



## TITLE 18

### Insurance Code

#### Insurance

### CHAPTER 69. CAPTIVE INSURANCE COMPANIES

#### Subchapter III. Special Purpose Financial Captive Insurance Companies

##### § 6951. Purpose.

This subchapter provides for the authorization of special purpose financial captive insurance companies empowered to issue securities and otherwise access financial markets and alternative sources of capital through securitizations and other transactions. The intent of this subchapter is to provide for an authorization process for special purpose financial captive insurance companies that is both thorough and swift, and for the ongoing regulation of such companies that recognizes and accommodates the special purpose nature of such entities. (76 Del. Laws, c. 161, § 15.)

##### § 6952. Definitions.

As used in this subchapter, unless the context requires otherwise:

(1) "Counterparty" means a person, other than a natural person, which may but need not be the parent or an affiliate of the special purpose financial captive insurance company, that enters into an SPFC contract with a special purpose financial captive insurance company.

(2) "Insolvency" or "insolvent" means:

a. A person's inability to pay its obligations when they are due, unless those obligations are the subject of a bona fide dispute; or

b. The liabilities of a person exceed the value of all of the assets of the person. In the case of a special purpose financial captive insurance company, liabilities and assets are determined under the method of accounting used by the special purpose financial captive insurance company in accordance with § 6962 of this title.

(3) "Organizational document" means the certificate of incorporation, articles of organization, bylaws, limited liability company agreement or other documents pursuant to which a special purpose financial captive insurance company or a special purpose financial captive insurance company applicant, as the case may be, is formed.

(4) "Permitted investments" means those investments that meet the qualifications set forth in § 6910(b) of this title.

(5) "Securities" has the same meaning as defined in § 7302(17) of Title 6, and also includes any form of debt obligation, equity, surplus certificate, surplus note, funding agreement, derivative or other financial instrument that the Commissioner designates, by rule or order, as "securities" for purposes of this subchapter.

(6)a. "Special purpose financing transaction" means:

1. A Transaction or a group of related transactions, which may include but are not limited to capital market offerings and securitizations, by which:

A. Proceeds are obtained by a special purpose financial captive insurance company through the issuance of securities by the special purpose financial captive insurance company or by any other person, and all or any part of such proceeds are used to fund the special purpose financial captive insurance company's obligations under 1 or more SPFC contracts; or

B. A person provides 1 or more letters of credit or other assets to or for the benefit of the special purpose financial captive insurance company, which the Commissioner authorizes the special purpose financial captive insurance company to treat as admitted assets for purposes of the special purpose financial captive insurance company's annual report, and all or any part of those letters of credit or other assets, as applicable, are used to fund the special purpose financial captive insurance company's obligations under 1 or more SPFC contracts; or

2. Other financing arrangements as the Commissioner may approve.

b. "Special purpose financing transaction" does not include the issuance of a letter of credit to satisfy all or part of the special purpose financial captive's minimum capital and surplus requirements under § 6905 of this title.

(7) "Special purpose financial captive insurance company" means a captive insurance company that is granted a certificate of authority under this subchapter.

(8) "SPFC contract" means a contract or group of related contracts between a special purpose financial captive insurance company and a counterparty or counterparties pursuant to which insurance risk is transferred by the counterparty or counterparties to the special purpose financial captive insurance company. An SPFC contract may include 1 or more other parties.

(9) "Surplus note" means an unsecured subordinated debt obligation treated as surplus and not debt in accordance with § 6956 of this title. (76 Del. Laws, c. 161, § 15.)

### **§ 6953. Application of subchapter.**

(a) Except as otherwise provided, subchapters I, II, and IV of this chapter apply under this subchapter to special purpose financial captive insurance companies.

(b) The Commissioner, by rule or order, at the Commissioner's discretion and on a case-by-case basis, may exempt a special purpose financial captive insurance company, or 1 or more protected cells of a special purpose financial captive insurance company that is also a sponsored captive insurance company, from 1 or more of the provisions of this chapter.

