

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 819

Introduced by Lindstrom, 18.

Read first time January 08, 2016

Committee: Banking, Commerce and Insurance

- 1 A BILL FOR AN ACT relating to insurance; to amend section 44-4404,
- 2 Reissue Revised Statutes of Nebraska; to adopt the Corporate
- 3 Governance Annual Disclosure Act; to change provisions relating to
- 4 risk retention groups; to provide an operative date; and to repeal
- 5 the original section.
- 6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 9 of this act shall be known and may be
2 cited as the Corporate Governance Annual Disclosure Act.

3 Sec. 2. (1) The purposes of the Corporate Governance Annual
4 Disclosure Act are to:

5 (a) Provide the director a summary of an insurer's or insurance
6 group's corporate governance structure, policies, and practices to permit
7 the director to gain and maintain an understanding of the insurer's or
8 insurance group's corporate governance framework;

9 (b) Outline the requirements for completing a corporate governance
10 annual disclosure with the director; and

11 (c) Provide for the confidential treatment of the corporate
12 governance annual disclosure and related information that contains
13 confidential and sensitive information related to an insurer's or
14 insurance group's internal operations and proprietary and trade secret
15 information which, if made public, could potentially cause the insurer or
16 insurance group competitive harm or disadvantage.

17 (2) Nothing in the Corporate Governance Annual Disclosure Act shall
18 be construed (a) to prescribe or impose corporate governance standards
19 and internal procedures beyond that which is required under applicable
20 state corporate law or (b) to limit the director's authority, or the
21 rights or obligations of third parties, under the Insurers Examination
22 Act.

23 (3) The requirements of the Corporate Governance Annual Disclosure
24 Act shall apply to all insurers that are domiciled in this state.

25 Sec. 3. For purposes of the Corporate Governance Annual Disclosure
26 Act:

27 (1) Corporate governance annual disclosure means a confidential
28 report filed by an insurer or insurance group made in accordance with the
29 requirements of the Corporate Governance Annual Disclosure Act;

30 (2) Director means the Director of Insurance;

31 (3) Insurance group means those insurers and affiliates included

1 within an insurance holding company system as defined in section 44-2121;
2 and

3 (4) Insurer has the same meaning as in section 44-103, except that
4 it shall not include agencies, authorities, or instrumentalities of the
5 United States, its possessions and territories, the Commonwealth of
6 Puerto Rico, the District of Columbia, or a state or political
7 subdivision of a state.

8 Sec. 4. (1) An insurer, or the insurance group of which the insurer
9 is a member, shall, no later than June 1 of each calendar year, submit to
10 the director a corporate governance annual disclosure that contains the
11 information described in section 5 of this act. Notwithstanding any
12 request from the director made pursuant to subsection (3) of this
13 section, if the insurer is a member of an insurance group, the insurer
14 shall submit the disclosure required by this section to the director of
15 the lead state for the insurance group, in accordance with the laws of
16 the lead state, as determined by the procedures outlined in the Financial
17 Analysis Handbook adopted by the National Association of Insurance
18 Commissioners.

19 (2) The corporate governance annual disclosure must include a
20 signature of the insurer's or insurance group's chief executive officer
21 or corporate secretary attesting to the best of that individual's belief
22 and knowledge that the insurer or insurance group has implemented the
23 corporate governance practices contained in the corporate governance
24 annual disclosure and that a copy of the disclosure has been provided to
25 the insurer's board of directors or the appropriate committee thereof.

26 (3) An insurer not required to submit a corporate governance annual
27 disclosure under this section shall do so upon the director's request.

28 (4) For purposes of completing the corporate governance annual
29 disclosure, the insurer or insurance group may provide information
30 regarding corporate governance at the ultimate controlling parent level,
31 an intermediate holding company level, or the individual legal entity

1 level, depending upon how the insurer or insurance group has structured
2 its system of corporate governance. The insurer or insurance group is
3 encouraged to make the corporate governance annual disclosure at the
4 level at which the insurer's or insurance group's risk appetite is
5 determined, the level at which the earnings, capital, liquidity,
6 operations, and reputation of the insurer are overseen collectively and
7 at which the supervision of those factors are coordinated and exercised,
8 or the level at which legal liability for failure of general corporate
9 governance duties would be placed. If the insurer or insurance group
10 determines the level of reporting based on one of these three criteria,
11 it shall indicate which of the three criteria was used to determine the
12 level of reporting and explain any subsequent changes in level of
13 reporting.

