

2SSB 6331 - S AMD **1340**
By Senator Mullet

ADOPTED 03/07/2020

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

3 **"NEW SECTION.** **Sec. 1.** The legislature finds that creating a
4 framework for Washington corporations and public institutions of
5 higher education to manage their risks through captive insurers will
6 facilitate the growth and safety of those entities and protect the
7 public interest. The legislature further finds that captive insurance
8 promotes prudent risk management and provides access to insurance and
9 reinsurance markets that may not be available to these Washington
10 entities otherwise. The legislature believes that encouraging the use
11 of captive insurance will support those who rely upon the strength
12 and stability of employers in this state.

13 The legislature notes that, under the federal McCarran-Ferguson
14 act, the regulation and taxation of insurance is left to the states.
15 The due process clauses of the Fifth and Fourteenth Amendments to the
16 United States Constitution limit the ability of states to regulate
17 and tax transactions outside their territorial boundaries. In *State*
18 *Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), the
19 United States supreme court ruled that a state may not tax an
20 insurance transaction that has no connection with the state other
21 than the location of the risk.

22 However, that decision has been called into question following
23 the United States supreme court's decision in *South Dakota v.*
24 *Wayfair, Inc.*, 585 U.S. ____ (2018), in which the court held that
25 states may charge tax on purchases made from out-of-state sellers,
26 even those without a physical presence in the taxing state. The
27 legislature finds that although the *Wayfair* decision dealt expressly
28 with sales tax, its impact extends to any transactions made over the
29 internet, which, in modern commerce, means transactions in nearly
30 every industry, including insurance.

31 The legislature finds that the ability of out-of-state
32 corporations to use captive insurers to manage risk associated with

1 economic activity in Washington discourages corporations from
2 subjecting themselves to regulation and taxation by the state of
3 Washington, and seriously impairs the capacity of the state of
4 Washington to provide and enforce effective regulation of the
5 insurance business. Accordingly, the legislature finds it necessary
6 and proper to regulate and tax captive insurers that are used to
7 manage the Washington risk of out-of-state corporations that have
8 purposefully availed themselves of the benefits of an economic market
9 in Washington.

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

13 (1) "Affiliate" means an entity directly or indirectly
14 controlling, controlled by, or under common control with another
15 entity. "Affiliate" also means any person that holds an insured
16 interest because that person has or had an employment or sales
17 contract with an insured person.

18 (2) "Control" means possession of the power to direct the
19 management and policies of an entity through ownership of voting
20 securities, by contract, or otherwise.

21 (3) "Foreign captive insurer" means an insurance company with the
22 following characteristics:

23 (a) It is wholly owned by a corporation, that:

24 (i) Has its principal place of business in another state or
25 territory of the United States other than this state, or the District
26 of Columbia;

27 (ii) Is itself not an insurer; and

28 (iii) Has total assets worth at least twenty-five million dollars
29 as verified by audited financial statements prepared by independent
30 certified accountants;

31 (b) It insures risks of the parent corporation, the parent
32 corporation's other affiliates, or both; and

33 (c) It is licensed as a captive insurer by the jurisdiction in
34 which it is domiciled.

35 (4) "Washington captive insurer" means an insurance company with
36 the following characteristics:

37 (a) It is wholly owned by a corporation or a public institution
38 of higher education as defined in RCW 28B.10.016, that:

39 (i) Has its principal place of business in Washington;

1 (ii) Is not itself an insurer; and

2 (iii) Has total assets worth at least twenty-five million dollars
3 as verified by audited financial statements prepared by independent
4 certified accountants;

5 (b) It insures risks of the parent corporation or institution,
6 the parent corporation's or institution's other affiliates, or both;
7 and

8 (c) It is licensed as a captive insurer by the jurisdiction in
9 which it is domiciled.

10 NEW SECTION. **Sec. 3.** (1) Within one hundred twenty days after
11 the effective date of this section or, if later, within one hundred
12 twenty days after first issuing a policy that covers Washington
13 risks, a Washington captive insurer must register with the
14 commissioner. Upon furnishing evidence of good standing in its state
15 of domicile and paying a fee of two thousand five hundred dollars, a
16 Washington captive insurer is entitled to receive a certificate of
17 captive authority as a registered Washington captive insurer. No
18 other documents, deposits, or payments may be required to obtain this
19 certificate.

