ACT 140

S.B. NO. 2853

A Bill for an Act Relating to Insurance.

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

PART I

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

"ARTICLE
RISK MANAGEMENT AND OWN RISK AND SOLVENCY ASSESSMENT

§431: -101 Scope and purpose. (a) This article shall apply to all insurers domiciled in this State unless exempt pursuant to section 431: -106.

(b) The purposes of this article shall be to:

(1) Provide the requirements for maintaining a risk management framework and completing an own risk and solvency assessment; and

(2) Provide guidance and instructions for filing an own risk and solvency assessment summary report with the commissioner.

§431: -102 Definitions. As used in this article:

"Insurance group" means those insurers and affiliates included within an insurance holding company system as defined in article 11.

"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 that are exempt from state and federal income taxes; or

(4) Unauthorized insurers.

"Own risk and solvency assessment" means a confidential internal assessment, appropriate to the nature, scale, and complexity of an insurer or insurance group and conducted by that insurer or insurance group, of the material and relevant risks associated with the insurer or insurance group's current business plan and the sufficiency of capital resources to support those risks.

"Own Risk and Solvency Assessment Guidance Manual" means the Own Risk and Solvency Assessment Guidance Manual as developed and adopted by the National Association of Insurance Commissioners and as amended from time to time. A change in the Own Risk and Solvency Assessment Guidance Manual shall take effect on the January 1 following the calendar year in which the changes have been adopted by the National Association of Insurance Commissioners.

"Own risk and solvency assessment summary report" means a confidential, high-level summary of an insurer or insurance group's own risk and solvency assessment.

§431: -103 Risk management framework. An insurer shall maintain a risk management framework to assist the insurer with identifying, assessing, monitoring, managing, and reporting its material and relevant risks. This re-

quirement may be satisfied if the insurance group of which the insurer is a member maintains a risk management framework applicable to the operations of the insurer.

§431: -104 Own risk and solvency assessment requirement. Subject to section 431: -106, an insurer or the insurance group of which the insurer is a member shall regularly conduct an own risk and solvency assessment consistent with a process comparable to the Own Risk and Solvency Assessment Guidance Manual. The own risk and solvency assessment shall be conducted no less than annually but also at any time when there are significant changes to the risk profile of the insurer or the insurance group of which the insurer is a member.

§431: -105 Own risk and solvency assessment summary report. (a) Upon the commissioner's request, and no more than once each year beginning in 2018, an insurer shall submit to the commissioner an own risk and solvency assessment summary report or any combination of reports that together contain the information described in the Own Risk and Solvency Assessment Guidance Manual, which is applicable to the insurer, the insurance group of which it is a member, or both.

(b) Notwithstanding any request from the commissioner, if the insurer is a member of an insurance group, the insurer shall submit any reports required by this section if the commissioner is the lead state commissioner of the insurance group as determined by the procedures in the Financial Analysis Handbook adopted by the National Association of Insurance Commissioners.

(c) Any reports filed pursuant to this section shall include a signature of the insurance group's chief risk officer or another executive responsible for the oversight of the insurer's enterprise risk management process attesting, to the best of the person's belief and knowledge, that:

(1) The insurer applies the enterprise risk management process described in the own risk and solvency assessment summary report; and

(2) A copy of the report has been provided to the insurer's board of directors or the appropriate committee thereof.

(d) An insurer may comply with subsection (a) by providing the most recent and substantially similar report, which is provided by the insurer or another member of an insurance group of which the insurer is a member, or any combination of reports that together contain the information described in the Own Risk and Solvency Assessment Guidance Manual, to the commissioner of another state or a supervisor or regulator of a foreign jurisdiction if that report provides information comparable to that described in the Own Risk and Solvency Assessment Guidance Manual. Any such report in a language other than English must be accompanied by a translation of that report into the English language.

§431: -106 Exemption. (a) An insurer shall be exempt from the requirements of this article if:

(1) The insurer's annual direct written and assumed premium, excluding premiums reinsured with the Federal Crop Insurance Corporation and National Flood Insurance Program, is less than $500,000,000; and

(2) The insurance group of which the insurer is a member has an annual direct written and assumed premium, excluding premiums reinsured with the Federal Crop Insurance Corporation and National Flood Insurance Program, less than $1,000,000,000.

