CHAPTER 284
FORMERLY
HOUSE BILL NO. 304

AN ACT TO AMEND TITLE 18 OF THE DELAWARE CODE RELATING TO INSURANCE RISK RETENTION GROUPS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 18, § 8003 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 8003 Risk retention groups chartered in this State.

(a) A risk retention group shall, pursuant to this chapter, be chartered and licensed to write only liability insurance pursuant to this chapter and, except as provided elsewhere in this chapter, must comply with all of the laws, rules, regulations and requirements applicable to such insurers chartered and licensed in this State and with § 8004 of this title to the extent such requirements are not a limitation on laws, rules, regulations or requirements of this State.

(b) Before it may offer insurance in any state, each risk retention group shall also submit for approval to the Insurance Commissioner of this State a plan of operation or feasibility study. The risk retention group shall submit an appropriate revision in the event of any subsequent material change in any item of the plan of operation or feasibility study, within 10 days of any such change. The group shall not offer any additional kinds of liability insurance, in this State or in any other state, until a revision of such plan or study is approved by the Commissioner.

(c) At the time of filing its application for charter, the risk retention group shall provide to the Commissioner in summary form the following information: The identity of the initial members of the group, the identity of those individuals who organized the group or who will provide administrative services or otherwise influence or control the activities of the group, the amount and nature of initial capitalization, the coverages to be afforded and the states in which the group intends to operate. Upon receipt of this information, the Commissioner shall forward such information to the National Association of Insurance Commissioners. Providing notification to the National Association of Insurance Commissioners is in addition to and shall not be sufficient to satisfy the requirements of § 8004 of this title or any other sections of this chapter.

(d) Governance standards for risk retention groups – By January 1, 2018, existing risk retention groups shall be in compliance with the following Governance Standards. New risk retention groups shall be in compliance with the standards at the time of licensure.

(1) Board of directors – As used in this section, the "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, and "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 as a director.

(a)(i) Independent directors – The board of directors of the risk retention group shall have a majority of independent directors. If the risk retention group is a reciprocal, then the attorney-in-fact would 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/subscribers advisory committee under these standards; and, to the extent permissible under state law, service providers of a reciprocal risk retention group should contract with the risk retention group and not the attorney-in-fact.

(ii) No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no "material relationship" with the risk retention group. Each risk retention group shall disclose these determinations to its domestic regulator, at least annually. For this purpose, any person that is a direct or indirect owner of or subscriber in the risk retention group (or is an officer, director or employee of such an owner and insured, unless some other position of such officers, director or employee constitutes a "material relationship"), as contemplated by Section 3901(a)(4)(E)(ii) of the Liability Risk Retention Act, is considered to be "independent."

(b) "Material relationship" of a person with the risk retention group includes any of the following:

(i) The receipt in any one 12-month period of compensation or payment of any other item of value by such person, a member of such person's immediate family or any business with which such person is affiliated from the risk retention group or a consultant or service provider to the risk retention group or a consultant or service provider to the risk retention group is greater than or equal to 5% of the risk retention group's gross written premium for such 12-month period or 2% of its surplus, whichever is greater, as measured at the end of any fiscal quarter falling in such a 12-month period. Such person or immediate family member of such person is not independent until one year after his/her compensation from the risk retention group falls below the threshold.

(ii) A relationship with an auditor as follows: a director or an immediate family member of a director who is affiliated with or employed in a professional capacity by a present or former internal or external auditor of the risk retention group is not independent until 1 year after the end of the affiliation, employment or auditing relationship.

(iii) A relationship with a related entity as follows: a director or immediate family member of a director who is employed as an executive officer of another company where any of the risk retention group's present executives serve on that other company's board of directors is not independent until 1 year after the end of such service or the employment relationship.

(2) Service provider contracts – The term of any material service provider contract with the risk retention group shall not exceed 5 years. Any such contract, or its renewal, shall require the approval of the majority of the risk retention group's independent directors. The risk retention group's board of directors shall have the right to terminate any service provider, audit or actuarial contracts at any time for cause after providing adequate notice as defined in the contract. The service provider contract is deemed material if the amount to be paid for such contract is greater than or equal to 5% of the risk retention group's annual gross written premium or 2% of the its surplus, whichever is greater.

