

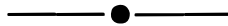
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CITIZEN WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2002



ENROLLED

House Bill No. 4669

(By Delegates Flanigan, Pino, Beach, Azinger,
Faircloth, Walters and Webb)



Passed March 9, 2002

In Effect Ninety Days from Passage

FILED
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OFFICE WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

H. B. 4669

(BY DELEGATES FLANIGAN, PINO, BEACH, AZINGER,
FAIRCLOTH, WALTERS AND WEBB)

[Passed March 9, 2002; in effect ninety days from passage.]

AN ACT to amend and reenact section nine, article two, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the hiring of examiners by the insurance commissioner; exempting from purchasing requirements; requiring the posting of a bond.

Be it enacted by the Legislature of West Virginia:

That section nine, article two, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, to read as follows:

§33-2-9. Examination of insurers, agents, brokers and solicitors; access to books, records, etc.

- 1 (a) The purpose of this section is to provide an effective and
- 2 efficient system for examining the activities, operations,
- 3 financial condition and affairs of all persons transacting the
- 4 business of insurance in this state and all persons otherwise

5 subject to the jurisdiction of the commissioner. The provisions
6 of this section are intended to enable the commissioner to adopt
7 a flexible system of examinations which directs resources as
8 may be considered appropriate and necessary for the adminis-
9 tration of the insurance and insurance related laws of this state.

10 (b) For purposes of this section, the following definitions
11 shall apply:

12 (1) "Commissioner" means the commissioner of insurance
13 of this state;

14 (2) "Company" or "insurance company" means any person
15 engaging in or proposing or attempting to engage in any
16 transaction or kind of insurance or surety business and any
17 person or group of persons who may otherwise be subject to the
18 administrative, regulatory or taxing authority of the commis-
19 sioner, including, but not limited to, any domestic or foreign
20 stock company, mutual company, mutual protective association,
21 farmers mutual fire companies, fraternal benefit society,
22 reciprocal or inter-insurance exchange, nonprofit medical care
23 corporation, nonprofit health care corporation, nonprofit
24 hospital service association, nonprofit dental care corporation,
25 health maintenance organization, captive insurance company,
26 risk retention group or other insurer, regardless of the type of
27 coverage written, benefits provided or guarantees made by
28 each;

29 (3) "Department" means the department of insurance of this
30 state; and

31 (4) "Examiners" means the commissioner of insurance or
32 any individual or firm having been authorized by the commis-
33 sioner to conduct an examination pursuant to this section,
34 including, but not limited to, the commissioner's deputies, other

35 employees, appointed examiners or other appointed individuals
36 or firms who are not employees of the department of insurance.

37 (c) The commissioner or his or her examiners may conduct
38 an examination under this section of any company as often as
39 the commissioner in his or her discretion considers appropriate.
40 The commissioner or his or her examiners shall at least once
41 every five years visit each domestic insurer and thoroughly
42 examine its financial condition and methods of doing business
43 and ascertain whether it has complied with all the laws and
44 regulations of this state. The commissioner may also examine
45 the affairs of any insurer applying for a license to transact any
46 insurance business in this state.

47 (d) The commissioner or his or her examiners shall, at a
48 minimum, conduct an examination of every foreign or alien
49 insurer licensed in this state not less frequently than once every
50 five years. The examination of an alien insurer may be limited
51 to its United States business: Provided, That in lieu of an
52 examination under this section of any foreign or alien insurer
53 licensed in this state, the commissioner may accept an examina-
54 tion report on the company as prepared by the insurance
55 department for the company's state of domicile or port-of-entry
56 state until the first day of January, one thousand nine hundred
57 ninety-four. Thereafter, the reports may only be accepted if:

58 (1) The insurance department was at the time of the
59 examination accredited under the national association of
60 insurance commissioners' financial regulation standards and
61 accreditation program; or

62 (2) The examination is performed under the supervision of
63 an accredited insurance department or with the participation of
64 one or more examiners who are employed by an accredited state
65 insurance department and who, after a review of the examina-
66 tion work papers and report, state under oath that the examina-

67 tion was performed in a manner consistent with the standards
68 and procedures required by their insurance department.

