

Senate Bill No. 435

(By Senator Minard)

[Introduced February 4, 2011; referred to the Committee on Banking and Insurance; and then to the Committee on Finance.]

A BILL to amend and reenact §33-12C-3, §33-12C-5, §33-12C-7 and §33-12C-8 of the Code of West Virginia, 1931, as amended, all relating to surplus lines insurance; defining terms; providing for compliance with the federal Nonadmitted and Reinsurance Reform Act of 2010; authorizing Insurance Commissioner to enter into multistate agreement regarding taxation of surplus lines insurance; establishing a blended taxation rate with respect to policies involving multistate risks; authorizing participation in clearinghouse for allocation of taxes; specifying disbursement and distribution of moneys; and exempting certain large entities from compliance with due diligence requirements.

Be it enacted by the Legislature of West Virginia:

That §33-12C-3, §33-12C-5, §33-12C-7 and §33-12C-8 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 12C. SURPLUS LINE – NONADMITTED INSURANCE ACT.

§33-12C-3. Definitions.

1 As used in this article:

2 (a) “Admitted insurer” means an insurer licensed to do an
3 insurance business in this state.

4 (b) “Business entity” means a corporation, association,
5 partnership, limited liability company, or other legal entity.

6 (c) “Capital”, as used in the financial requirements of
7 section five of this article, means funds paid in for stock or
8 other evidence of ownership.

9 (d) “Commissioner” means the Insurance Commissioner of
10 West Virginia, or the commissioner’s deputies or staff, or the
11 commissioner, director or superintendent of insurance in any
12 other state.

13 (e) “Eligible surplus lines insurer” means a nonadmitted
14 insurer with which a surplus lines licensee may place surplus
15 lines insurance pursuant to section five of this article.

16 (f) “Exempt commercial purchaser” means any person
17 purchasing commercial insurance that, at the time of

18 placement, employs or retains a qualified risk manager to
19 negotiate insurance coverage, has paid aggregate nationwide
20 commercial property and casualty insurance premiums in
21 excess of \$100,000 in the immediately preceding twelve
22 months, and meets at least one of the following criteria:

23 (1) Has a net worth in excess of \$20 million;
24 (2) Generates annual revenues in excess of \$50 million;
25 (3) Employs more than five hundred full-time or full-time
26 equivalent employees per individual insured or is a member
27 of an affiliated group employing more than one thousand
28 employees in the aggregate;

29 (4) Is a not-for-profit organization or public entity generat-
30 ing annual budgeted expenditures of at least \$30 million; or
31 (5) Is a municipality with a population in excess of fifty
32 thousand persons: *Provided*, That on January 1, 2015 and
33 every five years thereafter, the amounts in subdivisions (1),
34 (2) and (4) of this subsection shall be adjusted to reflect the
35 percentage change for such five-year period in the Consumer
36 Price Index for All Urban Consumers published by the
37 Bureau of Labor Statistics of the federal Department of
38 Labor.

39 ~~(f)~~ (g) “Export” means to place surplus lines insurance with
40 a nonadmitted insurer.

41 ~~(g)~~ (h) “Foreign decree” means any decree or order in
42 equity of a court located in any United States jurisdiction,
43 including a federal court of the United States, against any
44 person engaging in the transaction of insurance in this state.

45 (i) “Home state” means, with respect to an insured:

46 (1) The state in which an insured maintains its principal
47 place of business or, in the case of an individual, the individ-
48 ual’s principal residence; or

49 (2) If one-hundred percent of the insured risk is located out
50 of the state referred to in subdivision one of this subsection,
51 the state to which the greatest percentage of the insured’s
52 taxable premium for that insurance contract is allocated.

53 ~~(h)~~ (j) “Individual” means any private or natural person as
54 distinguished from a partnership, corporation, limited
55 liability company or other legal entity.

56 ~~(f)~~ (k) “Insurance” means any of the lines of authority in
57 section ten, article one of this chapter.

58 ~~(f)~~ (l) “Insurance producer” means a person required to be
59 licensed under the laws of this state to sell, solicit or negoti-

60 ate insurance. Wherever the word “agent” appears in this
61 chapter, it shall mean an individual insurance producer.

62 ~~(k)~~ (m) “Insurer” means any person, corporation, associa-
63 tion, partnership, reciprocal exchange, interinsurer, Lloyds
64 insurer, insurance exchange syndicate, fraternal benefit
65 society, and any other legal entity engaged in the business of
66 making contracts of insurance under section two, article one
67 of this chapter.

