

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #2

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2002 MAY 29 P 2:28

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Insurance Commissioner TITLE NUMBER: 114

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code § 33-2-10

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 20

TITLE OF RULE BEING AMENDED: Excess Line Brokers

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

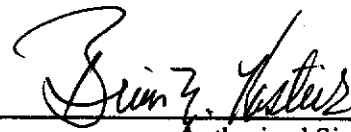
IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 1, 2002 AT 4:30 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Gregory A. Elam, Associate Counsel

West Virginia Insurance
Commission
P.O. Box 50540

Charleston, WV 25305-0540

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

SCANNED

Department of Tax and Revenue
Agency Questionnaire

Re: Administrative Rule to be Filed

EXCESS LINE BROKERS

TITLE 114, SERIES 20

Question 1: Are regulations required?

Yes. The changes to the existing rule are required by the amendment of West Virginia Code §§ 33-12-1 et seq. made by H. B. 4497, which was passed March 9, 2002 and went into effect June 7, 2002.

Question 2: Is the rule you are proposing controversial? If yes, what are the pros and the cons?

There should be no controversy over the proposed rule. We expect some comments regarding the definition of due diligence.

Question 3: Is the rule you are proposing a copy of another state's rule? A model rule? Custom-drafted?

The changes to the existing rule are custom-drafted.

Question 4: What are the really important things you think the Secretary of Tax and Revenue should know about this rule and the issues that surround it?

West Virginia Code §§ 33-12C-1 et seq. were created by H. B. 4497 to remove excess line brokers from the agent and agency licensing section. The current 114CSR20, which establishes the regulations for excess line brokers, must therefore be amended as well to conform to the amendment of the code. The current 114CSR20 does not define due diligence, and this amendment defines the minimum requirements for due diligence.

Insurance Commissioner
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EXCESS LINE BROKERS

TITLE 114, SERIES 20

BRIEF SUMMARY OF RULE

This rule sets forth the standards which the Insurance Commissioner deems necessary to carry out the provisions of Article 12c, Chapter 33 of the West Virginia Code dealing with excess line brokers, establishing requirements for due diligence and setting forth the sanctions to be imposed for failure to comply with the requirements.

The proposed amendment to the rule brings the rule into compliance with reciprocity requirements, defines due diligence and changes the penalties in conformity with the amendment and reenactment of the underlying statute made by H.B. 4497, passed March 9, 2002 and effective June 7, 2002.

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EXCESS LINE BROKERS

TITLE 114, SERIES 20

STATEMENT OF CIRCUMSTANCES

H.B. 4497, which goes into effect June 7, 2002, created Article 12C, Chapter 33 providing the statutory requirements for licensed excess line brokers from, Article 12, Chapter 33 of the West Virginia Code. Title 114, Series 20 of the Code of State Rules establishes the administrative standards for excess line brokers, and must be amended to conform to the new language of the Code and reciprocity requirements.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Excess Line Brokers
Title 114, Series 20

Type of Rule: X Legislative Interpretive Procedural

Agency: Insurance Commissioner

Address: Post Office Box 50540
1124 Smith Street, Greenbrooke Building
Charleston, West Virginia 25305-0540

1. Effect of Proposed Rule

| | ANNUAL | | FISCAL YEAR | | |
|-------------------------|----------|----------|-------------|------|------------|
| | Increase | Decrease | Current | Next | Thereafter |
| ESTIMATED TOTAL COST | None | None | None | None | None |
| PERSONAL SERVICES | None | None | None | None | None |
| CURRENT EXPENSE | None | None | None | None | None |
| REPAIRS AND ALTERATIONS | None | None | None | None | None |
| EQUIPMENT | None | None | None | None | None |
| OTHER | None | None | None | None | None |

2. Explanation of above estimates:

The amendment to the existing rule will have no additional fiscal impact on local, state or federal governments.

3. Objectives of these rules:

The rule sets forth the provisions under which the Insurance Commissioner administers the responsibilities of W. Va. Code §§ 33-12C-1 et seq, which requires the licensing of excess line brokers.

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4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: May 29, 2002

Signature of Agency Head or Authorized Representative



GREGORY A. ELAM, ASSOCIATE COUNSEL

114CSR20

**WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER**

**SERIES 20
EXCESS LINE BROKERS**

Section

- 114-20-1. General.
- 114-20-2. Definitions.
- 114-20-3. Licensing of an Excess Line Broker; Revocation, Suspension or Refusal to Renew License and Penalty in Lieu Thereof.
- 114-20-4. Placement of Excess Line Coverages.
- 114-20-5. Excess Line Premium Tax Annual Return and Report by Broker.
- 114-20-6. Separability.

