



Mike Kreidler- Insurance Commissioner

As required by

The Washington State Administrative Procedures Act

Chapter 34.05 RCW

Matter No. **R 2021-12**

**CONCISE EXPLANATORY STATEMENT; RESPONSIVENESS
SUMMARY; RULE DEVELOPMENT PROCESS; AND
IMPLEMENTATION PLAN**

Relating to the Adoption of

Captive Insurance Rules in Chapter 284-201 WAC

November 15, 2021

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Section 1: Introduction

Revised Code of Washington (RCW) 34.05.325(6) requires the Office of Insurance Commissioner (OIC) to prepare a “concise explanatory statement” (CES) prior to filing a rule for permanent adoption. The CES shall:

1. Identify the Commissioner's reasons for adopting the rule;
2. Describe differences between the proposed rule and the final rule (other than editing changes) and the reasons for the differences; and
3. Summarize and respond to all comments received regarding the proposed rule during the official public comment period, indicating whether or not the comment resulted in a change to the final rule, or the Commissioner's reasoning in not incorporating the change requested by the comment; and
4. Be distributed to all persons who commented on the rule during the official public comment period and to any person who requests it.

Section 2: Reasons for Adopting the Rule

The Act relating to Captive Insurance (2SSB 5315) has become effective as law (Chapter 48.201 RCW). This law establishes statutory framework for Washington-based private entities and public institutions of higher education to manage their risks through captive insurers, which will require proper regulation and taxation by the Office of the Insurance Commissioner (OIC). This law also authorizes OIC rulemaking to incorporate the statutory framework and requirements for Captive Insurance into the Washington Administrative Code, along with implementation processes, clarifications, and regulatory guidance.

The anticipated effects of the rulemaking relate to determining eligibility of captive insurers, registering and renewing eligible captive insurers, enforcement, and collecting associated taxes, registration fees, and annual renewal fees from captive insurers that are licensed by their domicile jurisdictions and insure Washington-based entities.

These rules will facilitate implementation of the law relating to Captive Insurance by ensuring that all affected entities understand their rights and obligations under the new law.

Section 3: Rule Development Process

On July 6, 2021, the Commissioner filed a Preproposal Statement of Inquiry (CR-101) notice of intent to adopt rules and initiate rulemaking for captive insurance. The comment period on the Preproposal Statement of Inquiry (CR-101) was open through July 28, 2021. Two comments were submitted, where both indicated interest in participating in the rulemaking process. All comments received on this rulemaking (R 2021-12) are included in the Responsiveness Summary (Section 5).

On August 20, 2021, the Commissioner issued a working stakeholder draft of the new regulations, which present an example of the proposed rules regarding captive insurance. The Commissioner notified captive insurers and those interested in captive insurance regulations, through GovDelivery, and publication on the OIC website. The stakeholder draft was published with a three (3) week comment period. Several comments were submitted that discussed due process concerns and requests for clarifications. All comments received on this rulemaking (R 2021-12) are included in the Responsiveness Summary (Section 5).

On October 6, 2021, the Commissioner filed a Proposed Rule Making CR-102. The comment period was open through October 27, 2021. Multiple comments were submitted in response to the CR-102 filing, all of which are outlined in the Responsiveness Summary (Section 5).

On November 9, 2021, the Commissioner held a public hearing and was available to hear testimony on the proposed rule. Multiple people attended the public hearing and testimony was provided. The Hearing Summary is contained in Appendix A.

On November 15, 2021, the Commissioner will adopt the regulations proposed under R 2021-12 relating to Captive Insurance, with an effective date of December 21, 2022.

The Responsiveness Summary included in Section 5 below addresses all comments and testimony received in response to this rulemaking (R 2021-12).

