

111TH CONGRESS
2D SESSION

H. R. 4802

To modernize the Liability Risk Retention Act of 1986 and expand coverage to include commercial property insurance, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 2010

Mr. MOORE of Kansas (for himself, Mr. CAMPBELL, and Ms. KOSMAS) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To modernize the Liability Risk Retention Act of 1986 and expand coverage to include commercial property insurance, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Risk Retention Mod-
5 ernization Act of 2010”.

1 **SEC. 2. OVERSIGHT OF COMPLIANCE WITH PREEMPTION**
2 **OF STATE LAW UNDER THE LIABILITY RISK**
3 **RETENTION ACT OF 1986.**

4 The Liability Risk Retention Act of 1986 (15 U.S.C.
5 3901 et seq.) is amended by adding at the end the fol-
6 lowing new section:

7 “OVERSIGHT OF COMPLIANCE WITH PREEMPTION OF
8 STATE LAW

9 “SEC. 8. (a) SURVEY.—The Secretary of the Treas-
10 ury shall survey and evaluate the extent to which States
11 are in compliance with the prohibition under this Act of
12 State regulation of risk retention groups and purchasing
13 groups that are not domiciliaries of such State and peri-
14 odically submit to the President and Congress reports on
15 such compliance.

16 “(b) DISPUTES.—In any dispute in which an issue
17 arises of whether this Act preempts the regulation of a
18 risk retention group or purchasing group by a State, any
19 party to the dispute may make a written submission to
20 the Secretary of the Treasury to request a determination
21 as to whether the regulation at issue is preempted by this
22 Act.

23 “(c) STANDARD.—The Secretary of Treasury may
24 only issue a determination under paragraph (b) that the
25 regulation at issue is preempted by this Act if the regula-

tion imposes a requirement upon the risk retention group that is inconsistent with the provisions of this Act.

“(d) REGULATIONS, POLICIES, AND PROCEDURES.—Not later than 90 days after the effective date in section 11 of the Risk Retention Modernization Act of 2010, the Secretary of the Treasury shall publish in the Federal Register final regulations, policy statements, guidelines, or procedures to implement this section.

“(e) APPLICABILITY OF ADMINISTRATIVE PROCEDURES ACT.—Determinations issued pursuant to subsection (b) shall be subject to the applicable provisions of subchapter II of chapter 5 of title 5, United States Code (relating to administrative procedure).

“(f) JUDICIAL REVIEW.—Any party to the dispute may seek review of a final order of the Secretary of the Treasury under subsection (b) in the United States Court of Appeals for the District of Columbia Circuit.”.

SEC. 3. CORPORATE GOVERNANCE STANDARDS.

The Liability Risk Retention Act of 1986 (15 U.S.C. 3901 et seq.), as amended by section 2 of this Act, is further amended by adding at the end the following new section:

“CORPORATE GOVERNANCE STANDARDS

“SEC. 9.

“(a) GOVERNANCE STANDARDS.—The Secretary of the Treasury shall, not later 30 days after the effective

1 date in section 11 of the Risk Retention Modernization
2 Act of 2010, issue corporate governance standards for risk
3 retention groups, which shall include requirements that—

4 “(1) the governing body of a risk retention
5 group shall at all times include a majority of inde-
6 pendent directors;

7 “(2) any material relationship between a direc-
8 tor of a risk retention group and a service provider
9 shall—

10 “(A) be documented by a written contract
11 that—

12 “(i) is for a term of not more than 5
13 years; and

14 “(ii) may be terminated at any time
15 for cause after providing reasonable notice
16 as set forth in the contract;

17 “(B) be approved upon commencement and
18 upon any renewal by a majority of the inde-
19 pendent directors of a risk retention group; and

20 “(C) be approved by the insurance com-
21 missioner of the State in which such service
22 provider is chartered;

23 “(3) unless the insurance commissioner of the
24 State in which the risk retention group is chartered
25 permits the governing body of a risk retention group

1 to exercise the function as a whole, such risk reten-
2 tion group shall have an audit committee of its gov-
3 erning body with a written charter defining the pur-
4 poses of the committee, which shall include—

5 “(A) providing oversight of—

6 “(i) the integrity of financial state-
7 ments;

8 “(ii) compliance with legal and regu-
9 latory requirements;

10 “(iii) the qualifications, independence,
11 and performance of auditors and actuaries;
12 and

13 “(iv) the performance of service pro-
14 viders; and

15 “(B) reviewing the annual audited finan-
16 cial statements and quarterly statements with
17 the management of the risk retention group;

18 “(C) reviewing the annual audited financial
19 statements with the auditor of the risk reten-
20 tion group and, if advisable, reviewing quarterly
21 financial statements with such auditor;

22 “(D) establishing policies with respect to
23 risk assessment and risk management;

