NAIC NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Date: 9/16/2022

Virtual Meeting

SURPLUS LINES (C) TASK FORCE
Monday, October 17, 2022
12:00 – 1:00 p.m. ET / 11:00 a.m. – 12:00 p.m. CT / 10:00 – 11:00 a.m. MT / 9:00 – 10:00 a.m. PT

ROLL CALL

James J. Donelon, Chair	Louisiana	Gary D. Anderson	Massachusetts
Larry D. Deiter, Vice Chair	South Dakota	Mike Chaney	Mississippi
Mark Fowler	Alabama	Troy Downing	Montana
Lori K. Wing-Heier	Alaska	Edward M. Deleon Guerrero	N. Mariana Islands
Peni Itula Sapini Teo	American Samoa	Barbara D. Richardson	Nevada
Ricardo Lara	California	Mike Causey	North Carolina
Michael Conway	Colorado	Jon Godfread	North Dakota
David Altmaier	Florida	Michael Humphreys	Pennsylvania
Michelle B. Santos	Guam	Elizabeth Kelleher-Dwyer	Rhode Island
Colin M. Hayashida	Hawaii	Michael Wise	South Carolina
Dean L. Cameron	Idaho	Carter Lawrence	Tennessee
Doug Ommen	Iowa	Cassie Brown	Texas
Vicki Schmidt	Kansas	Mike Kreidler	Washington
Kathleen A. Birrane	Maryland		

AGENDA

1. Consider Adoption of its Spring National Meeting Minutes —*Commissioner James J. Donelon (LA)* — Attachment A

2. Consider Adoption of the Report of the Surplus Lines (C) Working Group —*Stewart Guerin (LA)*

3. Consider Adoption of its 2023 Proposed Charges —*Commissioner James J. Donelon (LA)* — Attachment B

4. Discuss Comments Received on the Draft *Nonadmitted Insurance Model Act* (#870)—*Commissioner James J. Donelon (LA)* — Attachment C

5. Hear an Update on Surplus Lines Industry Results—*Andy Daleo (NAIC)*

6. Discuss Any Other Matters Brought Before the Task Force —*Commissioner James J. Donelon (LA)*

7. Adjournment

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Draft: 5/26/22

Surplus Lines (C) Task Force
Virtual Meeting
May 23, 2022

The Surplus Lines (C) Task Force met May 23, 2022. The following Task Force members participated: James J. Donelon, Chair, Stewart Guerin, and Tom Travis (LA); Larry D. Deiter, Vice Chair, represented by Charlene Squires-Keller (SD); Lori K. Wing-Heier represented by Sian Ng-Ashcraft (AK); Jim L. Ridling represented by Jimmy Gunn (AL); Ricardo Lara represented by Libio Latimer (CA); Michael Conway represented by Rolf Kaumann (CO); David Altmaier represented by Robert Ballard (FL); Colin M. Hayashida represented by Martha Im (HI); Doug Ommen represented by Kim Cross (IA); Dean L. Cameron represented by Randy Pipal (ID); Vicki Schmidt represented by Marcia Kramer (KS); Gary D. Anderson represented by James A. McCarthy (MA); Kathleen A. Birrane represented by Robert Baron (MD); Mike Chaney represented by Ryan Blakeney (MS); Troy Downing represented by Sharon Richetti (MT); Mike Causey represented by Hasije Harris (NC); Jon Godfread represented by Janelle Middlestead (ND); Barbara D. Richardson represented by Gennady Stolyarov (NV); Michael Humphreys represented by Michael McKenney (PA); Elizabeth Kelleher Dwyer represented by Beth Vollucci (RI); Michael Wise represented by Rachel Moore (SC); Carter Lawrence represented by Trey Hancock (TN); Cassie Brown represented by Jamie Walker (TX); and Mike Kreidler represented by Jeff Baughman (WA).

1. Adopted its 2021 Fall National Meeting Minutes

Mr. Pipal made a motion, seconded by Mr. Baughman, to adopt the Task Force's Nov. 29, 2021, minutes (*see NAIC Proceedings – Fall 2021, Surplus Lines (C) Task Force*). The motion passed unanimously.

2. Adopted the Report of the Surplus Lines (C) Working Group

Mr. Guerin reported that since the 2021 Fall National Meeting, the Surplus Lines (C) Working Group met Dec. 20, 2021, and March 24 in regulator-to-regulator session, pursuant to paragraph 3 (specific companies, entities or individuals) of the NAIC Policy Statement on Open Meetings, to discuss 10 applications seeking approval for listing on the NAIC *Quarterly Listing of Alien Insurers,* and all 10 applications were approved.

Mr. Kaumann made a motion, seconded by Mr. Baron, to adopt the report of the Surplus Lines (C) Working Group. The motion passed unanimously.

3. Discussed and Exposed the Draft Model #870

Commissioner Donelon stated that last summer, the *Nonadmitted Insurance Model Act* (#870) drafting group was formed, following approval in the spring, to begin working on Model #870. He asked Andy Daleo (NAIC) to provide a summary of the drafting group's activities. Mr. Daleo indicated that the drafting group consisted of participants from Colorado, Illinois, Louisiana, Texas, and Washington. He stated that the drafting group met Sept. 28, 2021; Oct. 20, 2021; Nov. 4, 2021; and Dec. 1, 2021. Further, he indicated that the drafting group met Jan. 10 and May 3 in regulator-to-regulator session to discuss administrative tasks. He stated that during the open calls, the drafting group discussed each section of Model #870 and worked through a revision-marked version that resulted in the current draft. He stated that many comments were received as shown in the Excel matrix within the materials. Following Mr. Daleo's comments Commissioner Donelon asked Mr. Travis to provide a summary of the primary revisions to Model #870. Mr. Travis commented that all the comments within the Excel matrix were addressed by the drafting group. Further, he indicated that the last column of the comment matrix provides details on how each of the comments were addressed. He indicated that the most significant work completed was to bring Model #870

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in compliance with the federal Dodd-Frank Wall Street Reform and Consumer Protection Act, Nonadmitted and Reinsurance Reform Act of 2010 (NRRA). He stated that the most notable edits were regarding the "Home State" taxation provision. He commented that the drafting group spent a considerable amount of time discussing "Home State" determination of unaffiliated groups, given that the NRRA remained silent on the issue. He indicated that the drafting group integrated text into Model #870, and it believed it provided a good framework to address the issue. He also stated that the drafting group added optional sections on domestic surplus lines insurers to address the increasing number of states that have adopted this legislation. He stated that given that the Task Force developed the *Guideline on Nonadmitted Accident and Health Coverages* (#1860), reference to it was included below the "Surplus Lines Insurance" definition. He also indicated that Section 2–Definitions was significantly enhanced by adding additional key definitions such as Control, Exempt Commercial Purchaser, and Home State. He stated that the drafting group believes its work is substantially complete, and it turned Model #870 over to the Task force and requested a 60-day public exposure.

Commissioner Donelon requested a motion to expose the draft Model #870 for a 45-day public comment period ending July 6. Mr. Baughman made a motion, seconded by Mr. Kaumann, to expose the draft Model #870 for a 45-day public comment period ending July 6. The motion passed unanimously.

John Meetz (Wholesale & Specialty Insurance Association—WSIA) asked whether the comment period was for a 60-day period, as indicated by Mr. Travis, or a 45-day period, as stated in the motion. Following a brief discussion, Commissioner Donelon requested a revised motion to expose the draft Model #870 for a 60-day public comment period ending July 21. Mr. Baughman made a motion, seconded by Mr. Baron, to expose the draft Model #870 for a 60-day public comment period ending July 21. The motion passed unanimously.

Having no further business, the Surplus Lines (C) Task Force adjourned.

SLTF Minutes May 2022.docx

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Draft: 9/6/22
Adopted by the Property and Casualty Insurance (C) Committee—
Adopted by the Surplus Lines (C) Task Force—

2023~~2~~2 Proposed Charges

SURPLUS LINES (C) TASK FORCE

The mission of the Surplus Lines (C) Task Force is to monitor the surplus lines market and regulation, including the activity and financial condition of U.S. and alien surplus lines insurers by providing a forum for discussion of issues and to develop or amend relevant NAIC model laws, regulations and/or guidelines.

Ongoing Support of NAIC Programs, Products or Services

1. The **Surplus Lines (C) Task Force** will:
   A. Provide a forum for discussion of current and emerging surplus lines-related issues and topics of public policy and determine appropriate regulatory response and action.
   B. Review and analyze quantitative and qualitative data on U.S. domestic and alien surplus lines industry results and trends.
   C. Monitor federal legislation related to the surplus lines market and ensure all interested parties remain apprised.
   D. Develop or amend relevant NAIC model laws, regulations and/or guidelines.
   E. Oversee the activities of the Surplus Lines (C) Working Group.

2. The **Surplus Lines (C) Working Group** will:
   A. Operate in regulator-to-regulator session pursuant to paragraph 3 (specific companies, entities or individuals) of the NAIC Policy Statement on Open Meetings and operate in open session when discussing surplus lines topics and policy issues, such as amendments to the International Insurers Department (IID) Plan of Operation.
   B. Maintain and draft new guidance within the IID Plan of Operation regarding standards for admittance and continued inclusion on the NAIC *Quarterly Listing of Alien Insurers*.
   C. Review and consider appropriate decisions regarding applications for admittance to the NAIC *Quarterly Listing of Alien Insurers*.
   D. Analyze renewal applications of alien surplus lines insurers on the NAIC *Quarterly Listing of Alien Insurers* and ensure solvency and compliance per the IID Plan of Operation guidelines for continued listing.
   E. Provide a forum for surplus lines-related discussion among jurisdictions.

NAIC Support Staff: Andy Daleo

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August 8, 2022

To: Surplus Lines (C) Task Force

From: Model 870 Drafting Group

Re: Summary of Comments Received on Exposure of Model 870

During a May 23, 2022 Webex, the Surplus Lines (C) Task Force heard an update from the Model 870 Drafting Group regarding progress made on the model. The Drafting Group summarized that they met six times since its formation and has addressed 40 comments received during those meetings. The Drafting Group presented the draft model to the Task Force on May 23 and the Task Force formally exposed Model 870 for a 60-day public comment period that ended on July 21st. As a result of that exposure, 27 comments were received that covered seven issues. The following provides a summary of how the Drafting Group addressed those issues which are cross-referenced to the comment matrix included in your materials.

Matrix Reference 1 - Domestic Surplus Lines Insurer (DSLI) References
Model 870 Reference – Entire Model

Summary of Comment
A comment was received regarding the marking of all references to domestic surplus lines insurers (DSLI) within Model 870 as "optional."

Drafting Group Response
The Drafting Group ensured all lead-in references to Domestic Surplus Lines Insurers were marked as "Optional."

Matrix Reference 2-4 - Exempt Commercial Purchaser
Model 870 Reference – Section 3, Definitions

Summary of Comments
Exempt Commercial Purchaser Section 3H(3)(b) regarding the five-year Consumer Price Index (CPI) adjustment does not establish a definitive effective date for the commencement of CPI adjustments. The Nonadmitted and Reinsurance Reform Act (NRRA) specifies the dates for each CPI adjustment on the fifth January 1, occurring the date after the enactment of the NRRA (July 21, 2010) and each fifth January 1 thereafter. The Model should specify the starting point of July 21, 2010.

Drafting Group Response
The Drafting Group amended the draft Model to reflect, the July 21, 2010 starting date.

Matrix Reference 5 - Principal Place of Business and Principal Residence
Model 870 Reference – Section 3, Definitions

Summary of Comments
"Principal Place of Business" and "Principal Residence" Definitions (Section 3O-P). Subsection (2) in each definition appear to allow states to tax non-U.S. premium. APCIA supports language clarifying and confirming that states are not allowed to tax non-U.S. premiums.

Drafting Group Response
The Drafting Group addressed the concern by modifying the definition for Taxable Premium as follows:

"Taxable Premium" means any premium less return premium that is not otherwise exempt from tax pursuant to this Act. [Optional] [Premium on property risk or exposure that is properly allocated to federal or international waters or is under the jurisdiction of a foreign government is not taxable in this state.]

Matrix Reference 6 – Surplus Lines Insurance
Model 870 Reference – Section 3, Definitions

Summary of Comments
The Drafting Note to, Surplus Lines Insurance (Section 3R) correctly indicates that some states allow certain non-property and casualty coverages to be written in the surplus lines market. The Task Force may wish to consider whether it is necessary to retain the reference to "property and casualty" in the definition as opposed to just defining it as any coverage permitted to be placed by a surplus lines licensee with an eligible surplus lines insurer.

Drafting Group Response
The Drafting Group removed "Property and Casualty" from the definition. As a result, the drafting note is no longer necessary and was eliminated.

Matrix Reference 7-15 – Home State - Unaffiliated Groups
Model 870 Reference – Section 3, Definitions

Summary of Comments
Numerous comments were received on the definition of "home state" regarding the determination of the "home state" for unaffiliated group policies. Most comments indicated that since the NRRA remains silent on the determination of the "home state" for unaffiliated group policies and that Section 3, J(4) should either be eliminated from the Model or clarify that the "home state" of the unaffiliated group policy is the "home state" of the group policyholder. A few of the comments received follow:

- If group policies require separate tax payments for each member of the group to be issued to each state of residence, brokers would be unable to continue servicing many of their existing group policies;
- It is neither practical nor feasible for regulators and brokers to be subjected to tax payments in multiple states for each unaffiliated group member;
- A definition of home state that would allow for multiple home states would be a significant administrative challenge and would create immediate staffing concerns for companies…; and
- The proposed definition of the home state for "unaffiliated groups" demonstrates the perils of deviating from NRRA principles. The NRRA sought to simplify and streamline nonadmitted compliance through the designation of a single "home state" with the sole authority to regulate and tax each nonadmitted policy.

Drafting Group Response
The Drafting Group modified the definition of "Home State" to allow two options. The first option continues to allow for a single payment to the "home state" of the group policyholder as well as allocation of tax payments to the "home state" for each member of the unaffiliated group. The second option allows for the single payment of

tax to the "home state" of the unaffiliated group based on its principal place of business and the state with the greatest percent of taxable premium for the insurance contract.

Matrix Reference 16-21 – Diligent Search
Model 870 Reference – Section 5, Surplus Lines Insurance

Summary of Comments
Various comments were received regarding the statement, "States may want to consider the need to modernize diligent search requirements in light of electronic transactions." The comments encourage the use of examples for the modernization of diligent search.

Drafting Group Response
In response to the comments, the Drafting Group concluded that exchanging the word, "modernize" for "changing" would allow for greater flexibility by the states given the varying degree of diligent search requirements from state to state.

Matrix Reference 22-27 – Arbitration
Model 870 Reference – Section 9, Service of Process

Summary of Comments
The comments suggest the deletion of Section 9(H) on arbitration clauses. The commenters indicated that arbitration of insurance contracts should be fully negotiable, including the location of the proceedings. Further, one comment indicated that arbitration should be permitted in whichever state (or country) the parties designate in the contract, regardless of whether the exposures are located in that state.

Drafting Group Response
The Drafting Group refers decision on the suggested elimination of Section 9(H) to the Surplus Lines Task Force for consideration.

DRAFT 9/25/2022

NONADMITTED INSURANCE MODEL ACT

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Section 1. Short Title

This Act shall be known and may be cited as "The Nonadmitted Insurance Act."

Section 2. Purpose—Necessity for Regulation

This Act shall be liberally construed and applied to promote its underlying purposes which include:

A. Protecting persons seeking insurance in this Sstate;

B. Permitting Ssurplus Llines Iinsurance to be placed with reputable and financially sound Nnonadmitted Iinsurers and exported from this Sstate pursuant to this Act;

C. Establishing a system of regulation which will permit orderly access to Ssurplus Llines Iinsurance in this Sstate and encourage Aadmitted Iinsurers to provide new and innovative types of insurance available to consumers in this Sstate;

D. Providing a system through which persons may purchase insurance other than Ssurplus Llines Iinsurance, from Nnonadmitted Iinsurers pursuant to this Act;

E. Protecting revenues of this Sstate; and

F. Providing a system pursuant to this Act which subjects Nnonadmitted Iinsurance activities in this Sstate to the jurisdiction of the insurance Ceommissioner and Sstate and federal courts in suits by or on behalf of the Sstate.

Section 3. Definitions

As used in this Act:

A. "Admitted Iinsurer" means an insurer licensed to ~~do~~ engage in ~~an~~ the business of insurance ~~business~~ in this state.

B. ''Affiliate'' means, with respect to an insured, any entity that controls, is controlled by, or is under common control with the insured.

C. ''Affiliated Group'' means any group of entities that are all affiliated. ~~"Capital," as used in the financial requirements of Section 5, means funds paid in for stock or other evidence of ownership.~~

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DC. "Commissioner" means the insurance commissioner of [insert name of state] , or the commissioner's deputies or staff, or the Commissioner, Director or Superintendent of Insurance in any other state.

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

E. "Control" means with respect to an insured:

(1) A person either directly or indirectly or acting through one or more other persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity; or

(2) The entity controls in any manner the election of a majority of the directors or trustees of the other entity.

F. [OPTIONAL] [[~~"~~"Domestic Surplus Lines Insurer" means a surplus lines insurer domiciled in this state, which may write insurance in this state on ~~as if it were~~ a surplus lines ~~insurer~~ basis~~domiciled in another state~~.]

G. "Eligible S~~s~~urplus L~~l~~ines I~~i~~nsurer" means a nonadmitted insurer with which a surplus lines licensee may place surplus lines insurance pursuant to Section 5 of this Act.

H. "Exempt Commercial Purchaser" means any person purchasing commercial insurance that, at the time of placement, meets the following requirements:

(1) The person employs or retains a qualified risk manager to negotiate insurance coverage.

(2) The person has paid aggregate nationwide commercial property and casualty insurance premiums in excess of $100,000 in the immediately preceding 12 months.

(3) (a) The person meets at least one~~1~~ of the following criteria:

(i) The person possesses a net worth in excess of $20,000,000.

(ii) The person generates annual revenues in excess of $50,000,000.

(iii) The person employs more than 500 full-time or full-time equivalent employees per individual insured or is a member of an affiliated group employing more than 1,000 employees in the aggregate.

(iv) The person is a not-for-profit organization or public entity generating annual budgeted expenditures of at least $30,000,000.

(v) The person is a municipality with a population in excess of 50,000 persons.

(b) Effective on July 21, 2010 and each fifth January 1 occurring thereafter, the amounts in Items (i), (ii), and (iv) of Subparagraph (a) of this Paragraph shall be adjusted to reflect the percentage change for such 5-year period in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

Drafting Note: This definition of "Exempt Commercial Purchaser" follows the language of the federal Nonadmitted and Reinsurance Reform Act (NRRA). Some states have chosen not to adopt the inflation adjustment. The NRRA uses the term "municipality," which some states may find limiting. States may choose to use terminology consistent with state law to expand this provision to include counties and other public entities.

~~E~~I. "Export" means to place surplus lines insurance with a nonadmitted insurer.

~~F. "Foreign decree" means any decree or order in equity of a court located in any United States jurisdiction, including a federal court of the United States, against any person engaging in the transaction of insurance in this state.~~

J. "Home State" means with respect to an insured:

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(1) The state in which an insured maintains its principal place of business or, in the case of a natural person, the person's principal place of residence;

(2) If 100 percent of the insured risk is located out of the state referred to in subp~~P~~aragraph (1), the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated;

(3) If the insured is an affiliated group with more than one member listed as a named insured on a single Nonadmitted Insurance contract, the home state is the home state of the member of the affiliated group that has the largest percentage of premium attributed to it under the insurance contract; or

(4) [Option 1] In the case of an unaffiliated group policy:

(a) If a group policyholder pays 100% of the premium from its own funds, then the home state is determined according to paragraphs (1) and (2).

(b) If a group policyholder does not pay 100% of the premium from its own funds, then the home state is determined according to paragraphs (1) and (2) for each member of the group.

[Option 2] In the case of an unaffiliated group policy, the home state shall be the home state of the group policyholder as determined by the application of paragraphs (1) and (2).

Comment: The NRRA definition of "home state" includes Paragraphs (1), (2), and (3). The NRRA definition does not expressly cover unaffiliated groups ~~such as risk purchasing groups~~. The model language contains two options for~~addition of~~ Paragraph (4) that are~~is~~ intended to bring clarity by expressly covering unaffiliated groups~~treating the members of such a group as individual insureds for purposes of placement and taxation~~.

~~K. "Insurer" means any person, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, insurance exchange syndicate, fraternal benefit society, and any other legal entity engaged in the business of insurance.~~

~~H. "Kind of insurance" means one of the types of insurance required to be reported in the annual statement which must be filed with the commissioner by admitted insurers.~~

K. "Nonadmitted Insurance" means any insurance written on properties, risks or exposures, located or to be performed in this state, by an insurer not licensed to engage in the ~~transaction~~business of insurance in this state [or a d~~D~~omestic s~~S~~urplus l~~L~~ines i~~I~~nsurer].

L~~I~~. "Nonadmitted I~~i~~nsurer" means an insurer not licensed to ~~do an~~engage in the ~~transaction~~business of insurance ~~business~~ in this state but does not include a risk retention group pursuant to the federal Liability Risk Retention Act of 1986.

M~~J~~. "Person" means any natural person or ~~other~~ business entity, including~~, but not limited to, individuals~~, partnerships, associations, trusts or corporations."

N. "Premium" means any payment made as consideration for an insurance contract.

~~N.~~O. "Principal Place of Business"

(1) The state where a person maintains its headquarters and where the person's high-level officers direct, control, and coordinate the business activities; or

(2) If the person's high-level officers direct, control, and coordinate the business activities in more than one state, or if the person's principal place of business is located outside any state, then it is the state to which the greatest percentage of the person's taxable premium for that insurance contract is allocated.

P~~O~~. "Principal Residence" means:

Commented [DAT1]: Refer to the modified definition for "Taxable Premium"

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(1) The state where the person resides for the greatest number of days during a calendar year; or

(2) If the person's principal residence is located outside any state, the state to which the greatest percentage of the person's taxable premium for that insurance contract is allocated.