(b) If an insurer qualifies for exemption pursuant to subsection (a)(1), but the insurance group of which the insurer is a member does not qualify for exemption pursuant to subsection (a)(2), then the own risk and solvency assessment summary report required pursuant to section 431: -105 shall include every insurer within the insurance group. This requirement may be satisfied by the submission of more than one own risk and solvency assessment summary report for any combination of insurers; provided that any combination of reports includes every insurer within the insurance group.

(c) If an insurer does not qualify for exemption pursuant to subsection (a)(1), but the insurance group of which it is a member qualifies for exemption pursuant to subsection (a)(2), then the only own risk and solvency assessment summary report required pursuant to section 431: -105 shall be the report applicable to that insurer.

(d) An insurer that does not qualify for exemption pursuant to subsection (a) may apply to the commissioner for a waiver from the requirements of this article based upon unique circumstances.

(1) In deciding whether to grant the insurer's request for waiver, the commissioner may consider:
   (A) The type and volume of business written;
   (B) The ownership and organizational structure; and
   (C) Any other factor the commissioner considers relevant to the insurer or insurance group of which the insurer is a member.

(2) If the insurer is part of an insurance group with insurers domiciled in more than one state, the commissioner shall coordinate with the lead state commissioner and other domiciliary commissioners in considering whether to grant the insurer's request for a waiver.

(e) Notwithstanding the exemptions stated in this section:

(1) The commissioner may require that an insurer maintain a risk management framework, conduct an own risk and solvency assessment, and file an own risk and solvency assessment summary report based upon unique circumstances including but not limited to the type and volume of business written, the ownership and organizational structure, federal agency requests, and international supervisor requests.

(2) The commissioner may require that an insurer maintain a risk management framework, conduct an own risk and solvency assessment, and file an own risk and solvency assessment summary report if the insurer:
   (A) Has risk-based capital for company action level event as set forth in section 431:3-403;
   (B) Meets one or more of the standards of an insurer deemed to be in hazardous financial condition as defined in section 431:15-103.5; or
   (C) Otherwise exhibits qualities of a troubled insurer as determined by the commissioner.

(f) If an insurer that qualifies for an exemption pursuant to subsection (a) subsequently no longer qualifies for that exemption due to changes in premium, as reflected in the insurer's most recent annual statement or in the most recent annual statements of the insurers within the insurance group of which the insurer is a member, the insurer shall have one year following the year the threshold is exceeded to comply with the requirements of this article.

§431: -107 Contents of own risk and solvency assessment summary report. (a) The own risk and solvency assessment summary report shall be prepared

consistent with the Own Risk and Solvency Assessment Guidance Manual and subject to the requirements of subsection (b). Documentation and supporting information shall be maintained and made available upon examination or upon request of the commissioner.

(b) The review of the own risk and solvency assessment summary report and any additional requests for information shall be made using similar procedures currently used in the analysis and examination of multi-state or global insurers and insurance groups.

§431: -108 Confidentiality. (a) Documents, materials, or other information, including the own risk and solvency assessment summary report, in the possession or control of the commissioner that are obtained by, created by, or disclosed to the commissioner or any other person under this article are recognized as proprietary and containing trade secrets.

All such documents, materials, or other information shall be confidential by law and privileged, shall not be disclosable under chapter 92F, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.

The commissioner is authorized to use the documents, materials, or other information to further any regulatory or legal action brought as a part of the commissioner's official duties. The commissioner shall not otherwise make the documents, materials, or other information public without prior written consent of the insurer.

(b) Neither the commissioner nor any person who received documents, materials, or other own risk and solvency assessment information through examination or otherwise, while acting under the authority of the commissioner or with whom such documents, materials, or other information are shared pursuant to this article, shall be permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to subsection (a).

