

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: CREDIT FOR REINSURANCE
(TITLE 114, SERIES 40)

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 40

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

Gara A. Hoke, 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: hokega@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

ATTACHMENT TO QUESTION 2 (d):

Two sets of comments were received during the comment period in response to the proposed legislative rule; one from Mary Kate Donnelly, representing Allstate and one from the Reinsurance Association of America.

- A. Mary Kate Donnelly submits the following comments by e-mail dated June 26, 2003:
1. Regarding proposed 114 C.S.R. § 40.10.2 (m), Ms. Donnelly suggests that the revision should more properly read that “the assets shall be distributed according to the trust agreement,” not according to the state’s priority statutes. Moreover, the revision refers to the “U.S. beneficiaries of the trust” while existing 10.2 (e) expressly provides that the “trust agreement shall be established for the sole benefit of the beneficiary.” Ms. Donnelly also suggests that the language in 10.2 (m) may have been inadvertently placed there as pertaining to individual trust funds, instead of only pertaining to multiple beneficiary trust funds.

The Commissioner declines to amend Section 10.2. (m) as Ms. Donnelly suggests because the proposed rule along with the accompanying amendments are in conformity with the NAIC model regulation.

- B. Reinsurance Association of America (“RAA”) submits the following comments by letter dated and received on June 27, 2003:
1. RAA proposes that the term “insurer” be amended to state, “domestic insurer” in Sections 4, 5.1 and 6.1.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

2. RAA proposes that the term “ceding insurer” in Section 7.1. be amended to state, “domestic insurer.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

3. RAA proposes that the language in Section 4 be amended to state, "that was licensed in this state as of any date on which statutory financial statement credit for reinsurance is claimed."

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

4. RAA proposes to amend section 5.1. by changing "prior to the effective date of the contract and as of the date of the ceding insurer's statutory financial statement" to "as of any date on which statutory financial statement credit for reinsurance is claimed."

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

5. RAA proposes that the words "is one which" should be stricken in the last sentence of Section 5.1.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

6. RAA proposes that other acceptable evidence of proof of a license to transact insurance or reinsurance be included in Section 5.1. (b).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

7. RAA proposes that the term "most recent audited financial statement" be replaced with "annual statement" in Section 5.1. (c).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

8. RAA proposes that "and a copy of its most recent audited financial statement" be included in Section 5.1. (c).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

9. RAA proposes that the phrase, "or, in the case of companies with" be amended to the phrase, "or maintains" in Section 5.1. (d).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

10. RAA proposes that the language in Section 6.1. be amended to state, “any date on which statutory financial statement credit for reinsurance is claimed.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

11. RAA proposes that in Section 7.1. the language be amended to “any date on which statutory financial statement credit for reinsurance in claimed and thereafter for so long as the credit for reinsurance is claimed.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

12. RAA proposes that the term “policyholders” be removed from Section 7.1., and the term “domestic” be used to describe ceding insurers.

The Commissioner agrees to amend the language to conform to the NAIC model, including the removal of the term “policyholders.” However, the Commissioner chooses to amend the additional language as conforms to the NAIC model and not to the proposed language of the RAA.

13. RAA proposes that a change be made from “business written in the United States” to “reinsurance ceded by U.S. domiciled insurers” in Section 7.2.

The Commissioner agrees to amend the language to conform to the NAIC model.

14. RAA proposes that additional language be included in Section 7.2. (a) to state, “the assuming insurer shall maintain.”

The Commissioner agrees to amend the language to conform to the NAIC model.

15. RAA proposes that the term “aggregate” in Section 7.2. (b) be changed to “several.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

16. RAA proposes that the term “policyholders” be removed from Section 7.3. (b).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

17. RAA proposes that Section 7.3. (f) be deleted altogether and therefore place the conjunctive "and" at the conclusion of Section 7.3. (d).

The Commissioner disagrees with the assertion that Section 7.3. (f) should be deleted altogether because it allows the Commissioner to review any and all amendments to the agreements. Therefore, the Commissioner declines to follow the proposal of RAA.

18. RAA proposes that Section 7.4. be amended to state "its state or country of domicile" and not limit to the state of West Virginia.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

19. RAA proposes grammatical changes to Section 7.4.(c) including the addition of the word "If" and the addition of the word "determines" to replace the term "upon determining."

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

20. RAA proposes a change in Section 7.6. from the word "verified" to the word "specified."

The Commissioner maintains that the word "specified" exists in the proposed rule, and therefore, it is unnecessary to make the aforementioned change.

21. RAA proposes the deletion of the letters "nd" and the subsequent addition of the word "and" in Section 7.6. (e) (1) (A) (2).

The Commissioner maintains that no such grammatical error exists in the proposed rule, and therefore, it is unnecessary to make the aforementioned change.

22. RAA proposes the deletion of the letter "o" and the subsequent addition of the word "to" in Section 7.6. (f) (3).

The Commissioner maintains that no such grammatical error exists in the proposed rule, and therefore, it is unnecessary to make the aforementioned change.

23. RAA proposes that "ceding insurer" be amended to "domestic insurer" in Section 8.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

24. RAA proposes technical clean-up to Section 8 in the form of the replacement of the words “respect to” with the word “as” and the word “such” with the word “the.” In addition, RAA proposes the deletion of the word “any.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

25. RAA proposes an amendment to the title of Section 9 to state, “**Asset or Reduction From Liability for Reinsurance Ceded to an Unauthorized Ceding Insurer.**”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

26. RAA proposes the term “insurer” be amended to state “domestic insurer” and the addition of the term “reinsurance contract” in Section 9.1. Also, in Section 9.1., RAA proposes the replacement of the word “thereunder” with the word “under” and the replacement of the word “the” with the word “such.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

27. RAA proposes that in addition to the term “in the possession of,” that the option of “or in trust for” be added in Section 9.1. (c).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

28. RAA proposes that the remainder of Section 10.2. (c) be deleted from the word “except” through “United States.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

29. RAA proposes that the trust agreement shall be made subject to and governed by the laws of the state in which the trust is domiciled and not where established, as stated in Section 10.2. (h).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

30. RAA proposes to omit the phrase, “notwithstanding any other conditions in this rule,” in Section 10.2. (k).

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

31. RAA proposes to omit Section 10.2. (k) (3).

The Commissioner maintains that RAA has incorrectly numbered its comments and the language referred to is Section 10.2. (k) (3) (A). The Commissioner agrees to delete the language in subparagraph A to conform to the NAIC model regulation.

32. RAA proposes amendments to Section 10.2. (k) (3) to state:

“Notwithstanding other provisions of this rule, when a trust agreement is established **to meet the requirements of Section 9** in conjunction with a reinsurance agreement covering life, annuities or accident and health **risks**, where it is customary practice to provide a trust agreement for a specific purpose, a trust agreement may, ~~notwithstanding any other conditions in this rule~~, provide that the ceding insurer shall undertake to use and apply amounts drawn upon the trust account, without diminution because of the insolvency of the ceding insurer or the assuming insurer, **only** for the following purposes:”

The Commissioner maintains that RAA has incorrectly numbered its comments and the language referred to is Section 10.2. (l). The Commissioner agrees to amend the language to conform to the NAIC model regulation.

33. RAA proposes amendments to Section 10.2. (m) to address technical clean-up especially that referring to “its state or country of domicile.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

34. RAA proposes an amendment to Section 10.4. (a) omitting the phrase, “which is entered into in conjunction with a trust agreement and the establishment of a trust account.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

35. RAA proposes to dispose of the use of the term “legal tender” in Section 10.4. (a) (2) in favor of the word “dollars.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

36. RAA proposes an amendment of the following language to Section 10.4.(a) (2):
“provided investments in or issued by an entity controlling, controlled by or under common control with either the grantor or the beneficiary of the trust shall not exceed 50% of the total investments.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation, including language “not to exceed five percent (5%) of total investments” rather than the 50% proposed by RAA.

37. RAA proposes an amendment to Section 10.4.(a) (5) (A) and (B) to include “pay or.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

38. RAA proposes Section 10.4. (a) (5) (A) be amended to state, “To pay or reimburse the ceding insurer for the assuming insurer’s share **under the specific reinsurance** agreement of premiums returned **but not yet recovered from the assuming insurer** to the owners of policies reinsured under the reinsurance agreement because of the cancellation of the policies;”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

39. RAA proposes the deletion of Section 10.4 (a) (5) (C) and a new Section 10.4. (a) (5) (C) to state, “ Any other amounts necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer;”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

40. RAA proposes the deletion of Section 10.4 (a) (5) (D) and a new Section 10.4 (a) (5) (D) to state, “To make payment to the assuming insurer of amounts held in the trust account in excess of the amount necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

41. RAA proposes the term “ceding insurer” be amended to “domestic insurer” in Section 11.1.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

42. RAA proposes an amendment to Section 11.5 in that “(Publication 400)” be amended to read “(Publication 500), or any successor publication.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

43. RAA proposes an amendment to Section 11.6 in that “Publication 400” be amended to read “Publication 500, or any successor publication” and the Article be amended to read Article 17.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

44. RAA proposes an amendment to Section 11.9. (a) (2) (A) to state, “To **pay or** reimburse the ceding insurer for the assuming insurer’s share **under the specific reinsurance agreement** of premiums returned **but not yet recovered from the assuming insurers**, to the owners of policies reinsured under the reinsurance agreement on account of cancellations of the policies; **and**”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

45. RAA proposes an amendment to Section 11.9. (a) (2) (B) to state, “To **pay or** reimburse the ceding insurer for the assuming insurer’s share **under the specific reinsurance agreement** of surrenders and benefits or losses paid by the ceding insurer **but not yet recovered from the assuming insurers** under the terms and provisions of the policies reinsured under the reinsurance agreement;”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

46. RAA proposes an amendment to delete Section 11.9. (a) (2) (C) in its entirety and insert a new provision which states, “**Any other amounts necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.**”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

47. RAA proposes an amendment to delete Section 11.9. (a) (2) (D) in its entirety and insert a new provision which states, **“To make payment to the assuming insurer of amounts held in the trust account in excess of the amount necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.”**

The Commissioner declines to amend Section 11.9. (a) (2) (D) in the manner RAA proposes, as it is not included in the NAIC model regulation. Instead, the Commissioner chooses to delete the section in its entirety.

48. RAA proposes a typographical change from the word “nay” to the word “any” in Section 11.9. (a) (2) (E).

The Commissioner agrees to this change, as it was a typographical error.

49. RAA proposes a grammatical change from the phrase “and/or” in Section 11.9. (b) 1. to “or.”

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

50. RAA proposes the deletion of Section 11.9. (c) in its entirety.

The Commissioner agrees to delete the language to conform to the NAIC model regulation.

51. RAA proposes the deletion of Section 11.10 in its entirety.

The Commissioner agrees to delete the language to conform to the NAIC model regulation.

52. RAA proposes the addition of **“nor an agent or reduction from liability allowed”** to Section 13.

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

53. RAA suggests the following amendment to Section 13.2.:
“Includes a provision pursuant to W.Va. Code Section 33-4-15a (c) (6) whereby **the assuming insurer, if** an unauthorized assuming insurer has submitted to the jurisdiction of **alternative dispute resolution panel or a court of competent jurisdiction** within the United States, has agreed to comply with all requirements necessary to give the court **or panel** jurisdiction, has designated an agent upon whom service of process may be effected, and has agreed to abide by the final decision of the court **or panel.”**

The Commissioner agrees to amend the language to conform to the NAIC model regulation.

54. RAA proposes the deletion of Section 7.2. (c) in its entirety.

The Commissioner declines to delete Section 7.2. (c) because it is statutory in nature and contained in the NAIC model regulation.

55. RAA proposes an amendment to Section 13.1, as subsection a. to read: **“Includes a proper solvency clause that provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable under a contract(s) reinsured by the assuming insurer on the basis of reported claims allowed by the liquidation court, without diminution because of the insolvency of the ceding insurer. Such payments shall be made directly to the ceding insurer or to its domiciliary liquidator except: (a) where the contract or other written agreement specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer, or (b) where the assuming insurer, with the consent of the direct insured(s), has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.”**

The Commissioner declines to amend Section 13.1, as subsection a., because the RAA amendments have not been adopted by the NAIC at this time.