Q. "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Norther Mariana Islands, the Virgin Island, and American Samoa.

~~K. "Policy" or "contract" means any contract of insurance, including but not limited to annuities, indemnity, medical or hospital service, workers' compensation, fidelity or suretyship.~~

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

~~(1) Sections 5F, 5I(5), 5Q(10), 5R(4) and Section 6; and~~

~~(2) The allocation schedule and reporting form contained in [cite the regulation on surplus lines taxation].~~

~~M. "Surplus," as used in the financial requirements of Section 5, means funds over and above liabilities and capital of the company for the protection of policyholders.~~

RN. "Surplus Llines Iinsurance" means any property and casualty insurance ~~in this state on properties, risks or exposures, located or to be performed in this state,~~ permitted to be placed through a surplus lines licensee with an ~~nonadmitted insurer~~ eligible surplus lines insurer ~~to accept such insurance~~, pursuant to Section 5 of this Act.

~~**Drafting Note:** If a state chooses to adopt the alternative Section 5B, this definition of "surplus lines insurance" should be consistent with the acceptable coverage listed in Section 5B. States may choose to extend the definition of "surplus lines insurance" beyond property/casualty insurance.~~NAIC :

S. "Surplus Lines Insurer" means a nonadmitted [or domestic surplus lines] insurer that is eligible to accept the placement of surplus lines insurance pursuant to Section 5 of this Act.

TO. "Surplus Llines Llicensee" means any person ~~individual, firm or corporation~~ licensed under Section 5 of this Act to place surplus lines insurance ~~on properties, risks or exposures located or to be performed~~ in this state with an ~~nonadmitted insurers~~ eligible surplus lines insurers~~to accept such insurance~~.

U. "Taxable Premium" means any premium less return premium that is not otherwise exempt from tax pursuant to this Act. [Optional] [Premium on property risk or exposure that is properly allocated to federal or international waters or is under the jurisdiction of a foreign government is not taxable in this state.]

VS. "Transaction of Iinsurance"

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

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

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

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

(d) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for insurance or any part thereof;

(e) The issuance or delivery in this state of contracts of insurance to residents of this state or to persons authorized to do business in this state;

(f) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;

(g) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of risks with respect to properties, risks or exposures located or to be performed in this state;

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

(i) The offering of insurance or the transacting of insurance business; or

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

(2) The provisions of this subsection shall not operate to prohibit employees, officers, directors or partners of a commercial insured from acting in the capacity of an insurance manager or buyer in placing insurance on behalf of the employer, provided that the person's compensation is not based on buying insurance.

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

Drafting Note: States may need to alter this subsection to reflect their decision as to whether they intend to permit citizens to directly purchase coverage within the state from a nonadmitted insurer, or if self-procurement of coverage will be permitted only when it occurs outside the state. States electing to allow direct procurement will need to insert an appropriate exemption in Section 4A of this Act. Additionally, states should consider whether the preceding definition of "transaction of insurance" is consistent with other statutory definitions of this phrase in the state. Finally, states may want to consider whether group insurance purchases or the maintenance of insurance books and records in this state should fall within the scope of the definition of "transaction of insurance."

WQ. ~~"Type of insurance" means coverage afforded under the particular policy that is being placed.~~

T. "Wet Mmarine and Ttransportation Iinsurance" means:

(1) Insurance upon vessels, crafts, hulls and other interests in them or with relation to them;

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

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

(4) Insurance of personal property and interests therein, in the course of exportation from or importation into any country, or in the course of transportation coastwise or on inland waters, including transportation by land, water or air from point of origin to final destination, in connection with any and all risks or perils of navigation, transit or transportation, and while being prepared for and while awaiting shipment, and during any incidental delays, transshipment, or reshipment; provided, however, that insurance of personal property and interests therein shall not be considered wet marine and transportation insurance if the property has:

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(a) Been transported solely by land; or

(b) Reached its final destination as specified in the bill of lading or other shipping document; or

(c) The insured no longer has an insurable interest in the property.

~~**Comment:** The language added in 1994 to the end of the definition of "wet marine and transportation insurance" {Subparagraphs 4(a), 4(b), and 4(c)} is intended to clarify the scope of the definition, which ultimately affects the exemption of certain risks from this Act. The 1994 amendments address current regulatory concerns and concerns raised by those who drafted the 1983 amendments to the Model Surplus Lines Law. The 1983 drafters wrote: "Several [drafters] felt the term 'storage' should not appear in... [the wet marine definition] to ensure that warehousemen and other types of insurance covering risks of storage are not interpreted to be within the purview of this definition. The term 'delays' is sufficiently broad to cover temporary storage while in the course of transit."~~

Drafting Note: In addition to the definitions provided in this section, individual states may wish to consider adopting definitions for "agent," "broker" or "producer" in a manner consistent with its other laws. Additionally, states may want to cross-reference the definition of "insurance" as it appears elsewhere in the state insurance code. The definition of insurance should reach illegal unauthorized activities.

Section 4. Placement of Insurance Business

A. An insurer shall not engage in the Ttransaction of Iinsurance unless authorized by a license in force pursuant to the laws of this Sstate~~,~~ or exempted by this Act or ~~otherwise exempted by~~ the insurance laws of this Sstate.

B. A Pperson shall not directly or indirectly engage in a Ttransaction of Iinsurance with or on behalf of ~~or shall in this state directly or indirectly act as agent for, or otherwise represent or aid on behalf of another,~~ a Nnonadmitted Iinsurer in this State.~~in the solicitation, negotiation, procurement or effectuation of insurance, or renewals thereof, or forwarding of applications, or delivery of policies or contracts or inspection of risks, or fixing of rates, or investigation or adjustment of claims or losses, or collection or forwarding of premiums, or in any other manner represent or assist the insurer in the transaction of insurance.~~

C. A Pperson who represents or aids a Nnonadmitted Iinsurer in violation of this section shall be subject to the penalties set forth in Section 7 of this Act. No insurance contract entered into in violation of this section shall preclude the insured from enforcing his rights under the contract in accordance with the terms and provisions of the contract of insurance and the laws of this Sstate, to the same degree those rights would have been enforce~~-~~able had the contract been lawfully procured.

D. If the Nnonadmitted Iinsurer fails to pay a claim or loss within the provisions of the insurance contract and the laws of this Sstate, a Pperson who assisted or in any manner aided directly or indirectly in the procurement of the insurance contract, shall be liable to the insured for the full amount under the provisions of the insurance contract.

E. Section 4B or 4D shall not apply to a Pperson in regard to an insured who independently procures insurance as provided under Section 6. This section shall not apply to a Ppperson, properly licensed as an agent or broker in this Sstate who, for a fee and pursuant to a written agreement, is engaged solely to offer to the insured advice, counsel or opinion, or service with respect to the benefits, advantages or disadvantages promised under any proposed or in-force policy of insurance if the Ppperson does not, directly or indirectly, participate in the solicitation, negotiation or procurement of insurance on behalf of the insured;

Drafting Note: If a Sstate collects tax on unlicensed transactions which violate this Act, it may consider imposing liability for payment of those taxes on persons who violate this Act by assisting in the procurement of Nnonadmitted Iinsurance.

Drafting Note: Some Sstates permit other licensed professionals to engage in these activities as provided in their insurance statutes or other Sstate statutes. Those Sstates may want to amend Section 4E to include those professionals, to the extent they act within the scope of their licenses.

F. This section shall not apply to a Ppperson acting in material compliance with the insurance laws of this Sstate in the placement of the types of insurance identified in Paragraphs (1), (2), (3) and (4) below:

(1) Surplus Llines Iinsurance as provided in Section 5. For the purposes of this subsection, a licensee shall be deemed to be in material compliance with the insurance laws of this Sstate, unless the licensee committed a violation of Section 5 that proximately caused loss to the insured;

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(2) Transactions for which a certificate of authority to do business is not required of an insurer under the insurance laws of this Sstate;

~~**Drafting Note:** A number of states exempt from licensing and premium taxation nonprofit educational insurers insuring only nonprofit educational institutions and their employees. Some states require certificates of authority while others require licensing, and the appropriate language should be used in Paragraph (2) above. Additionally, some states may want to consider adding language to establish an option of allowing persons to file for an exemption with the Department of Insurance.~~

(3) Reinsurance provided that, unless the Ccommissioner waives the requirements of this subsection:

(a) The assuming insurer is authorized to ~~do~~ engage in the business of~~an~~ insurance or reinsurance ~~business by~~in its domiciliary jurisdiction and is authorized to write the type of reinsurance in its domiciliary jurisdiction; and

(b) The assuming insurer satisfies all legal requirements for such reinsurance in the Sstate of domicile of the ceding insurer;

(4) The property and operation of railroads or aircraft engaged in interstate or foreign commerce, W~~w~~et M~~m~~arine and Ttransportation Iinsurance;

(5) Transactions subsequent to issuance of a policy not covering properties, risks or exposures located, or to be performed in this Sstate at the time of issuance, and lawfully solicited, written or delivered outside this Sstate.

Drafting Note: States may also wish to consider exempting from Section 4A of this Act self-procured insurance or industrial insurance purchased by a sophisticated buyer who does not necessarily require the same regulatory protections as an average insurance buyer. Additionally, some Sstates allow other insurance transactions with Nnonadmitted Iinsurers. Examples include certain aviation and railroad risks. Other Sstates may want to narrow the scope of the exemptions above or reserve the right to approve exemptions on a case-by-case basis.

Section 5. Surplus Lines Insurance

A. Surplus Llines Iinsurance may be placed by a Ssurplus Llines Llicensee if:

(1) Each insurer is ~~an~~ eligible to write Ssurplus Llines Insurance~~insurer~~; and

(2) ~~(2)~~ Each insurer is authorized to write the type of insurance in its domiciliary jurisdiction; and

(3) Other than for eExempt cCommercial pPurchasers, t~~T~~he full amount or type of insurance cannot be obtained from insurers who are admitted to ~~do~~ engage in the business of insurance in this Sstate. The full amount or type of insurance may be procured from Eeligible Ssurplus Llines Iinsurers, provided that a diligent search is made among the insurers who are admitted to transact and are actually writing the particular type of insurance in this Sstate if any are writing it; and

(4) All other requirements of this Act are met.

Drafting Note: ~~States may prefer to reference "kind of insurance" rather than "type of insurance" in Section 5A(3). The term utilized should be defined within the Act.~~The diligent search requirement of Section 5A(3) must be satisfied in accordance with the statutes and regulations of the governing Sstate. ~~Such~~ Diligent search statutes and regulations ~~might~~ vary from Sstate to Sstate in terms of the number of declinations required and the Pperson designated to conduct the search. Several States permit surplus lines placement without a diligent search for or without regard to the availability of admitted coverage. States may want to consider changing diligent search requirements in light of electronic transactions. Section 5A(3) does not prohibit a regulatory system in which a Ssurplus Llines Llicensee may place with an eligible Nnonadmitted Iinsurer any coverage listed on a current "Eexport Llist" maintained by the Ccommissioner. The Eexport list would identify types of insurance for which no admitted market exists. The Ccommissioner may waive the diligent search requirement for any such type of insurance.

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Drafting Note: Utilizing the "full amount" standard in Section 5A(3) of this Act may have certain market implications. An alternative to this approach would be to require that whatever part of the coverage is attainable through the admitted market be placed in the admitted market and only the excess part of the coverage may be exported.

B. Subject to Section 5A(3) of this Act, a Ssurplus Llines Llicensee may place any coverage with an ~~nonadmitted~~Eligible Surplus Lines Iinsurer ~~eligible to accept the insurance~~, unless specifically prohibited by the laws of this Sstate.

[Alternative S~~ubs~~ection B]

[~~C~~B. Subject to Section 5A(3) of this Act, a Ssurplus Llines Llicensee may place only the following types of coverage with an ~~nonadmitted~~Eligible Surplus Lines Iinsurer ~~eligible to accept insurance~~: {list acceptable coverage}.]

Drafting Note: The two statutory alternatives described in Section 5B represent different regulatory approaches to defining those coverages which may be placed in the nonadmitted market and they would impact the admitted market in different manners.

C. A Ssurplus Llines Llicensee shall not place Surplus Lines Insurance~~coverage with a nonadmitted insurer~~, unless, at the time of placement, the Ssurplus Llines Llicensee has determined that the ~~nonadmitted~~ insurer:

(1) ~~(1)~~ **Deleted**.

~~Has established satisfactory evidence of good repute and financial integrity; and~~

(2) ~~Qualifies I~~is eligible to write Surplus Lines Insurance under one of the following subparagraphs:

(a) For a Nonadmitted Insurer domiciled in another United States jurisdiction, the insurer shall have both of the following:

(i) The authority to write the type of insurance in its domiciliary jurisdiction; and

(ii) ~~Has c~~Capital and surplus or its equivalent under the laws of its domiciliary jurisdiction ~~which~~that equals the greater of:

(I) (A) The minimum capital and surplus requirements under the law of this Sstate; or

(B) $15,000,000;

Drafting Note: ~~States that have not previously increased capital and surplus requirements may wish to consider implementation of the capital and surplus requirements in this subparagraph in a series of phases over a period of up to three (3) years. In some circumstances, implementation of a $15,000,000 capital and surplus requirement may represent a dramatic increase over existing requirements. States may wish to allow insurers which are eligible under existing law some period of time to increase their capital and surplus to meet the new standards.~~Current numbering is retained in this Model to remain consistent with the reference within the NRRA.

(II~~i~~) The requirements of Subparagraph (a)(ii) may be satisfied by an insurer's possessing less than the minimum capital and surplus upon an affirmative finding of acceptability by the C~~c~~ommissioner. The finding shall be based upon such factors as quality of management, capital and surplus of any parent company, company underwriting profit and investment income trends, market availability and company record and reputation within the industry. In no event shall the C~~c~~ommissioner make an affirmative finding of acceptability when the N~~n~~onadmitted I~~i~~nsurer's capital and surplus is less than $4,500,000; or

(b) For a Nonadmitted Insurer domiciled outside the United States, the insurer shall be listed on the *Quarterly Listing of Alien Insurers* maintained by the International Insurers Department of the National Association of Insurance Commissioners (NAIC); [or]

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[(c) [For an insurer domiciled in this State, the insurer is a Domestic Surplus Lines Insurer.]

(b) In the case of an insurance exchange created by the laws of a state other than this state:

(i) The syndicates of the exchange shall maintain under terms acceptable to the commissioner capital and surplus, or its equivalent under the laws of its domiciliary jurisdiction, of not less than $75,000,000 in the aggregate; and

(ii) The exchange shall maintain under terms acceptable to the commissioner not less than fifty percent (50%) of the policyholder surplus of each syndicate in a custodial account accessible to the exchange or its domiciliary commissioner in the event of insolvency or impairment of the individual syndicate; and

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

(I) For insurance exchanges which maintain funds in an amount of not less than $15,000,000 for the protection of all exchange policyholders, the syndicate shall maintain under terms acceptable to the commissioner minimum capital and surplus, or its equivalent under the laws of the domiciliary jurisdiction, of not less than $5,000,000; or

(II) For insurance exchanges which do not maintain funds in an amount of not less than $15,000,000 for the protection of all exchange policyholders, the syndicate shall maintain under terms acceptable to the commissioner minimum capital and surplus, or its equivalent under the laws of its domiciliary jurisdiction, of not less than the minimum capital and surplus requirements under the laws of its domiciliary jurisdiction or $15,000,000, whichever is greater; or

Drafting Note: Some states may want to cross-reference statutory provisions in their own states which provide a grandfather clause for syndicates established with a lower capital and surplus requirement.

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

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

(ii) In addition, the group shall establish and maintain in trust a surplus in the amount of $100,000,000; which shall be available for the benefit of United States surplus lines policyholders of any member of the group.

(iii) 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.

(iv) The trust funds shall be maintained in an irrevocable trust account in the United States in a qualified financial institution, consisting of cash, securities, letters of credit or investments of substantially the same character and quality as those which are eligible investments for the capital and statutory reserves of admitted insurers to write like kinds of insurance in this state and, in addition, the trust required by item (ii) of this paragraph shall satisfy the requirements of the

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Standard Trust Agreement required for listing with the National Association of Insurance Commissioners (NAIC) International Insurers Department; or

(d) In the case of a group of incorporated insurers under common administration, which has continuously transacted an insurance business outside the United States for at least three (3) years immediately prior to this time, and which submits to this state's authority to examine its books and records and bears the expense of the examination:

(i) The group shall maintain an aggregate policyholders' surplus of $10,000,000,000; and

(ii) The group shall maintain in trust a surplus in the amount of $100,000,000; which shall be available for the benefit of United States surplus lines policyholders of any member of the group; and

(iii) Each insurer shall individually maintain capital and surplus of not less than $25,000,000 per company.

(iv) The trust funds shall satisfy the requirements of the Standard Trust Agreement requirement for listing with the NAIC International Insurers Department, and shall be maintained in an irrevocable trust account in the United States in a qualified financial institution, and shall consist of cash, securities, letters of credit or investments of substantially the same character and quality as those which are eligible investments for the capital and statutory reserves of admitted insurers to write like kinds of insurance in this state.

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

(e) Except for an exchange or plan complying with Subparagraph (b), (c) or (d), an insurer not domiciled in one of the United States or its territories shall satisfy the capital and surplus requirements of Subsection C(2)(a) of this section and shall have in force a trust fund of not less than the greater of:

(i) $5,400,000; or

(ii) Thirty percent (30%) of the United States surplus lines gross liabilities, excluding aviation, wet marine and transportation insurance liabilities, not to exceed $60,000,000, to be determined annually on the basis of accounting practices and procedures substantially equivalent to those promulgated by this state, as of December 31 next preceding the date of determination, where:

(I) The liabilities are maintained in an irrevocable trust account in the United States in a qualified financial institution, on behalf of U.S. policyholders consisting of cash, securities, letters of credit or other investments of substantially the same character and quality as those which are eligible investments pursuant to [cite insurance investment law] for the capital and statutory reserves of admitted insurers to write like kinds of insurance in this state. The trust fund, which shall be included in any calculation of capital and surplus or its equivalent, shall satisfy the requirements of the Standard Trust Agreement required for listing with the NAIC International Insurers Department; and

(II) The insurer may request approval from the commissioner to use the trust fund to pay valid surplus lines claims; provided, however, that the balance of the trust fund is never less than the greater of $5,400,000 or thirty percent (30%) of the insurer's current gross U.S. surplus lines liabilities, excluding aviation, wet marine and transportation insurance

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liabilities; and

(III) In calculating the trust fund amount required by this subsection, credit shall be given for surplus lines deposits separately required and maintained for a particular state or U.S. territory, not to exceed the amount of the insurer's loss and loss adjustment reserves in the particular state or territory;

Drafting Note: The commissioner may wish to establish the authority to set a higher level on a case-by-case basis.

(f) An insurer or group of insurers meeting the requirements to do a surplus lines business in this state at the effective date of this law shall have two (2) years from the date of enactment to meet the requirements of Subparagraph (e), as follows:

Year Following Enactment	Trust Fund Requirement
1	15% of U.S. surplus lines liabilities, excluding aviation, wet marine and transportation insurance, with a maximum of $30,000,000
2	30% of U.S. surplus lines liabilities, excluding aviation, wet marine and transportation insurance, with a maximum of $60,000,000.

(g) The commissioner shall have the authority to adjust, in response to inflation, the trust fund amounts required by Subparagraph (e).

(3) In addition to all of the other requirements of this subsection, an insurer not domiciled in the United States or its territories shall be listed by the NAIC International Insurers Department. The commissioner may waive the requirement in Paragraph (3) or the requirements of Section 5C(2)(e)(ii) may be satisfied by an insurer's possessing less than the trust fund amount specified in Section 5C(2)(e)(ii) upon an affirmative finding of acceptability by the commissioner if the commissioner is satisfied that the placement of insurance with the insurer is necessary and will not be detrimental to the public and the policyholder. In determining whether business may be placed with the insurer, the commissioner may consider such factors as:

(a) The interests of the public and policyholders;

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

(c) Unavailability of particular coverages from authorized insurers or unauthorized insurers meeting the requirements of this section;

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

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

(f) The past and projected trend in the size of the company's capital and surplus considering such factors as premium growth, operating history, loss and expense ratios, or other appropriate criteria; and

(4) Has caused to be provided to the commissioner a copy of its current annual statement certified by the insurer and an actuarial opinion as to the adequacy of, and methodology used to determine, the insurer's loss reserves. The statement shall be provided at the same time it is provided to the insurer's domicile, but in no event more than eight (8) months after the close of the period reported upon, and shall be certified as a true and correct copy by an accounting or auditing firm licensed in the jurisdiction of the insurer's domicile and certified by a senior officer of the nonadmitted insurer as a true and correct copy of the statement filed with the regulatory

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~~authority in the domicile of the nonadmitted insurer. In the case of an insurance exchange qualifying under Paragraph (2)(b) of this subsection, the statement may be an aggregate combined statement of all underwriting syndicates operating during the period reported; and~~

~~**Drafting Note:** The following paragraph is for use by those states which desire to adopt a "white list" for determining the eligibility of nonadmitted insurers to write surplus lines insurance.~~

~~(5) In addition to meeting the requirements in Paragraphs (1) to (4) of this subsection an insurer shall be an eligible surplus lines insurer if it appears on the most recent list of eligible surplus lines insurers published by the commissioner from time to time but at least semiannually. Nothing in this paragraph shall require the commissioner to place or maintain the name of any nonadmitted insurer on the list of eligible surplus lines insurers.~~

~~(6) Notwithstanding Section 5A, only that portion of any risk eligible for export for which the full amount of coverage is not procurable from listed eligible surplus lines insurers may be placed with any other nonadmitted insurer which does not appear on the list of eligible surplus lines insurers published by the commissioner pursuant to Paragraph (5) of this subsection but nonetheless meets the requirements set forth in Sections 5C(1) and 5C(2) and any regulations of the commissioner. The surplus lines licensee seeking to provide coverage through an unlisted nonadmitted insurer shall make a filing specifying the amounts and percentages of each risk to be placed, and naming the nonadmitted insurers with which placement is intended. Within [insert number] days after placing the coverage, the surplus lines licensee shall also send written notice to the insured or the producing broker that the insurance, or a portion thereof, has been placed with the nonadmitted insurer.~~

D. The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State.

E~~D~~. Insurance procured under this section shall be valid and enforceable as to all parties.

