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CHAPTER 87.

REGULATION AND TAXATION OF RISK RETENTION GROUPS AND PURCHASING GROUPS

SECTION 38-87-10. Purpose.

The purpose of this chapter is to regulate the formation and operation of risk retention groups and purchasing groups in this State formed pursuant to the provisions of the Federal Liability Risk Retention Act of 1986 to the extent permitted by that law.

SECTION 38-87-20. Definitions.

As used in this chapter:

(1) "Commissioner" means the commissioner, director, or superintendent of insurance in a state. "Director" means the person who is appointed by the Governor upon the advice and consent of the Senate and who is responsible for the operation and management of the South Carolina Department of Insurance, including all of its divisions. The director may appoint or designate the person or persons who shall serve at the pleasure of the director to carry out the objectives or duties of the department as provided by law. Furthermore, the director may bestow upon his designee or deputy director any duty or function required of him by law in managing or supervising the Insurance Department.

(2) "Completed operations liability" means liability arising out of the installation, maintenance, or repair of any product at a site which is not owned or controlled by:

(a) any person who performs that work; or

(b) any person who hires an independent contractor to perform that work; but includes liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability;

(3) "Domicile", for purposes of determining the state in which a purchasing group is domiciled, means:

(a) for a corporation, the state in which the purchasing group is incorporated; and

(b) for an unincorporated entity, the state of its principal place of business;

(4) "Hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able:

(a) to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or

(b) to pay other obligations in the normal course of business;

(5) "Insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under the laws of this State;

(6) "Liability":

(a) means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of:

(i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations; or

(ii) any activity of any state or local government, or any agency or political subdivision thereof; and

(b) does not include personal risk liability and an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. 51 et seq.);

(7) "Personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in item (6);

(8) "Plan of operation or a feasibility study" means an analysis which presents the expected activities and results of a risk retention group including, at a minimum:

- (a) information sufficient to verify that its members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;
- (b) for each state in which it intends to operate, the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer;
- (c) historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that this experience is reasonably available;
- (d) pro forma financial statements and projections;
- (e) appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;
- (f) identification of management, underwriting and claims procedures, marketing methods, managerial oversight methods, investment policies, and reinsurance agreements;
- (g) identification of each state in which the risk retention group has obtained, or sought to obtain, a charter and license, and a description of its status in each such state; and
- (h) such other matters as may be prescribed by the commissioner of the state in which the risk retention group is chartered for liability insurance companies authorized by the insurance laws of that state;
- (9) "Product liability" means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of such a person when the incident giving rise to the claim occurred;
- (10) "Purchasing group" means any group which:
 - (a) has as one of its purposes the purchase of liability insurance on a group basis;
 - (b) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in item (10)(c);
 - (c) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and
 - (d) is domiciled in any state;
- (11) "Risk retention group" means any corporation or other limited liability association:
 - (a) whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;
 - (b) which is organized for the primary purpose of conducting the activity described under item (11)(a);
 - (c) which:
 - (i) is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state; or
 - (ii) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before such date, had certified to the insurance commissioner of at least one state that it satisfied the capitalization requirements of such state, except that any such group must be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as such terms were defined in the Product Liability Risk Retention Act of 1981 before the date of the enactment of the Liability Risk Retention Act of 1986);
 - (d) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;
 - (e) which:
 - (i) has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group; or
 - (ii) has as its sole owner an organization which has as

- (A) its members only persons who comprise the membership of the risk retention; and
- (B) its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;
- (f) whose members are engaged in businesses or activities similar or related with respect to the liability of which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;
- (g) whose activities do not include the provision of insurance other than:
- (i) liability insurance for assuming and spreading all or any portion of the liability of its group members; and
- (ii) reinsurance with respect to the liability of any other risk retention group (or any members of such other group) which is engaged in businesses or activities so that such group or member meets the requirement described in item (f) of this section for membership in the risk retention group which provides such reinsurance; and
- (h) the name of which includes the phrase "Risk Retention Group";
- (12) "State" means any state of the United States or the District of Columbia.