56. RAA proposes an amendment to Section 13.1., as subsection b. to read: **“Notwithstanding subsection (a), in the event that a life and health insurance guaranty association has made the election to succeed to the rights and obligations of the insolvent insurer under the contract of reinsurance, then the reinsurer’s liability to pay covered reinsured claims shall continue under the current contract of reinsurance, subject to the payment to the reinsurer of the reinsurance premiums for such coverage. Payment for such reinsured claims shall only be made by the reinsurer pursuant to the direction of the guaranty association or its designated successor. Any payment made at the direction of the guaranty association or its designated successor by the reinsurer will discharge the reinsurer of all further liability to any other party for said claim payment.”**

The Commissioner declines to amend Section 13.1, as subsection b., because the RAA amendments have not been adopted by the NAIC at this time.

57. RAA proposes an amendment to Section 13.1., as subsection c. to read:
“The reinsurance agreement may provide that the domiciliary liquidator of an insolvent ceding insurer shall give written notice to the assuming insurer of the pendency of a claim against such ceding insurer on the contract reinsured within a reasonable time after such claim is filed in the liquidation proceeding. During the pendency of such claim, any assuming insurer may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be adjudicated any defenses which it deems available to the ceding insurer, or its liquidator. Such expense may be filed as a claim against the insolvent ceding insurer to the extent of a proportionate share of the benefit which may accrue to the ceding insurer solely as a result of the defense undertaken by the assuming insurer. Where two or more assuming insurers are involved in the same claim and a majority in interest elect to interpose a defense(s) to such claim, the expense shall be apportioned in accordance with the terms of the reinsurance as though such expense has been incurred by the ceding insurer; and

The Commissioner declines to amend Section 13.1, as subsection c., because the RAA amendments have not been adopted by the NAIC at this time.

Joy Zirkle

From: Gara Hoke [hokega@mail.wvnet.edu]
Sent: Tuesday, July 01, 2003 9:02 AM
To: Joy Zirkle
Subject: FW: West Virginia Proposed Regulations regarding Credit for Reinsurance Section 114-40-1 through Section 114-40-15

Another to add to your list for Series 40. Mary Kate is representing Allstate.

Gara

-----Original Message-----

From: Donnelly, Mary Kate [mailto:MDONNEL1@allstate.com]
Sent: Thursday, June 26, 2003 1:55 PM
To: 'hokega@mail.wvnet.edu'
Cc: Hoffman, Nancie
Subject: West Virginia Proposed Regulations regarding Credit for Reinsurance Section 114-40-1 through Section 114-40-15

Dear Ms. Hoke:

I write here and comment on West Virginia's proposed amendments to West Virginia's Credit for Reinsurance Regulations at Section 114-40-1 through Section 114-40-15.

As respects trust agreements used to "qualify for a reduction from liability for reinsurance ceded to an unauthorized assuming insurer" under Section 114-40-9, the proposed amendments require such trust agreements to contain a new provision set forth at proposed Section 114-40-10.2(m). Proposed Section 114-40-10.2(m) provides as follows:

Notwithstanding any other provisions in the trust instrument, if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation or similar proceedings under the laws of its state or country of domicile, the trustee shall comply with an order of the commissioner with regulatory oversight over the trust or court of competent jurisdiction directing the trustee to transfer to the commissioner with regulatory oversight or other designated receiver all of the assets of the trust fund. The assets shall be applied in accordance with the priority statutes and laws of the state in which the trust is domiciled applicable to the assets of insurance companies in liquidation. If the commissioner with regulatory oversight determines that the assets of the trust fund or any part thereof are not necessary to satisfy claims of the U.S. beneficiaries of the trust, the assets or any part of them shall be returned to the trustee for distribution in accordance with the trust agreement.

Proposed Section 114-40-10.2(m).

The proposed provision appears to authorize the Commissioner to take funds held in trust for a single beneficiary and creditor and to distribute them according to the "priority statutes" of the state of domicile, rather than in accordance with the instructions contained in the trust agreement. The revision further states that when all of the claims of U.S. beneficiaries have been satisfied, the remaining funds will then be returned to the trustee for "distribution in accordance with the trust agreement." Does West Virginia intend to authorize the Commissioner to satisfy claims of creditors according to the priority statutes using the funds held in trust for the single named beneficiary? The revision should more properly read that "the assets shall be distributed according to the trust agreement," not according to the state's priority statutes. Moreover, the revision refers to "U.S. beneficiaries of the trust," while existing Section 10.2(e) expressly provides that "the trust agreement shall be established for the sole benefit of the beneficiary."

Notably, the provision proposed at Section 114-40-10.2(m) also appears in the proposed amendments pertaining to multiple beneficiary trust funds governed by West Virginia Regulation 114-40-7 and seems proper there. See Section 114-40-7.4(a). The above cited provision may simply have inadvertently also been included under Section 14-40-10.2 pertaining to individual trust funds. We understand that the RAA is looking into whether the insertion of this provision into the single beneficiary trust section of the credit for reinsurance regulations was a mistake.

Should you have any questions regarding the above comment or wish to discuss this matter further, please do not hesitate to contact me by e-mail or at 847) 551-2085. Thank you for your consideration.

7/1/2003

Mary Katherine Donnelly

Joy Zirkle

From: Jane Cline [clineja@mail.wvnet.edu]
Sent: Friday, June 27, 2003 5:03 PM
To: Gara Hoke; Mary Jane Pickens; Bill Kenny
Cc: Joy Zirkle; Cindy Pennington
Subject: Fw: Proposed Amendments to West Virginia Credit for ReinsuranceRule



cfr reg WV
omment letter 6-27.

Jane L. Cline
Insurance Commissioner
West Virginia Insurance Commission
PO Box 50540
Charleston, WV 25305-0540
TEL: 304.558.3354
FAX: 304.558.0412

----- Original Message -----

From: "Penny R. Moore" <moore@reinsurance.org>
To: <clineja@mail.wvnet.edu>
Cc: "Marsha A. Cohen" <cohen@reinsurance.org>; "Debra J. Hall" <hall@reinsurance.org>; "Bradley L. Kading" <kading@reinsurance.org>; "Penny R. Moore" <moore@reinsurance.org>; "Frank Nutter" <nutter@reinsurance.org>; "Matt Wulf" <wulf@reinsurance.org>
Sent: Friday, June 27, 2003 4:46 PM
Subject: Proposed Amendments to West Virginia Credit for ReinsuranceRule

Please find attached correspondence regarding the above-referenced subject.



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Via E-mail: clineja@mail.wvnet.edu

June 27, 2003

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

Re: Proposed Amendments to West Virginia Credit for Reinsurance Rule

Dear Commissioner Cline:

We commend your efforts to amend the West Virginia credit for reinsurance rule to comply with the National Association of Insurance Commissioners (NAIC) model regulation. We wish to take this opportunity to respectfully offer additional amendments to the West Virginia rule.

The RAA is a national trade association representing property and casualty organizations that specialize in reinsurance. The RAA membership is diverse, including large and small, broker and direct, U.S. companies and subsidiaries of foreign companies. Together, RAA members write approximately two-thirds of the gross reinsurance coverage provided by U.S. property and casualty reinsurers and affiliates.

We have noted that the West Virginia rule includes provisions from three different versions of the NAIC model regulation: 1991 adopted model, 1996 amended model and 2001 amended model. We are providing our amendments partly as a clean-up measure and so that West Virginia will be able to track the most up-to-date version of the NAIC model.

In order to fully conform the West Virginia rule to the NAIC model, we recommend making the following changes (our recommended changes are in bold—underlines denote additions and ~~strikethroughs~~ denote deletions). We've divided the letter into three parts:

- Part 1 deals with technical amendments to the rule to conform it to the NAIC model;
- Part 2 relates to the deletion of the "ILU Clause" provision; and
- Part 3 provides amendments and rationale for incorporation of the RAA "model" cut through and insolvency clause provisions.

PART 1—General Amendments to West Virginia's Rule to Conform to the NAIC Model

Sec. 114-40-4. Credit for Reinsurance – Reinsurer Licensed in This State.

Pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(c)(1), the commissioner shall allow credit for reinsurance ceded by an a domestic insurer to an assuming insurers ~~which were that was~~ licensed in this state as of ~~the~~ any date ~~of~~ on which statutory financial statement credit for reinsurance is claimed.

Sec. 114-40-5. Credit for Reinsurance – Accredited Reinsurers.

5.1. Pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(c)(2), the commissioner shall allow credit for reinsurance ceded by ~~an~~ a domestic insurer to an assuming insurer which is accredited as a reinsurer in this state ~~prior to~~ as of the effective date of the contract and as of the date of the ceding insurer's statutory financial statement any date on which statutory financial statement credit for reinsurance is claimed. An accredited reinsurer ~~is one which~~:

b. Files with the commissioner a certified copy of ~~a letter or~~ a certificate of authority or ~~of compliance as~~ other acceptable evidence that it is licensed to transact insurance or reinsurance in at least one state, or, in the case of a United States branch of an alien assuming insurer, is entered through and licensed to transact insurance or reinsurance in at least one state;

c. Files annually, on or before the first day of March its annual statement, a copy of its ~~most recent audited financial annual~~ statement and remits a ~~one hundred dollar (\$100.00)~~ \$100.00 annual statement filing fee to the commissioner. The annual statement shall be a copy of the statement filed with the insurance department of its state of domicile or, in the case of an alien assuming insurer, with the state through which it is entered and in which it is licensed to transact insurance or reinsurance; and a copy of its most recent audited financial statement; and

d. Has applied to the commissioner, paid a ~~one hundred dollar (\$100.00)~~ \$100.00 application fee and maintains a surplus as regards policyholders in an amount not less than \$20,000,000 and whose accreditation has not been denied by the commissioner within ninety (90) days of its application ~~or, in the case of companies with~~ or maintains a surplus as regards policyholders of less than \$20,000,000, and whose accreditation has been approved by the commissioner. A letter of accreditation issued by the commissioner is evidence of approval; and

Section 114-40-6. Credit for Reinsurance - Reinsurer Domiciled and Licensed in Another State.

6.1. Pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(c)(3), the commissioner shall allow credit for reinsurance ceded by ~~an~~ a domestic insurer to an assuming insurer which as of ~~the~~ any

date on which of the ceding insurer's statutory financial statement credit for reinsurance is claimed:

Sec. 114-40-7. Credit for Reinsurance - Reinsurers Maintaining Trust Funds.

The trust fund is intended to benefit domiciled ceding insurers, not policyholders, therefore we recommend amending the next section to read as follows:

7.1. Pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(c)(4), the commissioner shall allow credit for reinsurance ceded by a ceding a domestic insurer to an assuming insurer which, as of the any date on which of the ceding insurer's statutory financial statement credit for reinsurance is claimed and thereafter for so long as credit for reinsurance is claimed, maintains a trust fund in an amount prescribed in this section in a qualified United States financial institution as defined in ~~West Virginia~~ W. Va. Code Section 33-4-5a(f), for the payment of the valid claims of its United States ~~policyholders~~ and domestic ceding insurers, . . .

7.2. The following requirements apply to the following categories of assuming insurer: -

a. The trust fund for a single assuming insurer shall consist of funds in trust in an amount not less than the assuming insurer's liabilities attributable to ~~business written in the United States,~~ reinsurance ceded by U.S. domiciled insurers, and in addition, the assuming insurer shall maintain a trusted surplus of not less than \$20,000,000.

b. The trust fund for a group, including incorporated and individual unincorporated underwriters shall consist of funds in trust in an amount not less than the group's ~~aggregate~~ several liabilities . . .

Sec. 114-40-7. Credit for Reinsurance - Reinsurers Maintaining Trust Funds.

Once again, the trust fund is intended to benefit domiciled ceding insurers, not policyholders, therefore we recommend amending the next section to read as follows:

7.3.b. Legal title to the assets of the trust shall be vested in the trustee for the benefit of the grantor's United States ~~policyholders and~~ ceding insurers, their assigns and successors in interest;

7.3.d. The trust shall remain in effect for as long as the assuming insurer, or any member or former member of a group of insurers, shall have outstanding obligations under reinsurance agreements subject to the trust; and

~~7.3.f. Any amendment to the trust shall not be effective unless reviewed and approved in advance by the commissioner.~~

7.4. Notwithstanding any other provisions in the trust instrument, if the trust fund is inadequate because it contains less than the amount required by this section or if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation or similar proceedings under the laws of the state of West Virginia: its state or country of domicile, . . .

7.4.c. If ~~the~~ commissioner with regulatory oversight over the trust, upon determining determines that the assets of the trust fund or any part thereof are not necessary to satisfy the claims of the U.S. beneficiaries of the trust, shall return the assets, or any part thereof, to the trustee for distribution in accordance with the trust agreement.

