

ESB 6240 - H COMM AMD

By Committee on Financial Institutions & Insurance

NOT CONSIDERED 03/11/2010

1 Strike everything after the enacting clause and insert the
2 following:

3 NEW SECTION. **Sec. 1.** Availability of insurance for loss arising
4 from flooding in the geographical area protected by any dam is vital to
5 the economy of the state of Washington. If adequate property insurance
6 for loss arising from this flood is not available, the security of
7 citizens' property and the viability of business operations and
8 services are threatened. This chapter gives the commissioner authority
9 to ensure continued availability of excess insurance to insure property
10 at risk from, and business that is interrupted by, flood arising from
11 the failure of a dam or from efforts to prevent the failure of a dam.
12 The commissioner may establish a temporary joint underwriting
13 association for excess flood insurance to insure property at risk from,
14 and business that is interrupted by, flood arising from the failure of
15 a dam or from efforts to prevent the failure of a dam if:

16 (1) Excess flood insurance of a particular class or type is not
17 available from the voluntary market; or

18 (2) There are so few insurers selling excess flood insurance that
19 a competitive market does not exist.

20 The commissioner may use appropriated funds as needed to establish
21 and supervise the association.

22 NEW SECTION. **Sec. 2.** The definitions in this section apply
23 throughout this chapter unless the context clearly requires otherwise.

24 (1) "Association" means a nonprofit underwriting association
25 established under this chapter.

26 (2) "Board" means the governing board of the association.

27 (3) "Casualty insurance" has the same meaning as "general casualty
28 insurance" in RCW 48.11.070. "Casualty insurance" does not include any
29 type of:

- 1 (a) Workers' compensation insurance;
- 2 (b) Employers' liability insurance;
- 3 (c) Nuclear liability insurance;
- 4 (d) Surety insurance; or
- 5 (e) Personal insurance.

6 (4) "Dam" means any United States army corps of engineers dam
7 located in a county with a population that exceeds one million.

8 (5) "Excess flood insurance" means insurance against loss,
9 including business interruption, arising from flood that is in excess
10 of the limit of liability insurance offered by the national flood
11 insurance program. Excess flood insurance does not include coverage
12 for personal insurance.

13 (6) "Person" means a natural person, association, partnership, or
14 corporation.

15 (7) "Personal insurance" means:

- 16 (a) Private passenger automobile coverage;
- 17 (b) Homeowner's coverage, including mobile homeowners,
18 manufactured homeowners, condominium owners, and renter's coverage;
- 19 (c) Dwelling property coverage;
- 20 (d) Earthquake coverage for a residence or personal property;
- 21 (e) Personal liability and theft coverage;
- 22 (f) Personal inland marine coverage; and
- 23 (g) Mechanical breakdown coverage for personal auto or home
24 appliances.

25 (8) "Property insurance" has the same meaning as in RCW 48.11.040
26 and does not include personal insurance or surety insurance.

27 NEW SECTION. **Sec. 3.** (1) The commissioner may create an
28 association to provide excess flood insurance to insure property at
29 risk from, and business that is interrupted by, flood arising from the
30 failure of a dam or from efforts to prevent the failure of a dam if the
31 requirements of this section are met.

32 (2) The commissioner must hold a hearing under chapters 48.04 and
33 34.05 RCW before forming an association.

34 (3) An association may not begin underwriting operations for excess
35 flood or business interruption insurance until the commissioner finds
36 that:

1 (a) If a market assistance plan formed under section 15 of this act
2 finds that there are fewer than four admitted or surplus lines insurers
3 offering excess flood insurance, exclusive of personal insurance, then
4 the market assistance plan is inadequate to insure property at risk
5 from, and business that is interrupted by, flood arising from the
6 failure of a dam or from efforts to prevent the failure of a dam;

7 (b) Persons cannot buy excess flood insurance through the voluntary
8 market; or

9 (c) There are so few insurers selling excess flood insurance that
10 a competitive market does not exist.

11 (4) At a hearing to appeal the commissioner's finding that excess
12 flood insurance is unavailable through the voluntary market or that a
13 competitive market does not exist, the finding that four or more
14 admitted or surplus lines insurers are offering excess flood insurance,
15 exclusive of personal insurance, is prima facie evidence that a
16 competitive market does exist. A decision of the commissioner, finding
17 that excess flood insurance is unavailable through the market
18 assistance plan, voluntary market, or that a competitive market does
19 not exist, may be appealed under chapters 48.04 and 34.05 RCW.

20 NEW SECTION. **Sec. 4.** (1) The association may offer policies only
21 as follows:

22 (a) The coverage of any one policy may not exceed five million
23 dollars; and

24 (b) The total amount of all coverage offered by the association may
25 never exceed two hundred fifty million dollars.