Section 4: Differences Between Proposed and Final Rule

The proposed captive insurance regulations outline insurance limitations, where captive insurers are unable to provide workers compensation, unless under certain parameters in WAC 284-201-230(1)(b). Feedback received in response to the proposed rulemaking (CR-102) suggested that the rules be revised to include 'state' in front of workers compensation insurance, so as to make it clear this limitation is a state or jurisdiction limit for Washington, and not for US L&H coverage. Captives covering Washington risk cannot provide Washington State workers compensation directly under Title 51 RCW. The requested revision attempts to achieve that which the rule was drafted for, limiting captive insurers from providing workers compensation insurance in Washington, unless done properly through US L&H coverage and not under Title 51 RCW. Therefore, the rule received a minor technical revision, which clarifies that *"Captive insurers may not provide workers compensation coverage subject to Title 51 RCW that directly covers the worker. Captive insurers may indemnify a self-insured employer for their state workers' compensation liability."* (WAC 284-201-230(1)(b)). This change is within the general subject matter of the proposed rule (RCW 34.05.340).

Section 5: Responsiveness Summary

Comments	Consideration
<p>Comments Received – <i>“We have been following the Captive Bill since the beginning. We do not have anything to add at this point however the Surplus Line Association of Washington will offer assistance and/or suggestions when we are able to review any proposed rule. As always we look forward to working with you.”</i></p>	<p>Comment in response to CR-101, reviewed with no resulting changes to the rules.</p> <p>Responded with OIC Laws and Rules site, information on stakeholder draft, and GovDelivery signup link.</p>
<p>Comments Received – <i>“Noting that the due date for comments is July 28. It's now July 20 and the OIC has not published any draft rules or guidance. I would like to know if any draft will be forthcoming such that we can review and have opportunity to comment prior to the July 28 due date.”</i></p>	<p>Comment in response to CR-101, reviewed with no resulting changes to the rules.</p> <p>Responded with notice that comments due by July 28 are solely for CR-101. Also gave info on OIC Laws and Rules site, stakeholder draft, and GovDelivery link.</p>
<p>Comments state that since the licensing jurisdiction for captives principally regulates these insurers, commenters recommend revising the term <u>regulation</u> to read as <u>registration</u>.</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>Initially, the term registration was included in the first draft. However, the OIC decided registration was repetitive with regulation. Therefore, OIC determined that regulation is the best term to use here, as it covers registration and Washington State’s regulation of captive insurers.</p>
<p>Comments were submitted with concerns on missing defined terms including Captive Owner and Washington Risks.</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>These terms are defined in law (RCW 48.201.020). OIC asserts that the definitions in Chapter 48.201 RCW apply in this regulation unless otherwise specified. Duplicating the terms defined in statute, with references in the rules, will not achieve clarity, regulatory guidance, or remove ambiguities.</p>
<p>Comments state that subsection (1) should add the clarification “if later” to the sentence “Eligible captive insurers must register with the commissioner within 120 days of May 12, 2021, or <u>if later</u>, within 120 days after first issuing a policy that covers Washington risks.</p>	<p>Comments in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The law (RCW 48.201.030) does use the phrase ‘if later’ in captive insurance registration requirements.</p> <p>To ensure the rules clearly communicate the dates of effective compliance for the proposed regulations, the stakeholder draft with proposed regulations were revised to include the phrase “if later” to the sentence “Eligible captive insurers must register with the commissioner within 120 days of May 12, 2021, or <u>if later</u>, within 120 days after first issuing a policy that covers Washington risks.”</p>
<p>Comments state concerns with the renewal period duration being less than ten months in rule, where the statute contemplates one year. Recommends adding the phrase ‘starting in 2023’ at the end of the first sentence in subsection (1).</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>RCW 48.201.030(5) states that a registered captive insurer may renew its certificate of registration for successive periods of 12 months each. The comment’s recommendation is not in alignment with the renewal timelines contained in law.</p>

