

## BUSINESS TRANSACTED WITH PRODUCER CONTROLLED PROPERTY/CASUALTY INSURER ACT

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### Section 1. Short Title

This Act may be cited as the Business Transacted with Producer Controlled Insurer Act.

### Section 2. Definitions

As used in this Act:

- A. “Accredited state” means a state in which the insurance department or regulatory agency has qualified as meeting the minimum financial regulatory standards promulgated and established from time to time by the National Association of Insurance Commissioners (NAIC).
- B. “Control” or “controlled” has the meaning ascribed in [cite insurance law section incorporating NAIC Model Insurance Holding Company Act];
- C. “Controlled insurer” means a licensed insurer that is controlled, directly or indirectly, by a producer.
- D. “Controlling producer” means a producer who, directly or indirectly, controls an insurer.
- E. “Licensed insurer” or “insurer” means a person, firm, association or corporation duly licensed to transact a property/casualty insurance business in this state. The following, among others, are not licensed insurers for the purposes of this Act:
  - (1) All residual market pools and joint underwriting authorities or associations; and
  - (2) All captive insurers other than risk retention groups as defined in 15 U.S.C. Section 3901 et seq. and 42 U.S.C. Section 9671 (for the purposes of this Act, captive insurers are insurance companies owned by another organization whose exclusive purpose is to insure risks of the parent organization and affiliated companies or, in the case of groups and associations, insurance organizations owned by the insureds whose exclusive purpose is to insure risks to member organizations and group members and their affiliates).
- F. “Producer” means an insurance broker or brokers or any other person, firm, association or corporation, when, for any compensation, commission or other thing of value, the person, firm, association or corporation acts or aids in any manner in soliciting, negotiating or procuring the making of an insurance contract on behalf of an insured other than the person, firm, association or corporation.

**Drafting Note:** The term “producer” as used in this Act is not intended to include an exclusive agent or any independent agent acting on behalf of the controlled insurer and a subagent or representative of the agent, who acts as such in the solicitation of, negotiation for, or procurement or making of an insurance contract, if the agent is not also acting in the capacity of an insurance broker in the transaction in question. States that define both insurance agent and insurance broker should substitute the term “insurance broker” and an appropriate definition for the term “producer,” and rename the Act accordingly.

**Section 3. Applicability**

This Act shall apply to licensed insurers as defined in Section 2 of this Act, either domiciled in this state or domiciled in a state that is not an accredited state having in effect a substantially similar law. All provisions of the Insurance Holding Company Act, to the extent they are not superseded by this Act, shall continue to apply to all parties within holding company systems subject to this Act.

**Section 4. Minimum Standards**

A. Applicability of section.

- (1) The provisions of this section shall apply if, in any calendar year, the aggregate amount of gross written premium on business placed with a controlled insurer by a controlling producer is equal to or greater than five percent (5%) of the admitted assets of the controlled insurer, as reported in the controlled insurer's quarterly statement filed as of September 30 of the prior year.
- (2) Notwithstanding Paragraph (1) of this subsection, the provisions of this section shall not apply if:
  - (a) The controlling producer:
    - (i) Places insurance only with the controlled insurer, or only with the controlled insurer and a member or members of the controlled insurer's holding company system, or the controlled insurer's parent, affiliate or subsidiary and receives no compensation based upon the amount of premiums written in connection with such insurance; and
    - (ii) Accepts insurance placements only from non-affiliated subproducers, and not directly from insureds; and
  - (b) The controlled insurer, except for insurance business written through a residual market facility such as [cite example], accepts insurance business only from a controlling producer, a producer controlled by the controlled insurer, or a producer that is a subsidiary of the controlled insurer.

B. Required contract provisions. A controlled insurer shall not accept business from a controlling producer and a controlling producer shall not place business with a controlled insurer unless there is a written contract between the controlling producer and the insurer specifying the responsibilities of each party, the contract has been approved by the board of directors of the insurer, and it contains the following minimum provisions:

- (1) The controlled insurer may terminate the contract for cause, upon written notice to the controlling producer. The controlled insurer shall suspend the authority of the controlling producer to write business during the pendency of any dispute regarding the cause for the termination.
- (2) The controlling producer shall render accounts to the controlled insurer detailing all material transactions, including information necessary to support all commissions, charges and other fees received by, or owing to, the controlling producer.
- (3) The controlling producer shall remit all funds due under the terms of the contract to the controlled insurer on at least a monthly basis. The due date shall be fixed so that premiums or installments thereof collected shall be remitted no later than ninety (90) days after the effective date of a policy placed with the controlled insurer under this contract.