SECTION 38-87-30. Chartering of risk retention groups; submission of plan of operation; revisions of plan; information required.

(A) A risk retention group, pursuant to the provisions of this title, must be chartered and licensed to write only liability insurance under this chapter and, except as provided elsewhere in this chapter, or Chapter 90 for a risk retention group licensed as a captive insurance company, shall comply with all of the laws, regulations, and requirements applicable to these insurers chartered and licensed in this State and with Section 38-87-40 to the extent these requirements are not a limitation on laws, regulations, or requirements of this State.

(B) Before it may offer insurance in any state, each risk retention group chartered in this State shall submit for approval to the director or his designee 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 ten days of any such change. The group may 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 director or his designee.

(C) At the time of filing its application for charter, the risk retention group shall provide to the director or his designee 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 director or his designee may forward such information to the National Association of Insurance Commissioners. Providing notification to the National Association of Insurance Commissioners is in addition to, and is not sufficient to satisfy, the requirements of Section 38-87-40 or any other provision of this chapter.

SECTION 38-87-40. Out-of-state chartered risk retention groups; requirements for doing business in state.

Risk retention groups chartered and licensed in states other than this State and seeking to do business as a risk retention group in this State shall comply with the laws of this State as follows:

- (1) Notice of Operations and Designation of director or his designee as Agent.
- (a) Before offering insurance in this State, a risk retention group shall submit to the director or his designee:
 - (i) a statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, charter date, its principal place of business, and such other information,

including information on its membership, as the director or his designee of this State may require to verify that the risk retention group is qualified under Section 38-87-20(11);

(ii) a copy of its plan of operations or feasibility study and revisions of such plan or study submitted to the state in which the risk retention group is chartered and licensed; however, the provision relating to the submission of a plan of operation or feasibility study does not apply with respect to any line or classification of liability insurance which:

(A) was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986; and

(B) was offered before such date by any risk retention group which had been chartered and operating for not less than three years before such date.

(b) The risk retention group shall submit a copy of any revision to its plan of operation or feasibility study required by Section 38-87-30(B) at the same time that such revision is submitted to the commissioner of its chartering state.

(c) A statement of registration and a notice designating the commissioner as agent for the purpose of receiving service of legal documents or process must be submitted on such forms as the director or his designee may prescribe or approve.

(d) Annual license fees, equal to the license fees required of an admitted liability insurer licensed to transact business in this State, must be paid in this State.

(2) Financial Condition. Any risk retention group doing business in this State shall submit to the director or his designee:

(a) a copy of the group's financial statement submitted to the state in which the risk retention group is chartered and licensed which must be certified by an independent public accountant and shall contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a loss reserve specialist qualified under such criteria as the director or his designee may prescribe or approve;

(b) a copy of each examination of the risk retention group as certified by the commissioner of its chartering state or other public official conducting the examination;

(c) upon request by the director or his designee, a copy of any information or document pertaining to any outside audit performed with respect to the risk retention group;

(d) such information as may be required to verify its continuing qualification as a risk retention group under Section 38-87-20(11).

(3) Taxation.

(a) Each risk retention group is liable for the payment of premium taxes and taxes on premiums of direct business for risks resident or located within this State and shall report to the director or his designee the net premiums written for risks resident or located within this State. Such risk retention group is subject to taxation, including any applicable fines and penalties related thereto, on the same basis as an admitted insurer.

(b) To the extent licensed agents or brokers are utilized pursuant to Section 38-87-120, they shall report to the department the premiums for direct business for risks resident or located within this State which such licensees have placed with or on behalf of a risk retention group not chartered in this State.

