October 27, 2021

Via RulesCoordinator@OIC.WA.GOV

Michael Walker
Office of the Code Reviser
P.O. Box 40260
Olympia, WA 98504-0260

Re: Captive Insurance (Chapter 48.201 RCW – Oct. 1, 2021)
Insurance Commissioner Matter R 2021-12

Dear Mr. Walker:

The Risk and Insurance Management Society ("RIMS") provides the following comments on the referenced proposed rule (the "Proposed Rule"). RIMS comprises 10,000 risk management professionals located in more than 60 countries. The entities represented are typically commercial insurance policyholders of all sizes, ranging from Fortune 500 companies to small businesses, but also cities, counties and school districts. Many RIMS members are consumers of commercial property and casualty insurance, and some *independently procure* insurance from a captive insurance company, including with respect to Washington State risks.

RIMS is concerned that the Proposed Rule interprets the statute being implemented, Captive Insurance (chapter 281, Laws of 2021), to 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 – unless it uses a licensed surplus lines broker – even if (1) the captive is domiciled in another state; (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. This interpretation is contrary to the limits on state regulation of nonadmitted insurance as set forth in the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA"),[1] and it violates the United States Supreme Court holding in *State Board of Insurance v. Todd Shipyards Corp.*[2]

Specifically, Proposed Rule Section 284-201-130(2), referring to 48.201 RCW, generally defines an "eligible captive insurer" as an insurance company licensed in the state where it is

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1 Act July 21, 2010, Pub. L. No. 111-203, 124 Stat. 1590, *codified at* 15 U.S.C. 8201 §§ *et seq.*
2 370 U.S. 451 (1962), *affirming*, 340 S.W.2d 339 (Tx. Civ. App. 1960).

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. Proposed Rule Section 281-201-250(b) states that a captive insurer that insures risks in Washington but is *not* eligible to register is subject to RCW 48.15.020; specifically, it would be treated as an unauthorized insurer, so it would not be permitted to insure Washington risks. This prohibition is problematic in light of the Nonadmitted and Reinsurance Reform Act and the *Todd Shipyards* case.

Nonadmitted & Reinsurance Reform Act

The Nonadmitted and Reinsurance Reform Act ("NRRA"), enacted in 2010, limits the authority to regulate the placement of nonadmitted insurance to the insured's "home State." Specifically, the NRRA states that "[e]xcept as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the *insured's home State*."[3] (Emphasis added.) Generally speaking, the NRRA defines "home State" to mean, "with respect to an insured . . . the State in which an insured maintains its principal place of business. . . ."[4] The term "nonadmitted insurance" means "any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a nonadmitted insurer eligible to accept such insurance."[5] And a "nonadmitted insurer" means, "with respect to a State, an insurer not licensed to engage in the business of insurance in such State"[6]; which would include a captive insurer with respect to any state other than the insurer's domiciliary state. Finally, the term "independently procured insurance" means insurance procured directly by an insured from a nonadmitted insurer, *without* using a surplus lines broker.[7]

The Proposed Rule would prohibit a captive insurer domiciled in a State other than Washington from insuring Washington state risk even if the home State of the insured is not Washington State. That is clearly prohibited by the NRRA, so the provision should be struck or modified accordingly.

Todd Shipyards

Nor would the prohibition survive under *Todd Shipyards*. In that case, 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

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[3] 15 U.S.C. § 8202(a).
[4] 15 U.S.C. § 8206(6)(A)(i).
[5] 15 U.S.C. § 8206(9).
[6] 15 U.S.C. § 8206(11)(A).
[7] 15 U.S.C. § 8206(7).

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 Rule would prohibit a captive that did not qualify as an eligible captive insurer from insuring Washington state risk – even where the only connection between the insurance transaction and Washington is that the risk is located there – we believe that the prohibition would be invalid under *Todd Shipyards*.[8]

Conclusion

In conclusion, the NRRA preempts states other than the applicable home state from taxing nonadmitted insurance premiums. It is important to recognize that there is a longstanding position within the industry that captives by definition are not nonadmitted insurers. Putting that argument aside, by the Office's definition of nonadmitted insurers, under the NRRA the state of Washington is preempted from taxing premiums covering Washington risk written by captives not eligible to register under the new statute.

Sincerely,

Lynn Haley Pilarski

Lynn Haley Pilarski
Chair, External Affairs Committee

[8] 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).