

## UNIFORM CAPTIVE INSURER ACT

***\*\*This language is only meant to serve as a starting point for discussion. A formal first-draft of a Model Act may be developed at a later time.***

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## **Section 1. Short Title**

This Act shall be known and may be cited as “The Uniform Captive Insurer Act.”

## **Section 2. Purpose**

- A. The purpose of this Act is to provide uniform requirements for licensing of captive insurance companies within each of the fifty states in the United States of America.
- B. This Act shall not apply to the formation of foreign captive insurance companies.

## **Section 3. Definitions**

(1) “Agency captive insurance company” shall mean an insurance company described in paragraphs (2)a. and b. of this section:

- a. An insurance company that is owned or controlled by an insurance agency, brokerage or reinsurance intermediary, or an affiliate thereof, or under common ownership or control with such agency, brokerage or reinsurance intermediary, and that only insures the risks of insurance or annuity contracts placed by or through such agency, brokerage or reinsurance intermediary; or

- b. An insurance company that is owned or controlled by a marketer or producer of service contracts and/or warranties, and that only insures or reinsures the contractual liability arising out of such service contracts or warranties sold through such marketer or producer.

- c. For the purposes of this paragraph (2), “common ownership or control” shall mean ownership of 10 percent or more of the voting securities of a person or such other form of ownership or control as the Commissioner may approve.

(2) “Alien captive insurance company” means any insurance company formed to write insurance business for its parents and affiliates and licensed pursuant to the laws of an alien jurisdiction which imposes statutory or regulatory standards in a form acceptable to the commissioner on companies transacting the business of insurance in such jurisdiction.

(3) “Association” means any legal association of persons that has been in continuous existence for at least 1 year or such lesser period of time approved by the Commissioner, the association members of which, or which does itself, whether or not in conjunction with some or all of the association members:

- a. Directly or indirectly, own, control or hold with power to vote all of the outstanding voting securities or other voting interests of, or have complete voting control over, an association captive insurance company; or

b. Constitute all of the subscribers of an association captive insurance company organized as a reciprocal insurer.

(4) “Association captive insurance company” means any captive insurance company that insures risks of the Association Members of the association and any of their affiliated companies.

(5) “Association member” means any person that belongs to an association.

(6) “Branch business” means any insurance business transacted by a branch captive insurance company in this state.

(7) “Branch captive insurance company” means any alien captive insurance company licensed by the commissioner to transact the business of insurance in this state through a business unit with a principal place of business in this state. A branch captive insurance company is a pure captive insurance company with respect to operations in this state, unless otherwise permitted by the commissioner.

(8) “Branch operations” means any business operations of a branch captive insurance company in this state.

(9) “Capital and surplus” means the amount by which the value of all of the assets of the captive insurance company exceeds all of the liabilities of the captive insurance company, as determined under the method of accounting utilized by the captive insurance company in accordance with the applicable provisions of this chapter.

(10) “Captive insurance company” means any pure captive insurance company, association captive insurance company, agency captive insurance company, sponsored captive insurance company, industrial insured captive insurance company, special purpose captive insurance company, special purpose financial captive insurance company, series captive insurance company, or risk retention group, whether domestic, foreign or alien, or branch captive insurance company, licensed under the provisions of this chapter.

(11) “Commissioner” means the Insurance Commissioner of this State or the Commissioner’s designee.

(12) “Domestic” means formed under the laws of this State.

(13) “Foreign” means formed under the laws of any state.

(14) “General account” means all assets and liabilities of a protected cell captive insurance company not attributable to a protected cell.

(15) “Industrial insured captive insurance company” means any captive insurance company that insures risks of the industrial insureds that comprise the industrial insured group and any of their affiliated companies.

(16) “Industrial insured group” means any group of industrial insureds that collectively:

a. Directly or indirectly, own, control, or hold with power to vote all of the outstanding voting securities or other voting interests of, or have complete voting control over, an industrial insured captive insurance company; or

b. Constitute all of the subscribers of an industrial insured captive insurance company organized as a reciprocal insurer.

(17) “Organizational documents” means the documents that must be submitted to form a captive insurer in this state and obtain a Certificate of Authority.