14 (5) The review of the corporate governance annual disclosure and any
15 additional requests for information shall be made through the lead state
16 as determined by the procedures within the Financial Analysis Handbook
17 adopted by the National Association of Insurance Commissioners.

18 (6) Insurers providing information substantially similar to the
19 information required by the Corporate Governance Annual Disclosure Act in
20 other documents provided to the director, including proxy statements
21 filed in conjunction with the requirements of section 44-2132 or other
22 state or federal filings provided to the director, shall not be required
23 to duplicate such information in the corporate governance annual
24 disclosure, but shall only be required to cross reference the document in
25 which such information is included.

26 Sec. 5. The corporate governance annual disclosure shall be
27 prepared in a manner prescribed by the director. The insurer or insurance
28 group shall have discretion over the responses to the corporate
29 governance annual disclosure inquiries, except that the corporate
30 governance annual disclosure shall contain the material information
31 necessary to permit the director to gain an understanding of the

1 insurer's or insurance group's corporate governance structure, policies,
2 and practices. The director may request additional information that he or
3 she deems material and necessary to provide the director with a clear
4 understanding of the corporate governance policies, reporting or
5 information systems, or controls implementing the corporate governance
6 policies. Documentation and supporting information shall be maintained
7 and made available upon examination or upon request of the director.

8 Sec. 6. (1) Documents, materials, or other information, including
9 the corporate governance annual disclosure, in the possession or control
10 of the Department of Insurance that are obtained by, created by, or
11 disclosed to the director or any other person under the Corporate
12 Governance Annual Disclosure Act are recognized by this state as being
13 proprietary and to contain trade secrets. All such documents, materials,
14 or other information shall be confidential by law and privileged, shall
15 not be a public record subject to disclosure by the director pursuant to
16 sections 84-712 to 84-712.09, shall not be subject to subpoena, and shall
17 not be subject to discovery or admissible in evidence in any private
18 civil action. However, the director is authorized to use the documents,
19 materials, or other information in the furtherance of any regulatory or
20 legal action brought as a part of the director's official duties. The
21 director shall not otherwise make the documents, materials, or other
22 information public without the prior written consent of the insurer.
23 Nothing in this section shall be construed to require written consent of
24 the insurer before the director may share or receive confidential
25 documents, materials, or other information related to the corporate
26 governance annual disclosure pursuant to subsection (3) of this section
27 to assist in the performance of the director's regular duties.

28 (2) Neither the director nor any person who received documents,
29 materials, or other information related to the corporate governance
30 annual disclosure, through examination or otherwise, while acting under
31 the authority of the director, or with whom such documents, materials, or

1 other information are shared pursuant to the Corporate Governance Annual
2 Disclosure Act, shall be permitted or required to testify in any private
3 civil action concerning any confidential documents, materials, or other
4 information subject to subsection (1) of this section.

5 (3) In order to assist in the performance of the director's
6 regulatory duties, the director:

7 (a) May, upon request, share documents, materials, or other
8 information related to the corporate governance annual disclosure,
9 including the confidential and privileged documents, materials, or other
10 information subject to subsection (1) of this section, including
11 proprietary and trade secret documents and materials, with other state,
12 federal, and international financial regulatory agencies, including
13 members of any supervisory college as described in section 44-2137.01,
14 with the National Association of Insurance Commissioners, and with third-
15 party consultants pursuant to section 7 of this act if the recipient
16 agrees in writing to maintain the confidentiality and privileged status
17 of such documents, materials, or other information and has verified in
18 writing the legal authority to maintain confidentiality; and

19 (b) May receive documents, materials, or other information related
20 to the corporate governance annual disclosure, including otherwise
21 confidential and privileged documents, materials, or other information,
22 including proprietary and trade secret documents and materials, from
23 regulatory officials of other state, federal, and international financial
24 regulatory agencies, including members of any supervisory college as
25 described in section 44-2137.01 and from the National Association of
26 Insurance Commissioners, and shall maintain as confidential or privileged
27 any documents, materials, or other information received with notice or
28 the understanding that it is confidential or privileged under the laws of
29 the jurisdiction that is the source of the document, material, or other
30 information.