114CSR20

WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 20
EXCESS LINE BROKERS

FILED

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

§114-20-1. General.

1.1. Scope. -- This legislative rule establishes certain requirements for the licensing and regulation of excess line brokers pursuant to W. Va. Code §33-12-1 et. seq.

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

1.3. Filing Date. -- ~~April 2, 1996.~~

1.4. Effective Date. -- ~~April 2, 1996.~~

§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. "Excess Line 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. "Excess Line Broker" means an individual licensed pursuant to the provisions of this rule and W. Va. Code ~~§33-12-13~~ §33-12C-4 for the purposes of placing insurance ~~of~~ on risks resident, located or to be performed in this state, with an excess line insurer.

2.5. "Excess Line Market" means the entire scope of insurance business on risks resident, located or to be performed in this state, to be placed with an excess line 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.

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§114-20-3. Licensing of an Excess Line Broker; Revocation, Suspension or Refusal to Renew License and Penalty in Lieu Thereof.

3.1. Licensing requirements. -- Any applicant for an excess line broker's license issued or renewed under the provisions of W. Va. Code §~~33-12-13~~33-12C-4:

a. Shall be a duly licensed ~~West Virginia resident agent~~ 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 excess line market;

b. Shall have held for at least three (3) consecutive years immediately preceding the date of application a valid agent's license for the type(s) of insurance the applicant expects and intends to export to the excess line market, and shall have held a valid West Virginia resident or nonresident agent'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 or surplus line broker license issued by another state.

d. Shall pay the required license fee as established by the provisions of W. Va. Code §~~33-12-13~~33-12-10;

e. Shall file with the commissioner and thereafter maintain in force for so long as the license or any renewal thereof remains in effect, a bond in favor of the state of West Virginia in the penal sum as established by the provisions of W. Va. Code, §~~33-12-13~~33-12C-4 with an authorized corporate surety approved by the commissioner, conditioned that he or she shall conduct business under his or her license in accordance with this rule and the West Virginia Code. No bond shall be terminated unless at least thirty (30) days' prior written notice thereof is filed with the commissioner;

f. Shall be considered trustworthy for the purpose of conducting insurance business as an excess line broker, as required by the provisions of W. Va. Code §~~33-12-13~~33-12C-4; and

g. 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 excess line broker has violated any provisions of any administrative rule of the commissioner or any provisions of W. Va. Code §~~33-12-25~~33-12-24, or

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is incompetent or untrustworthy, he or she shall revoke, suspend or refuse to renew the license of the excess line broker as required by the provisions of W. Va. Code §33-12-25. In lieu of revoking, suspending or refusing to renew the license, the Commissioner, in his or her discretion, may order the licensee to pay to the State of West Virginia a penalty in a sum not to exceed one thousand dollars (\$1,000) for each violation, may place on probation, suspend, revoke or refuse to issue or renew an excess line broker'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 Excess Line Coverages.

4.1. Due diligence. -- In accordance with the provisions of W. Va. Code §33-12-10(b) ~~33-12C-1(b)~~, the insurance coverage written by an excess line insurer and placed by an excess line broker shall not be procurable from licensed insurers authorized to transact that kind of insurance in this state. The broker shall submit to the commissioner a sworn notarized affidavit, as provided in subsection 4.45 of this rule, that a diligent search has been made to place the risk with licensed insurers authorized to write and actually writing the particular type of risk sought to be placed in the excess line market. This affidavit, which shall include a sworn statement as to the reasons why the broker has been unable to place the risk with licensed insurers, will be maintained as required by W. Va. Code §33-12-15 ~~33-12C-8~~ as a part of the full and true record of each excess line 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. The individual insurance producer shall execute and forward to the licensed excess line broker 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.

a. A diligent effort by the individual insurance producer to procure the desired coverage from licensed insurers has been made if the individual insurance producer declares on the prescribed form that at least three licensed insurers that are writing comparable coverages in this state to the coverage being sought have declined to insure the particular risk.

b. An individual insurance producer who obtains a declination from a licensed insurer shall either obtain the 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 person working for 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

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of the individual insurance producer at or near the time of receipt of the declination and maintained in the regular course of business.

c. 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 reasons supporting the declination.

d. 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 c.

e. A declination of coverage by a licensed insurer shall be made by a person who is a full-time employee of the licensed insurer and who has underwriting responsibility for that licensed insurer or by a full-time employee of a firm acting in the capacity of underwriting manager for the licensed insurer.

f. 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. Excess line 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 do not apply if the affiliated insurers write 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.