(18) “Parent” means a person that directly or indirectly owns, controls, or holds with power to vote more than 50 percent of the outstanding voting securities or other voting interests of a pure captive insurance company.

(19) “Participant” means a person or an entity, authorized to be a participant under this Act, and any affiliate of a participant, that is insured by a protected cell captive insurance company, if the losses of the participant are limited through a participant contract.

(20) “Participant contract” means a contract by which a protected cell captive insurance company insures the risks of a participant and limits the losses of each such participant to its pro rata share of the assets of one (1) or more protected cells identified in such participant contract.

(21) “Person” means a natural person, partnership (whether general or limited), trust, estate, association, corporation, limited liability company, statutory trust, business trust, custodian, nominee or any other individual or entity in its own or any representative capacity, in each case whether domestic, foreign, or alien.

(22) “Protected cell” has the meaning given such term in this Act.

(23) “Protected cell” means a separate account established by a protected cell captive insurance company formed or licensed under this chapter, in which an identified pool of assets and liabilities are segregated and insulated by means of this chapter from the remainder of the protected cell captive insurance company’s assets and liabilities in accordance with the terms of one (1) or more participant contracts to fund the liability of the protected cell captive insurance company with respect to the participants as set forth in the participant contracts.

(24) “Protected cell assets” means all assets, contract rights, and general intangibles identified with and attributable to a specific protected cell of a protected cell captive insurance company.

(25) “Protected cell captive insurance company” means any captive insurance company:

(a) In which the minimum capital and surplus required by this chapter are provided by one (1) or more sponsors;

(b) That is formed or licensed under this chapter;

(c) That insures the risks of separate participants through participant contracts; and

(d) That funds its liability to each participant through one (1) or more protected cells and segregates the assets of each protected cell from the assets of other protected cells and from the assets of the protected cell captive insurance company’s general account.

(26) “Protected cell liabilities” means all liabilities and other obligations identified with and attributed to a specific protected cell of a protected cell captive insurance company.

(27) “Pure captive insurance company” means any captive insurance company that insures risks of its parent and any of such parent’s affiliated companies and any controlled unaffiliated business.

(28) “Series” means a series established under this Act, or corresponding law of another state.

(29) “Series captive insurance company” means a series which has received a certificate of authority pursuant to this chapter.

(30) “Special purpose captive insurance company” means any person that is licensed under this chapter and designated as a special purpose captive insurance company by the Commissioner.

(31) “Special purpose financial captive insurance company” means a captive insurance company that is granted a certificate of authority under this Act.

(32) “Sponsor” means any person or entity that is approved by the commissioner to provide all or part of the capital and surplus required by this chapter and to organize and operate a protected cell captive insurance company.

(33) “Sponsored captive insurance company” means a captive insurance company, including a special purpose financial captive insurance company as defined in this Act:

- a. Of which the minimum capital and surplus required by this Act is provided by 1 or more sponsors;
- b. That is licensed under the provisions of this Act;
- c. That insures the risks of its participants only, through separate participant contracts; and
- d. That funds its liability to each participant through 1 or more protected cells and segregates the assets of each protected cell from the assets of other protected cells and from the assets of the sponsored captive insurance company's general account.

(34) "State" means the State of \_\_\_\_\_, and "state" means any other state, district, commonwealth or possession of the United States of America.

#### **Section 4. Name**

No captive insurer shall adopt a name that is the same, deceptively similar, or likely to be confused with or mistaken for any other existing business name registered in this state nor any name likely to mislead the public.

#### **Section 5. Requirements and Limitations of Captive Insurance Company**

(1) Any captive insurance company, when permitted by its organizational documents, may apply to the commissioner for a license to do any and all insurance comprised in this Act; provided, however, that:

(a) No pure captive insurance company shall insure any risks other than those of its parent and affiliated companies or a controlled unaffiliated business or businesses;

(b) No association captive insurance company shall insure any risks other than those of its association, those of the member organizations of its association, and those of a member organization's affiliated companies;

(c) No industrial insured captive insurance company shall insure any risks other than those of the industrial insureds that comprise the industrial insured group, those of their affiliated companies, and those of the controlled unaffiliated business of an industrial insured or its affiliated companies;

(d) No captive insurance company shall provide personal motor vehicle or homeowner's insurance coverage or any component thereof;

(e) No captive insurance company shall accept or cede reinsurance except as provided in this Act.