(c) To assist in performing the commissioner's regulatory duties, the commissioner:

(1) May, upon request, share information subject to subsection (a) and proprietary and trade secret documents with:
   (A) Other state, federal, and international financial regulatory agencies; and
   (B) Members of any supervisory college referred to in section 431:11-107.5, the National Association of Insurance Commissioners, and any third-party consultants designated by the commissioner;

   provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the own risk and solvency assessment documents, materials, or other information and has verified in writing the legal authority to maintain confidentiality;

(2) May receive information subject to subsection (a) and proprietary and trade secret documents from regulatory officials of other foreign or domestic jurisdictions, including members of any supervisory college referred to in section 431:11-107.5, and the National Association of Insurance Commissioners. The commissioner shall maintain as confidential or privileged any documents, materials, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(3) Shall enter into a written agreement with the National Association of Insurance Commissioners or a third-party consultant governing sharing and use of information provided pursuant to this article and consistent with this subsection, which shall:

(A) Specify procedures and protocols regarding the confidentiality and security of information shared with the National Association of Insurance Commissioners or a third-party consultant pursuant to this article, including procedures and protocols for sharing by the National Association of Insurance Commissioners with other state regulators from states in which the insurance group has domiciled insurers. The agreement shall provide that the recipient agrees to maintain the confidentiality and privileged status of the own risk and solvency assessment documents, materials, or other information and has verified in writing the legal authority to maintain confidentiality;

(B) Specify that ownership of information shared with the National Association of Insurance Commissioners or a third-party consultant pursuant to this article remains with the commissioner and that use of the information by the National Association of Insurance Commissioners or a third-party consultant is subject to the direction of the commissioner;

(C) Prohibit the National Association of Insurance Commissioners or third-party consultant from storing the information shared pursuant to this article in a permanent database after the underlying analysis is completed;

(D) Require prompt notice to be given to an insurer whose confidential information in the possession of the National Association of Insurance Commissioners or a third-party consultant pursuant to this article is subject to a request or subpoena to the National Association of Insurance Commissioners or a third-party consultant for disclosure or production;

(E) Require the National Association of Insurance Commissioners or a third-party consultant to consent to intervention by an insurer in any judicial or administrative action in which the National Association of Insurance Commissioners or a third-party consultant may be required to disclose confidential information about the insurer shared with the National Association of Insurance Commissioners or a third-party consultant pursuant to this article; and

(F) In the case of an agreement involving a third-party consultant, provide for the insurer's written consent.

(d) The sharing of information and documents by the commissioner pursuant to this article shall not constitute a delegation of regulatory authority or rulemaking, and the commissioner is solely responsible for the administration, execution, and enforcement of the provisions of this article.

(e) No waiver of any applicable privilege or claim of confidentiality in the documents, proprietary, and trade secret materials or other own risk and solvency assessment information shall occur as a result of disclosing any own risk and solvency assessment information or documents to the commissioner pursuant to this section or as a result of sharing as authorized in this article.

(f) Documents, materials, or other information in the possession or control of the National Association of Insurance Commissioners or a third-party consultant pursuant to this article shall be confidential by law and privileged,

shall not be subject to chapter 92F, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.

§431: -109 Sanctions. (a) Any insurer failing without just cause to timely file the own risk and solvency assessment summary report as required in this article shall be required after notice and hearing to pay a penalty of not less than $100 and not more than $500 for each day's delay, which shall be recovered by the commissioner. Any penalty recovered pursuant to this section shall be paid into the compliance resolution fund.

(b) The maximum penalty under this section is $50,000. The commissioner may reduce the penalty if the insurer demonstrates to the commissioner that imposing the penalty would constitute a financial hardship to the insurer.

§431: -110 Severability. If any provision of this article or its application to any person or circumstance is held invalid, that determination shall not affect the provisions or applications of this article that can be given effect without the invalid provision or application, and to that end, the provisions of this article are severable."

PART II

SECTION 2. Section 431:19-115, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Sections 431:3-302 to 431:3-304.5, 431:3-307, 431:3-401 to [~~431:3-408,~~] 431:3-409, 431:3-411, 431:3-412, and 431:3-414; articles 1, 2, 4A, 5, 6, 9A, 9B, 9C, 11, 11A, and 15; and chapter 431K shall apply to risk retention captive insurance companies."