68 ~~(l)~~ (n) “Kind of insurance” means one of the types of
69 insurance required to be reported in the annual statement
70 which must be filed with the commissioner by admitted
71 insurers.

72 ~~(m)~~ (o) “License” means a document issued by this state’s
73 Insurance Commissioner authorizing an individual to act as
74 a surplus lines licensee for the lines of authority specified in
75 the document. The license itself does not create any author-
76 ity, actual, apparent or inherent, in the holder to represent
77 or commit an insurer.

78 ~~(n)~~ (p) “Nonadmitted insurer” means an insurer not
79 licensed to do an insurance business in this state.

80 (q) “Nonadmitted and Reinsurance Reform Act of 2010” or
81 “NRRA” means those provisions incorporated as Subtitle B

82 of the Dodd-Frank Wall Street Reform and Consumer
83 Protection Act, P.L. 111-517.

84 (r) “Nonadmitted Insurance Multi-State Agreement” or
85 “NIMA” means the model agreement adopted by the Na-
86 tional Association of Insurance Commissioners on December
87 16, 2010, to facilitate the collection, allocation and disburse-
88 ment of premium taxes attributable to the placement of
89 nonadmitted insurance, provide for uniform methods of
90 allocation and reporting among nonadmitted insurance risk
91 classifications, and share information among states relating
92 to nonadmitted insurance premium taxes; such term includes
93 the agreements’ allocation tables and any changes made
94 thereto in response to changes to the laws of signatory states.

95 (s) “Person” means any natural person or other entity,
96 including, but not limited to, individuals, partnerships,
97 associations, trusts or corporations.

98 (p) (t) “Policy” or “contract” means any contract of
99 insurance including, but not limited to, annuities, indemnity,
100 medical or hospital service, workers’ compensation, fidelity
101 or suretyship.

102 (q) (u) “Reciprocal Signatory state” means a state that has
103 enacted provisions substantially similar to: entered into

104 NIMA or a similar allocation procedure with this state.

105 ~~(1) Section seven, subdivision (5) of subsection (b) of
106 section nine, subsection (j) of section sixteen, and subsection
107 (d) of section seventeen of this article; and~~

108 ~~(2) The NAIC model allocation schedule and reporting
109 form.~~

110 ~~(r)~~ (v) “Surplus”, as used in the financial requirements of
111 section five of this article, means funds over and above
112 liabilities and capital of the company for the protection of
113 policyholders.

114 ~~(s)~~ (w) “Surplus lines insurance” means any property and
115 casualty insurance in this state on properties, risks or
116 exposures, located or to be performed in this state, permitted
117 to be placed through a surplus lines licensee with a
118 nonadmitted insurer eligible to accept such insurance,
119 pursuant to section seven of this article. Wherever the term
120 “excess line” appears in this chapter, it shall mean surplus
121 lines insurance.

122 ~~(t)~~ (x) “Surplus lines licensee” means an individual
123 licensed under section five of this article to place insurance
124 on properties, risks or exposures located or to be performed
125 in this state with nonadmitted insurers eligible to accept

126 such insurance. Wherever the term "excess line broker"
127 appears in this chapter, it shall mean surplus lines licensee.

128 ~~(t)~~ (y) "Transaction of insurance" –

129 (1) For purposes of this article, any of the following acts in
130 this state effected by mail or otherwise by a nonadmitted
131 insurer or by any person acting with the actual or apparent
132 authority of the insurer, on behalf of the insurer, is deemed
133 to constitute the transaction of an insurance business in or
134 from this state:

135 (A) The making of or proposing to make, as an insurer, an
136 insurance contract;

137 (B) The making of or proposing to make, as guarantor or
138 surety, any contract of guaranty or suretyship as a vocation
139 and not merely incidental to any other legitimate business or
140 activity of the guarantor or surety;

141 (C) The taking or receiving of an application for insurance;

142 (D) The receiving or collection of any premium, commis-
143 sion, membership fees, assessments, dues or other consider-
144 ation for insurance or any part thereof;

145 (E) The issuance or delivery in this state of contracts of
146 insurance to residents of this state or to persons authorized
147 to do business in this state;

148 (F) The solicitation, negotiation, procurement or effectua-
149 tion of insurance or renewals thereof;

150 (G) The dissemination of information as to coverage or
151 rates, or forwarding of applications, or delivery of policies or
152 contracts, or inspection of risks, the fixing of rates or
153 investigation or adjustment of claims or losses or the trans-
154 action of matters subsequent to effectuation of the contract
155 and arising out of it, or any other manner of representing or
156 assisting a person or insurer in the transaction of risks with
157 respect to properties, risks or exposures located or to be
158 performed in this state;

159 (H) The transaction of any kind of insurance business
160 specifically recognized as transacting an insurance business
161 within the meaning of the statutes relating to insurance;

162 (I) The offering of insurance or the transacting of insurance
163 business; or

164 (J) Offering an agreement or contract which purports to
165 alter, amend or void coverage of an insurance contract.

