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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Office of the Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

**Natalie E. Tennant**  
Secretary of State  
State of West Virginia

Telephone: (304) 558-6000  
Toll Free: 1-866-SOS-VOTE  
Fax: (304) 558-0900  
www.wvsos.com

June 30, 2009

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**

**AGENCY:** Offices of the Insurance Commissioner

**RULE:** Amendments, 114CSR36, Life and Health Insurance Guaranty Association Act Notice Requirements

**DATE FILED AS AN EMERGENCY RULE:** June 26, 2009

**DECISION NO. 10-09**

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

A handwritten signature in cursive script that reads "Natalie E. Tennant".

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**NATALIE E. TENNANT**  
Secretary of State

EMERGENCY RULE DECISION  
(ERD 10-09)

AGENCY: Offices of the Insurance Commissioner  
RULE: Amendments, 114CSR36, Life and Health Insurance Guaranty Association Act Notice Requirements  
FILED AS AN EMERGENCY RULE: June 26, 2009

- par. 1 The Offices of the Insurance Commissioner (Commissioner) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Commissioner filed this emergency rule with supporting documents with the Secretary of State June 26, 2009 and with the LRMRC June 26, 2009.
- par. 7 It is the determination of the Secretary of State that the Commissioner has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code 33-28-5b(2) reads:

***§33-26A-19. Prohibited advertisement of insurance guaranty association act in insurance sales; notice to policyholders.***

***(a) A person, including any insurer, agent or affiliate of an insurer shall not make, publish, disseminate, circulate or place before the public, or cause directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in any newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet,***

*letter or poster, or over any radio station or television station, or in any other way, any advertisement, announcement or statement, written or oral, which uses the existence of the insurance guaranty association of this state for the purpose of sales, solicitation or inducement to purchase any form of insurance covered by the West Virginia life and health insurance guaranty association act: Provided, That this section shall not apply to the association or any other entity which does not sell or solicit insurance.*

*(b) Within one hundred eighty days of the effective date of this section, the association shall prepare a summary document describing the general purposes and current limitations of the act and complying with subsection (c) of this section. This document should be submitted to the commissioner for approval. Sixty days after receiving such approval, no insurer may deliver a policy or contract described in subdivision (1) of subsection (b) of section three of this article to a policy or contract holder unless the document is delivered to the policy or contract holder prior to or at the time of delivery of the policy or contract except if subsection (d) of this section applies. The document should also be available upon request by a policyholder. The distribution, delivery, or contents or interpretation of this document shall not mean that either the policy or the contract of the holder thereof would be covered in the event of the impairment or insolvency of a member insurer. The description document shall be revised by the association as amendments to the act may require. Failure to receive this document does not give the policyholder, contract holder, certificate holder or insured any greater rights than those stated in this article.*

*(c) The document prepared under subsection (b) of this section shall contain a clear and conspicuous disclaimer on its face. The commissioner shall promulgate a rule establishing the form and content of the disclaimer. The disclaimer shall:*

- (1) State the name and address of the association and insurance department;*
- (2) Prominently warn the policy or contract holder that the association may not cover the policy or, if coverage is available, it will be subject to substantial limitations and exclusions and conditioned on continued residence in the state;*
- (3) State that the insurer and its agents are prohibited by law from using the existence of the association for the purpose of sales, solicitation or inducement to purchase any form of insurance;*
- (4) Emphasize that the policy or contract holder should not rely on coverage under the association when selecting an insurer;*
- (5) Provide other information as directed by the commissioner.*

*(d) An insurer or agent may not deliver a policy or contract described in subdivision (1) of subsection (b) of section three of this article and excluded under paragraph (A), subdivision (2), subsection (b) of section three of this article from coverage under this article unless the insurer or agent, prior to or at the time of delivery, gives the policy or contract holder a separate written notice which clearly and conspicuously discloses that the policy or contract is not covered by the association. The commissioner shall by rule specify the form and content of the notice, which rules shall be promulgated on or before the second day of August, one thousand nine hundred ninety-three.*

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

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

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

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

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

The Life and Health Guaranty Association ("GA"), created in W. Va. Code §33-29A-6, is a "nonprofit legal entity" governed by a board of directors (but under the "immediate supervision of the insurance commissioner"). The GA's function is to protect persons covered by life and health policies and annuity holders from insurance companies' failure to perform their obligations under such policies and contracts. To perform this task, the GA is authorized to assess other companies. The WV Offices of the Insurance Commissioner regulates the GA pursuant to W. Va. Code §33-26A-11.

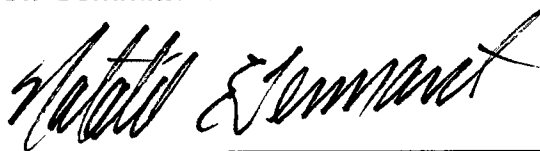
It is possible for an insurer to exempt a policy from the coverage normally provided by the Guaranty Association Act. W. Va. Code §33-26A-3(b)(2) provides that "[t]his article shall not provide coverage for: (1) A portion of policy or contract not guaranteed by the insurer, or under which the risk is borne by the policy or contract owner."

W. Va. Code §33-26A-19(b) requires that the association prepare a summary document, approved by the Insurance Commissioner, describing the general purposes and current limitations of the act and containing a clear and conspicuous disclaimer on its face, which is mandated by W. Va. Code §33-26A-19(c). W. Va. Code of St. R. §114 CSR 36 is the rule promulgated in response to this statutory mandate and the Appendix found in this rule sets forth the summary document, with the disclaimer, that is approved by the Commissioner for use. The amendments to the GA Act contained in H.B. 3278, enacted by the 2009 Legislature, made changes to the provision affected by the disclosure notice, §33-26A-3(b)(1), which describes the types of policies/contracts to which the GA Act applies and with respect to which the notice is required in order to exempt such policies/contracts from GA coverage. The 2009 amendments were so vast that it requires an update to the Appendix found in this rule in order to remain in compliance with the Code.

The rule is being amended further to add an additional Appendix that will set forth the document required by W. Va. Code §33-26A-19(d). When an insurer or producer delivers an insurance policy or contract, the document found in the new Appendix is required to be given to the consumer stating that the policy of insurance they are covering is not covered by the Guaranty Association. The effective date of the statute is July 10, 2009 so the rule will need to be in effect July 10, 2009 as well to remain in compliance with the statute.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "time limitation"

par. 14 This decision shall be cited as Emergency Rule Decision 10-09 or ERD 10-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Insurance Commissioner, the Attorney General and the Legislative Rule Making Review Committee.



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NATALIE E. TENNANT  
Secretary of State

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