

112TH CONGRESS
1ST SESSION

H. R. 2126

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

JUNE 3, 2011

Mr. CAMPBELL (for himself and Mr. WELCH) 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 2011”.

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 **“SEC. 8. OVERSIGHT OF COMPLIANCE WITH PREEMPTION**
8 **OF STATE LAW.**

9 “(a) SURVEY.—The Director of the Federal Insur-
10 ance Office shall periodically survey and evaluate the ex-
11 tent to which each State is in compliance with the prohibi-
12 tion under this Act regarding State regulation of risk re-
13 tention groups and purchasing groups that are not domi-
14 ciliaries of such State and submit to the President and
15 Congress a report on 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 Director of the Federal Insurance Office to request
21 a determination as to whether the regulation at issue is
22 preempted by this Act.

23 “(c) STANDARD.—The Director of the Federal Insur-
24 ance Office may only issue a determination under sub-
25 section (b) that the regulation at issue is preempted by
26 this Act if the regulation imposes a requirement upon the

1 risk retention group that is inconsistent with the provi-
2 sions of this Act.

3 “(d) **APPLICABILITY OF ADMINISTRATIVE PROCE-**
4 **DURES ACT.**—Determinations issued pursuant to sub-
5 section (b) shall be subject to the applicable provisions of
6 subchapter II of chapter 5 of title 5, United States Code
7 (relating to administrative procedure).

8 “(e) **JUDICIAL REVIEW.**—Any party to the dispute
9 described in subsection (b) may seek review of a final
10 order of the Director of the Federal Insurance Office
11 under such subsection in the United States Court of Ap-
12 peals for the District of Columbia Circuit.

13 “(f) **REGULATIONS, POLICIES, AND PROCEDURES.**—
14 Not later than 90 days after the effective date described
15 in section 7 of the Risk Retention Modernization Act of
16 2011, the Director of the Federal Insurance Office shall
17 publish in the Federal Register final regulations, policy
18 statements, guidelines, or procedures to implement this
19 section.”.

20 **SEC. 3. CORPORATE GOVERNANCE STANDARDS.**

21 The Liability Risk Retention Act of 1986 (15 U.S.C.
22 3901 et seq.), as amended by section 2 of this Act, is fur-
23 ther amended by adding at the end the following new sec-
24 tion:

1 **“SEC. 9. CORPORATE GOVERNANCE STANDARDS.**

2 “(a) GOVERNANCE STANDARDS.—The Director of
3 the Federal Insurance Office shall, not later than 30 days
4 after the effective date described in section 7 of the Risk
5 Retention Modernization Act of 2011, issue corporate gov-
6 ernance standards for risk retention groups, which shall
7 include the following requirements:

8 “(1) The governing body of a risk retention
9 group shall at all times have a majority of inde-
10 pendent directors.

11 “(2) Any material relationship between a risk
12 retention group and a service provider shall—

13 “(A) be documented by a written contract
14 that—

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

17 “(ii) may be terminated at any time
18 for cause after providing reasonable notice
19 as set forth in the contract;

20 “(B) be approved upon commencement and
21 upon any renewal by a majority of the inde-
22 pendent directors of the risk retention group;
23 and

24 “(C) be approved by the insurance com-
25 missioner of the State in which such risk reten-
26 tion group is chartered.

1 “(3) Unless the insurance commissioner of the
2 State in which the risk retention group is chartered
3 permits the governing body of a risk retention group
4 to exercise the function as a whole, such risk reten-
5 tion group shall have an audit committee of its gov-
6 erning body with a written charter defining the pur-
7 poses of the committee, which shall include—

8 “(A) providing oversight of—

9 “(i) the integrity of financial state-
10 ments;

11 “(ii) compliance with legal and regu-
12 latory requirements;

13 “(iii) the qualifications, independence,
14 and performance of auditors and actuaries;
15 and

16 “(iv) the performance of service pro-
17 viders;