69 (e) In scheduling and determining the nature, scope and
70 frequency of examinations conducted pursuant to this section,
71 the commissioner may consider such matters as the results of
72 financial statement analyses and ratios, changes in management
73 or ownership, actuarial opinions, reports of independent
74 certified public accountants and other criteria as set forth in the
75 examiners' handbook adopted by the national association of
76 insurance commissioners and in effect when the commissioner
77 exercises discretion under this section.

78 (f) For purposes of completing an examination of any
79 company under this section, the commissioner may examine or
80 investigate any person, or the business of any person, insofar as
81 the examination or investigation is, in the sole discretion of the
82 commissioner, necessary or material to the examination of the
83 company.

84 (g) The commissioner may also cause to be examined, at
85 the times as he or she considers necessary, the books, records,
86 papers, documents, correspondence and methods of doing
87 business of any agent, broker, excess lines broker or solicitor
88 licensed by this state. For these purposes, the commissioner or
89 his or her examiners shall have free access to all books, records,
90 papers, documents and correspondence of all the agents,
91 brokers, excess lines brokers and solicitors wherever the books,
92 records, papers, documents and records are situate. The
93 commissioner may revoke the license of any agent, broker,
94 excess lines broker or solicitor who refuses to submit to the
95 examination.

96 (h) In addition to conducting an examination, the commis-
97 sioner or his or her examiners may, as the commissioner
98 considers necessary, analyze or review any phase of the

99 operations or methods of doing business of an insurer, agent,
100 broker, excess lines broker, solicitor or other individual or
101 corporation transacting or attempting to transact an insurance
102 business in the state of West Virginia. The commissioner may
103 use the full resources provided by this section in carrying out
104 these responsibilities, including any personnel and equipment
105 provided by this section as the commissioner considers neces-
106 sary.

107 (i) Examinations made pursuant to this section shall be
108 conducted in the following manner:

109 (1) Upon determining that an examination should be
110 conducted, the commissioner or his or her designee shall issue
111 an examination warrant appointing one or more examiners to
112 perform the examination and instructing them as to the scope of
113 the examination. The appointment of any examiners pursuant
114 to this section by the commissioner shall not be subject to the
115 requirements of article three, chapter five-a of this code, except
116 that the contracts and agreements shall be approved as to form
117 and conformity with applicable law by the attorney general. In
118 conducting the examination, the examiner shall observe those
119 guidelines and procedures set forth in the examiners' handbook
120 adopted by the national association of insurance commissioners.
121 The commissioner may also employ any other guidelines or
122 procedures as the commissioner may consider appropriate;

123 (2) Every company or person from whom information is
124 sought, its officers, directors and agents shall provide to the
125 examiners appointed under subdivision (1) of this subsection
126 timely, convenient and free access at all reasonable hours at its
127 offices to all books, records, accounts, papers, documents and
128 any or all computer or other recordings relating to the property,
129 assets, business and affairs of the company being examined.
130 The officers, directors, employees and agents of the company

131 or person shall facilitate the examination and aid in the exami-
132 nation so far as it is in their power to do so;

133 (3) The refusal of any company, by its officers, directors,
134 employees or agents, to submit to examination or to comply
135 with any reasonable written request of the examiners shall be
136 grounds for suspension, revocation, refusal or nonrenewal of
137 any license or authority held by the company to engage in an
138 insurance or other business subject to the commissioner's
139 jurisdiction. Any proceedings for suspension, revocation,
140 refusal or nonrenewal of any license or authority shall be
141 conducted pursuant to section eleven, article two of this
142 chapter;

