

§ 58-3-165. Business transacted with producer-controlled property or casualty insurers.

(a) As used in this section:

- (1) "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 NAIC.
- (2) "Captive insurer" means an insurance company that is owned by another organization and whose exclusive purpose is to insure risks of the parent organization and affiliated companies. In the case of groups and associations, "captive insurer" means an insurance organization that is owned by the insureds, and whose exclusive purpose is to insure risks of member organizations or group members and their affiliates. "Captive insurer" does not include a risk retention group licensed under Part 9 of Article 10 of this Chapter.
- (3) "Control" and its cognates mean the direct or indirect possession 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. Control is presumed to exist if any person directly or indirectly owns, controls, holds with the power to vote, or holds proxies representing ten percent (10%) or more of the voting securities of any other person.
- (4) "Controlled insurer" means an insurer that is controlled, directly or indirectly, by a producer.
- (5) "Controlling producer" means a producer who, directly or indirectly, controls an insurer.
- (6) "Insurer" means any person licensed to write property or casualty insurance in this State. "Insurer" includes a risk retention group licensed under Part 9 of Article 10 of this Chapter but excludes a residual market mechanism, a joint underwriting authority, and a captive insurer.
- (7) "Producer" means an insurance broker or brokers or any other person, when, for any compensation, commission, or other thing of value, that person acts or aids in any manner in soliciting, negotiating, or procuring the making of any insurance contract on behalf of an insured other than that person. "Producer" does not mean an exclusive agent or any independent agent acting on behalf of a controlled insurer, including any 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.

(b) 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 determination, that control exists in fact, notwithstanding the absence of a presumption to that effect. The Commissioner may determine upon application that any person does not or will not upon the taking of some proposed action control another person. The Commissioner may prospectively revoke or modify that determination, after notice and opportunity to be heard, whenever in the Commissioner's judgment revocation or modification is consistent with this section.

(c) This section applies to insurers that are either domiciled in this State or domiciled in a state that is not an accredited state having in effect a substantially similar law. The provisions of Article 19 of this Chapter, to the extent they are not superseded by this section, apply to all parties within holding company systems subject to this section.

(d) The provisions of this section apply if, in any calendar year, the aggregate amount of gross written premiums 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 most recent annual statement or its quarterly statement filed as of September 30 of the prior year. The provisions of this section do not apply if:

- (1) The controlling producer 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 that insurance; and the controlling producer accepts insurance placements only from nonaffiliated subproducers, and not directly from insureds; and
- (2) The controlled insurer, except for insurance business written through a residual market mechanism, 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.

(e) 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 producer and the insurer specifying the responsibilities of each party, and unless the contract has been approved by the board of directors of the insurer and contains all of the following minimum provisions:

- (1) The insurer may terminate the contract for cause, upon written notice to the producer. The insurer shall suspend the producer's authority to write business during the pendency of any dispute regarding the cause for the termination.
- (2) The producer shall render accounts to the insurer detailing all material transactions, including information necessary to support all commissions, charges, and other fees received by, or owing to, the producer.
- (3) The producer shall remit all funds due under the contract terms to the insurer on at least a monthly basis. The due date shall be fixed so that premiums or installments of premiums collected shall be remitted no later than 90 days after the effective date of any policy placed with the insurer under this contract.
- (4) The producer shall hold all funds collected for the insurer's account 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 this Chapter as applicable. Funds of a producer who is not required to be licensed in this State shall be maintained in compliance with the requirements of the producer's domiciliary jurisdiction.
- (5) The producer shall maintain separately identifiable records of business written for the insurer.
- (6) The producer shall not assign the contract in whole or in part.
- (7) The insurer shall provide the producer with its underwriting standards, rules and procedures, the manual setting forth the rates to be charged, and the conditions for the acceptance or rejection of risks. The 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 insurer by a producer other than a controlling producer.

- (8) The rates and terms of the producer's commissions, charges, or other fees and the purposes for the 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 insurer by producers other than controlling producers. For the purposes of this subdivision and subdivision (7) of this subsection, "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 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 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 insurer's reserves on remaining claims has been independently verified under subsection (g) of this section.
- (10) A limit on the producer's writings in relation to the insurer's surplus and total writings. The insurer may establish a different limit for each line or subline of business. The insurer shall notify the producer when the applicable limit is approached and shall not accept business from the producer if the limit is reached. The producer shall not place business with the insurer if it has been notified by the insurer that the limit has been reached.
- (11) The producer may negotiate but shall not bind reinsurance on behalf of the insurer on business the producer places with the insurer; however, the producer may bind facultative reinsurance contracts under obligatory facultative agreements if the producer's contract with the insurer contains underwriting guidelines including, for both reinsurance assumed and ceded, a list of reinsurers with which the automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured, and commission schedules.

(f) Every controlled insurer shall have an audit committee, consisting of independent directors, of the insurer's board of directors. The audit committee shall meet annually with the insurer's management, the insurer's independent certified public accountants, and an independent casualty actuary or another independent loss reserve specialist acceptable to the Commissioner, to review the adequacy of the insurer's loss reserves.

(g) In addition to any other required loss reserve certification, the controlled insurer shall, on or before April 1 of each year, file with the Commissioner an opinion of an independent casualty actuary or of another independent loss reserve specialist acceptable to the Commissioner, reporting loss ratios for each kind of insurance written and attesting to the adequacy of loss reserves established for losses incurred and outstanding and for incurred but not reported losses as of the end of the prior calendar year on business placed by the producer.

(h) The controlled insurer shall report annually to the Commissioner the amount of commissions paid to the controlling producer, the percentage that amount represents of the net premiums written, and comparable amounts and percentages paid to noncontrolling producers for placements of the same kinds of insurance.

(i) The controlling producer, before the effective date of any policy, shall deliver written notice to the prospective insured disclosing the relationship between the producer and the controlled insurer: However, if the business is placed through a subproducer who is not a controlling producer, the controlling producer shall retain in the controlling producer's 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 prospective insured.

(j) If the Commissioner believes that a controlling producer or any other person has not materially complied with this section or with any rule adopted or order issued under this section, after notice and opportunity to be heard, the Commissioner may order the controlling producer to stop placing business with the controlled insurer. If it is found that, because of the material noncompliance, the controlled insurer or any policyholder of the controlled insurer 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.

(k) If an order for liquidation or rehabilitation of the controlled insurer has been entered under Article 30 of this Chapter, and the receiver appointed under that order believes that the controlling producer or any other person has not materially complied with this section or any rule adopted or order issued under this section, 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.

(l) In addition to any other remedies provided in this section, whenever the Commissioner believes that a person has not materially complied with this section, the Commissioner may institute a proceeding under G.S. 58-2-60 or under G.S. 58-2-70. In addition to the civil penalty or restitution proceedings provided for in G.S. 58-2-70, the Commissioner may issue a cease and desist order against the person.

(m) This section does not affect the Commissioner's right to impose any other penalties provided for in this Chapter nor the rights of policyholders, claimants, creditors, or other third parties.

(n) Controlled insurers and controlling producers who are not in compliance with subsection (e) of this section on October 1, 1991, have until December 1, 1991, to come into compliance and shall comply with subsection (i) of this section beginning with all policies written or renewed on or after December 1, 1991. (1991, c. 681, s. 28; c. 720, s. 92; 2014-65, s. 20.)