7.6. Assets deposited in trusts established pursuant to W. Va. Code Section 33-4-15a (d) and this section shall be valued according to their fair market value and shall consist only of cash in U.S. dollars, certificates of deposit issued by a U.S. financial institution as defined in W. Va. Code Section 33-4-15a (f) and (g) clean, irrevocable unconditional and "evergreen" letters of credit issued or confirmed by a qualified U.S. financial institution as defined in W. Va. Code Section 3-4-15a (f) and (g) and investments of the type ~~Verified~~ specified in this subsection, . . .

7.6.e.2. Were originated by a savings ~~nd~~ and loan association, . . .

7.6.f.3. An investment in or loan upon any one institution's outstanding equity interests shall not exceed one percent (1%) of the assets of the trust. The cost of an investment in equity interests made pursuant to this paragraph, when added to the aggregate cost of other investments in equity interests then held pursuant ~~o~~ to . . .

Section 114-40-8. Credit for Reinsurance Required by Law.

Pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(c)(5), the commissioner shall allow credit for reinsurance ceded by a **ceding domestic** insurer to an assuming insurer not meeting the requirements of ~~West Virginia~~ W. Va. Code Sections 33-4-15a(c)(1); 33-4-15a(c)(2); 33-4-15a(c)(3); and 33-4-15a(c)(4), but only with **respect to as** the insurance of risks located in jurisdictions where **such the** reinsurance is required by the applicable law or regulation of that jurisdiction. As used in this section, "jurisdiction" means ~~any~~ state, district or territory of the United States and any lawful national government.

Section 114-40-9. Asset or Reduction From Liability for Reinsurance Ceded to an Unauthorized Assuming Insurer.

9.1. Pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(e), the commissioner shall allow a reduction from liability for reinsurance ceded by **an a domestic** insurer to an assuming insurer not meeting the requirements of ~~West Virginia~~ W. Va. Code Section 33-4-15a(c) in an amount not exceeding the liabilities carried by the ceding insurer. The reduction shall be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the exclusive benefit of the ceding insurer, under a reinsurance contract with ~~the~~ **such** assuming insurer as security for the payment of obligations ~~thereunder~~ **the reinsurance contract**. . . .

9.1.c. Clean, irrevocable, unconditional and "evergreen" letters of credit issued or confirmed by a qualified United States institution, as defined in ~~West Virginia~~ W. Va. Code Section 33-4-15a(f), effective no later than December 31 of the year for which filing is being made, and in the possession of, **or in trust for**, the ceding company on or before the filing date of its annual statement. Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance (or

confirmation) shall, notwithstanding the issuing (or confirming) institution's subsequent failure to meet applicable standards of issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification or amendment, whichever first occurs.

9.2. An admitted asset or a reduction from liability for reinsurance ceded to an unauthorized assuming insurer pursuant to ~~paragraphs a, b, c, of subsection 1 subdivisions a, b, and c, subsection 9.1 of this rule-section~~ shall be allowed only when the requirements of sections 10, 11 or 12 of this rule are satisfied.

10.2. Required conditions.

10.2.c. All assets in the trust account shall be held by the trustee at the trustee's office in the United States, ~~except that a bank may apply for the Commissioner's permission to use a foreign branch office of the bank as trustee for trust agreements established pursuant to this section. If the Commissioner approves the use of a foreign branch office as trustee, then its use must be approved by the beneficiary in writing and the trust agreement must provide that the written notice described in subparagraph A, of paragraph d, of subsection 2 of this section paragraph 1, subdivision d of this subsection must also be presentable, as a matter of legal right, at the trustee's principal office in the United States.~~

10.2.h. The trust agreement shall be made subject to and governed by the laws of the state in which the trust is ~~established-domiciled~~.

10.2.k. Notwithstanding other provisions of this rule, when a trust agreement is established in conjunction with a reinsurance agreement covering risks other than life, annuities and accident and health, where it is customary practice to provide a trust agreement for a specific purpose, a trust agreement may, ~~notwithstanding any other conditions in this rule, . . .~~

10.2.k.3.1. ~~A. The reinsurance agreement entered into in conjunction with the trust agreement may, but need not, contain the provisions required by subparagraph B of paragraph a of subsection 4 paragraph 2, subdivision a, subsection 10.4 of this section, so long as these required conditions are included in the trust agreement.~~

10.2.k.3.1. Notwithstanding other provisions of this rule, when a trust agreement is established to meet the requirements of Section 9 in conjunction with a reinsurance agreement covering life, annuities or accident and health risks, where it is customary practice to provide a trust agreement for a specific purpose, a trust agreement may, notwithstanding any other conditions in this rule, provide that the ceding insurer shall undertake to use and apply amounts drawn upon the trust account, without diminution because of the insolvency of the ceding insurer or the assuming insurer, only for the following purposes:

10.2.m. Notwithstanding any other provisions in the trust instrument, if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation or similar proceedings under the laws of the its state, or country of domicile, the trustee shall comply with an order of the commissioner of with regulatory oversight over the trust or court of competent jurisdiction directing the trustee to transfer to the commissioner with regulatory oversight or other designated

receiver all of the assets of the trust fund. The assets shall be applied in accordance with the priority statutes and laws of the state in which the trust is domiciled applicable to the assets of insurance companies in liquidation. If the commissioner with regulatory oversight determines that the assets of the trust fund or any part of thereof are not necessary to satisfy claims of the U.S. beneficiaries of the trust, the assets or any part of them shall be returned to the trustee for distribution in accordance with the trust agreement.

10.4. Additional conditions applicable to reinsurance agreements.

10.4.a. A reinsurance agreement, ~~which is entered into in conjunction with a trust agreement and the establishment of a trust account,~~ may contain provisions that:

10.4.a.B--2. Stipulate that assets deposited in the trust account shall be valued according to their current fair market value and shall consist only of cash (United States ~~legal tender~~dollars), certificates of deposit (issued by a United States bank and payable in United States ~~legal tender~~dollars), and investments of the types permitted by Chapter 33 of the West Virginia Code or any combination of the above, provided ~~that the investments are issued by an institution that is not the parent, subsidiary or affiliate of either the grantor or the beneficiary in or issued by an entity controlling, controlled by or under common control with either the grantor or the beneficiary of the trust shall not exceed 50% of total investments.~~ The reinsurance agreement may further specify the types of investments to be deposited. Where a trust agreement is entered into in conjunction with a reinsurance agreement covering risks other than life, annuities and accident and health, then the trust agreement may contain the provisions required by this paragraph in lieu of including them in the reinsurance agreement;

10.4.a.E--5. Stipulate that the assuming insurer and the ceding insurer agree that the assets in the trust account, established pursuant to the provisions of the reinsurance agreement, may be withdrawn by the ceding insurer at any time, notwithstanding any other provisions in the reinsurance agreement, and shall be utilized and applied by the ceding insurer or its successors in interest by operation of law, including without limitation any liquidator, rehabilitator, receiver or conservator of the company, without diminution because of insolvency on the part of the ceding insurer or the assuming insurer, only for the following purposes:

10.4.a.5.A. To pay or reimburse the ceding insurer for the assuming insurer's share under the specific reinsurance agreement of premiums returned but not yet recovered from the assuming insurer to the owners of policies reinsured under the reinsurance agreement because of cancellations of the policies;

10.4.a.5.B. To pay or reimburse the ceding insurer for the assuming insurer's share of surrenders and benefits or losses paid by the ceding insurer pursuant to the provisions of the policies reinsured under the reinsurance agreement;

10.4.a.5.(e)C. ~~To fund an account with the ceding insurer in an amount at least equal to the deduction, for reinsurance ceded, from the ceding insurer liabilities for policies ceded under the agreement. The account shall include, but not be limited to, amounts for policy reserves, claims and losses incurred (including losses incurred but not reported), loss adjustment~~

~~expenses and unearned premium reserves; and~~ Any other amounts necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.

~~10.4.a.5.(d)D. To pay any other amounts the ceding insurer claims are due under the reinsurance agreement. To make payment to the assuming insurer of amounts held in the trust account in excess of the amount necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.~~

Section 114-40-11. Letters of Credit Qualified Under Section 9.

11.1. The letter of credit must be clean, irrevocable and unconditional and issued or confirmed by a qualified United States financial institution as defined in ~~West Virginia~~ W. Va. Code Section 33-4-15a(f). The letter of credit shall contain an issue date and date of expiration and shall stipulate that the beneficiary need only draw a sight draft under the letter of credit and present it to obtain funds and that no other document need be presented. The letter of credit shall also indicate that it is not subject to any condition or qualifications outside of the letter of credit. In addition, the letter of credit itself shall not contain reference to any other agreements, documents or entities, except as provided in ~~paragraph a, subsection 9 subdivision a, subsection 11.9~~ of this section. As used in this section, "beneficiary" means the ~~ceding~~ ceding-domestic insurer for whose benefit the letter of credit has been established . . .

11.5. The letter of credit shall state whether it is subject to and governed by the laws of this state or the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication 400-500, or any successor publication), and all drafts drawn under the letter of credit shall be presentable at an office in the United States of a qualified United States financial institution.

11.6. If the letter of credit is made subject to the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication 400-500, or any successor publication), then the letter of credit shall specifically address and make provision for an extension of time to draw against the letter of credit in the event that one or more of the occurrences specified in Article ~~1917~~ of Publication 400-500, or any successor publication occur.

11.9. Reinsurance agreement provisions.

~~11.9.B.-2.~~ Stipulate that the assuming insurer and ceding insurer agree that the letter of credit provided by the assuming insurer pursuant to the provisions of the reinsurance agreement may be drawn upon at any time, notwithstanding any other provisions in the agreement, and shall be utilized by the ceding insurer or its successors in interest only for one or more of the following reasons:

(a)-A. To pay or reimburse the ceding insurer for the assuming insurer's share under the specific reinsurance agreement of premiums returned but not yet recovered from the assuming insurers, to the owners of policies reinsured under the reinsurance agreement on account of cancellations of the policies; and

~~(b) B. To pay or reimburse the ceding insurer for the assuming insurer's share under the specific reinsurance agreement of surrenders and benefits or losses paid by the ceding insurer but not yet recovered from the assuming insurers under the terms and provisions of the policies reinsured under the reinsurance agreement;~~

~~(c) C. To fund an account with the ceding insurer in an amount at least equal to the deduction, for reinsurance ceded, from the ceding insurer's liabilities for policies ceded under the agreement (the amount shall include, but not be limited to, amounts for policy reserves, claims and losses incurred and unearned premium reserves); and Any other amounts necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.~~

~~(d) D. To pay any other amounts the ceding insurer claims are due under the reinsurance agreement. To make payment to the assuming insurer of amounts held in the trust account in excess of the amount necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.~~

~~(e) E. Where the letter of credit will expire without renewal or be reduced or replaced by a letter of credit for a reduced amount and where the assuming insurer's entire obligations under the specific reinsurance remain unliquidated and undischarged ten (10) days prior to the termination date to withdraw amounts equal to the assuming insurer's share of the liabilities, to the extent that the liabilities have not yet been funded by the assuming insurer and exceed the amount of any reduced or replacement letter of credit, and deposit those amounts in a separate account in the name of the ceding insurer in a qualified U.S. financial institution apart from its general assets, in trust for such uses and purposes specified in this subsection as may remain after withdrawal and for ~~any~~ any period after the termination date.~~

~~A-1. An interest payment, at a rate not in excess of the prime rate of interest, on the amounts held pursuant to ~~part (c), subparagraph B, paragraph a~~ subparagraph C, paragraph 2, subdivision a of this subsection; ~~and/or~~~~

~~e. When a letter of credit is obtained in conjunction with a reinsurance agreement covering risks other than life, annuities and health, where it is customary practice to provide a letter of credit for a specific purpose, then the reinsurance agreement may, in lieu of subparagraph B, paragraph a paragraph 2, subdivision a of this subsection, require that the parties enter into a "Trust Agreement" which may be incorporated into the reinsurance agreement or be a separate document.~~

~~11.10. A letter of credit may not be used to reduce any liability for reinsurance ceded to an unauthorized assuming insurer in financial statements required to be filed with the commissioner unless an acceptable letter of credit with the filing ceding insurer as beneficiary has been issued on or before the date of filing of the financial statement. Further, the reduction for the letter of credit may be up to the amount available under the letter of credit but no greater than the specific obligation under the reinsurance agreement which the letter of credit was intended to secure.~~

Section 114-40-13. Reinsurance Contract.