(c) To the extent that insurance agents or brokers are utilized pursuant to Section 38-87-120, such agent or broker shall keep a complete and separate record of all policies procured from each such risk retention group, which record must be open to examination by the director or his designee or his representative on demand. These records shall, for each policy and each kind of insurance provided thereunder, include the following:

(i) the limit of liability;

(ii) the time period covered;

(iii) the effective date;

(iv) the name of the risk retention group which issued the policy;

(v) the gross premium charged;

(vi) the amount of return premiums, if any;

(vii) such additional information as the director or his designee may require.

(4) Compliance with Claims Settlement Practices Laws. Every risk retention group, its agents, and its representatives shall comply with the claims settlement practices laws of this State, including, but not limited to, Section 38-57-70, Chapter 59 of Title 38, and such other provisions relative to claims settlement practices required by law.

(5) Deceptive, False, or Fraudulent Practices. Every risk retention group shall comply with the laws of this State regarding deceptive, false, or fraudulent acts or practices, including, but not limited to, Chapter 57 of this title and such other provisions relative to deceptive, false, or fraudulent practices required by law.

(6) Examination Regarding Financial Condition. A risk retention group shall submit to an examination by the director or his designee to determine its financial condition if the director or his designee of the jurisdiction in which the group is chartered and licensed has not initiated an examination or does not initiate an examination within sixty days after a request by the director or his designee of this State. The examination must be coordinated to avoid unjustified repetition and must be conducted in an expeditious manner and in accordance with the National Association of Insurance Commissioners' Examiner's Handbook.

(7) Notice to Purchasers. Every application form for insurance from a risk retention group, and every policy (on its front and declaration pages) issued by a risk retention group, must contain in ten point type the following notice:

NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group.

(8) Prohibited Acts Regarding Solicitation or Sale. The following acts by a risk retention group are prohibited:

(a) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in the group;

(b) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or financially impaired.

(9) Prohibition on Ownership by an Insurance Company. No risk retention group is allowed to do business in this State if an insurance company is directly or indirectly a member or owner of such risk retention group, other than in the case of a risk retention group all of whose members are insurance companies.

(10) Prohibited Coverage. The terms of any insurance policy issued by any risk retention group may not provide, or be construed to provide, coverage prohibited generally by statute of this State or declared unlawful by the Supreme Court of South Carolina.

(11) Delinquency Proceedings. A risk retention group not chartered in this State and doing business in this State shall comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by a state insurance commissioner if there has been a finding of financial impairment after an examination under Section 38-87-40(6).

(12) Penalties. A risk retention group that violates any provision of this chapter is subject to fines and any other penalties, including revocation of its right to do business in this State, applicable to licensed insurers generally.

(13) Operation Prior to Enactment of this Chapter. In addition to complying with the requirements of this section, any risk retention group operating in this State prior to enactment of this chapter shall comply within thirty days after the effective date of this chapter with the provisions of item (1)(a) of this section.

SECTION 38-87-50. Participation by risk retention groups and purchasing groups in state insurance insolvency guaranty fund.

(A) No risk retention group is required or permitted to join or contribute financially to any insurance insolvency guaranty fund, or similar mechanism, in this State; nor may any risk retention group, or its

insureds or claimants against its insureds, receive any benefit from any such fund for claims arising under the insurance policies issued by such risk retention group.

(B) When a purchasing group obtains insurance covering its members' risks from an approved surplus lines insurer not admitted in this State or a risk retention group, no such risks, wherever resident or located, may be covered by any insurance guaranty fund or similar mechanism in this State.

(C) When a purchasing group obtains insurance covering its members' risks from an authorized insurer, only risks resident or located in this State may be covered by the South Carolina Property and Casualty Insurance Guaranty Association created under Chapter 31 of this title.

(D) The director or his designee may require a risk retention group to participate in any mechanism established or authorized under the law of this State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism, and such risk retention group shall submit sufficient information to the department to enable him to apportion on a nondiscriminatory basis the risk retention group's proportionate share of such losses and expenses.

SECTION 38-87-70. Purchasing group and insurer subject to all applicable state laws; exceptions.