24 “(E) meeting separately and periodically,
25 either directly or through designated represent-

1 atives of the committee, with the management
2 and auditor of the risk retention group;

3 “(F) reviewing with the auditor of the risk
4 retention group any audit problems or difficul-
5 ties and the response to such problems or dif-
6 ficulties by the management of the risk reten-
7 tion group;

8 “(G) establishing clear policies regarding
9 the hiring of employees or former employees of
10 the current or former auditor of the risk reten-
11 tion group;

12 “(H) requiring, through contract or nego-
13 tiation, the auditor of the risk retention group
14 to rotate partners with primary responsibility
15 for the audit of the risk retention group and
16 the partner responsible for reviewing such
17 audit, in order to assure that no individual per-
18 forms these services for more than five consecu-
19 tive years; and

20 “(I) reporting regularly on the foregoing
21 matters to the governing body of the group;

22 “(4) a risk retention group shall adopt and pro-
23 vide upon request to the members of such risk reten-
24 tion group governance standards that address—

1 “(A) the means of providing evidence of
2 each the ownership interest of each member of
3 the risk retention group;

4 “(B) the process by which the governing
5 body of the risk retention group is elected by
6 the members of the risk retention group;

7 “(C) qualification standards for and re-
8 sponsibilities of directors of the risk retention
9 group;

10 “(D) access to the management and inde-
11 pendent advisors of the risk retention group by
12 the directors of the risk retention group;

13 “(E) compensation of directors of the risk
14 retention group, if any;

15 “(F) orientation and education of directors
16 of the risk retention group;

17 “(G) succession of management of the risk
18 retention group; and

19 “(H) annual performance evaluations of
20 the management, officers, and members of the
21 risk retention group by the governing body of
22 the risk retention group;

23 “(5) a risk retention group shall adopt a code
24 of business conduct and ethics applicable to direc-

tors, officers, and employees of the risk retention group that address—

“(A) conflicts of interest;

“(B) corporate opportunities;

“(C) confidentiality;

“(D) fair dealing;

“(E) protection and proper use of the assets of the risk retention group;

“(F) compliance with applicable laws and regulations; and

“(G) reporting of any illegal or unethical behavior which affects the operation of the risk retention group; and

“(6) any manager or chief executive officer of a risk retention group shall promptly notify the domestic regulator in writing if either becomes aware of any material noncompliance with any governance standard required by this section, if such noncompliance is not cured within a reasonable period from detection not to exceed 60 days.

“(b) DEFINITIONS.—In this section:

“(1) AUDITOR.—The term ‘auditor’ means the person providing certification of the annual financial statement of a risk retention group provided to a State in section 3(d)(3).

1 “(2) DIRECTOR.—The term ‘director’ means a
2 member of the governing body of a risk retention
3 group.

4 “(3) INDEPENDENT DIRECTOR.—The term
5 ‘independent director’ means a director of a risk re-
6 tention group that the governing body of such risk
7 retention group determines has no material relation-
8 ship with—

9 “(A) such risk retention group;

10 “(B) a member of such risk retention
11 group; or

12 “(C) an officer, director, or employee of
13 such member.

14 “(4) MATERIAL RELATIONSHIP.—The term
15 ‘material relationship’ means a relationship between
16 an entity or an individual and a risk retention group
17 where such entity or individual, or a member of the
18 immediate family of such individual or any business
19 with which such individual or entity is affiliated, re-
20 ceives compensation or payment from such risk re-
21 tention group during any 12-month period in an
22 amount of—

23 “(A) 5 percent or more of the gross writ-
24 ten premiums of such risk retention group for
25 such 12-month period; or

1 “(B) 2 percent or more of the surplus of
2 such risk retention group as measured at the
3 end of any fiscal quarter falling within such 12-
4 month period.

5 “(5) MEMBER.—The term ‘member’ means a
6 person or entity that—

7 “(A) is insured by a risk retention group;
8 and

9 “(B) maintains an ownership interest in
10 such risk retention group in accordance with
11 the laws of the State in which such risk reten-
12 tion group is domiciled.

13 “(6) SERVICE PROVIDER.—The term ‘service
14 provider’ means—

15 “(A) a provider of regular ongoing insur-
16 ance, corporate, or regulatory services to a risk
17 retention group, including management compa-
18 nies, auditors, accountants, actuaries, invest-
19 ment advisors, lawyers, manager general under-
20 writers, and any other parties responsible for
21 underwriting, determining rates, collecting pre-
22 miums, adjusting and settling claims or the
23 preparation of financial statements;

24 “(B) does not include defense counsel re-
25 tained by a risk retention group to defend

1 claims, unless the amount of fees paid to such
2 counsel would otherwise result in it having a
3 material relationship with the risk retention
4 group.