(a) For purposes of this subsection, "service providers" shall include captive managers, auditors, accountants, actuaries, investment advisors, lawyers, managing general underwriters or other party responsible for underwriting, determination of rates, collection of premium, adjusting and settling claims and/or the preparation of financial statements. Any reference to "lawyers" in the prior sentence does not include defense counsel retained by the risk retention group to defend claims, unless the amount of fees paid to such lawyers is "material" as referenced in paragraph (1)(b) of this subsection.

(b) No service provider contract meeting the definition of "material relationship" contained in paragraph (1)(b) of this subsection shall be entered into unless the risk retention group has notified the Commissioner in writing of its intention to enter into such transaction at least 30 days prior thereto and the Commissioner has not disapproved it within such period.

(3) Written policy – The risk retention group's board of directors shall adopt a written policy in the plan of operation as approved by the board that requires the board to:

(a) Assure that all owners and insurers of the risk retention group receive evidence of ownership interest;

(b) Develop a set of governance standards applicable to the risk retention group;

(c) Oversee the evaluation of the risk retention group's management including but not limited to the performance of the captive manager, managing general underwriter, or other party or parties responsibility for underwriting, determination of rates, collection of premium, adjusting or settling claims or the preparation of financial statements;

(d) Review and approve the amount to be paid for all material service providers; and

(e) Review and approve, at least annually:

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

(ii) The officers' and service providers' performance in light of those goals and objectives; and

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

(4) Audit committee – The risk retention group shall have an audit committee composed of at least 3 independent board members as defined in paragraph (1) of this subsection. A non-independent board members may participate in the activities of the audit committee, if invited by the members, but cannot be a member of such committee.

(a) The audit committee shall have a written charter that defines the committee's purpose, which, at a minimum must be to:

(i) Assist board oversight of: (1) the integrity of the financial statements, (2) the compliance with legal and regulatory requirements, and (3) the qualifications, independence and performance of the independent auditor and *actuary;*

(ii) Discuss the annual audited financial statements and quarterly financial statements with management;

(iii) Discuss the annual audited financial statements with its independent auditor and, if advisable, discuss its quarterly financial statements with its independent auditor;

(iv) Discuss policies with respect to risk assessment and risk management;

(v) Meet separately and periodically, either directly or through a designated representative of the committee, with management and intendent auditors;

(vi) Review with the independent auditor any audit problems or difficulties and management's response;

(vii) Set clear hiring policies of the risk retention group as to the hiring of employees or former employees of the independent auditor;

(viii) Require the external auditor to rotate the lead, or coordinating, 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 more than 5 consecutive fiscal years; and

(ix) Report regulatory to the board of directors.

(b) The domestic regulator may waive the requirement to establish an audit committee composed of independent board members if the risk retention group is able to demonstrate to the domestic regulator that it is impracticable to do so and the risk retention group's board of directors itself is otherwise able to accomplish the purposes of an audit committee, as described in paragraph (4)(a) of this subsection.

(5) Governance standards – The board of directors shall adopt and disclose governance standards, where "disclose" means making such information available through electronic (e.g., posting such information on the risk retention group's website) or other means, and providing such information to members or insureds upon request, which shall include:

(a) A process by which the directors are elected by the owner/insureds;

(b) Director qualification standards;

(c) Director responsibilities;

(d) Director access to management and, as necessary and appropriate, independent advisors;

(e) Director compensation;

(f) Director orientation and continuing education;

(g) The policies and procedures that are followed for management succession; and

(h) The policies and procedures that are followed for annual performance evaluation of the board.

(6) Business conduct and ethics – The board of directors shall adopt and disclose a code of business conduct and ethic for directors, officers, and employees and promptly disclose to the board of directors any waivers of the code for directors or executive officers, which shall include all of the following topics:

(a) Conflicts of interest;

(b) Matters covered under the corporate opportunities doctrine under the state of domicile;

(c) Confidentiality;

(d) Fair dealing;

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

(f) Compliance with all applicable laws, rules and regulations;

(g) Requiring the reporting of any illegal or unethical behavior which affects the operation of the risk retention group.

(7) Reporting non-compliance – The captive manager, president, or chief executive officer of the risk retention group shall promptly notify the domestic regulator in writing if that captive manager, president, or chief executive becomes aware of any material non-compliance with any of these governance standards.

Section 2. This Act shall take effect on January 1, 2017.

Approved June 28, 2016