Credit will not be granted, nor an asset or reduction from liability allowed, to a ceding insurer for reinsurance effected with assuming insurers meeting the requirements of sections 4, 5, 6, 7, or 9 of this rule or otherwise in compliance with ~~West Virginia~~ W. Va. Code Section 33-4-15a(c) after the adoption of this rule unless the reinsurance agreement:

13.2. Includes a provision pursuant to ~~West Virginia~~ W. Va. Code Section 33-4-15a(c)(6) whereby the assuming insurer, if an unauthorized assuming insurer has submitted to the jurisdiction of alternative dispute resolution panel or a court of competent jurisdiction within the United States, has agreed to comply with all requirements necessary to give the court or panel jurisdiction, has designated an agent upon whom service of process may be effected, and has agreed to abide by the final decision of the court or panel.

PART 2—Deletion of the “ILU Clause,” Subsection c. of Sec. 114-40-7. Credit for Reinsurance - Reinsurers Maintaining Trust Funds.

The RAA suggests omitting in its entirety the following Subsection c. of Sec. 114-40-7. Credit for Reinsurance - Reinsurers Maintaining Trust Funds, even though there is statutory authority for it. The section provides for the trust for a group of incorporated insurers under common administration, also known as the Independent London Underwriters (ILU). This trust, however, was never operational. It was never funded, and the ILU is no longer in existence (its members merged into another organization). The Industry Advisory Group recommended to the NAIC Reinsurance Task Force, at its June 2000 meeting, to delete this provision (Subsection c. of Section 2(D)(3)(b)) from the NAIC model.

~~7.2.e. The trust fund for a group of incorporated insurers under common administration, whose members possess aggregate policyholders surplus of \$10,000,000,000 (calculated and reported in substantially the same manner as prescribed by the annual statement instructions and Accounting Practices and Procedures Manual of the National Association of Insurance Commissioners) and which has continuously transacted an insurance business outside the United States for at least three (3) years immediately prior to making application for accreditation, shall consist of funds in trust in an amount not less than the assuming insurers' liabilities attributable to business ceded by United States ceding insurers to any members of the group pursuant to reinsurance contracts issued in the name of the group. In addition, the group shall maintain a joint trusteed surplus of which \$100,000,000 shall be held jointly for the benefit of United States ceding insurers of any member of the group. The group shall file a properly executed Form AR-1, (attached as Appendix A to this rate) as adopted by the National Association of Insurance Commissioners, as evidence of the submission to this state's authority to examine the books and records, pursuant to West Virginia W. Va. Code Section 33-2-9, of any of its members and shall certify that any member examined will bear the expense of the examination. The group shall make available to the commissioner annual certifications by the members' domiciliary regulators and their independent public accountants of the solvency of each member of the group.~~

PART 3—Cut Through and Insolvency Clause Provisions

In addition to amending West Virginia's rule to conform to the NAIC model, we recommend amending Section 114-40-13.1. to incorporate the RAA's model cut through and insolvency clause provisions. This language clarifies a reinsurer's responsibility in the event of insurance company insolvency. The amendment adds language that specifies the proper insolvency clause and requires that a receiver give reasonable notice to reinsurers of pending claims against an insolvent ceding insurer, similar to language contained in the laws and regulations of other states. The language offers guidance as to what should be included in the insolvency clause provisions in reinsurance agreements as well as adds cut through provisions. We have drafted an amendment that codifies standard insolvency clause requirements. These provisions are found in all insolvency clauses and simply codify what is the current practice with regard to interactions between a receiver and a reinsurer.

Section 114.40.13. Reinsurance Contract.

13.1. (a) Includes a proper insolvency clause pursuant to ~~West Virginia W. Va. Code Section 33-4-15(e)~~; and that provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable under a contract(s) reinsured by the assuming insurer on the basis of reported claims allowed by the liquidation court, without diminution because of the insolvency of the ceding insurer. Such payments shall be made directly to the ceding insurer or to its domiciliary liquidator except: (a) where the contract or other written agreement specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer, or (b) where the assuming insurer, with the consent of the direct insured(s), has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

(b) Notwithstanding subsection (a), in the event that a life and health insurance guaranty association has made the election to succeed to the rights and obligations of the insolvent insurer under the contract of reinsurance, then the reinsurer's liability to pay covered reinsured claims shall continue under the contract of reinsurance, subject to the payment to the reinsurer of the reinsurance premiums for such coverage. Payment for such reinsured claims shall only be made by the reinsurer pursuant to the direction of the guaranty association or its designated successor. Any payment made at the direction of the guaranty association or its designated successor by the reinsurer will discharge the reinsurer of all further liability to any other party for said claim payment.

(c) The reinsurance agreement may provide that the domiciliary liquidator of an insolvent ceding insurer shall give written notice to the assuming insurer of the pendency of a claim against such ceding insurer on the contract reinsured within a reasonable time after such claim is filed in the liquidation proceeding. During the pendency of such claim, any assuming insurer may investigate such claim and interpose, at its own expense, in the

proceeding where such claim is to be adjudicated any defenses which it deems available to the ceding insurer, or its liquidator. Such expense may be filed as a claim against the insolvent ceding insurer to the extent of a proportionate share of the benefit which may accrue to the ceding insurer solely as a result of the defense undertaken by the assuming insurer. Where two or more assuming insurers are involved in the same claim and a majority in interest elect to interpose a defense(s) to such claim, the expense shall be apportioned in accordance with the terms of the reinsurance agreement as though such expense had been incurred by the ceding insurer; and

Rationale:

The cut through amendments:

- *Increase marketplace competitiveness, address the needs of smaller companies, address consumer needs, and will not adversely affect administration of insurance receiverships.*
- *Clarify that domestic ceding companies are able to receive credit for reinsurance when there is a cut through.*
- *Encourage small, domestic insurance companies to compete with large, local and national carriers.*
- *Encourage small, domestic insurance companies to compete with non-domestic companies whose domestic states' laws already have similar provisions.*
- *Encourage the small West Virginia domestic insurance companies to expand to write additional lines of business and to other states.*
- *Address consumer needs by providing a greater choice of insurance carriers, increasing capacity, thus impacting availability and affordability.*
- *Clarify that West Virginia's statutes conform with the laws of the majority of the states.*
- *Clarify that the wording was not intended to put reinsurers at risk of paying twice in the event that a cut through clause is used.*
- *Clarify that policyholders do not have a right of direct action against a reinsurer. The reinsurance proceeds belong to the receivership estate, absent the circumstances enumerated in our amended language.*

Cut Through Background:

A cut through is a clause added to an insurance policy to provide that, in the event of the insolvency of the insurance company, the amount of any loss which would have been recovered from the reinsurer by the insurance company will be paid instead directly to the policyholder by the reinsurer. Cut throughs had their origin in the need for mortgage lenders to have assurance that the

insurer writing a homeowners' policy could stand behind its obligations. The mortgage companies, and later the secondary mortgage markets, instituted rules which required an insurer of a mortgaged home to meet certain financial standards or have a specified rating by an insurer rating service. Often, small insurers or new insurers could not qualify and, thus, were shut out of the homeowners' market.

Reinsurers, which were willing to stand behind the insurers via the use of a cut through, responded to the mortgage lenders' concerns. The banks were satisfied that the larger and favorably-rated reinsurer was a sufficient financial strength to protect the collateral. The common market effect of the existence of cut throughs is to encourage competition among insurers by ensuring that additional insurers can compete for business. If a reinsurer issues a cut through, it has a contractual obligation to pay the beneficiary of the cut through. It also could have the obligation to pay the same proceeds to the receiver. This bill clarifies that the reinsurer's obligation is to pay the claim only once.

The use of a cut through enables insureds to utilize the financial strength of large, financially secure reinsurers. Some clients require insurers to obtain a cut through or face the possibility of losing business to a larger or non-domestic insurance company. Reinsurers usually only provide cut throughs if an underlying insured and insurer request one. Business could be lost by domestic West Virginia insurers to non-domestic insurers, because most states recognize cut throughs for all lines of business.

All states allow credit for reinsurance if there is a cut through. *The following states have adopted improved provisions in recent years: Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Texas, Vermont, Virginia and Washington.* (We expect Massachusetts and Wisconsin to adopt similar provisions by year-end 2003.)

Insolvency Clause Background:

In 1939, the New York Legislature passed a law requiring that all reinsurance contracts contain an insolvency clause if the cedent desired to receive credit for reinsurance. Under the law, the insolvency clause came into operation if the ceding insurer became insolvent and, at that time, it obligated the reinsurer to pay money it owed under the reinsurance contract on the basis of the ceding company's actual claims payment obligations to its policyholders, not on the basis of whether the insolvent cedent had actually paid the money it owed its policyholders. The law guaranteed a reinsurer its rights to fully investigate claims reported by the insolvent, to have access to records and to audit the insolvent's records, and to defend against claims.

Following the 1939 law, many states enacted a requirement similar to New York's insolvency clause. *The following states have similar provisions in their laws: Alabama, California, Colorado, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia and Washington.*

We have proposed amendments to West Virginia's rule to ensure that cut throughs and assumption liability endorsements are recognized and that the reinsurer is not put in the impossible position of having to pay the same claim twice—once to the beneficiary and once to the receiver.

Conclusion

If you have any questions about our recommendations, or if you need further information, please feel free to contact me (202/783-8329) or Matt Wulf (202/783-8381) at your earliest convenience. Thank you for the opportunity to offer these comments.

Regards,



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Matthew T. Wulf
Assistant Vice President & Legal Counsel
wulf@reinsurance.org

cc: FWN, BLK, DJH, MAC, MTW, PRM

Insurance Commissioner
Legislative Rule
Title 114, Series 40

CREDIT FOR REINSURANCE

TITLE 114, SERIES 40

BRIEF SUMMARY OF RULE

These amendments to the rule track the National Association of Insurance Commissioner's Model Act on Credit for Reinsurance. By amending, the West Virginia rule will track the language of the model act amended in 2002, and therefore, continue to allow West Virginia to keep pace with the ever-evolving reinsurance situation. Specifically, the amendments include additional requirements for the maintenance of a reinsurance trust fund, required provisions for those trust agreements that are not able to meet their obligations, and provides further clarification as to what may be considered a letter of credit. In addition, the amendments delete Appendix A, form AR-1, so that if any changes to the form are necessary, legislative rule amendments will not be necessary in the future. However, the form will still be accessible through the Insurance Commission and the NAIC.

Insurance Commissioner
Legislative Rule
Title 114, Series 40

CREDIT FOR REINSURANCE

TITLE 114, SERIES 40

STATEMENT OF CIRCUMSTANCES

The West Virginia Legislature adopted Series 40 in 1995 to comply with the National Association of Insurance Commissioner's model act on Credit for Reinsurance for accreditation purposes. To date, the NAIC has adopted amendments to the model act, however, the West Virginia rule has not been amended to track the model. The amendments contained in the rule include additional requirements for the maintenance of a reinsurance trust fund, required provisions for those trust agreements that are not able to meet their obligations, and provides further clarification as to what may be considered a letter of credit. In addition, the amendments delete Appendix A, form AR-1, so that if any changes to the form are necessary, legislative rule amendments will not be necessary in the future. However, the form as adopted by the NAIC can still be acquired by contacting the Insurance Commission or the NAIC.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Credit for Reinsurance
Series 40

Type of Rule: Legislative Interpretive Procedural

Agency: Insurance Commissioner

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

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

The rule will have no additional fiscal impact upon state government because it is anticipated that the Commissioner can accomplish the review of any additional documentation with current staff and resources.

Rule Title: Credit for Reinsurance
Title 114, Series 40

3. Objectives of these rules:

The amendments to this rule include additional requirements for the maintenance of a reinsurance trust fund, required provisions for those trust agreements that are not able to meet their obligations, and provides further clarification as to what may be considered a letter of credit. In addition, the amendments delete Appendix A, form AR-1, so that if any changes to the form are necessary, legislative rule amendments will not be necessary in the future. However, the form is still accessible from the Insurance Commission or the National Association of Insurance Commissioners.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

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

None

C. Economic Impact on Citizens/Public at Large.

There is not expected to be any specific economic impact on the public as a result of the amendments to this rule. In fact, the greater impact would be if the amendments were not adopted because the amendments allow the Insurance Commissioner greater oversight of the reinsurance trust fund agreements under her jurisdiction.