166 (2) The provisions of this subsection shall not operate to
167 prohibit employees, officers, directors or partners of a
168 commercial insured from acting in the capacity of an
169 insurance manager or buyer in placing insurance on behalf

170 of the employer, provided that the person's compensation is
171 not based on buying insurance.

172 (3) The venue of an act committed by mail is at the point
173 where the matter transmitted by mail is delivered or issued
174 for delivery or takes effect.

175 ~~(v)~~ (z) "Line of insurance" means coverage afforded under
176 the particular policy that is being placed.

177 ~~(w)~~ (aa) "Model allocation schedule and reporting form"
178 means the current version of the NAIC model allocation
179 schedule and reporting form for surplus lines insurers.

180 ~~(x)~~ (bb) "Wet marine and transportation insurance" means:
181 (1) Insurance upon vessels, crafts, hulls and other interests
182 in them or with relation to them;

183 (2) Insurance of marine builder's risks, marine war risks
184 and contracts of marine protection and indemnity insurance;

185 (3) Insurance of freight and disbursements pertaining to a
186 subject of insurance within the scope of this subsection; and

187 (4) Insurance of personal property and interests therein, in
188 the course of exportation from or importation into any
189 country, or in the course of transportation coastwise or on
190 inland waters, including transportation by land, water or air
191 from point of origin to final destination, in connection with

192 any and all risks or perils of navigation, transit or transpor-
193 tation, and while being prepared for and while awaiting
194 shipment, and during any incidental delays, transshipment,
195 or reshipment; provided, however, that insurance of personal
196 property and interests therein shall not be considered wet
197 marine and transportation insurance if the property has:
198 (A) Been transported solely by land; or
199 (B) Reached its final destination as specified in the bill of
200 lading or other shipping document; or
201 (C) The insured no longer has an insurable interest in the
202 property.

§33-12C-5. Surplus lines insurance.

- 1 (a) The placement of surplus lines insurance is subject to
2 this section only if this state is the insured's home state.
3 ~~(a)~~ (b) Surplus lines insurance may be placed by a surplus
4 lines licensee if:
5 (1) Each insurer is an eligible surplus lines insurer; and
6 (2) Each insurer is authorized to write the type of insur-
7 ance in its domiciliary jurisdiction; and
8 (3) The full amount or line of insurance cannot be obtained
9 from insurers who are admitted to do business in this state.
10 The full amount or type of insurance may be procured from

11 eligible surplus lines insurers, provided that a diligent search
12 is made by the individual insurance producer among the
13 insurers who are admitted to transact and are actually
14 writing the particular type of insurance in this state if any
15 are writing it: Provided, That such a search is not required
16 when the licensee is seeking to procure or place nonadmitted
17 insurance for an exempt commercial purchaser if the licensee
18 disclosed to such purchaser that such insurance may or may
19 not be available from the admitted market that may provide
20 greater protection with more regulatory oversight and that
21 such purchaser has subsequently requested in writing that
22 the licensee procure or place such insurance from a
23 nonadmitted insurer; and

24 (4) All other requirements of this article are met.

25 ~~(b)~~ (c) Subject to subdivision (3), subsection ~~(a)~~ (b) of this
26 section, a surplus lines licensee may place any coverage with
27 a nonadmitted insurer eligible to accept the insurance, unless
28 specifically prohibited by the laws of this state.

29 ~~(e)~~ (d) A surplus lines licensee shall not place coverage with
30 a nonadmitted insurer, unless, at the time of placement, the
31 surplus lines licensee has determined that the nonadmitted
32 insurer:

33 (1) Has established satisfactory evidence of good repute

34 and financial integrity; and

35 (2) Qualifies under one of the following paragraphs:

36 (A) Has capital and surplus or its equivalent under the

37 laws of its domiciliary jurisdiction which equals the greater

38 of:

39 (i)(I) The minimum capital and surplus requirements under

40 the law of this state; or

41 (II) \$15 million;

