NAIC NATIONAL MEETING SPRING 2023

Draft date: 2/27/23

2023 Spring National Meeting
Louisville, Kentucky

SURPLUS LINES (C) TASK FORCE
Tuesday, March 21, 2023
11:00 a.m. – 12:00 p.m.
Kentucky Convention Center—Ballroom B—Main Concourse Level

ROLL CALL

James J. Donelon, Chair	Louisiana	Kathleen A. Birrane	Maryland
Larry D. Deiter, Vice Chair	South Dakota	Gary D. Anderson	Massachusetts
Mark Fowler	Alabama	Troy Downing	Montana
Lori K. Wing-Heier	Alaska	Joseph Rios Jr.	N. Mariana Islands
Peni Itula Sapini Teo	American Samoa	Nick Stosic	Nevada
Ricardo Lara	California	Mike Causey	North Carolina
Michael Conway	Colorado	Glen Mulready	Oklahoma
Karima M. Woods	District of Columbia	Michael Humphreys	Pennsylvania
Michael Yaworsky	Florida	Alexander S. Adams Vega	Puerto Rico
Michelle B. Santos	Guam	Michael Wise	South Carolina
Dean L. Cameron	Idaho	Carter Lawrence	Tennessee
Dana Popish Severinghaus	Illinois	Cassie Brown	Texas
Doug Ommen	Iowa	Mike Kreidler	Washington
Vicki Schmidt	Kansas		

NAIC Support Staff: Andy Daleo

AGENDA

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

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

3. Consider Adoption of the Draft *Nonadmitted Insurance Model Act* (#870) — Attachment Two
   —*Commissioner James J. Donelon (LA)*

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

5. Adjournment

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Draft Pending Adoption

Draft: 12/22/22

Surplus Lines (C) Task Force
Tampa, Florida
December 12, 2022

The Surplus Lines (C) Task Force met in Tampa, FL, Dec. 12, 2022. The following Task Force members participated: James J. Donelon, Chair, Stewart Guerin, and Tom Travis (LA); Larry D. Deiter, Vice Chair (SD); Lori K. Wing-Heier represented by Sian Ng-Ashcraft (AK); Mark Fowler represented by Jennifer Brantley (AL); Ricardo Lara represented by Libio Latimer (CA); Michael Conway represented by Rolf Kaumann (CO); David Altmaier represented by Jane Nelson (FL); Colin M. Hayashida represented by Martha Im (HI); Doug Ommen represented by Kim Cross (IA); Vicki Schmidt represented by Craig VanAalst (KS); Gary D. Anderson represented by John Turchi (MA); Kathleen A. Birrane represented by Erin Nickles (MD); Troy Downing represented by Kari Leonard (MT); Mike Causey represented by Tracy Biehn (NC); Jon Godfread represented by Jacob Just (ND); Michael Humphreys represented by Michael Fissel (PA); Elizabeth Kelleher Dwyer represented by Beth Vollucci (RI); Michael Wise represented by Ryan Basnett and 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 Oct. 17 Minutes

Walker made a motion, seconded by Cross, to adopt the Task Force's Oct. 17 minutes (Attachment ___). The motion passed unanimously.

2. Adopted the Report of the Surplus Lines (C) Working Group, Including the IID Plan of Operation

Guerin reported that since Oct. 17, the Surplus Lines (C) Working Group met Oct. 19 (Attachment __) and Dec. 7 (Attachment __) to discuss amendments to the International Insurers Department (IID) Plan of Operation and Dec. 8 in regulator-to-regulator session, pursuant to paragraph 3 (specific companies, entities or individuals) of the NAIC Policy Statement on Open Meetings, to discuss five applications seeking approval for listing on the NAIC *Quarterly Listing of Alien Insurers,* and all five applications were approved.

Kaumann made a motion, seconded by Van Aalst, to adopt the report of the Surplus Lines (C) Working Group, including the IID Plan of Operation. The motion passed unanimously.

3. Discussed Comments Received on the Exposure Draft of Model #870

Commissioner Donelon indicated that the *Nonadmitted Insurance Model Act* (#870) Drafting Group will provide an update on its work on the draft. Travis summarized that since the Oct. 17 meeting of the Task Force, the drafting group meet once on Oct. 24 to discuss revisions to Section 9H regarding arbitration. As a result, an amendment was made to Section 9H that reflects an exclusion of exempt commercial purchasers from the requirement to arbitrate in the state where the risk is located. Further, Commissioner Donelon stated that the drafting group amended the drafting note to reflect that states need to consider their own state laws with respect to arbitration. Travis indicated that following the friendly amendments, and as directed by the Task Force during the Oct. 17 meeting, Model #870 was re-exposed for a 30-day public comment period that ended on Nov. 27. He stated that as a result of the exposure, five comments were received that covered two remaining open issues. The first comment was from Robert Wake (ME) regarding Section 5D, specifically the current language on the placement of surplus lines insurance. The second comment covered the arbitration clause within Section 9H.

