

114CSR20

**LEGISLATIVE RULE
INSURANCE COMMISSIONER**

**SERIES 20
SURPLUS LINES INSURANCE**

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**SERIES 20
SURPLUS LINES INSURANCE**

§114-20-1. General.

1.1. Scope. -- This legislative rule establishes certain requirements for the licensing and regulation of surplus lines licensees, regulates access to the surplus lines market, and prescribes procedures for the placement of insurance with surplus lines insurers pursuant to W. Va. Code §33-12C-1 et. seq.

1.2. Authority. -- W. Va. Code §33-2-10.

1.3. Filing Date. -- May 6, 2005.

1.4. Effective Date. -- May 6, 2005.

§114-20-2. Definitions.

2.1. "Commissioner" means the Insurance Commissioner of West Virginia.

2.2. "Evidence of Insurance" means written or printed statements evidencing the applicability and effectiveness of insurance coverages, including, but not limited to, policy forms, certificates, cover notes, binders and other traditionally acceptable evidences of insurance.

2.3. "Surplus Lines Insurer" means an insurer not licensed by the commissioner to do insurance business, and considered to be a nonadmitted insurer, in the state of West Virginia.

2.4. "Surplus Lines Licensee" means an individual licensed pursuant to the provisions of this rule and W. Va. Code §33-12C-8 for the purposes of placing insurance on risks resident, located or to be performed in this state, with a surplus lines insurer.

2.5. "Surplus Lines Market" means the entire scope of insurance business on risks resident, located or to be performed in this state, to be placed with a surplus lines insurer.

2.6. "Insolvent Insurer" means any insurer which is determined to be insolvent in accordance with the provisions of chapter thirty three of the West Virginia Code, or any insurer which is determined to be insolvent by the commissioner of any other state.

2.7. "Licensed Insurer" means an insurer licensed by the commissioner to do insurance business in the state of West Virginia.

2.8. "Export list" means a list published by the commissioner of coverages and classes of insurance for which the commissioner has determined no general market exists with admitted insurers.

2.9. "Producer" means an individual insurance producer.

2.10. "Surplus lines transaction" means the solicitation, negotiation, procurement or effectuation with a surplus lines insurer of an insurance contract or certificate of insurance. It also means any renewal, cancellation, endorsement, audit, or other adjustment to the insurance contract.

§114-20-3. Licensing of a Surplus Lines Licensee; Revocation, Suspension or Refusal to Renew License and Penalty in Lieu Thereof.

3.1. Licensing requirements. -- Any applicant for a surplus lines licensee's license issued or renewed under the provisions of W. Va. Code §33-12C-8:

a. Shall be a duly licensed individual insurance producer holding a current and valid license for the type(s) of insurance which the applicant expects and intends to export to the surplus lines market;

b. Shall have held for at least three (3) consecutive years immediately preceding the date of application a valid individual insurance producer's license for the type(s) of insurance the applicant expects and intends to export to the surplus lines market, and shall have held a valid West Virginia resident or nonresident individual insurance producer's license for such type(s) of insurance for at least one (1) of those three (3) years, or hold a valid excess or surplus line broker license issued by another state. The commissioner, in his or her discretion, may waive this requirement if the applicant otherwise demonstrates the necessary trustworthiness and competence by education, experience or other relevant factors;

c. Shall satisfactorily complete an examination administered by the office of the commissioner or its designated agent or hold a valid excess line broker or surplus lines license issued by another state.

d. Shall pay the required license fee as established by the provisions of W. Va. Code §33-12C-8;

e. Shall be considered trustworthy for the purpose of conducting insurance business as a surplus lines licensee, as required by the provisions of W. Va. Code §33-12C-8; and

f. Shall satisfy any other criteria reasonably established by the commissioner.