42 (ii) The requirements of subparagraph (i), paragraph (A) of

43 this subdivision may be satisfied by an insurer's possessing

44 less than the minimum capital and surplus upon an affirma-

45 tive finding of acceptability by the commissioner. The

46 finding shall be based upon such factors as quality of

47 management, capital and surplus of any parent company,

48 company underwriting profit and investment income trends,

49 market availability and company record and reputation

50 within the industry. In no event shall the commissioner make

51 an affirmative finding of acceptability when the nonadmitted

52 insurer's capital and surplus is less than \$4,500,000; or

53 (B) In the case of an insurance exchange created by the

54 laws of a state other than this state:

55 (i) The syndicates of the exchange shall maintain under
56 terms acceptable to the commissioner capital and surplus, or
57 its equivalent under the laws of its domiciliary jurisdiction,
58 of not less than \$75 million in the aggregate; and

59 (ii) The exchange shall maintain under terms acceptable to
60 the commissioner not less than fifty percent of the policy-
61 holder surplus of each syndicate in a custodial account
62 accessible to the exchange or its domiciliary commissioner in
63 the event of insolvency or impairment of the individual
64 syndicate; and

65 (iii) In addition, each individual syndicate to be eligible to
66 accept surplus lines insurance placements from this state
67 shall meet either of the following requirements:

68 (I) For insurance exchanges which maintain funds in an
69 amount of not less than \$15 million for the protection of all
70 exchange policyholders, the syndicate shall maintain under
71 terms acceptable to the commissioner minimum capital and
72 surplus, or its equivalent under the laws of the domiciliary
73 jurisdiction, of not less than \$5 million; or

74 (II) For insurance exchanges which do not maintain funds
75 in an amount of not less than \$15 million for the protection
76 of all exchange policyholders, the syndicate shall maintain

77 under terms acceptable to the commissioner minimum
78 capital and surplus, or its equivalent under the laws of its
79 domiciliary jurisdiction, of not less than the minimum
80 capital and surplus requirements under the laws of its
81 domiciliary jurisdiction or \$15 million, whichever is greater;
82 or

83 (C) In the case of a Lloyd's plan or other similar group of
84 insurers, which consists of unincorporated individual
85 insurers, or a combination of both unincorporated and
86 incorporated insurers:

87 (i) The plan or group maintains a trust fund that shall
88 consist of a trustee account representing the group's
89 liabilities attributable to business written in the United
90 States; and

91 (ii) In addition, the group shall establish and maintain in
92 trust a surplus in the amount of \$100 million; which shall be
93 available for the benefit of United States surplus lines
94 policyholders of any member of the group.

95 (iii) The incorporated members of the group shall not be
96 engaged in any business other than underwriting as a
97 member of the group and shall be subject to the same level of
98 solvency regulation and control by the group's domiciliary
99 regulator as are the unincorporated members.

100 (iv) The trust funds shall be maintained in an irrevocable
101 trust account in the United States in a qualified financial
102 institution, consisting of cash, securities, letters of credit or
103 investments of substantially the same character and quality
104 as those which are eligible investments for the capital and
105 statutory reserves of admitted insurers to write like kinds of
106 insurance in this state and, in addition, the trust required by
107 subparagraph (ii) of this subdivision shall satisfy the re-
108 quirements of the standard trust agreement required for
109 listing with the National Association of Insurance Commis-
110 sioners (NAIC) International Insurers Department or any
111 successor thereto; or

112 (D) In the case of a group of incorporated insurers under
113 common administration, which has continuously transacted
114 an insurance business outside the United States for at least
115 three years immediately prior to this time, and which
116 submits to this state's authority to examine its books and
117 records and bears the expense of the examination:

118 (i) The group shall maintain an aggregate policyholders'
119 surplus of \$10 billion; and
120 (ii) The group shall maintain in trust a surplus in the
121 amount of \$10 billion; which shall be available for the

122 benefit of United States surplus lines policyholders of any
123 member of the group; and

124 (iii) Each insurer shall individually maintain capital and
125 surplus of not less than \$25 million per company.

126 (iv) The trust funds shall satisfy the requirements of the
127 standard trust agreement requirement for listing with the
128 NAIC International Insurers Department or any successor
129 thereto, and shall be maintained in an irrevocable trust
130 account in the United States in a qualified financial institu-
131 tion, and shall consist of cash, securities, letters of credit or
132 investments of substantially the same character and quality
133 as those which are eligible investments for the capital and
134 statutory reserves of admitted insurers to write like kinds of
135 insurance in this state.