F~~E~~. ~~Withdrawal of Eligibility as a Surplus Lines Insurer~~

If at any time the Ceommissioner has reason to believe that a Ssurplus Llines Iinsurer is no longer eligible under Section 5C, ~~:~~

~~(1) Is in unsound financial condition or has acted in an untrustworthy manner;~~

~~(2) No longer meets standards set forth in Section 5C of this Act;~~

~~(3) Has willfully violated the laws of this state; or~~

~~(4) Does not conduct a proper claims practice.~~

~~The~~the Ceommissioner may after notice and an opportunity for a hearing declare it ineligible. The Ceommissioner shall promptly ~~mail~~publish notice of all such declarations in a timely manner reasonably calculated to reach to each Ssurplus Llines Llicensee or surplus lines advisory organization, for distribution to all surplus lines licensees.

Drafting Note: Individual Sstates should consider whether such declarations of ineligibility are appropriate in view of the state's other due process and administrative procedure requirements. Eligibility criteria are independent of other considerations such as compliance with other laws, for example, 18-USC 1033, relating to felons participating in the insurance business.

G~~F~~. Surplus Lines Tax

(1) In addition to the full amount of gross Ppremiums charged by the insurer for the insurance, every Pperson licensed pursuant to Section 5J~~H~~ of this Act shall collect and pay to the Ceommissioner a sum equal to [insert number] percent of the gross Ppremiums charged, less any return Ppremiums, for Ssurplus Llines Iinsurance provided by the licensee pursuant to the license. Where the insurance covers properties, risks or exposures located or to be performed both in and out of this Sstate, the

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sum payable shall be ~~computed on that portion of the gross premiums allocated to this state pursuant to Paragraph (4) of this subsection less the amount of gross premiums allocated to this state and returned to the insured~~ paid entirely to the Home State of the insured. The tax on any portion of the Ppremium unearned at termination of insurance having been credited by the Sstate to the licensee shall be returned to the policyholder directly by the Ssurplus Llines Llicensee or through the producing broker, if any. The Ssurplus Llines Llicensee is prohibited from rebating, for any reason, any part of the tax.

(2) At the time of filing the [insert monthly, quarterly, annual] report as set forth in Subsection S~~R~~ of this section, each Ssurplus Llines Llicensee shall pay the Ppremium tax due for the policies written during the period covered by the report.

~~(3) If a surplus lines policy procured through a surplus lines licensee covers properties, risks or exposures only partially located or to be performed in this state, the tax due shall be computed on the portions of the premiums which are attributable to the properties, risks or exposures located or to be performed in this state. In determining the amount of premiums taxable in this state, all premiums written, procured or received in this state shall be considered written on properties, risks or exposures located or to be performed in this state, except premiums which are properly allocated or apportioned and reported as taxable premiums of a reciprocal state. In no event shall the tax payable to this state be less than the tax due pursuant to Paragraph (4) of this subsection; provided, however, in the event that the amount of tax due under this provision is less than $50 in any jurisdiction, it shall be payable in the jurisdiction in which the affidavit required in Subsection K of this section is filed. The commissioner shall, at least annually furnish to the commissioner of a reciprocal state, as defined in Section 3L, a copy of all filings reporting an allocation of taxes as required by this subsection.~~

~~(4) In determining the amount of gross premiums taxable in this state for a placement of surplus lines insurance covering properties, risks or exposures only partially located or to be performed in this state, the tax due shall be computed on the portions of the premiums which are attributable to properties, risks or exposures located or to be performed in this state and which relates to the kinds of insurance being placed as determined by reference to an allocation schedule duly promulgated in a regulation by the commissioner.~~

~~(a) If a policy covers more than one classification:~~

~~(i) For any portion of the coverage identified by a classification on the Allocation Schedule, the tax shall be computed by using the Allocation Schedule for the corresponding portion of the premium;~~

~~(ii) For any portion of the coverage not identified by a classification on the Allocation Schedule, the tax shall be computed by using an alternative equitable method of allocation for the property or risk;~~

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

~~(b) If the information provided by the surplus lines licensee is insufficient to substantiate the method of allocation used by the surplus lines licensee, or if the commissioner determines that the licensee's method is incorrect, the commissioner shall determine the equitable and appropriate amount of tax due to this state as follows:~~

~~(i) By use of the Allocation Schedule where the risk is appropriately identified in the schedule;~~

~~(ii) Where the Allocation Schedule does not identify a classification appropriate to the coverage, the commissioner may give significant weight to documented evidence of the underwriting bases and other criteria used by the insurer. The~~

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~~commissioner may also consider other available information to the extent sufficient and relevant, including the percentage of the insured's physical assets in this state, the percentage of the insured's sales in this state, the percentage of income or resources derived from this state, and the amount of premium tax paid to another jurisdiction for the policy.~~

~~**Drafting Note:** Subparagraph (b) above may be included in the Act or in a separate regulation at the option of the state. It is highly recommended that the model Allocation Schedule and reporting form be adopted by regulation in conjunction with the adoption of the above language. In order for the model law to work effectively, the allocation schedules used by the states should be as uniform as possible.~~

HG. Collection of Tax

If the tax owed by a Ssurplus Llines Llicensee under this section has been collected and is not paid within the time prescribed, the same shall be recoverable in a suit brought by the Ceommissioner against the Ssurplus Llines Llicensee and the surety on the bond filed under Subsection HI of this section. The Ceommissioner may charge interest at the rate of [insert number] percent per year for the unpaid tax.

IH. Surplus Lines Licenses

(1) A Pperson shall not procure a contract of Ssurplus Llines Iinsurance with a ~~nonadmitted~~Surplus Lines Iinsurer unless the Pperson possesses a current Ssurplus Llines Iinsurance producer license issued by the Ceommissioner.

(2) The Ceommissioner may issue a resident surplus lines license to a qualified holder of ~~a current~~ underlying property and casualty ~~agent's or broker's or general agent's~~ licenses but only when the ~~broker or agent~~producer has:

(a) Remitted the $[insert amount] annual fee to the Ceommissioner;

(b) Submitted a completed license application on a form supplied by the Ceommissioner;

~~(c) Passed a qualifying examination approved by the commissioner, except that all holders of a license prior to the effective date of this Act shall be deemed to have passed such an examination;~~

(cd) In the case of a resident agent, filed with the Ceommissioner, and continues to maintain during the term of the license, in force and unimpaired, a bond or errors and omissions (E&O) policy in favor of this Sstate in the penal sum of $[insert amount] aggregate liability, with corporate sureties approved by the Ceommissioner. The bond or E&O policy shall be conditioned that the Ssurplus Llines Llicensee will conduct business in accordance with the provisions of this Act and will promptly remit the taxes as provided by law. No bond or E&O policy shall be terminated unless at least thirty (30) days prior written notice is given to the licensee and Ceommissioner;

Drafting note: Under Public Law No. 106-102 (the "Gramm-Leach-Bliley Act"), it is believed that a requirement for a nonresident agent to file a bond may contravene the reciprocity provisions. The requirement for a resident agent to file a bond would not, seemingly, contravene these provisions, and there may be methodologies whereby such resident bonds could become reciprocal between Sstates. Some Sstates have expressed concern that their bonding requirements constitute important consumer protections, and that elimination of these simply to comply with Gramm-Leach-Bliley may result in unintended consequences, and a lack of Ceontrol over possibly unscrupulous nonresident agents.

(de) If a resident, established and continues to maintain an office in this Sstate~~,; and~~

~~(f) Designated the commissioner as agent for service of process, thereby designating the commissioner to be the licensee's true and lawful attorney upon whom may be served all lawful process in a proceeding instituted by or on behalf of an insured or beneficiary arising out of any contract of insurance, and shall signify its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon the licensee.~~

(3) A nonresident Pperson shall receive a nonresident surplus lines license if:

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(a) The Pperson is currently licensed as a Ssurplus Llines Llicensee and in good standing in his or her Hhome Sstate;

(b) The Pperson has submitted the proper request for licensure and has paid the fees required by [insert appropriate reference to Sstate law or regulation];

(c) The Pperson has submitted or transmitted to the insurance commissioner the application for licensure that the Pperson submitted to his or her Hhome Sstate, or in lieu of the same, a completed Uniform Application; and

(d) The person's Hhome Sstate awards nonresident surplus lines licenses to residents of this Sstate on the same basis.

Drafting Note: In accordance with Public Law No. 106-102 (the "Gramm-Leach-Bliley Act") Sstates should not require any additional attachments to the Uniform Application or impose any other conditions on applicants that exceed the information requested within the Uniform Application.

(4) The insurance commissioner may verify the person's licensing status through the Producer Database maintained by the National Association of Insurance Commissioners, its Aaffiliates or subsidiaries.,

(5) A nonresident Ssurplus Llines Llicensee who moves from one Sstate to another Sstate or a resident Ssurplus Llines Llicensee who moves from this Sstate to another Sstate shall file a change of address and provide certification from the new resident Sstate within thirty (30) days of the change of legal residence. No fee or license application is required.

(6) The insurance commissioner shall waive any requirements for a nonresident surplus lines license applicant with a valid license from his or her Hhome Sstate, except the requirements imposed by this subsection, if the applicant's Hhome Sstate awards nonresident surplus lines licenses to residents of this Sstate on the same basis.

(7) Each surplus lines license shall expire on [insert date] of each year, and an application for renewal shall be filed before [insert date] of each year upon payment of the annual fee and compliance with other provisions of this section. A Ssurplus Llines Llicensee who fails to apply for renewal of the license before [insert date] shall pay a penalty of $[insert amount] and be subject to penalties provided by law before the license will be renewed.

Drafting Note: States may wish to reference their specific licensing statutes in this section.

Drafting Note: Some Sstates allow surplus lines licensees to hold binding authorities on behalf of ~~eligible~~ Ssurplus Llines Iinsurers. States which allow such binding authorities might want to establish minimum standards for the related agreements. In addition, Sstates might want to consider requiring surplus lines licensees with such binding authorities to submit the related agreements to Sstate regulators for review and approval.

JI. Suspension, Revocation or Nonrenewal of Surplus Lines Licensee's License

The Ceommissioner may suspend, revoke or refuse to renew the license of a Ssurplus Llines Llicensee after notice and an opportunity for a hearing as provided under the applicable provision of this state's laws for ~~upon one or more of the following grounds~~:

~~(1) Removal of the resident surplus lines licensee's office from this state;~~

~~(2) Removal of the resident surplus lines licensee's office accounts and records from this state during~~

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~~the period during which the accounts and records are required to be maintained under Subsection Q of this section;~~

~~(3) Closing of the surplus lines licensee's office for a period of more than thirty (30) business days, unless permission is granted by the commissioner;~~

~~(4) Failure to make and file required reports;~~

~~(5) Failure to transmit required tax on surplus lines premiums to this state or a reciprocal state to which a tax is owing;~~

~~(6) Failure to maintain required bond;~~

(17) Violation of any provision of this Act; or

(28) For any cause for which an insurance license could be denied, revoked, suspended or renewal refused under Sections [insert applicable citation].

KJ. Actions Against Eligible Surplus Lines Insurers Transacting Surplus Lines Business

(1) An Eeligible Ssurplus Llines Iinsurer may be sued upon a cause of action arising in this Sstate under a Ssurplus Llines Iinsurance contract made by it or evidence of insurance issued or delivered by the Ssurplus Llines Llicensee. A policy issued by the Eeligible Ssurplus Llines Iinsurer shall contain a provision stating the substance of this section and designating the Pperson to whom the Ceommissioner shall mail process.

(2) The remedies provided in this section are in addition to any other methods provided by law for service of process upon insurers.

LK. Duty to File Evidence of Insurance and Affidavits

Within [insert number] days after the placing of any Ssurplus Llines Iinsurance, each producing broker shall execute and each Ssurplus Llines Llicensee shall execute where appropriate, and file a written report regarding the insurance which shall be kept confidential by the Ceommissioner, including the following:

(1) The name and address of the insured;

(2) The identity of the insurer or insurers;

(3) A description of the subject and location of the risk;

(4) The amount of Ppremium charged for the insurance;

(5) Such other pertinent information as the Ceommissioner may reasonably require; and

(6) An affidavit on a standardized form promulgated by the Ceommissioner, as to the diligent efforts to place the coverage with Aadmitted Iinsurers and the results of that effort or the insured is an Exempt Commercial Purchaser. The affidavit shall be open to public inspection. The affidavit shall affirm that the insured was expressly advised in writing prior to placement of the insurance that:

(a) The Ssurplus Llines Iinsurer with whom the insurance was to be placed is not licensed in this Sstate and is not subject to its supervision; and

(b) In the event of the insolvency of the Ssurplus Llines Iinsurer, losses will not be paid by the Sstate insurance guaranty fund.

Drafting Note: Surplus lines licensees will frequently communicate with the insured through a producing broker rather than communicate with the insured directly. In preparing affidavit forms, Sstates may wish to recognize that, as a result of communications passing through the producing broker, the Ssurplus Llines Llicensee may not be in a position to affirm, based upon personal knowledge, that the insured received from the producing broker the written information required by this subsection.

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ML. Surplus Lines Advisory Organizations

(1) There is hereby created a nonprofit association to be known as the [insert name]. All surplus lines licensees shall be deemed to be members of the association. The association shall perform its functions under the plan of operation established pursuant to Paragraph (3) of this subsection and must exercise its powers through a board of directors established under Paragraph (2) of this subsection. The association shall be supervised by the Ceommissioner. The association shall be authorized and have the duty to:

Drafting Note: The preceding paragraph provides that all surplus lines licensees are "deemed" to be members of the association. Some Sstates, however, may choose not to establish a surplus lines advisory organization; in those Sstates Subsection L would not be necessary.

(a) Receive, record, and subject to Subparagraph (b) of this paragraph, stamp all Ssurplus Llines Iinsurance documents which surplus lines brokers are required to file with the association pursuant to the plan of operation;

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Drafting Note: Subparagraph (a) of this paragraph authorizes the association to receive, record and stamp all surplus lines documents which must be submitted to the association pursuant to the plan of operation. Documents to be submitted to the association for stamping are likely to vary by State.

(b) Refuse to stamp submitted insurance documents, if the association determines that a Nonadmitted Insurer does not meet minimum State financial standards of eligibility, or the Commissioner orders the association not to stamp insurance documents pursuant to Paragraph (9) of this subsection. The association shall notify the Commissioner and provide an explanation for any refusal to stamp submitted insurance documents other than a refusal based upon the order of the Commissioner;

(c) Prepare and deliver annually to each licensee and to the Commissioner a report regarding surplus lines business. The report shall include a delineation of the classes of business procured during the preceding calendar year, in the form the board of directors prescribes;

(d) Encourage compliance by its members with the surplus lines law of this State and the rules and regulations of the Commissioner relative to Surplus Lines Insurance;

(e) Communicate with organizations of agents, brokers and Admitted Insurers with respect to the proper use of the surplus lines market;

(f) Employ and retain persons as necessary to carry out the duties of the association;

(g) Borrow money as necessary to effect the purposes of the association;

(h) Enter contracts as necessary to effect the purposes of the association; and

(i) Provide such other services to its members as are incidental or related to the purposes of the association.

(2) The association shall function through a board of directors elected by the association members, and officers who shall be elected by the board of directors.

(a) The board of directors of the association shall consist of not less than five (5) nor more than nine (9) persons serving terms as established in the plan of operation. The plan of operation shall provide for the election of a board of directors by the members of the association from its membership. The plan of operation shall fix the manner of voting and may weigh each member's vote to reflect the annual Surplus Lines Insurance Premium written by the member.

(b) The board of directors shall elect officers as provided for in the plan of operation.

(3) The association shall establish a plan of operation. The plan of operation shall provide for the formation, operation and governance of the association. The plan and any amendments shall be effective upon approval by the Commissioner, which shall not be unreasonably withheld or delayed. All association members shall comply with the plan of operation or any amendments to it. Failure to comply with the plan of operation or any amendments shall constitute a violation of the insurance law and the Commissioner may issue an order requiring discontinuance of the violation.

(4) The association shall file with the Commissioner:

(a) A copy of its plan of operation and any amendments to it;

(b) A current list of its members revised at least annually;

(c) The name and address of a resident of this State upon whom notices or orders of the Commissioner or processes issued at the direction of the Commissioner may be served; and

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(d) An agreement that the Ceommissioner may examine the association in accordance with the provisions of Paragraph (5) of this subsection.

(5) The Ceommissioner shall, at least once in [insert number] years, make or cause to be made an examination of the association. The reasonable cost of an examination shall be paid by the association upon presentation to it by the Ceommissioner of a detailed account of each cost. The officers, managers, agents, and employees of the association may be examined at any time, under oath, and shall exhibit all books, records, accounts, documents or agreements governing its method of operation. The Ceommissioner shall furnish a copy of the examination report to the association and shall notify the association that it may request a hearing within thirty (30) days on the report or on any facts or recommendations contained in it. If the Ceommissioner finds the association to be in violation of this section, the Ceommissioner may issue an order requiring the discontinuance of the violation. A director may be removed from the association's board of directors by the Ceommissioner for cause, stated in writing, after an opportunity has been given to the director to be heard.

(6) There shall be no liability on the part of and no causes of action of any nature shall arise against the association, its directors, officers, agents or employees for any action taken or omitted by them in the performance of their powers and duties under this section, absent gross negligence or willful misconduct.

(7) Within [insert number] days after a surplus lines policy is procured, a licensee shall submit to the association for recording and stamping all documents which surplus lines brokers are required to file with the association. Every insurance document submitted to the association pursuant to this subsection shall set forth:

(a) The name and address of the insured;

(b) The gross Ppremium charged;

(c) The name of the Nnonadmitted Iinsurer; and

(d) The class of insurance procured.

Drafting Note: The appropriate time limits for submitting documents required for stamping will vary by Sstate.

(8) It shall be unlawful for an insurance agent, broker or surplus lines broker to deliver in this Sstate any insurance document which surplus lines brokers are required to file with the association unless the insurance document is stamped by the association or is exempt from such requirements. However, a licensee's failure to comply with the requirements of this subsection shall not affect the validity of the coverage.

(9) The services performed by the association shall be funded by a stamping fee assessed for each premium-bearing document submitted to the association. The stamping fee shall be established by the board of directors of the association from time to time. The stamping fee shall be paid by the insured.

(10) The Ceommissioner may declare a Nnonadmitted Iinsurer ineligible and order the association not to stamp insurance documents issued by the Nnonadmitted Iinsurer and issue any other appropriate order.

NM. Evidence of the Insurance and Subsequent Changes to the Insurance

(1) Upon placing Ssurplus Llines Iinsurance, the Ssurplus Llines Llicensee shall promptly deliver to the insured or the producing broker the policy, or if the policy is not then available, a certificate as described in Paragraph (4) of this subsection, cover note, binder or other evidence of insurance. The certificate described in Paragraph (4) of this subsection, cover note, binder or other evidence of insurance shall be executed by the Ssurplus Llines Llicensee and shall show the description and location of the subject of the insurance, coverages including any material limitations other than those

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in standard forms, a general description of the coverages of the insurance, the Ppremium and rate charged and taxes to be collected from the insured, and the name and address of the insured and Ssurplus Llines Iinsurer or insurers and proportion of the entire risk assumed by each, and the name of the Ssurplus Llines Llicensee and the licensee's license number.

(2) A Ssurplus Llines Llicensee shall not issue or deliver any evidence of insurance or purport to insure or represent that insurance will be or has been written by any ~~eligible~~ Ssurplus Llines Iinsurer~~,~~ or a Nnonadmitted Iinsurer ~~pursuant to Section 5C(4),~~ unless the licensee has authority from the insurer to cause the risk to be insured, or has received information from the insurer in the regular course of business that the insurance has been granted.

(3) If, after delivery of any evidence of insurance, there is any change in the identity of the insurers, or the proportion of the risk assumed by any insurer, or any other material change in coverage as stated in the surplus lines licensee's original evidence of insurance, or in any other material as to the insurance coverage so evidenced, the Ssurplus Llines Llicensee shall promptly issue and deliver to the insured or the original producing broker an appropriate substitute for, or endorsement of the original document, accurately showing the current status of the coverage and the insurers responsible for the coverage.

(4) As soon as reasonably possible after the placement of the insurance, the Ssurplus Llines Llicensee shall deliver a copy of the policy or, if not available, a certificate of insurance to the insured or producing broker to replace any evidence of insurance previously issued. Each certificate or policy of insurance shall contain or have attached a complete record of all policy insuring agreements, conditions, exclusions, clauses, endorsements or any other material facts that would regularly be included in the policy.

~~(5) A surplus lines licensee who fails to comply with the requirements of this subsection shall be subject to the penalties provided in this Act.~~

(56) The Ssurplus Llines Llicensee shall give the following consumer notice to every Pperson, other than Exempt Commercial Purchasers, applying for insurance with a Nnonadmitted Iinsurer. The notice shall be printed in 16-point type on a separate document affixed to the application. The applicant shall sign and date a copy of the notice to acknowledge receiving it. The Ssurplus Llines Llicensee shall maintain the signed notice in its file for a period of five (5) years from expiration of the policy. The Ssurplus Llines Llicensee shall tender a copy of the signed notice to the insured at the time of delivery of each policy the licensee transacts with a Nnonadmitted Iinsurer. The copy shall be a separate document affixed to the policy.

*"**Notice**: ~~1. A~~n ~~"~~nonadmitted~~"~~ or ~~"~~Surplus Lines Iinsurer ~~that is not licensed in this state~~ is issuing the insurance policy that you have applied to purchase. ~~These companies are called "nonadmitted" or "surplus lines" insurers. 2. The insurer is not subject to the financial solvency regulation and enforcement that applies to licensed insurers in this state. 3~~. These insurers ~~generally~~ do not participate in State insurance guaranty funds ~~created by state law~~. The~~se~~ guaranty funds will not pay your claims or protect your assets if the insurer becomes insolvent and is unable to make payments as promised. ~~4. Some states maintain lists of approved or eligible surplus lines insurers and surplus lines brokers may use only insurers on the list. Some states issue orders that particular surplus lines insurers can not be used. 5~~. For additional information about the above matters and about the insurer, you should ask questions of your insurance agent, broker or surplus lines broker. You may also contact your insurance department consumer help line."*

Drafting Note: This notice is intended to inform personal lines customers and smaller commercial risks of the nature of the coverage they are purchasing. A Sstate may wish to add language to this statute providing that this notice need not be given to commercial risks meeting defined criteria for size and insurance expertise.