26 (2) The board, jointly with the commissioner, shall apportion
27 policies within these limitations on an equitable basis.

28 NEW SECTION. **Sec. 5.** (1) If an association is formed, a person
29 that is unable to obtain excess flood or business interruption
30 insurance because it is unavailable in the voluntary market or because
31 the market is not competitive is eligible to apply to an association
32 for insurance.

33 (2) The association may decline to insure particular persons that
34 present an extraordinary risk because of the nature of their
35 operations, property condition, past claims experience, or inadequate

1 risk management. However, the location of a property for which
2 insurance is sought from the association must not, in and of itself,
3 constitute an extraordinary risk.

4 (3) Any decision to decline coverage must be sent to the applicant
5 and include:

- 6 (a) A statement of the actual reason for declination; and
- 7 (b) A statement that the applicant may appeal the decision to the
8 commissioner.

9 (4) If the commissioner finds that the decision to decline coverage
10 is not supported by the criteria in this section, the commissioner may
11 require the association to provide coverage.

12 (5) A decision of the commissioner to provide or to decline to
13 provide coverage under this may be appealed under chapters 48.04 and
14 34.05 RCW.

15 NEW SECTION. **Sec. 6.** (1) The association is composed of all
16 insurers that have a certificate of authority to write either casualty
17 or property insurance, or both, in this state. Every property or
18 casualty insurer, or both, must be a member of the association as a
19 condition of its authority to continue to transact business in this
20 state.

21 (2) The association has the general powers and limitations of a
22 nonprofit corporation under chapter 24.03 RCW and of an insurance
23 company under Title 48 RCW, as needed to transact its business.

24 (3) To the extent consistent with this chapter, the association and
25 its member insurers are "persons" under chapter 48.30 RCW.

26 NEW SECTION. **Sec. 7.** (1) A governing board shall administer the
27 association.

28 (2) The board and the commissioner shall work cooperatively to
29 achieve the objectives of this chapter.

30 (3) The board may select and employ one or more persons to manage
31 the operations of an association. Every managing person must be
32 authorized to transact insurance in the state of Washington and have
33 demonstrated expertise in excess flood insurance. The board may employ
34 any advisors that the board deems necessary.

35 (4) The board must consist of seven persons appointed as set forth
36 in this subsection.

1 (a) Three board members must be member insurers appointed by each
2 of the following three trade associations: Property casualty insurers
3 association of America, American insurance association, and national
4 association of mutual insurance companies. At least one of the three
5 insurers on the board must be a domestic insurer.

6 (b) Four board members must be residents of the state. One is
7 appointed by the insurance commissioner. One is appointed by the King
8 county council. One is appointed by the association of Washington
9 cities, to represent one or more of the following municipal
10 governments: Auburn, Kent, Renton, or Tukwila. One is appointed by
11 the board of directors of the center for advanced manufacturing Puget
12 Sound. None of the resident-appointees may be employed by, serve on
13 the board of directors of, or have a substantial ownership interest in
14 any insurer.

15 (c) Original board members must be appointed to serve an initial
16 term of three years and may be appointed for a second term. Board
17 members may serve consecutive terms. Successor board members must be
18 appointed as soon as possible subject to (a) and (b) of this
19 subsection.

20 (5) The commissioner shall notify the members of the board if he or
21 she has information that any board member is dishonest, reckless, or
22 incompetent or is failing to perform any duty of his or her office, and
23 the board shall meet immediately to consider the matter. The
24 commissioner must receive notice of the time and place of this meeting.
25 If the board finds by a majority of the board members, with the accused
26 board member not voting on this matter, that the commissioner's
27 objection is well-founded, the accused board member shall be removed
28 immediately. The successor of a board member removed under this
29 section must be appointed as soon as possible subject to subsection (4)
30 of this section.

31 (6) All members of the board shall conduct the business of the
32 association in a manner that is in the interest of all policyholders of
33 the association. Board members stand in a fiduciary relationship to
34 the association and must discharge their duties in good faith and with
35 that diligence, care, and skill that ordinary, prudent persons would
36 exercise under similar circumstances in a like position.

37 (7) Each person serving on the board or any subcommittee thereof,
38 each member insurer of the association, and each officer and employee

1 of the association must be indemnified by the association against all
2 costs and expenses actually and necessarily incurred by him, her, or it
3 in connection with the defense of any action, suit, or proceeding in
4 which he, she, or it is made a party by reason of his, her, or its
5 being or having been a member of the board, or a member or officer or
6 employee of the association, except in relation to matters as to which
7 he, she, or it has been judged in such action, suit, or proceeding to
8 be liable by reason of willful misconduct in the performance of his,
9 her, or its duties as a member of the board, or member, officer, or
10 employee of the association. This indemnification is not exclusive of
11 other rights as to which the member, officer, or employee may be
12 entitled as a matter of law.

