

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 29, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: OFFICE OF THE INSURANCE COMMISSIONER
ATTN: Legal Division
1124 Smith Street
Post Office Box 50540
Charleston, West Virginia 25305-0540

LEGISLATIVE RULE TITLE: SURPLUS LINES INSURANCE
(TITLE 114, SERIES 20)

1. Authorizing statute(s) citation:

W. Va. Code §33-2-10.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

May 28, 2003 - Comment Period.

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of Public Hearing(s) or Public Comment Period ended:

Comment period ended June 27, 2003.

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

**e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing:
(be exact)**

July 29, 2003

Insurance Commissioner
Title 114, Series 20

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Gregory Elam, Associate Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston, WV 25305-0540
Phone: (304) 558-0401
Fax: (304) 558-1362
E-mail: elamg@mail.wvnet.edu

- g. IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Same

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

Not applicable

- b. Date of hearing or comment period:

Not applicable

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

Not applicable

- d. Attach findings and determinations and reasons:

Not applicable

Insurance Commissioner
Title 114, Series 20

ATTACHMENT TO QUESTION 2(d):

Five sets of comments were received during the comment period ENDING June 27, 2003 in response to the proposed legislative rule. Comments were submitted by BB&T Insurance Services, Inc.; DVUA West Virginia, Inc.; City Insurance Professionals; Bloss and Dillard, Inc.; and Commercial Insurance Services.

A. BB&T Insurance Services, Inc. ("BB&T") submitted the following comments by letter dated and received on June 25, 2003:

1. BB&T's first comment concerns the export list as defined in Subsection 2.8 of the Rule. BB&T agrees an export list would be an excellent tool for improving the current situation. BB&T commends this addition to the law.

2. BB&T states that the definition of "producer" in Subsection 2.9 is somewhat ambiguous. BB&T states that it appears in reading that this could apply to not only the Surplus Lines Licensee, but also the producing agent. BB&T further comments it believes the rule needs a clearly defined separation, as they serve two separate purposes.

The Insurance Commissioner agrees with this comment. The Commissioner agrees to make amendments to Subsection 2.9, as follows:

2.9. "Producer" means an individual insurance producer ~~or surplus~~
~~lines licensee.~~

3. BB&T comments that the wording of Subsection 4.1 should be changed from "not procurable from 3 licensed insurers" since there are a number of agencies in this state that cannot meet this requirement since they do not represent three licensed insurers. BB&T further comments that there are a number of agents that only represent one licensed insurer. BB&T suggests the wording be changed to "not procurable by the producer from licensed insurers they represent."

The Commissioner does not agree to amend Subsection 4.1. This subsection assures that reasonable efforts have been made to place the insured consumer in the admitted insurance market prior to being placed in the surplus lines market. The surplus lines market does not afford the insured the protection of the guarantee fund or the rate and form protections of the admitted market. This provision is a consumer protection issue. The lack of access to the admitted market by the individual producer is not sufficient justification to place a consumer in the surplus lines market. West Virginia Code Section 33-12-18 allows an individual producer to have a notice of appointment filed within fifteen

days from the date the agency contract is executed or the first insurance application is submitted. This allows the individual producer to seek coverage in the admitted market from insurers the individual producer is not appointed with.

4. BB&T comments that the requirement of Subdivision a of Subsection 4.4 that the portion of the commission retained by the countersigning surplus lines licensee may not be less than ten percent of the gross policy premium may not be feasible. BB&T suggests there are a number of situations where the total commission for these types of policies is less than this amount.

The Insurance Commissioner does not agree with this comment. The rule provides for an alternative amount and states the commission shall be the lesser of the two. This rule applies only if there is a commission payment to the countersigning surplus lines licensee. The rule does not require the countersigning surplus lines licensee to be paid a commission. The Insurance Commissioner's intent is to establish requirements for countersignatures and not set commission levels.

However, the Commissioner agrees to make amendments to Subdivision a of Subsection 4.4 as follows:

a. The entire commission payable by any surplus lines insurer authorized to transact insurance in this state on any insurance policy shall be paid directly to the licensed resident surplus lines licensee who countersigns the policy. The countersigning surplus lines licensee may not pay any part of the commission to any person other than a licensed individual producer. Provided, That the portion of such commission retained by the countersigning surplus lines licensee may not be less than ten percent of the gross policy premium or fifty percent of the commission payable by the surplus lines insurer as provided herein, whichever is the lesser amount. The term "commission" as used herein shall include engineering fees, service fees or any other compensation incident to the issuance of a policy payable by or to any insurer or insurance producer or surplus lines licensee. A licensed individual producer or surplus lines licensee may pay his or her commissions, or direct that his or her commissions be paid, to a business entity licensed as an insurance producer.

5. BB&T comments that the wording of Subsection 7.2 seems convoluted. BB&T states that it appears that producers will be required to contact admitted insurers they do not represent. BB&T states this would be an impossible task and would probably keep people from being able to take care of their clients by not being able to use the Excess & Surplus Lines markets available to them.

The Insurance Commissioner does not agree with this comment. The rule provides that there will be two avenues for the placement in the Surplus Lines Market. Once the export list is established, there is no requirement for a diligent search for coverage on the export list. If the coverage is not on the export list, then a diligent search must be made pursuant to Section 4 of Series 20. An individual insurance producer's lack of access to the admitted insurance market is not sufficient reason to place an insured in the Surplus Lines Insurance market. The insured should be placed where the consumer retains the guarantee fund protection and the rate and form regulation afforded in the admitted insurance market when possible.

6. BB&T comments generally on the need for disclaimers on advertising, stating it does not see the need for disclaimers. BB&T comments it believes most producing agents, if not all, are very forthright with their customers and the requirements of stamping the insurance policies provides them with an opportunity to explain to their clients this part of the system.

The Insurance Commissioner does not agree with this comment. The advertising and notification requirements are consumer protection provisions. The notification requirement informs the consumer that the surplus lines insurance market does not have guarantee fund protection or rate and form regulation prior to purchasing surplus lines insurance. The policy is stamped with these provisions; however, the consumer receives this notification after being placed in the surplus lines market.

B. DVUA West Virginia, Inc. ("DVUA") submitted the following comments by letter dated June 24, 2003 and received on June 26, 2003:

1. DVUA comments generally that the establishment of an export list in West Virginia is long overdue.

The Insurance Commissioner agrees with this comment.

2. DVUA comments generally that the initiation of a diligent search should begin with the individual producer.

The Insurance Commissioner agrees with this comment.