PART III

SECTION 3. Section 431K-1, Hawaii Revised Statutes, is amended by adding two new definitions to be appropriately inserted and to read as follows:

""Board of directors" or "board" means the governing body of the risk retention group elected by the shareholders or members to establish policy, elect or appoint officers and committees, and make other governing decisions.

"Director" means a natural person designated in the articles of the risk retention group or designated, elected, or appointed by any other manner, name, or title to act as a director."

SECTION 4. Section 431K-2, Hawaii Revised Statutes, is amended to read as follows:

"[~~]~~431K-2[~~]~~ Risk retention groups chartered in this State. (a) A risk retention group seeking to be chartered in this State shall be chartered and licensed as a liability insurance company authorized by the insurance laws of this State and, except as provided elsewhere in this chapter, shall comply with all of the laws, rules, and requirements applicable to these insurers chartered and licensed in this State and with section 431K-3, to the extent these requirements are not a limitation on the laws, rules, or requirements of this State. Prior to offering insurance in any state, each risk retention group shall also submit for approval to the commissioner [~~of this State~~] a plan of operation or [~~a~~] feasibility study and revisions of such plan or study if the group intends to offer any additional lines of liability insurance. Immediately upon receipt of an application for charter, the commissioner shall provide summary information concerning the filing to the National Association of Insurance Commissioners, including:

(1) The name of the risk retention group;
(2) The identity of the initial members of the group;
(3) 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;
(4) The amount and nature of initial capitalization;
(5) The coverages to be afforded; and
(6) The states in which the group intends to operate.

Providing notification to the National Association of Insurance Commissioners is in addition to and shall not be sufficient to satisfy the requirements of section 431K-3 or any other sections of this chapter.

(b) New risk retention groups established on or after July 1, 2016, shall be in compliance with the governance standards set forth in subsection (c).

(c) By July 1, 2017, existing risk retention groups shall be in compliance with the following:

(1) The board shall have a majority of independent directors. The board of directors shall: determine whether a director is independent and has no material relationship with the risk retention group; review such determination annually; and maintain a record of the determinations, which shall be provided to the commissioner annually. If the risk retention group is reciprocal, then the attorney-in-fact shall be required to adhere to the same standards regarding independence of operation and governance as imposed on the risk retention group's board of directors and subscribers advisory committee.

(2) The term of any material service provider contract entered into with a risk retention group shall not exceed five years. The contract or its renewal requires approval of a majority of the risk retention group's independent directors. The board of directors has the right to terminate a contract at any time for cause after providing adequate notice as defined in the terms of the contract. Service providers of a reciprocal risk retention group shall contract with the risk retention group.

(3) A risk retention group shall not enter into a material service provider contract without the prior written approval of the commissioner.

(4) A risk retention group's plan of operation shall include written policies approved by its board of directors requiring the board to:

(A) Provide evidence of ownership interest to each risk retention group member;

(B) Develop governance standards applicable to the risk retention group;

(C) Oversee the evaluation of the risk retention group's management, including the performance of its captive manager, managing general underwriter, or any other person responsible for underwriting, rate determination, premium collection, claims adjustment and settlement, or preparation of financial statements;

(D) Review and approve the amount to be paid under a material service provider contract; and

(E) Review and approve at least annually:

(i) The risk retention group's goals and objectives relevant to the compensation of officers and service providers;

(ii) The performance of officers and service providers as measured against the risk retention group's goals and objectives; and

(iii) The continued engagement of officers and material service providers.

(5) A risk retention group shall have an audit committee composed of at least three independent board members. A nonindependent board member may participate in the committee's activities if invited to do so by the audit committee, but a nonindependent board member shall not serve as a committee member. The commissioner may waive the requirement of an audit committee if the risk retention group demonstrates to the commissioner's satisfaction that having such committee is impracticable and that the board of directors itself is able to sufficiently perform the committee's responsibilities. The audit committee shall have a written charter defining its responsibilities, which shall include:

(A) Assisting board oversight of the integrity of financial statements, compliance with legal and regulatory requirements, and qualifications, independence, and performance of the independent auditor or actuary;

(B) Reviewing annual audited financial statements and quarterly financial statements with management;

(C) Reviewing annual audited financial statements with its independent auditor and, if deemed advisable, the risk retention group's quarterly financial statements;