O~~N~~. Licensee's Duty to Notify Insured

(1) No contract of insurance placed by a Ssurplus Llines Llicensee under this Act shall be binding upon the insured and no Ppremium charged shall be due and payable until the Ssurplus Llines Llicensee or the producing broker shall have notified the insured in writing, in a form acceptable to the Ceommissioner, a copy of which shall be maintained by the licensee or the producing broker with the records of the contract and available for possible examination, that:

(a) The insurer [other than a Domestic Surplus Lines Insurer] with which the licensee places

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the insurance is not licensed by this Sstate and is not subject to its supervision; and

(b) In the event of the insolvency of the Ssurplus Llines Iinsurer, losses will not be paid by the Sstate insurance guaranty fund.

(2) Nothing herein contained shall nullify any agreement by any insurer to provide insurance.

Drafting Note: To ensure the meaningfulness of the notice required by this subsection, the Ceommissioner might want to establish criteria related to readability, ~~type-face~~font, and ~~type-~~size of the notice.

PO. Effect of Payment to Surplus Lines Licensee

A payment of Ppremium to a Ssurplus Llines Llicensee acting for a Pperson other than itself in procuring, continuing or renewing any policy of insurance procured under this section shall be deemed to be payment to the insurer, whatever conditions or stipulations may be inserted in the policy or contract notwithstanding.

QP. Surplus Lines Licensees May Accept Business from Other Producers

A Ssurplus Llines Llicensee may originate Ssurplus Llines Iinsurance or accept such insurance from any other producing broker duly licensed as to the kinds of insurance involved, and the Ssurplus Llines Llicensee may compensate the producing broker for the business.

RQ. Records of Surplus Lines Licensee

(1) Each Ssurplus Llines Llicensee shall keep ~~in this state~~ a full and true record of each Ssurplus Llines Iinsurance contract placed by or through the licensee, including a copy of the policy, certificate, cover note or other evidence of insurance showing each of the following items applicable:

(~~1~~a) Amount of the insurance, risks and perils insured;

(~~2~~b) Brief description of the property insured and its location;

(~~3~~c) Gross Ppremium charged;

(~~4~~d) Any return Ppremium paid;

(~~5~~e) Rate of Ppremium charged upon the several items of property;

(~~6~~f) Effective date and terms of the contract;

(~~7~~g) Name and address of the insured;

(~~8~~h) Name and address of the insurer;

(~~9~~i) Amount of tax and other sums to be collected from the insured;

~~(10) Allocation of taxes by state as referred to in Subsection F of this section;~~ and

(~~11~~j) Identity of the producing broker, any confirming correspondence from the insurer or its representative, and the application.

(2) The record of each contract shall be kept open at all reasonable times to examination by the Ceommissioner without notice for a period not less than five (5) years following termination of the contract. In lieu of maintaining offices in this Sstate, each nonresident Ssurplus Llines Llicensee shall make available to the Ceommissioner any and all records that the Ceommissioner deems necessary for examination.

Drafting Note: States may wish to extend the five-year period prescribed for open access to insurance records because of the long-term nature of this business.

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SR. Reports—Summary of Exported Business

On or before the end of the month following each [insert month, quarter, year], each Ssurplus Llines Llicensee shall file with the Ceommissioner, on forms prescribed by the Ceommissioner, a verified report in duplicate of all Ssurplus Llines Iinsurance transacted during the preceding period, showing:

(1) Aggregate gross Ppremiums written;

(2) Aggregate return Ppremiums;

(3) Amount of aggregate tax remitted to this Sstate; and

(4) Amount of aggregate tax due or remitted to each other Sstate for which an allocation is made pursuant to Subsection F of this section.

Drafting Note: States desiring to have taxes remitted annually may call for more frequent detailed listing of business.

T. [OPTIONAL] [Domestic Surplus Lines Insurers]

(1) The Commissioner may designate a domestic insurer as a domestic Surplus Lines Insurer upon its application, which shall include, as a minimum, an authorizing resolution of the board of directors and evidence to the Commissioner's satisfaction that the insurer has capital and surplus of not less than fifteen million dollars.

(2) A Domestic Surplus Lines Insurer:

(a) Shall be limited in its authority in this State to providing Surplus Lines Insurance.

(b) May be authorized to write any type of property and casualty [or accident and health] insurance in this State that may be placed with a Surplus Lines Insurer pursuant to this Subpart.

(c) Be subject to the legal and regulatory requirements applicable to domestic insurers, except for theas following:

(i) Premium taxes, fees, and assessments applicable to admitted insurance;

(ii) Regulation of rates and formss ~~requiring the filing of rates and forms for approval~~;

(iii) Assessment or coverage by insurance guaranty funds.

Section 6. Insurance Independently Procured—Duty to Report and Pay Tax

A. Each insured whose Home State is ~~in~~ this Sstate who procures, ~~or~~ continues or renews insurance with a Nnonadmitted Iinsurer ~~on properties, risks or exposures located or to be performed in whole or in part in this state~~, other than insurance procured through a Ssurplus Llines Llicensee, shall, within [insert number] days after the date the insurance was so procured, continued or renewed, file a written report with the Ceommissioner, upon forms prescribed by the Ceommissioner, showing the name and address of the insured or insureds, name and address of the insurer, the subject of the insurance, a general description of the coverage, the amount of Ppremium currently charged, and additional pertinent information reasonably requested by the Ceommissioner.

~~For the purposes of this subsection, properties, risks or exposures only partially located or to be performed in this state, which are covered under a multistate policy placed by a surplus lines licensee in another state, shall be deemed to be insurance independently procured unless the insurer is an admitted insurer.~~

Drafting Note: Subsection A may need to be revised in those Sstates exempting from taxation insurance procured by nonprofit educational institutions and their employers, from nonprofit educational insurers.

B. ~~Gross~~ Ppremiums charged for the insurance, less any return Ppremiums, are subject to a tax at the rate of

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[insert number] percent. At the time of filing the report required in Subsection A of this section, the insured whose Home State is this State shall pay the tax on all Ttaxable Premium to the Ceommissioner, who shall transmit the same for distribution as provided in this Act.

Drafting Note: Existing Sstate laws and procedures may require that the tax report be forwarded to another Sstate agency, such as the Department of the Treasury, rather than to the Ceommissioner. In addition, some Sstates may require the tax to be paid on a periodic basis (e.g., annually) rather than at the time of the filing required by Subsection A. Subsections A and B may need to be revised in these Sstates.

~~C. If an independently procured policy covers properties, risks or exposures only partially located or to be performed in this state, the tax payable shall be computed on the portion of the premium properly attributable to the properties, risks or exposures located or to be performed in this state, as set forth in Sections 5F(3) and 5F(4) of this Act.~~

CD. Delinquent taxes hereunder shall bear interest at the rate of [insert number] percent per year.

DE. This section does not abrogate or modify, and shall not be construed or deemed to abrogate or modify any other provision of this Act.

Section 7. Penalties

A. A Pperson who in this Sstate represents or aids a Nnonadmitted Iinsurer in violation of this Act may be found guilty of a criminal act and subject to a fine not in excess of $[insert amount].

Drafting Note: Some Sstates might want to specify "misdemeanor" or "felony" rather than "criminal act" in Section 7A.

B. In addition to any other penalty provided herein or otherwise provided by law, including any suspension, revocation or refusal to renew a license, any Pperson, firm, association or corporation violating any provision of this Act shall be liable to a civil penalty not exceeding $[insert amount] for the first offense, and not exceeding $[insert amount] for each succeeding offense.

C. The above penalties are not exclusive remedies. Penalties may also be assessed under [insert citation to trade practices and fraud statute] of the insurance code of this Sstate.

Section 8. Violations

Whenever there is evidence satisfactory to the Ceommissioner ~~believes, from evidence satisfactory to him or her,~~ that a Ppperson is violating or about to violate the provisions of this Act, the Ceommissioner may cause a complaint to be filed in the [insert appropriate court] Court for restitution and to enjoin and restrain the Ppperson from continuing the violation or engaging in or doing any act in furtherance thereof. The court shall have jurisdiction of the proceeding and shall have the power to make and enter an order of judgment awarding such preliminary or final injunctive relief and restitution as in its judgment is proper.

Section 9. Service of Process

A. Any act of transacting insurance by an unauthorized Ppperson or a Nnonadmitted Iinsurer is equivalent to and shall constitute an irrevocable appointment by the unauthorized Ppperson or insurer, binding upon it, its executor or administrator, or successor in interest of the [insert title of appropriate Sstate official] or his or her successor in office, to be the true and lawful attorney of the unauthorized Ppperson or insurer upon whom may be served all lawful process in any action, suit or proceeding in any court by the Ceommissioner or by the Sstate and upon whom may be served any notice, order, pleading or process in any proceeding before the Ceommissioner and which arises out of transacting insurance in this Sstate by the unauthorized Ppperson or insurer. Any act of transacting insurance in this Sstate by a Nnonadmitted Iinsurer shall signify its acceptance of its agreement that any lawful process in such court action, suit or proceeding and any notice, order, pleading or process in such administrative proceeding before the Ceommissioner so served shall be of the same legal force and validity as personal service of process in this Sstate upon the unauthorized Ppperson or insurer.

B. Service of process in the action shall be made by delivering to and leaving with the [insert title of appropriate Sstate official], or some Ppperson in apparent charge of the office, two (2) copies thereof and by payment to the [insert title of appropriate Sstate official] of the fee prescribed by law. Service upon the [insert title of appropriate Sstate official] as attorney shall be service upon the principal.

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Drafting Note: Existing state laws and procedures may require that service of process be made upon either the commissioner or another state official.

C. The [insert title of appropriate state official] shall forward by certified mail one of the copies of the process or notice, order, pleading or process in proceedings before the commissioner to the defendant in the court proceeding or to whom the notice, order, pleading or process in the administrative proceeding is addressed or directed at its last known principal place of business and shall keep a record of all process so served on the commissioner which shall show the day and hour of service. Service is sufficient, provided:

(1) Notice of service and a copy of the court process or the notice, order, pleading or process in the administrative proceeding are sent within ten (10) days by certified mail by the plaintiff or the plaintiff's attorney in the court proceeding or by the commissioner in the administrative proceeding to the defendant in the court proceeding or to whom the notice, order, pleading or process in the administrative proceeding is addressed or directed at the last known principal place of business of the defendant in the court or administrative proceeding; and

(2) The defendant's receipt or receipts issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person or insurer to whom the letter is addressed, and an affidavit of the plaintiff or the plaintiff's attorney in a court proceeding or of the commissioner in an administrative proceeding, showing compliance are filed with the clerk of the court in which the action, suit or proceeding is pending or with the commissioner in administrative proceedings, on or before the date the defendant in the court or administrative proceeding is required to appear or respond, or within such further time as the court or commissioner may allow.

D. A plaintiff shall not be entitled to a judgment or a determination by default in any court or administrative proceeding in which court process or notice, order, pleading or process in proceedings before the commissioner is served under this section until the expiration of forty-five (45) days from the date of filing of the affidavit of compliance.

E. Nothing in this section shall limit or affect the right to serve any process, notice, order or demand upon any person or insurer in any other manner now or hereafter permitted by law.

F. Each nonadmitted insurer assuming insurance in this state, or relative to property, risks or exposures located or to be performed in this state, shall be deemed to have subjected itself to this Act.

G. ~~Not withstanding~~Notwithstanding conditions or stipulations in the policy or contract, a nonadmitted insurer may be sued upon any cause of action arising in this state, or relative to property, risks or exposures located or to be performed in this state, under any insurance contract made by it.

H. ~~Not withstanding~~Notwithstanding conditions or stipulations in the policy or contract, a nonadmitted insurer subject to arbitration or other alternative dispute resolution mechanism arising in this state or relative to property, risks or exposures located or to be performed in this state under an insurance contract made by it shall conduct the arbitration or other alternative dispute resolution mechanism in this state.

Commented [DAT2]: Task Force discussion on proposed deletion of H.

Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the prior subsection 9 H. States should consider adoption or modification of the prior subsection in light of their own laws on arbitration or other alternative dispute resolution in insurance and commercial transactions.

I. A policy or contract issued by the nonadmitted insurer or one which is otherwise valid and contains a condition or provision not in compliance with the requirements of this Act is not thereby rendered invalid but shall be construed and applied in accordance with the conditions and provisions which would have applied had the policy or contract been issued or delivered in full compliance with this Act.

Section 10. Legal or Administrative Procedures

A. Before any nonadmitted insurer files or causes to be filed any pleading in any court action, suit or proceeding or in any notice, order, pleading or process in an administrative proceeding before the commissioner instituted against the person or insurer, by services made as provided in this Act, the insurer shall either:

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(1) Deposit with the clerk of the court in which the action, suit or proceeding is pending, or with the Commissioner of Insurance in administrative proceedings before the Ceommissioner, cash or securities, or file with the clerk or Ceommissioner a bond with good and sufficient sureties, to be approved by the clerk or Ceommissioner in an amount to be fixed by the court or Ceommissioner sufficient to secure the payment of any final judgment which may be rendered in the action or administrative proceeding; or

(2) Procure a certificate of authority to transact the business of insurance in this Sstate. In considering the application of an insurer for a certificate of authority, for the purposes of this paragraph the Ceommissioner need not assert the provisions of [insert sections of insurance laws relating to retaliation] against the insurer with respect to its application if the Ceommissioner determines that the company would otherwise comply with the requirements for a certificate of authority.

B. The Commissioner of Insurance, in any administrative proceeding in which service is made as provided in this Act, may in the Ceommissioner's discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Subsection A of this section and to defend the action.

C. Nothing in Subsection A of this section shall be construed to prevent a Nnonadmitted Iinsurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in this Act, on the ground that the Nnonadmitted Iinsurer has not done any of the acts enumerated in the pleadings.

D. Nothing in Subsection A of this section shall apply to placements of insurance which were lawful in the Home Sstate of the insured ~~in which the placement took place~~ and which were not unlawful placements under the laws of this Sstate. Without limiting the generality of the foregoing, nothing in Subsection A shall apply to a placement made pursuant to Section 5 of this Act.

Section 11. Enforcement

A. The Ceommissioner shall have the authority to proceed in the courts of this Sstate or any other United States jurisdiction to enforce an order or decision in any court proceeding or in any administrative proceeding before the Ceommissioner of Insurance.

~~A. Filing and Status of Foreign Decrees~~

~~A copy of a foreign decree authenticated in accordance with the statutes of this state may be filed in the office of the clerk of any [insert proper court] Court of this state. The clerk, upon verifying with the commissioner that the decree or order qualifies as a "foreign decree" shall treat the foreign decree in the same manner as a decree of a [insert proper court] Court of this state. A foreign decree so filed has the same effect and shall be deemed a decree of a [insert proper court] Court of this state, and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a decree of a [insert proper court] Court of this state and may be enforced or satisfied in like manner.~~

~~B. Notice of Filing~~

~~(1) At the time of the filing of the foreign decree, the plaintiff shall make and file with the clerk of the court an affidavit setting forth the name and last known post office address of the defendant.~~

~~(2) Promptly upon the filing of the foreign decree and the affidavit, the clerk shall mail notice of the filing of the foreign decree to the defendant at the address given and to the commissioner of this state and shall make a note of the mailing in the docket. In addition, the plaintiff may mail a notice of the filing of the foreign decree to the defendant and to the commissioner of this state and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the plaintiff has been filed.~~

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(3) No execution or other process for enforcement of a foreign decree filed hereunder shall issue until thirty (30) days after the date the decree is filed.

Drafting Note: This section presumes that the commissioner has authority to proceed without the cooperation of the state's attorney general. Governing state laws might require that a person other than the commissioner or the attorney general serve as the plaintiff. The title of that person shall be substituted for "commissioner" or "plaintiff" in Section 11 whenever required by state law.

C. Stay of the Foreign Decree

(1) If the defendant shows the [insert proper court] Court that an appeal from the foreign decree is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign decree until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the defendant has furnished the security for the satisfaction of the decree required by the state in which it was rendered.

(2) If the defendant shows the [insert proper court] Court any ground upon which enforcement of a decree of any [insert proper court] Court of this state would be stayed, the court shall stay enforcement of the foreign decree for an appropriate period, upon requiring the same security for satisfaction of the decree which is required in this state.

B. D. It shall be the policy of this State that the insurance Ceommissioner shall cooperate with regulatory officials in other United States jurisdictions to the greatest degree reasonably practicable in enforcing lawfully issued orders of such other officials subject to public policy and the insurance laws of the State. Without limiting the generality of the foregoing, the Ceommissioner may enforce an order lawfully issued by other officials provided the order does not violate the laws or public policy of this State.

Section 12. Suits by Nonadmitted Insurers

A Nonadmitted Iinsurer may not commence or maintain an action inat law or in equity, including arbitration or any other dispute resolution mechanism, in this State to enforce any right arising out of any insurance transaction except with respect to:

A. Claims under policies lawfully placed pursuant to the law of the Home State of the insuredwritten in this state;

B. Liquidation of assets and liabilities of the insurer (other than collection of new Ppremium), resulting from its former authorized operations in this State;

C. Transactions subsequent to issuance of a policy not covering domestic risks at the time of issuance, and lawfully procured under the laws of the jurisdiction where the transaction took place;

D. Surplus Llines Iinsurance placed by a licensee under authority of Section 5 of this Act;

E. Reinsurance placed under the authority of [insert citations of state's reinsurance intermediary act and other reinsurance laws];

F. The continuation and servicing of life insurance, health insurance policies or annuity contracts remaining in force as to residents of this State where the formerly authorized insurer has withdrawn from the State and is not transacting new insurance in the State;

G. Servicing of policies written by an Aadmitted Iinsurer in a State to which the insured has moved but in which the company does not have a certificate of authority until the term expires;

H. Claims under policies covering Wwet Mmarine and Ttransportation Iinsurance;

I. Placements of insurance which were lawful in the jurisdiction in which the transaction took place and which were not unlawful placements under the laws of this State.

Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the opening paragraph of this section.

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Section 13. ~~Separability~~ Severability Clause~~of Provisions~~

If any provisions of this Act, or the application thereof ~~of the provision~~ to any P~~p~~erson or circumstance, ~~shall~~ is~~be~~ held invalid, such determination shall not affect the provisions or ~~the remainder of the Act and the~~ applications of this Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are severable ~~to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby~~.

Section 14. Effective Date

This Act shall take effect [insert appropriate date].

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

1994 Proc. 3rd Quarter 14, 16-17, 24, 28-46 (adopted).
1996 Proc. 3rd Quarter 9, 42, 1110, 1168, 1169-1173, 1189-1190 (amended).
1997 Proc. 4th Quarter 25, 27-28, 1004, 1029 (amended).
1999 Proc. 3rd Quarter 25, 26, 1080, 1135, 1151-1153 (amended).
2002 Proc. 2nd Quarter 14, 250-251, 344, 347, 349-350 (amended).

This model draws from and replaces three earlier NAIC models:

Model Surplus Lines Law
1983 Proc. I 6, 36, 834, 900, 913-922 (adopted).
1985 Proc. II 11, 24, 702, 722, 723-724 (amended).
1986 Proc. I 9-10, 24, 799, 813, 814-821 (amended).
1990 Proc. I 6, 30, 840-841, 897-898, 900-901 (amended).
1991 Proc. I 9, 18, 908, 949, 950, 952-961 (amended and reprinted).

Unauthorized Insurers Model Act
1969 Proc. I 168, 218, 222-227, 271 (adopted).
1978 Proc. I 13, 15, 348, 350 (amended).
1990 Proc. II 7, 13-14, 159-160, 187-191 (amended and reprinted).

Model Nonadmitted Insurance Act
1983 Proc. I 6, 36, 834, 899-900, 923-926 (adopted).