<p>Concerns were communicated on the renewal application process and required timeframes. The comments state concerns with the four-month renewal window in WAC 284-201-220(5).</p>	<p>Comments in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The four-month renewal window was discussed and determined by OIC to provide the agency with sufficient time for processing and registration renewal work. The OIC wants to provide adequate time for all affected parties to meet their statutory and regulatory duties for captive insurance. Therefore, the regulations proposed in the stakeholder draft have been revised to include a three-month window, which would start April 1, 2021, instead of a four-month window starting March 1, 2021.</p>
<p>Comments recommend the following revisions: “Renewal requires that a registered eligible captive insurer continue to meet the eligibility requirements in sections 2 and 3, chapter 281, Laws of 2021, and pay a renewal fee.”</p>	<p>Comment in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The OIC determined that reporting the methodology and relevant analysis used to determine premium allocations is more directly related to captive insurance taxes, and thus the regulations for reporting of methodologies and relevant analyses used to determine premium allocations has been relocated to the tax regulation section (WAC 284-201-240).</p>
<p>Comment states recommended revisions, including: <i>“To assure a timely annual renewal, a registered eligible captive insurer should file its renewal application between March 1st and May 1st. If the OIC notifies a captive insurer that its renewal application has been denied, the eligible captive insurer’s registration will expire effective June 30th and it will have to register anew. Operating without a valid registration in place may also subject a captive insurer to fines and penalties for acting as an unauthorized insurer.”</i></p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>The regulations as drafted provide alignment with the captive insurance laws (Chapter 48.201 RCW). The proposed revisions would not add clarity to the regulations or remove ambiguities.</p>
<p>Comments state revisions should be made to include ‘in Washington’ at the end of the first clause. This would read as <i>“A registered eligible captive insurer may provide only property and casualty insurance, and may provide such insurance to a captive owner, to the captive owner’s other affiliates, or both, <u>in Washington.</u>”</i></p>	<p>Comments in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The example rules in the stakeholder draft were revised to propose adding “for Washington risks” at the beginning of the sentence in the first clause.</p> <p>The addition of the phrase “for Washington risks” simply clarifies the bounds of the regulations and new law. Captives insure more than P&C in other states. That does not mean these captive insurers cannot insure risk in Washington state.</p>
<p>Commenter suggests that WAC 284-201-230(2) is ambiguous, because it is not clear whether the preceding subsection language refers to (1) or (1)(b). Recommends revisions ‘<u>the preceding subsection</u>’ to ‘<u>this section</u>’.</p>	<p>Comment in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>In the interest of clarity, the preceding section and this section have been replaced with the phrase “...<i>in subsection (1).</i>”</p>

<p>Comments state concerns with the methodology for calculating Washington risks should be a part of the tax-reporting process (as opposed to renewal requirements, where they were located). An example was given of a captive insurer not renewing, where the OIC would still want to know the captives final tax payment. Recommend revising WAC 284-201-240(4) to <i>“As part of its statement of premiums and payment of tax, a registered eligible captive insurer must provide the methodology and analysis used to determine its allocation of Washington risks.”</i></p>	<p>Comment in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The OIC determined that reporting the methodology and relevant analysis used to determine premium allocations is more directly related to captive insurance taxes, and thus decided to move the regulations on this topic to the tax regulation section (WAC 284-201-240).</p>
<p>Comments stated concerns as currently drafted, it may not be clear which definitions apply to the referenced terms.</p>	<p>Comment in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The regulations have been revised to clearly communicate which definitions apply to this chapter of the WAC.</p> <p>Additionally, the definitions in RCW 48.201.020, apply to this regulation unless otherwise specified.</p>
<p>Comments communicated concerns regarding captive insurers representing themselves as maintaining financial viability or having a proper financial condition, as result of registration with OIC. The comments also communicated concerns with captive insurers possibly claiming approval of registration signifies the Commissioner’s active supervision of the captive.</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>This comment is not within the scope of rulemaking. The comment is alluding to additional requirements for captive insurers that are not in law, such as advertising provisions, disclosure requirements, and financial responsibility aspects. These topics are not covered in the law and are beyond the scope of rulemaking.</p>
<p>Comments state OIC should regularly publish registration status of registered eligible captive insurers on our website. Commenter also believes that the regulations should specify that certain information regarding registered eligible captive insurers will be made available on the OIC website (including captive information and tax filings).</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>This comment is not within the scope of rulemaking. The comment requests OIC to consider regulations requiring the agency to have a regulatory duty to publish certain information for captive insurers to the public. There are no provisions pertaining to confidentiality in the captive insurance laws. There is also no statutory requirement for the OIC to create rulemaking requiring captive insurance information to be published publicly.</p>
<p>Comments urged the OIC to include that risk retention groups are not subject to the registration process for eligible captive insurers.</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>The rules as drafted clearly state applicability of chapter and identify those with regulatory duties.</p>
<p>Comments urged OIC to strike the provisions in the stakeholder draft or amend them to recognize the restrictions on taxation and regulation of captive insurance as set forth in <i>Todd Shipyards</i>.</p>	<p>Comment in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The rules have been revised to address eligible captive insurers as defined in Chapter 48.201 RCW.</p> <p>Previously the stakeholder draft with proposed regulations attempted to create rules for ineligible captive insurers. Chapter 48.201 RCW only includes provisions regarding eligible captive insurers. Accordingly, ineligible captive insurers will</p>