(c) This subchapter is not intended to limit the transactions in which a captive insurance company other than a special purpose financial captive insurance company may engage, and this subchapter does not apply to any such other captive insurance company. (76 Del. Laws, c. 161, § 15.)

### **§ 6954. Application requirements.**

In addition to the items required under § 6903 of this title and, as applicable, under § 6933 of this title, a special purpose financial captive insurance company's plan of operation must include the following:

(1) A description of the contemplated special purpose financing transaction and the SPFC contract;

(2) Copies, or, at the discretion of the Commissioner, a written summary, of all material agreements, instruments or documents, including, without limitation, opinions of

Delaware legal counsel regarding compliance of the SPFC contract and the special purpose financing transaction with the requirements of this chapter, that are to be entered into or required to effectuate the SPFC contract and the special purpose financing transaction, which must include:

- a. The name of the counterparty;
- b. The nature of the risks being assumed;
- c. The proposed use of protected cells, if any; and

- d. The amounts, purpose, nature and interrelationships of the various transactions required to effectuate the SPFC contract and the special purpose financing transaction;

(3) The proposed investment policy of the special purpose financial captive insurance company and a description of its proposed investment strategy;

(4) A description of the underwriting, reporting, and claims payment methods by which losses covered by the SPFC contract are to be reported, accounted for, and settled; and

(5) Pro forma balance sheets, income statements, and other financial projections demonstrating the performance of the special purpose financial captive insurance company pursuant to the SPFC contract under such stress case scenarios as may be required by the Commissioner. (76 Del. Laws, c. 161, § 15.)

#### **§ 6955. Certificate of authority and order.**

(a) Upon a determination by the Commissioner that the requirements in § 6954 of this title have been met, the Commissioner may grant a certificate of authority and, at the discretion of the Commissioner, an order imposing the conditions, limitations or other terms that the Commissioner considers appropriate.

(b) As soon as reasonably practicable after the closing of each SPFC contract or special purpose financing transaction, and, in any event, within 30 days after such closing, the special purpose financial captive insurance company shall provide to the Commissioner a final executed copy of all material agreements, instruments or documents, including, without limitation, opinions of Delaware legal counsel regarding compliance of the SPFC contract and the special purpose financing transaction with the requirements of this chapter, that have been entered into or that have been required to effectuate the SPFC contract or the special purpose financing transaction.

(c) Any material change of the special purpose financial captive insurance company's plan of operation requires prior approval of the Commissioner. The following are not considered material changes:

- (1) If approved in the plan of operation, securities subsequently issued or entered into to continue the activities of the special purpose financial captive insurance company either before or after expiration, redemption or satisfaction of part or all of the securities issued or entered into pursuant to the initial special purpose financing transaction; and

- (2) If a swap transaction has been approved in the plan of operation, a change or substitution of a swap counterparty, if, at the time of the change or substitution, the replacement swap counterparty carries the same or a higher rating than its predecessor from 2 or more nationally recognized rating agencies.

- (d) Upon termination or cancellation of all of the SPFC contracts and all related special purpose financing transactions set forth in a plan of operation, unless otherwise approved by the Commissioner, the certificate of authority granted by the Commissioner terminates, and the special purpose financial captive insurance company may not enter into any further or

additional SPFC contracts or special purpose financing transactions.

(e) In the case of a special purpose financial captive insurance company organized as a sponsored captive insurance company, upon termination or cancellation of all of the SPFC contracts and all related special purpose financing transactions set forth in the plan of operation with respect to a protected cell, unless otherwise approved by the Commissioner, the authority granted by the Commissioner with respect to that particular cell terminates, and the protected cell may not enter into any further or additional SPFC contracts or special purpose financing transactions.

(f) A special purpose financial captive insurance company that is organized as a sponsored captive insurance company may add or eliminate 1 or more protected cells under a single certificate of authority upon approval by the Commissioner of a plan of operation specific to the protected cells.