3. DVUA comments generally that the requirements for documentation of the diligent search are too burdensome. DVUA further comments that the diligent search documentation requirements place a small producer at a competitive disadvantage with a large producer. DVUA comments that the documentation requirements for the diligent search impose undeniable liability on the part of the producer should one of the numerous steps be incomplete. DVUA suggests the following to mitigate some of the burden of the diligent search:

a. Not require the affidavit be completed prior to applying for surplus lines insurance. DVUA states over 30 states place some limited number of days (30, 45, 60, etc.) after placement of surplus lines insurance to certify non-availability in the standard market.

b. Reduce the extent of the documentation in regards to which carriers (and which personnel of that carrier) are considered valid to decline a risk. DVUA states the following reasons:

There are hundreds of rural producers in West Virginia that have one standard carrier in their agency. Correspondingly, it is a reality that rural producers service rural areas that are most likely to be under-served by standard insurance carriers. Such a producer would be forced to contact carriers with which there is no existing appointment, with unfavorable chances of getting a positive response.

Turnover of underwriting personnel in an insurance operation is an unavoidable part of the business. There is too much opportunity for the best efforts of small and large producers to confuse personnel of insurance carriers. The liability for inadvertently contacting an underwriter who may not be the final and ultimate authority of underwriting for that carrier is unavoidable (within the context of the proposed revision) should litigation occur.

Underwriters who constantly receive futile attempts from a producer to make exceptions on risks for which the underwriter has no appetite tend to quit responding to the producer's calls.

The Insurance Commissioner does not find the rule to be burdensome nor to place unwarranted liability on the individual producer. Section 4 of Series 20 establishes the requirement for a diligent search. The minimum requirements for a diligent search set forth in Section 4 is existing law and is not a proposed amendment for comment. The provisions require the producer to document three declinations. These may be in writing, orally, or by failure to respond. The rule places a burden on the producer to document his diligent search. Without documentation, the Insurance Commissioner as well as the consumer must take in good faith that a diligent search was completed. This requirement for documentation provides for the facilitation of market conduct examinations by the Insurance Commissioner for the protection of the consumers. The individual producer's lack of access to the admitted insurance market does not justify the placement of a consumer in the surplus lines market. The concern of contacting an underwriter inadvertently that does not have final and ultimate authority may be alleviated by merely asking them about their authority at the time of the conversation. Acknowledging this

problem exists in the industry, it would appear to make it a prudent measure on a routine basis. The rule provides for documenting a failure to respond by the insurer as a declination. The rule only requires documentation that the call was placed.

C. City Insurance Professionals ("CITY") submitted the following comments by letter dated June 24, 2003 and received on June 25, 2003:

1. CITY comments generally on the rule with little specific comments to the rule. CITY comments that the rule places an undue burden on the individual insurance producers who are just trying to serve their clients. CITY further comments that they are professionals and the Commissioner should give them the benefit of the doubt and not place additional burdens on them.

The Insurance Commissioner does not find the rule to be unduly burdensome. The Commissioner is concerned that consumers would not be adequately protected by merely relying on an unsubstantiated statement that a diligent search was performed. The Commissioner feels that a written record of the diligent search that may be verified with a market conduct examination is a more professional way to protect the consuming public.

2. CITY states generally that it cannot comply with Subsection 4.4 stating some of it is ambiguous and some of it is impossible to work with.

The Insurance Commissioner cannot comment without some specificity as to the alleged problems. The Insurance Commissioner has agreed to amend Subdivision a of Subsection 4.4. See response to the comments submitted by BB&T.

3. CITY states that it cannot comply with Section 6 of the proposed rule.

The Insurance Commissioner cannot comment without some specificity as to the alleged problems. Section 6 is the NAIC model rule for allocation of premium tax on multi-state risks.

This rule establishes the allocation table for the multi-state risk premium tax allocation required in Section 7, Article 12C of Chapter 33 of the West Virginia Code.

4. CITY comments on Subsection 4.4, stating surplus lines commissions as well as all property/casualty commissions are paid to the agency, not the individual producer or licensee. CITY further comments that this rule is setting up a bookkeeping and tax nightmare for the agency and the individual licensee, agencies would/could quickly lose control of the tax revenue stream on surplus lines placement.

The Insurance Commissioner disagrees with the comment. It is a statutory requirement that commissions be paid directly to individual producers for property/casualty insurance. The individual producer may assign or pay the commission to the agency. This rule only applies to countersignatures, and does not require a countersigning surplus lines licensee to be paid with a commission. See response to the comments submitted by BB&T.

D. Bloss and Dillard, Inc. ("DILLARD") submitted the following comments by letter dated June 20, 2003 and received on June 27, 2003:

1. DILLARD comments generally on the state of the surplus lines market in West Virginia and makes no specific comments on the proposed rule. DILLARD generally states that the Independent Agency ranks would not be able to place non-admitted business under these guidelines.

The Insurance Commissioner cannot comment without some specificity as to the alleged problems.

2. DILLARD comments that they would like to see the adoption of an "Export List" which could go a long way toward resolving the due diligence problem.

The Insurance Commissioner agrees with this comment.

3. DILLARD comments that the three declinations required as written in Subsection 4.2 just won't work while the system they currently are working under seems to work very well.

The Insurance Commissioner disagrees with this comment. Subsection 4.2 does not contain proposed amendments for comment. Subsection 4.2 is the current law for due diligence. The system without a due diligence record-keeping requirement may work well for the individual insurance agents and surplus lines licensees; however, it does not necessarily work well for the insured consumers. Consumers are placed in the surplus lines insurance market with no record that due diligence was performed or that it was in the best interest of the consumer to have been placed in the surplus lines market. The lack of a record makes it virtually impossible for the Insurance Commissioner to monitor or audit placement of consumers in the surplus lines market.

E. Commercial Insurance Services ("COMMERCIAL") submitted the following comments by letter dated and received on June 27, 2003:

1. COMMERCIAL comments that the definition of "producer" in Subsection 2.9 should not include surplus lines licensee.

The Insurance Commissioner agrees with this comment and will amend Subsection 2.9 accordingly. See response to the comments submitted by BB&T.

2. COMMERCIAL comments that after "shall not be procurable..." on line 3 of Subsection 4.1 the Commissioner should add "by the Producer" to help eliminate any confusion on who is responsible for the due diligence in Subsection 4.1.