31 (4) The sharing of information and documents by the director

1 pursuant to the Corporate Governance Annual Disclosure Act shall not
2 constitute a delegation of regulatory authority or rulemaking, and the
3 director is solely responsible for the administration, execution, and
4 enforcement of the provisions of the act.

5 (5) No waiver of any applicable privilege or claim of
6 confidentiality in the documents, materials, or other information related
7 to the corporate governance annual disclosure shall occur as a result of
8 disclosure of such documents, materials, or other information to the
9 director under this section or as a result of sharing as authorized in
10 the Corporate Governance Annual Disclosure Act.

11 Sec. 7. (1) The director may retain, at the insurer's expense,
12 third-party consultants, including attorneys, actuaries, accountants, and
13 other experts not otherwise a part of the director's staff, as may be
14 reasonably necessary to assist the director in reviewing the corporate
15 governance annual disclosure and related information or the insurer's
16 compliance with the Corporate Governance Annual Disclosure Act.

17 (2) Any persons retained under subsection (1) of this section shall
18 be under the direction and control of the director and shall act in a
19 purely advisory capacity.

20 (3) The National Association of Insurance Commissioners and third-
21 party consultants shall be subject to the same confidentiality standards
22 and requirements as the director.

23 (4) As part of the retention process, a third-party consultant shall
24 verify to the director, with notice to the insurer, that the third-party
25 consultant is free of a conflict of interest and that it has internal
26 procedures in place to monitor compliance with a conflict of interest and
27 to comply with the confidentiality standards and requirements of the
28 Corporate Governance Annual Disclosure Act.

29 (5) A written agreement with the National Association of Insurance
30 Commissioners or a third-party consultant governing sharing and use of
31 information provided pursuant to the Corporate Governance Annual

1 Disclosure Act shall contain the following provisions and expressly
2 require the written consent of the insurer prior to making public
3 information provided under the act:

4 (a) Specific procedures and protocols for maintaining the
5 confidentiality and security of information related to the corporate
6 governance annual disclosure that is shared with the National Association
7 of Insurance Commissioners or a third-party consultant pursuant to the
8 act;

9 (b) Procedures and protocols for sharing by the National Association
10 of Insurance Commissioners only with other state regulators from states
11 in which the insurance group has domiciled insurers. The agreement shall
12 provide that the recipient agrees in writing to maintain the
13 confidentiality and privileged status of the documents, materials, or
14 other information related to the corporate governance annual disclosure
15 and has verified in writing the legal authority to maintain
16 confidentiality.

17 (c) A provision specifying that (i) ownership of the information
18 related to the corporate governance annual disclosure that is shared with
19 the National Association of Insurance Commissioners or a third-party
20 consultant remains with the Department of Insurance and (ii) the National
21 Association of Insurance Commissioners' or third-party consultant's use
22 of the information is subject to the direction of the director;

23 (d) A provision that prohibits the National Association of Insurance
24 Commissioners or a third-party consultant from storing the information
25 shared pursuant to the Corporate Governance Annual Disclosure Act in a
26 permanent data base after the underlying analysis is completed;

27 (e) A provision requiring the National Association of Insurance
28 Commissioners or third-party consultant to provide prompt notice to the
29 director and to the insurer or insurance group regarding any subpoena,
30 request for disclosure, or request for production of the insurer's or
31 insurance group's information related to the corporate governance annual

1 disclosure; and

2 (f) A requirement that the National Association of Insurance
3 Commissioners or a third-party consultant consent to intervention by an
4 insurer in any judicial or administrative action in which the National
5 Association of Insurance Commissioners or a third-party consultant may be
6 required to disclose confidential information about the insurer shared
7 with the National Association of Insurance Commissioners or a third-party
8 consultant pursuant to the Corporate Governance Annual Disclosure Act.

9 Sec. 8. Any insurer failing, without just cause, to timely file the
10 corporate governance annual disclosure as required in the Corporate
11 Governance Annual Disclosure Act shall forfeit fifty dollars each day
12 thereafter such failure continues. The maximum forfeit shall not exceed
13 ten thousand dollars. In addition to the forfeiture, the director may
14 suspend, after notice and hearing, the certificate of authority of the
15 insurer until it has complied with the act. The director may reduce the
16 forfeiture if the insurer demonstrates to the director that the
17 forfeiture would constitute a financial hardship to the insurer. The
18 director shall remit any forfeiture collected pursuant to this section to
19 the State Treasurer for distribution in accordance with Article VII,
20 section 5, of the Constitution of Nebraska.