136 (v) Additionally, each member of the group shall make
137 available to the commissioner an annual certification of the
138 member's solvency by the member's domiciliary regulator
139 and its independent public accountant; or

140 (E) Except for an exchange or plan complying with
141 paragraph (B), (C) or (D) of this subdivision, an insurer not
142 domiciled in one of the United States or its territories shall
143 satisfy the capital and surplus requirements of paragraph

144 (A), subdivision (2), subsection ~~(e)(d)~~ of this section and shall

145 have in force a trust fund of not less than the greater of:

146 (i) \$5,400,000; or

147 (ii) Thirty percent of the United States surplus lines gross

148 liabilities, excluding aviation, wet marine and transportation

149 insurance liabilities, not to exceed \$60 million, to be deter-

150 mined annually on the basis of accounting practices and

151 procedures substantially equivalent to those promulgated by

152 this state, as of December 31 next preceding the date of

153 determination, where:

154 (I) The liabilities are maintained in an irrevocable trust

155 account in the United States in a qualified financial institu-

156 tion, on behalf of U.S. policyholders consisting of cash,

157 securities, letters of credit or other investments of substan-

158 tially the same character and quality as those which are

159 eligible investments pursuant to article eight of this chapter

160 for the capital and statutory reserves of admitted insurers to

161 write like kinds of insurance in this state. The trust fund,

162 which shall be included in any calculation of capital and

163 surplus or its equivalent, shall satisfy the requirements of the

164 Standard Trust Agreement required for listing with the

165 NAIC International Insurers Department or any successor

166 thereto; and

167 (II) The insurer may request approval from the commis-

168 sioner to use the trust fund to pay valid surplus lines claims;

169 *Provided, however,* That the balance of the trust fund is

170 never less than the greater of \$5,400,000 or thirty percent of

171 the insurer's current gross U.S. surplus lines liabilities,

172 excluding aviation, wet marine and transportation insurance

173 liabilities; and

174 (III) In calculating the trust fund amount required by this

175 subsection, credit shall be given for surplus lines deposits

176 separately required and maintained for a particular state or

177 U.S. territory, not to exceed the amount of the insurer's loss

178 and loss adjustment reserves in the particular state or

179 territory;

180 (F) An insurer or group of insurers meeting the require-

181 ments to do a surplus lines business in this state at the

182 effective date of this law shall have two years from the date

183 of enactment to meet the requirements of paragraph (E) of

184 this subdivision, as follows:

	Year Following Enactment	Trust Fund Requirement
185	1	15% of U.S. surplus lines liabilities, excluding aviation, wet marine and transportation insurance, with a maximum of \$30 million
186	2	30% of U.S. surplus lines liabilities, excluding aviation, wet marine and transportation insurance, with a maximum of \$60 million
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194 (G) The commissioner shall have the authority to adjust, in
195 response to inflation, the trust fund amounts required by
196 paragraph (E) of this subdivision.

197 (3) In addition to all of the other requirements of this
198 subsection, an insurer not domiciled in the United States or
199 its territories shall be listed on the NAIC's quarterly listing
200 of alien insurers. The commissioner may waive the require-
201 ment in this subdivision or the requirements of subparagraph
202 (ii), paragraph (E), subdivision (2), subsection ~~(e)~~ (d) of this
203 section may be satisfied by an insurer's possessing less than
204 the trust fund amount specified in subparagraph (ii), para-
205 graph (E), subdivision (2), subsection ~~(e)~~ (d) of this section
206 upon an affirmative finding of acceptability by the commis-
207 sioner if the commissioner is satisfied that the placement of

208 insurance with the insurer is necessary and will not be
209 detrimental to the public and the policyholder. In determin-
210 ing whether business may be placed with the insurer, the
211 commissioner may consider such factors as:

212 (A) The interests of the public and policyholders;

213 (B) The length of time the insurer has been authorized in
214 its domiciliary jurisdiction and elsewhere;

215 (C) Unavailability of particular coverages from authorized
216 insurers or unauthorized insurers meeting the requirements
217 of this section;

218 (D) The size of the company as measured by its assets,
219 capital and surplus, reserves, premium writings, insurance in
220 force or other appropriate criteria;

221 (E) The kinds of business the company writes, its net
222 exposure and the extent to which the company's business is
223 diversified among several lines of insurance and geographic
224 locations; and

225 (F) The past and projected trend in the size of the com-
226 pany's capital and surplus considering such factors as
227 premium growth, operating history, loss and expense ratios,
228 or other appropriate criteria; and

