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

Do Not Mark In This Box

FILED

2004 APR 16 A 10: 25

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #6

NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE

AGENCY: Insurance Commissioner TITLE NUMBER: 114

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 20

TITLE OF RULE BEING AMENDED: Surplus Lines Insurance

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) H.B. 4217

SECTION 64-7-2(b), PASSED ON March 12, 2004

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: April 16, 2004

Authorized Signature

STATE OF WEST VIRGINIA

Offices of the Insurance Commissioner

Legal Division

BOB WISE
Governor

JANE L. CLINE
Insurance Commissioner

FILED

2004 JUN -3 A 10:42

STATE OF WEST VIRGINIA
SECRETARY OF STATE

June 1, 2004

Judy Cooper, Director
Administrative Law Division
Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0770

Re: 114CSR20 - Surplus Lines Insurance

Dear Judy,

To follow up on your May 27, 2004 conversation with Joy Zirkle of our office with regard to the Series 20 rule, please find attached a copy of the rule which was final filed with the Secretary of State's Office and became effective on April 16, 2004. We struck through and hi-lited paragraphs 1, 2 and 3 of subdivision b under subsection 7.2 which, according to H.B. 4217 (also attached), should have been deleted from the rule.

As always, thank you so much for all your help. Let us know if you have any questions.

Sincerely,

Mary Jane Pickens

Mary Jane Pickens
General Counsel

RECEIVED
JUN 03 2004
JOE MANCHIN III
WV SECRETARY OF STATE

MJP/jz
Attachments

TITLE 114
LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 20
SURPLUS LINES INSURANCE

§114-20-1. General.

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

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

1.3. Filing Date. -- April 16, 2004.

1.4. Effective Date. -- April 16, 2004.

§114-20-2. Definitions.

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

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

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

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

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

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

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

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

2.9. "Producer" means an individual insurance producer.

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

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

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

a. Shall be a duly licensed individual insurance producer holding a current and valid

license for the type(s) of insurance which the applicant expects and intends to export to the surplus lines market;

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

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

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

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

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

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

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

4.1. Diligent Search - In accordance with the provisions of W. Va. Code §33-12C-5(a)(3), insurance coverage written by a surplus lines insurer and placed by a surplus lines licensee may not be procured until a diligent search has been made by the individual insurance producer to place the risk with an admitted insurer. The surplus lines licensee shall submit to the commissioner a sworn notarized affidavit, as provided in subsection 4.5 of this rule, that a diligent search has been made by the individual insurance producer to place the risk with licensed insurers authorized to write and actually writing the particular risk sought to be placed in the excess lines market. This affidavit shall be maintained, as required by W. Va. Code §33-12C-16, as part of the full and true record of each surplus lines contract procured.

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

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

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

2. In the event the surplus lines

insurance becomes insolvent, claims will not be paid nor will unearned premiums be returned by any West Virginia insurance guaranty fund.

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

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

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

1. The name, office location and phone number of the licensed insurer or firm acting in the capacity of underwriting manager for the licensed insurer.

2. The name and position of the person contacted.

3. The date of contact.

4. A detailed explanation of the licensed insurer's reasons for declining to insure the risk.

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

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

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

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

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

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

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

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

4.4. Countersignature. -- In accordance with

the provisions of W. Va. Code §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 a surplus lines licensee unless the contract is signed or countersigned in writing by a duly licensed resident 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.

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

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

a. The name and address of the surplus lines insurer;

b. The names and addresses of the insureds;

c. The amount of insurance;

d. The gross premium charged;

e. The return premium paid, if any;

f. The rate of premium charged on the several items of coverages;

g. The effective date of the contract and the terms of the contract;

h. A brief general description of the risks insured against and the property insured;

i. The policy number;

j. The written due diligence declaration of the individual insurance producer required in subsection 4.2 of this rule; and

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

4.7. Each resident surplus lines licensee which countersigns a surplus lines contract shall keep in his or her office a full and true record of each 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 surplus lines licensee;

b. The name and address of the 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 surplus lines licensee. -- Each licensed surplus lines licensee who participates directly or indirectly in effecting any insurance contract on a surplus lines basis:

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

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

c. In those instances in which surplus lines business is produced to a surplus lines licensee by an individual insurance producer licensed in this state for the kind of insurance involved, it is the surplus lines licensee's responsibility to include the necessary information in the Annual Report of Written Surplus Lines Policies required by subsection 4.5 of this rule and the Annual Surplus Lines Tax Return Reconciliation Form Leb 4A, as required by subsection 5.1 of this rule.