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Attachment C

Ref.	Commenter	Date of Ltr.	Section	Comment
1	CA DOI - Libio Latimer	1/10/2022	DSLI References	If insertions will be made so that Model Act (#870) will have references to "Domestic surplus lines insurer," all such references must be in brackets or other indicators that show such inserted language is optional and does not apply to all states.
2	WSIA	7/18/2022	Section 3 - Definitions **Exempt Commercial Purchaser**	One technical issue we identified deals with the definition for Exempt Commercial Purchaser. Section 3H(3)(b) addressing the five-year Consumer Price Index (CPI) adjustment does not establish a definitive effective date for the commencement of CPI adjustments. Because the NRRA specifies the dates for each CPI adjustment on the fifth January 1, occurring the date after the enactment of the NRRA (July 21, 2010) and each fifth January 1 thereafter (January 1, 2015; January 1, 2020; January 1, 2025, etc.), we believe it is appropriate to revise the model language to establish a definitive starting point with the language, "Effective on July 21, 2010 and each…" This would ensure uniform codification of the Exempt Commercial Purchaser thresholds revised by the CPI and reported by the NAIC every five years.
3	The Council (CIAB)	7/19/2022	Section 3 - Definitions **Exempt Commercial Purchaser**	To avoid confusion regarding the commencement of Consumer Price Index (CPI) adjustments, we suggest revising the model definition in section 3. for "Exempt Commercial Purchaser" to begin with a definitive starting point. We recommend adding the following language at section 3H(3)(b), "effective on July 21, 2010, and each…"
4	American P/C Insurance Assn.	7/21/2022	Section 3 - Definitions **Exempt Commercial Purchaser**	"Exempt Commercial Purchaser" (Section 3(H)(3)(b)) . APCIA believes that the revised exempt commercial purchaser provision is generally an improvement and is consistent with state commercial modernization laws. However, we would like to highlight a technical issue. The definition of "Exempt Commercial Purchaser" includes monetary thresholds for net worth, annual revenues, and (for non-profits) budgeted expenditures. These thresholds are to be adjusted for inflation every five years beginning on January 1 after enactment of the state law. However, the NRRA requires the date of adjustment be tied to the date of enactment of the NRRA, which raises a question as to whether this provision is technically compliant with the NRRA. While we understand that drafting matching language with the NRRA presents some challenges for a clause of this type, care should be exercised to make sure the language in the model complies with the corresponding language in the NRRA as closely as possible.
5	American P/C Insurance Assn.	7/21/2022	Section 3 - Definitions Principal Place of Business Principal Residence	"Principal Place of Business" and "Principal Residence" Definitions (Section 3(O) and (P)). Subsection (2) in each definition appear to allow states to tax non-US premium. APCIA supports language clarifying and confirming that states are not allowed to tax non-US premiums.
6	American P/C Insurance Assn.	7/21/2022	Section 3 - Definitions **Surplus Lines Insurance**	Surplus Lines Insurance Definition (Section 3(R)). The Drafting Note to this section correctly indicates that some states allow certain non-property casualty coverages to be written in the surplus lines market. The Task Force may wish to consider whether it is necessary to retain the reference to "property casualty insurance" in the definition of "Surplus Lines Insurance" as opposed to just defining it as any coverage permitted to be placed by a surplus lines licensee with an eligible surplus lines insurer.
7	WSIA	7/18/2022	Section 3 - Definitions **Unaffiliated Groups**	WSIA maintains the position that the home state of a policy covering an unaffiliated group should be the home state of the group policyholder, in order to be consistent with the NRRA's goal of vesting a single jurisdiction with sole regulatory and tax authority over the surplus lines transaction. This concept is not reflected in the current draft; rather there could be multiple home states for a single policy based upon the home state of each member of the group. This would defeat one of the primary goals of the NRRA and would have significant consequences for the distribution and availability of insurance for a critical segment of consumers. Additionally, the definition within the draft represents the current practice in a small minority of states. The general practice in most states is to determine the home state of the group based upon the state where the group is located. We strongly encourage the drafting group to consider a definition that would make a home state determination at the group, rather than member level. If the task force does not adopt a group level determination, we would encourage the task force to consider the conclusions of the 2017 Surplus Lines Drafting Group Report - Determining the "Home State" of Unaffiliated Group Policies, and to table the issue until there is additional consensus from the states (Attachment A). Practically, the definition currently in the exposure draft would create untenable burdens for brokers and regulators by forcing unaffiliated groups to submit to regulatory requirements and issue tax payments to 2 multiple states. If group policies require separate tax payments for each member of the group to be issued to each state of residence, brokers would be unable to continue servicing many of their existing group policies. To the extent that these policies would remain in place, states would have to process hundreds if not thousands of de minimis tax payments that cumulatively would not provide significant tax revenue for any state. Also, this public policy decision would only effect multi-state insurance policies which compose a relatively minor portion of all surplus lines in the United States but would have a significant impact on the administration of these policies. Statistics for multi-state versus single-state surplus lines policies are not widely available, but data provided by the Florida Surplus Lines Service Office showed that only 0.4% of policies reported to the office contained non-Florida risk and it's reasonable to estimate that only a small fraction of the 0.4% came from unaffiliated group policies. Including the current definition for unaffiliated groups will not have a significant impact on tax revenue because it makes up such a small portion of overall surplus lines premium; however, it will have a significant impact to the specific group of consumers that this type of policy serves, and in some cases is the best, if not only, way for them to have an affordable insurance option. A definition of home state for unaffiliated groups that would create a significant administrative burden for issuing group policies will only hurt consumers. Conducting business under the proposed definition will, at best, unnecessarily increase the costs associated with the policies, but it is more likely that thesepolicies will be eliminated altogether. In the absence of consensus on this issue, and the lack of any national issue or generally held concern, we continue to urge the task force, as we urged the drafting group, to omit the definition of home state for unaffiliated groups from Model 870. Including a definition that is currently only incorporated into a small number of existing state laws, that is not agreed upon by most states, does not support the charges forthis undertaking.
8	CRC Group Wholesale & Specialty	7/20/2022	Section 3 - Definitions **Unaffiliated Groups**	Regarding unaffiliated groups, CRC believes that the home state of a policy covering an unaffiliated group should be the home state of the group policyholder. We believe this approach is aligned with the Non-admitted and Reinsurance Reform Act goal of vesting a single jurisdiction with sole regulatory and tax authority over the surplus lines transaction. We also believe this approach is best for both the industry and consumers. CRC has a moderately high volume of multi-state unaffiliated group policies. A definition of home state that would allow for multiple home states would be a significant administrative challenge and would create immediate staffing concerns for companies such as CRC and service concerns for our clients and insureds who place these types of policies. As such, I respectfully encourage the task force to omit or amend the definition of home state for unaffiliated groups in Model 870.

Attachment C

Ref.	Commenter	Date of Ltr.	Section	Comment
9	National Risk Retention Assn.	7/11/2022	Section 3 - Definitions **Unaffiliated Groups**	Premised on bringing the Model Act into conformity with the federal Nonadmitted and Reinsurance Reform Act ("NRRA"), the exposed draft revisions to the Model Act include the addition of a new Section 3.J defining "Home State"; however, the inclusion of Subsection (4) in Section 3.J deviates substantially from the definition provided in the NRRA by addressing the determination of "home state" in the case of an unaffiliated group, which is nowhere addressed in the NRRA. . . While, as noted below, the NRRA specifically exempts application to RRGs formed under the LRRA, the NRRA nowhere addresses the treatment of "unaffiliated groups" which would include all RPGs formed under the LRRA. The Task Force's desire to address this omission in the pursuit of its overall charge to address uniformity in the treatment of nonadmitted insurance taxation and regulation is understandable; however, the inclusion of Subsection (4) in the new Section 3.J draft revision to the Model Act constitutes an action that is at the same time unnecessary in order to conform the Model Act with the NRRA, and clearly represents an intrusion into congressional authority with respect to a federal law that runs the risk of federal preemption. This is precisely the conclusion reached by the Surplus Lines Drafting Group in its report of April 3, 2017 on the subject of Determining the "Home State" of Unaffiliated Group Policies in recommending that no action is necessary. . . If the Task Force determines to pursue action against that former recommendation, given the impact of proposed Subsection (4) for RPGs formed and operating under the LRRA, the NRR Association believes that before doing so it is critically important for the Task Force to recognize that in this instance it is effectively presented with the task of devising a Model Law that must satisfy the intent of, not one, but actually two (2) federal statutes. Accordingly, it is appropriate and necessary to analyze the congressional intent imbedded in both the LRRA and the NRRA so as to not complicate the matter or otherwise result in unintended consequences in the process. Indeed, given the circumstances, congressional intent is all we have to work with here, rather than to engage in any exercise attempting to rewrite a federal law, much less these two statutory schemes created by the Congress. So in the words of the Hippocratic oath in medicine, please let us "do no harm!" . . To treat an unaffiliated group differently from an affiliated group under and for purposes of the NRRA flies directly in the face and is therefore antithetical to the purpose of the NRRA. The Home State of the RPG should be the state entitled to collect the surplus lines and nonadmitted taxes for surplus lines and nonadmitted insurance purchased by the RPG for its members. . . As pointed out by the WSIA and Lloyd's in their comment letters to the Task Force, since passage of the NRRA over 10 years ago (albeit twenty-four [24] years after adoption of the LRRA) few states have taken the position proposed by Subsection (4) to determine the home state of an RPG at the level of the group member rather than at the level of the group itself. Hence, the Model Act (i.e., subsection [4]) as currently drafted would effectively force states to adopt treatment of RPGs that is contrary to the common practice currently in place and would actually violate the LRRA by requiring all RPGs to be subject to multi-state tax payment and reporting obligations. In many circumstances, this would be deemed treatment discriminatory against purchasing groups as a whole in violation of Section 3903(a)(8) of the LRRA.
10	The Council (CIAB)	7/19/2022	Section 3 - Definitions **Unaffiliated Groups**	We suggest removing the language in section 3. Definitions J(4) "in the case of an unaffiliated group policy" because it is inconsistent with the NRRA's overarching objective of streamlining regulatory and tax authority of group surplus lines policies. It is neither practical nor feasible for regulators and brokers to be subjected to tax payments in multiple states for each unaffiliated group member. The common practice among states has been to designate the principal place of business of the unaffiliated group as the home state, just as the NRRA requires that the principal place of business of an affiliated group be the home state. Suggesting that states may regulate and tax unaffiliated groups at the member level creates a burdensome administrative challenge for regulators and brokers. States adopting this approach would bear a significant burden by potentially having to process hundreds if not thousands of de minimis tax payments, which would result in minimal tax revenue. But more importantly, brokers deterred by burdensome regulatory and tax requirements, including the increased costs, would be less likely to place unaffiliated group policies, reducing options for those consumers.
11	Lloyd's	7/18/2022	Section 3 - Definitions **Unaffiliated Groups**	Lloyd's supports the Drafting Group's work to update the Model Act to reflect the Nonadmitted and Reinsurance Reform Act of 2010 ("the NRRA"). We agree with the trades' position that the Model Act should adhere to the NRRA's principles and use NRRA definitions to the extent possible. The proposed definition of the home state for "unaffiliated groups" demonstrates the perils of deviating from NRRA principles. The NRRA sought to simplify and streamline nonadmitted compliance through the designation of a single "home state" with the sole authority to regulate and tax each nonadmitted policy. However, as currently proposed, the definition of home state of an unaffiliated group instructs that the home state is where each premium paying member of the group resides. This could result in a single unaffiliated group policy having multiple "home states," which is entirely inconsistent with the NRRA. Lloyd's respectfully suggests the following definition of home state of an unaffiliated group as more consistent with the NRRA: if the insured is an unaffiliated group, the home state of the insured shall be the principal place of business of the group, without regard to the location of the members of the group that may be insured under the master policy Alternatively, the Task Force could choose not to create a definition of the home state of an unaffiliated group. Unaffiliated group is not a defined term in the NRRA. In fact, the words unaffiliated group do not appear a single time in the NRRA. Therefore, creating a definition of the home state of an unaffiliated group is not necessary to bring the Model Act into compliance with the NRRA. Such a position would be consistent with the past work of the Surplus Lines Task Force, which, as recently as 2017, adopted a report from another drafting group which concluded that a definition was not needed, as there was no urgent problem in need of a solution. Indeed, there is little evidence that a regulatory issue exists with regard to determining the home state of unaffiliated groups. Lloyd's writes surplus lines business in all 50 states, and our underwriters do not believe this is an area requiring additional regulatory guidance. It is worth noting that surplus lines brokers and carriers are well aware of the NRRA's omission of the term "unaffiliated groups." This omission was created well over a decade ago, and since that time the industry practice has been to designate the principal place of business of the unaffiliated group as the home state, just as the NRRA requires that the principal place of business of an affiliated group be the home state. When the NRRA was enacted in 2010 the legal analysis at that time was that such an approach was the only outcome consistent with the NRRA, as there was no obvious reason to treat the home state of "unaffiliated groups" differently than "affiliated groups." Absent specific state law on unaffiliated groups, this remains the widely accepted legal analysis today. Lloyd's urges the Task Force not to deviate from this established and mainstream position. It is also helpful to remember why policies are written on a group basis. Group policies leverage efficiencies and economies of scale to make insurance more available and affordable for group members than it would otherwise be. Requiring compliance for unaffiliated groups at member level would eliminate these benefits and make group insurance for the members unfeasible in many circumstances. In a time of rapid and sustained inflation, it is incumbent upon all elected and appointed officials to take measures to mitigate the harmful impacts of inflation. Altering the regulatory treatment of group policies would do just the opposite – it would make insurance more expensive and less available in an economic climate that is already extremely challenging for many Americans. Therefore, designating a single home state for unaffiliated groups is not only the correct legal outcome, it is also the best policy outcome.
12	CA DOI - Libio Latimer	1/10/2022	Section 3 - Definitions **Unaffiliated Groups**	If the Task Force chooses to explore the development of a definition of "Home state" for unaffiliated groups, such exploration and development should be conducted separately from the current work of the Drafting Group. This is because, as shown in a previous exploration of the issue within the Task Force, differing opinions regarding the matter may exist and other may arise. Proper treatment of the issue requires an appropriate forum or mechanism and sufficient time. A rushed definition might create problems instead of solutions. For these reasons as well as efficiency to the work of the Drafting group, we recommend that the exploration of a definition be taken up separately. We note that the California Insurance Code ("CIC"), similar to the NRRA, has a definition of "Home state" for affiliated groups (CIC §1760.1(e)(4)), but not for unaffiliated groups. According to the Surplus Lines Association, which is the California Department of Insurance "CDI")'s surplus line advisory organization, this has not created a market problem or disruption in the placement, registration, or tax payment of such surplus line insurance.

Attachment C

Ref.	Commenter	Date of Ltr.	Section	Comment
13	McDermott Will & Emery	7/21/2022	Section 3 - Definitions **Unaffiliated Groups**	The NRRA provides for a single "home state" for each multi-state nonadmitted insurance placement, and states that "the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State." See Section 522 of the NRRA. The NRRA itself does not provide for a separate definition of home state with respect to unaffiliated groups. The current Draft introduces a definition of home state for an unaffiliated group that would result in separate home states for each group member. Namely, under the Draft, the home state is determined by reference to the principal place of business or principal residence of each group member. For group and blanket business this means that there are likely to be multiple home states (perhaps every single state for placements involving participants nationwide), instead of what should have been a single placement of insurance in the master policyholder's home state. In practice, it means that surplus lines brokers will effectively have to treat every issuance of a certificate or evidence of insurance under the master policy as a separate surplus lines insurance placement, with attendant diligent search, reporting and surplus lines tax payment obligations, which will likely result in these types of coverages not being written in the surplus lines market at all. There is a decades-long history of difficult-to-place group and blanket insurance being written in the surplus lines market. Specialist surplus lines brokers and insurers have been able to take on programs that are too large (or too small) for admitted insurers, too risky or too novel – coverages with no track record in the marketplace such as cyber and insurtech products. In addition, to the extent that regulators are proposing community-based property insurance for wildfire or flood risks, a surplus lines group policy could provide the ideal solution for such distressed markets. Adopting the proposed definition of home state for unaffiliated groups would instead mean that those states which adopt the Model Act will foreclose access by their residents to master policy insurance programs on a surplus lines basis. And if not foreclosing access entirely, such coverages will only be available on a more expensive single policy basis without the economies of scale normally associated with group or blanket insurance. It has now been 12 years since the NRRA was enacted, and 11 years since it went into effect. We are unaware of any regulatory problems having arisen during this time that would suggest a need for adopting such a definition of home state for unaffiliated groups; indeed, in our experience treating the home state of the master policyholder as the home state for tax and compliance purposes was the default approach even prior to the NRRA's existence. We would therefore urge the NAIC to maintain the status quo – that is, silence on the definition of home state for unaffiliated groups – since that approach is consistent with the NRRA and is the only logical interpretation of the NRRA that would allow group and blanket insurance to continue to be written on a surplus lines basis. Indeed, to the extent that any state adopts a contrary definition of home state for unaffiliated groups, it is our view that such laws conflict with the NRRA and on that basis alone ought to be repealed. But we also believe that in a time of unparalleled technological change, combined with so many insurance challenges (climate change, cybersecurity and pandemics to name three) regulators and legislators ought to be opening the door to the type of innovation that master policy programs can support.
14	American P/C Insurance Assn.	7/21/2022	Section 3 - Definitions **Unaffiliated Groups**	Unaffiliated Group Coverages (Section 3(J)). APCIA's most significant issue with the draft is the problematic definition of "Home State" in Section 3(J)(4). The draft indicates that if an unaffiliated group itself is the payer of all premiums, then the home state is the state of the group's principal place of business (unless 100% of the risk is outside of that state, in which case the home state is the state that has the largest percentage of the insured's taxable premium). However, if individual members of the group pay all or a portion of the premiums, then each member has its own home state, which will result in tax payments on a group master policy being allocated to multiple states. This would make group coverages much more difficult and burdensome to offer and to administer. The provision could result in a reluctance on the part of insurers to write certain group coverages. This would be harmful to consumers as the efficiencies of group policies often make coverages available to consumers that otherwise would not be available to them. One APCIA member has suggested that this provision would create hundreds of new surplus lines filings in numerous states, which would be burdensome not only for insurers but for states receiving the filings. We also think it important to note that the creation of multiple "home states" in this circumstance would be inconsistent with the spirit of the NRRA when the primary goal of this drafting exercise is to harmonize the Model Act with the NRRA. APCIA therefore strongly recommends the removal of Section 3(J)(4).
15	Brown & Riding	7/18/2022	Section 3 - Definitions **Unaffiliated Groups**	I wanted to reach out to you regarding the definition of "home state" for unaffiliated groups. Per the information we received from WSIA, the exposure draft contains a definition for "home state" of unaffiliated groups that would grant tax and regulatory authority to the home state of each member of an unaffiliated group, rather than to the home state of the group itself. This seems to be how most states are already handling unaffiliated groups. We have a Risk Purchasing Group in our book of business that has insureds in 50 states. When we reached out to each state to confirm filing instructions, they each had their own required documents, filing procedures, and rules. Here is a list of the problems we've run into: 1.Kentucky municipal tax applies to each individual insured's address. KY requires we file and pay municipal tax directly to the city or county. If there are 30 individuals living in various Kentucky cities, this means we must create 30 filings, 30 reconciliations and 30 payments. This is on top of an already complex and antiquated taxing system the KY has in place. I have attached the KY tax tables for your reference, there are 3 pdfs referred to while processing the municipal tax. Each insured's address must be looked up on a map to determine city/county boundaries. From there, the municipality is identified and if they have an additional code, there may be taxes due to the city AND county for 1 insured. 2.Since tax rates and tax types vary by state, the retail agent has great difficulty accurately estimating tax amounts to be collected from the insureds. This creates mayhem for our accounting department when trying to process the tax payments. This is greatly affected by item #1 since the tax calculation process for KY is so cumbersome. 3.As I mentioned above, each state has their own requirements. Please see attached excel spreadsheet showing the hoops we jump through for each state. I just want to reiterate that this is required for what we consider to be 1 insured. Our preference would be to use the state where the group is registered, or the state with the greatest amount of premium, as the home state. Tax amounts and other requirements would then follow the rules in that state.