18 “(B) reviewing the annual audited finan-
19 cial statements and quarterly statements with
20 the management of the risk retention group;

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

1 “(D) establishing policies with respect to
2 risk assessment and risk management;

3 “(E) meeting separately and periodically,
4 either directly or through designated represent-
5 atives of the committee, with the management
6 and auditor of the risk retention group;

7 “(F) reviewing with the auditor of the risk
8 retention group any audit problems or difficul-
9 ties and the response to such problems or dif-
10 ficulties by the management of the risk reten-
11 tion group;

12 “(G) establishing clear policies regarding
13 the hiring of employees or former employees of
14 the current or former auditor of the risk reten-
15 tion group;

16 “(H) requiring, through contract or nego-
17 tiation, the auditor of the risk retention group
18 to rotate partners with primary responsibility
19 for the audit of the risk retention group and
20 the partner responsible for reviewing such
21 audit, in order to assure that no individual per-
22 forms these services for more than 5 consecu-
23 tive years; and

1 “(I) reporting regularly to the governing
2 body of the group regarding the matters de-
3 scribed in subparagraphs (A) through (H).

4 “(4) A risk retention group shall adopt and
5 provide upon request to the members of such risk re-
6 tention group governance standards that address—

7 “(A) the means of providing evidence of
8 the ownership interest of each member of the
9 risk retention group;

10 “(B) the process by which the governing
11 body of the risk retention group is elected by
12 the members of the risk retention group;

13 “(C) qualification standards for and re-
14 sponsibilities of directors of the risk retention
15 group;

16 “(D) access to the management and inde-
17 pendent advisors of the risk retention group by
18 the directors of the risk retention group;

19 “(E) compensation of directors of the risk
20 retention group, if any;

21 “(F) orientation and education of directors
22 of the risk retention group;

23 “(G) succession of management of the risk
24 retention group; and

1 “(H) annual performance evaluations of
2 the management and officers of the risk reten-
3 tion group by the governing body of the risk re-
4 tention group.

5 “(5) A risk retention group shall adopt a code
6 of business conduct and ethics applicable to direc-
7 tors, officers, and employees of the risk retention
8 group that addresses—

9 “(A) conflicts of interest;

10 “(B) corporate opportunities;

11 “(C) confidentiality;

12 “(D) fair dealing;

13 “(E) protection and proper use of the as-
14 sets of the risk retention group;

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

17 “(G) reporting of any illegal or unethical
18 behavior which affects the operation of the risk
19 retention group.

20 “(6) Any manager or chief executive officer of
21 a risk retention group shall promptly notify the in-
22 surance commissioner of the State in which the
23 group is chartered in writing if the manager or offi-
24 cer becomes aware of any material noncompliance
25 with any governance standard required by this sec-

1 tion and such noncompliance is not cured within a
2 reasonable period from the time it is detected, but
3 not to exceed 60 days.

4 “(b) DEFINITIONS.—In this section:

5 “(1) AUDITOR.—The term ‘auditor’ means the
6 person providing certification of the annual financial
7 statement of a risk retention group to the insurance
8 commissioner of each State as required by section
9 3(d)(3).

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

13 “(3) INDEPENDENT DIRECTOR.—The term
14 ‘independent director’ means a director of a risk re-
15 tention group that the governing body of such risk
16 retention group determines has no material relation-
17 ship with—

18 “(A) such risk retention group; or

19 “(B) a service provider of such risk reten-
20 tion group.

21 “(4) MATERIAL RELATIONSHIP.—The term
22 ‘material relationship’ means a relationship between
23 an entity or an individual and a risk retention group
24 where such entity or individual, or a member of the
25 immediate family of such individual or any business

1 with which such individual or entity is affiliated, re-
2 ceives compensation or payment from such risk re-
3 tention group during any 12-month period in an
4 amount of—

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

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

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

14 “(A) is insured by a risk retention group;
15 and

16 “(B) maintains an ownership interest in
17 such risk retention group in accordance with
18 the laws of the State in which such risk reten-
19 tion group is domiciled.