Wake stated that Section 5D indicates that the placement of surplus lines insurance shall be subject to the statutory and regulatory requirements of solely the home state. While there is the federal Dodd-Frank Wall Street

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Reform and Consumer Protection Act (Dodd-Frank Act), the Nonadmitted and Reinsurance Reform Act of 2010 (NRRA) indicates, "… except as otherwise provided," and also references nonadmitted insurance as opposed to surplus lines insurance. Wake stated that the biggest exemption was related to workers' compensation coverage. He summarized that most states can regulate workers' compensation, and most states require that workers' compensation be written in the admitted market. He suggested that the second issue regarding terminology may be remedied by repealing the draft language and replacing it with, "If this state is not the insured's Home State, the statutory and regulatory requirements of this state do not apply to the placement of property and casualty coverage, other than workers' compensation insurance and excess workers' compensation insurance, in the Surplus Lines Market." He also recommended a drafting note that indicates that even though these states do not regulate the placement of coverage in the surplus lines market, that does not necessarily preempt laws that require compulsory auto insurance to be placed in the admitted market. Further, he commented that Section 5N excludes exempt commercial purchasers from providing notice, while the NRRA requires notification. He stated that it should be kept simple, and they should get the standard notice.

Commissioner Donelon inquired as to those that made comments regarding Section 9H on arbitration. John Meetz (Wholesale & Specialty Insurance Association—WSIA) indicated that the provisions regarding arbitration do not permit a negotiable process between commercial-insured or personal-insured. He stated that it only permits the location of the arbitration to be negotiable for exempt commercial purchasers. He stated that arbitration should be fully negotiable for commercial insurance. He commented that he understands the argument that personal lines should conduct arbitration where the insurance is located. Tim Grant (Lloyd's America Inc.) commented that Lloyd's submitted a comment letter that addresses a similar issue with a different solution, and he encouraged the drafting group to consider their comments.

Commissioner Donelon commented that this leaves the Task Force with nearly a final draft of Model #870. He stated that the next steps will be to finalize the model, which will involve the drafting group and NAIC staff. He indicated that the plan will be to allow the necessary time for NAIC staff to draft the project history and for the drafting group and NAIC staff to finalize the model. He concluded that the Task Force will reconvene during the 2023 Spring National Meeting to take a vote on adoption.

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

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Draft 3/1/23

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 state;

B. Permitting surplus lines ~~I~~insurance to be placed with reputable and financially sound nonadmitted insurers and exported from this state pursuant to this Act;

C. Establishing a system of regulation which will permit orderly access to surplus lines insurance in this state and encourage admitted insurers to provide new and innovative types of insurance available to consumers in this state;

D. Providing a system through which persons may purchase insurance other than surplus lines insurance, from nonadmitted insurers pursuant to this Act;

E. Protecting revenues of this state; and

F. Providing a system pursuant to this Act which subjects nonadmitted insurance activities in this state to the jurisdiction of the insurance commissioner and state and federal courts in suits by or on behalf of the state.

Section 3. Definitions

As used in this Act:

A. "Admitted insurer" 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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D~~C~~. "Commissioner" means the insurance commissioner of [insert name of state], or the commissioner's deputies or staff, or the c~~C~~ommissioner, d~~D~~irector or s~~S~~uperintendent 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 l~~L~~ines i~~I~~nsurer" means a surplus lines insurer domiciled in this state, that~~which~~ may write insurance in this state on ~~as if it were~~ a surplus lines ~~insurer~~ basis~~domiciled in another state~~.]

G. "Eligible surplus lines insurer" 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) ~~n H~~has paid aggregate nationwide commercial property and casualty insurance premiums in excess of $100,000 in the immediately preceding 12 months; and~~.~~

(2) (a) ~~The person m~~Meets at least one~~1~~ of the following criteria:

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

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

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

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

(b) Effective on July 21, 2010, every five years ~~and each fifth January 1 occurring thereafter~~ on January 1, the amounts in subsections~~Items~~ (i), (ii), and (iv) of ~~Subparagraph~~Section 3H(~~3~~2)(a)~~of this Paragraph~~ shall be adjusted to reflect the percentage change for such five~~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: The~~is~~ 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, means:

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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~~Paragraph (1)Section 3J(1), the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated; ~~.~~or

(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 ~~S~~subsections ~~Paragraphs~~ (1), (2), and (3) of Section 3J. The NRRA definition does not expressly cover unaffiliated groups. States have taken different approaches to the taxation of unaffiliated group policies. Some states tax based on the ""home state"" of the group policyholder. Other states tax based on the ""home state"" of the group member or certificate holder under the unaffiliated group policy. Some states assess tax on the ""home state"" of the person that pays the premium. Not all states have an express provision to address unaffiliated group policies~~. The Drafting Group could not arrive at language to address each possibility and opted to omit it from the Model.~~ ~~such as risk purchasing groups~~model language contains two options foraddition ofthat areisexpressly 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 domestic surplus lines insurer].