Ref.	Commenter	Date of Ltr.	Section	Comment
16	WSIA	7/18/2022	Section 5 - Surplus Lines Insurance **Diligent Search**	WSIA was pleased to see that the drafting group included language in the drafting note alluding to the modernizations that have occurred in several states in recent years. We believe there is an opportunity to expand upon this further and we would ask that the task force include specific examples of ways that the diligent search process may be modernized. In 2020, the Innovation and Technology (EX) Task Force solicited comments from interested parties related to specific "regulatory relief" or "regulatory accommodations" offered by states as a result of the COVID-19 pandemic that they would recommend be made permanent. WSIA and other industry partners offered diligent search requirements as an example of a regulatory practice that could be improved in a remote work environment. When diligent search requirements are paired with wet signature, paper filing or notarization requirements, the process of completing diligent search becomes extremely difficult. Furthermore, the process of obtaining, documenting and filing declinations, even when done electronically, is largely viewed as an unnecessary, pro forma exercise, that does not necessarily ensure that surplus lines insurance continues to serve as a safety valve, rather than the market of first resort. In recent years, several states have taken innovative approaches to ensure that the surplus lines market continues to serve as a supplemental market, without forcing agents and brokers to perform the tedious 3 task of obtaining declinations. We outlined several of these approaches in our November 3, 2021 letter to the drafting group and we would suggest that the drafting note be revised to reflect these innovations and give guidance to states seeking to modernize their diligent search process. Drafting Note: Some states do not require the diligent search in Section 5A(3). If a state includes the diligent search requirement, it must be satisfied in accordance with the statutes and regulations of the governing state. States may also choose to make exemptions to the diligent search requirement where appropriate. For example, Section 5A(3) does not prohibit a state from exempting commercial surplus lines placements from diligent search when a risk is referred to the surplus lines producer by a licensed producer who is not affiliated with the surplus lines producer. Nor does it prohibit a state from exempting commercial lines of insurance that are not subject to rate and form requirements in the admitted market. Nor does it prohibit a regulatory system in which a surplus lines licensee may place with an eligible nonadmitted insurer any coverage listed on a current "export list" maintained by the commissioner. The export list would identify types of insurance for which no admitted market exists. The commissioner may waive the diligent search requirement for any such type of insurance. Such statutes and regulations might vary from state to state in terms of the number of declinations required and the person designated to conduct the search. Section 5A(3) does not prohibit a state from deeming that a periodic filing by a surplus lines licensee constitutes a certification of diligent search. States may consider including a provision that requires the surplus lines licensee to produce evidence of the diligent search upon request.
17	CRC Group Wholesale & Specialty	7/20/2022	Section 5 - Surplus Lines Insurance **Diligent Search**	As to the diligent search process, CRC appreciates the drafting group's recognition of the various state-by-state approaches to this topic and modernizations taking place in some jurisdictions. Aspects of the diligent search process consistently pose administrative and operational challenges for brokers such as CRC. I would respectfully encourage you to include modernization examples in the drafting note as they may be helpful for states seeking to consider changes in this area.
18	Excess Line Assn. of NY	7/22/2022	Section 5 - Surplus Lines Insurance **Diligent Search**	ELANY respectfully suggests that the drafting note immediately following Section 5(A)(4) be amended as follows to reflect existing practices, and to emphasize the necessity of imposing diligent search only when necessary to achieve its public policy objective (recommended language in blue): Drafting Note: The diligent search requirement of Section 5A(3) must be satisfied in accordance with the statutes and regulations of the governing State. Such Diligent search statutes and regulations might vary from State to State in terms of the number of declinations required and the Person designated to conduct the search. Several States permit surplus lines placement without a diligent search for or without regard to the availability of admitted coverage. **States may want to consider the need to modernize diligent search requirements in light of electronic transactions. States should consider requiring diligent search only when necessary to assure that risks are only being written in the surplus lines market when admitted insurers will not do so, and that diligent search reporting requirements are limited to essential data points that the State or stamping office actively utilize. Wholesale placements in which the wholesale producer is unaffiliated with the retail producer, classes of business that are deregulated in the admitted market, and the use of Export lists are examples of risks that States should consider exempting from diligent search requirements.** Section 5A(3) does not prohibit a regulatory system in which a Surplus Lines Licensee may place with an eligible Nonadmitted Insurer any coverage listed on a current "Export List" maintained by the Commissioner. The Export list would identify types of insurance for which no admitted market exists. The Commissioner may waive the diligent search requirement for any such type of insurance.
19	The Council (CIAB)	7/19/2022	Section 5 - Surplus Lines Insurance **Diligent Search**	We suggest the Task Force demonstrate its commitment to the NRRA by encouraging regulators to adopt uniform diligent search requirements. Ideally, the model should include specific language for states to consider, such as exemptions for commercial surplus lines placements, Commissioner-created export lists, and declination requirements only upon initial purchase and not at each renewal.
20	McDermott Will & Emery	7/21/2022	Section 5 - Surplus Lines Insurance **Diligent Search**	If the Task Force wishes to use its definition of "home state" in the current draft, then we believe the only way to do so without effectively eliminating the availability of group and blanket insurance in the surplus lines market would be to revise the Model Act to allow for streamlining of surplus lines diligent searches in those states that still require diligent searches. For example, brokers should be allowed to perform a single diligent search in the group policyholder's home state. Brokers should also be permitted to rely on their market knowledge that no admitted insurers are willing to write certain novel types of cover without having to ask admitted insurers over and over again for declinations on every new policy. States should prioritize the digitization of the surplus lines filing process. All states should maintain export lists and should update them on a frequent basis. These goals – or some combination of these goals – would all be consistent with the aim of the Innovation, Cybersecurity and Technology (H) Committee. Indeed, we agree with the comments from WSIA that updating the Model Act provides the opportunity to carry out the aims of the Innovation and Technology (EX) Task Force in its 2020 request for suggestions of Covid-19 regulatory accommodations for remote working that could be made permanent so as to modernize the industry, now that it has been proven such accommodations worked well and did not harm consumers. Some of the suggestions provided to the Innovation and Technology (EX) Task Force at that time included eliminating the requirement for hard copy and/or notarized affidavits of diligent search, and eliminating the requirement to file proof of a diligent search for every surplus lines risk. Since the NRRA does not address these topics, they could be incorporated into the Model Act in a manner that is consistent with the NRRA. In fact, arguably any effort to streamline the surplus lines placement process is consistent with the spirit if not the letter of the NRRA.
21	American P/C Insurance Assn.	7/21/2022	Section 5 - Surplus Lines Insurance **Diligent Search**	Diligent Search (Section 5(A)(3)). APCIA appreciates revised language in the proposed Drafting Note that acknowledges that some states are rethinking their approach to diligent search requirements. We note, however, that WSIA has suggested revisions to the Drafting Note that would help to highlight innovative new approaches being taken by states to preserve the supplemental nature of the surplus lines market while avoiding the burdens and costs of diligent search requirements. APCIA endorses WSIA's proposed language and urges the Task Force to adopt it.
22	WSIA	7/18/2022	Section 9 - Service of Process **Arbitration**	We believe that the provisions of Section 9(H) also go beyond the task of bringing the model in compliance with the NRRA. As written, this provision dictates that arbitration must be conducted within the state where the risk is located. Under this provision, an insured may hold a policy whose home state is determined to be State A, but a claim occurs on a property located in State B, thus forcing the insured to engage in arbitration in a state that is neither their principle state of residence nor their principal place of business. This provision would be detrimental to an insurance consumer and would not comport with the spirit of the NRRA. Additionally, and of great concern for the recommended change, we believe that arbitration provisions within contracts for commercial insurance should be fully negotiable between the two parties. There are many instances where it may be advantageous for an insured to conduct arbitration in a state of their choosing rather than the state where the dispute arose. For these reasons, we would ask that Section 9(H) simply be removed from the model. Alternatively, the task force may consider an amendment at the end of subsection 9(H) that says, "unless the parties mutually agree to conduct the arbitration or other alternative dispute resolution elsewhere."
23	National Risk Retention Assn.	7/11/2022	Section 9 - Service of Process **Arbitration**	...the NRR Association also concurs with WSIA's and Lloyd's request that the Task Force delete in its entirety section 9(H) of the Model act, i.e., the arbitration venue provision. NRR Association's position is predicated upon three (3) separate legal bases that would appear to render section 9(H) illegal and unenforceable...
24	The Council (CIAB)	7/19/2022	Section 9 - Service of Process **Arbitration**	Remove Section 9. "Service of Process (H)," which states arbitration should occur within the State where the risk is located. This language could harm consumers who are required to travel and be subjected to a state other than their home state or principal place of business.

Attachment C

Ref.	Commenter	Date of Ltr.	Section	Comment
25	Lloyd's	7/18/2022	Section 9 - Service of Process **Arbitration**	Lloyd's respectfully suggests that Section 9(H) on arbitration clauses should be deleted. Arbitration clauses in commercial insurance contracts should be fully negotiable, including the location of the arbitration proceedings. It is not unusual for commercial insureds with operations in multiple states to designate a single, convenient location for arbitration, often in a major commercial city. As drafted, Section 9(H) would not allow this as it would require arbitration to occur where exposures or risks are located, even if such a state is not the home state. This violates the home state principle of the NRRA and also impinges upon surplus lines insurers' freedom of form, which is essential to covering hard to place risks.
26	McDermott Will & Emery	7/21/2022	Section 9 - Service of Process **Arbitration**	Section 9(H) of the Draft requires arbitration to occur where exposures or risks are located, regardless of the home state. This language was in the previous version of the Model Act, but in order to be consistent with the NRRA, we believe the language should be deleted. As you well know, nonadmitted insurers generally have expansive freedom of form and at least for commercial lines buyers typically negotiate the arbitration clauses in their policies. In short, we believe that arbitration should be permitted in whichever state (or country) the parties designate in the contract, regardless of whether the exposures are located in that state. Typically both insurers and insureds prefer to have the predictability of a single specified location as the venue in which insurance disputes can be resolved, rather than requiring the arbitration to take place wherever the exposure is. The language in Section 9(H) would remove that freedom for the parties to negotiate their preferred venue for arbitration but instead would leave it up to chance when a loss occurs.
27	American P/C Insurance Assn.	7/21/2022	Section 9 - Service of Process **Arbitration**	Arbitration (Section 9(H)). This provision trumps arbitration clauses in insurance policies and provides that nonadmitted insurers must conduct any arbitration or alternative dispute resolution in the state where the insured property, risks, or exposures are located. APCIA supports allowing the insurer and policyholder to negotiate contractual arbitration terms and we see no benefit in statutory limitations on such negotiating freedom. Therefore, we recommend that this section be removed from the draft. If the section is retained, the phrase "unless the parties mutually agree to conduct the arbitration or other alternative dispute resolution elsewhere" should be appended at the end of the existing language.

American Property Casualty Insurance Association
INSURING AMERICA apci.org

July 21, 2022

Commissioner Jim Donelon, Chair
Surplus Lines Task Force
National Association of Insurance Commissioners

Re: Nonadmitted Insurance Model Act

Dear Commissioner Donelon:

The American Property Casualty Insurance Association (APCIA) appreciates the work of the Model 870 Drafting Group for their revisions to the Nonadmitted Insurance Model Act and would like to thank the Surplus Lines Task Force for the opportunity to comment on the draft. The goals of bringing the Model Act into compliance with the Nonadmitted and Reinsurance Reform Act (NRRA) as well as updating the Model are worthy ones. The majority of updates appear to support these goals.

The comments provided below are intended to help the Task Force add clarity to the Model Act and maximize the insurance purchase experience and benefits.

Unaffiliated Group Coverages (Section 3(J)). APCIA's most significant issue with the draft is the problematic definition of "Home State" in Section 3(J)(4). The draft indicates that if an unaffiliated group itself is the payer of all premiums, then the home state is the state of the group's principal place of business (unless 100% of the risk is outside of that state, in which case the home state is the state that has the largest percentage of the insured's taxable premium). However, if individual members of the group pay all or a portion of the premiums, then each member has its own home state, which will result in tax payments on a group master policy being allocated to multiple states. This would make group coverages much more difficult and burdensome to offer and to administer. The provision could result in a reluctance on the part of insurers to write certain group coverages. This would be harmful to consumers as the efficiencies of group policies often make coverages available to consumers that otherwise would not be available to them. One APCIA member has suggested that this provision would create *hundreds* of new surplus lines filings in numerous states, which would be burdensome not only for insurers but for states receiving the filings. We also think it important to note that the creation of multiple "home states" in this circumstance would be inconsistent with the spirit of the NRRA when the primary goal of this drafting exercise is to harmonize the Model Act with the NRRA. APCIA therefore strongly recommends the removal of Section 3(J)(4).

Arbitration (Section 9(H)). This provision trumps arbitration clauses in insurance policies and provides that nonadmitted insurers must conduct any arbitration or alternative dispute resolution in the state where the insured property, risks, or exposures are located. APCIA supports allowing the insurer and policyholder to negotiate contractual arbitration terms and we see no benefit in statutory limitations on such negotiating freedom. Therefore, we recommend that this section be removed from the draft. If the section is retained, the phrase "unless the parties mutually agree to conduct the arbitration or other alternative dispute resolution elsewhere" should be appended at the end of the existing language.

"Exempt Commercial Purchaser" (Section 3(H)(3)(b)) . APCIA believes that the revised exempt commercial purchaser provision is generally an improvement and is consistent with state commercial modernization laws. However, we would like to highlight a technical issue. The definition of "Exempt Commercial Purchaser" includes monetary thresholds for net worth, annual revenues, and (for non-profits) budgeted expenditures. These thresholds are to be adjusted for inflation every five years beginning on January 1 after enactment of the state law. However, the NRRA requires the date of adjustment be tied to the date of enactment of the NRRA, which raises a question as to whether this provision is technically compliant with the NRRA. While we understand that drafting matching language with the NRRA presents some challenges for a clause of this type, care should be exercised to make sure the language in the model complies with the corresponding language in the NRRA as closely as possible.

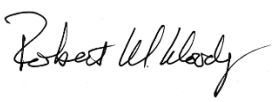
"Principal Place of Business" and "Principal Residence" Definitions (Section 3(O) and (P)). Subsection (2) in each definition appear to allow states to tax non-US premium. APCIA supports language clarifying and confirming that states are not allowed to tax non-US premiums.

Diligent Search (Section 5(A)(3)). APCIA appreciates revised language in the proposed Drafting Note that acknowledges that some states are rethinking their approach to diligent search requirements. We note, however, that WSIA has suggested revisions to the Drafting Note that would help to highlight innovative new approaches being taken by states to preserve the supplemental nature of the surplus lines market while avoiding the burdens and costs of diligent search requirements. APCIA endorses WSIA's proposed language and urges the Task Force to adopt it.

Surplus Lines Insurance Definition (Section 3(R)). The Drafting Note to this section correctly indicates that some states allow certain non-property casualty coverages to be written in the surplus lines market. The Task Force may wish to consider whether it is necessary to retain the reference to "property casualty insurance" in the definition of "Surplus Lines Insurance" as opposed to just defining it as any coverage permitted to be placed by a surplus lines licensee with an eligible surplus lines insurer.

Thank you for the opportunity to participate in this drafting effort and your consideration of our suggestions. We are pleased to answer any questions you may have.

Sincerely,



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Daleo, Andrew T.

From: Lauren Thatcher <lthatcher@brcins.com>
Sent: Monday, July 18, 2022 3:07 PM
To: Daleo, Andrew T.
Cc: Doug Bollschweiler; Harold Nam; Lauren Thatcher
Subject: Concerns about the definition of "home state" for unaffiliated groups
Attachments: Muni Tax Schedule 2022-2023.pdf; 2022-2023 LGPT Payee & Address.pdf; 2022-2023 Tax Code Description.pdf; RPG by state.xlsx; Louisiana updates and call for comments to NAIC

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello Andy,

I wanted to reach out to you regarding the definition of "home state" for unaffiliated groups. Per the information we received from WSIA, the exposure draft contains a definition for "home state" of unaffiliated groups that would grant tax and regulatory authority to the home state of each member of an unaffiliated group, rather than to the home state of the group itself. This seems to be how most states are already handling unaffiliated groups. We have a Risk Purchasing Group in our book of business that has insureds in 50 states. When we reached out to each state to confirm filing instructions, they each had their own required documents, filing procedures, and rules. Here is a list of the problems we've run into:

1. Kentucky municipal tax applies to each individual insured's address. KY requires we file and pay municipal tax directly to the city or county. If there are 30 individuals living in various Kentucky cities, this means we must create 30 filings, 30 reconciliations and 30 payments. This is on top of an already complex and antiquated taxing system the KY has in place.

   I have attached the KY tax tables for your reference, there are 3 pdfs referred to while processing the municipal tax. Each insured's address must be looked up on a map to determine city/county boundaries. From there, the municipality is identified and if they have an additional code, there may be taxes due to the city AND county for 1 insured.

2. Since tax *rates* and tax *types* vary by state, the retail agent has great difficulty accurately estimating tax amounts to be collected from the insureds. This creates mayhem for our accounting department when trying to process the tax payments. This is greatly affected by item #1 since the tax calculation process for KY is so cumbersome.

3. As I mentioned above, each state has their own requirements. Please see attached excel spreadsheet showing the hoops we jump through for each state. I just want to reiterate that this is required for what we consider to be 1 insured.

Our preference would be to use the state where the group is registered, or the state with the greatest amount of premium, as the home state. Tax amounts and other requirements would then follow the rules in that state.

Thank you in advance for your consideration on this matter. Please let me know if you need clarification on any of the points above.

Lauren (McLean) Thatcher | Assistant Vice President, Compliance Manager
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www.brownandriding.com | LinkedIn

RICARDO LARA
CALIFORNIA INSURANCE COMMISSIONER

January 10, 2022

VIA ELECTRONIC MAIL to ADaleo@naic.org

Tom Travis
Chair
Nonadmitted Insurance Model Act (#870) Drafting Group (the "Drafting Group")
Surplus Lines (C) Task Force
National Association of Insurance Commissioners
Attention: Andrew Daleo

SUBJECT: Comments on Nonadmitted Insurance Model Act (#870)

Dear Mr. Travis,

We appreciate the Drafting Group's work with respect to the Nonadmitted Insurance Model Act (#870) Drafting Group to both bring it into compliance with the Nonadmitted and Reinsurance Reform Act (NRRA) as well as other amendments to modernize the model.

We appreciate the opportunity to offer the following comments to the Drafting Group:

1. **Definition of "Home state" for unaffiliated groups (such as risk purchasing groups)**

If the Task Force chooses to explore the development of a definition of "Home state" for unaffiliated groups, such exploration and development should be conducted separately from the current work of the Drafting Group. This is because, as shown in a previous exploration of the issue within the Task Force, differing opinions regarding the matter may exist and other may arise. Proper treatment of the issue requires an appropriate forum or mechanism and sufficient time. A rushed definition might create problems instead of solutions. For these reasons as well as efficiency to the work of the Drafting group, we recommend that the exploration of a definition be taken up separately.

We note that the California Insurance Code ("CIC"), similar to the NRRA, has a definition of "Home state" for affiliated groups (CIC §1760.1(e)(4)), but not for unaffiliated groups. According to the Surplus Lines Association, which is the California Department of Insurance "CDI")'s surplus line advisory organization, this has not created a market problem or disruption in the placement, registration, or tax payment of such surplus line insurance.

2. **Domestic surplus lines insurer**

If insertions will be made so that Model Act (#870) will have references to "Domestic surplus lines insurer," all such references must be in brackets or other indicators that show such inserted language is optional and does not apply to all states.

We note that the California law does not provide for domestic surplus lines insurers.

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We may have further comments after the Drafting Group incorporate comments in an updated revised draft and exposes it for comments before it presents a revised Model Act #870 to the Task Force.

Should you have any question about this letter, please feel free to contact me.

Sincerely,

Libio B. Latimer
Attorney IV

cc: Bryant Henley, CDI
Michelle Lo, CDI
Kim Hudson, CDI

THE COUNCIL
The Council of Insurance Agents & Brokers

July 19, 2022

VIA ELECTRONIC MAIL – ADaleo@naic.org

Commissioner Jim Donelon,
Chair, Surplus Lines Task Force
National Association of Insurance Commissioners
c/o Mr. Andy Daleo
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

RE: Comments on May, 2022 Exposure Draft of the Nonadmitted Model Act #870

Dear Commissioner Donelon and members of the Surplus Lines Task Force:

The Council of Insurance Agents and Brokers ("The Council") appreciates this opportunity to comment on the Task Force's most recent draft revisions to the May 2022 Nonadmitted Model Act #870.[1] The Council strongly supports and applauds the Task Force's efforts to modernize the model to reflect the federal Nonadmitted and Reinsurance and Reform Act (NRRA). Accordingly, our comments below focus solely on changes in the May 2022 exposure draft. We look forward to continued discussion with the Task Force on these important issues.

1. *We suggest removing the language in section 3. Definitions J(4) "in the case of an unaffiliated group policy" because it is inconsistent with the NRRA's overarching objective of streamlining regulatory and tax authority of group surplus lines policies.*

It is neither practical nor feasible for regulators and brokers to be subjected to tax payments in multiple states for each unaffiliated group member. The common practice among states has been to designate the principal place of business of the unaffiliated group as the home state, just as the NRRA requires that the principal place of business of an affiliated group be the home state. Suggesting that states may regulate and tax unaffiliated groups at the member level creates a burdensome administrative challenge for regulators and brokers. States adopting this approach would bear a significant burden by potentially having to process hundreds if not thousands of de minimis tax payments, which would result in minimal tax revenue.

But more importantly, brokers deterred by burdensome regulatory and tax requirements, including the increased costs, would be less likely to place unaffiliated group policies, reducing options for those consumers.

Therefore, we urge the Task Force to remove or redraft this definition and avoid any reference to an individual insured for placement or taxation purposes, including the

[1] Draft Revised Nonadmitted Model Act Language (May, 2022), available at: https://content.naic.org/sites/default/files/inline-files/3%20DRAFT%20Model%20870%20May%202022.pdf

comment in the draft that regulatory and tax authority could be determined at the member level, where appropriate.

~~(4) In the case of an unaffiliated group policy:~~

~~(a) If a group policyholder pays 100% of the premium from its own funds, then the home state is determined according to paragraphs (1) and (2).~~

~~(b) If a group policyholder does not pay 100% of the premium from its own funds, then the home state is determined according to paragraphs (1) and (2) for each member of the group.~~

~~Comment: The NRRA definition of "home state" includes Paragraphs (1), (2), and (3). The NRRA definition does not expressly cover unaffiliated groups such as risk purchasing groups. The addition of Paragraph (4) is intended to bring clarity by treating the members of such a group as individual insureds for purposes of placement and taxation, where appropriate.~~

2. *To avoid confusion regarding the commencement of Consumer Price Index (CPI) adjustments, we suggest revising the model definition in section 3. for "Exempt Commercial Purchaser" to begin with a definitive starting point. We recommend adding the following language at section 3H(3)(b), "effective on* ***July 21, 2010,*** *and each..."*

The NRRA does not specify a CPI commencement date; however, it did define the dates for CPI adjustments, as the fifth January 1, after the adoption of the NRRA (July 21, 2010) and every five years after. Therefore, to reduce confusion, the model revisions should include a start date.

For these reasons, we recommend this minor clarification to the exempt commercial purchaser, section 3. Definitions at 3H(3)(b):

b. Effective on **January 1, 20~~[xx]~~10** and each fifth January 1 occurring thereafter, the amounts in Items (i), (ii), and (iv) of Subparagraph (a) of this Paragraph shall be adjusted to reflect the percentage change for such 5-year period in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

3. *Include language encouraging states to adopt commonsense diligent search requirements. The current lack of uniformity and burdensome declination reporting landscape no longer provides meaningful protection to agents and brokers or policyholders who must purchase insurance in the nonadmitted market.*

We suggest the Task Force demonstrate its commitment to the NRRA by encouraging regulators to adopt uniform diligent search requirements. Ideally, the model should include specific language for states to consider, such as exemptions for commercial surplus lines placements, Commissioner-created export lists, and declination requirements only upon initial purchase and not at each renewal.

4. *Remove Section 9. "Service of Process (H)," which states arbitration should occur within the State where the risk is located. This language could harm consumers who are required to travel and be subjected to a state other than their home state or principal place of business.*

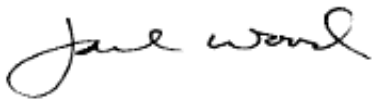
~~H. Notwithstanding conditions or stipulations in the policy or contract, a Nonadmitted Insurer subject to arbitration or other alternative dispute resolution mechanism arising in this State or relative to property, risks or exposures located or to be performed in this State under an insurance contract made by it shall conduct the arbitration or other alternative dispute resolution mechanism in this State.~~

~~Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the prior subsection 9 H. States should consider adoption or modification of the prior subsection in light of their own laws on arbitration or other alternative dispute resolution in insurance and commercial transactions.~~

* * *

Again, we appreciate the Task Force's continued efforts to update the Nonadmitted model act and your consideration of our comments. Please do not hesitate to contact us if we can provide additional information or answer any questions.

Respectfully submitted,



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CRC Group
Wholesale & Specialty

July 20, 2022

Commissioner Jim Donelon, Chair
Surplus Lines Task Force
National Association of Insurance Commissioners

Re: Nonadmitted Insurance Model Act

Commissioner Donelon and members of the Surplus Lines Task Force:

On behalf of CRC Group, I would like to thank the Model 870 Drafting Group for your hard work on revisions to the Nonadmitted Insurance Model Act. I would also like to thank the Surplus Lines Task Force for allowing the industry to comment on the draft. Surplus Lines is a core part of CRC's operations and we appreciate the opportunity to contribute to the conversation.

Our surplus lines team and I would like to comment on two topics in particular: unaffiliated groups and the diligent search process.

Regarding unaffiliated groups, CRC believes that the home state of a policy covering an unaffiliated group should be the home state of the group policyholder. We believe this approach is aligned with the Non-admitted and Reinsurance Reform Act goal of vesting a single jurisdiction with sole regulatory and tax authority over the surplus lines transaction. We also believe this approach is best for both the industry and consumers. CRC has a moderately high volume of multi-state unaffiliated group policies. A definition of home state that would allow for multiple home states would be a significant administrative challenge and would create immediate staffing concerns for companies such as CRC and service concerns for our clients and insureds who place these types of policies. As such, I respectfully encourage the task force to omit or amend the definition of home state for unaffiliated groups in Model 870.