	continue to be subject to the authorities for unlawful, unauthorized insurers.
<p>Commenter stated four concerns about the Stakeholder Draft including: (1) It assumes insuring risk in this state allows OIC taxing/regulatory jurisdiction of a foreign captive; (2) It subjects ineligible captives to penalties and precludes ineligible captives from insuring risk in the state, despite Washington’s constitutional inability to tax on the basis of risk in this state alone; (3) It assumes the constitutional limitation is overcome if the PBB of the insured is also in the state; and (4) it imposes a retroactive tax to 2011, under authority of the NRRRA, which may not clearly apply to captives (Appendix B6 of the Captive Study).</p>	<p>Comment in response to stakeholder draft, reviewed with no resulting changes to the rules.</p> <p>The proposed regulations do not restrict the ability of captive insurers to raise due process defenses.</p> <p>The prior period tax requirement is a statutory duty for captive insurers.</p>
<p>Comments requested to clarify by rulemaking any limitations on who may be insured by captive insurers. It was understood during legislation that captives “do not provide insurance to the public.” See Final Bill Report. However, the limitation on who a captive may insure is stated here:</p> <p>Sec. 3(6) A registered eligible captive insurer may provide only property and casualty insurance and may provide such insurance to a captive owner, to the captive owner's other affiliates, or both. A registered eligible captive insurer may assume risks from other insurers as a reinsurer without regard to the limitations in the preceding sentence.</p>	<p>Comments in response to stakeholder draft, reviewed and considered with changes resulting to the example rules in the stakeholder draft.</p> <p>The statute uses restrictive language, “only” for the type of insurance, but it does not use similar restrictive language for who may be insured.</p> <p>The following revision resulted to the Insurance Limitations section (WAC 284-201-230):</p> <p>(1) For Washington risks, a registered eligible captive insurer may provide only property and casualty insurance, and may provide such insurance to only a captive owner, to the captive owner's other affiliates, or both, unless it places the insurance through a surplus lines broker pursuant to chapter 48.15 RCW.</p> <p>The addition of the word “<u>only</u>” in the rule is supported by the following:</p> <p>It was understood during legislation that captives “do not provide insurance to the public.” See Final Bill Report.</p> <p>The second sentence of Sec. 3(6) refers to the “limitations” in the preceding sentence, meaning that the first sentence places more than one restriction on captive insurers, i.e., it restricts the type of insurance and who may be insured.</p> <p>The first sentence of Sec. 3(6) is a carve out for captives from unlawful unauthorized insurance. Although phrased permissively, it sets forth the boundary on who a captive may insure.</p> <p>The addition of “<u>for Washington risks</u>” simply clarifies the bounds of Washington’s regulations/laws. Captives insure more than P&C in other states. That does not mean they cannot insure risk in Washington state.</p>
<p>Comment Submission – <i>Self-references: WAC 284-201-110 refers to “[t]hese regulations”; WAC 284-201-120, WAC 284-201-150, and WAC 284-201-250(2)(a) refer to “this chapter”; WAC 285-201-130 says “this regulation”; and WAC 284-201-140 says “this rule.”</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The OIC’s use of self-references in the proposed regulations is proper and consistent with other insurance rules in the Washington Administrative Code (e.g., WAC 284-180-110).</p>