20 “(6) SERVICE PROVIDER.—

21 “(A) IN GENERAL.—The term ‘service pro-
22 vider’ means a provider of regular ongoing in-
23 surance, corporate, or regulatory services to a
24 risk retention group, including management
25 companies, auditors, accountants, actuaries, in-

1 vestment advisors, lawyers, manager general
2 underwriters, and any other parties responsible
3 for underwriting, determining rates, collecting
4 premiums, adjusting and settling claims or the
5 preparation of financial statements.

6 “(B) EXCEPTION.—The term ‘service pro-
7 vider’ does not include defense counsel retained
8 by a risk retention group to defend claims, un-
9 less the amount of fees paid to such counsel
10 would otherwise result in the counsel having a
11 material relationship with the risk retention
12 group.

13 “(c) SUPERSEDURE.—

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

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

19 “(A) STATE.—The term ‘State’ includes a
20 State and the District of Columbia, any polit-
21 ical subdivisions thereof, and any agency or in-
22 strumentality of a State.

23 “(B) STATE LAW.—The term ‘State law’
24 includes all laws, decisions, rules, regulations,

1 or other State action having the effect of law,
2 of any State.”.

3 **SEC. 4. COMMERCIAL PROPERTY INSURANCE.**

4 The Liability Risk Retention Act of 1986 (15 U.S.C.
5 3901 et seq.) is further amended—

6 (1) in section 2(a) (15 U.S.C. 3901(a))—

7 (A) in paragraph (4)—

8 (i) in subparagraph (C)(i), by striking
9 “a liability” and inserting “an”; and

10 (ii) in subparagraph (G)(i), by insert-
11 ing “or commercial property” after “liabil-
12 ity”;

13 (B) in paragraph (5)(A), by inserting “or
14 commercial property” after “liability”;

15 (C) in paragraph (6), by striking “and” at
16 the end;

17 (D) in paragraph (7)(B), by striking the
18 period at the end and inserting “; and”; and

19 (E) by adding at the end the following new
20 paragraph:

21 “(8) ‘commercial property insurance’ means in-
22 surance that indemnifies a business, nonprofit orga-
23 nization, or governmental entity for damage to, loss
24 of, theft of, or destruction of real property or busi-
25 ness property, owned by or leased to such business,

1 nonprofit organization, or governmental entity, in-
2 cluding insurance that indemnifies a business, non-
3 profit organization, or governmental entity for dam-
4 age to, loss of, theft of, or destruction of furniture,
5 fixtures, and inventory, from any and all perils or
6 causes of loss and against consequential loss or dam-
7 age, including business interruption, other than non-
8 contractual legal liability for such loss or damage.”;

9 (2) in section 3 (15 U.S.C. 3902)—

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

12 (B) in subsection (b)(2), by inserting “or
13 commercial property” after “liability” each
14 place it appears; and

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

17 (3) in section 4 (15 U.S.C. 3903)—

18 (A) in subsection (b)—

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

21 (ii) in paragraph (2)—

22 (I) by redesignating subpara-
23 graphs (B) and (C) as subparagraphs
24 (C) and (D), respectively; and

1 (II) by inserting after subpara-
2 graph (A) the following new subpara-
3 graph:

4 “(B) commercial property insurance;”; and
5 (B) in subsection (d)(1)(B), by inserting
6 “and commercial property” after “liability”;
7 and

8 (4) in section 6(b) (15 U.S.C. 3905(b)), by in-
9 serting “or commercial property” after “liability”
10 each place it appears.