As to the diligent search process, CRC appreciates the drafting group's recognition of the various state-by-state approaches to this topic and modernizations taking place in some jurisdictions. Aspects of the diligent search process consistently pose administrative and operational challenges for brokers such as CRC. I would respectfully encourage you to include modernization examples in the drafting note as they may be helpful for states seeking to consider changes in this area.

Sincerely,

Dave Obenauer
Chief Executive Officer
CRC Group
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980.465.5823

EXCESS LINE ASSOCIATION OF NEW YORK
120 Wall Street, 24th Floor
New York, New York 10005
Howard W. Greene
Director of Government Affairs & Strategic Initiatives

July 22, 2022

The Honorable Jim Donelon,
Chair, Surplus Lines Task Force
National Association of Insurance Commissioners
C/o Mr. Andy Daleo
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

RE: Comments on May 3, 2022 Exposure Draft of the Nonadmitted Insurance Model Act

Dear Commissioner Donelon and members of the Surplus Lines Task Force:

The Excess Line Association of New York (ELANY), the statutorily created surplus lines stamping office for New York State, commends the Surplus Lines Task Force for its thoughtful work on revisions to the Nonadmitted Insurance Model Act. We strongly believe that both efficiency and consistency in regulatory oversight of the surplus lines marketplace is a critical goal and ELANY is supportive of the Task Force's efforts in this regard.

Overall, ELANY supports the comments submitted to the Task Force by the Wholesale & Specialty Insurance Association (WSIA). We would like to focus on one point in particular that the Task Force should strongly consider.

States have varying approaches to diligent search requirements. Some states have eliminated it altogether; others employ an Export List to exempt specified coverages, while certain states have adopted other exemptions. In addition, diligent search reporting requirements vary state-by-state.

The public policy behind diligent search is to ensure that only risks that admitted insurers will not write flow to the surplus lines market. Where there is negligible chance of risks being written by surplus lines insurers that admitted carriers will readily accept, diligent search has little consumer protection efficacy and the requirement simply adds unnecessary confusion and delay to the process of placing insurance that consumers want. ELANY strongly believes that the Nonadmitted Insurance Model Act would serve the best interests of consumers, insurers and producers by explicitly recognizing the intent to focus diligent search on transactions where it is necessary to serve the public policy interest for which it exists.

Many states currently exempt certain risks from the diligent search. While most states require it, five permit surplus lines placements without a diligent search (four completely, one for commercial lines). In addition, Illinois exempts commercial lines surplus lines placements from the diligent search requirement when the risk

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Director of Government Affairs & Strategic Initiatives

is referred to the surplus lines producer by a licensed insurance producer who is not affiliated with the surplus lines producer. Texas exempts certain classes of business that are deregulated in the admitted market. Export Lists are maintained by 18 states. Only 13 States require diligent search declination information to be filed for each risk with the state or the state's surplus lines stamping office.

ELANY respectfully suggests that the drafting note immediately following Section 5(A)(4) be amended as follows to reflect existing practices, and to emphasize the necessity of imposing diligent search only when necessary to achieve its public policy objective (recommended language in blue):

> Drafting Note: ~~States may prefer to reference "kind of insurance" rather than "type of insurance" in Section 5A(3). The term utilized should be defined within the Act.~~ The diligent search requirement of Section 5A(3) must be satisfied in accordance with the statutes and regulations of the governing S~~s~~tate. ~~Such~~ Diligent search statutes and regulations ~~might~~ vary from S~~s~~tate to S~~s~~tate in terms of the number of declinations required and the P~~p~~erson designated to conduct the search. Several States permit surplus lines placement without a diligent search for or without regard to the availability of admitted coverage. States may want to consider the need to modernize diligent search requirements in light of electronic transactions. States should consider requiring diligent search only when necessary to assure that risks are only being written in the surplus lines market when admitted insurers will not do so, and that diligent search reporting requirements are limited to essential data points that the State or stamping office actively utilize. Wholesale placements in which the wholesale producer is unaffiliated with the retail producer, classes of business that are deregulated in the admitted market, and the use of Export lists are examples of risks that States should consider exempting from diligent search requirements. Section 5A(3) does not prohibit a regulatory system in which a S~~s~~urplus L~~l~~ines L~~l~~icensee may place with an eligible N~~n~~onadmitted I~~i~~nsurer any coverage listed on a current "E~~e~~xport list" maintained by the C~~e~~ommissioner. The E~~e~~xport list would identify types of insurance for which no admitted market exists. The C~~e~~ommissioner may waive the diligent search requirement for any such type of insurance.

Thank you for your consideration. ELANY stands ready to work with the Task Force toward achieving a revised Model that protects consumers, and encourages focused regulation that permits the efficient placement of risks in the surplus lines market.

Sincerely,

Howard W. Greene

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www.elany.org
(646) 292-5591

July 18, 2022

Via Email

The Honorable James Donelon
Louisiana Commissioner of Insurance
Chair, NAIC Surplus Lines Task Force

Re: Draft Revisions to the Nonadmitted Insurance Model Act ("the Model Act")

Dear Commissioner Donelon:

This comment letter is submitted on behalf of Underwriters at Lloyd's, London ("Lloyd's") in response to the referenced exposure. Lloyd's is the largest writer of nonadmitted insurance in the United States. In 2021, Lloyd's wrote more than $13.6 billion in surplus lines premium and an additional $1.47 billion in other nonadmitted premiums, encompassing business from all 50 states. We appreciate the opportunity to provide these comments.

Lloyd's supports the Drafting Group's work to update the Model Act to reflect the Nonadmitted and Reinsurance Reform Act of 2010 ("the NRRA"). We agree with the trades' position that the Model Act should adhere to the NRRA's principles and use NRRA definitions to the extent possible. The proposed definition of the home state for "unaffiliated groups" demonstrates the perils of deviating from NRRA principles. The NRRA sought to simplify and streamline nonadmitted compliance through the designation of a single "home state" with the sole authority to regulate and tax each nonadmitted policy. However, as currently proposed, the definition of home state of an unaffiliated group instructs that the home state is where each premium paying member of the group resides. This could result in a single unaffiliated group policy having multiple "home states," which is entirely inconsistent with the NRRA. Lloyd's respectfully suggests the following definition of home state of an unaffiliated group as more consistent with the NRRA:

> if the insured is an unaffiliated group, the home state of the insured shall be the principal place of business of the group, without regard to the location of the members of the group that may be insured under the master policy

Alternatively, the Task Force could choose not to create a definition of the home state of an unaffiliated group. Unaffiliated group is not a defined term in the NRRA. In fact, the words unaffiliated group do not appear a single time in the NRRA. Therefore, creating a definition of the home state of an unaffiliated group is not necessary to bring the Model Act into compliance with the NRRA. Such a position would be consistent with the past work of the Surplus Lines Task Force, which, as recently as 2017, adopted a report from another drafting group which concluded that a definition was not needed, as there was no urgent problem in need of a solution. Indeed, there is little evidence that a regulatory issue exists with regard to determining the home state of unaffiliated groups. Lloyd's writes surplus lines business in all 50 states, and our underwriters do not believe this is an area requiring additional regulatory guidance.

It is worth noting that surplus lines brokers and carriers are well aware of the NRRA's omission of the term "unaffiliated groups." This omission was created well over a decade ago, and since that time the industry practice has been to designate the principal place of business of the unaffiliated group as the home state, just as the NRRA requires that the principal place of business of an affiliated group be the home state. When the NRRA was enacted in 2010 the legal analysis at that time was that such an approach was the only outcome consistent with the NRRA, as there was no obvious reason to treat the home state of "unaffiliated groups" differently than "affiliated groups." Absent specific state law on unaffiliated groups, this remains the widely accepted legal analysis today. Lloyd's urges the Task Force not to deviate from this established and mainstream position.

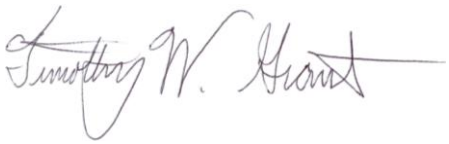
It is also helpful to remember why policies are written on a group basis. Group policies leverage efficiencies and economies of scale to make insurance more available and affordable for group members than it would otherwise be. Requiring compliance for unaffiliated groups at member level would eliminate these benefits and make group insurance for the members unfeasible in many circumstances. In a time of rapid and sustained inflation, it is incumbent upon all elected and appointed officials to take measures to mitigate the harmful impacts of inflation. Altering the regulatory treatment of group policies would do just the opposite – it would make insurance more expensive and less available in an economic climate that is already extremely challenging for many Americans. Therefore, designating a single home state for unaffiliated groups is not only the correct legal outcome, it is also the best policy outcome.

Arbitration

Additionally, Lloyd's respectfully suggests that Section 9(H) on arbitration clauses should be deleted. Arbitration clauses in commercial insurance contracts should be fully negotiable, including the location of the arbitration proceedings. It is not unusual for commercial insureds with operations in multiple states to designate a single, convenient location for arbitration, often in a major commercial city. As drafted, Section 9(H) would not allow this as it would require arbitration to occur where exposures or risks are located, even if such a state is not the home state. This violates the home state principle of the NRRA and also impinges upon surplus lines insurers' freedom of form, which is essential to covering hard to place risks.

Lloyd's appreciates the opportunity to offer these comments and would be glad to discuss them further with the Task Force.

Very truly yours,



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BY EMAIL

Commissioner Jim Donelon
Chair, Surplus Lines Task Force
National Association of Insurance Commissioners
c/o Mr. Andy Daleo
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

21 July 2022

Dear Commissioner Donelon and Members of the Surplus Lines Task Force:

Nonadmitted Insurance Model Act ("Model Act")

We and our clients appreciate the opportunity to provide you and members of the Surplus Lines Task Force (the "Task Force") and the Surplus Lines Working Group (the "Working Group") with our comments regarding the May 3rd draft (the "Draft") of the Model Act. As you know, we represent many nonadmitted insurers, both U.S. based and those listed by the International Insurers Department of the NAIC. We applaud and support the Task Force in undertaking the work to develop much-needed updates to the Model Act consistent with changes brought about by the Nonadmitted and Reinsurance Reform Act of 2010 ("the NRRA"). As noted in our comments below, while we believe there are additional revisions to the Draft that would enhance and ensure consistency with the NRRA we also believe that there are further opportunities to modernize regulation of this key segment of the industry—the "laboratory" of the industry – consistent with the stated goals of the NAIC's Innovation, Cybersecurity and Technology (H) Committee.

Home State

On the 12th anniversary of its passage, it is important to recall that a key objective of the NRRA was to streamline the process for multi-state surplus lines placements. The Draft's proposed definition of the home state for "unaffiliated groups" does not get us closer to attaining this objective.

The NRRA provides for a single "home state" for each multi-state nonadmitted insurance placement, and states that "the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State." See Section 522 of the NRRA. The NRRA itself does not provide for a separate definition of home state with respect to unaffiliated groups. The current Draft introduces a definition of home state for an unaffiliated group that would result in separate home states for each group member.

Namely, under the Draft, the home state is determined by reference to the principal place of business or principal residence of *each group member*. For group and blanket business this means that there

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are likely to be multiple home states (perhaps every single state for placements involving participants nationwide), instead of what should have been a single placement of insurance in the master policyholder's home state. In practice, it means that surplus lines brokers will effectively have to treat every issuance of a certificate or evidence of insurance under the master policy as a separate surplus lines insurance placement, with attendant diligent search, reporting and surplus lines tax payment obligations, which will likely result in these types of coverages not being written in the surplus lines market at all.

There is a decades-long history of difficult-to-place group and blanket insurance being written in the surplus lines market. Specialist surplus lines brokers and insurers have been able to take on programs that are too large (or too small) for admitted insurers, too risky or too novel – coverages with no track record in the marketplace such as cyber and insurtech products. In addition, to the extent that regulators are proposing community-based property insurance for wildfire or flood risks, a surplus lines group policy could provide the ideal solution for such distressed markets. Adopting the proposed definition of home state for unaffiliated groups would instead mean that those states which adopt the Model Act will foreclose access by their residents to master policy insurance programs on a surplus lines basis. And if not foreclosing access entirely, such coverages will only be available on a more expensive single policy basis without the economies of scale normally associated with group or blanket insurance.

It has now been 12 years since the NRRA was enacted, and 11 years since it went into effect. We are unaware of any regulatory problems having arisen during this time that would suggest a need for adopting such a definition of home state for unaffiliated groups; indeed, in our experience treating the home state of the master policyholder as the home state for tax and compliance purposes was the default approach even prior to the NRRA's existence. We would therefore urge the NAIC to maintain the status quo – that is, silence on the definition of home state for unaffiliated groups – since that approach is consistent with the NRRA and is the only logical interpretation of the NRRA that would allow group and blanket insurance to continue to be written on a surplus lines basis. Indeed, to the extent that any state adopts a contrary definition of home state for unaffiliated groups, it is our view that such laws conflict with the NRRA and on that basis alone ought to be repealed. But we also believe that in a time of unparalleled technological change, combined with so many insurance challenges (climate change, cybersecurity and pandemics to name three) regulators and legislators ought to be opening the door to the type of innovation that master policy programs can support.

Diligent Search

If the Task Force wishes to use its definition of "home state" in the current draft, then we believe the only way to do so without effectively eliminating the availability of group and blanket insurance in the surplus lines market would be to revise the Model Act to allow for streamlining of surplus lines diligent searches in those states that still require diligent searches. For example, brokers should be allowed to perform a single diligent search in the group policyholder's home state. Brokers should also be permitted to rely on their market knowledge that no admitted insurers are willing to write certain novel types of cover without having to ask admitted insurers over and over again for declinations on every new policy. States should prioritize the digitization of the surplus lines filing process. All states should maintain export lists and should update them on a frequent basis.

These goals – or some combination of these goals – would all be consistent with the aim of the Innovation, Cybersecurity and Technology (H) Committee. Indeed, we agree with the comments from WSIA that updating the Model Act provides the opportunity to carry out the aims of the Innovation and Technology (EX) Task Force in its 2020 request for suggestions of Covid-19 regulatory accommodations for remote working that could be made permanent so as to modernize the industry, now that it has been proven such accommodations worked well and did not harm consumers. Some of

the suggestions provided to the Innovation and Technology (EX) Task Force at that time included eliminating the requirement for hard copy and/or notarized affidavits of diligent search, and eliminating the requirement to file proof of a diligent search for every surplus lines risk. Since the NRRA does not address these topics, they could be incorporated into the Model Act in a manner that is consistent with the NRRA. In fact, arguably any effort to streamline the surplus lines placement process is consistent with the spirit if not the letter of the NRRA.

Arbitration

Section 9(H) of the Draft requires arbitration to occur where exposures or risks are located, regardless of the home state. This language was in the previous version of the Model Act, but in order to be consistent with the NRRA, we believe the language should be deleted. As you well know, nonadmitted insurers generally have expansive freedom of form and at least for commercial lines buyers typically negotiate the arbitration clauses in their policies. In short, we believe that arbitration should be permitted in whichever state (or country) the parties designate in the contract, regardless of whether the exposures are located in that state. Typically both insurers and insureds prefer to have the predictability of a single specified location as the venue in which insurance disputes can be resolved, rather than requiring the arbitration to take place wherever the exposure is. The language in Section 9(H) would remove that freedom for the parties to negotiate their preferred venue for arbitration but instead would leave it up to chance when a loss occurs.

Thank you again for the opportunity to provide these comments. We would be pleased to discuss any questions the Task Force may have.

Yours sincerely

Andrea Best

Andrea Best

NRRA National Risk Retention Association

July 11, 2022

Commissioner James J. Donelon, Chair
Surplus Lines (C) Task Force
National Association of Insurance Commissioners

Attn: Andrew T. Daleo
NAIC
Via Email: ADaleo@naic.org

Re: Nonadmitted Insurance Model Act (#870) - Draft Revisions
Supplemental Comments addressing Congressional Intent

Dear Commissioner Donelon:

The National Risk Retention Association ("NRR Association") appreciates the opportunity to submit our supplemental comments for consideration by the Surplus Lines (C) Task Force with respect to the exposed draft revisions to the *Nonadmitted Insurance Model Act* ("Model Act"). In an effort to not repeat what has been discussed already by members of the committees and industry representatives, the purpose of this letter fundamentally is to provide a necessary analysis of the **congressional intent** underlying two separate federal statutory schemes vis-à-vis the proposed language of the Model Act. Indeed, the judicial determination of "legislative intent" is more often than not the "go to" remedy used by courts everywhere to help resolve issues of interpretation or conflicts in the resolution of what particular laws were intended to accomplish.

Premised on bringing the Model Act into conformity with the federal Nonadmitted and Reinsurance Reform Act ("NRRA"), the exposed draft revisions to the Model Act include the addition of a new Section 3.J defining "Home State"; however, the inclusion of Subsection (4) in Section 3.J deviates substantially from the definition provided in the NRRA by addressing the determination of "home state" in the case of an unaffiliated group, which is nowhere addressed in the NRRA. Specifically, that Subsection provides as follows:

> *(4) In the case of an unaffiliated group policy:*
> *(a) If a group policyholder pays 100% of the premium from its own funds, then the home state is determined according to paragraphs (1) and (2).*
> *(b) If a group policyholder does not pay 100% of the premium from its own funds, then the home state is determined according to paragraphs (1) and (2) for each member of the group.*

While later in this letter below the NRR Association will focus more definitively as to how reliance upon the proposed language of subsection (4) would be preempted by the LRRA, as a starting

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point, the NRR Association concurs with the comments provided to the Task Force by WSIA on June 27, 2022, and by Underwriters at Lloyd's, etc. on June 30, 2022, on their observations *inter alia* concerning the potential for unanticipated damage which conceivably will take place should Section 3.J as drafted be adopted in the revisions to the Model Act. As a separate consideration and not to be confused with what is set forth below, the NRR Association also concurs with WSIA's and Lloyd's request that the Task Force delete in its entirety section 9(H) of the Model act, i.e., the arbitration venue provision. NRR Association's position is predicated upon three (3) separate legal bases that would appear to render section 9(H) illegal and unenforceable. For ease of reading, those legal bases are summarized in Addendum A to this letter.

NRR Association has a significant interest in the exposed revisions to the Model Act. We are an IRC Section 501(c) (6) non-profit and non-partisan trade association that is dedicated to the development, education, and promotion of U.S. alternatives to traditional insurance, specifically risk retention groups ("RRGs") and risk purchasing groups ("RPGs") created under the federal Liability Risk Retention Act ("LRRA"), 15 U.S.C. Sec. 3901 et seq.

Historically, this federal legislation (the LRRA, enacted in 1986, and its predecessor, the Products Liability Risk Retention Act [PLRRA] which was adopted in 1981) was motivated by a crisis in the industry at the time earmarked by the ***unavailability*** and ***unaffordability*** of commercial liability insurance. Given the same issues which continue to exist to this day in one form or another in the commercial liability insurance arena, RRGs and RPGs remain as relevant and critical today as important mechanisms for solving marketplace inefficiencies and deficiencies for commercial liability consumers.

At present there are well over 1,000 RPGs which have been formed across the country, providing access to insurance for hundreds of thousands of commercial liability insurance consumers and their businesses that otherwise might not be able to obtain or afford access to the important insurance products they need. Most of these RPGs access the nonadmitted insurance market for the group purchase of commercial liability insurance for their members and virtually all RPGs have been associated with what is referred to as "unaffiliated" groups under the applicable definitions provided within the NRRA.

While, as noted below, the NRRA specifically exempts application to RRGs formed under the LRRA, the NRRA nowhere addresses the treatment of "unaffiliated groups" which would include all RPGs formed under the LRRA. The Task Force's desire to address this omission in the pursuit of its overall charge to address uniformity in the treatment of nonadmitted insurance taxation and regulation is understandable; however, the inclusion of Subsection (4) in the new Section 3.J draft revision to the Model Act constitutes an action that is at the same time unnecessary in order to conform the Model Act with the NRRA, and clearly represents an intrusion into congressional authority with respect to a federal law that runs the risk of federal preemption. This is precisely the conclusion reached by the Surplus Lines Drafting Group in its report of April 3, 2017 on the subject of Determining the "Home State" of Unaffiliated Group Policies in recommending that no action is necessary.

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If the Task Force determines to pursue action against that former recommendation, given the impact of proposed Subsection (4) for RPGs formed and operating under the LRRA, the NRR Association believes that before doing so it is critically important for the Task Force to recognize that in this instance it is effectively presented with the task of devising a Model Law that must satisfy the intent of, not one, but actually two (2) federal statutes. Accordingly, it is appropriate and necessary to analyze the **congressional intent** imbedded in **both** the LRRA and the NRRA so as to not complicate the matter or otherwise result in unintended consequences in the process. Indeed, given the circumstances, congressional intent is all we have to work with here, rather than to engage in any exercise attempting to rewrite a federal law, much less these two statutory schemes created by the Congress. So in the words of the Hippocratic oath in medicine, please let us "do no harm!"

Since it is the elder of the two statutes, and poignantly affecting the RPG entities specifically enabled under same, we should start with a discussion of the **congressional intent** underlying the LRRA.

As stated earlier, it is important to remind the reader that RRGs were **expressly exempted** from application in the NRRA.[1] RPGs were not, in all probability because the Congress and the drafters did not see the need to exempt them, in light of what they are and what they do. This observation will become more focused below.

First, both RRGs and RPGs are *group* entities with requirements that their members be in the same or similar business or professions. RRGs *write* insurance on a *group* basis, while RPGs only *purchase* (i.e., "pay for") liability insurance on a *group* basis. Both were unquestionably designed to acquire coverage in a way that allows them to avoid the perennially challenging problem of unavailability and/or unaffordability of coverage to their unique businesses. Both are enabled under the *same federal legislation*, and each of which, while drafted as alternate images of one another, nevertheless contain highly specified safeguards to prevent states from undertaking conduct calculated to impede their progress or success.[2]

Second, another interesting comparison of the two entities in the statutory scheme, however, reveals a substantively important distinction between the treatment of RRGs vs RPGs in terms of premium taxation:

15.U.S.C., §3902 (a) (1) (B) (the RRG provisions) allows non-domiciliary states to require RRGs to:

> …"pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;…."

