



MAY 2005

WEST VIRGINIA INFORMATIONAL LETTER

No. 152

**TO: All Insurance Companies Licensed to Do Business in the State of West Virginia, Insurance Trade Associations, Insurance Media Publications and Other Interested Persons**

**RE: Summary of 2005 Legislation**

The purpose of this Informational Letter is to summarize significant insurance legislation enacted during the 2005 Regular Session of the West Virginia Legislature. This letter does not necessarily include all legislation that may affect the insurance industry or insurance consumers and is only intended to highlight the major points in the more important bills. The explanations contained herein should in no way be construed as being indicative of the Insurance Commissioner's views on or interpretation of the legislation.

To view the following bills, you may access the website of the West Virginia Legislature at [www.legis.state.wv.us](http://www.legis.state.wv.us). To obtain a copy of particular legislation, please contact the West Virginia Legislature, Senate Clerk's Office at (304) 357-7800, or House Clerk's Office at (304) 340-3200, Main Unit, State Capitol, Charleston, West Virginia 25305. The rules may be viewed on the Insurance Commissioner's website at [www.wvinsurance.gov](http://www.wvinsurance.gov) or the Secretary of State's website at [www.wvsos.com](http://www.wvsos.com).

***Senate Bill 30 – Discontinuing use of prior approval system of insurance rate and form filing; other provisions (effective July 8, 2005)***

Nonrenewal of property policies -- The bill would extend a nonrenewal option to property insurers similar to that applied to automobile nonrenewals last year. The current method of nonrenewal would remain an option, and insurers electing to remain with this method would be permitted to use as an additional basis for nonrenewal of a property insurance policy two or more paid claims occurring under that policy within thirty-six (36) months.

An insurer electing the alternative method would be able to refuse to renew a policy for any reason "consistent with its underwriting standards," as long as the decision is not made for an unlawfully discriminatory reason. Under the alternative method, an insurance company could only non-renew up to 1% of its total property policies statewide and only 1% in each county (but at least one policy per county) each year. The non-renewal notice must give the insured notice of the specific reasons for non-renewal and of

his or her right to a hearing before the Commissioner to determine whether the company's action was based on an unlawfully discriminatory reason or on an invalid underwriting basis, whether the notice was deficient or whether the 1% limit had been exceeded.

Insurers electing the new alternative method will be bound to such election for at least five years and will be required to file copies of their underwriting standards with the Commissioner; these standards will be confidential and exempt from FOIA disclosure. The Insurance Commission is required to file a report with the Legislature by July 1, 2010, on the impact of this law on rates and availability of insurance.

Commercial file and use -- The purpose of this portion of the bill is to permit most *commercial* insurance policy forms and rates to be used as soon as they are filed without being first approved by the Commissioner; the Commissioner, however, retains the authority to ask for more information and to disapprove any form or rate at any time. The bill does not change the requirement that medical malpractice and personal lines insurance forms and rates be approved by the Commissioner before they may be used.

Other changes – The bill corrects a mistake in the Workers' Compensation legislation enacted during the 1<sup>st</sup> Extraordinary Session that repealed a section dealing with the withdrawal of auto insurers. It also permits group health insurance policies to be issued to trusts created by associations.

***Senate Bill 253 – Permitting Insurance Commissioner to waive or reduce penalty for late filing of tax returns (effective July 1, 2005)***

An automatic penalty of \$25 is currently imposed for each day an insurer or surplus lines licensee is late in filing their tax returns with the Insurance Commissioner; for nonpayment of taxes, a daily penalty of 1% of the amount owed is imposed. Under current law, the Insurance Commissioner can reduce or waive either of these penalties only if the taxpayer is able to demonstrate that the late filing or nonpayment was *not* due to neglect on its part. This bill would permit the Commissioner to reduce or waive penalties for *late filing* on the grounds of “excusable neglect.” The waiver rule as to nonpayment, however, is unchanged.

***Senate Bill 254 – Relating to reinsurance intermediaries (effective July 8, 2005)***

This bill provides a detailed application process for the licensing of persons or entities as reinsurance intermediary (“RI”) brokers and RI-managers; licensed producers will continue to be able to act as RI-Brokers or RI-managers without meeting any additional requirements or paying any additional fees. The bill specifically provides for a hearing for any applicant who is denied an RI license. An application fee (\$500) and an annual renewal fee (\$200) are added, as are other filing fees that are comparable to those charged for similar filings by other licensees.