229 (4) Has caused to be provided to the commissioner a copy
230 of its current annual statement certified by the insurer and
231 an actuarial opinion as to the adequacy of, and methodology
232 used to determine, the insurer's loss reserves. The statement
233 shall be provided at the same time it is provided to the
234 insurer's domicile, but in no event more than eight months
235 after the close of the period reported upon, and shall be
236 certified as a true and correct copy by an accounting or
237 auditing firm licensed in the jurisdiction of the insurer's
238 domicile and certified by a senior officer of the nonadmitted
239 insurer as a true and correct copy of the statement filed with
240 the regulatory authority in the domicile of the nonadmitted
241 insurer. In the case of an insurance exchange qualifying
242 under paragraph (B), subdivision (2) of this subsection, the
243 statement may be an aggregate combined statement of all
244 underwriting syndicates operating during the period re-
245 ported; and

246 (5) In addition to meeting the requirements in subdivisions
247 (1) to (4) of this subsection an insurer shall be an eligible
248 surplus lines insurer if it appears on the most recent list of
249 eligible surplus lines insurers published by the commissioner
250 from time to time but at least annually. Nothing in this

251 subdivision shall require the commissioner to place or
252 maintain the name of any nonadmitted insurer on the list of
253 eligible surplus lines insurers.

254 (6) Notwithstanding subsection (a) of this section, only that
255 portion of any risk eligible for export for which the full
256 amount of coverage is not procurable from listed eligible
257 surplus lines insurers may be placed with any other
258 nonadmitted insurer which does not appear on the list of
259 eligible surplus lines insurers published by the commissioner
260 pursuant to subdivision (5) of this subsection but nonetheless
261 meets the requirements set forth in subdivisions (1) and (2),
262 subsection ~~(e)~~ (d) of this section and any regulations of the
263 commissioner. The surplus lines licensee seeking to provide
264 coverage through an unlisted nonadmitted insurer shall
265 make a filing specifying the amounts and percentages of each
266 risk to be placed, and naming the nonadmitted insurers with
267 which placement is intended. Within thirty days after
268 placing the coverage, the surplus lines licensee shall also
269 send written notice to the insured that the insurance, or a
270 portion thereof, has been placed with the nonadmitted
271 insurer.

272 ~~(d)~~ (e) Insurance procured under this section shall be valid

273 and enforceable as to all parties.

§33-12C-7. Surplus lines tax.

1 (a) In addition to the full amount of gross premiums
2 charged by the insurer for the insurance, every person
3 licensed pursuant to section eight of this article shall collect
4 and pay to the commissioner a sum equal to four and fifty-
5 five one-hundredths percent of the gross premiums and gross
6 fees charged, less any return premiums, for surplus lines
7 insurance provided by the licensee pursuant to the license.
8 Where the insurance covers properties, risks or exposures
9 located or to be performed both in and out of this state and
10 this state is the insured's home state, the sum payable shall
11 be computed on that portion of the gross premiums allocated
12 to this state, ~~pursuant to subsection (g) of this section, plus~~
13 an amount equal to the portion of the gross premiums
14 allocated to other states or territories on the basis of the tax
15 rates and fees applicable to properties, risks or exposures
16 located or to be performed outside of this state, and less the
17 amount of gross premiums allocated to this state and re-
18 turned to the insured due to cancellation of policy: Provided,
19 That the surcharge imposed by section thirty-three, article

20 three of this chapter on surplus lines policies shall no longer
21 be effective with respect to premium attributable to coverage
22 under such policies for periods after June 30, 2011: Provided,
23 however, That twelve per cent of taxes collected under this
24 subsection with respect to premium attributable to coverage
25 under such policies after June 30, 2011, shall be disbursed
26 and distributed in accordance with subsection (d), section
27 three, article three of this chapter and eighty-eight per cent
28 in accordance with subsection (h) of this section. The tax on
29 any portion of the premium unearned at termination of
30 insurance having been credited by the state to the licensee
31 shall be returned to the policyholder directly by the surplus
32 lines licensee or through the producing broker, if any.

33 (b) The individual insurance producer may not:
34 (1) Pay directly or indirectly the tax or any portion thereof,
35 either as an inducement to the policyholder to purchase the
36 insurance or for any other reason; or
37 (2) Rebate all or part of the tax or the surplus lines li-
38 censee's commission, either as an inducement to the policy-
39 holder to purchase the insurance or for any reason.
40 (c) The surplus lines licensee may charge the prospective
41 policyholder a fee for the cost of underwriting, issuing,

42 processing, inspecting, service or auditing the policy for

43 placement with the surplus lines insurer if:

44 (1) The service is required by the surplus lines insurer;

45 (2) The service is actually provided by the individual

46 insurance producer or the cost of the service is actually

47 incurred by the surplus lines licensee; and

48 (3) The provision or cost of the service is reasonable,

49 documented and verifiable.