143 (4) The commissioner or his or her examiners shall have the
144 power to issue subpoenas, to administer oaths and to examine
145 under oath any person as to any matter pertinent to the exami-
146 nation, analysis or review. The subpoenas shall be enforced
147 pursuant to the provisions of section six, article two of this
148 chapter;

149 (5) When making an examination, analysis or review under
150 this section, the commissioner may retain attorneys, appraisers,
151 independent actuaries, independent certified public accountants,
152 professionals or specialists with training or experience in
153 reinsurance, investments or information systems, or other
154 professionals and specialists as examiners, the cost of which
155 shall be borne by the company which is the subject of the
156 examination, analysis or review or, in the commissioner's
157 discretion, paid from the commissioner's examination revolving
158 fund. The commissioner may recover costs paid from the
159 commissioner's examination revolving fund pursuant to this
160 subdivision from the company upon which the examination,
161 analysis or review is conducted unless the subject of the
162 examination, analysis or review is an individual, described in
163 subdivision (2), subsection (q) of this section;

164 (6) Nothing contained in this section may be construed to
165 limit the commissioner's authority to terminate or suspend any
166 examination, analysis or review in order to pursue other legal
167 or regulatory action pursuant to the insurance laws of this state.
168 The commissioner or his or her examiners may at any time
169 testify and offer other proper evidence as to information
170 secured during the course of an examination, analysis or
171 review, whether or not a written report of the examination has
172 at that time either been made, served or filed in the commis-
173 sioner's office;

174 (7) Nothing contained in this section may be construed to
175 limit the commissioner's authority to use and, if appropriate, to
176 make public any final or preliminary examination report, any
177 examiner or company workpapers or other documents or any
178 other information discovered or developed during the course of
179 any examination, analysis or review in the furtherance of any
180 legal or regulatory action which the commissioner may, in his
181 or her sole discretion, consider appropriate. An examination
182 report, when filed, shall be admissible in evidence in any action
183 or proceeding brought by the commissioner against an insur-
184 ance company, its officers or agents and shall be prima facie
185 evidence of the facts stated therein.

186 (j) Examination reports prepared pursuant to the provisions
187 of this section shall comply with the following requirements:

188 (1) All examination reports shall be comprised of only facts
189 appearing upon the books, records or other documents of the
190 company, its agents or other persons examined or as ascertained
191 from the testimony of its officers or agents or other persons
192 examined concerning its affairs and any conclusions and
193 recommendations the examiners find reasonably warranted
194 from the facts;

195 (2) No later than sixty days following completion of the
196 examination, the examiner in charge shall file with the commis-
197 sioner a verified written report of examination under oath. Upon
198 receipt of the verified report, the commissioner shall transmit
199 the report to the company examined, together with a notice
200 which shall afford the company examined a reasonable opportu-
201 nity of not more than ten days to make a written submission or
202 rebuttal with respect to any matters contained in the examina-
203 tion report;

204 (3) Within thirty days of the end of the period allowed for
205 the receipt of written submissions or rebuttals, the commis-
206 sioner shall fully consider and review the report, together with
207 any written submissions or rebuttals and any relevant portions
208 of the examiner's workpapers, and enter an order:

209 (A) Adopting the examination report as filed or with
210 modification or corrections. If the examination report reveals
211 that the company is operating in violation of any law, rule or
212 prior order of the commissioner, the commissioner may order
213 the company to take any action the commissioner considers
214 necessary and appropriate to cure the violation; or

215 (B) Rejecting the examination report with directions to the
216 examiners to reopen the examination for purposes of obtaining
217 additional data, documentation or information and refile
218 pursuant to subdivision (2) above; or

219 (C) Calling for an investigatory hearing with no less than
220 twenty days notice to the company for purposes of obtaining
221 additional documentation, data, information and testimony;

222 (4) All orders entered pursuant to this subsection shall be
223 accompanied by findings and conclusions resulting from the
224 commissioner's consideration and review of the examination
225 report, relevant examiner workpapers and any written submis-

226 sions or rebuttals. Any order issued pursuant to paragraph (A),
227 subdivision (3) of this subsection shall be considered a final
228 administrative decision and may be appealed pursuant to
229 section fourteen [§§ 33-2-14], article two of this chapter and
230 shall be served upon the company by certified mail, together
231 with a copy of the adopted examination report. Within thirty
232 days of the issuance of the adopted report, the company shall
233 file affidavits executed by each of its directors stating under
234 oath that they have received a copy of the adopted report and
235 related orders.