The bill adopts the service-of-process provisions applicable to other licensed insurers and designates the Secretary of State as the agent for receipt of process. The bill also includes reciprocity provisions that mirror those for insurance producers with respect to the waiver of license requirements and the recognition of continuing education credits.

***Senate Bill 256 – Requiring insurance companies to inform policyholders if flood damage is not covered (effective July 6, 2005)***

This bill requires that an insurer issuing or renewing an insurance policy that provides coverage for the peril of fire but excludes damage that may result from a flood is to notify the applicant or policyholder that the policy does not cover flood damage (the “Flood Notice”). The statute contains the mandatory language required for the Flood Notice: **“THIS POLICY DOES NOT COVER DAMAGE FROM FLOOD. FOR INFORMATION ABOUT FLOOD INSURANCE, CONTACT THE NATIONAL FLOOD INSURANCE PROGRAM OR YOUR INSURANCE AGENT.”** The Flood Notice must be set forth in a minimum 10 point font size, in capital letters and in a commonly used font style, and it must be provided to each applicant and each policyholder annually. The method for issuing or providing the Flood Notice is not prescribed under the bill, therefore, an insurer may elect the manner in which the Flood Notice is issued or provided to each applicant and policyholder. If the Flood Notice is incorporated into a form already approved for use in West Virginia, then the insurer must file the amended form with the Rates and Forms Division of the Office of the Insurance Commission pursuant to West Virginia Code §§33-6-8 & 33-17-8. If the Flood Notice is set forth verbatim as stated in the bill and is either provided as a separate and distinct notice or embodied in a form that is not subject to review under the aforementioned code sections (billing notices, important reminders, etc.), then a filing is not required.

Any questions with respect to the above may be directed to Jack M. Rife, Director, Rates and Forms Division, Office of the Insurance Commissioner, (304) 558-2094.

***Senate Bill 357 – Authorizing Department of Revenue to promulgate legislative rules***

This bill approved the following rules in Title 114 of the Code of State Rules (each rule is effective May 6, 2005):

***Series 3 – Cancellation and Nonrenewal of Automobile Liability Policies*** – In 2004, the Legislature provided an alternative method by which an insurer could elect to base nonrenewals of automobile policies on its own underwriting standards. Under this alternative, however, the insurer is limited to nonrenewing no more than 1% of its policies in any county and statewide in any year, and any hearing requested by an insured to dispute a nonrenewal is limited to determining if the nonrenewal notice was adequate, whether the nonrenewal is discriminatory, whether the underwriting standard given as the basis for the nonrenewal violates the insurance code and whether the 1% cap has been exceeded. The rule simply revises the agency’s hearing rule to include these limitations. It also specifies that the cancellation/nonrenewal notice be written in clear language and that all automobile insurers file their underwriting standards with the Commissioner.

***Series 15 – Examiners and Examinations*** – This rule brings the Commission’s travel rules in line with those in the Governor’s office and imposes NAIC-model record-retention requirements to permit more efficient examinations.

***Series 20 – Surplus Lines Insurance*** – In 2003, the Legislature enacted a requirement that all surplus lines insurance had to be countersigned by a licensed surplus lines licensee, and this requirement was incorporated in a rule filed in 2003. In 2004, the legislature removed this requirement as of December 31, 2004, and this amendment simply reflects this change.

***Series 42 – Continuing Education for Individual Insurance Producers*** – In 2004, the Legislature changed the education requirements for individual insurance producers from twenty-four (24) hours every three years to twenty-four (24) hours every two years; the rule reflects this change. The rule also allows an individual insurance producer who is suspended for failure to meet his or her continuing education requirements to stay the effect of the suspension by timely requesting a hearing to contest the action. The rule specifically permits the Commissioner to tax costs of the proceeding – transcription, witness fees, subpoena service – to a non-prevailing producer and to penalize education providers who fail to timely submit the forms demonstrating credit granted to individuals. A hearing process is also set out for education providers to contest a fine or course disapproval.

Any questions with respect to this rule may be directed to Greg Elam, Associate Counsel, Legal Division, Office of the Insurance Commissioner, (304) 558-0401, ext. 158.

***Series 68 – Valuation of Life Insurance Policies*** – This rule provides tables of select mortality factors and rules for their use, rules for minimum standards for valuation of plans with non-level premiums or benefits and of plans with secondary guarantees, and an actuarial formula for calculating life insurance policy reserves.

