

SENATE BILL NO. 373
INTRODUCED BY M. HALLIGAN
BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING CAPTIVE INSURANCE COMPANIES TO TRANSACT BUSINESS IN THIS STATE; PROVIDING DEFINITIONS; PROVIDING FOR LICENSING; LIMITING THE USE OF NAMES BY CAPTIVE INSURANCE COMPANIES; PROVIDING MINIMUM CAPITAL AND SURPLUS REQUIREMENTS; PROVIDING FOR FORMATION OF CAPTIVE INSURANCE COMPANIES; ESTABLISHING REQUIREMENTS FOR PAYMENT OF DIVIDENDS; PROVIDING FOR REPORTS, EXAMINATIONS, AND INVESTIGATIONS; ESTABLISHING GROUNDS FOR LICENSE SUSPENSION AND REVOCATION; CREATING A TAX ON PREMIUMS COLLECTED TO BE PAID TO THE OFFICE OF THE STATE AUDITOR AND DEPOSITED IN THE GENERAL FUND; AUTHORIZING CERTAIN INVESTMENTS FOR CAPTIVE INSURANCE COMPANIES; PROVIDING FOR REINSURANCE; EXEMPTING CAPTIVE INSURANCE COMPANIES FROM JOINING RATING ORGANIZATIONS AND CERTAIN COMPULSORY ORGANIZATIONS; PROVIDING RULEMAKING AUTHORITY; ESTABLISHING APPLICABLE LAW; AMENDING SECTION 33-2-708, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. As used in [sections 1 through 16], unless the context requires otherwise, the following definitions apply:

(1) "Affiliated company" means any company in the same corporate system as a parent, an industrial insured, or a member organization by virtue of common ownership, control, operation, or management.

(2) "Association" means any legal association of sole proprietorships, corporations, partnerships, limited liability companies, or associations that has been in continuous existence for at least 1 year, the member organizations of which collectively, or the association itself:

(a) owns, controls, or holds with power to vote all of the outstanding voting securities of an association captive insurance company incorporated as a stock insurer; or

(b) has complete voting control over an association captive insurance company incorporated as a mutual insurer.

(3) "Association captive insurance company" means any company that insures risks of the member

organizations of an association and their affiliated companies.

(4) "Captive insurance company" means any pure captive insurance company, association captive insurance company, or industrial insured captive insurance company formed or licensed under the provisions of [sections 1 through 16].

(5) "Industrial insured" means an insured:

(a) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer;

(b) whose aggregate annual premiums for insurance on all risks total at least \$25,000; and

(c) who has at least 25 full-time employees.

(6) "Industrial insured captive insurance company" means any company that insures risks of the industrial insureds that comprise the industrial insured group and their affiliated companies.

(7) "Industrial insured group" means any group of industrial insureds that collectively:

(a) owns, controls, or holds with power to vote all of the outstanding voting securities of an industrial insured captive insurance company incorporated as a stock insurer; or

(b) has complete voting control over an industrial insured captive insurance company incorporated as a mutual insurer.

(8) "Member organization" means a sole proprietorship, corporation, partnership, or association that belongs to an association.

(9) "Parent" means a corporation, partnership, or individual that directly or indirectly owns, controls, or holds with power to vote more than 50% of the outstanding voting securities of a pure captive insurance company.

(10) "Pure captive insurance company" means any company that insures risks of its parent and affiliated companies.

NEW SECTION. Section 2. Licensing -- authority. (1) A captive insurance company, when permitted by its articles of incorporation, charter, or other organizational document, may apply to the commissioner for a license to provide property and casualty insurance, except that:

(a) a pure captive insurance company may not insure any risks other than those of its parent and affiliated companies;

(b) an industrial insured captive insurance company may not insure any risks other than those of the industrial insureds that comprise the industrial insured group and their affiliated companies;

(c) an association captive insurance company may not insure any risks other than those of the member

organizations of its association or their affiliated companies; and

(d) a captive insurance company may not:

(i) provide personal lines of insurance, including but not limited to motor vehicle or homeowner's insurance coverage or any component of those coverages;

(ii) accept or cede reinsurance except as provided in [section 12];

(iii) provide health or disability insurance or life insurance; or

(iv) provide workers compensation insurance in any manner or form.