A purchasing group, including its insurer or insurers, is subject to all applicable laws of this State, except that a purchasing group, including its insurer or insurers, is exempt, in regard to liability insurance for the purchasing group, from any law that would:

- (1) prohibit the establishment of a purchasing group;
- (2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages based on their loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages, or other matters;
- (3) prohibit a purchasing group or its members from purchasing insurance on a group basis described in item (2) of this section;
- (4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;
- (5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or certain legal form;
- (6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;
- (7) otherwise discriminate against a purchasing group or any of its members; or
- (8) require that any insurance policy issued to a purchasing group or any of its members be countersigned by an insurance agent or broker residing in this State.

SECTION 38-87-80. Purchasing group; notice of intent to do business; notice of changes; designation of commissioner as agent for service; exceptions; additional information.

(A) A purchasing group prior to doing business in this State shall furnish notice to the department, on forms prescribed or approved by it, which shall:

- (1) identify the state in which the group is domiciled;
- (2) identify all other states in which the group intends to do business;
- (3) specify the lines and classifications of liability insurance which the purchasing group intends to purchase;
- (4) identify the insurance company from which the group intends to purchase its insurance and the domicile of such company;
- (5) specify the method by which, and the person, if any, through whom insurance will be offered to its members whose risks are resident or located in this State;
- (6) identify the principal place of business of the group;
- (7) provide other information as may be required by the director or his designee to verify that the purchasing group is qualified under Section 38-87-20(10).

(B) A purchasing group shall notify, within ten days, the director or his designee of any changes in any of the items set forth in subsection (A) of this section.

(C) The purchasing group shall register with the department and designate the Director of the Department of Insurance as its agent solely for the purpose of receiving service of legal documents or process, except that such requirements do not apply in the case of a purchasing group which satisfies the director or his designee that it only purchases insurance that was authorized under the Federal Products Liability Risk Retention Act of 1981, and:

(1) that in any state of the United States (a) it was domiciled before April 1, 1986; and (b) it is domiciled on and after October 27, 1986;

(2) that (a) before October 27, 1986, it purchased insurance from an insurance carrier licensed in any state; and (b) since October 27, 1986, it purchased its insurance from an insurance carrier licensed in any state; or

(3) that it was a purchasing group under the requirements of the Product Liability Risk Retention Act of 1981 before October 27, 1986.

(D) Each purchasing group that is required to give notice pursuant to subsection (A) of this section also shall furnish such information as may be required by the director or his designee to:

(1) verify that the entity qualifies as a purchasing group;

(2) determine where the purchasing group is located;

(3) determine appropriate tax treatment.

SECTION 38-87-90. Purchase of insurance from non-state chartered group or non-state admitted insurer; notice requirements; deductible or self-insured retention not permitted; aggregate limits on purchase.

(A) A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of that state.

(B) A purchasing group which obtains liability insurance from an approved surplus lines insurer not admitted in this State or a risk retention group shall inform each of the members of the group which has a risk resident or located in this State that the risk is not protected by an insurance insolvency guaranty fund in this State and that the risk retention group or the insurer may not be subject to all insurance laws and regulations of this State.

(C) No purchasing group may purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole. However, coverage may provide for a deductible or self-insured retention applicable to individual members.

(D) Purchases of insurance by purchasing groups are subject to the same standards regarding aggregate limits which are applicable to all purchases of group insurance.

SECTION 38-87-100. Premium taxes.

Premium taxes and other taxes on premiums paid for coverage of risks resident or located in this State by a purchasing group or any members of the purchasing group are imposed and must be paid as follows:

(1) If the insurer is an admitted insurer, taxes are imposed on the insurer at the same rate and in the same manner and subject to the same procedures, interest, and penalties as that applicable to premium taxes and other taxes imposed on other admitted liability insurers relative to coverage of risks resident or located in this State.