The Insurance Commissioner does not find the subsection confusing. This is the existing law, other than changing the term "excess line broker" to "surplus lines licensee." Subsection 4.1 references W. Va. Code § 33-12C-5(a)(3) which clearly places the responsibility for the diligent search on the individual producer.

3. COMMERCIAL makes the following comments:

a. Don't really have a problem with a signed statement from the producer but can't see any other requirements beyond that.

The Insurance Commissioner sees the need to have a verifiable and auditable record to assure due diligence is being conducted for the protection of insured consumers.

b. Many agencies in the state of West Virginia don't represent 3 licensed insurers and the number that does is dropping every week. A captive agent, such as Nationwide or State Farm, only represents one insurer. Would have to clarify licensed insurers that they are contracted with since they obviously couldn't deal with or know what other licensed insurers in the State do.

The Insurance Commissioner does not find the lack of access to the insured market by an individual producer as a sufficient reason to place a consumer in the surplus lines market and strip the consumer of guarantee fund protection and rate and form regulation.

c. What about the situation where the insurance producer knows that their licensed insurer doesn't write a certain type of risk based on manuals with prohibitive classes the insurer puts out or prior declinations? It would be a problem to continue going to these insurers each time just to obtain the declination you know you are going to receive. Companies don't have the time to do this.

The Insurance Commissioner responds that West Virginia Code Section 33-12C-5(a) establishes the limits on this type of declination:

(a) Surplus lines insurance may be placed by a surplus lines licensee if:

- (1) Each insurer is an eligible surplus lines insurer; and
- (2) Each insurer is authorized to write the type of insurance in its domiciliary jurisdiction; and
- (3) The full amount or line of insurance cannot be obtained from insurers who are admitted to do business in this state. The full amount or type of insurance may be procured from eligible surplus lines insurers, provided that a diligent search is made by the individual insurance producer among the insurers who are admitted to transact and are actually writing the particular type of insurance in this state if any are writing it.

If the individual producer knows the insurer is not writing a line this code section prohibits it from being considered in the diligent search.

d. All this information would slow down the process of obtaining insurance for the consumer. The task would become overwhelming to maintain all of this information.

The Insurance Commissioner disagrees that this rule would slow down the process and be overwhelming. The rule requires the individual producer to maintain records of the diligent search the individual producer is performing. This information is necessary to protect the consumer and assure that consumers are not being placed in the surplus lines market for the convenience of the individual producer.

e. How do you define "underwriting responsibilities?" Many surplus lines licensees have "underwriting responsibility" according to the surplus lines insurer.

The Insurance Commissioner does not have sufficient information to respond to this comment. The proposed rule deals with allocation of multi-state surplus lines taxes, export list and advertising in the surplus lines market. The Insurance Commissioner does not know what part of the rule or what connotation this comment relates to.

4. COMMERCIAL comments that requiring a written document of an oral communication hurts smaller agents.

The Insurance Commissioner does not agree with this comment. The documentation of oral communications provides a means to confirm due diligence was performed and is a consumer protection rule.

5. COMMERCIAL comments on Subdivision a of Subsection 4.4 asking whether they read too much into this since it refers to "Countersignature" and is not intended to cover policies they underwrite. If not, they would question telling surplus lines licensees what commissions to pay.

Subsection 4.4 applies only to countersignatures. The Insurance Commissioner has agreed to amend Subdivision a of Subsection 4.4. See comment by BB&T to Subsection 4.4 *infra*.

6. COMMERCIAL questions how they will know what a Reciprocal and Nonreciprocal state are, as referenced in Subdivision a of Subsection 6.1.

West Virginia Code Section 33-12C-3(q) defines reciprocal state:

"Reciprocal state" means a state that has enacted provisions substantially similar to:

- (1) Section seven, subdivision (5) of subsection (b) of section nine, subsection (j) of section sixteen, and subsection (d) of section seventeen of this article; and
- (2) The NAIC model allocation schedule and reporting form.

7. COMMERCIAL comments on the export list provisions in Section 7 by stating if changes need to be made this could eliminate a lot of the problems with the due diligence portion of the rule.

The Insurance Commissioner agrees with this comment.

8. COMMERCIAL comments on Subdivision b of Subsection 7.2 by questioning if they know a company doesn't write a certain risk, does this mean you can't use it as part of your due diligent search? The wording in the first two lines makes it sound like that.

The Insurance Commissioner responds that West Virginia Code Section 33-12C-5(a) establishes the limits on this type of declination:

- (a) Surplus lines insurance may be placed by a surplus lines licensee if:
 - (1) Each insurer is an eligible surplus lines insurer; and
 - (2) Each insurer is authorized to write the type of insurance in its domiciliary jurisdiction; and

(3) The full amount or line of insurance cannot be obtained from insurers who are admitted to do business in this state. The full amount or type of insurance may be procured from eligible surplus lines insurers, provided that a diligent search is made by the individual insurance producer among the insurers who are admitted to transact and are actually writing the particular type of insurance in this state if any are writing it.

The rule follows the statute and both prohibit the use of a known insurer that is not writing that particular type of insurance.

9. COMMERCIAL comments on Subdivision c of Subsection 8.1 that they have to start putting a disclaimer on their advertising. COMMERCIAL comments this goes too far. Do producers have to place the disclaimer on all of their ads in case it goes to a surplus lines insurer? COMMERCIAL comments that everybody will have to change all advertising, at a great expense.

The Insurance Commissioner does not agree with this comment. This rule relates specifically to surplus lines insurance. The rule requires a notice that the insurance will be placed in the surplus lines market. This is a consumer protection notice and notifies the consumer that it is surplus lines insurance. This does not place a significant burden on the individual producer or the surplus lines licensee.

A letter from LeBoeuf, Lamb, Greene & MacRae, dated June 26, 2003, was received by the Commissioner on July 1, 2001. The letter was received after the comment period closed on June 27, 2003, therefore the comments of the LeBoeuf, Lamb, Greene & MacRae letter have not been considered.

A letter from Professional Independent Insurance Agents of West Virginia, dated June 26, 2003, was received by the Commissioner on July 1, 2001. The letter was received after the comment period closed on June 27, 2003, therefore the comments of the Professional Independent Insurance Agents of West Virginia letter have not been considered.



Fax Transmission

Please Deliver To: Jane Cline

Company: W Insurance Commissioner

Phone: 558-0401

Fax: 558-4966

From: Allen McVey

Company: BB&T - Carson Insurance Services

Phone: 304-346-0806

Fax: 304-344-5724

Date: 6-25-03

No. of Pages (incl. cover page) 3

RE: Series 20 - Proposed Regulations

Jane - Enclosed are my comments on the above
which are also being mailed.