3.2. Revocation, suspension or refusal to renew license. -- Whenever, after notice and hearing, the commissioner is satisfied that any surplus lines licensee has violated any provisions

of any administrative rule of the commissioner or any provisions of W. Va. Code §33-12C-9, or is incompetent or untrustworthy, the commissioner may place on probation, suspend, revoke or refuse to issue or renew a surplus lines licensee's license, or may levy a civil penalty not to exceed five thousand dollars (\$5,000.00) or any combination of actions for each violation, and upon failure of the licensee to pay the penalty by delivery of the sum to the commissioner within thirty (30) days of notice of the penalty, the commissioner shall revoke, suspend or refuse to renew the license.

§114-20-4. Placement of Surplus Lines Coverages.

4.1. Diligent Search – In accordance with the provisions of W. Va. Code §33-12C-5(a)(3), insurance coverage written by a surplus lines insurer and placed by a surplus lines licensee may not be procured until a diligent search has been made by the individual insurance producer to place the risk with an admitted insurer. The surplus lines licensee shall submit to the commissioner a sworn notarized affidavit, as provided in subsection 4.4 of this rule, that a diligent search has been made by the individual insurance producer to place the risk with licensed insurers authorized to write and actually writing the particular risk sought to be placed in the excess lines market. This affidavit shall be maintained, as required by W. Va. Code §33-12C-16, as part of the full and true record of each surplus lines contract procured.

4.2. The following minimum requirements and conditions apply to the conduct of a diligent search to place a risk with licensed insurers:

a. The individual insurance producer shall execute and forward to the licensed surplus lines licensee a written statement, in a form prescribed by the commissioner, declaring that a diligent effort to procure the desired coverage from admitted insurers was made. The form shall contain an affidavit that the individual insurance producer complied with the due diligence requirements of this rule. The affidavit shall affirm that the insured was expressly advised prior to the placement of the insurance that:

1. The surplus lines insurer with which the insurance is to be placed is not an admitted authorized insurer in this state and is not subject to the commissioner's supervision; and,

2. In the event the surplus lines insurance becomes insolvent, claims will not be paid nor will unearned premiums be returned by any West Virginia insurance guaranty fund.

b. No individual insurance producer may solicit, procure, place, or renew any insurance with a nonadmitted insurer unless the producer has been unable to procure the requested insurance from an authorized insurer after conducting a diligent search. A diligent search requires the individual insurance producer to contact as many insurers as the individual insurance producer represents, that customarily write the kind of insurance requested by the insured. A diligent search is presumed if declinations are received from each authorized insurer contacted.

c. An individual insurance producer shall obtain a declination in writing from the

licensed insurer or create a written record of an oral declination by the licensed insurer. A written record of an oral declination shall be made by the person who initially received the declination or by another employee of the individual insurance producer from information transmitted by the person who received the declination. A declination shall be obtained from the licensed insurer or recorded by or on behalf of the individual insurance producer at or near the time of receipt of the declination, and the records shall be maintained in the regular course of business.

d. A written record documenting an oral declination shall include:

1. The name, office location and phone number of the licensed insurer or firm acting in the capacity of underwriting manager for the licensed insurer.
2. The name and position of the person contacted.
3. The date of contact.
4. A detailed explanation of the licensed insurer's reasons for declining to insure the risk.

e. If a licensed insurer fails to respond within 5 business days after first being contacted by the individual insurance producer, the individual insurance producer may assume that the insurer has declined to write the risk. The individual insurance producer shall create a written record of the contact, including the manner in which contact was made and the information required under subdivision d of this subsection.

f. A declination of coverage by a licensed insurer shall be made by a full time employee of the licensed insurer who has underwriting responsibility or by a full time employee of a firm acting in the capacity of underwriting manager for the licensed insurer.

g. For purposes of this subdivision, the term "affiliate" is used as defined in W. Va. Code §33-27-2.

1. A declination may not be obtained from a licensed insurer which is an affiliate of a licensed insurer from which a declination has already been obtained.