Date: July 29, 2003

Signature of Agency Head or Authorized Representative



Jane L. Cline, Insurance Commissioner

114 CSR40
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 40
CREDIT FOR REINSURANCE

Section

- 114-40-1. Authority.
- 114-40-2. Purpose.
- 114-40-3. Credit for Reinsurance.
- 114-40-4. Credit for Reinsurance - Reinsurer Licensed in This State.
- 114-40-5. Credit for Reinsurance - Accredited Reinsurers.
- 114-40-6. Credit for Reinsurance - Reinsurer Domiciled and Licensed in Another State.
- 114-40-7. Credit for Reinsurance - Reinsurers Maintaining Trust Funds.
- 114-40-8. Credit for Reinsurance Required by Law.
- 114-40-9. Asset or Reduction From Liability for Reinsurance Ceded to an Unauthorized Assuming Insurer.
- 114-40-10. Trust Agreements Qualified Under Section 9.
- 114-40-11. Letters of Credit Qualified Under Section 9.
- 114-40-12. Other Security.
- 114-40-13. Reinsurance Contract.
- 114-40-14. Contracts Affected.
- 114-40-15. Severability.

~~Appendix A. Form AR-1~~

114 CSR40
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 40
CREDIT FOR REINSURANCE

FILED

2003 JUL 29 P 2:52

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§114-40-1. Authority.

1.1. Scope. -- This legislative rule establishes the rules, procedural requirements and the form required which the commissioner considers necessary to carry out the provision of West Virginia W. Va. Code §33-4-15a dealing with credit for reinsurance.

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

1.3. Filing Date. -- ~~April 10, 1995~~.

1.4. Effective Date. -- ~~April 14, 1995~~.

§114-40-2. Purpose.

The purpose of this rule is to set forth rules and procedural requirements which the commissioner considers necessary to carry out the provisions of West Virginia W. Va. Code §33-4-15a. The actions and information required by this rule are hereby declared to be necessary and appropriate in the public interest and for the protection of the ceding insurers in this state.

§114-40-3. Credit for Reinsurance.

3.1. The commissioner shall allow a credit for reinsurance to a domestic ceding insurer as either an asset or a deduction from liability on account of reinsurance ceded only when the reinsurer meets the requirements of section 4, section 5, section 6, section 7, or section 8 of this rule.

3.2. A foreign ceding insurer or an alien ceding insurer transacting insurance in West Virginia that is domiciled in a jurisdiction that employs standards regarding credit for reinsurance that are not substantially similar to those applicable under West Virginia W. Va. Code §33-4-1 et seq. shall be allowed a credit for reinsurance by the commissioner as either an asset or a deduction from liability on account of reinsurance ceded only when the reinsurer meets the requirements of section 4, section 5, section 6, section 7, or section 8 of this rule.

§114-40-4. Credit for Reinsurance - Reinsurer Licensed in This State.

Pursuant to West Virginia W. Va. Code §33-4-15a(c)(1), the commissioner shall allow credit for reinsurance ceded by an a domestic insurer to assuming insurers which were an assuming insurer that was licensed in this state as of the any date of the ceding insurer's on which statutory financial

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statement credit for reinsurance is claimed.

§114-40-5. Credit for Reinsurance - Accredited Reinsurers.

5.1. Pursuant to ~~West Virginia~~ W. Va. Code §33-4-15a(c)(2), the commissioner shall allow credit for reinsurance ceded by ~~an a domestic~~ insurer to an assuming insurer which is accredited as a reinsurer in this state prior to ~~the effective date of the contract and as of the~~ as of any date of the ceding insurer's on which statutory financial statement credit for reinsurance is claimed. An accredited reinsurer is ~~one~~ which:

a. Files a properly executed Form AR-1, ~~(attached as Appendix A to this rule)~~ as adopted by the National Association of Insurance Commissioners, as evidence of its submission to this state's jurisdiction and to this state's authority to examine its books and records, pursuant to ~~West Virginia~~ W. Va. Code §33-2-9;

b. Files with the commissioner a certified copy of ~~a letter or~~ a certificate of authority or ~~of compliance as~~ other acceptable evidence that it is licensed to transact insurance or reinsurance in at least one state, or, in the case of a United States branch of an alien assuming insurer, is entered through and licensed to transact insurance or reinsurance in at least one state;

c. Files annually, on or before the first day of March a copy of its annual statement, ~~a copy of its most recent audited financial statement~~ and remits a ~~one hundred dollar (\$100.00)~~ \$100.00 annual statement filing fee to the commissioner. The annual statement shall be a copy of the statement filed with the insurance department of its state of domicile or, in the case of an alien assuming insurer, with the state through which it is entered and in which it is licensed to transact insurance or reinsurance, and a copy of its most recent audited financial statement; and

d. Has applied to the commissioner, paid a ~~one hundred dollar (\$100.00)~~ \$100.00 application fee and maintains a surplus as regards policyholders in an amount not less than \$20,000,000 and whose accreditation has not been denied by the commissioner within ninety (90) days of its application or, ~~in the case of companies with~~ maintains a surplus as regards policyholders of less than \$20,000,000, and whose accreditation has been approved by the commissioner. A letter of accreditation issued by the commissioner is evidence of approval; and

e. Has filed any other information the commissioner requests to determine that the assuming insurer qualifies for accreditation under this section.

5.2. If the commissioner determines that the assuming insurer has failed to meet or maintain any of the qualifications required by this section, he or she may upon written notice and hearing revoke the accreditation. No credit shall be allowed a ceding insurer with respect to reinsurance

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ceded if the assuming insurer's accreditation has been denied or revoked by the commissioner after notice and hearing.

§114-40-6. Credit for Reinsurance - Reinsurer Domiciled and Licensed in Another State.

6.1. Pursuant to ~~West Virginia~~ W. Va. Code §33-4-15a(c)(3), the commissioner shall allow credit for reinsurance ceded by an a domestic insurer to an assuming insurer which as of the any date of the ceding insurer's on which statutory financial statement credit for reinsurance is claimed:

a. Is domiciled and licensed in (or, in the case of a United States branch of an alien assuming insurer, is entered through and licensed in) a state which employs standards regarding credit for reinsurance substantially similar to those applicable under ~~West Virginia~~ W. Va. Code §33-4-15a and this rule;

b. Maintains a surplus as regards policyholders in an amount not less than \$20,000,000; and

c. Files a properly executed Form AR-1, ~~(attached as Appendix A to this regulation)~~ as adopted by the National Association of Insurance Commissioners, with the commissioner as evidence of its submission to this state's authority to examine its books and records, pursuant to ~~West Virginia~~ W. Va. Code §33-2-9.

6.2. The provisions of this section relating to surplus as regards policyholders shall not apply to reinsurance ceded and assumed pursuant to pooling arrangements among insurers in the same holding company system.

6.3. As used in this section, "substantially similar" standards means credit for reinsurance standards which the commissioner determines equal or exceed the standards of ~~West Virginia~~ W. Va. Code §33-4-15a and this rule.

§114-40-7. Credit for Reinsurance - Reinsurers Maintaining Trust Funds.

7.1. Pursuant to ~~West Virginia~~ W. Va. Code §33-4-15a(c)(4), the commissioner shall allow credit for reinsurance ceded by a ceding domestic insurer to an assuming insurer which, as of the any date of the ceding insurer's on which statutory financial statement credit for reinsurance is claimed and thereafter for so long as credit for reinsurance is claimed, maintains a trust fund in an amount prescribed in this section in a qualified United States financial institution as defined in ~~West Virginia~~ W. Va. Code §33-4-5a(f), for the payment of the valid claims of its United States ~~policyholders and domestic~~ ceding insurers, their assigns and successors in interest. The assuming insurer shall report annually to the commissioner substantially the same information as that required to be reported on

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the National Association of Insurance Commissioners annual statement form by licensed insurers, to enable the commissioner to determine the sufficiency of the trust fund.

7.2. The following requirements apply to the following categories of assuming insurer:

a. The trust fund for a single assuming insurer shall consist of funds in trust in an amount not less than the assuming insurer's liabilities attributable to ~~business written in the United States~~ reinsurance ceded by United States domiciled insurers, and in addition, the assuming insurer shall maintain a trusted surplus of not less than \$20,000,000.

b. The trust fund for a group, including incorporated and individual unincorporated underwriters shall consist of funds in trust in an amount not less than the group's ~~aggregate~~ several liabilities attributable to business written in the United States and, in addition, the group shall maintain a trusted surplus of which \$100,000,000 shall be held jointly for the benefit of the United States ceding insurers of any member of the group. The incorporated members of the group shall not be engaged in any business other than underwriting as a member of the group and shall be subject to the same level of solvency regulation and control by the group's domiciliary regulator as are the unincorporated members. The group shall make available to the commissioner annual certifications by the group's domiciliary regulator and its independent public accountants of the solvency of each underwriter member of the group.

c. The trust fund for a group of incorporated insurers under common administration, whose members possess aggregate policyholders surplus of \$10,000,000,000 (calculated and reported in substantially the same manner as prescribed by the annual statement instructions and Accounting Practices and Procedures Manual of the National Association of Insurance Commissioners) and which has continuously transacted an insurance business outside the United States for at least three (3) years immediately prior to making application for accreditation, shall consist of funds in trust in an amount not less than the assuming insurers' liabilities attributable to business ceded by United States ceding insurers to any members of the group pursuant to reinsurance contracts issued in the name of the group. In addition, the group shall maintain a joint trusted surplus of which \$100,000,000 shall be held jointly for the benefit of United States ceding insurers of any member of the group. The group shall file a properly executed Form AR-1, (~~attached as Appendix A to this rule~~) as adopted by the National Association of Insurance Commissioners, as evidence of the submission to this state's authority to examine the books and records, pursuant to West Virginia W. Va. Code §33-2-9, of any of its members and shall certify that any member examined will bear the expense of the examination. The group shall make available to the commissioner annual certifications by the members' domiciliary regulators and their independent public accountants of the solvency of each member of the group.

7.3. The trust shall be established in a form approved by the commissioner and shall comply

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with ~~West Virginia~~ W. Va. Code §33-4-15a(d) and this section. The trust instrument shall provide that:

a. Contested claims shall be valid and enforceable out of funds in trust to the extent remaining unsatisfied thirty (30) days after entry of the final order of any court of competent jurisdiction in the United States;

b. Legal title to the assets of the trust shall be vested in the trustee for the benefit of the grantor's United States ~~policyholders and~~ ceding insurers, their assigns and successors in interest;

c. The trust shall be subject to examination as determined by the commissioner;

d. The trust shall remain in effect for as long as the assuming insurer, or any member or former member of a group of insurers, shall have outstanding obligations under reinsurance agreements subject to the trust;

e. The trustees of the trust shall report no later than February 28 of each year to the commissioner in writing setting forth the balance in the trust and listing the trust's investments at the preceding year end, and shall certify the date of termination of the trust, if so planned, or certify that the trust shall not expire prior to the next following December 31; and

f. Any amendment to the trust shall not be effective unless reviewed and approved in advance by the commissioner.

7.4. Notwithstanding any other provisions in the trust instrument, if the trust fund is inadequate because it contains less than the amount required by this section or if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation or similar proceedings under the laws of its country or state of domicile:

a. The trustee shall comply with an order of the commissioner with regulatory oversight over the trust or with an order of a court of competent jurisdiction directing the trustee to transfer to the commissioner with regulatory oversight or other designated receiver, all of the assets of the trust fund.

b. The assets shall be distributed by and claims shall be filed with and valued by the commissioner with regulatory oversight over the trust in accordance with the laws of the state in which the trust is domiciled applicable to the liquidation of domestic insurance companies.

c. If the commissioner with regulatory oversight over the trust determines that the assets of the trust fund or any part thereof are not necessary to satisfy the claims of the U.S.

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beneficiaries of the trust, shall return the assets, or any part thereof, to the trustee for distribution in accordance with the trust agreement.

d. The grantor shall waive any right otherwise available to it under U.S. law that is inconsistent with this provision.