11 **SEC. 5. FINANCIAL STATEMENTS; DISCLOSURE REQUIRE-**
12 **MENTS; FIDUCIARY DUTY; AND UNDER-**
13 **SCORING THE EXEMPTION.**

14 The Liability Risk Retention Act of 1986 (15 U.S.C.
15 3901 et seq.) is amended as follows:

16 (1) FINANCIAL STATEMENTS.—In section
17 3(d)(3) (15 U.S.C. 3902(d)(3))—

18 (A) by redesignating subparagraphs (A)
19 and (B) as clauses (i) and (ii), respectively, and
20 moving the margins two ems to the right;

21 (B) by striking “which statement shall be
22 certified” and inserting “which statement
23 shall—”

24 “(A) be certified”;

1 (C) in subparagraph (A)(ii) (as redesignated by subparagraph (A)), by striking the period and inserting a semicolon; and

2
3
4 (D) by adding at the end the following new subparagraphs:

5
6 “(B) be filed not later than the earlier of—

7
8 “(i) June 30, for the preceding calendar year; or

9
10 “(ii) such time as the State in which the risk retention group is chartered requires; and

11
12
13 “(C) if not prepared in conformity with statutory accounting principles, include appropriate notes for conversion of such statement to statutory accounting principles.”.

14
15
16
17 (2) DISCLOSURE REQUIREMENTS.—In section 3
18 (15 U.S.C. 3902)—

19 (A) in subsection (a)(1)—

20 (i) in subparagraph (G), by striking
21 “jurisdiction;” and inserting “jurisdiction;
22 and”;

23 (ii) in subparagraph (H), by striking
24 “impaired; and” and inserting “impaired.”;
25 and

1 (iii) by striking subparagraph (I); and
2 (B) by adding at the end the following new
3 subsection:

4 “(i) DISCLOSURE REQUIREMENTS.—Each risk reten-
5 tion group shall provide to each member of such group,
6 on the front page and the declaration page of each insur-
7 ance policy issued by such group, in bold 12-point or larg-
8 er type, the following notice: ‘This policy is issued by your
9 risk retention group of which you are a part owner. Your
10 risk retention group is primarily regulated under the laws
11 of _____ and may not be subject to all of the in-
12 surance laws and consumer protections of your State. If
13 your risk retention group fails, it is not protected by a
14 State insurance insolvency guaranty fund.’. The risk re-
15 tention group shall insert the name of the State in which
16 the risk retention group is chartered or licensed in place
17 of the blank space.”.

18 (3) FIDUCIARY DUTY.—In section 3 (15 U.S.C.
19 3902), as amended by paragraph (2), by adding at
20 the end the following new subsection:

21 “(j) FIDUCIARY DUTY.—The board of directors of a
22 risk retention group shall have a fiduciary duty to operate
23 in the best interests of the group.”.

24 (4) UNDERSCORING THE EXEMPTION.—

1 (A) RISK RETENTION GROUPS.—In section
2 3 (15 U.S.C. 3902)—

3 (i) in subsection (a) in the matter pre-
4 ceding paragraph (1), by striking “Except
5 as provided” and inserting “Except as spe-
6 cifically provided”; and

7 (ii) in subsection (f)(1), by inserting
8 “or purchasing group” after “risk reten-
9 tion group”.

10 (B) PURCHASING GROUPS.—In section
11 4(a) (15 U.S.C. 3903(a)), in the matter pre-
12 ceding paragraph (1), by striking “Except as
13 provided” and inserting “Except as specifically
14 provided”.

15 (5) FINANCIAL RESPONSIBILITY.—Section 6(d)
16 (15 U.S.C. 3905(d)) is amended by adding at the
17 end the following: “Such means may not include re-
18 quirements that risk retention groups be licensed or
19 admitted by that State as a demonstration of finan-
20 cial responsibility.”.

21 **SEC. 6. AMENDMENT TO SHORT TITLE.**

22 Section 1 of the Liability Risk Retention Act of 1986
23 (15 U.S.C. 3901 note) is amended by striking “Liability
24 Risk Retention Act of 1986” and inserting “Risk Reten-
25 tion Act of 1986”.

1 **SEC. 7. EFFECTIVE DATE.**

2 The amendments made by sections 2, 3, 4, and 5
3 shall take effect on the date that is 18 months after the
4 date of the enactment of this Act.

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