236 (k) Hearings conducted pursuant to this section shall be
237 subject to the following requirements:

238 (1) Any hearing conducted pursuant to this section by the
239 commissioner or the commissioner's authorized representative
240 shall be conducted as a nonadversarial confidential investiga-
241 tory proceeding as necessary for the resolution of any inconsis-
242 tencies, discrepancies or disputed issues apparent upon the face
243 of the filed examination report or raised by or as a result of the
244 commissioner's review of relevant workpapers or by the written
245 submission or rebuttal of the company. Within twenty days of
246 the conclusion of any hearing, the commissioner shall enter an
247 order pursuant to paragraph (A), subdivision (3), subsection (j)
248 of this section;

249 (2) The commissioner may not appoint an examiner as an
250 authorized representative to conduct the hearing. The hearing
251 shall proceed expeditiously with discovery by the company
252 limited to the examiner's workpapers which tend to substantiate
253 any assertions set forth in any written submission or rebuttal.
254 The commissioner or the commissioner's representative may
255 issue subpoenas for the attendance of any witnesses or the
256 production of any documents considered relevant to the
257 investigation whether under the control of the commissioner,
258 the company or other persons. The documents produced shall

259 be included in the record and testimony taken by the commis-
260 sioner or the commissioner's representative shall be under oath
261 and preserved for the record. Nothing contained in this section
262 shall require the commissioner to disclose any information or
263 records which would indicate or show the existence or content
264 of any investigation or activity of a criminal justice agency;

265 (3) The hearing shall proceed with the commissioner or the
266 commissioner's representative posing questions to the persons
267 subpoenaed. Thereafter, the company and the department may
268 present testimony relevant to the investigation. Cross-examina-
269 tion may be conducted only by the commissioner or the
270 commissioner's representative. The company and the commis-
271 sioner shall be permitted to make closing statements and may
272 be represented by counsel of their choice.

273 (l) Adoption of the examination report shall be subject to
274 the following requirements:

275 (1) Upon the adoption of the examination report under
276 paragraph (A), subdivision (3), subsection (j) of this section, the
277 commissioner may continue to hold the content of the examina-
278 tion report as private and confidential information for a period
279 of ninety days except to the extent provided in subdivision (6),
280 subsection (i) of this section. Thereafter, the commissioner may
281 open the report for public inspection so long as no court of
282 competent jurisdiction has stayed its publication;

283 (2) Nothing contained in this section may prevent or be
284 construed as prohibiting the commissioner from disclosing the
285 content of an examination report, preliminary examination
286 report or results or any matter relating thereto or the results of
287 any analysis or review to the insurance department of this or
288 any other state or country or to law-enforcement officials of this
289 or any other state or agency of the federal government at any
290 time, so long as the agency or office receiving the report or

291 matters relating thereto agrees in writing to hold it confidential
292 and in a manner consistent with this section;

293 (3) In the event the commissioner determines that regula-
294 tory action is appropriate as a result of any examination,
295 analysis or review, he or she may initiate any proceedings or
296 actions as provided by law;

297 (4) All working papers, recorded information, documents
298 and copies thereof produced by, obtained by or disclosed to the
299 commissioner or any other person in the course of an examina-
300 tion, analysis or review made under this section must be given
301 confidential treatment and are not subject to subpoena and may
302 not be made public by the commissioner or any other person,
303 except to the extent provided in subdivision (5), subsection (i)
304 of this section. Access may also be granted to the national
305 association of insurance commissioners. The parties must agree
306 in writing prior to receiving the information to provide to it the
307 same confidential treatment as required by this section, unless
308 the prior written consent of the company to which it pertains
309 has been obtained.