***Series 69 – Recognition of the 2001 CSO Mortality Table for Use in Determining Minimum Reserve Liabilities and Nonforfeiture Benefits*** – This rule, based on an NAIC model regulation, requires the use of the 2001 revision of the 1980 CSO mortality tables after 2008.

***Series 71 – Insurance Fraud Prevention*** – The 2004 legislative session enacted the insurance fraud prevention act and required any “person engaged in the business of insurance” to report fraud to the Commissioner and provide “the information required by, and in a manner prescribed by, the commissioner.” This new rule sets out some of the specific procedures related to such reporting, such as a requirement that each insurer designate 1-4 persons to act as contacts on fraud matters. It also sets out detailed reporting requirements, e.g. that a person must report within fourteen (14) days after reaching a reasonable belief that fraud has been committed.

Any questions with respect to this rule may be directed to Greg Elam, Associate Counsel, Legal Division, Office of the Insurance Commissioner, (304) 558-0401, ext. 158.

***Series 73 – Small Employer Eligibility Requirements*** – In legislation enacted in 2004 to address the difficulty small employers have in obtaining group health coverage, the legislature mandated that rules be promulgated to prevent employers from manipulating their corporate structures in order to qualify for the lower rates available under the statutory program. This rule, which replaces the current emergency rule now in place, would require each employer seeking to participate in one of the plans to submit an affidavit designed to show that its current structure is legitimate.

***Senate Bill 418 – Providing insurance reform by expanding and providing funding and expanded powers for Office of Consumer Advocacy (effective July 8, 2005)***

This bill clarifies that there is no private cause of action under the Unfair Trade Practices Act for third-party unfair claims-settlement practices. The bill also changes the administrative process under which a claimant files a complaint for such a claim with the Insurance Commissioner. Following the effective date of the bill, complainants may recover actual economic damages as well as up to \$10,000 in non-economic damages if the insurer has committed an unfair claims settlement practice with such frequency as to indicate a general business practice. The Consumer Advocate, who will be appointed by the Governor, may participate in such hearings and represent the consumer.

***Senate Bill 421 – Relating to apportionment of damages in court actions involving tortious conduct in certain cases (effective July 8, 2005)***

This bill replaces the common law rule -- that liability among joint tortfeasors is joint and several -- with a rule that limits the application of joint liability to those tortfeasors who are found to be more than 30% at fault. It also allows a plaintiff who has been unable to collect the full amount due from any defendant to seek reallocation of the uncollectible amount among the other defendants according to their percentage of fault, except that no reallocation may increase the liability of any defendant whose degree of fault is less than or equal to the plaintiff's or less than 10%.

***Senate Bill 427 – Relating to health maintenance organizations (effective July 8, 2005)***

The bill allows out of state entities to be licensed in West Virginia as HMOs. This bill also makes risk-based capital (RBC) requirements, a common test for measuring solvency, applicable to HMOs in the same manner as they currently apply to other insurers, and it makes HMOs subject to some other requirements applicable to other insurers by eliminating the need to file annual COA renewal applications, requiring that HMOs retain grievance records for five years, increasing the mandatory minimum examination cycle from three years to five years and increasing the filing fee for annual reports from \$25 to \$100.

***Senate Bill 459 – Relating to reinsurance and insolvency liability (effective July 6, 2005)***

This bill provides recognition of so-called "cut through" arrangements by which the insolvency of a ceding insurer does not affect the liability of an assuming insurer under a reinsurance contract. It provides that credit as an admitted asset of the ceding insurer is not allowed for reinsurance unless the reinsurance contract includes certain provisions that would, in the event of the insolvency of the insurer, require payment by the reinsurer under the reinsurance contract of reported claims allowed by the liquidation court. It would also allow the reinsurer to investigate and defend against claims and to make claims against the ceding insurer for the expense of such actions.

***Senate Bill 521 – Requiring state board study insuring buildings and contents owned by county board (effective July 8, 2005)***

This bill requires the West Virginia State Board of Education to conduct a study on the feasibility of requiring flood insurance and/or general property insurance on all buildings owned by county boards of education and to report in its findings to the Legislature by December 1, 2005.

***Senate Bill 666 – Relating to exemptions for certain insurance companies from business franchise tax and corporation net income tax (effective July 8, 2005)***

This provides exemptions from the business franchise tax and corporate net income tax for the employers' mutual insurance company and other private carriers authorized by recent legislation to engage in the workers' compensation market; these insurers are subject to surcharges under the Workers' Compensation statutes.

