assets.

(d) The liquidator’s proposal, with respect to an insolvent insurer writing life or health insurance or annuities, shall provide for disbursements of assets to any guaranty fund or association, or any foreign guaranty fund or association covering life or health insurance or annuities or to any other



entity or organization reinsuring, assuming, or guaranteeing policies or contracts of insurance under the acts creating such funds or associations.

(e) Notice of the application shall be given to the classes affected, the guaranty fund or association in, and to the commissioners of insurance of, each of the states. Any such notice shall be deemed to have been given when deposited in the United States certified mail, first class postage prepaid, at least thirty days prior to submission of the application to the court. Action on the application may be taken by the court provided the above required notice has been given and provided further that the liquidator's proposal complies with subsections (b)(1) and (2)."

SECTION 11. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:15-332 and to read as follows:

**"§431:15-332 Priority of distribution.** The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

(a) Class 1. The costs and expenses of administration, including but not limited to the following:

- (1) The actual and necessary costs of preserving or recovering the assets of the insurer;
- (2) Compensation for all services rendered in the liquidation;
- (3) Any necessary filing fees;
- (4) The fees and mileage payable to witnesses; and
- (5) Reasonable attorney's fees.

(b) Class 2. The reasonable expenses of a guaranty fund or association, or foreign guaranty association in handling claims.

(c) Class 3. Debts due to employees for services performed to the extent that they do not exceed \$1,000 and represent payment for services performed within one year before the filing of the petition for liquidation. Officers and directors shall not be entitled to the benefit of this priority. The priority shall be in lieu of any other similar priority which may be authorized by law as to wages or compensation of employees.

(d) Class 4. All claims under policies for losses incurred, including third party claims, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, and all claims of a guaranty fund or association or foreign guaranty association. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment by an employer to its employee shall be treated as a gratuity.

(e) Class 5. Claims under nonassessable policies for unearned premium or other premium refunds and claims of general creditors.

(f) Class 6. Claims of the federal or any state or local government. Claims including those of any governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained

from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of the claims shall be postponed to the class of claims under subsection (h).

(g) Class 7. Claims filed late or any other claims other than claims under subsections (h) and (i).

(h) Class 8. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be limited in accordance with law.

(i) Class 9. The claims of shareholders or other owners."

SECTION 12. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated section 431:16-109 and to read as follows:

**"§431:16-109 Plan of operation.**

- (a) (1) The association shall submit to the commissioner a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the commissioner.
- (2) If the association fails to submit a suitable plan of operation within ninety days following May 25, 1971, or if at any time thereafter the association fails to submit suitable amendments to the plan, the commissioner, after notice and hearing, shall adopt, pursuant to chapter 91, such rules as are necessary to effectuate this part. The rules shall continue in force until modified by the commissioner or superseded by a plan submitted by the association and approved by the commissioner.
- (b) All member insurers shall comply with the plan of operation.
- (c) The plan of operation shall:
  - (1) Establish the procedures whereby all the powers and duties of the association under section 431:16-108 will be performed;
  - (2) Establish procedures for handling assets of the association;
  - (3) Establish the amount and method of reimbursing members of the board of directors under section 431:16-107(c);
  - (4) Establish procedures by which claims may be filed with the association and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the association or its agent and a list of the claims shall be periodically submitted to the association or similar organization in another state by the receiver or liquidator;
  - (5) Establish regular places and times for meetings of the board of directors;
  - (6) Establish procedures for records to be kept of all financial transactions of the association, its agents, and the board of directors;
  - (7) Provide that any member insurer aggrieved by any final action or decision of the association may appeal to the commissioner within thirty days after the action or decision;
  - (8) Establish the procedures whereby selections for the board of directors will be submitted to the commissioner; and
  - (9) Contain additional provisions necessary or proper for the execution of the powers and duties of the association.

(d) The plan of operation may provide that any or all powers and duties of the association, except those under section 431:16-108(a)(3) and (b)(2), are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this association, or its equivalent, in two or more states. The corporation, association, or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other function of the association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this part."

SECTION 13. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be designated as section 431:20-115 and to read as follows:

**"§431:20-115 Use of reinsurance reserve on liquidation, dissolution or insolvency.** (a) If a domestic title insurer becomes insolvent, is in the process of liquidation or dissolution, or is in the possession of the commissioner:

- (1) The amount of the reinsurance reserve then remaining may be used by or with the written approval of the commissioner to pay for reinsurance of the liability of the title insurer upon all outstanding title insurance policies or reinsurance agreements to the extent for which claims for losses by the holders thereof are not then pending. The balance of the assets, if any, equal to the reinsurance reserve may be transferred to the general assets of the title insurer; and
- (2) The assets net of the reinsurance reserve shall be available to pay claims for losses sustained by holders of title insurance policies then pending or arising up to the time reinsurance is effected. If claims for losses exceed any other assets of the title insurer, the claims, when established, shall be paid pro rata out of the surplus assets attributable to the reinsurance reserve, to the extent of the surplus, if any.

(b) If reinsurance is not obtained, assets equal to the reinsurance reserve and assets constituting minimum capital, or so much as remains thereof after outstanding claims have been paid, shall constitute a trust fund to be held and invested by the commissioner for twenty years, out of which claims of policyholders shall be paid as they arise. The balance, if any, of the trust fund, at the expiration of twenty years, shall revert to the general assets of the title insurer."

SECTION 15. New statutory material is underscored.<sup>1</sup>

SECTION 16. This Act shall take effect on July 1, 1988 only if H.B. No. 410, H.D. 1, S.D. 1, C.D. 1, in any form passed by the legislature, Regular Session of 1987, becomes an Act.

(Approved July 2, 1987.)

**Note**

1. Edited pursuant to HRS §23G-16.5.