5 “(c) SUPERSEDURE.—

6 “(1) IN GENERAL.—The provisions of this sec-
7 tion shall supersede any State law relating to the
8 corporate governance standards required for risk re-
9 tention groups and purchasing groups.

10 “(2) DEFINITIONS.—In this subsection:

11 “(A) STATE.—The term ‘State’ includes a
12 State and the District of Columbia, any polit-
13 ical subdivisions thereof, and any agency or in-
14 strumentality of a State.

15 “(B) STATE LAW.—The term ‘State law’
16 includes all laws, decisions, rules, regulations,
17 or other State action having the effect of law,
18 of any State.”.

19 **SEC. 4. COMMERCIAL PROPERTY INSURANCE.**

20 The Liability Risk Retention Act of 1986 (15 U.S.C.
21 3901 et seq.) is further amended—

22 (1) in section 2 (15 U.S.C. 3901)—

23 (A) in subsection (a)—

24 (i) in paragraph (4)—

1 (I) in subparagraph (C)(i) by
2 striking “a liability” and inserting
3 “an”; and

4 (II) in subparagraph (G)(i), by
5 inserting “or commercial property”
6 after “liability”;

7 (ii) in paragraph (5)(A), by inserting
8 “or commercial property” after “liability”;
9 (iii) in paragraph (6), by striking
10 “and” at the end;

11 (iv) in paragraph (7)(B), by striking
12 the final period and inserting “; and”; and

13 (v) by adding at the end the following
14 new paragraph:

15 “(8) ‘commercial property insurance’ means in-
16 surance that indemnifies a business, nonprofit orga-
17 nization, or governmental entity for damage to, theft
18 of, or destruction of real property or business prop-
19 erty, owned by or leased to such business, nonprofit
20 organization, or governmental entity, including in-
21 surance that indemnifies a business, nonprofit orga-
22 nization, or governmental entity for damage to, theft
23 of, or destruction of furniture, fixtures, and inven-
24 tory, from any and all perils or causes of loss and
25 against consequential loss or damage, including busi-

1 ness interruption, other than noncontractual legal li-
 2 ability for such loss or damage.”; and

3 (B) in subsection (b), by inserting “, com-
 4 mercial property” after “of liability”;
 5 (2) in section 3 (15 U.S.C. 3902)—

6 (A) in subsection (a)(1)(C), by inserting
 7 “or commercial property” after “liability”;

8 (B) in subsection (b), by inserting “or
 9 commercial property” after “liability” each
 10 place it appears; and

11 (C) in subsection (d)(1)(B), by inserting
 12 “or commercial property” after “liability”;

13 (3) in section 4 (15 U.S.C. 3903)—

14 (A) in subsection (b)—

15 (i) in paragraph (1), by inserting “or
 16 commercial property” after “liability”; and

17 (ii) in paragraph (2)—

18 (I) by redesignating subpara-
 19 graphs (B) and (C) as subparagraphs
 20 (C) and (D), respectively; and

21 (II) by inserting after subpara-
 22 graph (A) the following new subpara-
 23 graph:

24 “(B) commercial property insurance;”; and

1 (B) in subsection (d)(1)(B), by inserting
2 “and commercial property” after “liability”;
3 and
4 (4) in section 6(b) (15 U.S.C. 3905(b)), by in-
5 serting “or commercial property” after “liability”
6 each place it appears.

7 **SEC. 5. FINANCIAL STATEMENTS; DISCLOSURE REQUIRE-**
8 **MENTS; FIDUCIARY DUTY; AND UNDER-**
9 **SCORING THE EXEMPTION.**

10 The Liability Risk Retention Act of 1986 is amended
11 as follows:

12 (1) FINANCIAL STATEMENTS.—In section
13 3(d)(3) (15 U.S.C. 3902(d)(3))—

14 (A) by redesignating subparagraphs (A)
15 and (B) as clauses (i) and (ii), respectively, and
16 moving the margins two ems to the right;

17 (B) by striking “which statement shall be
18 certified” and inserting “which statement
19 shall—”

20 “(A) be certified”;

21 (C) in subparagraph (A)(ii) (as designated
22 by subparagraphs (A) and (B)), by striking the
23 period and inserting a semicolon; and

24 (D) by adding at the end the following new
25 subparagraphs:

1 “(B) be filed not later than the earlier
2 of—

3 “(i) June 1, for the preceding cal-
4 endar year; and

5 “(ii) such time as the State in which
6 the risk retention group is chartered re-
7 quires; and

8 “(C) if not prepared in conformity with
9 statutory accounting principles, include appro-
10 priate notes for conversion of such statement to
11 statutory accounting principles.”.