(2) A captive insurance company may not do any insurance business in this state unless:

(a) it first obtains from the commissioner a license authorizing it to do insurance business in this state;

(b) its board of directors holds at least one meeting each year in this state; and

(c) it maintains its principal place of business in this state.

(3) (a) Before receiving a license, a captive insurance company shall:

(i) file with the commissioner a certified copy of its charter and bylaws, a statement under oath of its president and secretary showing its financial condition, and any other statements or documents required by the commissioner; and

(ii) submit to the commissioner for approval a description of the coverages, deductibles, coverage limits, and rates, together with any additional information that the commissioner may reasonably require.

(b) In the event of any subsequent material change in any item in the description provided for in subsection (3)(a)(ii), the captive insurance company shall submit to the commissioner for approval an appropriate revision and may not offer any additional kinds of insurance until a revision of the description is approved by the commissioner. The captive insurance company shall inform the commissioner of any change in rates within 30 days of the adoption of the change.

(c) In addition to the information required by subsections (3)(a) and (3)(b), each applicant captive insurance company shall file with the commissioner evidence of the following:

(i) the amount and liquidity of its assets relative to the risks to be assumed;

(ii) the adequacy of the expertise, experience, and character of the person or persons who will manage it;

(iii) the overall soundness of its plan of operation;

(iv) the adequacy of the loss prevention programs of its parent, member organizations, or industrial insureds as applicable; and

(v) any other factors considered relevant by the commissioner in ascertaining whether the proposed

captive insurance company will be able to meet its policy obligations.

(d) Information submitted pursuant to this subsection (3) must remain confidential and may not be made public by the commissioner or an employee or agent of the commissioner without the written consent of the company, except that:

(i) the information may be discoverable by a party in a civil action or contested case to which the captive insurance company that submitted the information is a party, upon a showing by the party seeking to discover the information that the information sought is relevant to and necessary for the furtherance of the action or case, the information sought is unavailable from other nonconfidential sources, and a subpoena issued by a judicial or administrative officer of competent jurisdiction has been submitted to the commissioner;

(ii) the commissioner may, in the commissioner's discretion, disclose the information to a public officer having jurisdiction over the regulation of insurance in another state or to a public official of the federal government, as long as the public official agrees in writing to maintain the confidentiality of the information and the laws of the state in which the public official serves, if applicable, require the information to be and to remain confidential.

(4) (a) Each captive insurance company shall pay to the commissioner a nonrefundable fee of \$200 for the examining, investigating, and processing of its application for license, and the commissioner is authorized to retain legal, financial, and examination services from outside the department, the reasonable cost of which may be charged to the applicant.

(b) The provisions of Title 33, chapter 1, part 4, apply to examinations, investigations, and processing conducted under the authority of this section. In addition, each captive insurance company shall pay a license fee for the year of registration and a renewal fee for each subsequent year of \$300.

(5) If the commissioner is satisfied that the documents and statements that the applicant captive insurance company has filed comply with the provisions of [sections 1 through 16] and applicable provisions of Title 33, the commissioner may grant a license authorizing the company to do insurance business in this state. The license is effective until March 1 of each year and may be renewed upon proper compliance with [sections 1 through 16].

NEW SECTION. Section 3. Names of captive insurance companies. A captive insurance company may not adopt a name that is the same, deceptively similar, or likely to be confused with or mistaken for any other existing business name registered in the state of Montana.

NEW SECTION. Section 4. Minimum capital surplus -- letter of credit. (1) A captive insurance company may not be issued a license unless it possesses and maintains unimpaired paid-in capital and surplus of:

- (a) in the case of a pure captive insurance company, not less than \$250,000;
- (b) in the case of an industrial insured captive insurance company, not less than \$500,000; and
- (c) in the case of an association captive insurance company, not less than \$750,000.

(2) The commissioner may require additional capital and surplus based upon the type, volume, and nature of insurance business transacted.

(3) Capital and surplus may be in the form of cash or an irrevocable letter of credit issued by a bank chartered by the state of Montana or a member bank of the federal reserve system and approved by the commissioner.

NEW SECTION. Section 5. Formation of captive insurance companies. (1) A pure captive insurance company must be incorporated as a stock insurer with its capital divided into shares and held by the stockholders.

