

A BILL

entitled

INSURANCE AMENDMENT (NO. 2) ACT 2018

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WHEREAS it is expedient to amend the Insurance Act 1978 in order to revise and update provisions relating to policy-holder protection;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Insurance Act 1978 (the "principal Act"), may be cited as the Insurance Amendment (No. 2) Act 2018.

Amends title to Part IV

2 The principal Act is amended in the title to Part IV by inserting after the words "LONG-TERM" the words "AND GENERAL".

Amends section 23

3 The principal Act is amended in section 23 by inserting after the words "long-term" the words "and general".

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Amends section 24

4 The principal Act is amended in section 24—

- (a) in the heading to the section, by inserting after the words “long term” the words “and general”;
- (b) by repealing subsections (1) to (5) and substituting the following subsections—

“(1) An insurer carrying on both long-term business and general business shall keep its accounts in respect of its long-term business separate from any accounts kept in respect of any other business.

(2) The assets comprising line 15 of column A on Form 1SFS of Schedule 1 to the Insurance Accounts Rules 2016 or line 15 of Form 1A of Schedule 1 to the Insurance Accounts Regulations 1980, as applicable, shall be carried to, and form part of, a special fund with an appropriate name, in this Act referred to as a “general business fund”.

(3) The assets comprising line 15 of column C on Form 1SFS of Schedule 1 to the Insurance Accounts Rules 2016 or line 15 of Form 4 of Schedule 1 to the Insurance Accounts Regulations 1980, as applicable, shall be carried to, and form part of, a special fund with an appropriate name, in this Act referred to as a “long-term business fund”.

(4) No payment from the insurer’s long-term business fund shall be made directly or indirectly for any purpose other than a purpose of the insurer’s long-term business, notwithstanding any arrangement for its subsequent repayment out of receipts of business other than the long-term business, except in so far as such payment can be made out of any surplus certified by the insurer’s approved actuary to be available for distribution otherwise than to policy-holders.

(5) No payment from the insurer’s general business fund shall be made directly or indirectly for any purpose other than a purpose of the insurer’s general business, notwithstanding any arrangement for its subsequent repayment out of receipts of business other than the general business, except in so far as such payment can be made out of any surplus available for distribution otherwise than to policy-holders.

(5A) No insurer to which this section applies shall declare or pay a dividend to any person other than a policy-holder unless the value of the assets of its long-term business fund, as certified by the insurer’s approved actuary, exceeds the extent (as so certified) of the liabilities of the insurer’s long-term business; and the amount of any such dividend shall not exceed the aggregate of—

- (a) that excess; and
- (b) any other funds properly available for the payment of dividend, being funds arising out of business of the insurer other than long-term business.

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(5B) No insurer to which this section applies shall transfer assets from the long-term business fund to the general business fund unless immediately following such transfer the insurer shall continue to meet its enhanced capital requirements and minimum margin of solvency requirements with respect to its long-term business.

(5C) No insurer to which this section applies shall transfer assets from the general business fund to the long-term business fund unless immediately following such transfer the insurer shall continue to meet its enhanced capital requirements, minimum margin of solvency requirements and liquidity ratios with respect to its general business.”.

Inserts section 24A

5 The principal Act is amended by inserting after section 24 the following new section—

“Certification of dividends

24A No insurer carrying on long-term business shall declare or pay a dividend to any person other than a policyholder unless the value of the assets of such insurer, as certified by its approved actuary, exceeds its liabilities (as so certified) by the greater of its margin of solvency or, if applicable, its enhanced capital requirement and the amount of any such dividend shall not exceed that excess.”.

Inserts section 35A

6 The principal Act is amended by inserting after section 35 the following new section—

“Insurers carrying on long-term business

35A An insurer which carries on long-term business shall not be wound up voluntarily.”.

Repeals and replaces section 36

7 The principal Act is amended by repealing section 36 and substituting the following section—

“Winding up of insurers carrying on long-term and general business

36 (1) In a winding up of an insurer to which this section applies, the provisions of section 33 of the Employment Act 2000 and section 236 of the Companies Act 1981 shall not apply except as provided for in this section.

(2) Subject to rules made by virtue of section 40, subsections (4) to (8) shall apply in a winding up of composite insurers entitled to carry on long-term business and general business, other than those composite insurers under subsection (3).