2. Surplus lines insurance may not be placed with an unlicensed insurer that is an affiliate of a licensed insurer from which a declination has been obtained.

3. The restrictions in paragraphs 1 and 2 of this subdivision do not apply if the affiliated insurers write coverage independently of each other using separate and independently developed underwriting criteria and marketing plans and, for underwriting purposes, compete with each other for the same type of coverage or class of insurance.

4.3. Notification. -- Each surplus lines insurance policy or evidence of insurance shall have printed or stamped in contrasting color on the front page the following statement:

THIS COMPANY IS NOT LICENSED TO DO BUSINESS IN WEST VIRGINIA,
AND IS NOT SUBJECT TO THE WEST VIRGINIA INSURANCE GUARANTY ACT.

4.4. Surplus lines licensee's affidavit and report. -- Each surplus lines licensee shall execute and file with the commissioner, in accordance with the provisions of W. Va. Code §33-12C-7, the information requested on the Annual Affidavit of Surplus Line Licensee and the Annual Report of Written Surplus Lines Policies. This affidavit and report shall be filed under oath, and shall be received by the commissioner on or before the first day of March in conjunction with the Annual Surplus Lines Tax Return Reconciliation, Form Leb 4A, as revised, and as required under subsection 5.1 of this rule. The Annual Affidavit of Surplus Line Licensee shall include a sworn statement that the Annual Report of Surplus Lines Policies is inclusive of every excess line policy procured by the Surplus Line Licensee during the preceding calendar year. The commissioner may require that the Annual Report of Written Surplus Lines Policies be submitted in a computer readable form compatible with the electronic data processing system of the Office of the Insurance Commissioner.

4.5. Records of surplus lines licensee. -- In accordance with the provisions of W. Va. Code §33-12C-16 each surplus lines licensee shall keep in his or her office a full and true record of each surplus lines contract procured by him or her, and the records may be examined at any time thereafter by the commissioner. The records shall include the following items as they are applicable:

- a. The name and address of the surplus lines insurer;
- b. The names and addresses of the insureds;
- c. The amount of insurance;
- d. The gross premium charged;
- e. The return premium paid, if any;
- f. The rate of premium charged on the several items of coverages;
- g. The effective date of the contract and the terms of the contract;
- h. A brief general description of the risks insured against and the property insured;
- i. The policy number;
- j. The written due diligence declaration of the individual insurance producer required in subsection 4.2 of this rule; and
- k. Any additional information the commissioner may require to effectuate the

provisions of article twelve-c of chapter thirty-three.

4.6. Responsibilities of the surplus lines licensee. -- Each licensed surplus lines licensee who participates directly or indirectly in effecting any insurance contract on a surplus lines basis:

a. Shall, in no instance, knowingly place any coverage in an insolvent insurer, in accordance with the provisions of W. Va. Code §33-12C-26;

b. May accept and place authorized surplus lines business from any individual insurance producer licensed in this state for the kind of insurance involved, and may compensate the individual insurance producer. The surplus lines licensee has the right to receive from the surplus lines insurer the customary commission, in accordance with the provisions of W. Va. Code §33-12C-15; and

c. In those instances in which surplus lines business is produced to a surplus lines licensee by an individual insurance producer licensed in this state for the kind of insurance involved, it is the surplus lines licensee's responsibility to include the necessary information in the Annual Report of Written Surplus Lines Policies required by subsection 4.4 of this rule and the Annual Surplus Lines Tax Return Reconciliation Form Leb 4A, as required by subsection 5.1 of this rule.

4.7. Surplus lines insurance valid. -- In accordance with the provisions of W. Va. Code §33-12C-5, any insurance contract procured as surplus lines coverage from a surplus lines insurer shall be fully valid and enforceable as to all parties, and shall be given recognition in all matters and respects to the same effect as like contracts issued by licensed insurers.

