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:

Thank you for the opportunity to provide comments on the October 1, 2021 draft of *Proposed Rule R 2021-12 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), 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, 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. This interpretation is contrary to the constitutional limits on a state's authority to tax insurance independently procured[1] from an insurance company, as set forth in the United States Supreme Court's decision in *State Board of Insurance v. Todd Shipyards Corp*.[2]

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

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[1] The term "independently procured insurance" means "insurance procured directly by an insured from a nonadmitted insurer." 15 U.S.C. § 8206(7). *See also* "An FAQ on The State of Direct Procurement Insurance," 2019 Law360 10-77 (Jan. 10, 2019).

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

whose principal place of business is in Washington.[3] 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. RCW 48.15.020, in turn, states in part: "An insurer that is not authorized by the commissioner may not solicit insurance business in this state or transact insurance business in this state, except as provided in this chapter." The practical effect of these provisions would appear to be to prohibit a captive that does not qualify as an eligible captive insurer from insuring Washington risks.[4] This prohibition would be unconstitutional in light of the *Todd Shipyards* case.[5]

In *Todd Shipyards*, 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 the case, 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 Rule would prohibit a captive that does not qualify as an eligible captive insurer from insuring Washington state risk through the independent procurement of insurance, we believe the prohibition would be invalid under *Todd Shipyards*.[6]

Thank you for this opportunity to comment.

Sincerely,

Richard Smith
President

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

[4] An earlier version of Proposed Rule Subsection WAC 284-2XX-250(2)(b) stated: "A captive insurer that is not eligible to register under this chapter or chapter 48.92 RCW [which governs risk retention groups] may not cover Washington risk, unless it is acting as a reinsurer." This language has been omitted from the current draft.

[5] We question whether the authorizing statute gives the Office the authority to prohibit a captive that does not qualify as an eligible captive insurer from insuring Washington risks as the statute does not address a captive that does not qualify as an eligible captive insurer.

[6] 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); but we do not read those cases, particularly the August 2021 case out of the Western District of Washington, to weaken our argument.

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