(2) If the insurer is an approved nonadmitted surplus lines insurer, taxes are imposed on the licensed broker who effected coverage on risks resident or located in this State at the same rate and in the same manner and subject to the same procedures, interest, and penalties as that applicable to taxes imposed on other licensed brokers effecting coverage with approved nonadmitted surplus lines insurers on risks resident or located in this State.

SECTION 38-87-110. Powers of Chief Insurance Commissioner; applicable procedures; injunctive relief.

(A) The director or his designee is authorized to use any power established under this title to enforce the insurance laws of this State not specifically preempted by the Liability Risk Retention Act of 1986, including, but without limitation, the administrative authority of the director or his designee to investigate, issue subpoenas, conduct depositions and hearings, issue orders, impose monetary penalties, and seek injunctive relief. With regard to any investigation, administrative proceedings, or litigation, the director or his designee may rely on the procedural laws of this State.

(B) Whenever the director or his designee determines that any person, risk retention group, purchasing group, or insurer of a purchasing group has violated, is violating, or is about to violate any provision of this chapter or any other insurance law of this State applicable to such person or entity, or has failed to comply with a lawful order of his, he may, in addition to any other lawful remedies or penalties, cause a complaint to be filed in the Court of Common Pleas for Richland County to enjoin and restrain such person, risk retention group, purchasing group, or insurer from engaging in such violation, or to compel compliance with such order of the director or his designee. The court has jurisdiction of the proceeding and has the power to enter a judgment and order for injunctive or other relief. In any action by the director or his designee under this subsection, service of process must be made upon the Secretary of State, who shall forward the order, pleadings, or other process to the person, risk retention group, purchasing group, or insurer in accordance with the procedures specified in Section 38-25-510. Nothing herein may be construed to limit or abridge the authority of the director or his designee to seek injunctive relief in any district court of the United States as provided in Section 38-87-130.

SECTION 38-87-120. License required to solicit, negotiate or procure liability insurance; notice to insured.

(A) Risk retention group. No person may act or aid in any manner in soliciting, negotiating, or procuring liability insurance in this State from a risk retention group unless such person is licensed as an insurance agent for the risk retention group in accordance with Chapter 43 of this title or is licensed as a broker in accordance with Chapter 45 of this title.

(B) Purchasing groups.

(1) No person may act or aid in any manner in soliciting, negotiating, or procuring liability insurance in this State for a purchasing group from an authorized insurer or a risk retention group chartered in a state unless such person is licensed as an insurance agent for the insurer or risk retention group in accordance with Chapter 43 of this title or is licensed as a broker in accordance with Chapter 45 of this title.

(2) No person may act or aid in any manner in soliciting, negotiating, or procuring liability insurance coverage in this State for any member of a purchasing group under a purchasing group's policy unless such person is licensed as an insurance agent for the insurer in accordance with Chapter 43 of this title or is licensed as a broker in accordance with Chapter 45 of this title.

(3) No person may act or aid in any manner in soliciting, negotiating, or procuring liability insurance from an approved nonadmitted surplus lines insurer on behalf of a purchasing group located in this State unless such person is licensed as a broker in accordance with Chapter 45 of this title.

(C) For purposes of acting as an agent or broker for a risk retention group or purchasing group pursuant to Subsections (A) and (B) of this section, the requirement of residence in this State does not apply.

(D) Every person licensed as an agent or broker as required in this section, on business placed with risk retention groups or written through a purchasing group, shall inform each prospective insured of the provisions of the notice required by Section 38-87-40(7) in the case of a risk retention group and Section 38-87-90(A) in the case of a purchasing group.

SECTION 38-87-130. U.S. District Court injunctions enforceable in state courts.

An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance or operating in any state, or in all states or in any territory or possession of the United States, upon a finding that such a group is in hazardous financial or financially impaired condition is enforceable in the courts of this State.

SECTION 38-87-140. Rules and regulations.

The department may promulgate regulations necessary to carry out the provisions of this chapter.