§114-20-5. Surplus Lines Premium Tax Annual Return and Report by Surplus Lines Licensee.

5.1. Reporting of premiums placed and taxed. -- Each surplus lines licensee licensed in accordance with the provisions of this rule and W. Va. Code §33-12C-8, shall make under oath to the commissioner, a quarterly return on or before the twenty fifth day of the month succeeding the close of the quarter and an annual reconciliation return on or before the first day of March of the gross amount of premium charged the insured by surplus lines insurers and the gross amount of the fees charged by the surplus lines licensee for insurance procured by the surplus lines licensee during the previous calendar year, including any so called dividends on participating insurance policies applied in reduction of premiums, less premiums returnable for cancellation. The surplus lines licensee shall complete the Quarterly Surplus Lines Tax Return, Form Leb 4 and Annual Surplus Lines Tax Return Reconciliation Form Leb 4A, as revised, prepared and supplied by the commissioner.

5.2. Payment of surplus lines premium taxes. -- The tax required to be paid under the provisions of this rule shall be a sum equal to that in accordance with the provisions of W. Va. Code §33-12C-7, and shall be paid to the commissioner on a calendar year basis and in quarterly estimated installments due and payable on or before the twenty fifth day of the month succeeding the close of the quarter in which they accrued, except for the fourth quarter. For the fourth

quarter, the taxes shall be due and payable and final computation of the actual total liability for the prior calendar year shall be made, less credit for the three quarterly estimated payments on or before the first day of March. All the taxes paid to the commissioner shall be paid by him or her into a special account in the state treasury, designated the "municipal pensions and protection fund," and after appropriation by the Legislature, shall be distributed in accordance with the provisions of W. Va. Code §33-3-14D(c).

§114-20-6. Allocation of Surplus Lines Insurance Premium Tax on Multi-State Risks.

6.1. Premium tax on multi-state risks shall be allocated as follows:

a. In determining the amount of premiums taxable in this state, all premiums written, procured or received in this state shall be presumed to be written on properties, risks or exposures located or to be performed in this state, except:

1. For a reciprocal state, premiums that are allocated or apportioned as taxable premiums of the reciprocal state in accordance with the provisions of this rule, but the tax payable to this state shall not be less than the tax due pursuant to this rule. However, if the amount of tax due under this provision is less than \$50 in any jurisdiction, it shall be payable in the jurisdiction in which the affidavit is required to be filed; or

2. For a nonreciprocal state, premiums that are allocated or apportioned as taxable premiums of the nonreciprocal state and the taxes have been paid to the nonreciprocal state.

b. On an insurance policy covering properties, risks or exposures located or to be performed in various states, the tax to be paid to the commissioner of each state shall be computed on that portion of the policy premium that is attributable to properties, risks or exposures located or to be performed in each state.

c. The surplus lines licensee shall determine the taxable portion of the premium by using one of the following methods:

1. Allocate premium on the same basis or bases used to establish the policy premium; or

2. Allocate premium as prescribed in the allocation schedule prescribed by the commissioner that pertains to the classification describing the coverage, subject to the following:

A. If the allocation schedule does not identify a classification appropriate to the properties, risks or exposures being insured, the surplus lines licensee shall use an alternative equitable method of allocation; and

B. If a policy covers more than one classification:

1. For any portion of the coverage identified by a classification on the allocation schedule, the tax shall be computed by using the allocation schedule for the corresponding portion of the premium;

2. For any portion of the coverage not identified by a classification on the allocation schedule, the tax shall be computed in accordance with subparagraph A, paragraph 2 of this subdivision; and

3. For any portion of the coverage where the premium is indivisible, the tax shall be computed by using the method of allocation that pertains to the classification describing the predominant coverage.

d. If the information provided by the surplus lines licensee or the insured who has independently procured insurance is insufficient to substantiate its method of allocation, or if the commissioner determines that its method is incorrect, the commissioner shall determine the equitable and appropriate amount of tax due to this state, as follows:

1. If the allocation schedule identifies a classification appropriate to the coverage, the commissioner shall use the method prescribed in subdivision c of this subsection.