310 (m) The commissioner may require any examiner to furnish
311 a bond in such amount as the commissioner may determine to
312 be appropriate, and the bond shall be approved, filed and
313 premium paid, with suitable proof submitted to the commis-
314 sioner, prior to commencement of employment by the commis-
315 sioner. No examiner may be appointed by the commissioner if
316 the examiner, either directly or indirectly, has a conflict of
317 interest or is affiliated with the management of or owns a
318 pecuniary interest in any person subject to examination under
319 this section. This section shall not be construed to automatically
320 preclude an examiner from being:

321 (1) A policyholder or claimant under an insurance policy;

322 (2) A grantor of a mortgage or similar instrument on the
323 examiner's residence to a regulated entity if done under
324 customary terms and in the ordinary course of business;

325 (3) An investment owner in shares of regulated diversified
326 investment companies; or

327 (4) A settlor or beneficiary of a "blind trust" into which any
328 otherwise impermissible holdings have been placed;

329 (5) Notwithstanding the requirements of this subsection, the
330 commissioner may retain, from time to time, on an individual
331 basis, qualified actuaries, certified public accountants or other
332 similar individuals who are independently practicing their
333 professions, even though these persons may from time to time
334 be similarly employed or retained by persons subject to
335 examination under this section.

336 (n) Personnel conducting examinations, analyses or reviews
337 of either a domestic, foreign or alien insurer shall be compen-
338 sated for each day worked at a rate set by the commissioner.
339 The personnel shall also be reimbursed for their travel and
340 living expenses at the rate set by the commissioner. Other
341 individuals who are not employees of the department of
342 insurance shall all be compensated for their work, travel and
343 living expenses at rates approved by the commissioner, or as
344 otherwise provided by law. As used in this section the costs of
345 an examination, analysis or review means:

346 (1) The entire compensation for each day worked by all
347 personnel, including those who are not employees of the
348 department of insurance, the conduct of the examination,
349 analysis or review calculated as hereinbefore provided;

350 (2) Travel and living expenses of all personnel, including
351 those who are not employees of the department of insurance,

352 directly engaged in the conduct of the examination, analysis or
353 review calculated at the rates as hereinbefore provided for;

354 (3) All other incidental expenses incurred by or on behalf
355 of the personnel in the conduct of any authorized examination,
356 analysis or review.

357 (o) All insurers subject to the provisions of this section
358 shall annually pay to the commissioner on or before the first
359 day of July, one thousand nine hundred ninety-one, and every
360 first day of July thereafter an examination assessment fee of
361 eight hundred dollars. Four hundred fifty dollars of this fee
362 shall be paid to the treasurer of the state to the credit of a
363 special revolving fund to be known as the "Commissioner's
364 Examination Revolving Fund" which is hereby established and
365 three hundred fifty dollars shall be paid to the treasurer of the
366 state. The commissioner may at his or her discretion, upon
367 notice to the insurers subject to this section, increase this
368 examination assessment fee or levy an additional examination
369 assessment fee of two hundred fifty dollars. In no event may the
370 total examination assessment fee including any additional
371 examination assessment fee levied exceed one thousand five
372 hundred dollars per insurer in any calendar year.

373 (p) The moneys collected by the commissioner from an
374 increase or additional examination assessment fee shall be paid
375 to the treasurer of the state to be credited to the commissioner's
376 examination revolving fund. Any funds expended or obligated
377 by the commissioner from the commissioner's examination
378 revolving fund may be expended or obligated solely for
379 defrayment of the costs of examinations, analyses or reviews of
380 the financial affairs and business practices of insurance
381 companies, agents, brokers, excess lines brokers, solicitors or
382 other individuals or corporations transacting or attempting to
383 transact an insurance business in this state made by the com-
384 missioner pursuant to this section or for the purchase of

385 equipment and supplies, travel, education and training for the
386 commissioner's deputies, other employees and appointed
387 examiners necessary for the commissioner to fulfill the statu-
388 tory obligations created by this section.