Thanks -
Allen

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BB&T**BB&T Insurance Services, Inc.**

June 25, 2003

Carson Insurance ServicesTennessee at Lee (25302)
P.O. Box 6278
Charleston, WV 25362
(304) 346-0806
(800) 696-0802
Fax (304) 344-5724Honorable Jane L. Cline
Insurance Commissioner
State of West Virginia
P. O. Box 50541
Charleston, WV 25305-0541

RE: Series 20 – Proposed Regulations: Excess Lines/Surplus Lines Insurance

Dear Commissioner Cline:

I understand you will be taking public comment on the proposed changes in the above regulation until June 30, 2003. Although I feel certain protections need to be in place, I believe these rules could possibly hurt the consuming public here in West Virginia more than they help. My comments are as follows:

Section 2.8 – I would agree that an export list would be an excellent tool for improving the current situation. I feel, along with several other Excess & Surplus Lines Brokers (I assume we will be named Surplus Lines Licensees after this regulation has passed) this will allow us to focus on what we will need to do for our clients. I believe there are a number of states that are already doing this and I commend this addition to the law.

Section 2.9 – I feel the definition of producer is somewhat ambiguous. It does appear in reading that this could apply to not only the Surplus Lines Licensee, but also the producing agent. I believe you need a clearly defined separation, as they do serve two separate purposes. It does appear to be inconsistent with other aspects of our code.

Section 4.1 – You probably should change the wording “*not be procurable from 3 licensed insurers*” since there are a number of agencies in this state that cannot meet this requirement since they do not represent three licensed insurers. In fact, there are a number of agents who only represent one licensed insurer. I believe the market regulates this very strictly already from both the aspect of law and potential E&O situations. If we have a licensed company that will take a risk, believe me, that’s where the business will be placed. Of course, we have had situations where very strong licensed insurers have gone out of business very quickly, but I still believe the market regulates this. If you are going to maintain this requirement, you may want to change the wording to “*not be procurable by the producer from licensed insurers they represent.*”

Section 4.2 - You are going to require written documentation of an oral communication. I believe this is taken care of if all producers are considered trustworthy if they maintain their current licenses. Again, this requirement will hurt the smaller agent due to cumbersome, and I feel, unnecessary paperwork.

Honorable Jane L. Cline
June 25, 2003
Page Two

In addition, Section F of this part of the proposed regulation places an additional amount of burden on the producer. If the amount of time is taken into consideration, it is very possible, both from a time management and compensation situation, that this would end up hurting the consuming public by agents refusing to do certain types of business if the administrative process is too burdensome.

Section 4.4 – Again, the requirement to pay at least a 10% commission may not be feasible. There are a number of situations currently where the total commission for these types of policies is less than that. When that has to be split between the producing agent and the Surplus Lines Licensee, it is, again, an impossibility. This could constrict the market even more and this probably is over-regulating something that is being taken care of by the market. The amount of commission is also an incentive for producing agents to place their business in the admitted market, as commissions are generally much higher.

Section 6.1 – Will we be provided a list of the reciprocal states? I was just curious.

Section 7.2 – The wording seems somewhat convoluted. It appears that producers will be required to contact admitted insurers they do not represent. As you know, this is an impossible task and would probably keep people from being able to take care of their clients by not being able to use the Excess & Surplus Lines markets available to them. I believe this just needs to be worked on somewhat.

There are a number of items in the proposed regulations that are good and clean up the current code. However, the items I have mentioned need to be taken into consideration. In addition, I don't think we need any disclaimers on advertising, as I believe this is taken care of also by the market. The only advertising I have seen for these products is done by Surplus Lines Brokers to agents who use them. In addition, I believe most producing agents, if not all, are very forthright with their customers and the requirements of stamping the insurance policies provides them with an opportunity to explain to their clients how this part of the system works.

I appreciate your taking these comments, and if you would happen to have any questions or need additional assistance or clarification, please let me know.

Sincerely,

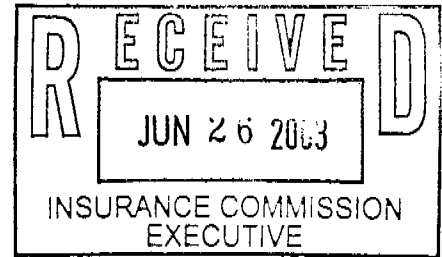


Allan L. McVey, CPCU, ARM, AAI, AAM, AIS
Vice President

ALM:kw



DVUA West Virginia, Inc.
DVUA of Ohio, Inc.
DVUA Virginia, Inc.
George F. "Rusty" Ellis, CPCU
Vice President



June 24, 2003

The Honorable Jane L. Cline
Insurance Commissioner
State of West Virginia
1124 Smith Street
Charleston, WV 25301

RECEIVED

JUN 26 2003

**LEGAL DIVISION
W.VA. INS. DEPT.**

RE: West Virginia Legislative Rules – Series 20
Pending Revision

Dear Commissioner Cline;

Please accept this letter as an official public comment on the proposed revisions to West Virginia Legislative Rules – Series 20, concerning regulation of Surplus Lines Insurance. There are two aspects to which I would like to specifically address, the Export List and the Diligent Search.

The creation of an Export List of classes of business in West Virginia eligible to be placed immediately in the surplus lines market is long overdue. My compliments to you and your staff for realizing the need for such a valuable tool in serving the urgent needs of consumers of West Virginia. My company has been placing surplus (formerly excess) lines insurance in this state for over 20 years. We have many times evaluated our writings to ascertain classes of business that we serve regularly. A list of those we see most frequently is attached to this letter for your consideration. When the time comes to develop the actual list, I will be happy to cooperate with your staff in developing an export list that is relevant and useful in West Virginia.

It is also commendable that your department clearly communicates that the initiation of a diligent search should begin with the individual producer. The producer is the party that is most familiar with the risks presented, by a potential insured, and can best communicate those facts to a standard carrier underwriter. It is the function of the individual producer to maintain relationships with standard carriers that are best capable of serving the producer's clients. I also concur that the surplus lines licensee is not without responsibility in the process but maintain that responsibility should be more of a reinforcement function of the producer. However, the very specific criteria that is established for defining what constitutes a diligent search is very likely beyond the capabilities of the majority of individual insurance producers in West Virginia.