(2) An association captive insurance company or an industrial insured captive insurance company may be:

- (a) incorporated as a stock insurer with its capital divided into shares and held by the stockholders; or
- (b) incorporated as a mutual insurer without capital stock, the governing body of which is elected by the member organizations of its association or associations.

(3) A captive insurance company incorporated or organized in this state may not have less than three incorporators, at least one of whom must be a resident of this state.

(4) (a) A captive insurance company shall deliver to the commissioner a draft of its proposed articles of incorporation. The commissioner shall examine the proposed articles of incorporation, and if the commissioner finds that the proposed articles comply with [sections 1 through 16] and the applicable provisions of Title 33, the commissioner shall approve, in writing, the draft articles.

(b) If the commissioner finds that the proposed articles of incorporation of the captive insurance company do not meet the requirements of the applicable laws, including but not limited to 33-2-112, the commissioner shall refuse to approve the draft of the articles of incorporation and shall return the draft to the proposed incorporators, together with a written statement explaining the refusal.

(c) The commissioner shall forward an approved draft of articles of incorporation to the proposed incorporators. The incorporators shall prepare two sets of the approved articles of incorporation and shall file one

set of articles of incorporation with the secretary of state as required by the applicable law and one set with the commissioner.

(5) The capital stock of a captive insurance company incorporated as a stock insurer may be authorized with no par value.

(6) At least one of the members of the board of directors of a captive insurance company must be a resident of this state.

(7) (a) A captive insurance company has the privileges and is subject to the provisions of general corporation law, as well as the applicable provisions contained in [sections 1 through 16].

(b) In the event of conflict between the provisions of general corporation law and [sections 1 through 16], the provisions of [sections 1 through 16] control.

(c) The provisions of Title 33 pertaining to mergers, consolidations, conversions, mutualizations, and redomestications apply in determining the procedures to be followed by captive insurance companies in carrying out any of those transactions.

NEW SECTION. Section 6. Dividends. (1) A captive insurance company may not pay a dividend out of, or other distribution with respect to, capital or surplus in excess of the limitations set forth in 33-2-1114 without the prior approval of the commissioner.

(2) Approval of an ongoing plan for the payment of dividends or other distributions must be conditioned upon retention, at the time of each payment, of capital surplus in excess of the amounts specified by or determined in accordance with formulas approved by the commissioner.

NEW SECTION. Section 7. Reports and statements. (1) A captive insurance company is not required to make an annual report except as provided in this section.

(2) (a) On or before March 1 of each year, each captive insurance company shall submit to the commissioner a report of its financial condition in a form and manner as required by the commissioner, verified by oath of two of its executive officers.

(b) Each captive insurance company shall report using generally accepted accounting principles, unless the commissioner requires the use of statutory accounting principles, with any necessary or useful modifications or additions required by the commissioner. The commissioner may also require the report to be supplemented by additional information.

NEW SECTION. Section 8. Examinations and investigations. (1) (a) At least once in 3 years, or more frequently if the commissioner considers it prudent, the commissioner or some competent person appointed by the commissioner shall visit each captive insurance company and thoroughly inspect and examine its affairs to ascertain its financial condition, its ability to fulfill its obligations, and whether it has complied with the provisions of [sections 1 through 16].

(b) The commissioner, upon application and in the commissioner's discretion, may enlarge the 3-year period to 5 years if the captive insurance company is:

(i) subject to a comprehensive annual audit during the 5-year period of a scope satisfactory to the commissioner; and

(ii) the audit is conducted by independent auditors approved by the commissioner.

(c) The expenses and charges of the examination must be paid to the commissioner by the company or companies examined.

(2) The provisions of Title 33, chapter 1, part 4, apply to examinations conducted under this section.

(3) Except as provided in subsection (4), all examination reports, preliminary examination reports or results, working papers, recorded information, documents, and their copies produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination made under this section are confidential, are not subject to subpoena, and may not be made public by the commissioner or an employee or agent of the commissioner without the written consent of the company or upon court order.

(4) Subsection (3) does not prevent the commissioner from using information obtained pursuant to this section in furtherance of the commissioner's regulatory authority under Title 33. The commissioner may, in the commissioner's discretion, grant access to information obtained pursuant to this section to public officers having jurisdiction over the regulation of insurance in any other state or country or to law enforcement officers of this state or any other state or agency of the federal government at any time, as long as the officers receiving the information agree in writing to hold it in a manner consistent with this section.