<p>All four terms are intended to capture the same thing—namely, the substance of ch. 284-201. Using a single term will promote consistency and avoid potential confusion.</p>	
<p>Comment Submission – <i>Purpose: WAC 284-201-110 says that the regulations in ch. 284-201 “implement captive insurance (chapter 48.201 RCW).” It would be more accurate to say that the regulations “implement chapter 48.201 RCW, concerning captive insurance.”</i></p> <p>WAC 284-201-110 also refers to “the processes and procedures for regulation and taxation of captive insurers.” Washington is not a captive domicile state. Rather, Washington relies on the jurisdictions where captives are domiciled to oversee and regulate them. “Regulation and taxation” should, therefore, read “registration and taxation.” See RCW 48.201.010 (“The legislature does not intend to make Washington a captive domicile state. Rather, the legislature is establishing a framework for registration by captive insurers that insure Washington-based entities and are licensed by the jurisdictions in which they are domiciled.”).</p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The delegating authority and purpose are accurately communicated in this section. The rules are drafted with clarity and correct legal citations.</p> <p>This comment also requests revisions to the phrasing “the processes and procedures for <u>regulation and taxation</u> of captive insurers”, so that it reads “<u>registration and taxation</u>.” The rules initially considered including registration, regulation, and taxation. However, the agency determined with subject matter expertise that including both regulation and registration was redundant, and the term regulation more accurately captures the framework for captives in Washington.</p>
<p>Comment Submission – <i>Definitions: The first two sentences in WAC 284-201-130 contradict each other. If the first sentence applies, everything that comes after it is unnecessary. If, on the other hand, it is desirable to have definitions in the rule, the first sentence should be eliminated. Irrespective of whether the first sentence remains, the definitions in WAC 284-201-130 should be consistent with those in the statute and not leave the reader at sea.</i></p> <p><i>For example, the definition of “captive insurer” in subsection (1) refers to “a ‘captive owner,’” but “captive owner” is not defined. WAC 284-201-130 should be amended to add this: “‘Captive owner’ has the same meaning as set forth in RCW 48.201.020.” Also, the word “it” in WAC 284-201-130(1) should be replaced with “that.”</i></p> <p><i>The definition of “captive insurer” in WAC 284- 201-130 also refers to “affiliates,” but the latter term is not defined. WAC 284-201-130 should be amended to add this: “‘Affiliate’ has the same meaning as set forth in RCW 48.201.020.”</i></p> <p><i>In many places (WAC 284-201-210(1), WAC 284-201-230(1), WAC 284-201-240(1), WAC 284-201-240(4), WAC 284-201-240(5), WAC 284-201-240(6)), the draft regulations refer to “Washington risks,” but there is no definition of “Washington risks.” WAC 284-201-130 should be amended to add this: “‘Washington risks’ has the same meaning as set forth in RCW 48.201.040.”</i></p> <p><i>The definition of “principal place of business” in WAC 284-201-130(4) starts out by referring to “a business entity,” but then it uses terminology appropriate to just a single type of business entity: a corporation. The first sentence should be</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The first two sentences of WAC 284-201-130 were strategically selected to show that the definitions in law (RCW 48.201.020) would apply in these rules, unless it is clear such a defined term would not achieve alignment between the authorities.</p> <p>The rules also provide definitions for terms that are common between the authorities, such as captive insurer and insurer. For example, the new captive laws (Chapter 48.201 RCW) do not provide definitions for the terms captive insurer or insurer, but the regulations do.</p> <p>Providing definitions for terms that are common between the authorities will achieve clarity in implementing captive insurance, as well as due process (i.e. defining measures of success in the rules) and legal thresholds.</p> <p>Captive owner is defined by law and does not need to be defined by rule.</p> <p>Use of the term “it” is proper in WAC 284-201-130(1) and correctly communicates the legal thresholds for a captive insurer.</p> <p>Affiliate is defined by law and does not need to be defined by rule (RCW 48.201.020(1)).</p> <p>Washington risks is defined by law and does not need to be defined by rule RCW 48.201.040(2).</p>