(f) Any captive insurance company may provide excess or stop-loss accident and health insurance, unless prohibited by federal law or the laws of the state having jurisdiction over the transaction;

(2) Except as provided in this Act, no captive insurance company shall transact any insurance business in this state unless:

(a) It first obtains from the Commissioner a license authorizing it to do insurance business in this state;

(b) Its board of directors or committee of members or managers or, in the case of a reciprocal insurer, its subscribers' advisory committee holds at least one (1) meeting each year in this state;

(c) It maintains its principal place of business in this state; and

(d) It appoints a registered agent to accept service of process and to otherwise act on its behalf in this state; provided, that whenever such registered agent cannot with reasonable diligence be found at the registered office of the captive insurance company, the commissioner shall be an agent of such captive insurance company upon whom any process, notice, or demand may be served.

(3) In order to receive a license to issue policies of insurance as a captive insurance company in this state, an applicant business entity shall meet the requirements of this subdivision (3):

(a) The applicant business entity shall submit its organizational documents to the commissioner. If the commissioner approves the organizational documents, then the commissioner shall issue a letter to the applicant certifying the commissioner's approval. The applicant business entity shall submit the organizational documents, along with a copy of the approval letter issued by the commissioner, and the required filing fees for organizational documents prescribed to the Secretary of State for filing. Upon filing the organizational documents, the secretary of state shall issue an acknowledgment letter to the applicant. The applicant business entity shall submit a copy of the acknowledgment letter relative to the applicant's organizational documents issued by the secretary of state to the commissioner.

(b) The applicant business entity shall also file with the commissioner evidence of the following:

(i) The amount and liquidity of its assets relative to the risks to be assumed;

(ii) The adequacy of the expertise, experience, and character of the person or persons who will manage it;

- (iii) The overall soundness of its plan of operation;
- (iv) The adequacy of the loss prevention programs of its insureds; and
- (v) Such other factors deemed relevant by the commissioner in ascertaining whether the applicant business entity will be able to meet its policy obligations.

(c) No less than the amount required by Section 6 shall be paid in by the applicant business entity and deposited with the Commissioner. In the alternative, an irrevocable letter of credit in that amount and acceptable to the commissioner shall be filed with the commissioner.

(4) Information submitted pursuant to this subsection (4) shall be and remain confidential, and shall not be made public by the commissioner without the written consent of the captive insurance company, except that:

(a) Such information may be discoverable by a party in a civil action or contested case to which the captive insurance company that submitted such information is a party, upon a showing by the party seeking to discover such information that:

(i) The information sought is relevant to and necessary for the furtherance of such action or case;

(ii) The information sought is unavailable from other non-confidential sources; and

(iii) A subpoena issued by a judicial or administrative officer of competent jurisdiction has been submitted to the commissioner.

(b) The commissioner shall have the discretion to disclose such information to a public officer having jurisdiction over the regulation of insurance in another state; provided, that:

(i) Such public official shall agree in writing to maintain the confidentiality of such information; and

(ii) The laws of the state in which such public official serves require such information to be and to remain confidential.

## **Section 6. Capital and Surplus Requirements**

(1) No captive insurance company shall be issued a license unless it possesses and maintains unimpaired paid-in capital and surplus of:



- (a) In the case of a pure captive insurance company, not less than two hundred fifty thousand dollars (State Specific);
- (b) In the case of an association captive insurance company, not less than five hundred thousand dollars (State Specific);
- (c) In the case of an industrial insured captive insurance company, not less than five hundred thousand dollars (State Specific);
- (d) In the case of a protected cell captive insurance company, not less than two hundred fifty thousand dollars (State Specific).

*Drafting Note: These specific amounts do not serve as an endorsement and are included only to represent what one state, Tennessee, has chosen for capital and surplus requirements. States may wish to consider their own capital and surplus requirements.*

- (2) The commissioner may prescribe additional capital and surplus based upon the type, volume, and nature of insurance business to be transacted.
- (3) Capital and surplus shall be in the form of cash, or cash equivalent, or an irrevocable letter of credit issued by a bank approved by the commissioner.