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~~4.2.~~ 4.3. Notification. -- Each excess line 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.

~~4.3.~~ 4.4. Countersignature. -- In accordance with the provisions of W. Va. Code ~~§33-12-733-12C-7~~, no contract of insurance covering a subject of insurance, resident, located or to be performed in this state, shall be executed, issued or delivered by an excess line broker unless the contract is signed or countersigned in writing by a duly licensed resident excess line broker. This section does not apply to: Reinsurance; credit insurance; any contract of insurance covering the rolling stock of any railroad or covering any vessel, aircraft or motor carrier used in interstate or foreign commerce, or covering any liability or other risks incident to the ownership, maintenance or operation thereof; any contract of insurance covering any property in interstate or foreign commerce, or any liability or risks incident thereto.

~~4.4.~~ 4.5. Excess line broker's affidavit and report. -- Each excess line broker shall execute and file with the commissioner, in accordance with the provisions of W. Va. Code ~~§33-12-11~~ 33-12C-2, the information requested on the Annual Affidavit of Excess Line Broker and the Annual Report of Written Excess Line 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 Excess Line Tax Return Reconciliation, Form Leb-4A, as revised, and as required under subsection 5.1 of this rule. The Annual Affidavit of Excess Line Broker shall include a sworn statement that the Annual Report of Excess Line Policies is inclusive of every excess line policy procured by the Excess Line Broker during the preceding calendar year. The commissioner may require that the Annual Report of Written Excess Line Policies be submitted in a computer-readable form compatible with the electronic data processing system of the Office of the Insurance Commissioner.

~~4.5.~~ 4.6. Records of excess line broker. -- In accordance with the provisions of W. Va. Code ~~§33-12-15~~, 33-12C-8 each excess line broker shall keep in his or her office a full and true record of each excess line 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 excess line insurer;
- b. The names and addresses of the insureds;
- c. The amount of insurance;
- d. The gross premium charged;

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- 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; and
- 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; and
- k. Any additional information the commissioner may require to effectuate the provisions of article twelve-c of chapter thirty-three.

4.7. Each resident excess line broker which countersigns an excess line contract shall keep in his or her office a full and true record of each excess line contract countersigned 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 license number of the nonresident excess line broker;
- b. The name and address of the excess line insurer;
- c. The names and addresses of the insureds;
- d. The policy number; and
- e. The gross premium charged.

~~4.6.~~ 4.8. Responsibilities of the excess line broker. -- Each licensed excess line broker who participates directly or indirectly in effecting any insurance contract on an excess line basis:

- a. In no instance shall knowingly place any coverage in an insolvent insurer, in accordance with the provisions of W. Va. Code ~~§33-12-22~~ 33-12C-11;
- b. May accept and place authorized excess line business from any insurance agent ~~or broker~~ licensed in this state for the kind of insurance involved, and may compensate the agent. ~~or broker of the insurance.~~ The excess line broker has the right to receive from the excess line

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insurer the customary commission, in accordance with the provisions of W. Va. Code ~~§33-12-14~~ 33-12C-6; and

c. In those instances in which excess line business is produced to an excess line broker by an agent ~~or broker~~ licensed in this state for the kind of insurance involved, it is the excess line broker's responsibility to include the necessary information in the Annual Report of Written Excess Line Policies required by subsection 4.45 of this rule and the Annual Excess Line Tax Return Reconciliation Form Leb-4A, as required by subsection 5.1 of this rule.

~~4.7.~~ 4.9. Excess line insurance valid. -- In accordance with the provisions of W. Va. Code ~~§33-12-12~~ 33-12C-3, any insurance contract procured as excess line coverage from an excess line 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. Excess Line Premium Tax Annual Return and Report by Broker.

5.1. Reporting of premiums placed and taxed. -- Each excess line broker licensed in accordance with the provisions of this rule and W. Va. Code ~~§33-12-13~~ 33-12C-4, 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 excess line insurers and the gross amount of the fees charged by the excess line broker for insurance procured by the ~~licensee~~ excess line broker 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 Excess Lines Broker shall complete the Quarterly Excess Line Tax Return, Form Leb-4 and Annual Excess Line Tax Return Reconciliation Form Leb-4A, as revised, prepared and supplied by the commissioner.

5.2. Payment of excess line 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 ~~§33-12-16A~~ 33-12C-9, 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).

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§114-20-6. Separability.

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