(g) At the request of a special purpose financial captive insurance company, a certificate of authority or an order granted under this section, or both, may be amended by the Commissioner. (76 Del. Laws, c. 161, § 15.)

### **§ 6956. Securities of special purpose financial captive insurance companies.**

(a) A special purpose financial captive insurance company may:

(1) Subject to the approval of the Commissioner, account for the proceeds of surplus notes issued by the special purpose financial captive insurance company as surplus and not as debt for purposes of statutory accounting; and

(2) Submit to the Commissioner periodic written requests for the advance approval by the Commissioner of the special purpose financial captive insurance company's making payments of interest on and repayments of principal of surplus notes.

(b) The Commissioner may approve, in advance, ongoing interest payments or principal repayments, or both, by the special purpose financial captive insurance company, provided that the interest payments or principal repayments, or both, are made in accordance with the plan of operation and formulas contained in the plan of operation.

(c) Notwithstanding the provisions of subsection (b) of this section, payment of interest or repayment of principal may not be made without the approval of the Commissioner if the operation or financial condition of the special purpose financial captive insurance company deviates from the formula approved by the Commissioner pursuant to subsection (b) of this section or if the payment of interest or repayment of principal threatens the solvency or liquidity of the special purpose financial captive insurance company.

(d) A security issued by a special purpose financial captive insurance company is not subject to regulation as an insurance contract. An investor in these securities or a holder of these securities is not considered to be transacting the business of insurance in this State solely by reason of having an interest in these securities. The underwriter's placement or selling agents and their partners, commissioners, officers, members, managers, employees, agents, representatives, and advisors involved in a special purpose financing transaction by a special purpose financial captive insurance company are not considered to be insurance producers or to be conducting business as an insurance company or as an insurance agency, brokerage, intermediary, advisory, or consulting business solely by virtue of their underwriting activities in connection with the special purpose financing transaction. (76 Del. Laws, c. 161, § 15.)

### **§ 6957. Authorized contracts and activities.**

(a) A special purpose financial captive insurance company may insure only the risks of a counterparty. A special purpose financial captive insurance company may cede risks assumed through an SPFC contract to third-party reinsurers through the purchase of reinsurance or retrocession protection as set forth in the plan of operation.

(b) A special purpose financial captive insurance company may enter into agreements with affiliated companies and third-parties and conduct other commercial activities related or incidental to, or necessary to fulfill, the purposes of an SPFC contract and special purpose financing transaction contemplated by the plan of operation approved by the Commissioner. The agreements may include management and administrative services agreements and other allocation, including tax allocation, and cost-sharing agreements.

(c) A special purpose financial captive insurance company may enter into asset management agreements as provided for in a plan of operation. These agreements may include, but are not limited to, swap agreements, hedge agreements, guarantee agreements, guaranteed investment contracts, or other investment contracts.

(d) An SPFC contract must:

(1) Obligate the special purpose financial captive insurance company to indemnify the counterparty for losses or otherwise to make payments to the counterparty with respect to the insurance risk transferred thereunder; and

(2) Make provision satisfactory to the Commissioner for payment of obligations of the special purpose financial captive insurance company under the SPFC contract.

(e) Without limiting the means by which the requirements of paragraph (d)(2) of this section may be satisfied, an SPFC contract is considered to satisfy those requirements if it:

(1) Requires the special purpose financial captive insurance company to:

a. To enter into a trust agreement that meets the criteria set forth in this section and in any regulations issued by the Commissioner applicable to this subsection and that specifies the recoverables or reserves, or both, to be covered; and

b. To establish a trust account for the benefit of the counterparty;

(2) Stipulates that assets deposited in the trust account are valued according to their current fair value and consist only of permitted investments;