7.5. For purposes of this rule, the term "liabilities" shall mean the assuming insurer's gross liabilities attributable to reinsurance ceded by U.S. domiciled insurers that are not otherwise secured by acceptable means, and shall include:

a. For business ceded by domestic insurers authorized to write accident and sickness, and property and casualty insurance:

1. Losses and allocated loss expenses paid by the ceding insurer, recoverable from the assuming insurer;

2. Reserves for losses reported and outstanding;

3. Reserves for losses incurred but not reported;

4. Reserves for allocated loss expenses; and

5. Unearned premiums.

b. For business ceded by domestic insurers authorized to write life, accident and sickness and annuity insurance:

1. Aggregate reserves for life policies and contracts net of policy loans and net due and deferred premiums;

2. Aggregate reserves for accident and sickness policies;

3. Deposit funds and other liabilities without life or disability contingencies;

and

4. Liabilities for policy and contract claims.

7.6. Assets deposited in trusts established pursuant to W. Va. Code §33-4-15a (d) and this section shall be valued according to their fair market value and shall consist only of cash in U.S. dollars, certificates of deposit issued by a U.S. financial institution as defined in W. Va. Code §33-4-

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15a (f) and (g), clean, irrevocable, unconditional and “evergreen” letters of credit issued or confirmed by a qualified U.S. financial institution, as defined in W. Va. Code §3-4-15a (f) and (g) and investments of the type specified in this subsection, but investments in or issued by an entity controlling, controlled by or under common control with either the grantor or beneficiary of the trust shall not exceed five percent (5%) of total investments. No more than twenty percent (20%) of the total of the investments in the trust may be foreign investments authorized under paragraph 5 of subdivision a, subdivision c, paragraph 2 of subdivision f, or subdivision g of this subsection, and no more than ten percent (10%) of the total of the investments in the trust may be securities denominated in foreign currencies. For purposes of applying the preceding sentence, a depository receipt denominated in U.S. dollars and representing rights conferred by a foreign security shall be classified as a foreign investment denominated in a foreign currency. The assets of a trust established to satisfy the requirements of this section shall be invested as follows:

a. Government obligations that are not in default as to principal or interest, that are valid and legally authorized and that are issued, assumed or guaranteed by:

1. The United States or by any agency or instrumentality of the United States;
2. A state of the United States;
3. A territory, possession or other governmental unit of the United States;
4. An agency or instrumentality of a governmental unit referred to in paragraphs 2 and 3 of this subdivision if the obligations shall be by law (statutory or otherwise) payable, as to both principal and interest, from taxes levied or by law required to be levied or from adequate special revenues pledged or otherwise appropriated or by law required to be provided for making these payments, but shall not be obligations eligible for investment under this paragraph if payable solely out of special assessments on properties benefitted by local improvements; or
5. The government of any other country that is a member of the Organization for Economic Cooperation and Development and whose government obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC;

b. Obligations that are issued in the United States, or that are dollar denominated and issued in a non-U.S. market, by a solvent U.S. institution (other than an insurance company) or that are assumed or guaranteed by a solvent U.S. institution (other than an insurance company) and that are not in default as to principal or interest if the obligations:

1. Are rated A or higher (or the equivalent) by a securities rating agency

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recognized by the Securities Valuation Office of the NAIC, or if not so rated, are similar in structure and other material respects to other obligations of the same institution that are so rated;

2. Are insured by at least one authorized insurer (other than the investing insurer or a parent, subsidiary or affiliate of the investing insurer) licensed to insure obligations in this state and, after considering the insurance, are rated AAA (or the equivalent) by a securities rating agency recognized by the Securities Valuation Office of the NAIC; or

3. Have been designated as Class One or Class Two by the Securities Valuation Office of the NAIC;

c. Obligations issued, assumed or guaranteed by a solvent non-U.S. institution chartered in a country that is a member of the Organization for Economic Cooperation and Development or obligations of U.S. corporations issued in a non-U.S. currency, provided that in either case the obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC;

d. An investment made pursuant to the provisions of subdivisions a, b, or c of this subsection shall be subject to the following additional limitations:

1. An investment in or loan upon the obligations of an institution other than an institution that issues mortgage-related securities shall not exceed five percent (5%) of the assets of the trust;

2. An investment in any one mortgage-related security shall not exceed five percent (5%) of the assets of the trust;

3. The aggregate total investment in mortgage-related securities shall not exceed twenty-five percent (25%) of the assets of the trust; and

4. Preferred or guaranteed shares issued or guaranteed by a solvent U.S. institution are permissible investments if all of the institution's obligations are eligible as investments under paragraphs 1 and 3, subdivision b of this subsection, but shall not exceed two percent (2%) of the assets of the trust.

e. As used in this regulation:

1. "Mortgage-related security" means an obligation that is rated AA or higher (or the equivalent) by a securities rating agency recognized by the Securities Valuation Office of the NAIC and that either:

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A. Represents ownership of one or more promissory notes or certificates of interest or participation in the notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of the notes, certificates, or participation of amounts payable under, the notes, certificates or participation), that:

1. Are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, or on a residential manufactured home as defined in 42 U.S.C.A. Section 5402(6), whether the manufactured home is considered real or personal property under the laws of the state in which it is located; and

2. Were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution that is supervised and examined by a federal or state housing authority, or by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to 12 U.S.C.A. Sections 1709 and 1715-b, or, where the notes involve a lien on the manufactured home, by an institution or by a financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to 12 U.S.C.A. Section 1703; or

B. Is secured by one or more promissory notes or certificates of deposit or participations in the notes (with or without recourse to the insurer of the notes) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, or notes meeting the requirements of parts 1 and 2, subparagraph A of this subdivision;

2. "Promissory note," when used in connection with a manufactured home, shall also include a loan, advance or credit sale as evidenced by a retail installment sales contract or other instrument.

f. Equity interests

1. Investments in common shares or partnership interests of a solvent U.S. institution are permissible if:

A. Its obligations and preferred shares, if any, are eligible as investments under this subsection; and

B. The equity interests of the institution (except an insurance company) are registered on a national securities exchange as provided in the Securities Exchange Act of 1934, 15 U.S.C. ss 78a to 78kk or otherwise registered pursuant to that Act, and if otherwise

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registered, price quotations for them are furnished through a nationwide automated quotations system approved by the National Association of Securities Dealers, Inc. A trust shall not invest in equity interests under this paragraph an amount exceeding one percent (1%) of the assets of the trust even though the equity interests are not so registered and are not issued by an insurance company;

2. Investments in common shares of a solvent institution organized under the laws of a country that is a member of the Organization for Economic Cooperation and Development, if:

A. All its obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC; and

B. The equity interests of the institution are registered on a securities exchange regulated by the government of a country that is a member of the Organization for Economic Cooperation and Development;

3. An investment in or loan upon any one institution's outstanding equity interests shall not exceed one percent (1%) of the assets of the trust. The cost of an investment in equity interests made pursuant to this paragraph, when added to the aggregate cost of other investments in equity interests then held pursuant to this paragraph, shall not exceed ten percent (10%) of the assets in the trust;

g. Obligations issued, assumed or guaranteed by a multinational development bank, provided the obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC.

h. Investment companies

1. Securities of an investment company registered pursuant to the Investment Company Act of 1940, 15 U.S.C. s 802, are permissible investments if the investment company:

A. Invests at least ninety percent (90%) of its assets in the types of securities that qualify as an investment under subdivisions a, b, or c of this subsection or invests in securities that are determined by the commissioner to be substantively similar to the types of securities set forth in subdivisions a, b, or c of this subsection; or

B. Invests at least ninety percent (90%) of its assets in the types of equity interests that qualify as an investment under paragraph 1, subdivision f of this subsection;

2. Investments made by a trust in investment companies under this paragraph

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shall not exceed the following limitations:

A. An investment in an investment company qualifying under subparagraph A, paragraph 1 of this subdivision shall not exceed ten percent (10%) of the assets in the trust and the aggregate amount of investment in qualifying investment companies shall not exceed twenty-five percent (25%) of the assets in the trust; and

B. Investments in an investment company qualifying under subparagraph B, paragraph 1 of this subdivision shall not exceed five percent (5%) of the assets in the trust and the aggregate amount of investment in qualifying investment companies shall be included when calculating the permissible aggregate value of equity interests pursuant to paragraph 1, subdivision f of this subsection.

i. Letters of Credit

1. In order for a letter of credit to qualify as an asset of the trust, the trustee shall have the right and the obligation pursuant to the deed of trust or some other binding agreement (as duly approved by the commissioner), to immediately draw down the full amount of the letter of credit and hold the proceeds in trust for the beneficiaries of the trust if the letter of credit will otherwise expire without being renewed or replaced.

2. The trust agreement shall provide that the trustee shall be liable for its negligence, willful misconduct or lack of good faith. The failure of the trustee to draw against the letter of credit in circumstances where such draw would be required shall be deemed to be negligence and/or willful misconduct.

j. A specific security provided to a ceding insurer by an assuming insurer pursuant to section 9 of this rule shall be applied, until exhausted, to the payment of liabilities of the assuming insurer to the ceding insurer holding the specific security prior to, and as a condition precedent for, presentation of a claim by the ceding insurer for payment by a trustee of a trust established by the assuming insurer pursuant to this section.

§114-40-8. Credit for Reinsurance Required by Law.

Pursuant to West Virginia W. Va. Code §33-4-15a(c)(5), the commissioner shall allow credit for reinsurance ceded by a ceding domestic insurer to an assuming insurer not meeting the requirements of West Virginia W. Va. Code §§33-4-15a(c)(1); 33-4-15a(c)(2); 33-4-15a(c)(3); and 33-4-15a(c)(4), but only with respect as to the insurance of risks located in jurisdictions where such the reinsurance is required by the applicable law or regulation of that jurisdiction. As used in this section, "jurisdiction" means any a state, district or territory of the United States and any lawful

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national government.

§114-40-9. Asset or Reduction From Liability for Reinsurance Ceded to an Unauthorized Assuming Insurer.

9.1. Pursuant to ~~West Virginia W. Va.~~ Code §33-4-15a(e), the commissioner shall allow a reduction from liability for reinsurance ceded by ~~an a domestic~~ insurer to an assuming insurer not meeting the requirements of ~~West Virginia W. Va.~~ Code §33-4-15a(c) in an amount not exceeding the liabilities carried by the ceding insurer. The reduction shall be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the exclusive benefit of the ceding insurer, under a reinsurance contract with ~~the such~~ assuming insurer as security for the payment of obligations ~~thereunder the reinsurance contract.~~ The security must be held in the United States subject to withdrawal solely by, and under the exclusive control of, the ceding insurer or, in the case of a trust, held in a qualified United States financial institution as defined in ~~West Virginia W. Va.~~ Code §33-4-15a(f). This security may be in the form of any of the following:

- a. Cash;
- b. Securities listed by the Securities Valuation Office of the National Association of Insurance Commissioners and qualifying as admitted assets; ~~or~~
- c. Clean, irrevocable, unconditional and "evergreen" letters of credit issued or confirmed by a qualified United States institution, as defined in ~~West Virginia W. Va.~~ Code §33-4-15a(f), effective no later than December 31 of the year for which filing is being made, and in the possession of, ~~or in trust for,~~ the ceding company on or before the filing date of its annual statement. Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance (or confirmation) shall, notwithstanding the issuing (or confirming) institution's subsequent failure to meet applicable standards of issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification or amendment, whichever first occurs; ~~or~~
- d. Any other form of security acceptable to the commissioner.

9.2. An admitted asset or a reduction from liability for reinsurance ceded to an unauthorized assuming insurer pursuant to ~~paragraphs a, b, c,~~ of subsection ~~† subdivisions a, b, c and d,~~ subsection 9.1 of this rule ~~section~~ shall be allowed only when the requirements of sections 10, 11 or 12 of this rule are satisfied.

§114-40-10. Trust Agreements Qualified Under Section 9.

10.1. As used in this section:

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a. "Beneficiary" means the entity for whose sole benefit the trust has been established and any successor of the beneficiary by operation of law. If a court of law appoints a successor in interest to the named beneficiary, then the named beneficiary includes and is limited to the court appointed domiciliary receiver (including a conservator, rehabilitator or liquidator).

b. "Grantor" means the entity that has established a trust for the sole benefit of the beneficiary. When established in conjunction with a reinsurance agreement, the grantor is the unlicensed, unaccredited assuming insurer.

c. "Obligations," as used in ~~paragraph k, subsection 2~~ subdivision k, subsection 10.2 of this section means:

~~A: 1.~~ 1. Reinsured losses and allocated loss expenses paid by the ceding company, but not recovered from the assuming insurer;

~~B: 2.~~ 2. Reserves for reinsured losses reported and outstanding;

~~C: 3.~~ 3. Reserves for reinsured losses incurred but not reported; and

~~D: 4.~~ 4. Reserves for allocated reinsured loss expenses and unearned premiums.