50 (d) The surplus lines licensee shall make a clear and

51 conspicuous written disclosure to the policyholder of:

52 (1) The total amount of premium for the policy;

53 (2) Any fee charged;

54 (3) The total amount of any fee charged; and

55 (4) The total amount of tax on the premium and fee.

56 (e) The clear and conspicuous written disclosure required

57 by subdivision (4) of this subsection is subject to the record

58 maintenance requirements of section eight of this article.

59 (f) This tax is imposed for the purpose of providing addi-

60 tional revenue for municipal policemen's and firemen's

61 pension and relief funds and additional revenue for volunteer

62 and part-volunteer fire companies and departments. This tax

63 is required to be paid and remitted, on a calendar year basis

64 and in quarterly estimated installments due and payable on
65 or before the twenty-fifth day of the month succeeding the
66 close of the quarter in which they accrued, except for the
67 fourth quarter, in respect of which taxes shall be due and
68 payable and final computation of actual total liability for the
69 prior calendar year shall be made, less credit for the three
70 quarterly estimated payments prior made, and filed with the
71 annual return to be made on or before March 1 of the
72 succeeding year. Provisions of this chapter relating to the
73 levy, imposition and collection of the regular premium tax
74 are applicable to the levy, imposition and collection of this
75 tax to the extent that the provisions are not in conflict with
76 this section.

77 All Except as provided in subsection (f) of this section, all
78 taxes remitted to the commissioner pursuant to this subsec-
79 tion shall be paid by him or her into a special account in the
80 State Treasury, designated Municipal Pensions and Protec-
81 tion Fund, or pursuant to section eighteen-b, article twenty-
82 two, chapter eight of this code, the Municipal Pensions
83 Security Fund, and after appropriation by the Legislature,
84 shall be distributed in accordance with the provisions of
85 subsection (c), section fourteen-d, article three of this

86 chapter. The surplus lines licensee shall return to the
87 policyholder the tax on any unearned portion of the premium
88 returned to the policyholder because of cancellation of
89 policy.

90 (g) If a surplus lines policy procured through a surplus
91 lines licensee covers properties, risks or exposures only
92 partially located or to be performed in this state, the tax due
93 shall be computed on the portions of the premiums which are
94 attributable to the properties, risks or exposures located or
95 to be performed in this state. In determining the amount of
96 premiums taxable in this state, all premiums written,
97 procured or received in this state shall be considered written
98 on properties, risks or exposures located or to be performed
99 in this state, except premiums which are properly allocated
100 or apportioned and reported as taxable premiums of a
101 reciprocal state. In no event shall the tax payable to this
102 state be less than the tax due pursuant to subsection (h) of
103 this section; provided, however, in the event that the amount
104 of tax due under this provision is less than \$50 in any
105 jurisdiction, it shall be payable in the jurisdiction in which
106 the affidavit required in section eleven is filed. The commis-
107 sioner may, at least annually furnish to the commissioner of

108 a reciprocal state, as defined in subsection (q), section three
109 of this article, a copy of all filings reporting an allocation of
110 taxes as required by this subsection.

111 ~~(h)~~ (g) In determining the amount of gross premiums
112 taxable in this state for a placement of surplus lines insur-
113 ance covering properties, risks or exposures only partially
114 located or to be performed in this state, the tax due shall be
115 computed on the portions of the premiums which are
116 attributable to properties, risks or exposures located or to be
117 performed in this state and which relates to the kinds of
118 insurance being placed as determined by reference to ~~the~~
119 ~~model an appropriate allocation schedule and reporting form~~
120 table.

121 (1) If a policy covers more than one classification:
122 (A) For any portion of the coverage identified by a classifi-
123 cation on the allocation schedule, the tax shall be computed
124 by using the allocation schedule for the corresponding
125 portion of the premium;

126 (B) For any portion of the coverage not identified by a
127 classification on the allocation schedule, the tax shall be
128 computed by using an alternative equitable method of
129 allocation for the property or risk;

130 (C) For any portion of the coverage where the premium is
131 indivisible, the tax shall be computed by using the method of
132 allocation which pertains to the classification describing the
133 predominant coverage.

