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ENGROSSED SUBSTITUTE HOUSE BILL 2560

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State of Washington

61st Legislature

2010 Regular Session

**By** House Financial Institutions & Insurance (originally sponsored by Representatives Orwall, Upthegrove, Quall, Simpson, Nelson, and Morrell; by request of Insurance Commissioner)

READ FIRST TIME 02/02/10.

1 AN ACT Relating to forming joint underwriting associations;  
2 amending RCW 48.15.040; adding a new chapter to Title 48 RCW; providing  
3 an expiration date; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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

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

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

3 The commissioner may use appropriated funds as needed to establish  
4 and supervise the association.

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

7 (1) "Association" means a nonprofit underwriting association  
8 established under this chapter.

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

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

- 13 (a) Workers' compensation insurance;
- 14 (b) Employers' liability insurance;
- 15 (c) Nuclear liability insurance;
- 16 (d) Personal insurance; or
- 17 (e) Surety insurance.

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

20 (5) "Excess flood insurance" means insurance against loss,  
21 including business interruption, arising from flood that is in excess  
22 of the limit of liability insurance offered by the national flood  
23 insurance program.

24 (6) "Person" means a natural person, association, partnership, or  
25 corporation.

26 (7) "Personal insurance" means:

- 27 (a) Private passenger automobile coverage;
- 28 (b) Homeowner's coverage, including mobile homeowners, manufactured  
29 homeowners, condominium owners, and renter's coverage;
- 30 (c) Dwelling property coverage;
- 31 (d) Earthquake coverage for a residence or personal property;
- 32 (e) Personal liability and theft coverage;
- 33 (f) Personal inland marine coverage; and
- 34 (g) Mechanical breakdown coverage for personal auto or home  
35 appliances.

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

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

6        (2) The commissioner must hold a hearing under chapters 48.04 and  
7 34.05 RCW before forming an association.

8        (3) An association may not begin underwriting operations for excess  
9 flood or business interruption insurance until the commissioner finds  
10 that:

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

17        (b) Persons cannot buy excess flood insurance through the voluntary  
18 market; or

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

21        (4) At a hearing to appeal the commissioner's finding that excess  
22 flood insurance is unavailable through the voluntary market or that a  
23 competitive market does not exist, the finding that four or more  
24 admitted or surplus lines insurers are offering excess flood insurance,  
25 exclusive of personal insurance, is prima facie evidence that a  
26 competitive market does exist. A decision of the commissioner, finding  
27 that excess flood insurance is unavailable through the market  
28 assistance plan, voluntary market, or that a competitive market does  
29 not exist, may be appealed under chapters 48.04 and 34.05 RCW.

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

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

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

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

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

6        (2) The association may decline to insure particular persons that  
7 present an extraordinary risk because of the nature of their  
8 operations, property condition, past claims experience, or inadequate  
9 risk management. However, the location of a property for which  
10 insurance is sought from the association must not, in and of itself,  
11 constitute an extraordinary risk.

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

14            (a) A statement of the actual reason for declination; and

15            (b) A statement that the applicant may appeal the decision to the  
16 commissioner.

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

20        (5) A decision of the commissioner to provide or to decline to  
21 provide coverage under this may be appealed under chapters 48.04 and  
22 34.05 RCW.

23        NEW SECTION.    **Sec. 6.**    (1) The association is composed of all  
24 insurers that have a certificate of authority to write either casualty  
25 or property insurance, or both, in this state. Every property or  
26 casualty insurer, or both, must be a member of the association as a  
27 condition of its authority to continue to transact business in this  
28 state.

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

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

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

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

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

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

10 (a) Three board members must be member insurers appointed by each  
11 of the following three trade associations: Property casualty insurers  
12 association of America, American insurance association, and national  
13 association of mutual insurance companies. At least one of the three  
14 insurers on the board must be a domestic insurer.

15 (b) Four board members must be residents of the state. One is  
16 appointed by the insurance commissioner. One is appointed by the King  
17 county council. One is appointed by the association of Washington  
18 cities, to represent one or more of the following municipal  
19 governments: Auburn, Kent, Renton, or Tukwila. One is appointed by  
20 the board of directors of the center for advanced manufacturing Puget  
21 Sound. None of the resident-appointees may be employed by, serve on  
22 the board of directors of, or have a substantial ownership interest in  
23 any insurer.

24 (c) Original board members must be appointed to serve an initial  
25 term of three years and may be appointed for a second term. Board  
26 members may serve consecutive terms. Successor board members must be  
27 appointed as soon as possible subject to (a) and (b) of this  
28 subsection.

29 (5) The commissioner shall notify the members of the board if he or  
30 she has information that any board member is dishonest, reckless, or  
31 incompetent or is failing to perform any duty of his or her office, and  
32 the board shall meet immediately to consider the matter. The  
33 commissioner must receive notice of the time and place of this meeting.  
34 If the board finds by a majority of the board members, with the accused  
35 board member not voting on this matter, that the commissioner's  
36 objection is well-founded, the accused board member shall be removed  
37 immediately. The successor of a board member removed under this

1 section must be appointed as soon as possible subject to subsection (4)  
2 of this section.