10.2. Required conditions.

a. The trust agreement shall be entered into between the beneficiary, the grantor and a trustee which shall be a qualified United States financial institution as defined in ~~West Virginia~~ W. Va. Code §33-4-15a(f).

b. The trust agreement shall create a trust account into which assets shall be deposited.

c. All assets in the trust account shall be held by the trustee at the trustee's office in the United States. ~~except that a bank may apply for the Commissioner's permission to use a foreign branch office of the bank as trustee for trust agreements established pursuant to this section. If the Commissioner approves the use of a foreign branch office as trustee, then its use must be approved by the beneficiary in writing and the trust agreement must provide that the written notice described in subparagraph A, of paragraph d, of subsection 2 of this section must also be presentable, as a matter of legal right, at the trustee's principal office in the United States.~~

d. The trust agreement shall provide that:

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~~A: 1.~~ The beneficiary has the right to withdraw assets from the trust account at any time, without notice to the grantor, subject only to written notice from the beneficiary to the trustee;

~~B: 2.~~ No other statement or document is required to be presented in order to withdraw assets, except that the beneficiary may be required to acknowledge receipt of withdrawn assets;

~~C: 3.~~ It is not subject to any conditions or qualifications outside of the trust agreement; and

~~D: 4.~~ It shall not contain references to any other agreements or documents except as provided for under ~~subparagraph D, paragraph K~~ subdivision k of this subsection.

e. The trust agreement shall be established for the sole benefit of the beneficiary.

f. The trust agreement shall require the trustee to:

~~A: 1.~~ Receive assets and hold all assets in a safe place;

~~B: 2.~~ Determine that all assets are in a form that the beneficiary, or the trustee upon direction by the beneficiary, may whenever necessary negotiate the assets, without consent or signature from the grantor or any other person or entity;

~~C: 3.~~ Furnish to the grantor and the beneficiary a statement of all assets in the trust account upon its inception and at intervals no less frequent than the end of each calendar quarter;

~~D: 4.~~ Notify the grantor and the beneficiary within ten (10) days, of any deposits to or withdrawals from the trust account;

~~E: 5.~~ Upon written demand of the beneficiary, immediately take any and all steps necessary to transfer absolutely and unequivocally all right, title and interest in the assets held in the trust account to the beneficiary and deliver physical custody of the assets to the beneficiary; and

~~F: 6.~~ Allow no substitutions or withdrawals of assets from the trust account, except on written instructions from the beneficiary, except that the trustee may, without the consent of but with notice to the beneficiary, upon call or maturity of any trust asset, withdraw the asset upon

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condition that the proceeds are paid into the trust account.

g. The trust agreement shall provide that at least thirty (30) days, but not more than forty-five (45) days, prior to termination of the trust account, written notification of termination shall be delivered by the trustee to the beneficiary.

h. The trust agreement shall be made subject to and governed by the laws of the state in which the trust is ~~established~~ domiciled.

i. The trust agreement shall prohibit invasion of the trust corpus for the purpose of paying compensation to, or reimbursing the expenses of, the trustee. In order for a letter of credit to qualify as an asset of the trust, the trustee shall have the right and the obligation pursuant to the deed of trust or some other binding agreement (as duly approved by the commissioner), to immediately draw down the full amount of the letter of credit and hold the proceeds in trust for the beneficiaries of the trust if the letter of credit will otherwise expire without being renewed or replaced.

j. The trust agreement shall provide that the trustee is liable for its own negligence, willful misconduct or lack of good faith. The failure of the trustee to draw against the letter of credit in circumstances where such draw would be required shall be deemed to be negligence and/or willful misconduct.

k. Notwithstanding other provisions of this rule, when a trust agreement is established in conjunction with a reinsurance agreement covering risks other than life, annuities and accident and health, where it is customary practice to provide a trust agreement for a specific purpose, a trust agreement may, ~~notwithstanding any other conditions in this rule,~~ provide that the ceding insurer shall undertake to use and apply amounts drawn upon the trust account without diminution because of the insolvency of the ceding insurer or the assuming insurer, for the following purposes:

~~A.~~ 1. To pay or reimburse the ceding insurer for the assuming insurer's share under the specific reinsurance agreement regarding any losses and allocated loss expenses paid by the ceding insurer, but not recovered from the assuming insurer, or for unearned premiums due to the ceding insurer if not otherwise paid by the assuming insurer;

~~B.~~ 2. To make payment to the assuming insurer of any amounts held in the trust account that exceed one hundred and two percent (102%) of the actual amount required to fund the assuming insurer's obligations under the specific reinsurance agreement; or

~~C.~~ 3. Where the ceding insurer has received notification of termination of the

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trust account and where the assuming insurer's entire obligations under the specific reinsurance agreement remain unliquidated and undischarged ten (10) days prior to the termination date, to withdraw amounts equal to the obligations and deposit those amounts in a separate account, in the name of the ceding insurer in any qualified United States financial institution as defined in ~~West Virginia~~ W. Va. Code §33-4-15a(f) apart from its general assets, in trust for such uses and purposes specified in ~~subparagraphs A and B of paragraph k~~ paragraphs 1 and 2 of this subsection subdivision as may remain executory after the withdrawal and for any period after the termination date.

~~1. The reinsurance agreement entered into in conjunction with the trust agreement may, but need not, contain the provisions required by subparagraph B of paragraph a of subsection 4, so long as these required conditions are included in the trust agreement.~~

1. Notwithstanding other provisions of this rule, when a trust agreement is established to meet the requirements of Section 9 in conjunction with a reinsurance agreement covering life, annuities or accident and health risks, where it is customary practice to provide a trust agreement for a specific purpose, a trust agreement may provide that the ceding insurer shall undertake to use and apply amounts drawn upon the trust account, without diminution because of the insolvency of the ceding insurer or the assuming insurer, for the following purposes:

1. To pay or reimburse the ceding insurer for:

A. The assuming insurers's share under the specific reinsurance agreement of premiums returned, but not yet recovered from the assuming insurer, to the owners of policies reinsured under the reinsurance agreement on account of cancellations of the policies; and

B. The assuming insurer's share under the specific reinsurance agreement of surrenders and benefits or losses paid by the ceding insurer, but not yet recovered from the assuming insurer, under the terms and provisions of the policies reinsured under the reinsurance agreement;

2. To pay to the assuming insurer amounts held in the trust account in excess of the amount necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer; or

3. Where the ceding insurer has received notification of termination of the trust and where the assuming insurer's entire obligations under the specific reinsurance agreement remain unliquidated and discharged ten (10) days prior to the termination date, to withdraw amounts equal to the assuming insurer's share of liabilities, to the extent that the liabilities have not yet been funded by the assuming insurer, and deposit those amounts in a separate account, in the name of the ceding insurer in any qualified U.S. financial institution apart from its general assets, in trust for the

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uses and purposes specified in paragraphs 1 and 2 of this subdivision as may remain executory after withdrawal and for any period after the termination date.

m. Notwithstanding any other provisions in the trust instrument, if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation or similar proceedings under the laws of the its state or country of domicile, the trustee shall comply with an order of the commissioner of with regulatory oversight over the trust or court of competent jurisdiction directing the trustee to transfer to the commissioner with regulatory oversight or other designated receiver all of the assets of the trust fund. The assets shall be applied in accordance with the priority statutes and laws of the state in which the trust is domiciled applicable to the assets of insurance companies in liquidation. If the commissioner with regulatory oversight determines that the assets of the trust fund or any part thereof are not necessary to satisfy claims of the U.S. beneficiaries of the trust, the assets or any part of them shall be returned to the trustee for distribution in accordance with the trust agreement.

10.3. Permitted conditions.

a. The trust agreement may provide that the trustee may resign upon delivery of a written notice of resignation, effective not less than ninety (90) days after receipt of the notice by the beneficiary and grantor and that the trustee may be removed by the grantor by delivery to the trustee and the beneficiary of a written notice of removal, effective not less than ninety (90) days after receipt of the notice by the trustee and the beneficiary. No resignation or removal is effective until a successor trustee has been duly appointed and approved by the beneficiary and the grantor and all assets in the trust have been duly transferred to the new trustee.

b. The grantor may have the full and unqualified right to vote any shares of stock in the trust account and to receive from time to time payments of any dividends or interest upon any shares of stock or obligations included in the trust account. The trustee shall promptly forward to the grantor, or deposit in a separate account established in the grantor's name, any interest or dividends received by the trustee.

c. The trustee may be given authority to invest, and accept substitutions of, any funds in the account, provided that no investment or substitution shall be made without prior approval of the beneficiary, unless the trust agreement specifies categories of investments acceptable to the beneficiary and authorizes the trustee to invest funds and to accept substitutions which the trustee determines are at least equal in market value to the assets withdrawn and that are consistent with the restrictions in ~~subparagraph B of paragraph a of subsection 4~~ paragraph 2, subdivision a, subsection 10.4 of this section.

d. The trust agreement may provide that the beneficiary may at any time designate

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a party to which all or part of the trust assets are to be transferred. The transfer may be conditioned upon the trustee receiving other specified assets, prior to or simultaneously with the transfer.

e. The trust agreement may provide that, upon termination of the trust account, all assets not previously withdrawn by the beneficiary shall, with written approval by the beneficiary, be delivered over to the grantor.

10.4. Additional conditions applicable to reinsurance agreements.

a. A reinsurance agreement, ~~which is entered into in conjunction with a trust agreement and the establishment of a trust account,~~ may contain provisions that:

~~A: 1.~~ 1. Require the assuming insurer to enter into a trust agreement and to establish a trust account for the benefit of the ceding insurer, and specify what the agreement is to cover;

~~B: 2.~~ 2. Stipulate that assets deposited in the trust account shall be valued according to their current fair market value and shall consist only of cash (United States ~~legal tender dollars~~), certificates of deposit (issued by a United States bank and payable in United States ~~legal tender dollars~~), and investments of the types permitted by Chapter 33 of the West Virginia Code or any combination of the above, ~~provided that the investments are issued by an institution that is not the parent, subsidiary or affiliate of either the grantor or the beneficiary in or issued by an entity controlling, controlled by or under common control with either the grantor or the beneficiary of the trust shall not exceed five percent (5%) of total investments.~~ The reinsurance agreement may further specify the types of investments to be deposited. Where a trust agreement is entered into in conjunction with a reinsurance agreement covering risks other than life, annuities and accident and health, then the trust agreement may contain the provisions required by this paragraph in lieu of including them in the reinsurance agreement;

~~C: 3.~~ 3. Require the assuming insurer, prior to depositing assets with the trustee, to execute assignments or endorsements in blank, or to transfer legal title to the trustee of all shares, obligations or any other assets requiring assignments, in order that the ceding insurer, or the trustee upon the direction of the ceding insurer, may whenever necessary negotiate these assets without consent or signature from the assuming insurer or any other entity;

~~D: 4.~~ 4. Require that all settlements of account between the ceding insurer and the assuming insurer be made in cash or its equivalent; and

~~E: 5.~~ 5. Stipulate that the assuming insurer and the ceding insurer agree that the assets in the trust account, established pursuant to the provisions of the reinsurance agreement, may

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be withdrawn by the ceding insurer at any time, notwithstanding any other provisions in the reinsurance agreement, and shall be utilized and applied by the ceding insurer or its successors in interest by operation of law, including without limitation any liquidator, rehabilitator, receiver or conservator of the company, without diminution because of insolvency on the part of the ceding insurer or the assuming insurer, only for the following purposes:

~~(a) A.~~ To pay or reimburse the ceding insurer for the assuming insurer's share of premiums returned, but not yet recovered from the assuming insurer, to the owners of policies reinsured under the reinsurance agreement because of cancellations of the policies;

~~(b) B.~~ To pay or reimburse the ceding insurer for the assuming insurer's share of surrenders and benefits or losses paid by the ceding insurer pursuant to the provisions of the policies reinsured under the reinsurance agreement;

~~(c) C.~~ To fund an account with the ceding insurer in an amount at least equal to the deduction, for reinsurance ceded, from the ceding insurer liabilities for policies ceded under the agreement. The account shall include, but not be limited to, amounts for policy reserves, claims and losses incurred (including losses incurred but not reported), loss adjustment expenses and unearned premium reserves; and Any other amounts necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer; and

~~(d) D.~~ To pay any other amounts the ceding insurer claims are due under the reinsurance agreement. To make payment to the assuming insurer of amounts held in the trust account in excess of the amount necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.

b. The reinsurance agreement may also contain provisions that:

~~A. 1.~~ Give the assuming insurer the right to seek approval from the ceding insurer to withdraw from the trust account all or any part of the trust assets and transfer those assets to the assuming insurer, provided:

~~(a) A.~~ The assuming insurer shall, at the time of withdrawal, replace the withdrawn assets with other qualified assets having a market value equal to the market value of the assets withdrawn so as to maintain at all times the deposit in the required amount, or

~~(b) B.~~ After withdrawal and transfer, the market value of the trust account is no less than one hundred and two percent (102%) of the required amount.