20 (2) A registered Washington captive insurer may renew its
21 certificate of captive authority for successive periods of twelve
22 months each by paying a fee not to exceed two thousand five hundred
23 dollars for each such period.

24 (3) A registered Washington captive insurer may provide insurance
25 to a parent corporation that has its principal place of business in
26 this state, to the parent corporation's other affiliates, or both. A
27 registered Washington captive insurer owned by an institution of
28 higher education as defined in RCW 28B.10.016 may provide insurance
29 to that institution, its affiliates, or both.

30 (4) A registered Washington captive insurer may insure risks of
31 its affiliates and obtain or provide reinsurance for risks insured in
32 this state.

33 NEW SECTION. **Sec. 4.** (1) Within one hundred twenty days after
34 the effective date of this section or, if later, within one hundred
35 twenty days after first issuing a policy that covers Washington
36 risks, a foreign captive insurer must register with the commissioner.
37 Upon furnishing evidence of good standing in its state of domicile
38 and paying a tax of two thousand five hundred dollars, a foreign

1 captive insurer is entitled to receive a certificate of authority as
2 a registered foreign captive insurer. No other documents, deposits,
3 or payments may be required to obtain this certificate.

4 (2) A registered foreign captive insurer may renew its
5 certificate of authority for successive periods of twelve months each
6 by paying a tax not to exceed two thousand five hundred dollars for
7 each period.

8 (3) A registered foreign captive insurer may insure risks of its
9 affiliates and obtain or provide reinsurance for risks insured in
10 this state.

11 (4) On or before the first day of March of each year, a
12 registered foreign captive insurer must remit to the state treasurer
13 through the commissioner a tax in the amount of two percent of the
14 premiums, exclusive of returned premiums and sums collected to cover
15 federal and state taxes and examination fees, for insurance directly
16 procured by and provided to its parent or another affiliate for
17 Washington risks during the preceding calendar year. The tax when
18 collected must be credited to the general fund.

19 (5) For the purposes of this section, "Washington risks" means
20 the share of risk covered by the premiums that is allocable to this
21 state, based upon where the underlying risks are located or where the
22 losses or injuries giving rise to covered claims arise. The foreign
23 captive insurer may use any reasonable method of determining such an
24 allocation, including actuarial analysis or use of a proxy such as
25 sales, property value, or payroll. The foreign captive insurer must
26 share their methodology and relevant analysis in determining their
27 allocation with the commissioner. Whether paid directly or by
28 reimbursement, neither the timing nor the nature of a foreign captive
29 insurer's payment may be deemed to reflect, create, or constitute
30 Washington risks.

31 (6) If a registered foreign captive insurer fails to remit the
32 tax provided by this section by the last day of the month in which
33 the tax becomes due, the registered foreign captive insurer must pay
34 the penalties and interest provided in RCW 48.14.060. The tax may be
35 collected by distress, or the tax and fine may be recovered by an
36 action instituted by the commissioner in any court of competent
37 jurisdiction. Any fine collected by the commissioner must be paid to
38 the state treasurer and credited to the general fund.

39 (7) A foreign captive insurer that registers with the
40 commissioner may not be deemed to be an unauthorized insurer for any

1 period preceding or following such registration. A registered foreign
2 captive insurer is exempt from sanctions set forth in RCW 48.14.095,
3 for violations of RCW 48.05.030(1), 48.14.060, or 48.15.020
4 regardless of when such violations are alleged to have occurred.

5 (8) Taxes on premiums may not be imposed or collected on a
6 foreign captive insurer for any period before January 1, 2010, and
7 all taxes must be limited to a foreign captive insurer's Washington
8 risk.

9 (9) For periods beginning January 1, 2020, a registered foreign
10 captive insurer is subject to the sanctions in subsection (6) of this
11 section.

12 (10) This section does not apply to institutions of higher
13 education as defined in RCW 28B.10.016.

14 **NEW SECTION.** **Sec. 5.** (1) On or before the first day of March of
15 each year, a registered Washington captive insurer must remit to the
16 state treasurer through the commissioner a tax in the amount of two
17 percent of the premiums, exclusive of returned premiums and sums
18 collected to cover federal and state taxes and examination fees, for
19 insurance directly procured by and provided to its parent or another
20 affiliate for Washington risks during the preceding calendar year.
21 The tax when collected must be credited to the general fund.