The numerous details that must be documented are so burdensome and impose such undeniable liability on the part of the producer (should one of the numerous steps be incomplete) that small agencies in the rural areas of our state will simply not be able to afford to work on business that requires a diligent search. This places such producers at an unfair competitive disadvantage with larger agencies that can afford the support staff to perform the extensive documentary procedures. This will eventually cause the rural agencies to lose not only certain surplus lines business not included on an export list, but also jeopardizes their ability to retain the other standard lines business that is usually maintained for the insured. A large producer who controls a difficult aspect of an insured's overall needs is likely to leverage that control to take over other policies that the insured purchases which do not present a surplus lines exposure. It jeopardizes the small producer's ability to service all the needs of his or her community.

I would like to encourage you to at least mitigate some of the burden of the diligent search requirements to make them more feasible for the smaller producers to accomplish, such as:

1. Not require that the affidavit be completed prior to applying for surplus lines insurance. You are most likely aware that over 30 of the states in our country place some limited number of days (30, 45, 60, etc.) after the placement of surplus lines insurance to certify non-availability in the standard market. Such a relief would enable the producer to obtain coverage more immediately to the demand of the consumer.
2. Reduce the extent of the documentation in regards to which carriers (and which personnel of that carrier) are considered valid to decline a risk. Valid reasons:
 - There are hundreds of rural producers in West Virginia that only have one standard carrier in their agency. Correspondingly, it is a reality that rural producers service rural areas that are most likely to be under-serviced by standard insurance carriers. Such a producer would be forced to contact carriers with which there is no existing appointment, with unfavorable chances of getting a positive response.
 - Turnover of underwriting personnel in an insurance operation in an unavoidable part of the business. There is too much opportunity for the best efforts of small and large producers to confuse personnel of insurance carriers. The liability for inadvertently contacting an underwriter who may not be the final and ultimate authority of underwriting for that carrier is unavoidable (within the context of the proposed revision) should litigation occur.
 - Underwriters who constantly receive futile attempts from a producer to make exceptions on risks for which the underwriter has no appetite tend to quit responding to the producer's calls.

It was inevitable that the regulations governing surplus lines activity in this state would have to be updated. Eventually, these changes too will become obsolete. My goal is to suggest to you aspects that will make the needed changes most relevant and useful for the beneficial operation of surplus lines business in West Virginia. I thank you for the opportunity to comment and hope you will take



sincere consideration of these suggestions. I repeat now that if I can be of service to your department in creating an export list, or useful in any of future project of your office, I will be available to you or your staff.

With kind regards,

A handwritten signature in cursive script that reads "Rusty Ellis". The signature is written in black ink and is positioned above the typed name.

George F. "Rusty" Ellis, Vice President
DVUA West Virginia, Inc.
Resident West Virginia Surplus Lines Licensee

enclosure

**Exposures Commonly Placed with Surplus Lines Carriers
in West Virginia by DVUA West Virginia, Inc.**

- Restaurants
- Taverns
- Bars
- Liquor Liability Exposures
- Machinery Repair and Manufacturer
- Construction Contractors
- Directors and Officers
- Medical Related Exposures (other than individual physicians)
- Umbrella Liability
- Excess General Liability
- Excess Automobile Liability
- Vacant Properties
- Habitational / Rental Property
- Employment Related Practices
- Consultants
- Physical Damage on Commercial Trucks
- Contractors Equipment
- Mining Operations
- Logging or Timbering Operations
- Sawmills
- Special / Short Term Events
- Prize Indemnification
- Stop Gap Employers Liability
- Excess Workers Compensation
- Social Service Operations
- Combustible Fuel Operations
- Exercise and Health Salons
- Recreational Activities (Whitewater rafting, guides and outfitters)
- Saddle Animal Exposures

City Insurance

PROFESSIONALS

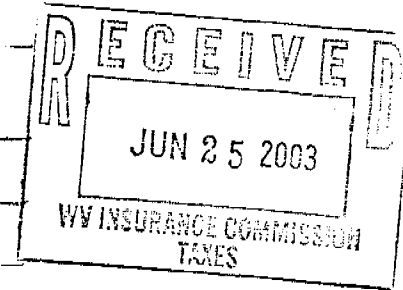
3601 MacCorkle Avenue, SE
PO Box 1126
Charleston, WV 25324

304.926.7400
fax: 304.926.7429

June 24, 2003

Delivered to
Commissioner

Legal



Commissioner Jane L. Cline
P.O. Box 50542
Charleston, WV 25305

RE: Surplus Lines Regulations
Series 20 Rules

Dear Commissioner Cline:

I have been a licensed Surplus Lines Agent in West Virginia since about 1975. As such, we are aware of the proposed changes to the Surplus Lines regulations and appreciate the opportunity to comment on some of those changes.

Our E&O attorney says the under the proposed regulations "agents have much more liability and less defenses". We as agents are very concerned. I missed some of his points but Chris Bastien understands the legal ramifications of this to the agents. We need his specific thoughts but it won't take long for the agents E&O carriers to walk or start raising premiums not to mention the time and expense of the agents trying to defend themselves.

Fully 25% of our commercial business was placed with surplus lines markets in 2002. The trend is up in 2003 and we have fairly good access to admitted markets. We only use surplus lines markets where we have to and in the end it is for the benefit of the consumer since most would not have insurance if they were relying on the admitted companies in this type of insurance and legal environment. The Commissioner should not place an undue burden on agents who are just trying to service their clients. We are professionals and the Commissioner should give us the benefit of the doubt not place additional burdens on us. Agents do not place business with Surplus Lines companies if they have admitted alternatives. Surplus Lines companies generally pay less commission; we get no contingent income, no volume to satisfy our admitted contracts and so forth. The paperwork/record keeping is greater with surplus lines companies so why not let the system work without it more cumbersome regulation.

This agency does a significant amount of surplus lines filings for large, out of state brokers. The State makes a great deal of tax money on these filings. We make very little revenue from these brokers for providing this service. That might be about to change but bottom line is we cannot be in compliance with several of the provisions of proposed changes 4.4 some of which is ambiguous and some of which is just impossible to work with. Nor can we be in compliance with 114-20-6, what a nightmare. Don't think we

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JUN 30 2003

LEGAL DIVISION
WVA. INS. DEPT.

could even attempt this. Granted, the burden might be on the large broker to do this but who is going to be qualified and staffed to monitor this provision...not us.

Too much of this is ambiguous. Could be that all producers placing surplus lines business need to have their surplus lines license, which will be cumbersome, expensive and more difficult to control than the current situation.