(3) Subsections (4) to (8) shall not apply to a composite insurer—

- (a) that meets the requirements of section 24(6); or
 - (b) where the long-term business of the composite insurer has been or is to be transferred as a going concern to another insurer in accordance with section 37.
- (4) Where a winding up of a composite insurer under subsection (2) applies—
- (a) the assets of the long-term business fund must be applied in discharge of the following debts and in the following order of priority—
 - (i) Employment Act preferential debts attributable to its long-term business, to which the provisions of section 33 of the Employment Act 2000 shall apply mutatis mutandis so that references therein to—
 - (A) assets of a company are deemed to be references to such assets as are attributable to the long-term business of the insurer; and
 - (B) costs, charges and expenses of the winding up of a company are deemed to be references to such costs, charges and expenses as are attributable to the winding up of the long-term business of the insurer;
 - (ii) Companies Act preferential debts attributable to its long-term business, to which the provisions of section 236 of the Companies Act 1981 shall apply mutatis mutandis so that references therein to—
 - (A) assets, property, goods or effects of a company are deemed to be references to such assets, property, goods and effects as are attributable to the long-term business of the insurer; and
 - (B) costs and expenses of the winding up of a company are deemed to be references to such costs and expenses as are attributable to the winding up of the long-term business of the insurer;
 - (iii) insurance debts attributable to its long-term business which shall rank equally among themselves and be paid in full, unless the assets of the long-term business fund of the insurer remaining after payment of the preferential debts attributable to its long-term business are insufficient to meet them, in which case they abate in equal proportions;
 - (b) the assets of the general business fund must be applied in discharge of the following debts and in the following order of priority—

- (i) Employment Act preferential debts attributable to its general business, to which the provisions of section 33 of the Employment Act 2000 shall apply mutatis mutandis so that references therein to—
 - (A) assets of a company are deemed to be references to such assets as are attributable to the general business of the insurer; and
 - (B) costs, charges and expenses of the winding up of a company are deemed to be references to such costs, charges and expenses as are attributable to the winding up of the general business of the insurer;
- (ii) Companies Act preferential debts attributable to its general business to which the provisions of section 236 of the Companies Act 1981 shall apply mutatis mutandis so that references therein to—
 - (A) assets, property, goods or effects of a company are deemed to be references to such assets, property, goods and effects as are attributable to the general business of the insurer; and
 - (B) costs and expenses of the winding up of a company are deemed to be references to such costs and expenses as are attributable to the winding up of the general business of the insurer;
- (iii) insurance debts attributable to its general business which shall rank equally among themselves and be paid in full, unless the assets of the general business fund of the insurer remaining after payment of the preferential debts attributable to its general business are insufficient to meet them, in which case they abate in equal proportions.

(5) Section 194 of the Companies Act 1981 and rule 140 of the Companies (Winding-Up) Rules 1982 shall apply separately to the long-term business assets and to the general business assets of a composite insurer.

(6) Where, under subsection (5), any fee, cost, charge or remuneration do not apply expressly to the long-term business assets or to the general business assets of a composite insurer, the liquidator may apportion any such fee, cost, charge or remuneration amongst those assets in such manner as he may determine.

(7) Where the value of the assets mentioned in paragraph (a) or paragraph (b) of subsection (4) exceeds the amount of the liabilities mentioned in that paragraph, so much of those assets as represents the excess must be applied in discharge of the following debts and in the following order of priority—

- (a) any preferential debts mentioned in subsection (4) the assets of which were deemed insufficient to meet liabilities shall rank equally among themselves and be paid in full, unless the excess of such assets is insufficient to meet liabilities, in which case they abate in equal proportions;
- (b) any insurance debts mentioned in subsection (4) the assets of which were deemed insufficient to meet liabilities shall rank equally among themselves and be paid in full, unless the excess of such assets remaining after payment of such debts is insufficient to meet liabilities in which case they abate in equal proportions;
- (c) all other debts of the insurer, which shall rank equally among themselves and be paid in full, unless the excess of assets remaining after payment of the debts referred to in subsection (4) are insufficient to meet liabilities, in which case they abate in equal proportions.

(8) In relation to the assets falling within either paragraph (a) or (b) of subsection (4), the creditors mentioned in section 176(1) and (2) of the Companies Act 1981 shall be only those who are creditors in respect of liabilities falling within that paragraph; and any general meetings of creditors summoned for the purposes of that section shall accordingly be separate general meetings of the creditors in respect of the liabilities falling within each paragraph.

(9) Where under section 247(1) of the Companies Act 1981 (power of court to assess damages against delinquent officers) the Court orders any money or property to be repaid or restored to an insurer or any sum to be contributed to its assets, then, if and so far as the wrongful act which is the reason for the making of the order relates to assets belonging to an insurer's long-term business fund or general business fund (as the case may be), the Court shall include in the order a direction that the money, property or contribution shall be treated for the purposes of this Act as assets of that fund, and this Act shall have effect accordingly.