NEW SECTION. Section 9. Suspension or revocation of license. (1) The license of a captive insurance company doing insurance business in this state may be suspended by the commissioner for any of the following reasons:

(a) insolvency or impairment of capital or surplus;

(b) failure to meet and maintain the requirements of [section 4];

(c) refusal or failure to submit an annual report, as required by [section 7], or any other report or

statement required by law or by lawful order of the commissioner;

- (d) failure to comply with the provisions of its own charter, bylaws, or other organizational document;
- (e) failure to submit to examination or to perform any legal obligation as required by [section 8];
- (f) use of methods that, although not otherwise specifically prohibited by law, nevertheless render its operation detrimental or its condition unsound with respect to the public or to its policyholders;
- (g) failure to pay the tax provided for in [section 10]; or
- (h) failure otherwise to comply with the laws of this state.

(2) If the commissioner finds, upon examination, hearing, or other evidence, that any captive insurance company has committed any of the acts specified in subsection (1), the commissioner may suspend or revoke the company's license if the commissioner considers it in the best interest of the public or the policyholders of the captive insurance company.

NEW SECTION. Section 10. Tax on premiums collected. (1) (a) Each captive insurance company shall pay to the commissioner, on or before March 1 of each year, a tax on the direct premiums collected or contracted for on policies or contracts of insurance written by the captive insurance company in this state during the year ending December 31, after deducting from the direct premiums subject to the tax the amounts paid to policyholders as return premiums, including dividends on unabsorbed premiums or premium deposits returned or credited to policyholders.

(b) The tax on direct premiums collected in this state must be calculated as follows:

- (i) 0.4% on the first 20 million dollars;
- (ii) 0.3% on the next 20 million dollars;
- (iii) 0.2% on the next 20 million dollars; and
- (iv) 0.075% on each subsequent dollar collected.

(2) (a) Each captive insurance company shall pay to the commissioner on or before March 1 of each year a tax on assumed reinsurance premiums.

(b) A reinsurance tax does not apply to premiums for risks or portions of risks that are subject to taxation on a direct basis pursuant to subsection (1).

(c) A reinsurance premium tax is not payable in connection with the receipt of assets in exchange for the assumption of loss reserves and other liabilities of another insurer under common ownership and control if the transaction is part of a plan to discontinue the operations of the other insurer and if the intent of the parties to the transaction is to renew or maintain the business with the captive insurance company.

(d) The amount of the reinsurance tax must be calculated as follows:

- (i) 0.225% on the first 20 million dollars of assumed reinsurance premiums;
- (ii) 0.150% on the next 20 million dollars of assumed reinsurance premiums; and
- (iii) 0.050% on each subsequent dollar of assumed reinsurance premiums.

(3) If the aggregate taxes to be paid by a captive insurance company calculated under subsections (1) and (2) amount to less than \$5,000 in any year, the captive insurance company shall pay a tax of \$5,000 for that year.

(4) Two or more captive insurance companies under common ownership and control must be taxed as though they were a single captive insurance company.

(5) For the purposes of this section, "common ownership and control" means:

- (a) in the case of stock corporations, the direct or indirect ownership of 80% or more of the outstanding voting stock of two or more corporations by the same shareholder or shareholders; and
- (b) in the case of mutual corporations, the direct or indirect ownership of 80% or more of the surplus and the voting power of two or more corporations by the same member or members.

NEW SECTION. Section 11. Legal investments. (1) An industrial insured captive insurance company and an association captive insurance company shall comply with the investment requirements contained in 33-2-532, 33-2-533, Title 33, chapter 12, and the rules promulgated in accordance with these provisions. Notwithstanding any other provision of this title, the commissioner may approve the use of alternative reliable methods of valuation and rating.

(2) A pure captive insurance company is not subject to any restrictions on allowable investments, except that the commissioner may prohibit or limit any investment that threatens the solvency or liquidity of the company.

(3) Only a pure captive insurance company may make loans to its parent company or affiliates. Loans to a parent company or any affiliate may not be made without prior written approval of the commissioner and must be evidenced by a note in a form approved by the commissioner. Loans of minimum capital and surplus funds required by [section 4] are prohibited.