Licensee "means an individual." 4.4 a says, "The entire commission shall be paid directly to the licensee who countersigns the policy." Surplus lines commissions as well as all property/casualty commissions are paid to the agency, not the individual licensee. Seems like this is setting up a bookkeeping and tax nightmare for the agency and the individual licensee...I don't want a 1099 at the end of the year that I have to deal with on my taxes. Agencies would/could quickly lose control of the revenue stream on surplus lines placements.

Many of us have been surplus lines brokers for many years. Perhaps you are aware of abuses that we are not aware of but it seems like we have gotten along fine without this much regulation up until now so why do we need more policing now? The last point I want to make here is that many smaller agencies in the State do not represent even three (3) admitted Insurance Companies. These agents rely very heavily on the Surplus Lines markets to service their clients. If these regulations are passed in the proposed form surely it will be one more big step towards putting these smaller agencies out of business. We will look forward to an opportunity to meet with you and your staff to discuss some of these issues in more detail. In the meantime; if I can be of further assistance in this matter please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Morton", written in a cursive style.

Charles S. Morton
President



BLOSS & DILLARD, Inc.



INSURANCE MANAGERS

June 20, 2003

Jane Cline, Commissioner
West Virginia Insurance Commission
1124 Smith Street
Charleston, WV 25301

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JUN 27 2003

LEGAL DIVISION
W.VA. INS. DEPT.

**Re: Series 20 - Proposed
"Surplus Lines Insurance"**

Dear Commissioner Cline:

I am writing as a Resident Excess Lines Broker and President of Bloss & Dillard, Inc. the largest writer of Excess Lines business in the state of West Virginia. The Series 20 - Proposed, drastically changes the way excess lines business will be written and makes me question the existence of Bloss & Dillard in the future, at least in this state.

In a conversation that I was involved in this week with several "major" players in the Independent Agency ranks, I heard the phrase "I wouldn't be able to place any non-admitted business under these guidelines" several times. The guidelines they were referring to was the "Series 20 - Proposed". They quickly followed it up with the comment that it would probably put them out of business since they rely so heavily on the Surplus Lines market, especially in the current market that exists. If this is the case for many of the larger agents, where does this leave the single agent shop in a small community?

I have learned that representatives of the PIIAWV have addressed many issues that they feel are problematic in a letter to you, I won't spend any time on those and will only address a key point that I feel can help resolve one of the issues.

I would like to see us adopt an "Export List" which could go a long way toward resolving the due diligence problem. The list, put out by your office, would clearly define those coverages and classes of business where an admitted market does not normally exist. This would keep the insurance producer from having to waste their time and that of the company to obtain a declination. Export Lists exist in many states and work well in defining what can automatically go to a surplus lines insurer. The three declinations required as written in 4.2 just won't work while the system we are currently working under seems to work very well.

I fully support the efforts of the PIIAWV and their membership in resolving these issues. I believe that it is critical that we do so because doing so is good for our state's insurance community, and most importantly, what is best for the insurance consumer. Many citizens of West Virginia would be without

Jane Cline, Commissioner
June 27, 2003
Page 2

Insurance, if not for the Surplus Lines market. The estimated premium for 2002 in WV in this segment of the insurance market was \$75 million. Entire industries, the main one being coal, would be devastated by the Series 20 - Proposed. Bloss & Dillard will celebrate its 50th Anniversary next year, fifty years of providing insurance solutions for the citizens of our state. We employee 37 people, have a significant payroll and pay total taxes in the hundreds of thousands, I want to remain a viable employer. Bloss & Dillard is looking forward to another 50 years. I would welcome a chance to discuss any of the issues with your or your staff and would actually encourage a meeting of your staff, members of the PIAWV and other insurance industry representatives to resolve these major issues. Thank you for your time.

Sincerely,



Kerry P. Dillard
President

KPD:lmm



June 27, 2003

VIA TELEFAX (304) 558-0412 -- 2 PAGES

Honorable Jane L. Cline
Insurance Commissioner
State of West Virginia
P.O. Box 50541
Charleston, WV 25305-0541

RE: Series 20 -- Proposed Regulations: Excess & Surplus Lines of Insurance

Dear Commissioner Cline:

We have been told that you will be taking public comment on the proposed changes in the Excess & Surplus regulations. We understand and respect your concerns in some areas and see the need for some corrections in other areas. However, we view some of the changes as potentially doing more harm than good. We offer the following:

2.9 -- Definition of Producer -- We don't feel the surplus lines licensee should be included here, only the individual insurance producer. Producer would imply that we were involved with the insured on producing this business and we are not.

4.1 -- After "shall not be procurable..." from line 3 add "by the Producer" to help eliminate any confusion on who is responsible for the due diligence.

- a) don't really have a problem with a signed statement from the "producer" but can't see any other requirements beyond that.
- b) Many agencies in the state of West Virginia don't represent 3 licensed insurers and the number that docs is dropping every week. A captive agent, such as Nationwide or State Farm, only represent one. Would have to clarify licensed insurers that they are contracted with since they obviously couldn't deal with or know what other licensed insurers in the State do.
- c) What about the situation where the insurance producer knows their licensed insurer doesn't write a certain type of risk based on manuals with prohibitive classes the insurer puts out or prior declinations? It would be a problem to continue going to these insurers each time just to obtain the declination you know you are going to receive. Companies don't have time to do this.
- d) All this information would slow down the process of obtaining insurance for the consumer. The task would become overwhelming to maintain all of this information.
- e) How do you define "underwriting responsibilities"? Many surplus lines licensees have "underwriting responsibility" according to the surplus lines insurer.

4.2 Requiring a written document of an oral communication requirement hurts smaller agents.

4.4 a) Did we read too much into this since it refers to "Countersignature" and is not intended to cover policies we underwrite? If not, we would question telling the surplus lines licensee what commission to pay? We have many situations where we don't even receive 10% commission or little over that and couldn't afford to pay what would be required. In most cases we do all the quoting, issuing of the policy, endorsements, maintenance, etc., that requires a lot of manpower to handle this.

6.1 a) 1&2 How do we know who the "Reciprocal" and "Nonreciprocal" states are? Is there a list?

114-20-7 Export List

If changes need to be made this could eliminate a lot of problems with the due diligence portion of the rule. Many states have this and we could pattern it after that.

7.2 b) If you know a company doesn't write a certain risk, does this mean you can't use as part of your due diligent search? The wording in the first two lines make it sound like that.