The ceding insurer shall not unreasonably or arbitrarily withhold its approval.

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B. 2. Provide for:

~~(a) A.~~ The return of any amount withdrawn in excess of the actual amounts required for ~~parts (a), (b) and (c) of subparagraph E of paragraph a of subsection 4~~ subparagraphs A, B and C, paragraph 5, subdivision a of this section subsection, or in the case of ~~part (d) of subparagraph E of paragraph a~~ subparagraph D, paragraph 5, subdivision a of this subsection, any amounts that are subsequently determined not to be due; and

~~(b) B.~~ Interest payments, at a rate not in excess of the prime rate of interest, on the amounts held pursuant to ~~part (c) of subparagraph E of paragraph a~~ subparagraph C, paragraph 5, subdivision a of this subsection.

C. 3. Permit the award by any arbitration panel or court of competent jurisdiction of:

~~(a) A.~~ Interest at a rate different from that provided in ~~part (b) of~~ subparagraph B of paragraph b subparagraph B, paragraph 2, subdivision b of this subsection,

~~(b) B.~~ Court or arbitration costs,

~~(c) C.~~ Attorney's fees, and

~~(d) D.~~ Any other reasonable expenses.

c. Financial reporting. A trust agreement may be used to reduce any liability for reinsurance ceded to an unauthorized assuming insurer in financial statements required to be filed with the commissioner in compliance with the provisions of this rule when established on or before the date of filing of the financial statement of the ceding insurer. Further, the reduction for the existence of an acceptable trust account may be up to the current fair market value of acceptable assets available to be withdrawn from the trust account at that time, but the reduction shall be no greater than the specific obligations under the reinsurance agreement that the trust account was established to secure.

d. Existing agreements. Notwithstanding the effective date of this rule, any trust agreement or underlying reinsurance agreement in existence prior to January 1, 1993, will continue to be acceptable until the expiration or renewal date of the agreement, at which time the agreement will have to be in full compliance with this rule for the trust agreement to be acceptable.

e. The failure of any trust agreement to specifically identify the beneficiary as defined in subsection 1 of this section shall not be construed to affect any actions or rights which the

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commissioner may take or possess pursuant to the provisions of the laws of this state.

§114-40-11. Letters of Credit Qualified Under Section 9.

11.1. The letter of credit must be clean, irrevocable and unconditional and issued or confirmed by a qualified United States financial institution as defined in ~~West Virginia~~ W. Va. Code §33-4-15a(f). The letter of credit shall contain an issue date and date of expiration and shall stipulate that the beneficiary need only draw a sight draft under the letter of credit and present it to obtain funds and that no other document need be presented. The letter of credit shall also indicate that it is not subject to any condition or qualifications outside of the letter of credit. In addition, the letter of credit itself shall not contain reference to any other agreements, documents or entities, except as provided in ~~paragraph a, subsection 9~~ subdivision a, subsection 11.9 of this section. As used in this section, "beneficiary" means the ~~ceding~~ ceding domestic insurer for whose benefit the letter of credit has been established and any successor of the beneficiary by operation of law. If a court of law appoints a successor in interest to the named beneficiary, then the named beneficiary includes and is limited to the court appointed domiciliary receiver (including a conservator, rehabilitator or liquidator).

11.2. The heading of the letter of credit may include a boxed section which contains the name of the applicant and other appropriate notations to provide a reference for the letter of credit. The boxed section shall be clearly marked to indicate that such information is for internal identification purposes only.

11.3. The letter of credit shall contain a statement to the effect that the obligation of the qualified United States financial institution under the letter of credit is in no way contingent upon reimbursement.

11.4. The term of the letter of credit shall be for at least one year and shall contain an "evergreen clause" which prevents the expiration of the letter of credit without due notice from the issuer. The "evergreen clause" shall provide for a period of no less than thirty (30) days' notice prior to the expiration date or nonrenewal.

11.5. The letter of credit shall state whether it is subject to and governed by the laws of this state or the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication ~~400~~ 500), or any successor publication, and all drafts drawn under the letter of credit shall be presentable at an office in the United States of a qualified United States financial institution.

11.6. If the letter of credit is made subject to the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication ~~400~~ 500), or any successor publication then the letter of credit shall specifically address and make provision for an

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extension of time to draw against the letter of credit in the event that one or more of the occurrences specified in Article ~~19~~ 17 of Publication ~~400~~ 500 or any successor publication, occur.

11.7. The letter of credit shall be issued or confirmed by a qualified United States financial institution authorized to issue letters of credit, pursuant to ~~West Virginia~~ W. Va. Code §33-4-15a(f).

11.8. If the letter of credit is issued by a qualified United States financial institution authorized to issue letters of credit, other than a qualified United States financial institution as described in subsection 7 of this section, then the following additional requirements shall be met:

a. The issuing qualified United States financial institution shall formally designate the confirming qualified United States financial institution as its agent for the receipt and payment of the drafts; and

b. The "evergreen clause" shall provide for thirty (30) days' notice prior to expiration date for nonrenewal.

11.9. Reinsurance agreement provisions.

a. The reinsurance agreement in conjunction with which the letter of credit is obtained may contain provisions which:

~~A:~~ 1. Require the assuming insurer to provide letters of credit to the ceding insurer and specify what they are to cover;

~~B:~~ 2. Stipulate that the assuming insurer and ceding insurer agree that the letter of credit provided by the assuming insurer pursuant to the provisions of the reinsurance agreement may be drawn upon at any time, notwithstanding any other provisions in the agreement, and shall be utilized by the ceding insurer or its successors in interest only for one or more of the following reasons:

(~~a~~) A. To pay or reimburse the ceding insurer for the assuming insurer's share under the specific reinsurance agreement of premiums returned, but not yet recovered from the assuming insurers, to the owners of policies reinsured under the reinsurance agreement on account of cancellations of the policies;

(~~b~~) B. To pay or reimburse the ceding insurer for the assuming insurer's share, under the specific reinsurance agreement, of surrenders and benefits or losses paid by the ceding insurer, but not yet recovered from the assuming insurers, under the terms and provisions of the policies reinsured under the reinsurance agreement; and

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~~(c) C.~~ To fund an account with the ceding insurer in an amount at least equal to the deduction, for reinsurance ceded, from the ceding insurer's liabilities for policies ceded under the agreement (the amount shall include, but not be limited to, amounts for policy reserves, claims and losses incurred and unearned premium reserves), and Any other amounts necessary to secure the credit or reduction from liability for reinsurance taken by the ceding insurer.

~~(d)~~ To pay any other amounts the ceding insurer claims are due under the reinsurance agreement.

~~(e) D.~~ Where the letter of credit will expire without renewal or be reduced or replaced by a letter of credit for a reduced amount and where the assuming insurer's entire obligations under the specific reinsurance remain unliquidated and undischarged ten (10) days prior to the termination date, to withdraw amounts equal to the assuming insurer's share of the liabilities, to the extent that the liabilities have not yet been funded by the assuming insurer and exceed the amount of any reduced or replacement letter of credit, and deposit those amounts in a separate account in the name of the ceding insurer in a qualified U.S. financial institution apart from its general assets, in trust for such uses and purposes specified in this subsection as may remain after withdrawal and for any period after the termination date.

~~€ 3.~~ All of the foregoing provisions of paragraph subdivision a of this subsection should be applied without diminution because of insolvency on the part of the ceding insurer or assuming insurer.

b. Nothing contained in paragraph subdivision a of this subsection precludes the ceding insurer and assuming insurer from providing for:

~~A: 1.~~ An interest payment, at a rate not in excess of the prime rate of interest, on the amounts held pursuant to part (c), subparagraph B, paragraph a subparagraph C, paragraph 2, subdivision a of this subsection; and/or

~~B: 2.~~ The return of any amounts drawn down on the letters of credit in excess of the actual amounts required for the above or, in the case of part (d), subparagraph B, paragraph a subparagraph D, paragraph 2, subdivision a of this subsection, any amounts that are subsequently determined not to be due.

~~c.~~ When a letter of credit is obtained in conjunction with a reinsurance agreement covering risks other than life, annuities and health, where it is customary practice to provide a letter of credit for a specific purpose, then the reinsurance agreement may, in lieu of subparagraph B, paragraph a of this subsection, require that the parties enter into a "Trust Agreement" which may be incorporated into the reinsurance agreement or be a separate document.

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~~11.10. A letter of credit may not be used to reduce any liability for reinsurance ceded to an unauthorized assuming insurer in financial statements required to be filed with the commissioner unless an acceptable letter of credit with the filing ceding insurer as beneficiary has been issued on or before the date of filing of the financial statement. Further, the reduction for the letter of credit may be up to the amount available under the letter of credit but no greater than the specific obligation under the reinsurance agreement which the letter of credit was intended to secure.~~

§114-40-12. Other Security.

A ceding insurer may take credit for unencumbered funds withheld by the ceding insurer in the United States which are subject to withdrawal solely by the ceding insurer and under its exclusive control.

§114-40-13. Reinsurance Contract.

Credit will not be granted, nor an asset or reduction from liability allowed, to a ceding insurer for reinsurance effected with assuming insurers meeting the requirements of sections 4, 5, 6, 7, or 9 of this rule or otherwise in compliance with ~~West Virginia W. Va.~~ Code §33-4-15a(c) after the adoption of this rule unless the reinsurance agreement:

13.1. Includes a proper insolvency clause pursuant to ~~West Virginia W. Va.~~ Code §33-4-15(c); and

13.2. Includes a provision pursuant to ~~West Virginia W. Va.~~ Code §33-4-15a(c)(6) whereby ~~an unauthorized~~ the assuming insurer, if an unauthorized assuming insurer, has submitted to the jurisdiction of an alternative dispute resolution panel or a court of competent jurisdiction within the United States, has agreed to comply with all requirements necessary to give the court or panel jurisdiction, has designated an agent upon whom service of process may be effected, and has agreed to abide by the final decision of the court or panel.

§114-40-14. Contracts Affected.

All new and renewal reinsurance transactions entered into after the effective date of this rule shall conform to the requirements of ~~West Virginia W. Va.~~ Code §33-4-15a and this rule if credit is to be given to the ceding insurer for the reinsurance.

§114-40-15. Severability.

If any provisions of this rule, or their application to any person or circumstance, is held

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invalid, that determination shall not affect other provisions or applications of this rule which can be given effect without the invalid provision or application, and to that end the provisions of this rule are separable.

FORM AR-1
CERTIFICATE OF ASSUMING INSURER

I, _____
(name of officer) _____ (title of officer)

of _____, the assuming insurer under a reinsurance
_____ (name of assuming insurer)

agreement(s) with one or more insurers domiciled in _____
_____ (name of state)

hereby certify that _____ ("Assuming Insurer");
_____ (name of assuming insurer)

1. Submits to the jurisdiction of any court of competent jurisdiction in _____
_____ (ceding insurer's state of domicile)

for the adjudication of any issues arising out of the reinsurance agreement(s), agrees to comply with all requirements necessary to give such court jurisdiction, and will abide by the final decision of such court or any appellate court in the event of an appeal. Nothing in this paragraph constitutes or should be understood to constitute a waiver of Assuming Insurer's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. This paragraph is not intended to conflict with or override the obligation of the parties to the reinsurance agreement(s) to arbitrate their disputes if such an obligation is created in the agreement(s).

2. Designates the Insurance Commissioner of _____
_____ (ceding insurer's state of domicile)

as its lawful attorney upon whom may be served any lawful process in any action, suit or proceeding arising out of the reinsurance agreement(s) instituted by or on behalf of the ceding insurer.

3. Submits to the authority of the Insurance Commissioner of West Virginia to examine its books and records pursuant to West Virginia Code §33-2-9.

4. Submits with this form a current list of insurers domiciled in _____
_____ (ceding insurer's state of domicile)

reinsured by Assuming Insurer and undertakes to submit additions to or deletions from the list to the Insurance Commissioner at least once per calendar quarter.

Dated: _____

_____ (name of assuming insurer)

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BY: _____

(name of officer)

(title of officer)