134 (2) If the information provided by the surplus lines licensee
135 is insufficient to substantiate the method of allocation used
136 by the surplus lines licensee, or if the commissioner deter-
137 mines that the licensee's method is incorrect, the commis-
138 sioner shall determine the equitable and appropriate amount
139 of tax due to this state as follows:

140 (A) By use of the allocation schedule where the risk is
141 appropriately identified in the schedule;

142 (B) Where the allocation schedule does not identify a
143 classification appropriate to the coverage, the commissioner
144 may give significant weight to documented evidence of the
145 underwriting bases and other criteria used by the insurer.

146 The commissioner may also consider other available infor-
147 mation to the extent sufficient and relevant, including the
148 percentage of the insured's physical assets in this state, the
149 percentage of the insured's sales in this state, the percentage
150 of income or resources derived from this state, and the

151 amount of premium tax paid to another jurisdiction for the
152 policy.

153 (h) The commissioner is authorized to participate in a
154 clearinghouse established through NIMA or in a similar
155 allocation procedure for the purpose of collecting and
156 disbursing to signatory states any funds collected pursuant
157 to this section that are allocable to properties, risks or
158 exposures located or to be performed outside of this state:
159 Provided, That twelve per cent of any moneys received from
160 a clearinghouse or through a similar allocation procedure
161 shall be disbursed and distributed in accordance with
162 subsection (d), section three, article three of this chapter and
163 eighty-eight per cent of such moneys shall be disbursed and
164 distributed in accordance with subsection (f) of this section:
165 Provided, however, That to the extent other states where
166 portions of the properties, risks or exposures reside have
167 failed to enter into NIMA or a similar allocation procedure
168 with this state, the net premium tax collected shall be
169 retained by this state and shall be disbursed and distributed
170 in the same manner as moneys received through a clearing-
171 house or similar allocation procedure.

172 (i) Collection of tax.

173 If the tax owed by a surplus lines licensee under this
174 section has been collected and is not paid within the time
175 prescribed, the same shall be recoverable in a suit brought
176 by the commissioner against the surplus lines licensee. The
177 commissioner may charge interest for any unpaid tax, fee,
178 financial assessment or penalty, or portion thereof: *Provided,*
179 That interest may not be charged on interest. Interest shall
180 be calculated using the annual rates which are established
181 by the Tax Commissioner pursuant to section seventeen-a of
182 article ten, chapter eleven of this code and shall accrue daily.

§33-12C-8. Surplus lines licenses.

1 (a) ~~A~~ No person shall ~~not~~ procure a contract of surplus
2 lines insurance with a nonadmitted insurer for an insured
3 whose home state is West Virginia unless the person pos-
4 sesses a current surplus lines insurance license issued by the
5 commissioner.

6 (b) The commissioner may issue a surplus lines license to
7 a qualified holder of a current property and casualty individ-
8 ual insurance producer's license but only when the individ-
9 ual insurance producer has:

10 (1) Remitted the \$200 annual fee to the commissioner, of
11 which all fees so collected are to be used for the purposes set
12 forth in section thirteen, article three of this chapter;

13 (2) Submitted a completed license application on a form
14 supplied by the commissioner;

15 (3) Passed a qualifying examination approved by the
16 commissioner, except that all holders of a license prior to the
17 effective date of this article shall be deemed to have passed
18 such an examination; and

19 (4) If a resident, established and continues to maintain an
20 office in this state.

21 (c) If the commissioner determines that a surplus lines
22 licensee of another state is competent, trustworthy and meets
23 the licensing requirements of this state, the commissioner
24 may, in his or her discretion, issue a nonresident surplus
25 lines license. A license shall not be issued unless the prospec-
26 tive licensee furnishes the commissioner with the name and
27 address of a resident of this state upon whom notices or
28 orders of the commissioner or process affecting the nonresi-
29 dent surplus lines licensee may be served. The licensee shall
30 promptly notify the commissioner in writing of every change
31 in its designated agent for service of process, and the change

32 shall not become effective until acknowledged by the
33 commissioner.

34 (d) Each surplus lines license shall expire at midnight on
35 May 31 next following the date of issuance, and an applica-
36 tion for renewal shall be filed before May 1 of each year upon
37 payment of the annual fee and compliance with other
38 provisions of this article. A surplus lines licensee who fails
39 to apply for renewal of the license before May 1 shall pay a
40 penalty of \$100 and be subject to penalties provided by law
41 before the license will be renewed.

(NOTE: The purpose of this bill is to amend the insurance code in accordance with the federal Nonadmitted and Reinsurance Reform Act of 2010 and to authorize the Insurance Commissioner to enter into a multistate agreement with respect to the collection and disbursement of surplus lines taxes.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.)