12 (2) DISCLOSURE REQUIREMENTS.—In section 3
13 (15 U.S.C. 3902)—

14 (A) in subsection (a)(1)—

15 (i) in subparagraph (G), by striking
16 “jurisdiction;” and inserting “jurisdiction;
17 and”;

18 (ii) in subparagraph (H), by striking
19 “impaired; and” and inserting “impaired.”;
20 and

21 (iii) by striking subparagraph (I); and

22 (B) by adding at the end the following new
23 subsection:

24 “(i) Each risk retention group shall provide to each
25 member of such group, on the front page and the declara-

1 tion page of each insurance policy issued by such group,
 2 in bold 12-point or larger type, the following notice: ‘This
 3 policy is issued by your risk retention group of which you
 4 are a part owner. Your risk retention group is primarily
 5 regulated under the laws of _____ and may not
 6 be subject to all of the insurance laws and consumer pro-
 7 tections of your State. If your risk retention group fails,
 8 it may not be protected by a State insurance insolvency
 9 guaranty fund.’. The risk retention group shall insert the
 10 name of the State in which the risk retention group is
 11 chartered or licensed in place of the blank space.”.

12 (3) FIDUCIARY DUTY.—In section 3 (15 U.S.C.
 13 3902) by adding at the end the following new sub-
 14 section:

15 “(j) The board of directors of a risk retention group
 16 shall have a fiduciary duty to operate in the best interests
 17 of the group.”.

18 (4) UNDERSCORING THE EXEMPTION.—(A) in
 19 section 3 (15 U.S.C. 3902)—

20 (i) in subsection (a) in the matter pre-
 21 ceding paragraph (1), by striking “Except
 22 as provided” and inserting “Except as spe-
 23 cifically provided”; and

1 (ii) in subsection (f)(1), by inserting
 2 “or purchasing group” after “risk reten-
 3 tion group”; and

4 (B) in section 4(a) in the matter preceding
 5 paragraph (1) (15 U.S.C. 3903(a)), by striking “Ex-
 6 cept as provided” and inserting “Except as specifi-
 7 cally provided”.

8 **SEC. 6. STUDY ON UNLAWFUL STATE REGULATION OF RISK**
 9 **RETENTION GROUPS.**

10 (a) STUDY.—The Comptroller General of the United
 11 States shall conduct a study of—

12 (1) instances where nondomiciliary States at-
 13 tempt to unlawfully regulate, directly or indirectly,
 14 the operation of risk retention groups through uni-
 15 lateral “cease and desist” orders or other means;

16 (2) costs to risk retention groups associated
 17 with State actions referred to in paragraph (A)
 18 above, including but not limited to legal fees and
 19 cessation of business operations;

20 (3) the ability of risk retention groups to pay
 21 for costs associated with challenging nondomiciliary
 22 States that violate the Liability Risk Retention Act
 23 of 1986 (15 U.S.C. 3901 et seq.) by applying their
 24 laws in an extra-territorial manner; and

1 (4) possible legislative solutions that would rein-
2 force and underscore the foundation of the Liability
3 Risk Retention Act of 1986, which exempts risk re-
4 tention groups and purchasing groups from laws of
5 a State other than their chartering State, except as
6 specifically provided in the Act as well as ways to re-
7 duce or eliminate costs if a particular risk retention
8 group prevails in a State or Federal court of com-
9 petent jurisdiction.

10 (b) REPORT.—Not later than 1 year after the date
11 of the enactment of this Act, the Comptroller General shall
12 submit to the Committee on Banking, Housing, and
13 Urban Affairs of the Senate and the Committee on Finan-
14 cial Services of the House of Representatives a report con-
15 taining the results of the study under subsection (a) and
16 any recommendations for actions that Congress should
17 consider to ensure that States do not interfere with or reg-
18 ulate, directly or indirectly, risk retention groups or pur-
19 chasing groups in an extra-territorial manner precluded
20 by sections 3 and section 4 of the Liability Risk Retention
21 Act of 1986 (15 U.S.C. 3902 and 3903).

22 (c) DEFINITIONS.—In this section, the terms “risk
23 retention group” and “purchasing group” have the mean-
24 ing given such terms in section 2 of the Liability Risk
25 Retention Act of 1986 (15 U.S.C. 3901).

1 **SEC. 7. TECHNICAL CORRECTION AND AMENDMENT TO**
2 **SHORT TITLE.**

3 (a) **TECHNICAL CORRECTION.**—Section 3(a)(1) of
4 the Liability Risk Retention Act of 1986 (15 U.S.C.
5 3902(a)(1)) is amended by striking “many” and inserting
6 “any”.

7 (b) **SHORT TITLE.**—Section 1 of the Liability Risk
8 Retention Act of 1986 (15 U.S.C. 3901 note) is amended
9 by striking “Liability Risk Retention Act” and inserting
10 “Risk Retention Act”.

11 **SEC. 8. EFFECTIVE DATE.**

12 The amendments made by sections 3, 4, and 5 shall
13 take effect on the date that is 18 months after the date
14 of the enactment of this Act.

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