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

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

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

5.2. Payment of surplus lines premium taxes. -- The tax required to be paid under the provisions of this rule shall be a sum equal to that

in accordance with the provisions of W. Va. Code §33-12C-7, and shall be paid to the commissioner on a calendar year basis and in quarterly estimated installments due and payable on or before the twenty fifth day of the month succeeding the close of the quarter in which they accrued, except for the fourth quarter. For the fourth quarter, the taxes shall be due and payable and final computation of the actual total liability for the prior calendar year shall be made, less credit for the three quarterly estimated payments on or before the first day of March. All the taxes paid to the commissioner shall be paid by him or her into a special account in the state treasury, designated the "municipal pensions and protection fund," and after appropriation by the Legislature, shall be distributed in accordance with the provisions of W. Va. Code §33-3-14D(c).

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

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

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

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

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

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

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

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

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

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

B. If a policy covers more than one classification:

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

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

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

d. If the information provided by the surplus lines licensee or the insured who has independently procured insurance is insufficient to substantiate its method of allocation, or if the commissioner determines that its method is incorrect, the commissioner shall determine the

equitable and appropriate amount of tax due to this state, as follows:

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

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

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

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

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

§114-20-7. Export List.

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

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

1. The current marketplace;

2. Information from the surplus line licensees;

3. Information from admitted and surplus lines insurers doing business in West Virginia;

4. Information from other sources, including producers and consumers; 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 only be placed with surplus lines insurers once a diligent search has been made.

~~1. A good faith diligent search must be made to place the insurance with admitted insurers. If that effort shows that the insurance cannot be obtained because of underwriting reasons or the insured requires specific terms and~~

AND,

On pages eleven and twelve, by striking out all of subdivision 7.2.b. and inserting in lieu thereof the following:

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

(c) The legislative rule filed in the state register on the twenty-first day of March, two thousand three, authorized under the authority of section ten, article two, chapter thirty-three, of this code, relating to the insurance commissioner (Medicare supplement insurance, 114 CSR 24), is authorized.

(d) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand three, authorized under the authority of section ten, article two, chapter thirty-three, of this code, modified by the insurance commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the fourth day of December, two thousand three, relating to the insurance commissioner (accident and sickness rate filing, 114 CSR 26), is authorized.

(e) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand three, authorized under the authority of section ten, article two, chapter thirty-three, of this code, modified by the insurance commissioner to meet the objections of the legislative rule-making review committee and

refiled in the state register on the twenty-third day of January, two thousand four, relating to the insurance commissioner (credit for reinsurance, 114 CSR 40), is authorized, with the following amendment:

On page one, subsection 2.2, line one, after the words "alien ceding insurer", by inserting the words "which is";

On page one, subsection 2.2, line two, by striking out the word "that" and inserting in lieu thereof the word "and";

On page two, subdivision 4.1.d, line four, after the words "The accredited reinsurer", by striking out the word "shall" and inserting in lieu thereof the word "may";

On page three, subsection 5.1, line two, after the words "insurer which", by inserting a comma:

On page three, subsection 5.1, line three, after the words "on which", by striking out the remainder of the subsection and inserting in lieu thereof the words "credit for reinsurance is claimed on the domestic insurer's statutory financial statement";

On page four, subdivision 6.2.b, line two, after the word "underwriters", by inserting a comma;

On page four, subdivision 6.2.b, line three, after the words "United States", by inserting a period, striking out the words "and in" and inserting in lieu thereof the word "In";

On page seven, subsection 6.6, line three, after the word "dollars", by changing the comma to a semi-colon;

On page seven, subsection 6.6, line four, after the terms "(f) and (g)", by changing the comma to a semi-colon;

On page seven, subsection 6.6, line five, after the terms "(f) and (g)", by changing the comma to a semi-colon;

On page ten, subparagraph 6.6.f.1.B, line five, by striking out the word "shall" and inserting in lieu thereof the word "may";

On page eleven, subdivision 6.6.i, line three, by striking out the words "shall be" and inserting in lieu thereof the word "is";

On page fifteen, subdivision 9.1.i, line three, by striking out the words "shall have" and inserting in lieu thereof the word "has";

And,

On page fifteen, subdivision 9.1.j, line three, by striking out the words "shall be" and inserting in lieu thereof the word "is".