22 (2) For the purposes of this section, "Washington risks" means
23 the share of risk covered by the premiums that is allocable to this
24 state, based upon where the underlying risks are located or where the
25 losses or injuries giving rise to covered claims arise. The captive
26 insurer may use any reasonable method of determining such an
27 allocation, including actuarial analysis or use of a proxy such as
28 sales, property value, or payroll. The captive insurer must share
29 their methodology and relevant analysis in determining their
30 allocation with the commissioner. Whether paid directly or by
31 reimbursement, neither the timing nor the nature of a captive
32 insurer's payment may be deemed to reflect, create, or constitute
33 Washington risks.

34 (3) If a registered Washington captive insurer fails to remit the
35 tax provided by this section by the last day of the month in which
36 the tax becomes due, the registered Washington captive insurer must
37 pay the penalties and interest provided in RCW 48.14.060. The tax may
38 be collected by distraint, or the tax and fine may be recovered by an
39 action instituted by the commissioner in any court of competent

1 jurisdiction. Any fine collected by the commissioner must be paid to
2 the state treasurer and credited to the general fund.

3 (4) A Washington captive insurer that registers with the
4 commissioner as provided in section 3 of this act may not be deemed
5 to be an unauthorized insurer for any period preceding or following
6 such registration. A registered Washington captive insurer is exempt
7 from sanctions set forth in RCW 48.14.095, for violations of RCW
8 48.05.030(1), 48.14.060, or 48.15.020 regardless of when such
9 violations are alleged to have occurred.

10 (5) Taxes on premiums may not be imposed or collected on a
11 Washington captive insurer for any period before January 1, 2010, and
12 all taxes must be limited to a Washington captive insurer's
13 Washington risk. Taxes on premiums may not be imposed or collected on
14 a Washington captive insurer affiliated with a public institution of
15 higher education for any period.

16 (6) For periods beginning January 1, 2020, a registered
17 Washington captive insurer is subject to the sanctions in subsection
18 (3) of this section.

19 (7) Subsections (1), (2), (3), and (6) of this section do not
20 apply to institutions of higher education as defined in RCW
21 28B.10.016.

22 NEW SECTION. **Sec. 6.** The commissioner may adopt rules as
23 necessary to implement this act, but such rules must recognize the
24 differences between captive insurance and commercial insurance
25 offered to Washington insureds by unrelated companies.

26 **Sec. 7.** RCW 48.14.020 and 2016 c 133 s 1 are each amended to
27 read as follows:

28 (1) Subject to other provisions of this chapter, each authorized
29 insurer except title insurers and registered Washington captive
30 insurers as defined in section 2 of this act shall on or before the
31 first day of March of each year pay to the state treasurer through
32 the commissioner's office a tax on premiums. Except as provided in
33 subsection (3) of this section, such tax shall be in the amount of
34 two percent of all premiums, excluding amounts returned to or the
35 amount of reductions in premiums allowed to holders of industrial
36 life policies for payment of premiums directly to an office of the
37 insurer, collected or received by the insurer under RCW 48.14.090
38 during the preceding calendar year other than ocean marine and

1 foreign trade insurances, after deducting premiums paid to
2 policyholders as returned premiums, upon risks or property resident,
3 situated, or to be performed in this state. For tax purposes, the
4 reporting of premiums shall be on a written basis or on a paid-for
5 basis consistent with the basis required by the annual statement. For
6 the purposes of this section the consideration received by an insurer
7 for the granting of an annuity shall not be deemed to be a premium.

8 (2) (a) The taxes imposed in this section do not apply to amounts
9 received by any life and disability insurer for health care services
10 included within the definition of practice of dentistry under RCW
11 18.32.020 except amounts received for pediatric oral services that
12 qualify as coverage for the minimum essential coverage requirement
13 under P.L. 111-148 (2010), as amended, and for stand-alone family
14 dental plans as defined in RCW 43.71.080(4)(a), only when offered in
15 the individual market, as defined in RCW 48.43.005((+27)), or to a
16 small group, as defined in RCW 48.43.005((+33))).

17 (b) Beginning January 1, 2014, moneys collected for premiums
18 written on qualified health benefit plans and qualified dental plans
19 offered through the health benefit exchange under chapter 43.71 RCW
20 must be deposited in the health benefit exchange account under RCW
21 43.71.060.