13 (8) Board members may not receive any compensation, but may be
14 reimbursed for all travel expenses as provided in RCW 43.03.050 and
15 43.03.060.

16 NEW SECTION. **Sec. 8.** (1) The board must adopt a plan of operation
17 within thirty days of its appointment.

18 (2) The plan of operation may take effect only after it has been
19 reviewed by the commissioner. Any changes recommended by the
20 commissioner must be either approved by a majority of the members of
21 the board or a written statement of the board's reasons for rejection
22 of any provision provided to the commissioner. The commissioner may
23 continue to consult with the board to arrive at a plan of operation
24 that is approved by both the commissioner and the board, or the
25 commissioner may accept the plan of operation of the board. This
26 process must conclude with a plan of operation accepted by the board
27 within thirty days of the first board appointed under this act.

28 (a) The plan of operation may be amended by agreement of a majority
29 of the members of the board and the commissioner.

30 (b) The association must use rates that are demonstrably sound as
31 compared to accepted actuarial standards. At the time of filing with
32 the commissioner, the rates must be accompanied by an actuarial
33 analysis. The rates must comply with chapter 48.19 RCW and be approved
34 by the commissioner.

35 NEW SECTION. **Sec. 9.** The association must file a statement
36 annually with the commissioner that contains information about the

1 association's transactions, financial condition, and operations during
2 the preceding year. The statement must be in the form and in a manner
3 approved by the commissioner. The association must maintain its
4 records according to the accounting practices and procedures manual
5 adopted by the national association of insurance commissioners. The
6 commissioner may require the association to furnish additional
7 information if the commissioner considers it necessary to evaluate the
8 scope, operation, and experience of the association.

9 NEW SECTION. **Sec. 10.** (1) The commissioner may examine the
10 transactions, financial condition, and operations of the association
11 when the commissioner finds it necessary in order to carry out the
12 purposes of this chapter. Except as set forth in subsections (2) and
13 (3) of this section, each examination must be conducted in the manner
14 prescribed for domestic insurance companies in chapter 48.03 or 48.37
15 RCW.

16 (2) The commissioner is not required to examine any association on
17 a prescribed cycle or schedule.

18 (3) An association created under this chapter is responsible for
19 the total costs of its financial and market conduct examinations. RCW
20 48.03.060 (1) and (2) and 48.37.060(14) (a) and (b) are not applicable
21 to the examination of an association created under this chapter.

22 NEW SECTION. **Sec. 11.** (1) The association is not a member of the
23 guaranty fund created under chapter 48.32 RCW. The guaranty fund, this
24 state, and any political subdivisions are not responsible for losses
25 sustained by the association.

26 (2) The association is exempt from payment of all fees and all
27 taxes levied by the state or any of its subdivisions, except taxes
28 levied on real or personal property.

29 NEW SECTION. **Sec. 12.** (1) The association is funded by premiums
30 paid by persons insured by the association.

31 (a) All premiums for the association must be deposited into a fund
32 or funds under management of the board.

33 (b) Premiums must be used to pay claims, administrative costs, and
34 other expenses of the association.

1 (2) The association may assess its members to pay past and future
2 financial obligations of the association, not funded by premiums. Each
3 member insurer must be assessed a proportionate share based on the sum
4 of direct premiums earned in this state for all property insurance and
5 casualty insurance.

6 (3) If the association makes an assessment, an assessed insurer
7 must pay the association within thirty days after it receives notice of
8 the assessment. If an insurer does not pay an assessment within thirty
9 days after it receives notice of the assessment:

10 (a) The assessment accrues interest at the maximum legal rate until
11 it is paid in full. The interest is paid to the association;

12 (b) The association may collect the assessment in a civil action
13 and must be awarded its attorneys' fees if it prevails;

14 (c) The commissioner may suspend, revoke, or refuse to renew an
15 insurer's certificate of authority; and

16 (d) The commissioner may fine the insurer up to ten thousand
17 dollars.

18 (4) This section may be enforced under RCW 48.02.080.

19 NEW SECTION. **Sec. 13.** (1) The association may operate for a
20 period of five years. At the end of the five-year period, the
21 association must be dissolved unless the legislature authorizes its
22 continued operation.

23 (2) If, at any time, the commissioner or the board of directors
24 holds a hearing under chapters 48.04 and 34.05 RCW and determines that
25 excess flood and business interruption insurance is available through
26 a market assistance plan, in the voluntary market, or that a
27 competitive market exists, the commissioner must order the association
28 to end its underwriting operations.