(f) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand three, authorized under the authority of section sixteen, article twelve-a, chapter twenty-nine, of this code, relating to the insurance commissioner (self-insurance pools for political subdivisions, 114 CSR 65), is authorized.

§64-7-3. Lottery commission.

(a) The legislative rule filed in the state register on the tenth day of July, two thousand three, authorized under the

authority of section five, article twenty-two, chapter twenty-nine, of this code, modified by the lottery commission to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-second day of December, two thousand three, relating to the lottery commission (state lottery rules, 179 CSR 1), is authorized.

(b) The legislative rule filed in the state register on the twenty-fourth day of July, two thousand three, authorized under the authority of section four hundred two, article twenty-two-b, chapter twenty-nine, of this code, modified by the lottery commission to meet the objections of the legislative rule-making review committee and refiled in the state register on the twelfth day of January, two thousand four, relating to the lottery commission (limited video lottery, 179 CSR 5), is authorized with the following amendment:

On page three, section two, subsection 2.13, line four, following the words "operating on", by inserting the word "that";

On page four, section two, subsection 2.15, line two, following the word "Code", by striking out the citation "§11-14-2", and inserting in lieu thereof the citation "§11-14C-2";

On page seven, section five, subsection 5.2, line one, following the word "subdivision", by striking out the citation "5.1.a", and inserting in lieu thereof the citation "5.1.b";

On page twenty-one, beginning on line four, by striking out

section 30 in its entirety and redesignating the remaining sections and parts thereof accordingly;

And,

On page twenty-four, section 34.2, by changing the period at the end of the sentence to a colon and inserting the words: "*Provided*, That a limited video lottery retailer may display a sign on the exterior of the establishment that states 'West Virginia Lottery Products available here,' which sign is of uniform size and design, no greater than twelve inches by twelve inches, produced and distributed to retailers by the lottery commission."

§64-7-4. Racing commission.

(a) The legislative rule filed in the state register on the thirty-first day of July, two thousand three, authorized under the authority of section six, article twenty-three, chapter nineteen, of this code, modified by the racing commission to meet the objections of the legislative rule-making review committee and refiled in the state register on the fifth day of December, two thousand three, relating to the racing commission (thoroughbred racing, 178 CSR 1), is authorized.

(b) The legislative rule filed in the state register on the thirty-first day of July, two thousand three, authorized under the authority of section six, article twenty-three, chapter nineteen, of this code, relating to the racing commission (greyhound racing, 178 CSR 2), is authorized.

§64-7-5. Tax commissioner.

The legislative rule filed in the state register on the eighteenth day of February, two thousand three, authorized under the authority of section twenty-three, article ten, chapter eleven, of this code, modified by the tax commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-first day of April, two thousand three, relating to the tax commissioner (alternative resolution of tax disputes, 110 CSR 10g), is authorized, with the following amendment:

On page two, subdivision 3.1.1, line two, after the word "and", by inserting a comma;

On page two, subsection 3.5, line three, by striking the word "shall" and inserting the in lieu thereof the word "must";

One page two, subsection 3.5, line six, after the word "assessment" by inserting a comma;

One page two, subsection 3.5, line six, by striking the word "commence" and inserting in lieu thereof the work "begin";

On page two, subdivision 3.5.1, line two, by striking the word "that" and inserting in lieu thereof the word "as";

On page three, subsection 4.1, line two, after the word "coordinator" by inserting a comma;

On page three, subdivision 4.2.1, line three, after the word "approved" by striking the comma and inserting in lieu thereof a

period;

One page three, subdivision 4.2.1, line three, by striking the word "and" and inserting in lieu thereof "The conciliation coordinator or assistant conciliation coordinator";

On page three, subdivision 4.2.1, line four, following the word "date" by striking the comma and inserting in lieu thereof a period;

On page three, subdivision 4.2.1, line five, by striking the word "which" and inserting in lieu thereof the words "The conference date";

On page three, subsection 4.4, line one by striking out the words "without regard to the rules of evidence";

On page three, subsection 4.4, line three after the word "dispute" by striking the period and inserting the words "and without regard to the rules of evidence".

~~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.~~

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

§114-20-9. Separability.

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

ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 4217

(By Delegates Mahan, R. Thompson, Cann, Kominar, Armstead and Faircloth)

[Passed March 12, 2004; in effect from passage.]