21 Sec. 9. The director may adopt and promulgate rules and regulations
22 to carry out the Corporate Governance Annual Disclosure Act.

23 Sec. 10. Section 44-4404, Reissue Revised Statutes of Nebraska, is
24 amended to read:

25 44-4404 (1) A risk retention group seeking to be chartered and
26 licensed in this state shall be chartered and licensed as a liability
27 insurance company under Chapter 44 and, except as provided elsewhere in
28 the Risk Retention Act, shall comply with all of the laws, rules, and
29 regulations applicable to such insurers chartered and licensed in this
30 state and with sections 44-4405 to 44-4413 to the extent such
31 requirements are not a limitation on laws, rules, or regulations of this

1 state.

2 (2) Before a risk retention group may offer insurance in any state,
3 it shall submit for approval to the director a plan of operation and
4 revisions of such plan if the group intends to offer any additional lines
5 of liability insurance.

6 (3) At the time of filing its application for a charter and license,
7 the risk retention group shall provide to the director in summary form
8 the following information: The identity of the initial members of the
9 group; the identity of those individuals who organized the group or who
10 will provide administrative services or otherwise influence or control
11 the activities of the group; the amount and nature of initial
12 capitalization; the coverages to be afforded; and the states in which the
13 group intends to operate. Upon receipt of this information, the director
14 shall forward such information to the National Association of Insurance
15 Commissioners. Providing notification to the National Association of
16 Insurance Commissioners shall be in addition to and shall not be
17 sufficient to satisfy the requirements of section 44-4405 or any other
18 sections of the act.

19 (4) Subsections (5) to (11) of this section provide governance
20 standards for risk retention groups licensed and chartered in this state.
21 Any risk retention group in existence on the operative date of this act
22 shall be in compliance with such standards by January 1, 2018. Any risk
23 retention group that is initially licensed on or after the operative date
24 of this act shall be in compliance with such standards at the time of
25 licensure.

26 (5)(a) For purposes of this subsection:

27 (i) Board of directors or board means the governing body of the risk
28 retention group elected by the shareholders or members to establish
29 policy, elect or appoint officers and committees, and make other
30 governing decisions; and

31 (ii) Director means a natural person designated in the articles of

1 the risk retention group or designated, elected, or appointed by any
2 other manner, name, or title to act as a director.

3 (b) The board of directors of the risk retention group shall have a
4 majority of independent directors. If the risk retention group is a
5 reciprocal, then the attorney-in-fact would be required to adhere to the
6 same standards regarding independence of operation and governance as
7 imposed on the risk retention group's board of directors or subscribers
8 advisory committee under this subsection. To the extent permissible under
9 state law, service providers of a reciprocal risk retention group should
10 contract with the risk retention group and not the attorney-in-fact.

11 (c) No director qualifies as independent unless the board of
12 directors affirmatively determines that the director has no material
13 relationship with the risk retention group. Each risk retention group
14 shall disclose these determinations to its domestic regulator at least
15 annually. For this purpose, any person that is a direct or indirect owner
16 of or subscriber in the risk retention group, or is an officer, director,
17 or employee of such an owner and insured unless some other position of
18 such officer, director, or employee constitutes a material relationship,
19 as contemplated by section 3901(a)(4)(E)(ii) of the federal Liability
20 Risk Retention Act of 1986, is considered to be independent.

21 (d) Material relationship of a person with the risk retention group
22 includes, but is not limited to:

23 (i) The receipt in any one twelve-month period of compensation or
24 payment of any other item of value by such person, a member of such
25 person's immediate family, or any business with which such person is
26 affiliated from the risk retention group or a consultant or service
27 provider to the risk retention group is greater than or equal to five
28 percent of the risk retention group's gross written premium for such
29 twelve-month period or two percent of its surplus, whichever is greater,
30 as measured at the end of any fiscal quarter falling in such a twelve-
31 month period. Such person or immediate family member of such person is

1 not independent until one year after his or her compensation from the
2 risk retention group falls below the threshold;

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

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

15 (6)(a) The term of any material service provider contract with the
16 risk retention group shall not exceed five years. Any such contract, or
17 its renewal, shall require the approval of the majority of the risk
18 retention group's independent directors. The risk retention group's board
19 of directors shall have the right to terminate any service provider,
20 audit, or actuarial contracts at any time for cause after providing
21 adequate notice as defined in the contract. The service provider contract
22 is deemed material if the amount to be paid for such contract is greater
23 than or equal to five percent of the risk retention group's annual gross
24 written premium or two percent of its surplus, whichever is greater.