29 (3) If the commissioner or the board of directors orders the
30 association to end all underwriting operations, the commissioner must
31 supervise the dissolution of the association, including settlement of
32 all financial and legal obligations and distribution of any remaining
33 assets as follows:

34 (a) If there has been an assessment on the members of the
35 association, and after all creditors of the association are paid in
36 full, then to the member insurers in a proportional manner and as
37 determined by rule by the commissioner; or

1 (b) If there has not been an assessment on the members of the
2 association, or if there are funds remaining after distribution under
3 (a) of this subsection and after all creditors of the association are
4 paid in full, then to the policyholders in a proportional manner and as
5 determined by rule by the commissioner.

6 NEW SECTION. **Sec. 14.** The commissioner may adopt all rules needed
7 to implement and administer this chapter and to ensure the efficient
8 operation of the association, including but not limited to rules:

9 (1) Creating sample plans of operation for the assistance of the
10 board;

11 (2) Requiring or limiting certain policy provisions;

12 (3) Containing the basis and method for assessing members for
13 operation of the association; and

14 (4) Establishing the order in which the assets of the association
15 that is dissolved by the commissioner must be distributed.

16 NEW SECTION. **Sec. 15.** (1) The commissioner must by rule require
17 insurers authorized to write property insurance in this state to form
18 a market assistance plan to assist persons located in the geographical
19 area protected by any dam that are unable to purchase excess flood or
20 business interruption insurance in an adequate amount from either the
21 admitted or nonadmitted market.

22 (2) For the purpose of this section, a market assistance plan means
23 a voluntary mechanism by insurers writing property insurance in this
24 state in either the admitted or nonadmitted market to provide excess
25 flood or business interruption insurance for a class of insurance as
26 designated in writing to the plan by the commissioner.

27 (3) The bylaws and method of operation of any market assistance
28 plan must be approved by the commissioner prior to its operation.

29 (4) A market assistance plan must have a minimum of twenty-five
30 insurers willing to insure risks within the class designated by the
31 commissioner. If twenty-five insurers do not voluntarily agree to
32 participate, the commissioner may require either property or property
33 and casualty, or both, insurers to participate in a market assistance
34 plan as a condition of continuing to do business in this state. The
35 commissioner must make this requirement to fulfill the quota of at

1 least twenty-five insurers. The commissioner must make his or her
2 designation on the basis of the insurer's premium volume of property
3 insurance in this state.

4 NEW SECTION. **Sec. 16.** The board and the commissioner shall report
5 to the respective committees of the house of representatives and senate
6 having jurisdiction over the insurance code by January 31, 2011, and
7 each subsequent January 31st of each year that the association remains
8 in existence.

9 **Sec. 17.** RCW 48.15.040 and 1983 1st ex.s. c 32 s 4 are each
10 amended to read as follows:

11 If certain insurance coverages cannot be procured from authorized
12 insurers, such coverages, hereinafter designated as "surplus lines,"
13 may be procured from unauthorized insurers subject to the following
14 conditions:

15 (1) The insurance must be procured through a licensed surplus line
16 broker.

17 (2) The insurance must not be procurable, after diligent effort has
18 been made to do so from among a majority of the insurers authorized to
19 transact that kind of insurance in this state.

20 (3) Coverage shall not be procured from an unauthorized insurer for
21 the purpose of securing a lower premium rate than would be accepted by
22 any authorized insurer nor to secure any other competitive advantage.

23 (4) The commissioner may by regulation establish the degree of
24 effort required to comply with subsections (2) and (3) of this section.

25 (5) At the time of the procuring of any such insurance an affidavit
26 setting forth the facts referred to in subsections (2) and (3) of this
27 section must be executed by the surplus line broker. Such affidavit
28 shall be filed with the commissioner within thirty days after the
29 insurance is procured.

30 (6) For purposes of chapter 48.-- RCW (the new chapter created in
31 section 18 of this act), a joint underwriting association established
32 or authorized by the legislature is not an authorized insurer.

33 NEW SECTION. **Sec. 18.** Sections 1 through 16 of this act
34 constitute a new chapter in Title 48 RCW.

1 NEW SECTION. **Sec. 19.** This act is necessary for the immediate
2 preservation of the public peace, health, or safety, or support of the
3 state government and its existing public institutions, and takes effect
4 immediately.

5 NEW SECTION. **Sec. 20.** This act expires December 31, 2016."

6 Correct the title.

EFFECT: References to the Green river area are deleted. "Dam" is defined as an Army Corps of Engineers dam located in a county with a population that exceeds one million people. Personal lines are defined and excluded from the definitions of excess flood insurance, property insurance, and casualty insurance. The exclusion from the definition of excess flood insurance means that the JUA cannot offer personal lines coverage. The exclusion from the definitions of property insurance and casualty insurance remove insurers that only offer personal lines coverage from the insurers required to be members of the JUA. Assessments are proportionate based on property insurance and casualty insurance premiums in this state. It is clarified that board members are not paid for their service.

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