(D) Reviewing risk assessment and risk management policies;

(E) Meeting with management, either directly or through a designated representative of the committee;

(F) Meeting with independent auditors, either directly or through a designated representative of the committee;

(G) Reviewing with the independent auditor any audit problems and management's response;

(H) Establishing clear hiring policies applicable to the hiring of employees or former employees of the independent auditor by the risk retention group;

(I) Requiring the independent auditor to rotate the lead audit partner having primary responsibility for the risk retention group's audit, as well as the audit partner responsible for reviewing that audit, so that neither individual performs audit services for the risk retention group for more than five consecutive fiscal years; and

(J) Reporting regularly to the board of directors.

(6) The board of directors shall adopt governance standards, which shall be available to risk retention group members through electronic or other means and, upon request, provided to risk retention group members. The governance standards shall include:

(A) A process by which risk retention group members elect directors;

(B) Director qualifications, responsibilities, and compensation;

(C) Director orientation and continuing education requirements;

(D) A process allowing the board access to management and, as necessary and appropriate, independent advisors;

(E) Policies and procedures for management succession; and

(F) Policies and procedures providing for an annual performance evaluation of the board.

(7) The board of directors shall adopt a code of business conduct and ethics applicable to directors, officers, and employees of the risk re-

tention group and disclose criteria for waivers of code provisions to the board of directors, which shall be available to risk retention group members through electronic or other means and, upon request, provided to risk retention group members. Provisions of the code shall address:

(A) Conflicts of interest;

(B) Matters covered under the Hawaii corporate opportunities doctrine;

(C) Confidentiality;

(D) Fair dealing;

(E) Protection and proper use of risk retention group assets;

(F) Standards for complying with applicable laws, rules, and regulations; and

(G) Mandatory reporting of illegal or unethical behavior affecting the operation of the risk retention group.

(8) The captive manager, president, or chief executive officer of a risk retention group shall promptly notify the commissioner in writing of any known noncompliance with the governance standards established in this subsection.

(d) For the purposes of this section:

"Independent director" means a director who does not have a material relationship with the risk retention group. A person who is a direct or an indirect owner of or subscriber in the risk retention group, as referenced in the definition of "risk retention group" in section 431K-1, or who is an officer, a director, or an employee of the owner and insured unless some other position of the officer, director, or employee constitutes a "material relationship", is considered independent. The commissioner shall have the authority to determine whether or not a director is independent.

A director has a "material relationship" with a risk retention group if the director or a member of the director's immediate family:

(1) Receives in any twelve-month period from the risk retention group or a consultant or service provider to the risk retention group compensation or other item of value in an amount equal to or greater than five per cent of the risk retention group's gross written premium or two per cent of the risk retention group's surplus as measured at the end of any fiscal quarter falling in the twelve-month period, whichever is greater. This provision also applies to compensation or items of value received by any business with which the director or a member of the director's immediate family is affiliated. The material relationship shall be deemed to exist for one year after the item of value is received or the compensation ceases or falls below the threshold established in this paragraph, as applicable;

(2) Is affiliated with or employed in a professional capacity by a current or former internal or external auditor of the risk retention group. The material relationship shall be deemed to exist for one year after the affiliation, employment, or audit ends; or

(3) Is employed as an executive officer of another company whose board of directors includes executive officers of the risk retention group unless a majority of the membership of the other company's board of directors is the same as the membership of the board of directors of the risk retention group. The material relationship shall be deemed to exist for one year after the employment or service ends.

"Material service provider" includes a captive manager, auditor, accountant, actuary, investment advisor, attorney, managing general underwriter, or other person responsible for underwriting, determination of rates, premium collection, claims adjustment or settlement, or preparation of financial statements, whose aggregate annual contract fees are equal to or greater than five per cent of the risk retention group's annual gross written premium or two per cent of its surplus, whichever is greater. "Material service provider" does not mean defense counsel retained by a risk retention group unless the counsel's annual fees are equal to or greater than five per cent of a risk retention group's annual gross written premium or two per cent of its surplus, whichever is greater."

PART IV

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

(Approved June 29, 2016.)