### **Section 7. Formation**

- (1) A pure captive insurance company may be incorporated as a stock insurer with its capital divided into shares and held by the stockholders, as a nonprofit corporation with one (1) or more members, or as a limited liability company.
- (2) An association captive insurance company, an industrial insured captive insurance company, or a risk retention group may be:
  - (a) Incorporated as a stock insurer with its capital divided into shares and held by the stockholders;
  - (b) Incorporated as a mutual corporation;
  - (c) Organized as a reciprocal insurer in accordance with chapter 16 of this title; or
  - (d) Organized as a limited liability company.
- (3) A captive insurance company incorporated or organized in this state shall have not less than three (3) incorporators or three (3) organizers of whom not less than one (1) shall be a resident of this state.

(4) The capital stock of a captive insurance company incorporated as a stock insurer may be authorized with no par value.

(5) In the case of a captive insurance company formed as a:

(a) Corporation, at least one (1) of the members of the board of directors shall be a resident of this state;

(b) Reciprocal insurer, at least one (1) of the members of the subscribers' advisory committee shall be a resident of this state; and

(c) Limited liability company, at least one (1) of the members or managers shall be a resident of this state.

Discussion Document (Pre-Draft)

## **Section 8. Organizational Documents**

The organizational documents shall include the National Association of Insurance Commissioners Uniform Certificate of Authority Application forms 1P, 2P, 8, 11, and 13.

## **Section 9. License Suspension/Revocation**

(1) The license of a captive insurance company may be suspended or revoked by the commissioner for any of the following reasons:

- (1) Insolvency or impairment of capital or surplus;
- (2) Failure to meet the requirements of this Act;
- (3) Refusal or failure to submit an annual report, as required by this chapter, or any other report or statement required by law or by lawful order of the commissioner;
- (4) Failure to comply with its own charter, bylaws or other organizational document;
- (5) Failure to submit to or pay the cost of examination or any legal obligation relative to an examination, as required by this chapter;
- (6) Use of methods that, although not otherwise specifically prohibited by law, nevertheless render its operation detrimental or its condition unsound with respect to the public or to its policyholders; or
- (7) Failure otherwise to comply with the laws of this state.

(2) If the commissioner finds, upon examination, hearing, or other evidence, that any captive insurance company has violated subsection (a), then the commissioner may suspend or revoke such company's license if the commissioner deems it in the best interest of the public and the policyholders of such captive insurance company, notwithstanding any other provision of this title.

## **Section 10. Investments**

No pure captive insurance company, industrial insured captive insurance company, protected cell captive insurance company, incorporated cell captive insurance company or special purpose financial captive insurance company as defined in this Act shall be subject to any restrictions on allowable investments; provided, that the commissioner may prohibit or limit any investment that threatens the solvency or liquidity of any such company. Companies under this section (1) must file with the commissioner a statement of investment policy approved by its governing body that describes the types of investments that the company may elect to undertake

and may not make investments that materially deviate from the statement of investment policy that is on file with the commissioner.

### **Section 11. Reinsurance**

(1) Any captive insurance company may provide reinsurance as authorized by this title on risks ceded by any other insurer.

(2) Any captive insurance company may take credit for the reinsurance of risks or portions of risks ceded to reinsurers complying with this title. If the reinsurer is licensed as a risk retention group, then the ceding risk retention group or its members must qualify for membership with the reinsurer. The commissioner shall have the discretion to allow a captive insurance company to take credit for the reinsurance of risks or portions of risks ceded to an unauthorized reinsurer, after review, on a case by case basis. The commissioner may require any documents, financial information or other evidence that such an unauthorized reinsurer will be able to demonstrate adequate security for its financial obligations.

(3) In addition to reinsurers authorized by this title, a captive insurance company may take credit for the reinsurance of risks or portions of risks ceded to a pool, exchange or association to the extent authorized by the commissioner. The commissioner may require any documents, financial information or other evidence that such a pool, exchange or association will be able to provide adequate security for its financial obligations. The commissioner may deny authorization or impose any limitations on the activities of a reinsurance pool, exchange or association that, in the commissioner's judgment, are necessary and proper to provide adequate security for the ceding captive insurance company and for the protection and consequent benefit of the public at large.