25 (b) For purposes of this subsection, service providers shall include
26 captive managers, auditors, accountants, actuaries, investment advisors,
27 lawyers, managing general underwriters, or other parties responsible for
28 underwriting, determination of rates, collection of premiums, adjusting
29 and settling claims, or the preparation of financial statements. Any
30 reference to lawyers in this subdivision does not include defense counsel
31 retained by the risk retention group to defend claims, unless the amount

1 of fees paid to such lawyers are material as referenced in subdivision
2 (5)(d) of this section.

3 (c) No service provider contract meeting the definition of material
4 relationship contained in subdivision (5)(d) of this section shall be
5 entered into unless the risk retention group has notified the director in
6 writing of its intention to enter into such transaction at least thirty
7 days prior thereto and the director has not disapproved it within such
8 period.

9 (7) The risk retention group's board of directors shall adopt a
10 written policy in the plan of operation as approved by the board that
11 requires the board to:

12 (a) Assure that all owners or insureds of the risk retention group
13 receive evidence of ownership interest;

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

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

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

23 (e) Review and approve, at least annually:

24 (i) The risk retention group's goals and objectives relevant to the
25 compensation of officers and service providers;

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

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

30 (8)(a) The risk retention group shall have an audit committee
31 composed of at least three independent board members as described in

1 subsection (5) of this section. A non-independent board member may
2 participate in the activities of the audit committee, if invited by the
3 members, but cannot be a member of such committee.

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

6 (i) Assist board oversight of (A) the integrity of the financial
7 statements, (B) the compliance with legal and regulatory requirements,
8 and (C) the qualifications, independence, and performance of the
9 independent auditor and actuary;

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

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

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

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

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

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

24 (viii) Require the external auditor to rotate the lead or
25 coordinating audit partner having primary responsibility for the risk
26 retention group's audit as well as the audit partner responsible for
27 reviewing that audit so that neither individual performs audit services
28 for more than five consecutive fiscal years; and

29 (ix) Report regularly to the board of directors.

30 (c) The domestic regulator may waive the requirement to establish an
31 audit committee composed of independent board members if the risk

1 retention group is able to demonstrate to the domestic regulator that it
2 is impracticable to do so and the risk retention group's board of
3 directors itself is otherwise able to accomplish the purposes of an audit
4 committee as described in subdivision (8)(b) of this section.

5 (9) The board of directors shall adopt and disclose governance
6 standards, where disclose means making such information available through
7 electronic or other means, including the posting of such information on
8 the risk retention group's web site, and providing such information to
9 members or insureds upon request, which shall include:

10 (a) A process by which the directors are elected by the owners or
11 insureds;

12 (b) Director qualification standards;

13 (c) Director responsibilities;

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

16 (e) Director compensation;

17 (f) Director orientation and continuing education;

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

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

22 (10) The board of directors shall adopt and disclose a code of
23 business conduct and ethics for directors, officers, and employees and
24 promptly disclose to the board of directors any waivers of the code for
25 directors or executive officers, which should include the following
26 topics:

27 (a) Conflicts of interest;

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

30 (c) Confidentiality;

31 (d) Fair dealing;

1 (e) Protection and proper use of risk retention group assets;
2 (f) Compliance with all applicable laws, rules, and regulations; and
3 (g) Requiring the reporting of any illegal or unethical behavior
4 which affects the operation of the risk retention group.

5 (11) The captive manager, president, or chief executive officer of
6 the risk retention group shall promptly notify the domestic regulator in
7 writing if he or she becomes aware of any material noncompliance with any
8 of the governance standards provided in subsections (5) to (11) of this
9 section.

10 Sec. 11. This act becomes operative on January 1, 2017.

11 Sec. 12. Original section 44-4404, Reissue Revised Statutes of
12 Nebraska, is repealed.