(3) Requires the special purpose financial captive insurance company, before depositing assets with the trustee, to execute assignments or endorsements in blank, or both, or to transfer legal title to the trustee of all shares, obligations, or any other assets requiring assignments, in order that the counterparty, or the trustee upon the direction of the counterparty, may transfer the assets whenever necessary without consent or signature from the special purpose financial captive insurance company or another entity;

(4) Requires that all settlements of account between the counterparty and the special purpose financial captive insurance company, unless otherwise approved by the Commissioner, be made in cash or its equivalent; and

(5) Stipulates that the special purpose financial captive insurance company and the counterparty agree that the assets in the trust account, established pursuant to the provisions of the SPFC contract:

a. May be withdrawn by the counterparty at any time, notwithstanding any other provisions in the SPFC contract; and

b. Must be used and applied by the counterparty or any successor by operation of law of the counterparty, including any liquidator, rehabilitator, receiver, or conservator of the counterparty, without diminution because of insolvency on the part of the counterparty or the special purpose financial captive insurance company, only for the following purposes:

1. To transfer all of the assets into 1 or more trust accounts for the benefit of the counterparty pursuant to and in accordance with the terms of the SPFC contract and in

compliance with the provisions of this title; and

2. To pay any other incurred and paid amounts that the counterparty claims are due pursuant to and under the terms of the SPFC contract and in compliance with this title.

(f) An SPFC contract may allow the special purpose financial captive insurance company to seek approval from the counterparty to withdraw all or part of the assets supporting payment of obligations of the special purpose financial captive insurance company under the SPFC contract, or income from them, and to transfer the assets to the special purpose financial captive insurance company; provided, that,

(1) At the time of the withdrawal, the special purpose financial captive insurance company replaces the withdrawn assets, excluding any income withdrawn, with other permitted investments having a fair value equal to the fair value of the assets withdrawn;

(2) After giving effect to the withdrawal and replacement, the fair value of the assets supporting payment of obligations of the special purpose financial captive insurance company under the SPFC contract satisfies the requirements of paragraph (d)(2) of this section; and

(3) The approval of the counterparty is received, which approval may not be unreasonably or arbitrarily withheld.

(g) The assets of a special purpose financial captive insurance company must be preserved and administered by or on behalf of the special purpose financial captive insurance company to satisfy the liabilities and obligations of the special purpose financial captive insurance company incident to the SPFC contract and the special purpose financing transaction.

(h) Unless otherwise permitted by this subchapter or approved by the Commissioner, a special purpose financial captive insurance company may not:

(1) Issue or administer primary insurance policies;

(2) Enter into an SPFC contract with a counterparty that is an insurer if the insurer is required to be, but is not, licensed or otherwise authorized to transact the business of insurance or reinsurance in at least its state or country of domicile;

(3) Assume or retain exposure to insurance or reinsurance losses for its own account that is not funded or to be funded, in whole or in part, by proceeds from a special purpose financing transaction that complies with the provisions of this subchapter;

(4) Have any direct obligation to policyholders or reinsureds of a counterparty; or

(5) Lend to, receive a capital contribution from, invest or place in custody, trust, or under management any of its assets with, or receive a loan or advance from, other than by issuance of the securities pursuant to a special purpose financing transaction, anyone convicted of a felony, or anyone convicted of a criminal offense or found civilly liable for an offense involving the conversion or misappropriation of fiduciary funds or insurance accounts, theft, deceit, fraud, misrepresentation, or corruption. (76 Del. Laws, c. 161, § 15.)

## **§ 6958. Dividends and distributions.**

(a) A special purpose financial captive insurance company may declare and pay dividends or other distributions to equity holders if the dividends or other distributions do not violate the provisions of this chapter, or jeopardize the fulfillment of the obligations of the special purpose financial captive insurance company pursuant to the special purpose financing transaction or the SPFC contract, or threaten the solvency or liquidity of the special purpose financial captive insurance company.