<p><i>revised to read as follows: “Principal place of business’ refers to the place where a business entity’s managers direct, control, and coordinate the entity’s activities—i.e., its ‘nerve center,’ which will typically be found at its headquarters.” In the next sentence, “the parent corporation” should read “a parent corporation.”</i></p>	<p>The definition for principal place of business refers to an entity’s management direct, control, and coordination, as well as a corporation’s activities. This language, along with the example provided, clearly define what must be met by either an entity or corporation to be considered a principal place of business.</p> <p>The term “a” that is used in place of “the” for the parent corporation in the last sentence of WAC 284-201-130(4) has been drafted by design and applies accurately for the example provided.</p>
<p>Comment Submission – <i>Severability: The language of WAC 284-201-150 is a little garbled. It should read as follows: “If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons and circumstances is not affected.” See Section 13 of Second Substitute Senate Bill 5315.</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>Comment reviewed with comparison of stakeholder draft to Section 13 of 2SSB 5315. Here, the only difference is the terminology “act” being used in Chapter 48.201 RCW, versus “chapter” being used in WAC 284-201-150.</p>
<p>Comment Submission – <i>Duration of registration: WAC 284-201-210(2) should be revised by adding, at the end, “of the following year.” Otherwise, a registration approved on June 28 will be valid for just two days. There should not be any disincentive for an early application or penalty for a prompt approval.</i></p> <p><i>The words “, and this section” at the end of WAC 284-201-210(5) should be deleted. There are no eligibility requirements in this section. (Compare the language in WAC 284-201-220(2).) A reader should not be distracted from examining ch. 48.201 RCW to learn what the eligibility requirements are.</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The regulations are drafted to provide renewals must be processed by June 30 (WAC 284-201-220 Renewal).</p> <p>The regulations also contain information indicating that the registration period is from the date the captive is approved by the Commissioner, through June 30th (WAC 284-201-210(2)).</p> <p>There are provisions of compliance, timing, registration, and renewal included in this section (WAC 284-201-210) and thus deleting WAC 284-201-210(5) would not be proper.</p>
<p>Comment Submission – <i>Renewal: Using “its” consistently in WAC 284-201-220(1) will promote clarity: “To maintain its registration with the commissioner, a registered eligible captive insurer must renew its certificate of registration annually by June 30th. If an eligible captive insurer fails to properly renew its certificate . . .”</i></p> <p><i>In WAC 284-201-220(4), as in WAC 284-201-210(2), the phrase “of the following year” should be added at the end.</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The comment alludes to including additional terms such as “its” for clarity in WAC 284-201-220. However, the agency’s subject matter experts determined that spelling out these provisions in detail best achieved clarity and due process, so that captives or potential captives, can determine how to maintain registration and continuing qualifications.</p> <p>The regulations have been drafted to apply clearly to registration and renewal.</p> <p>The rule section location also includes section headers or titles that detail either renewal or registration requirements.</p> <p>The rules contain sufficient clarity for compliance without adding “of the following year” to WAC 284-201-220(4) and WAC 284-201-210(2).</p>
<p>Comment Submission – <i>Limitations: The limitations in WAC 284-201-230(1) apply only in this state. These limitations are meant to avoid conflict with other provisions of Washington law; they do not (and may not) override federal law.</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules. Rules received earlier revisions for clarifications in this area of insurance limitations. No further revisions resulting from this comment.</p>

