September 10, 2021

Via RulesCoordinator@OIC.WA.GOV

Commissioner Mike Kreidler
Office of the Insurance Commissioner
Washington State
302 Sid Snyder Ave., SW, Suite 200
Olympia, WA 98501

Re: Proposed Rule R 2020-12 Captive Insurance

Dear Commissioner Kreidler:

Thank you for the opportunity to provide the following comments on the August 20, 2021 Stakeholder Draft of Proposed Rule R 2020-12 Captive Insurance (the "Proposed Rule"). The Vermont Captive Insurance Association ("VCIA") is the largest trade association for captive insurance in the world. Established in 1985, it has over 380 member companies that compromise Fortune 50 companies to small non-profit housing authorities.

VCIA is concerned that the proposed rule interprets the statute being implemented, Captive Insurance (chapter 281, Laws of 2021), will improperly grant the Office of the Insurance Commissioner (the "Office") too much authority. Specifically, the Proposed Rule would prohibit a captive insurer that is not eligible to register with Washington State from insuring Washington risks, even if (1) the captive is domiciled in another state, such as Vermont; (2) neither the captive's parent, nor another affiliate, has its principal place of business in Washington; and (3) the only connection to Washington is that the insured risk is located there. Second, the Proposed Rule would require such a captive insurer to pay premium taxes on Washington state placements that occurred as far back as January 1, 2011. Both interpretations are contrary to the limits on state taxation of insurance independently procured from a nonadmitted insurer as set forth in the United States Supreme Court's decision in *State Board of Insurance v. Todd Shipyards Corp*.[1]

[1] 370 U.S. 451 (1962), *affirming*, 340 S.W.2d 339 (Tx. Civ. App. 1960).

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The Proposed Rule would improperly tax a captive in connection with insurance independently procured where the only connection between the insurance transaction and Washington is that the risk is located in Washington. Specifically, Proposed Rule Section 284-2XX-130 generally defines an "eligible captive insurer" as an insurance company licensed in the state where is domiciled; that has a net worth of at least $1 Million; that is owned by a captive owner; that insures risks of the captive owner or an affiliate of the captive owner; and that insures one or more insureds whose principal place of business is in Washington.[2] The Proposed Rule places two prohibitions on a captive that is *not* an eligible captive insurer. Proposed Rule Section 284-2-250(2)(b) would act prospectively; it states that "[a] captive insurer that is not eligible to register under this chapter or chapter 48.92 RCW [Liability Risk Retention] may not cover Washington risk, unless acting as a reinsurer." If an ineligible captive insures such risks, the Proposed Rule provides that the captive would be acting as an "unlawful, unauthorized insurer" and be subject to premium taxes as well as penalties and interest. Additionally, Proposed Rule Section 284-2XX-240(5) would act retroactively; it states that "[c]aptive insurers who insured Washington risk for any period after January 1, 2011, must remit a two percent tax on premiums for insurance directly procured by and provided to its parent or another affiliate for Washington risks, if not previously remitted to the commissioner."

Neither of these proposed rules would survive under the *Todd Shipyards* case, in which the United Stated Supreme Court affirmed a Texas court's determination that, because the insurance transactions at issue took place entirely outside of Texas, there were not enough contacts with Texas to justify the tax in light of due process considerations. In *Todd Shipyards*, the Supreme Court considered whether Texas could assess premium taxes on several insurance transactions, where the primary connection to Texas was that the insured property was located there. The insured, Todd Shipyards, did business in Texas, but its principal place of business was in New York, where it was domiciled. The insurer had neither an office nor an agent in Texas, nor did it investigate claims in Texas. Each of the insurance contracts at issue was independently procured, contracted for, delivered, and paid for in New York. Thus, the Supreme Court concluded that the insurance transactions took place entirely outside of Texas, so as not to justify the Texas tax in light of due process considerations.

Likewise, to the extent the Proposed Rules would tax premiums on a captive insurer domiciled outside of Washington for insurance independently procured, where the only connection between Washington and the insurance transactions is that the covered risk is in Washington, we believe that the tax would not be permitted under *Todd Shipyards*.[3]

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[2] See the definition of "eligible captive insurer" in Section 2 of the new Captive Insurance law.

[3] Our analysis takes account of the fact that the scope of *Todd Shipyards* has been limited via later cases, as explained, for example, in *Red Shield Admin., Inc. v. Kreidler*, 2021 U.S. Dist. LEXIS 155031 (W.D.Wa. Aug. 21, 2021); *Combs v. SEP Nuclear Operating, Co*., 239 S.W.3d 264 (Tx. Civ. App. 2007); and *Associated Elec. & Gas Ins. Servs. v. Clark*, 676 A.2d 1357 (R.I. 1996).

Consequently, to the extent Proposed Rule Sections 284-2XX-250(2)(b) and 284-2XX-240(5) would tax an insurance transaction where the tax would be prohibited under *Todd Shipyards*, we urge that those Sections be struck, or amended to recognize the restrictions on taxation of directly procured insurance set forth in *Todd Shipyards*.

Thank you, again, for this opportunity to comment.

Sincerely,

Richard Smith
President

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