8.1 c) We have to start putting a "disclaimer" on our advertising? This seems to go too far. Do producers have to place this "disclaimer" on all of their ads in case it goes to a surplus lines insurer? Everybody will have to change all advertising, at a great expense.

We feel you have some real issues to address and possibly correct, in the best interest of every party including the West Virginia consumers. But, some of the issues addressed could make it harder on the consumer to obtain insurance since they may be forced to deal with a producer in another city. It is obvious the task of placing insurance will become much tougher on the producers and the surplus lines licensee. If the interpretation is correct with some of this, the smaller agents could be put out of business or forced into mergers since they do not represent 3 companies. I would think we are talking about 50%+ of the agents that might fall into this category. It really hurts small town agents as well as the consumer who will have to drive many miles to find someone who can help them. I know the intent here was to be in compliance with the NAIC, but at what cost? We thank you very much for allowing us to respond to you.

Sincerely,


Raye M. King
President, COO

Insurance Commissioner
Legislative Rule
Title 114, Series 20

SURPLUS LINES INSURANCE

TITLE 114, SERIES 20

BRIEF SUMMARY OF RULE

The amendments to this rule set 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 surplus lines insurance. By amending, the rule will coordinate with the adoption of the NAIC Model Surplus Lines Act, establish the procedure for the allocation of surplus lines insurance premium tax on multi-state risks, establish the procedure for the implementation of an export list for surplus lines insurance, and establish the method by which surplus lines insurance may be marketed. The proposed amendment to the rule brings the rule into conformity with Article 12C, Chapter 33 of the West Virginia Code and reenactment of the underlying statute made by H.B. 2715, which was passed March 7, 2003 and becomes effective June 5, 2003.

Insurance Commissioner
Legislative Rule
Title 114, Series 20

SURPLUS LINES INSURANCE

TITLE 114, SERIES 20

STATEMENT OF CIRCUMSTANCES

H.B. 2715, which was passed March 7, 2003 and becomes effective June 5, 2003, amended Article 12C relating to surplus lines insurance. H.B. 2715 adopted the NAIC Model Surplus Lines Act. This amendment coordinates the rule with the adoption of the NAIC Model Surplus Lines Act, establishes the rules for the allocation of surplus lines insurance premium tax on multi-state risks, provides for the implementation of an export list for surplus lines insurance, and the manner in which surplus lines insurance may be marketed. Title 114, Series 20 of the Code of State Rules establishes the administrative rules for surplus lines insurance and licenses and must be amended to conform to the amended language of the Code.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Surplus Lines Insurance
Title 114, Series 20

Type of Rule: XX 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	1,000.00	None	None	1,000.00	None
PERSONAL SERVICES	1,000.00	None	None	1,000.00	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 minimal additional fiscal impact on local, state or federal governments. The agency will incur the above costs developing and implementing the premium tax forms under the model allocation schedule. Once developed and implemented the costs should be the same as the existing premium tax collection.

Rule Title: Surplus Lines Insurance
Title 114, Series 20

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.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Provides for a more efficient collection of premium taxes for multi-state risks.

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

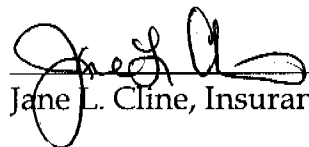
Surplus lines licensees will have minimal costs in completing the new allocation forms.

C. Economic Impact on Citizens/Public at Large.

None

Date: July 29, 2003

Signature of Agency Head or Authorized Representative



Jane L. Cline, Insurance Commissioner

114CSR20

WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 20

~~EXCESS LINE BROKERS~~ SURPLUS LINES INSURANCE

Section

- 114-20-1. General.
- 114-20-2. Definitions.
- 114-20-3. Licensing of ~~an Excess Line Broker~~ a Surplus Lines Licensee; Revocation, Suspension or Refusal to Renew License and Penalty in Lieu Thereof.
- 114-20-4. Placement of ~~Excess Line~~ Surplus Lines Coverages.
- 114-20-5. ~~Excess Line~~ Surplus Lines Premium Tax Annual Return and Report by ~~Broker~~ Surplus Lines Licensee.
- 114-20-6. Allocation of Surplus Lines Insurance Premium Tax on Multi-State Risks.
- 114-20-7. Export List.
- 114-20-8. Conditions For Marketing Insurance With Surplus Lines Insurers.
- 114-20-6 9. Separability.

WEST VIRGINIA LEGISLATIVE RULE

INSURANCE COMMISSIONER 2003 JUL 29 P 2:50

SERIES 20

~~EXCESS LINE BROKERS~~ SURPLUS LINES INSURANCEOFFICE 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~~ 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 ~~§33-12-1~~ 33-12C-1 et. seq.

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

1.3. Filing Date. -- April 3, 2003.

1.4. Effective Date. -- April 3, 2003.

§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~~ 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. "~~Excess Line Broker~~ Surplus Lines Licensee" means an individual licensed pursuant to the provisions of this rule and W. Va. Code ~~§33-12C-4~~ 33-12C-8 for the purposes of placing insurance on risks resident, located or to be performed in this state, with ~~an excess line~~ a surplus lines insurer.

2.5. "~~Excess Line~~ 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 ~~an excess line~~ 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.

**Insurance Commissioner
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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 an ~~Excess Line Broker~~ a Surplus Lines Licensee; Revocation, Suspension or Refusal to Renew License and Penalty in Lieu Thereof.

3.1. Licensing requirements. -- Any applicant for an ~~excess line broker's~~ a surplus lines licensee's license issued or renewed under the provisions of W. Va. Code §~~33-12C-4~~ 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 ~~excess line~~ 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 ~~excess line~~ 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 or surplus line broker~~ 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-10~~ 33-12C-8;

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e. Shall be considered trustworthy for the purpose of conducting insurance business as ~~an excess line broker~~ a surplus lines licensee, as required by the provisions of W. Va. Code §~~33-12C-4~~ 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 ~~excess line broker~~ surplus lines licensee has violated any provisions of any administrative rule of the commissioner or any provisions of W. Va. Code §~~33-12C-24~~ 33-12C-9, or is incompetent or untrustworthy, the commissioner may place on probation, suspend, revoke or refuse to issue or renew ~~an excess line broker~~ 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 ~~Excess Line~~ Surplus Lines Coverages.