- (4) All funds collected for the controlled insurer's account shall be held by the controlling producer in a fiduciary capacity, in one or more appropriately identified bank accounts in banks that are members of the Federal Reserve System, in accordance with the provisions of the insurance law as applicable. (However, funds of a controlling producer not required to be licensed in this state shall be maintained in compliance with the requirements of the controlling producer's domiciliary jurisdiction).
  - (5) The controlling producer shall maintain separately identifiable records of business written for the controlled insurer.
  - (6) The contract shall not be assigned in whole or in part by the controlling producer.
  - (7) The controlled insurer shall provide the controlling producer with its underwriting standards, rules and procedures, manuals setting forth the rates to be charged, and the conditions for the acceptance or rejection of risks. The controlling producer shall adhere to the standards, rules, procedures, rates and conditions. The standards, rules, procedures, rates and conditions shall be the same as those applicable to comparable business placed with the controlled insurer by a producer other than the controlling producer.
  - (8) The contract shall specify the rates and terms of the controlling producer's commissions, charges or other fees and the purposes for those charges or fees. The rates of the commissions, charges and other fees shall be no greater than those applicable to comparable business placed with the controlled insurer by producers other than controlling producers. For purposes of this paragraph and Paragraph (7) of this subsection, examples of "comparable business" includes the same lines of insurance, same kinds of insurance, same kinds of risks, similar policy limits and similar quality of business.
  - (9) If the contract provides that the controlling producer, on insurance business placed with the insurer, is to be compensated contingent upon the insurer's profits on that business, then the compensation shall not be determined and paid until at least five (5) years after the premiums on liability insurance are earned and at least one year after the premiums are earned on any other insurance. In no event shall the commissions be paid until the adequacy of the controlled insurer's reserves on remaining claims has been independently verified pursuant to Subsection D(1) of this section.
  - (10) The contract shall specify a limit on the controlling producer's writings in relation to the controlled insurer's surplus and total writings. The insurer may establish a different limit for each line or sub-line of business. The controlled insurer shall notify the controlling producer when the applicable limit is approached and shall not accept business from the controlling producer if the limit is reached. The controlling producer shall not place business with the controlled insurer if it has been notified by the controlled insurer that the limit has been reached.
  - (11) The controlling producer may negotiate but shall not bind reinsurance on behalf of the controlled insurer on business the controlling producer places with the controlled insurer, except that the controlling producer may bind facultative reinsurance contracts pursuant to obligatory facultative agreements if the contract with the controlled insurer contains underwriting guidelines including, for both reinsurance assumed and ceded, a list of reinsurers with which such automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured, and commission schedules.
- C. Audit Committee. Every controlled insurer shall have an audit committee of the board of directors composed of independent directors. The audit committee shall annually meet with management, the insurer's independent certified public accountants, and an independent casualty actuary or other independent loss reserve specialist acceptable to the commissioner to review the adequacy of the insurer's loss reserves.

**Drafting Note:** Insert the appropriate title for the chief insurance regulatory official wherever the term commissioner appears.

D. Reporting requirements.

- (1) In addition to any other required loss reserve certification, the controlled insurer shall annually, on April 1 of each year, file with the commissioner an opinion of an independent casualty actuary (or other independent loss reserve specialist acceptable to the commissioner) reporting loss ratios for each line of business written and attesting to the adequacy of loss reserves established for losses incurred and outstanding as of year-end (including incurred but not reported) on business placed by the producer; and
- (2) The controlled insurer shall annually report to the commissioner the amount of commissions paid to the producer, the percentage such amount represents of the net premiums written and comparable amounts and percentage paid to noncontrolling producers for placements of the same kinds of insurance.

**Section 5. Disclosure**

Prior to the effective date of the policy, the producer shall deliver written notice to the prospective insured disclosing the relationship between the producer and the controlled insurer; except that, if the business is placed through a subproducer who is not a controlling producer, the controlling producer shall retain in his or her records a signed commitment from the subproducer that the subproducer is aware of the relationship between the insurer and the producer and that the subproducer has or will notify the insured.

**Section 6. Penalties**

- A.
  - (1) If the commissioner believes that the controlling producer or any other person has not materially complied with this Act, or any regulation or order promulgated under this Act, after notice and opportunity to be heard, the commissioner may order the controlling producer to cease placing business with the controlled insurer; and
  - (2) If it is found that because of such material non-compliance the controlled insurer or any policyholder thereof has suffered any loss or damage, the commissioner may maintain a civil action or intervene in an action brought by or on behalf of the insurer or policyholder for recovery of compensatory damages for the benefit of the insurer or policyholder, or other appropriate relief.
- B. If an order for liquidation or rehabilitation of the controlled insurer has been entered pursuant to [insert state's rehabilitation and liquidation statute], and the receiver appointed under that order believes that the controlling producer or any other person has not materially complied with this Act, or any regulation or order promulgated hereunder, and the insurer suffered any loss or damage therefrom, the receiver may maintain a civil action for recovery of damages or other appropriate sanctions for the benefit of the insurer.
- C. Nothing contained in this section shall affect the right of the commissioner to impose any other penalties provided for in the Insurance Law.
- D. Nothing contained in this section is intended to or shall in any manner alter or affect the rights of policyholders, claimants, creditors or other third parties.

**Section 7. Effective Date**

This Act shall take effect on [insert date]. Controlled insurers and controlling producers who are not in compliance with Section 4 of this Act on its effective date shall have sixty (60) days to come into compliance and shall comply with Section 5 beginning with all policies written or renewed on or after [insert a date 60 days after the effective date of this Act].

*Chronological Summary of Actions (all references are to the Proceedings of the NAIC).*

*1989 Proc. I 14, 913-915, 915-918 (adopted at special plenary session September 1988).*

*1991 Proc. II 25, 58, 1091, 1096-1099 (amended and reprinted).*

*2012 Proc. 3<sup>rd</sup> Quarter, Vol. I 113, 117, 392-400 (amended).*