(4) Except where specifically provided otherwise, insurance by a captive insurance company of any workers' compensation or accident and health qualified self-insured plan of its parent and affiliates shall be deemed to be reinsurance.

### **Section 12. Taxes - To Be State Specific**

### **Section 13. Rules; Risk Management Function**

The commissioner may adopt rules establishing standards to ensure that a parent or its affiliated company, or an industrial insured or its affiliated company, is able to exercise control of the risk management function of any controlled unaffiliated business to be insured by a pure captive insurance company or an industrial insured captive insurance company, respectively; provided, however, that, until such time as rules under this section are adopted, the commissioner may approve the coverage of such risks by a pure captive insurance company or an industrial insured captive insurance company.

## **Section 14. Rules**

The Commissioner is authorized to promulgate rules and regulations necessary to effectuate the purposes of this Act. All such rules and regulations shall be promulgated in accordance with the Uniform Administrative Procedures Act.

## **Section 15. Recognition in Other States**

Notwithstanding anything in this Act to the contrary, a captive insurance company duly licensed in this State shall be recognized as a captive insurance company in foreign states provided it meets the capital and surplus requirements of such foreign state.

## **Section 16. Visits by Commissioner; audits**

(1) At least once every three (3) years, and whenever the commissioner determines it to be prudent, the commissioner shall visit each captive insurance company and thoroughly inspect and examine its affairs to ascertain its financial condition, its ability to fulfill its obligations and whether it has complied with this chapter. The commissioner may extend such three-year period to five (5) years; provided, that the captive insurance company is subject to a comprehensive annual audit by independent auditors approved by the commissioner during such five-year period. The comprehensive audit shall be of a scope satisfactory to the commissioner. The expenses and charges of the examination shall be paid by the captive insurance company.

(2) All examination reports, preliminary examination reports or results, working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under this section are confidential and are not subject to subpoena and may not be made public by the commissioner or an employee or agent of the commissioner without the written consent of the captive insurance company, except to the extent provided in this subsection (2). Nothing in this subsection (2), shall prevent the commissioner from using such information in furtherance of the commissioner's regulatory authority under this title. The commissioner shall have the discretion to grant access to such information to public officers having jurisdiction over the regulation of insurance in any other state or country, or to law enforcement officers of this state or any other state or agency of the federal government at any time, only if the officers receiving the information agree in writing to maintain the confidentiality of the information in manner consistent with this subsection (2).

## **Section 17. Dividends, payment out of capital or surplus**

No captive insurance company shall pay a dividend out of, or other distribution with respect to, capital or surplus without the prior approval of the commissioner. Approval of an ongoing plan for the payment of dividends or other distributions shall be conditioned upon the retention, at the time of each payment, of capital or surplus in excess of amounts specified by, or determined in accordance with formulas approved by the commissioner. A captive insurance company may otherwise make such distributions as are in conformity with its purposes and approved by the commissioner.

### **Section 18. Violations, authority of commissioner**

If, after providing notice consistent with the process established by applicable law and providing the opportunity for a contested case hearing held in accordance with the Uniform Administrative Procedures Act, the Commissioner finds that any insurer, person, or entity required to be licensed, permitted, or authorized to transact the business of insurance under this chapter has violated any provision of this chapter or any rule or regulation authorized by this chapter, the commissioner may order:

- (a) The insurer, person, or entity to cease and desist from engaging in the act or practice giving rise to the violation;
- (b) Payment of a monetary penalty of not more than (\_\_\_\_\_) for each violation, but not to exceed an aggregate penalty of (\_\_\_\_\_), unless the insurer, person, or entity knowingly violates a statute, rule or order, in which case the penalty shall not be more than (\_\_\_\_\_) for each violation, not to exceed an aggregate penalty of (\_\_\_\_\_\_). This subdivision (b) shall not apply where a statute or rule specifically provides for other civil penalties for the violation. For purposes of this subdivision (b), each day of continued violation shall constitute a separate violation; and
- (c) The suspension or revocation of the insurer's, person's, or entity's license.

### **Section 19. Severability**

If any clause, sentence, paragraph, section or part of this act or the application thereof to any person or circumstances, shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act, and the application thereof to other persons or circumstance, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.