(b) A special purpose financial captive insurance company may not declare or pay any dividend or other distribution to equity holders if the dividend or distribution violates the terms

of the special purpose financing transaction, and may not declare or pay any dividend or other distribution to equity holders which decreases the capital and surplus of the special purpose financial captive insurance company below the minimum amount required under § 6905 of this title.

(c) The Commissioner may approve, in advance, a special purpose financial captive insurance company's declaring and paying, on an ongoing basis, dividends or other distributions, or both, to equity holders, provided that each dividend or other distribution is made in accordance with the plan of operation and formulas contained in the plan. (76 Del. Laws, c. 161, § 15.)

#### **§ 6959. Delinquency.**

(a) Sections 6918 and 6938 of this title apply to any special purpose financial captive insurance company except as otherwise provided in this section.

(b) Any delinquency proceeding pursuant to Chapter 59 of this title, or any temporary restraining order or injunction issued pursuant thereto with respect to a counterparty, may not prohibit the transaction of business by a special purpose financial captive insurance company, including its performance of its obligations under a special purpose financing transaction, or any action or proceeding against a special purpose financial captive insurance company or its assets.

(c) The commencement of a summary proceeding with respect to a special purpose financial captive insurance company, and any order issued by the court in such a summary proceeding, may not prohibit payments by the special purpose financial captive insurance company or any action required to make the payment, provided that the payments:

(1) Are made pursuant to a special purpose financing transaction or an SPFC contract:  
and

(2) Are consistent with the special purpose financial captive insurance company's plan of operation, its certificate of authority, and any order issued in connection therewith, as they may be amended from time to time.

(d) Notwithstanding any other provisions of this title or other laws of this State:

(1) A receiver of a counterparty may not take action seeking to void, and has no authority to void, a nonfraudulent transfer by a counterparty to a special purpose financial captive insurance company of money or other property made pursuant to an SPFC contract;  
and

(2) A receiver of a special purpose financial captive insurance company may not take action seeking to void, and has no authority to void, a nonfraudulent transfer by the special purpose financial captive insurance company of money or other property made to a counterparty pursuant to an SPFC contract or made pursuant to a special purpose financing transaction.

(e) Notwithstanding any other provision of this title or other laws of this State, the assets of a special purpose financial captive insurance company, including assets held in trust for the benefit of the counterparty, may not be consolidated with or included in the estate of a counterparty in any bankruptcy, insolvency, delinquency, or similar proceeding against the counterparty. (76 Del. Laws, c. 161, § 15.)

#### **§ 6960. Discount on reserves; report on reserves.**

(a) A special purpose financial captive insurance company shall file annually with the Commissioner an actuarial opinion on reserves provided by an approved independent actuary.

(b) A special purpose financial captive insurance company may discount its reserves in

accordance with the actuarial opinion filed under this section, subject to review by the Commissioner. (76 Del. Laws, c. 161, § 15.)

#### **§ 6961. Certain actions by the Commissioner.**

Other than under § 6959 of this title, the Commissioner shall notify a special purpose financial captive insurance company not less than 30 days before suspending, revoking, amending, or modifying its certificate of authority or any order issued in connection therewith. The notice must state the basis for the suspension, revocation, amendment, or modification. The special purpose financial captive insurance company must be afforded the opportunity for a hearing and all rights provided pursuant to the provisions of the Administrative Procedures Act, Chapter 101 of Title 29. (76 Del. Laws, c. 161, § 15.)

#### **§ 6962. Books and records.**

Notwithstanding § 6907 of this title, a special purpose financial captive insurance company shall calculate reserves and otherwise report using statutory accounting principles, unless the Commissioner requires, approves, or accepts the use of generally accepted accounting principles or international accounting standards, in either case with any appropriate or necessary modifications or adaptations thereof required or approved or accepted by the Commissioner, and as supplemented by additional information required by the Commissioner. (76 Del. Laws, c. 161, § 15.)

#### **§ 6963. Short title.**

This chapter may be cited as the "Delaware Revised Captive Insurance Company Act." (75 Del. Laws, c. 150, § 1.)

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