389 (q) The commissioner may require other individuals who
390 are not employees of the department of insurance who have
391 been appointed by the commissioner to conduct or participate
392 in the examination, analysis or review of insurers, agents,
393 brokers, excess lines brokers, solicitors or other individuals or
394 corporations transacting or attempting to transact an insurance
395 business in this state to:

396 (1) Bill and receive payments directly from the insurance
397 company being examined, analyzed or reviewed for their work,
398 travel and living expenses as previously provided for in this
399 section; or

400 (2) If an individual agent, broker or solicitor is being
401 examined, analyzed or reviewed, bill and receive payments
402 directly from the commissioner's examination revolving fund
403 for their work, travel and living expenses as previously pro-
404 vided for in this section. The commissioner may recover costs
405 paid from the commissioner's examination revolving fund
406 pursuant to this subdivision from the person upon whom the
407 examination, analysis or review is conducted.

408 (r) The commissioner and his or her examiners shall be
409 entitled to immunity to the following extent:

410 (1) No cause of action shall arise nor shall any liability be
411 imposed against the commissioner or his or her examiners for
412 any statements made or conduct performed in good faith while
413 carrying out the provisions of this section;

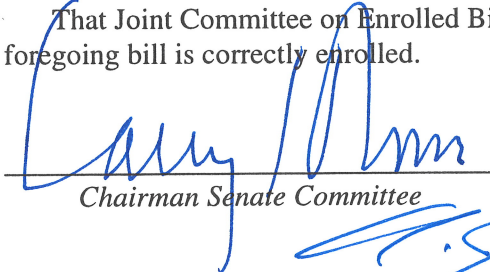
414 (2) No cause of action shall arise, nor shall any liability be
415 imposed, against any person for the act of communicating or

416 delivering information or data to the commissioner or his or her
417 examiners pursuant to an examination, analysis or review made
418 under this section if the act of communication or delivery was
419 performed in good faith and without fraudulent intent or the
420 intent to deceive;

421 (3) The commissioner or any examiner shall be entitled to
422 an award of attorney's fees and costs if he or she is the prevail-
423 ing party in a civil cause of action for libel, slander or any other
424 relevant tort arising out of activities in carrying out the provi-
425 sions of this section and the party bringing the action was not
426 substantially justified in doing so. For purposes of this section
427 a proceeding is "substantially justified" if it had a reasonable
428 basis in law or fact at the time that it was initiated;

429 (4) This subsection does not abrogate or modify in any way
430 any constitutional immunity or common law or statutory
431 privilege or immunity heretofore enjoyed by any person
432 identified in subdivision (1) of this subsection.

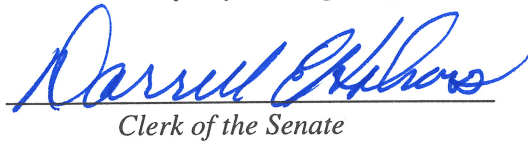
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


Chairman Senate Committee

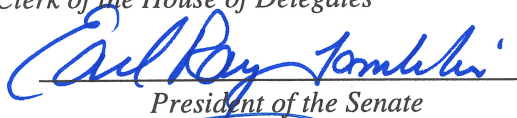

Chairman House Committee

Originating in the House.

In effect ninety days from passage.

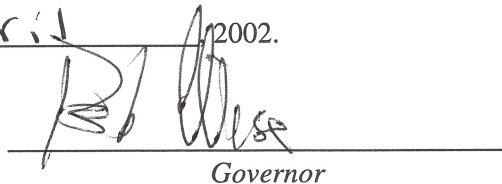

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within is approved this the 3rd
day of April 2002.


Governor

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Date 3/27/02

Time 10:25h