2. If the allocation schedule does not identify a classification appropriate to the coverage, the commissioner, in determining the equitable and appropriate amount of tax due to the state, shall give significant weight to documented evidence of the underwriting bases and other criteria used by the insurer. The commissioner may also consider other available information, to the extent sufficient and relevant, such as the percentage of the insured's physical assets in this state, the percentage of the insured's employee payroll in this state, the percentage of the insured's sales in this state and the amount of premium tax paid to another jurisdiction for the policy.

6.2. Reporting and remittance of tax. -- Each surplus lines licensee shall file a tax allocation report on the form prescribed by the commissioner.

a. The commissioner may at least annually furnish to the commissioner of a reciprocal state a copy of all filings reporting an allocation of taxes required by this section.

b. The preparation and submission of tax allocation reports and the payment of independently procured insurance taxes by a surplus lines licensee of another state to the commissioner of this state either directly or indirectly for lawful transactions taking place outside this state shall not be considered the placement of insurance in this state by the surplus lines licensee.

§114-20-7. Export List.

7.1. Commissioner may maintain export list. -- The commissioner may maintain an export list of insurance coverages and classes that may be placed with surplus lines insurers.

a. The commissioner may consider the following in determining the insurance coverages and classes to be listed:

1. The current marketplace;
2. Information from the surplus line licensees;
3. Information from admitted and surplus lines insurers doing business in West Virginia;
4. Information from other sources, including producers and consumers;
5. Any other information the commissioner deems relevant.

b. Any person may request in writing that, at the next publication of the list, the commissioner add or remove a coverage or class of insurance from the list. The person must provide evidence of market conditions to substantiate the request.

c. The list, if maintained, may be published at least annually but may be revised and republished at any time.

7.2. Conditions for placing insurance with surplus lines insurers. -- Placement of insurance with surplus lines insurers pursuant to W. Va. Code §33-12C-4 may only be done in accordance with either subdivision a or b of this subsection.

a. Insurance coverages and classes included on the export list may be placed with surplus lines insurers.

b. Insurance coverages and classes not included on the export list may only be placed with surplus lines insurers once a diligent search has been made.

§114-20-8. Conditions For Marketing Insurance With Surplus Lines Insurers.

8.1. Producers may not solicit business on behalf of a surplus lines insurer. However:

a. Producers may advertise the availability of insurance products for the insurance coverages and classes included on the export list to potential insureds and other producers.

b. Surplus lines licensees may advertise their services and product lines to other producers.

c. Such advertisements shall identify the fact that the insurance will be placed with a surplus lines insurer. The advertisements may not identify the insurer by name nor act as a solicitation on behalf of any surplus lines insurer. The advertisements may not identify specific rates or specific policy provisions.

8.2. Once negotiations over the available terms and conditions for specific coverages begin, at least the following facts must be disclosed in writing to the potential insured:

a. That the insurance will be placed through a surplus lines insurer and the name of the insurer;

b. That the producer is not an agent of the potential insurer because surplus lines insurers are not permitted to appoint individual insurance producers;

c. That the surplus lines market is a specialty market that has limited regulatory oversight by the commissioner, and specifically, there is no regulation of policy coverage forms or rates; and

d. That no protection is afforded under any West Virginia guaranty fund mechanism.

8.3. Subject to the general provisions of W. Va. Code §§33-12C-1 et seq., a surplus lines licensee may originate surplus lines insurance or accept applications for surplus lines insurance from any other producer duly licensed as to the kinds of insurance involved. The surplus lines licensee may compensate the producer.

§114-20-9. Separability.

9.1. Partial invalidity. -- If any provision of this rule is held invalid, the remainder of this rule shall not be affected thereby.