(10) For the purposes of this section—

- (a) a liability shall be attributable to the long-term business if it is, or would be, recorded in column C on Form 1SFS of Schedule 1 to the Insurance Account Rules 2016 or Form 4 of Schedule 1 to the Insurance Accounts Regulations 1980, as applicable; and
- (b) a liability shall be attributable to general business if it is, or would be, recorded on column A of Form 1SFS of Schedule 1 to the Insurance Account Rules 2016 or Form 1A of Schedule 1 to the Insurance Accounts Regulations 1980, as applicable.

(11) For the purposes of this Part—

“Companies Act preferential debts” means the debts mentioned in section 236(1)(a), (b), (c), (d) and (e) of the Companies Act 1981;

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“composite” has the meaning given in regulation 2 of the Insurance Accounts Regulations 1980;

“Employment Act preferential debts” means the debts mentioned in section 33(3)(a), (b) and (c) of the Employment Act 2000;

“insurance contract” means any contract of insurance, capital redemption contract or a contract that has been recorded as insurance business in the financial statements of the insurer pursuant to the Insurance Accounts 1980 or the Insurance Account Rules 2016, as applicable;

“insurance debt” means a debt to which an insurer is or may become liable pursuant to an insurance contract, excluding debts owed to an insurer under an insurance contract where the insurer is the person insured;

“preferential debts” means Companies Act preferential debts and Employment Act preferential debts.”;

“section 24(6) composite” has the meaning given in regulation 2 of the Insurance Accounts Regulations 1980.”.

Inserts section 36A

8 The principal Act is amended by inserting after section 36 the following new section—

“Winding up of insurers

36A (1) This section applies in the case of a winding up under the Companies Act 1981 of —

- (a) an insurer which was carrying on or entitled to carry on only long-term business;
- (b) an insurer which was carrying on or was entitled to carry on only general business;
- (c) a section 24(6) composite insurer; or
- (d) a composite insurer, where the long-term business of the composite insurer has been or is to be transferred as a going concern to another long-term insurer in accordance with section 37.

(2) Subject to subsection (3) and to rules made by virtue of section 40, and subject to the prior payment of Employment Act preferential debts and Companies Act preferential debts, the insurance debts of the insurer must be paid in priority to all other debts of the insurer.

(3) The insurance debts of an insurer shall rank equally among themselves and be paid in full unless the assets of the insurer are insufficient to meet them, in which case they abate in equal proportions.”.

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Amends section 40

9 Section 40 of the principal Act is amended by repealing subsection (2)(b).

Commencement

10 This Act shall come into operation—

- (a) on assent, with respect to insurers carrying on long-term business;
- (b) on 1 January 2019, with respect to insurers carrying on general business and composites.

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EXPLANATORY MEMORANDUM

This Bill amends the Insurance Act 1978 (the “principal Act”) to revise and update the winding up provisions of insurance businesses for the purpose of protecting policyholders during the winding up of an insurer.

Clause 1 provides a citation for the Bill.

Clause 2 amends the principal Act in the title to Part IV to cause the Part to apply to insurers carrying on both long-term and general business.

Clause 3 amends the principal Act in section 23 to insert the word “general” in order to cause the section to apply to insurers carrying on both long-term and general business.

Clause 4 amends the principal Act in section 24 to provide for general business and long-term business obligations of composite insurers to be separated by the creation of separate funds and for all assets pertaining to such businesses to be allocated to and captured in such funds. No payments, dividends or transfers may be made out of such funds for the purpose of any other matters. It may be noted, however, that the current section 24(6), which continues to apply, provides for the non-application of the provisions of section 26 (including as amended by this clause) to certain insurers which were carrying on business before 1 January 1980.

Clause 5 amends the principal Act by inserting a new section 24A in order to provide for the requirements long-term insurers are to meet prior to the payment of a dividend.

Clause 6 amends the principal Act to provide in a substantive and separate section the provisions of the current section 36(1) that long-term insurers may not be wound up voluntarily.

Clause 7 amends the principal Act by repealing section 36 and substituting a section that requires insurers carrying on both long-term and general business to give priority to payments of policyholders, which are to be made out of the assets of the insurer in a winding up. The order of priority of payments in a liquidation of insurers carrying on both long-term and general business (i.e. composites) shall be payments to: (1) liquidators, (2) preferential debts under the Employment Act 2000 and Companies Act 1981, (3) insurance debts and (4) general creditors.

Clause 8 amends the principal Act by inserting a new section 36A to provide for all long-term and general business insurers being wound up under the Companies Act 1981.

Clause 9 amends the principal Act in section 40 by deleting subsection (2)(b) to align the regulating making power under that section with the new winding up provisions.

Clause 10 provides for the coming into operation of the provisions of the Act. The Act is to come into operation on assent of the Act by the Governor with respect to insurers carrying on long-term business and on 1 January 2019 with respect to insurers carrying general business.