22 (3) In the case of insurers which require the payment by their
23 policyholders at the inception of their policies of the entire
24 premium thereon in the form of premiums or premium deposits which are
25 the same in amount, based on the character of the risks, regardless
26 of the length of term for which such policies are written, such tax
27 shall be in the amount of two percent of the gross amount of such
28 premiums and premium deposits upon policies on risks resident,
29 located, or to be performed in this state, in force as of the thirty-
30 first day of December next preceding, less the unused or unabsorbed
31 portion of such premiums and premium deposits computed at the average
32 rate thereof actually paid or credited to policyholders or applied in
33 part payment of any renewal premiums or premium deposits on one-year
34 policies expiring during such year.

35 (4) Each authorized insurer shall with respect to all ocean
36 marine and foreign trade insurance contracts written within this
37 state during the preceding calendar year, on or before the first day
38 of March of each year pay to the state treasurer through the
39 commissioner's office a tax of ninety-five one-hundredths of one
40 percent on its gross underwriting profit. Such gross underwriting

1 profit shall be ascertained by deducting from the net premiums (i.e.,
2 gross premiums less all return premiums and premiums for reinsurance)
3 on such ocean marine and foreign trade insurance contracts the net
4 losses paid (i.e., gross losses paid less salvage and recoveries on
5 reinsurance ceded) during such calendar year under such contracts. In
6 the case of insurers issuing participating contracts, such gross
7 underwriting profit shall not include, for computation of the tax
8 prescribed by this subsection, the amounts refunded, or paid as
9 participation dividends, by such insurers to the holders of such
10 contracts.

11 (5) The state does hereby preempt the field of imposing excise or
12 privilege taxes upon insurers or their appointed insurance producers,
13 other than title insurers, and no county, city, town or other
14 municipal subdivision shall have the right to impose any such taxes
15 upon such insurers or these insurance producers.

16 (6) If an authorized insurer collects or receives any such
17 premiums on account of policies in force in this state which were
18 originally issued by another insurer and which other insurer is not
19 authorized to transact insurance in this state on its own account,
20 such collecting insurer shall be liable for and shall pay the tax on
21 such premiums.

22 **Sec. 8.** RCW 48.14.095 and 2008 c 217 s 8 are each amended to
23 read as follows:

24 (1) This section applies to any insurer or taxpayer, as defined
25 in RCW 48.14.0201, violating or failing to comply with RCW
26 48.05.030(1), 48.17.060, 48.36A.290(1), 48.44.015(1), or
27 48.46.027(1).

28 (2) Except as provided in subsections (7) and (8) of this
29 section, RCW 48.14.020, 48.14.0201, and 48.14.060 apply to insurers
30 or taxpayers identified in subsection (1) of this section.

31 (3) If an insurance contract, health care services contract, or
32 health maintenance agreement covers risks or exposures, or enrolled
33 participants only partially in this state, the tax payable is
34 computed on the portion of the premium that is properly allocated to
35 a risk or exposure located in this state, or enrolled participants
36 residing in this state.

37 (4) In determining the amount of taxable premiums under
38 subsection (3) of this section, all premiums, other than premiums
39 properly allocated or apportioned and reported as taxable premiums of

1 another state, that are written, procured, or received in this state,
2 or that are for a policy or contract negotiated in this state, are
3 considered to be written on risks or property resident, situated, or
4 to be performed in this state, or for health care services to be
5 provided to enrolled participants residing in this state.

6 (5) Insurance on risks or property resident, situated, or to be
7 performed in this state, or health coverage for the provision of
8 health care services for residents of this state, is considered to be
9 insurance procured, continued, renewed, or performed in this state,
10 regardless of the location from which the application is made, the
11 negotiations are conducted, or the premiums are remitted.

12 (6) Premiums on risks or exposures that are properly allocated to
13 federal waters or international waters or under the jurisdiction of a
14 foreign government are not taxable by this state.

15 (7) This section does not apply to premiums on insurance procured
16 by a licensed surplus line broker under chapter 48.15 RCW.

17 (8) This section does not apply to premiums on insurance that is
18 issued by a Washington captive insurer under chapter 48.--- RCW (the
19 new chapter created in section 12 of this act).

