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**SECOND SUBSTITUTE SENATE BILL 6331**

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**State of Washington 66th Legislature 2020 Regular Session**

**By** Senate Ways & Means (originally sponsored by Senators Mullet and Wilson, L.)

AN ACT Relating to captive insurance; amending RCW 48.14.020, 48.14.095, 48.15.160, 82.04.320, and 48.14.090; adding a new chapter to Title 48 RCW; creating a new section; prescribing penalties; and declaring an emergency.

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

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

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

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

The legislature finds that the ability of out-of-state corporations to use captive insurers to manage risk associated with economic activity in Washington discourages corporations from subjecting themselves to regulation and taxation by the state of Washington, and seriously impairs the capacity of the state of Washington to provide and enforce effective regulation of the insurance business. Accordingly, the legislature finds it necessary and proper to regulate and tax captive insurers that are used to manage the Washington risk of out-of-state corporations that have purposefully availed themselves of the benefits of an economic market in Washington.

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

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

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

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

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

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

(ii) Is itself not an insurer; and

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

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

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

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

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

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

(ii) Is not itself an insurer; and

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

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

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

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

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

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

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

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

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

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

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

(5) For the purposes of this section, "Washington risks" means the share of risk covered by the premiums that is allocable to this state, based upon where the underlying risks are located or where the losses or injuries giving rise to covered claims arise. The foreign captive insurer may use any reasonable method of determining such an allocation, including actuarial analysis or use of a proxy such as sales, property value, or payroll. The foreign captive insurer must share their methodology and relevant analysis in determining their allocation with the commissioner. Whether paid directly or by reimbursement, neither the timing nor the nature of a foreign captive insurer's payment may be deemed to reflect, create, or constitute Washington risks. "Washington risks" do not include any risks covered by industrial insurance under Title 51 RCW.

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

(7) A foreign captive insurer that registers with the commissioner may not be deemed to be an unauthorized insurer for any period preceding or following such registration. A registered foreign captive insurer is exempt from sanctions set forth in RCW 48.14.095, for violations of RCW 48.05.030(1), 48.14.060, or 48.15.020 regardless of when such violations are alleged to have occurred.

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

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

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

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

(2) For the purposes of this section, "Washington risks" means the share of risk covered by the premiums that is allocable to this state, based upon where the underlying risks are located or where the losses or injuries giving rise to covered claims arise. The captive insurer may use any reasonable method of determining such an allocation, including actuarial analysis or use of a proxy such as sales, property value, or payroll. The captive insurer must share their methodology and relevant analysis in determining their allocation with the commissioner. Whether paid directly or by reimbursement, neither the timing nor the nature of a captive insurer's payment may be deemed to reflect, create, or constitute Washington risks. "Washington risks" do not include any risks covered by industrial insurance under Title 51 RCW.

(3) If a registered Washington captive insurer fails to remit the tax provided by this section by the last day of the month in which the tax becomes due, the registered Washington captive insurer must pay the penalties and interest provided in RCW 48.14.060. The tax may be collected by distraint, or the tax and fine may be recovered by an action instituted by the commissioner in any court of competent jurisdiction. Any fine collected by the commissioner must be paid to the state treasurer and credited to the general fund.

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

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

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

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

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

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

(1) Subject to other provisions of this chapter, each authorized insurer except title insurers and registered Washington captive insurers as defined in section 2 of this act shall on or before the first day of March of each year pay to the state treasurer through the commissioner's office a tax on premiums. Except as provided in subsection (3) of this section, such tax shall be in the amount of two percent of all premiums, excluding amounts returned to or the amount of reductions in premiums allowed to holders of industrial life policies for payment of premiums directly to an office of the insurer, collected or received by the insurer under RCW 48.14.090 during the preceding calendar year other than ocean marine and foreign trade insurances, after deducting premiums paid to policyholders as returned premiums, upon risks or property resident, situated, or to be performed in this state. For tax purposes, the reporting of premiums shall be on a written basis or on a paid-for basis consistent with the basis required by the annual statement. For the purposes of this section the consideration received by an insurer for the granting of an annuity shall not be deemed to be a premium.

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

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

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

(4) Each authorized insurer shall with respect to all ocean marine and foreign trade insurance contracts written within this state during the preceding calendar year, on or before the first day of March of each year pay to the state treasurer through the commissioner's office a tax of ninety-five one-hundredths of one percent on its gross underwriting profit. Such gross underwriting profit shall be ascertained by deducting from the net premiums (i.e., gross premiums less all return premiums and premiums for reinsurance) on such ocean marine and foreign trade insurance contracts the net losses paid (i.e., gross losses paid less salvage and recoveries on reinsurance ceded) during such calendar year under such contracts. In the case of insurers issuing participating contracts, such gross underwriting profit shall not include, for computation of the tax prescribed by this subsection, the amounts refunded, or paid as participation dividends, by such insurers to the holders of such contracts.

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

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

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

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

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

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

(4) In determining the amount of taxable premiums under subsection (3) of this section, all premiums, other than premiums properly allocated or apportioned and reported as taxable premiums of another state, that are written, procured, or received in this state, or that are for a policy or contract negotiated in this state, are considered to be written on risks or property resident, situated, or to be performed in this state, or for health care services to be provided to enrolled participants residing in this state.

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

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

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

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

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

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

(a) Ocean marine and foreign trade insurances.

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

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

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

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

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

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

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

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

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

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

In determining the amount of direct premium taxable in this state other than for policies issued by a Washington captive insurer as defined in section 2 of this act, all such premiums written, procured, or received in this state shall be deemed written upon risks or property resident, situated, or to be performed in this state except such premiums as are properly allocated or apportioned and reported as taxable premiums of any other state or states. For tax purposes, the reporting of premiums shall be on a written basis or on a paid-for basis consistent with the basis required by the annual statement.

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

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

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

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

**--- END ---**