NEW SECTION. Section 12. Reinsurance. (1) Subject to the prior approval of the commissioner, a captive insurance company may provide reinsurance on risks ceded by any other insurer.

(2) (a) Any captive insurance company may take credit for reserves on risks or portions of risks ceded to reinsurers complying with the provisions of 33-2-1216 and 33-2-1217.

(b) Prior approval of the commissioner is required for ceding or taking credit for reserves on risks or portions of risks ceded to reinsurers not complying with 33-2-1216 and 33-2-1217.

(3) (a) In addition to the credit allowed to reinsurers in 33-2-1216 and 33-2-1217, a captive insurance company may, if approved by the commissioner, take credit for reserves on risks or portions of risks ceded to a pool, exchange, or association acting as a reinsurer that has been authorized by the commissioner.

(b) The commissioner may require any documents, financial information, or other evidence that a pool, exchange, or association will be able to provide adequate security for its financial obligations.

(c) The commissioner may deny authorization or impose any limitations on the activities of a reinsurance pool, exchange, or association that, in the commissioner's judgment, are necessary and proper to provide adequate security for the ceding captive insurance company and for the protection and consequent benefit of the public at large.

NEW SECTION. Section 13. Rating organizations. A captive insurance company is not required to join a rating organization.

NEW SECTION. Section 14. Exemption from compulsory organizations. A captive insurance company may not join or contribute financially to any plan, pool, association, or guaranty or insolvency fund in this state, and a captive insurance company, its insureds, its parent, any affiliated company, or any member organization of an association may not receive any benefit from the plan, pool, association, or guaranty or insolvency fund for claims arising out of the operations of the captive insurance company.

NEW SECTION. Section 15. Rules. The commissioner may adopt rules necessary to implement the provisions of [sections 1 through 16]. The rules may include but are not limited to rules relating to forms, payment of fees, licensing, capital and surplus, formation of companies, reports, examinations, investigations, and suspension and revocation of licenses.

NEW SECTION. Section 16. Applicable laws. (1) The provisions relating to supervision, rehabilitation, and liquidation of insurance companies as provided for in Title 33, chapter 2, part 13, and the provisions of 33-18-201 and 33-18-242 apply to captive insurance companies.

(2) [Sections 1 through 16] may not be construed as exempting a captive insurance company, its parent, or affiliated companies from compliance with the laws governing workers' compensation insurance.

(3) Except as expressly provided in [sections 1 through 16], the provisions of Title 33 do not apply to captive insurance companies.

Section 17. Section 33-2-708, MCA, is amended to read:

"33-2-708. Fees and licenses. (1) (a) Except as provided in 33-17-212(2), the commissioner shall collect a fee of \$1,900 from each insurer applying for or annually renewing a certificate of authority to conduct the business of insurance in Montana.

(b) The commissioner shall collect certain additional fees as follows:

(i) nonresident insurance producer's license:

(A) application for original license, including issuance of license, if issued 100.00

(B) annual renewal of license 10.00

(ii) surplus lines insurance producer license:

(A) application for original license and for issuance of license, if issued 50.00

(B) annual renewal of license 50.00

(iii) 50 cents for each page for copies of documents on file in the commissioner's office.

(2) (a) The commissioner shall charge a fee of \$75 for each course or program submitted for review as required by 33-17-1204 and 33-17-1205, but may not charge more than \$1,500 to a sponsoring organization submitting courses or programs for review in any biennium.

(b) Insurers and associations composed of members of the insurance industry are exempt from the charge in subsection (2)(a).

(3) The commissioner shall promptly deposit with the state treasurer to the credit of the general fund all fines and penalties and those amounts received pursuant to 33-2-311, 33-2-705, ~~and 33-2-706,~~ and [section 10]. All other fees collected by the commissioner pursuant to Title 33 and the rules adopted under Title 33 must be deposited in the state special revenue fund to the credit of the state auditor's office.

(4) All fees are considered fully earned when received. In the event of overpayment, only those amounts in excess of \$10 will be refunded."

NEW SECTION. **Section 18. Codification instruction.** [Sections 1 through 16] are intended to be codified as an integral part of Title 33, and the provisions of Title 33 apply to [sections 1 through 16].

NEW SECTION. **Section 19. Effective date.** [This act] is effective July 1, 2001.

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