***Senate Bill 744 – Clarifying criteria for employee to sustain lawsuit for intentional injury (effective July 1, 2005)***

This bill changes the finding that a trier of fact must make in order for the employer of an injured employee to lose the immunity from suit provided by the Workers' Compensation statutes. Under the bill, the employer must be shown to have had "actual knowledge" of the unsafe condition rather than simply "a subjective realization and appreciation" of its existence. Moreover, if it is alleged that the unsafe condition was a violation of an industry standard, then this must be shown by "competent evidence of written standards" reflecting an industry consensus.

***House Bill 2878 – Relating to allowing the fraud unit to investigate the forgery of insurance documents (effective July 8, 2005)***

This bill is partly a response to House Bill 1004, enacted during the 2005 First Extraordinary Session, that transfers the fraud unit within the Workers' Compensation Commission to the Insurance Commissioner on July 1, 2005, as part of the anticipated transfer of the Workers' Compensation Commission's regulatory duties to the Insurance Commissioner upon the establishment of an employers' mutual insurance company. The bill gives the Insurance Commissioner the authority to assign to the Workers' Compensation fraud unit duties in addition to the investigation of Workers' Compensation fraud and, similarly, to assign other duties to the Insurance Commission fraud unit.

The bill also adds forgery (as defined in W.Va. Code §61-4-5) "relating to the business of insurance" to the crimes that the Insurance Commission fraud unit is authorized to investigate. This fraud unit is deemed a "criminal justice agency" for purposes of sharing information with other such entities when investigating insurance crimes. Finally, all applicants for employment with the fraud unit will be required to be fingerprinted and to undergo a background check through the FBI.

Any questions with respect to H.B. 2878 may be directed to Greg Elam, Associate Counsel, Legal Division, Office of the Insurance Commissioner, (304) 558-0401, ext. 158.

***House Bill 2937 – Replacement of life insurance policies and annuity contracts (effective July 8, 2005)***

The basic purposes of this bill are to extend to the replacement of annuities the same consumer protections already applicable to the replacement of life insurance policies and to update the rule by adopting the most recently enacted NAIC standards. The bill provides for the replacement of the current statutory provision (W.Va. Code §33-11-5a, which addresses only the replacement of life insurance and not annuities) and the related rule (114 WV CSR 8) with an emergency rule based on the NAIC model regulation.

***House Bill 2973 – Broker/dealers as custodians of insurance company assets (effective July 4, 2005)***

The bill adopts the recently-adopted NAIC model allowing broker/dealers to act as custodians of insurance company assets and adopts the NAIC-recommended level of necessary “tangible net worth” for such broker-dealers. The bill also makes some technical corrections to article 8A, chapter 33 of the Code; for instance, references to “securities used to meet the deposit requirements pursuant to the laws of a foreign country” were deleted because the Insurance Commissioner has no authority to consider such requirements.

***House Bill 3014 – Clarifying that mandated accident and sickness insurance benefits do not apply to limited coverage policies, unless expressly made applicable to such policies (effective July 8, 2005)***

Under current law, certain specified treatments and conditions must be covered by individual and group health insurance policies; however, several types of policies such as disability income insurance are exempted from this requirement. This bill provides that these types of policies are also exempt from any provision in article 15, chapter 33 that “generally requires” health insurance policies to cover specific conditions or treatments.

***House Bill 3138 – Relating to requiring health insurance plans to cover the cost of contraceptives (effective July 8, 2005)***

This bill declares prescription contraceptives to be “basic health care” and prohibits individual and group health insurance plans that provide benefits for prescription drugs or outpatient services from excluding contraceptive services for covered persons. Such coverage must be subject to the same terms as other covered drugs. The bill contains an exemption for “religious employers” whose “sincerely held religious beliefs or moral convictions are central to the employer’s operating principles.” Any employee whose employer invokes this exemption must be afforded the coverage by the insurer.

***House Bill 3152 – Clarifying that the Board of Risk and Insurance Management is not to provide insurance for every property, activity or responsibility of the county boards of education (effective April 9, 2005)***

This bill provides that the West Virginia Board of Risk and Insurance Management has discretion as to what risks of county boards of education, the boards' employees and Department of Corrections' employees it will provide liability and professional insurance for.

Unless another contact is listed under a particular bill or rule, please contact Mary Jane Pickens, General Counsel, at 304-558-0401 if you have any questions regarding these legislative acts.

ss://Jane L. Cline  
Jane L. Cline  
Insurance Commissioner