[1] See HR 4173 §527(11)(B), expressly excluding risk retention groups from the definition of "non-admitted" insurers thereunder.

[2] 15 U.S.C. §3902 and §3903 et seq.

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While it is clear that the Congress intended RRGs and RPGs to occupy similar but alternative purposes under the LRRA, one wonders why §3903 (the RPG provision) does not contain a similar provision? At the risk of oversimplification, the answer boils down to the reality that **1)** RRGs are insurers which underwrite, price and sell policies in different states, whereas **2)** RPGs are not insurers, they do not underwrite, price or sell policies in different states, but only really collect the money, i.e., pay for the policy(s), usually a "master policy" from an admitted or non-admitted carrier.

Third, to illustrate why the Congress did it this way, we need only look at §3903(f) (in the RPG provisions), which provides,

> …" (f) Purchases of insurance through licensed agents or brokers acting pursuant to surplus lines laws
>
> A purchasing group may not purchase insurance from a risk retention group that is not chartered in (**a)** State **or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State."**

Ergo, an RPG can purchase its group coverage through an RRG domicilied in any state, because the RRG will be subject to the allocation of premium taxes, pursuant to §3902 (a) (1) (B). If it procures the coverage through an admitted carrier within the state, that carrier, through its agents and brokers, is obviously responsible for the tax. And finally, if it procures the insurance through a non-admitted, surplus lines carrier, it must do so using a licensed agent or broker, etc., through which the tax must be paid. Note the consistency between this language and what is later decided in the NRRA to be the "home state."

Next we turn to a discussion of the congressional intent of the NRRA.

With the NRRA, the legislative intent of Congress is clearly articulated. The legislative history demonstrates that the purpose of the NRRA was and is to streamline the regulatory regime and create national standards and a uniform system for non-admitted insurance premium tax payment by giving the home state of the insured sole regulatory authority over the collection and allocation of such payments. As noted in our prior November 23, 2021 letter to the Model Act Drafting Group (pp 1-2):

> *[T]he Nonadmitted and Reinsurance Reform Act of 2010 creates a* ***uniform system*** *for nonadmitted insurance premium tax payments* ***based upon the home state*** *of the policyholder, encourages the states to develop a compact or other procedural mechanism for* ***uniform tax allocation****, and establishes* ***regulatory deference for the home state*** *of the insured.* H.R. Rep. No. 111-517, at 868 (2010) (Conf. Rep.) (Emphasis added)
>
> *This bill would establish* ***national standards*** *for how states may regulate, collect, and allocate taxes for a type of insurance that covers unique or atypical risks, known as*

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> *surplus lines or nonadmitted insurance."* S. Rep. No. 111-176, at 223 (2010) (Conf. Rep.) (emphasis added).
>
> *The letter and spirit of the NRRA is "to provide a simpler, uniform tax reporting and payment process* ***with a single payment****, to the insured's home state, for each transaction."* 156 Cong. Rec. E2144-01, WL510906 (Dec. 15, 2010) (Emphasis added).

Looking now to the purpose and intent of the NRRA, it is clear that the intent of that act was and is to resolve and simplify the issue of which state or states would be entitled to collect premium taxes underwritten by surplus lines and non-admitted carriers. Congress rectified the issue by determining that the Home State (as defined in the NRRA) of the policyholder would be entitled to collect the surplus lines and non-admitted taxes. While the NRRA speaks in terms of an Affiliated Group, the same intent, rationale, and system of primacy for the initial collection of surplus lines and non-admitted taxes would and should clearly apply to non-affiliated groups.

Congress also created or attempted to create a system in the NRRA to re-distribute the surplus lines and nonadmitted taxes paid to the Home State of the policyholder/purchasers of the surplus lines and nonadmitted insurance. In this regard, Congress suggested that the various states enter into a compact to allocate among the states the premium taxes paid the policyholder's Home State. Unfortunately the NAIC and other interested parties attempted to agree on such a compact, however, no compact has been adopted by the states.

To treat an unaffiliated group differently from an affiliated group under and for purposes of the NRRA flies directly in the face and is therefore antithetical to the purpose of the NRRA. The Home State of the RPG should be the state entitled to collect the surplus lines and nonadmitted taxes for surplus lines and nonadmitted insurance purchased by the RPG for its members. Similar to the process outlined in the NRRA, any allocation of those collected taxes can or would be accomplished via a compact amongst the states.

The foregoing analysis inescapably leads to the conclusion that §3903 (f) is completely consistent with the above cited statements of congressional intent discussed by Congress in passing the NRRA, i.e., that the tax should and would be paid through the home state. It establishes a taxation scheme for RPGs authorized by the legislation and is consistent with no effort by the drafters of the NRRA to treat RPGs any differently.

From the perspective of a potential preemption analysis, in the case of the LRRA, the clear and similar congressional intent was to enable RPGs to function in a business-friendly environment similar to their counterparts, RRGs, in order to overcome the perennial challenges of unavailability and unaffordability of commercial liability insurance.

Section 3901 of the LRRA defines an RPG as follows:

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*... **(5)** "purchasing group" means any group which--*
__(A)__ has as one of its purposes the purchase of liability insurance on a group basis;
__(B)__ purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);
__(C)__ is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and
__(D)__ is domiciled in any State;

For this discussion, the pertinent excerpts of Section 3903 of the LRRA provide protections relative to RPGs as follows:

"... (a) Exemptions from State laws, rules, regulations, or orders
Except as provided in this section and section 3905 of this title, a purchasing group is __exempt__ from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would--

…
__(2) make it unlawful__ for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, __advantages, based on their loss and expense experience__, __not afforded to other persons with respect to rates, policy forms, coverages__, or other matters;

__(3) prohibit__ a purchasing group or its members __from purchasing insurance on the group basis__ described in paragraph (2) of this subsection;
…
__(8) otherwise discriminate against a purchasing group or any of its members__.
[emphasis added]

The overarching theme of Section 3903 of the LRRA and its components relating to RPGs, previously cited, whether taken individually or collectively, is that Congress intended that states are not to undertake activities designed to discriminate against RPGs or calculated to create impediments to the ability of RPGs to do business.

Under the LRRA, RRGs are granted broad preemption from state regulation with nine (9) specified exceptions. RPGs, on the other hand, are broadly subject to state regulation with express exemptions from state laws designed to impede their progress. While these two federal provisions were drafted differently by Congress, they were created to compliment each other in support of a scheme designed to fulfill the same congressional intent. Why and how risk purchasing groups (RPGs) constitute "unaffiliated" entities has been discussed in other comments letters and does not need to be repeated here. In any event, the foregoing is almost universally the characteristic of RPGs and how they are intended by Congress to operate using the methodology which is precisely described under the LRRA.

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As pointed out by the WSIA and Lloyd's in their comment letters to the Task Force, since passage of the NRRA over 10 years ago (albeit twenty-four [24] years after adoption of the LRRA) few states have taken the position proposed by Subsection (4) to determine the home state of an RPG at the level of the group member rather than at the level of the group itself. Hence, the Model Act (i.e., subsection [4]) as currently drafted would effectively force states to adopt treatment of RPGs that is contrary to the common practice currently in place and would actually violate the LRRA by requiring all RPGs to be subject to multi-state tax payment and reporting obligations. In many circumstances, this would be deemed treatment discriminatory against purchasing groups as a whole in violation of Section 3903(a)(8) of the LRRA.

Moreover, crucial to the preemption analysis is to pragmatically examine the effects of the proposed Model Act vis-a-vis subsections (2), (3) and (8) of §3903(a) of the LRRA. Allowing or encouraging states to separately tax and regulate RPG members will effectively prevent them from being able to participate in the RPG, by depriving them of the benefits of the home state taxation concept espoused by the NRRA. The action is thus tantamount to "making it *unlawful* for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, **advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters**;" or would effectively "**prohibit an RPG or its members from purchasing insurance on the group basis"** described in paragraphs (2) and (3) of this subsection. By definition, therefore, the conduct would also be discriminatory, as prohibited in subsection (8).

Any violation of subsections (2)(3) and (8) of Section 3903(a) of the LRRA either separately or in concert with one another, would be preempted by the LRRA and probably the NRRA. This would be the practical result if the Model Act would promote states to tax the RPG members individually, rather than as a group.

Therefore, there appears to be a very cogent unanimity and nexus between the congressional intent as to the federal NRRA and the federal LRRA. The intent of both is to simplify the bureaucracy rather than to complicate it; to make affordable that which is not; and to generally promote a scheme that recommends that the states do the right thing here and simplify the process to make it possible for insurance consumers to have more access to the insurance they need.

Accordingly, to require determination of the home state of an RPG at the member level rather than at the group level would subject all RPGs to additional administrative burdens and reporting obligations to multiple jurisdictions in contradiction to the intent of both federal laws. The NRR Association asserts that inclusion of Subsection (4) of new Section 3.J of the proposed, revised Model Act would not solve the problem, but, rather, would effectively open the door to multiple potential violations of subsections (2)(3) and (8) of Section 3903(a) of the LRRA.

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In conclusion, the NRR Association strongly encourages the Task Force to consider removing Subsection (4) of new Section 3.J of the proposed, revised Model Act in order to avoid the confusion and damage to the marketplace which will most certainly be the unintended consequence of trying to craft a "definition" of what is meant by an "unaffiliated" group in the absence of congressional effort to amend the statute.

Very Truly Yours,

Joseph E. Deems
Executive Director

cc: Nancy Gray, NRRA Chair
Jon Harkavy, NRRA Vice-chair
Heather Ross, Vice-chair NRRA Government Affairs
Gerald Yoshida, Esq. Goodsill Anderson, Honolulu (GAC Drafting Group)

NRRA National Risk Retention Association

Addendum "A"

Legal Bases upon which Model 870 Section 9(H) should be deleted

1. Section 4 of the **Federal Arbitration Act** (FAA) categorically excludes venue restrictions in arbitration clauses in insurance contracts.
2. By definition, "master policies" issued on a "group" basis under 15 U.S.C. §§3901, 3903 et seq. must logically be able to provide a uniform (i.e. single) policy that is the same for all members including its arbitration clause and venue provisions, if required. Any law that would defeat a venue provision in any master policy, which must remain uniform in all states, would be violative of the LRRA. You cannot have a "group" arbitration venue law than has to change from state to state.
3. Any arbitration clause contained in a master policy provided by a *risk retention group* to an RPG pursuant to LRRA §3903(f) would categorically preempt any state law restricting its venue provisions. See *Allied Prof's Ins. Co. v. Anglesey,* 952 F.3d 1131, 1132, (9th Cir. 2020) (LRRA preempted Washington anti-arbitration statute); *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976, 980 (9th Cir. 2016) ("*ALPS*") (LRRA preempted Alaska statutory prohibition on reimbursement of defense costs incurred by insurer defending noncovered claims.) *Speece v. Allied Prof'ls Ins. Co.*, 289 Neb. 75, 84 (2014). (Nebraska Supreme Court holding that a Nebraska law voiding arbitration clauses in RRG policies of insurance was preempted by the LRRA as to an RRG domiciled in another state; holding further upon remand that the venue provisions of said contract were also completely preempted by LRRA.)

WSIA WHOLESALE & SPECIALTY INSURANCE ASSOCIATION

July 18, 2022

Commissioner Jim Donelon, Chair
Surplus Lines Task Force
National Association of Insurance Commissioners

Re: Nonadmitted Insurance Model Act

Commissioner Donelon and members of the Surplus Lines Task Force:

The Wholesale & Specialty Insurance Association (WSIA) would like to thank the Model 870 Drafting Group for their extensive work on revisions to the Nonadmitted Insurance Model Act and would like to thank the Surplus Lines Task Force for the opportunity to comment on the draft. Most of the draft revisions to the model adhere to the charges of bringing it in compliance with the federal Nonadmitted and Reinsurance Reform Act (NRRA) and making other modernizations. However, there are a couple of areas where we believe improvement could be made and the following summarizes our position on these outstanding issues.

Unaffiliated group issues

The most important area where the draft goes beyond the uniformity of the NRRA, is the home state definition for unaffiliated groups.

WSIA maintains the position that the home state of a policy covering an unaffiliated group should be the home state of the group policyholder, in order to be consistent with the NRRA's goal of vesting a single jurisdiction with sole regulatory and tax authority over the surplus lines transaction. This concept is not reflected in the current draft; rather there could be multiple home states for a single policy based upon the home state of each member of the group. This would defeat one of the primary goals of the NRRA and would have significant consequences for the distribution and availability of insurance for a critical segment of consumers. Additionally, the definition within the draft represents the current practice in a small minority of states. The general practice in most states is to determine the home state of the group based upon the state where the group is located. We strongly encourage the drafting group to consider a definition that would make a home state determination at the group, rather than member level. If the task force does not adopt a group level determination, we would encourage the task force to consider the conclusions of the 2017 Surplus Lines Drafting Group Report - Determining the "Home State" of Unaffiliated Group Policies, and to table the issue until there is additional consensus from the states (Attachment A).

Practically, the definition currently in the exposure draft would create untenable burdens for brokers and regulators by forcing unaffiliated groups to submit to regulatory requirements and issue tax payments to

multiple states. If group policies require separate tax payments for each member of the group to be issued to each state of residence, brokers would be unable to continue servicing many of their existing group policies. To the extent that these policies would remain in place, states would have to process hundreds if not thousands of de minimis tax payments that cumulatively would not provide significant tax revenue for any state. Also, this public policy decision would only effect multi-state insurance policies which compose a relatively minor portion of all surplus lines in the United States but would have a significant impact on the administration of these policies. Statistics for multi-state versus single-state surplus lines policies are not widely available, but data provided by the Florida Surplus Lines Service Office showed that only 0.4% of policies reported to the office contained non-Florida risk and it's reasonable to estimate that only a small fraction of the 0.4% came from unaffiliated group policies. Including the current definition for unaffiliated groups will not have a significant impact on tax revenue because it makes up such a small portion of overall surplus lines premium; however, it will have a significant impact to the specific group of consumers that this type of policy serves, and in some cases is the best, if not only, way for them to have an affordable insurance option.

A definition of home state for unaffiliated groups that would create a significant administrative burden for issuing group policies will only hurt consumers. Conducting business under the proposed definition will, at best, unnecessarily increase the costs associated with the policies, but it is more likely that these policies will be eliminated altogether.

In the absence of consensus on this issue, and the lack of any national issue or generally held concern, we continue to urge the task force, as we urged the drafting group, to omit the definition of home state for unaffiliated groups from Model 870. Including a definition that is currently only incorporated into a small number of existing state laws, that is not agreed upon by most states, does not support the charges for this undertaking.

Diligent search

WSIA was pleased to see that the drafting group included language in the drafting note alluding to the modernizations that have occurred in several states in recent years. We believe there is an opportunity to expand upon this further and we would ask that the task force include specific examples of ways that the diligent search process may be modernized.

In 2020, the Innovation and Technology (EX) Task Force solicited comments from interested parties related to specific "regulatory relief" or "regulatory accommodations" offered by states as a result of the COVID-19 pandemic that they would recommend be made permanent. WSIA and other industry partners offered diligent search requirements as an example of a regulatory practice that could be improved in a remote work environment. When diligent search requirements are paired with wet signature, paper filing or notarization requirements, the process of completing diligent search becomes extremely difficult. Furthermore, the process of obtaining, documenting and filing declinations, even when done electronically, is largely viewed as an unnecessary, pro forma exercise, that does not necessarily ensure that surplus lines insurance continues to serve as a safety valve, rather than the market of first resort.

In recent years, several states have taken innovative approaches to ensure that the surplus lines market continues to serve as a supplemental market, without forcing agents and brokers to perform the tedious

task of obtaining declinations. We outlined several of these approaches in our November 3, 2021 letter to the drafting group and we would suggest that the drafting note be revised to reflect these innovations and give guidance to states seeking to modernize their diligent search process.

> Drafting Note: Some states do not require the diligent search in Section 5A(3). If a state includes the diligent search requirement, it must be satisfied in accordance with the statutes and regulations of the governing state. States may also choose to make exemptions to the diligent search requirement where appropriate. For example, Section 5A(3) does not prohibit a state from exempting commercial surplus lines placements from diligent search when a risk is referred to the surplus lines producer by a licensed producer who is not affiliated with the surplus lines producer. Nor does it prohibit a state from exempting commercial lines of insurance that are not subject to rate and form requirements in the admitted market. Nor does it prohibit a regulatory system in which a surplus lines licensee may place with an eligible nonadmitted insurer any coverage listed on a current "export list" maintained by the commissioner. The export list would identify types of insurance for which no admitted market exists. The commissioner may waive the diligent search requirement for any such type of insurance. Such statutes and regulations might vary from state to state in terms of the number of declinations required and the person designated to conduct the search. Section 5A(3) does not prohibit a state from deeming that a periodic filing by a surplus lines licensee constitutes a certification of diligent search. States may consider including a provision that requires the surplus lines licensee to produce evidence of the diligent search upon request.

Arbitration

Finally, we believe that the provisions of Section 9(H) also go beyond the task of bringing the model in compliance with the NRRA. As written, this provision dictates that arbitration must be conducted within the state where the risk is located. Under this provision, an insured may hold a policy whose home state is determined to be State A, but a claim occurs on a property located in State B, thus forcing the insured to engage in arbitration in a state that is neither their principle state of residence nor their principal place of business. This provision would be detrimental to an insurance consumer and would not comport with the spirit of the NRRA. Additionally, and of great concern for the recommended change, we believe that arbitration provisions within contracts for commercial insurance should be fully negotiable between the two parties. There are many instances where it may be advantageous for an insured to conduct arbitration in a state of their choosing rather than the state where the dispute arose. For these reasons, we would ask that Section 9(H) simply be removed from the model. Alternatively, the task force may consider an amendment at the end of subsection 9(H) that says, "unless the parties mutually agree to conduct the arbitration or other alternative dispute resolution elsewhere."

NRRA Reforms

With the recognition that most states having already updated their laws in accordance with the NRRA, WSIA appreciates the changes to the model that are undertaken with the intent of compliance with the NRRA. The most important change contained in the NRRA was the uniformity provided by setting a standard definition of determining the "home state" of multi-state risks. This definition, which was widely supported by NAIC membership, brought significant clarity to the taxation and regulation of surplus lines

insurance and has been recognized by every state. The revised model will provide a uniform guideline for states to incorporate "home state" provisions into their laws if they haven't already done so. In addition, the revised model provides guidelines for uniform eligibility standards and exempt commercial purchasers that correspond with the NRRA.

One technical issue we identified deals with the definition for Exempt Commercial Purchaser. Section 3H(3)(b) addressing the five-year Consumer Price Index (CPI) adjustment does not establish a definitive effective date for the commencement of CPI adjustments. Because the NRRA specifies the dates for each CPI adjustment on the fifth January 1, occurring the date after the enactment of the NRRA (July 21, 2010) and each fifth January 1 thereafter (January 1, 2015; January 1, 2020; January 1, 2025, etc.), we believe it is appropriate to revise the model language to establish a definitive starting point with the language, "Effective on **July 21, 2010** and each…" This would ensure uniform codification of the Exempt Commercial Purchaser thresholds revised by the CPI and reported by the NAIC every five years.

With some reasonable modifications, WSIA stands ready to support the proposed revisions to the model and serve as a resource to any states seeking to revise their existing surplus lines statutes. Thank you for the opportunity to comment and please let us know if you have any questions.

Sincerely,

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National Association of Insurance Commissioners & The Center for Insurance Policy and Research

To: Commissioner Donelon, Chair, Surplus Lines (C) Task Force

From: Surplus Lines Drafting Group

Re: Surplus Lines Drafting Group Report – Determining the "Home State" of Unaffiliated Group Policies

Date: April 3, 2017

During the Surplus Lines (C) Task Force meeting on August 26, 2016, a discussion was held regarding the federal *Non-Admitted and Reinsurance Reform Act* (NRRA). The discussion was based on the fact that the NRRA provides a definition of "home state" applicable to affiliated member group policies. However, determination of the "home state" for unaffiliated member group policies (such as for a risk purchasing group) was left undefined. Consequently, questions have arisen on how brokers determine which state(s) is/are due the tax collected on individual member premium. Commissioner Donelon directed the formation of a drafting group to develop a definition to determine the "home state" for unaffiliated groups. Subsequently, the Surplus Lines Drafting Group was formed which included, Brett Barratt (UT), Jill Jacobi (CA), Keri Kish (National Association of Professional Surplus Lines Offices—NAPSLO), and David Kodama (Property Casualty Insurers Association of America (PCI)).

The Drafting Group met via conference call on October 5 and 27, November 17, and December 1, 2016, and March 29, 2017 to discuss an approach to address the definition of the "home state" for unaffiliated groups. During these calls the Drafting Group:

- Agreed the charge was not to develop a proposed model law or regulation under NAIC model law guidelines.
- Reviewed existing state laws and regulations that address the determination of home state for unaffiliated group surplus line placements, post-NRRA.
    - These laws range from states which define an insured's "home state," in the context of unaffiliated groups, as (1) the state of each group member, or (2) the state of a purchasing group's domicile, when the purchasing group has paid the premium for such policy, and (3) by other methods.
- Considered several approaches to accomplish the charge that included, uniform guidance, statutory language, or the development of a bulletin to be issued to the stamping offices and brokers.
- Reviewed federal circuit court cases, pre-NRRA, interpreting the insurance regulatory authority of non-domiciliary states and risk purchasing groups and excerpts from the purchasing group section of the *NAIC Risk Retention Handbook.*
- Reviewed data and information collected from an NAIC Member Survey completed in June 2016.

Based on the Drafting Group's research and analysis, including the degree of urgency of the issue, the Drafting Group concluded that no action is necessary at this time. However, the Drafting Group recognizes that the issue may become more prevalent depending on how future policies are written, particularly in sharing economy expansion. The NAIC will retain all collected research and make it available to all parties, upon request.

The Drafting Group would like to thank Alaska, Washington State, Wyoming, the International Underwriting Association, and Lloyd's of London for their comments and recognizes that at some point in the future, this issue may need to be revisited, and action in this area may become necessary and for this reason the NAIC's retaining of this drafting group's work is recommended.