4.1. Due diligence. -- In accordance with the provisions of W. Va. Code §~~33-12C-1(b)~~ 33-12C-5(a)(3), the insurance coverage written by ~~an excess line~~ a surplus lines insurer and placed by ~~an excess line broker~~ a surplus lines licensee shall not be procurable from licensed insurers authorized to transact that kind of insurance in this state. The ~~broker~~ surplus lines licensee shall submit to the commissioner a sworn notarized affidavit, as provided in subsection 4.5 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~~ surplus lines market. This affidavit, which shall include a sworn statement as to the reasons why the ~~broker~~ surplus lines licensee has been unable to place the risk with licensed insurers, will be maintained as required by W. Va. Code §~~33-12C-8~~ 33-12C-16 as a part of the full and true record of each ~~excess line~~ 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 ~~excess line broker~~ 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.

b. A diligent effort 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

**Insurance Commissioner
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licensed insurers writing coverages in this state comparable to the coverage being sought have declined to insure the particular risk.

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.

**Insurance Commissioner
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2. ~~Excess line~~ 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 ~~excess line~~ 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. Countersignature. -- In accordance with the provisions of W. Va. Code §~~33-12C-7~~ 33-12C-24, 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~~ a surplus lines licensee unless the contract is signed or countersigned in writing by a duly licensed resident ~~excess line broker~~ surplus lines licensee. 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.

a. The entire commission payable by any surplus lines insurer authorized to transact insurance in this state on any insurance policy shall be paid directly to the licensed resident surplus lines licensee who countersigns the policy. The countersigning surplus lines licensee may not pay any part of the commission to any person other than a licensed individual producer or surplus lines licensee. A licensed individual producer or surplus lines licensee may pay his or her commissions, or direct that his or her commissions be paid, to a business entity licensed as an insurance producer.

b. This section does not require that a surplus lines insurer compensate the countersigning surplus lines licensee on a commission basis. This section only requires the surplus lines licensee be paid the entire commission if a commission is payable.

**Insurance Commissioner
Legislative Rule
Title 114, Series 20**

c. A surplus lines licensee may be paid a fixed fee for countersigning policies. The fixed fee may not be based upon the number of policies countersigned or the gross amount of premiums involved.

4.5. ~~Excess line broker's~~ Surplus lines licensee's affidavit and report. -- Each ~~excess line broker surplus lines licensee~~ shall execute and file with the commissioner, in accordance with the provisions of W. Va. Code §~~33-12C-2~~ 33-12C-7, the information requested on the Annual Affidavit of ~~Excess Line Broker Surplus Line Licensee~~ and the Annual Report of Written ~~Excess Line 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 ~~Excess Line Surplus Lines~~ 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 Surplus Line Licensee~~ shall include a sworn statement that the Annual Report of ~~Excess Line Surplus Lines~~ Policies is inclusive of every excess line policy procured by the ~~Excess Line Broker Surplus Line Licensee~~ during the preceding calendar year. The commissioner may require that the Annual Report of Written ~~Excess Line Surplus Lines~~ Policies be submitted in a computer readable form compatible with the electronic data processing system of the Office of the Insurance Commissioner.

4.6. Records of ~~excess line broker surplus lines licensee~~. -- In accordance with the provisions of W. Va. Code §~~33-12C-8~~ 33-12C-16 each ~~excess line broker surplus lines licensee~~ shall keep in his or her office a full and true record of each ~~excess line 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 ~~excess line 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;

**Insurance Commissioner
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Title 114, Series 20**

- i. The policy number;
- j. The written due diligence declaration of the individual insurance producer required in ~~section~~ 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.

4.7. Each resident ~~excess line broker~~ surplus lines licensee which countersigns an ~~excess line a surplus lines~~ contract shall keep in his or her office a full and true record of each ~~excess line surplus lines~~ contract countersigned by him or her. These records may be examined at any time thereafter by the commissioner and shall include the following items as they are applicable:

- a. The name and license number of the nonresident ~~excess line broker~~ surplus lines licensee;
- b. The name and address of the ~~excess line~~ surplus lines insurer;
- c. The names and addresses of the insureds;
- d. The policy number; and
- e. The gross premium charged.

4.8. Responsibilities of the ~~excess line broker~~ surplus lines licensee. -- Each licensed ~~excess line broker~~ surplus lines licensee who participates directly or indirectly in effecting any insurance contract on an ~~excess line~~ 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-11~~ 33-12C-26;
- b. May accept and place authorized ~~excess line~~ 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 ~~excess line broker~~ surplus lines licensee has the right to receive from the ~~excess line~~ surplus lines insurer the customary commission, in accordance with the provisions of W. Va. Code §~~33-12C-6~~ 33-12C-15; and
- c. In those instances in which ~~excess line~~ surplus lines business is produced to an ~~excess line broker~~ surplus lines licensee by an individual insurance producer licensed in this state for the kind of insurance involved, it is the ~~excess line broker's~~ surplus lines licensee's responsibility to include the necessary information in the Annual Report of Written ~~Excess Line~~

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Surplus Lines Policies required by subsection 4.5 of this rule and the Annual ~~Excess-Line~~ Surplus Lines Tax Return Reconciliation Form Leb 4A, as required by subsection 5.1 of this rule.

4.9. ~~Excess-line~~ Surplus lines insurance valid. -- In accordance with the provisions of W. Va. Code §~~33-12C-3~~ 33-12C-5, any insurance contract procured as ~~excess-line surplus lines~~ coverage from an ~~excess-line 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. Excess-Line Surplus Lines Premium Tax Annual Return and Report by Broker Surplus Lines Licensee.

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

5.2. Payment of ~~excess-line 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-9~~ 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:

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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;

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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.

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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;
- and
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 be placed with surplus lines insurers only under the following conditions:

1. A good faith diligent search must be made to place the insurance with admitted insurers the producer has reason to believe will consider writing the type of coverage or class of insurance involved. If that effort shows that the insurance cannot be obtained because of underwriting reasons or the insured requires specific terms and conditions of coverage which are unavailable through admitted insurers, the insurance may be placed with surplus lines insurers. Placement with the surplus lines insurer solely to obtain a better price does not constitute good faith.

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2. The inability to place the insurance through an admitted insurer with whom the producer has an established relationship is not an exception to the obligation to place the insurance with an admitted insurer.

3. The producer must document his or her diligent search to place the insurance with admitted insurers pursuant to section 4 of this rule.

§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

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insurance from any other producer duly licensed as to the kinds of insurance involved. The surplus lines licensee may compensate the producer.

~~§114-20-6~~ 114-20-9. Separability.

6.1 9.1. Partial invalidity. -- If any provision of this rule is held invalid, the remainder of this rule shall not be affected thereby.