AN ACT to amend and reenact article 7, chapter 64 of the code of West Virginia, 1931, as amended, all relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive or administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate certain legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing certain of the agencies to promulgate certain legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate certain legislative rules with various modifications presented to and recommended

by the legislative rule-making review committee and as amended by the Legislature; authorizing the division of banking to promulgate a legislative rule relating to residential mortgage lenders, brokers and loan originators; authorizing the insurance commissioner to promulgate a legislative rule relating to the licensing and conduct of individual insurance producers, agencies and solicitors; authorizing the insurance commissioner to promulgate a legislative rule relating to surplus lines insurance; authorizing the insurance commissioner to promulgate a legislative rule relating to Medicare supplement insurance; authorizing the insurance commissioner to promulgate a legislative rule relating to accident and sickness rate filing; authorizing the insurance commissioner to promulgate a legislative rule relating to credit for reinsurance; authorizing the insurance commissioner to promulgate a legislative rule relating to self-insurance pools for political subdivisions; authorizing the lottery commission to promulgate a legislative rule relating to the state lottery; authorizing the lottery commission to promulgate a legislative rule relating to limited video lottery; authorizing the racing commission to promulgate a legislative rule relating to thoroughbred racing; authorizing the racing commission to promulgate a legislative rule relating to greyhound racing; and authorizing the tax

commissioner to promulgate a legislative rule relating the alternative resolution of tax disputes.

Be it enacted by the Legislature of West Virginia:

That article 7, chapter 64 of the code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 7. AUTHORIZATION FOR DEPARTMENT OF TAX AND REVENUE TO PROMULGATE LEGISLATIVE RULES.

§64-7-1. Division of banking.

The legislative rule filed in the state register on the fifteenth day of July, two thousand three, authorized under the authority of section three, article seventeen, chapter thirty-one, of this code, modified by the division of banking to meet the objections of the legislative rule-making review committee and refiled in the state register on the twentieth day of January, two thousand four, relating to the division of banking (residential mortgage lenders, brokers and loan originators, 106 CSR 5), is authorized, with the following amendment:

On page three, after section 3.1, by adding a new section to read "3.2 All records required to be maintained by section 3.1 shall be kept in the specific loan file relating to the individual borrower or loan applicant except for those records listed in subsections 3.1.z, 3.1.aa, 3.1.bb and 3.1.cc.";

On page four, after section 4.1, by adding a new section to read "4.2 All records required to be maintained by section 4.1

shall be kept in the specific loan file relating to the individual borrower or loan applicant except for those records listed in subsections 4.1.g, 4.1.h, 4.1.i, 4.1.j and 4.1.k.";

On page five, after section 5.1, by adding a new section to read "5.2 All records required to be maintained by section 5.1 shall be kept in the specific loan file relating to the individual borrower or loan applicant except for those records listed in subsections 5.1.j, 5.1.k, 5.1.l, 5.1.m and 5.1.n.";

And,

On page seven, after section 6.1, by adding a new section to read "6.2 All records required to be maintained by section 6.1 shall be kept in the specific loan file relating to the individual borrower or loan applicant except for those records listed in subsections 6.1.t, 6.1.u, 6.1.v, 6.1.w and 6.1.y."

§64-7-2. Insurance commissioner.

(a) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand three, authorized under the authority of section ten, article two, chapter thirty-three, of this code, modified by the insurance commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the fourth day of December, two thousand three, relating to the insurance commissioner (licensing and conduct of individual insurance producers, agencies and solicitors, 114 CSR 2), is authorized.

(b) The legislative rule filed in the state register on the twenty-ninth day of July, two thousand three, authorized under the authority of section ten, article two, chapter thirty-three, of this code, modified by the insurance commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the fourth day of December, two thousand three, relating to the insurance commissioner (surplus lines insurance, 114 CSR 20), is authorized with the following amendments:

On page three, by striking out all of subdivision 4.1 and inserting in lieu thereof the following:

"4.1 Diligent Search - In accordance with the provisions of West Virginia code §33-12C-5(a)(3), insurance coverage written by a surplus lines insurer and placed by a surplus lines licensee may not be procured until a diligent search has been made by the individual insurance producer to place the risk with an admitted insurer. The surplus lines licensee shall submit to the commissioner a sworn notarized affidavit, as provided in subsection 4.5 of this rule, that a diligent search has been made by the individual insurance producer to place the risk with licensed insurers authorized to write and actually writing the particular risk sought to be placed in the excess lines market. This affidavit shall be maintained, as required by West Virginia code §33-12C-16, as part of the full and true record of each surplus

lines contract procured.";

On page three, section 4 (subdivision 4.2.a.) following the word "rule" and the period by inserting the following:

