
ENGROSSED SECOND SUBSTITUTE SENATE BILL 6331

State of Washington

66th Legislature

2020 Regular Session

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

READ FIRST TIME 03/02/20.

1 AN ACT Relating to captive insurance; amending RCW 48.14.020,
2 48.14.095, 48.15.160, 82.04.320, and 48.14.090; adding a new chapter
3 to Title 48 RCW; creating a new section; prescribing penalties; and
4 declaring an emergency.

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

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

16 The legislature notes that, under the federal McCarran-Ferguson
17 act, the regulation and taxation of insurance is left to the states.
18 The due process clauses of the Fifth and Fourteenth Amendments to the
19 United States Constitution limit the ability of states to regulate
20 and tax transactions outside their territorial boundaries. In *State*
21 *Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), the

1 United States supreme court ruled that a state may not tax an
2 insurance transaction that has no connection with the state other
3 than the location of the risk.

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

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

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

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

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

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

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

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

4 (ii) Is itself not an insurer; and

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

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

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

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

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

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

17 (ii) Is not itself an insurer; and

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

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

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

26 NEW SECTION. **Sec. 3.** (1) Within one hundred twenty days after
27 the effective date of this section or, if later, within one hundred
28 twenty days after first issuing a policy that covers Washington
29 risks, a Washington captive insurer must register with the
30 commissioner. Upon furnishing evidence of good standing in its state
31 of domicile and paying a fee of two thousand five hundred dollars, a
32 Washington captive insurer is entitled to receive a certificate of
33 captive authority as a registered Washington captive insurer. No
34 other documents, deposits, or payments may be required to obtain this
35 certificate.

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

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

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

10 NEW SECTION. **Sec. 4.** (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 foreign captive insurer must register with the commissioner.
14 Upon furnishing evidence of good standing in its state of domicile
15 and paying a tax of two thousand five hundred dollars, a foreign
16 captive insurer is entitled to receive a certificate of authority as
17 a registered foreign captive insurer. No other documents, deposits,
18 or payments may be required to obtain this certificate.

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

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

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

34 (5) For the purposes of this section, "Washington risks" means
35 the share of risk covered by the premiums that is allocable to this
36 state, based upon where the underlying risks are located or where the
37 losses or injuries giving rise to covered claims arise. The foreign
38 captive insurer may use any reasonable method of determining such an
39 allocation, including actuarial analysis or use of a proxy such as

1 sales, property value, or payroll. The foreign captive insurer must
2 share their methodology and relevant analysis in determining their
3 allocation with the commissioner. Whether paid directly or by
4 reimbursement, neither the timing nor the nature of a foreign captive
5 insurer's payment may be deemed to reflect, create, or constitute
6 Washington risks.

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

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

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

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

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

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

38 (2) For the purposes of this section, "Washington risks" means
39 the share of risk covered by the premiums that is allocable to this

1 state, based upon where the underlying risks are located or where the
2 losses or injuries giving rise to covered claims arise. The captive
3 insurer may use any reasonable method of determining such an
4 allocation, including actuarial analysis or use of a proxy such as
5 sales, property value, or payroll. The captive insurer must share
6 their methodology and relevant analysis in determining their
7 allocation with the commissioner. Whether paid directly or by
8 reimbursement, neither the timing nor the nature of a captive
9 insurer's payment may be deemed to reflect, create, or constitute
10 Washington risks.

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

19 (4) A Washington captive insurer that registers with the
20 commissioner as provided in section 3 of this act may not be deemed
21 to be an unauthorized insurer for any period preceding or following
22 such registration. A registered Washington captive insurer is exempt
23 from sanctions set forth in RCW 48.14.095, for violations of RCW
24 48.05.030(1), 48.14.060, or 48.15.020 regardless of when such
25 violations are alleged to have occurred.

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

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

35 (7) Subsections (1), (2), (3), and (6) of this section do not
36 apply to institutions of higher education as defined in RCW
37 28B.10.016.

38 NEW SECTION. **Sec. 6.** The commissioner may adopt rules as
39 necessary to implement this act, but such rules must recognize the

1 differences between captive insurance and commercial insurance
2 offered to Washington insureds by unrelated companies.

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

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

23 (2)(a) The taxes imposed in this section do not apply to amounts
24 received by any life and disability insurer for health care services
25 included within the definition of practice of dentistry under RCW
26 18.32.020 except amounts received for pediatric oral services that
27 qualify as coverage for the minimum essential coverage requirement
28 under P.L. 111-148 (2010), as amended, and for stand-alone family
29 dental plans as defined in RCW 43.71.080(4)(a), only when offered in
30 the individual market, as defined in RCW 48.43.005(~~((+27))~~), or to a
31 small group, as defined in RCW 48.43.005(~~((+33))~~).

32 (b) Beginning January 1, 2014, moneys collected for premiums
33 written on qualified health benefit plans and qualified dental plans
34 offered through the health benefit exchange under chapter 43.71 RCW
35 must be deposited in the health benefit exchange account under RCW
36 43.71.060.

37 (3) In the case of insurers which require the payment by their
38 policyholders at the inception of their policies of the entire
39 premium thereon in the form of premiums or premium deposits which are

1 the same in amount, based on the character of the risks, regardless
2 of the length of term for which such policies are written, such tax
3 shall be in the amount of two percent of the gross amount of such
4 premiums and premium deposits upon policies on risks resident,
5 located, or to be performed in this state, in force as of the thirty-
6 first day of December next preceding, less the unused or unabsorbed
7 portion of such premiums and premium deposits computed at the average
8 rate thereof actually paid or credited to policyholders or applied in
9 part payment of any renewal premiums or premium deposits on one-year
10 policies expiring during such year.

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

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

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

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

1 (1) This section applies to any insurer or taxpayer, as defined
2 in RCW 48.14.0201, violating or failing to comply with RCW
3 48.05.030(1), 48.17.060, 48.36A.290(1), 48.44.015(1), or
4 48.46.027(1).

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

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

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

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

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

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

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

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

38 (1) The provisions of this chapter controlling the placing of
39 insurance with unauthorized insurers shall not apply to reinsurance.

1 to insurance issued by a Washington captive insurer under chapter
2 48.--- RCW (the new chapter created in section 12 of this act), or to
3 the following insurances when so placed by licensed insurance
4 producers of this state:

5 (a) Ocean marine and foreign trade insurances.

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

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

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

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

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

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

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

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

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

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

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

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

25 NEW SECTION. **Sec. 13.** If any provision of this act or its
26 application to any person or circumstance is held invalid, the
27 remainder of the act or the application of the provision to other
28 persons or circumstances is not affected.

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

31 NEW SECTION. **Sec. 15.** This act is necessary for the immediate
32 preservation of the public peace, health, or safety, or support of

1 the state government and its existing public institutions, and takes
2 effect immediately.

--- **END** ---