<p><i>Subsection (1)(a) should be clarified by adding, at the end, “in Washington.” In subsection (1)(b), the current text should be replaced with the following: “A registered eligible captive insurer may not provide direct coverage to workers for Washington risks that are governed by Title 51 RCW, but it may indemnify a self-insured employer for the employer’s liability to such workers. A registered eligible insurer may provide direct coverage to workers for risks governed by federal law if the registered eligible insurer is authorized by federal law to provide such coverage.”</i></p>	<p>This comment communicates concerns with the insurance limitations placed on captive insurers.</p> <p>The concern communicated in this comment alludes to the goals of these regulations, in preventing registered eligible captive insurers from providing direct coverage to workers for Washington risks that are under Title 51 RCW.</p> <p>However, a recent technical revision to the rules provides additional clarity and information in this area of insurance limitations.</p> <p>(b) A registered eligible captive insurer may not provide workers' compensation coverage subject to Title 51 RCW that directly covers the worker. A registered eligible captive insurer may indemnify a self-insured employer for their state workers' compensation liability.</p>
<p>Comment Submission – <i>Taxes: In WAC 284-201-240(4) and (5), “form” should replace “method.”</i></p> <p><i>The first sentence of WAC 284-201-240(5) does not provide an end date and does not address captives consistently. It should be rewritten as follows: “Eligible captive insurers that insured Washington risk for any period between January 1, 2011, and January 1, 2021, must remit a two percent tax on premiums for insurance directly procured by and provided to their parents or other affiliates for Washington risks, if not previously remitted to the commissioner.”</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The agency selected the term ‘method’ over the word ‘form’ as the term best describes the process that will be used for captive insurance tax processing.</p> <p>The comment requests an end date which is not contained in the new laws and is not possible to promulgate via rulemaking.</p>
<p>Comment Submission – <i>Administration: WAC 284-201-250(2)(d) should be streamlined and clarified as follows: “The commissioner may deny the registration or renewal of registration of a captive insurer that fails to meet the requirements in RCW 48.201.020 and 48.201.030 and this chapter.”</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The comment requests for streamlined revisions, which would eliminate language indicating the Commissioner’s determination. The revisions would also include changing the term demonstrate to meet.</p> <p>The current rules adequately and accurately communicate the appropriate decisionmaker, as well as the legal thresholds required in such determinations.</p>
<p>Comment Submission – <i>Adjudicative proceedings. WAC 284-201-300(2) should be clarified by restating the concluding words as follows: “. . . are contained in WAC 284-02-270 and in chapters 48.04 and 34.05 RCW.”</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>The rules outline which authorities will apply for adjudicative proceedings, including correct legal citations and accurate authorities.</p>
<p>Comment Submission – <i>The NRRRA limits the authority to regulate the placement of nonadmitted insurance to the insured’s home state. Since Washington will not be a domiciliary state for captives, this would mean captives would only be subject to their home state’s authorities/regulations. The commenter has taken issue with proposed rules in WAC 284-201-130(2) and WAC 284-201-250(2)(b).</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>WAC 284-201-130(2) – Defines eligible captive insurer, as having the same meaning as set forth in Chapter 48.201 RCW.</p> <p>WAC 284-201-250(2)(b) – Establishes that captives who are not eligible for registration, but have insured risks in Washington, will be subject to the authorities for unauthorized insurers (RCW 48.15.020).</p>

