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FILED
2011 JUN 30 PM 4:38

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June 30, 2011

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Offices of the Insurance Commissioner

RULE: Amendment, 114CSR20, Surplus Lines Insurance

DATE FILED AS AN EMERGENCY RULE: June 9, 2011

DECISION NO. 3-11

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 3-11)

AGENCY: Offices of the Insurance Commissioner
RULE: Amendment, 114CSR20, Surplus Line Insurance
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par. 1 The Offices of the Insurance Commissioner (Commissioner) has filed the above amendment to an existing rule as an emergency rule.

par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Commissioner filed this emergency rule with supporting documents with the Secretary of State June 9, 2011 and with the LRMRC June 9, 2011.

par. 7 It is the determination of the Secretary of State that the Commissioner has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §33-2-10 reads:

§33-2-10. Rules and regulations.

(a) The commissioner is authorized to promulgate and adopt rules relating to insurance as are necessary to discharge his or her duties and exercise his or her powers and to effectuate the provisions of this chapter, protect and safeguard the interests of policyholders and the public of this state.

(b) The commissioner is authorized to promulgate rules necessary to discharge his or her duties relating to workers' compensation insurance as set forth in chapter twenty-three of

this code, which shall be exempt from the provisions of chapter twenty-nine-a, article three of this code, except that these rules shall be filed with the Secretary of State's Office.

(c) Prior to assuming regulatory authority over workers' compensation insurance pursuant to article two-c, chapter twenty-three of this code, the commissioner shall review and revise all applicable rules to reflect the assumption of this new regulatory authority: Provided, That all such revisions shall be exempt from the provisions of chapter twenty-nine-a, article three, except that the amended rules shall be filed with the Secretary of State's Office

par. 9 It is the determination of the Secretary of State that the Commissioner has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Commissioner are as follows:

Effective July 20, 2011, a new federal statute changes how surplus lines insurance is able to be taxed and regulated by the states and preempts inconsistent state laws. Under the new federal law, only the "home state" of an insured can collect taxes on a surplus lines policy covering multi-state risks. In 2011, the West Virginia Legislature enacted SB 435 to amend its surplus lines statutes to reflect these changes, including the establishment of a "blended tax rate" and authorizing the Insurance Commissioner to enter into a national agreement with respect to allocating premium taxes among the states where there existed a risk under a surplus lines policy. The federal law permits the states to enter into allocation agreements, but that issue is currently being hotly debated and there is no consensus on how this is to be done. The proposed emergency rule establishes rules for the transition period as to how the taxes are to be paid, allocated, etc. under various situations, e.g. West Virginia joins one of the proposed national agreements. SB 435 refers to "applicable rates," and these rates are established in the rule as well.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "to prevent substantial harm to public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 3-11 or ERD 3-11 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Offices of the Insurance Commissioner, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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