"The affidavit shall affirm that the insured was expressly advised prior to the placement of the insurance that:

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

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

On pages three and four by striking out all of subdivision 4.2.b. and inserting in lieu thereof the following:

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

PROMULGATION HISTORY

WEST VIRGINIA INSURANCE COMMISSION

TITLE

SURPLUS LINES INSURANCE

TITLE 114, SERIES 20

5/28/03	Notice of Comment Period Filed
6/27/03	Last Date Comments Were Received
7/29/03	Agency Approved Legislative Rule Filed
11/18/03	Date Reviewed by Legislative Rule-Making Review Committee
4/16/04	Filing Date
4/16/04	Effective Date

114CSR20

WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 20
SURPLUS LINES INSURANCE

Section

114-20-1. General.

114-20-2. Definitions.

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

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

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

114-20-9. Separability.

114CSR20

FILED
2004 APR 16 A 10: 25
WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 20
SURPLUS LINES INSURANCE

§114-20-1. General.

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

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

1.3. Filing Date. -- April 16, 2004.

1.4. Effective Date. -- April 16, 2004.

§114-20-2. Definitions.

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

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

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

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

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

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

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

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

2.9. "Producer" means an individual insurance producer.

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

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

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

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

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

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

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

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

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

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

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

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

4.1. Diligent Search – In accordance with the provisions of W. Va. Code §33-12C-5(a)(3), insurance coverage written by a surplus lines insurer and placed by a surplus lines licensee may not be procured until a diligent search has been made by the individual insurance producer to place the risk with an admitted insurer. The surplus lines licensee shall submit to the commissioner a sworn notarized affidavit, as provided in subsection 4.5 of this rule, that a diligent search has been made by the individual insurance producer to place the risk with licensed insurers authorized to write and actually writing the particular risk sought to be placed in the excess lines market. This affidavit shall be maintained, as required by W. Va. Code §33-12C-16, as part of the full and true record of each surplus lines contract procured.

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

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

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

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

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

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

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

1. The name, office location and phone number of the licensed insurer or firm acting in the capacity of underwriting manager for the licensed insurer.

2. The name and position of the person contacted.

3. The date of contact.

4. A detailed explanation of the licensed insurer's reasons for declining to insure the risk.

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

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

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

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

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

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

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

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

4.4. Countersignature. -- In accordance with the provisions of W. Va. Code §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 a surplus lines licensee unless the contract is signed or countersigned in writing by a duly licensed resident 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.

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

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

a. The name and address of the surplus lines insurer;

b. The names and addresses of the insureds;

c. The amount of insurance;

d. The gross premium charged;

e. The return premium paid, if any;

f. The rate of premium charged on the several items of coverages;

g. The effective date of the contract and the terms of the contract;

h. A brief general description of the risks insured against and the property insured;

i. The policy number;

j. The written due diligence declaration of the individual insurance producer required in subsection 4.2 of this rule; and

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

4.7. Each resident surplus lines licensee which countersigns a surplus lines contract shall keep in his or her office a full and true record of each 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 surplus lines licensee;

b. The name and address of the 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 surplus lines licensee. -- Each licensed surplus lines licensee who participates directly or indirectly in effecting any insurance contract on a surplus lines basis:

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

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

c. In those instances in which surplus lines business is produced to a surplus lines licensee by an individual insurance producer licensed in this state for the kind of insurance involved, it is the surplus lines licensee's responsibility to include the necessary information in the Annual Report of Written Surplus Lines Policies required by subsection 4.5 of this rule and the Annual Surplus Lines Tax Return Reconciliation Form Leb 4A, as required by subsection 5.1 of this rule.

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

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

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

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

payments on or before the first day of March. All the taxes paid to the commissioner shall be paid by him or her into a special account in the state treasury, designated the "municipal pensions and protection fund," and after appropriation by the Legislature, shall be distributed in accordance with the provisions of W. Va. Code §33-3-14D(c).

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

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

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

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

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

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

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

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

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

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

B. If a policy covers more than one classification:

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

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

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

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

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

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

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

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

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

§114-20-7. Export List.

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

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

1. The current marketplace;

2. Information from the surplus line licensees;

3. Information from admitted and surplus lines insurers doing business in West Virginia;

4. Information from other sources, including producers and consumers; 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 only be placed with surplus lines insurers once a diligent search has been made.

1. A good faith diligent search must be made to place the insurance with admitted insurers. 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.

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

§114-20-9. Separability.

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