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

9 (7) Each person serving on the board or any subcommittee thereof,  
10 each member insurer of the association, and each officer and employee  
11 of the association must be indemnified by the association against all  
12 costs and expenses actually and necessarily incurred by him, her, or it  
13 in connection with the defense of any action, suit, or proceeding in  
14 which he, she, or it is made a party by reason of his, her, or its  
15 being or having been a member of the board, or a member or officer or  
16 employee of the association, except in relation to matters as to which  
17 he, she, or it has been judged in such action, suit, or proceeding to  
18 be liable by reason of willful misconduct in the performance of his,  
19 her, or its duties as a member of the board, or member, officer, or  
20 employee of the association. This indemnification is not exclusive of  
21 other rights as to which the member, officer, or employee may be  
22 entitled as a matter of law.

23 (8) Board members shall receive no compensation, but may be  
24 reimbursed for all travel expenses as provided in RCW 43.03.050 and  
25 43.03.060.

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

28 (2) The plan of operation may take effect only after it has been  
29 reviewed by the commissioner. Any changes recommended by the  
30 commissioner must be either approved by a majority of the members of  
31 the board or a written statement of the board's reasons for rejection  
32 of any provision provided to the commissioner. The commissioner may  
33 continue to consult with the board to arrive at a plan of operation  
34 that is approved by both the commissioner and the board, or the  
35 commissioner may accept the plan of operation of the board. This  
36 process must conclude with a plan of operation accepted by the board  
37 within thirty days of the first board appointed under this act.

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

3 (b) The association must use rates that are demonstrably sound as  
4 compared to accepted actuarial standards. At the time of filing with  
5 the commissioner, the rates must be accompanied by an actuarial  
6 analysis. The rates must comply with chapter 48.19 RCW and be approved  
7 by the commissioner.

8 NEW SECTION. **Sec. 9.** The association must file a statement  
9 annually with the commissioner that contains information about the  
10 association's transactions, financial condition, and operations during  
11 the preceding year. The statement must be in the form and in a manner  
12 approved by the commissioner. The association must maintain its  
13 records according to the accounting practices and procedures manual  
14 adopted by the national association of insurance commissioners. The  
15 commissioner may require the association to furnish additional  
16 information if the commissioner considers it necessary to evaluate the  
17 scope, operation, and experience of the association.

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

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

27 (3) An association created under this chapter is responsible for  
28 the total costs of its financial and market conduct examinations. RCW  
29 48.03.060 (1) and (2) and 48.37.060(14) (a) and (b) are not applicable  
30 to the examination of an association created under this chapter.

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

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

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

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

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

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

15 (3) If the association makes an assessment, an assessed insurer  
16 must pay the association within thirty days after it receives notice of  
17 the assessment. If an insurer does not pay an assessment within thirty  
18 days after it receives notice of the assessment:

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

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

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

25 (d) The commissioner may fine the insurer up to ten thousand  
26 dollars.

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

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

32 (2) If, at any time, the commissioner or the board of directors  
33 holds a hearing under chapters 48.04 and 34.05 RCW and determines that  
34 excess flood and business interruption insurance is available through  
35 a market assistance plan, in the voluntary market, or that a



1 competitive market exists, the commissioner must order the association  
2 to end its underwriting operations.

3 (3) If the commissioner or the board of directors orders the  
4 association to end all underwriting operations, the commissioner must  
5 supervise the dissolution of the association, including settlement of  
6 all financial and legal obligations and distribution of any remaining  
7 assets as follows:

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

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

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

20 (1) Creating sample plans of operation for the assistance of the  
21 board;

22 (2) Requiring or limiting certain policy provisions;

23 (3) Containing the basis and method for assessing members for  
24 operation of the association; and

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

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

33 (2) For the purpose of this section, a market assistance plan means  
34 a voluntary mechanism by insurers writing property insurance in this  
35 state in either the admitted or nonadmitted market to provide excess

1 flood or business interruption insurance for a class of insurance as  
2 designated in writing to the plan by the commissioner.

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

5 (4) A market assistance plan must have a minimum of twenty-five  
6 insurers willing to insure risks within the class designated by the  
7 commissioner. If twenty-five insurers do not voluntarily agree to  
8 participate, the commissioner may require either property or property  
9 and casualty, or both, insurers to participate in a market assistance  
10 plan as a condition of continuing to do business in this state. The  
11 commissioner must make this requirement to fulfill the quota of at  
12 least twenty-five insurers. The commissioner must make his or her  
13 designation on the basis of the insurer's premium volume of property  
14 insurance in this state.

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

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

22 If certain insurance coverages cannot be procured from authorized  
23 insurers, such coverages, hereinafter designated as "surplus lines,"  
24 may be procured from unauthorized insurers subject to the following  
25 conditions:

26 (1) The insurance must be procured through a licensed surplus line  
27 broker.

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

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

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

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

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

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

11 NEW SECTION. Sec. 19. This act is necessary for the immediate  
12 preservation of the public peace, health, or safety, or support of the  
13 state government and its existing public institutions, and takes effect  
14 immediately.

15 NEW SECTION. Sec. 20. This act expires December 31, 2016.

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