	<p>These captive provisions are provided by law. The commenter has requested changes that would take legislation to accomplish.</p> <p>The legislative history suggests that the NRRA was not intended to apply to captives and states are taking differing positions in interpreting/implementing the NRRA with captive insurance.</p> <p>Washington’s nonadmitted insurance tax law is to tax only Washington State situated risks insured by captives licensed outside of the state. Washington State imposes the taxes not on the insureds, but on the captive insurers, who insure Washington risks.</p>
<p>Comment Submission – <i>The proposed rules would be prohibited by the precedent established by the Todd Shipyards case. This case established legal thresholds for taxing insurance transactions by determining the defining measure of success for requisite minimum contacts with taxing states in insurance transactions. The Supreme Court held that the insurance transactions in this case took place entirely outside of Texas, and since the insurer had neither an office nor an agent in Texas, there were not sufficient contacts with the state to justify taxation.</i></p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p> <p>Washington’s captive laws have been drafted to establish sufficient minimum contacts with the state, so as to allow taxation under the precedent of the Todd Shipyards case. The laws have been drafted to achieve additional contacts with the state that were not present in the Todd Shipyards case. For example, an eligible captive insurer must have one or more of its insured with their principal place of business in Washington (RCW 48.201.020(5)(c)).</p>
<p>Comment communicates that there are no objections with the proposed rules, and an understanding of the exemption under law, preventing taxes on premiums from being imposed on or collected from an eligible captive insurer affiliated with a public institution of higher education.</p>	<p>Comment in response to CR-102, reviewed with no resulting changes to the rules.</p>

The OIC has carefully considered all comments and feedback received, and believes the current version of the proposed regulations contained in the attached filing documents will best implement Chapter 48.201 RCW, Captive Insurance, for all affected parties.

Section 6: Implementation Plan

A. Implementation and enforcement of the rule.

After the permanent rule is filed and adopted with the Office of the Code Reviser:

- Policy staff will distribute copies of the final rule and the Concise Explanatory Statement to all interested parties through the State’s Gov Delivery email system.
- The CR-103 documents and adopted permanent rule will be posted on the Office of the Insurance Commissioner’s website.
- Company Licensing will engage in implementation related to registering captive insurers. Fiscal will be involved in implementation efforts for taxation requirements related to captive insurers. Legal Affairs will enforce the resulting captive insurance regulations.

B. How the Agency intends to inform and educate affected persons about the rule.

Type of Inquiry	Division
Consumer assistance	Consumer Advocacy
Taxes	Operations
Rule content	Policy
Authority for rules	Policy
Enforcement of rule	Company Supervision and Legal Affairs
Market Compliance	Company Supervision

- **Unable to locate answers – Connect with Us - use this link (<https://www.insurance.wa.gov/connect-us>).**

C. How the Agency intends to promote and assist voluntary compliance for this rule.

The agency will provide instructions, guidance, and customer service to captive insurers and all affected parties.

D. How the Agency intends to evaluate whether the rule achieves the purpose for which it was adopted.

The agency will monitor eligible captive insurers to ensure statutory and regulatory duties related to registration are either met by insurers or are enforced by the Office of the Insurance Commissioner. The agency is able to query data related to eligible captive insurers and captive insurer registrations, to determine the rate of compliance. The agency will also review any feedback received from stakeholders, including consumers or insurers, on compliance with the new rules.

Appendix A

CR-102 Hearing Summary

Summarizing Memorandum

**To: Mike Kreidler
Insurance Commissioner**

**From: Michael Walker, Policy Analyst
Presiding Official, Hearing on Rule-making**

Matter No. R 2021-12

Topic of Rule-making: Captive Insurance (Chapter 48.201 RCW)

This memorandum summarizes the hearing on the above-named rule making, held on November 9, 2021, at 9:00 AM, via Zoom, over which I presided in your stead.

The following agency personnel were present:

Chief Financial Officer Stacey Warick
Company Licensing Specialist and Functional Program Analyst 4 Susan Baker
IT Business Analyst Kevin Torgerson
Insurance Enforcement Specialist, Sofia Pasarow

In attendance and testifying:

David Kenneraud

Contents of the presentations made at hearing:

David Kenneraud – Testimony mentioned it appeared or seemed as if there is some uncertainty around the concept of Washington Risks as it pertains to captive insurance. Testimony stated that the underlying law only defines Washington Risks in the context of an eligible captive insurer. Testimony requests clarification on the eligibility components for captive insurers, as well as what is meant by Washington Risks.

The hearing was adjourned.

SIGNED this 9th day of November, 2021

Michael S. Walker
Michael Walker, Presiding Official