20 **Sec. 9.** RCW 48.15.160 and 2008 c 217 s 11 are each amended to
21 read as follows:

22 (1) The provisions of this chapter controlling the placing of
23 insurance with unauthorized insurers shall not apply to reinsurance,
to insurance issued by a Washington captive insurer under chapter
24 48.--- RCW (the new chapter created in section 12 of this act), or to
25 the following insurances when so placed by licensed insurance
26 producers of this state:

27 (a) Ocean marine and foreign trade insurances.

28 (b) Insurance on subjects located, resident, or to be performed
29 wholly outside of this state, or on vehicles or aircraft owned and
30 principally garaged outside this state.

31 (c) Insurance on operations of railroads engaged in
32 transportation in interstate commerce and their property used in such
33 operations.

34 (d) Insurance of aircraft owned or operated by manufacturers of
35 aircraft, or of aircraft operated in schedule interstate flight, or
36 cargo of such aircraft, or against liability, other than workers'
37 compensation and employer's liability, arising out of the ownership,
38 maintenance or use of such aircraft.

1 (2) Insurance producers so placing any such insurance with an
2 unauthorized insurer shall keep a full and true record of each such
3 coverage in detail as required of surplus line insurance under this
4 chapter and shall meet the requirements imposed upon a surplus line
5 broker pursuant to RCW 48.15.090 and any regulations adopted
6 thereunder. The record shall be preserved for not less than five
7 years from the effective date of the insurance and shall be kept
8 available in this state and open to the examination of the
9 commissioner. The insurance producer shall furnish to the
10 commissioner at the commissioner's request and on forms as designated
11 and furnished by him or her a report of all such coverages so placed
12 in a designated calendar year.

13 **Sec. 10.** RCW 82.04.320 and 1961 c 15 s 82.04.320 are each
14 amended to read as follows:

15 ((This)) (1) Except as otherwise provided in this section, this
16 chapter ((shall)) does not apply to any person in respect to
17 insurance business upon which a tax based on gross premiums is paid
18 to the state((: PROVIDED, That the)).

19 (2) The provisions of this section ((shall)) do not exempt any
20 person engaging in the business of representing any insurance
21 company, whether as general or local agent, or acting as broker for
22 such companies((: PROVIDED FURTHER, That the)).

23 (3) The provisions of this section ((shall)) do not exempt any
24 bonding company from tax with respect to gross income derived from
25 the completion of any contract as to which it is a surety, or as to
26 any liability as successor to the liability of the defaulting
27 contractor.

28 (4) For purposes of this section, for periods preceding the
29 effective date of this section, Washington captive insurers as
30 defined in section 2 of this act are deemed to be persons in respect
31 to insurance business that have paid a tax on gross premiums to the
32 state.

33 **Sec. 11.** RCW 48.14.090 and 2009 c 161 s 4 are each amended to
34 read as follows:

35 In determining the amount of direct premium taxable in this state
36 other than for policies issued by a Washington captive insurer as
37 defined in section 2 of this act, all such premiums written,
38 procured, or received in this state shall be deemed written upon

1 risks or property resident, situated, or to be performed in this
2 state except such premiums as are properly allocated or apportioned
3 and reported as taxable premiums of any other state or states. For
4 tax purposes, the reporting of premiums shall be on a written basis
5 or on a paid-for basis consistent with the basis required by the
6 annual statement.

7 **NEW SECTION.** **Sec. 12.** Sections 1 through 6 of this act
8 constitute a new chapter in Title 48 RCW.

9 **NEW SECTION.** **Sec. 13.** If any provision of this act or its
10 application to any person or circumstance is held invalid, the
11 remainder of the act or the application of the provision to other
12 persons or circumstances is not affected.

13 **NEW SECTION.** **Sec. 14.** Sections 8 through 11 of this act apply
14 both retroactively and prospectively.

15 **NEW SECTION.** **Sec. 15.** This act is necessary for the immediate
16 preservation of the public peace, health, or safety, or support of
17 the state government and its existing public institutions, and takes
18 effect immediately."

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19 On page 1, line 1 of the title, after "insurance;" strike the
20 remainder of the title and insert "amending RCW 48.14.020, 48.14.095,
21 48.15.160, 82.04.320, and 48.14.090; adding a new chapter to Title 48
22 RCW; creating a new section; prescribing penalties; and declaring an
23 emergency."

EFFECT: Removes language that prohibits industrial insurance from being considered in Washington risks for the purpose of captive insurance premium tax.

--- END ---