L~~I~~. "Nonadmitted insurer" 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" means:

(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.

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PO. "Principal residence" means:

(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.

~~"State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Norther Mariana Islands, the Virgin Islands, 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.~~

Q.RN. "Surplus lines insurance" 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 .

RS. "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.

STO. "Surplus lines licensee" 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 insurer~~s to accept such insurance~~.

TU. "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.]

UVS. "Transaction of insurance"

~~(b)~~ (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;

(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;

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(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."

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

V~~T~~. "Wet marine and transportation insurance" 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;

~~(1)~~(3) Insurance of freight and disbursements pertaining to a subject of insurance within the scope of this subsection; and

~~(2)~~

(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:

(a) Been transported solely by land; or

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(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 transaction of insurance unless authorized by a license in force pursuant to the laws of this state~~,~~ or exempted by this Act or ~~otherwise exempted by~~ the insurance laws of this state.

B. A person shall not directly or indirectly engage in a transaction of insurance 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 nonadmitted insurer 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 person who represents or aids a nonadmitted insurer 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 state, to the same degree those rights would have been enforce able had the contract been lawfully procured.

D. If the nonadmitted insurer fails to pay a claim or loss within the provisions of the insurance contract and the laws of this state, a person 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 person in regard to an insured who independently procures insurance as provided under Section 6. This section shall not apply to a person, properly licensed as an agent or broker in this state 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 person does not, directly or indirectly, participate in the solicitation, negotiation or procurement of insurance on behalf of the insured.~~;~~

Drafting Note: If a state 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 nonadmitted insurance.

Drafting Note: Some states permit other licensed professionals to engage in these activities as provided in their insurance statutes or other state statutes. Those states 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 person acting in material compliance with the insurance laws of this state in the placement of the types of insurance identified in Paragraphs (1), (2), (3) and (4) below:

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(1) Surplus lines insurance 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 state, unless the licensee committed a violation of Section 5 that proximately caused loss to the insured;

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

~~**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 commissioner 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 state of domicile of the ceding insurer;

(4) The property and operation of railroads or aircraft engaged in interstate or foreign commerce, wet marine and transportation insurance;

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

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 states allow other insurance transactions with nonadmitted insurers. Examples include certain aviation and railroad risks. Other states 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 lines insurance may be placed by a surplus lines licensee if:

(1) Each insurer is ~~an~~ eligible to write surplus lines insurance~~insurer~~; and

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

(3) Other than for exempt commercial purchasers, 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 state. The full amount or type of insurance may be procured from eligible surplus lines insurers, 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 state 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 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 changing diligent search requirements in light of electronic transactions. 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

"Eexport List" maintained by the commissioner. The eExport 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.

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 surplus lines licensee may place any coverage with an nonadmitted eligible surplus lines insurer eligible to accept the insurance, unless specifically prohibited by the laws of this state.

[Alternative Subsection B]

[CB. Subject to Section 5A(3) of this Act, a surplus lines licensee may place only the following types of coverage with an nonadmitted eligible surplus lines insurer 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 surplus lines licensee shall not place surplus lines insurance coverage with a nonadmitted insurer, unless, at the time of placement, the surplus lines licensee has determined that the nonadmitted insurer is eligible to write surplus lines insurance under one of the following subsections:

(1) Has established satisfactory evidence of good repute and financial integrity; and

(2) Qualifies Iis eligible to write sSurplus lLines iInsurance under one of the following subparagraphs:

1. **Drafting Note**: Current numbering is retained in this Model to remain consistent with the reference within the NRRA.

2. Is eligible to write surplus lines insurance under one of the following subsections:

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

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

(iibii) Has eCapital and surplus or its equivalent under the laws of its domiciliary jurisdiction whichthat equals the greater of:

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

(IIB)(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.

(iiII) The requirements of Subparagraph (b)(i) may be satisfied by an insurer's possessing less than the minimum capital and surplus upon an affirmative finding of acceptability by the commissioner. The finding shall be based upon such factors as quality of management, capital and surplus of any parent company, company

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underwriting profit and investment income trends, market availability and company record and reputation within the industry. In no event shall the commissioner make an affirmative finding of acceptability when the nonadmitted insurer's capital and surplus is less than $4,500,000; or

~~(a)~~ 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]

(b)

(c) [~~(3)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 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

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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 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

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~~(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 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~~

F.

If at any time the commissioner has reason to believe that a surplus lines insurer 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 commissioner may, after notice and an opportunity for a hearing, declare it ineligible. The commissioner shall promptly ~~mail~~publish notice of all such declarations in a timely manner reasonably calculated to reach to each surplus lines licensee or surplus lines advisory organization, for distribution to all surplus lines licensees.

Drafting Note: Individual states 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

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(1) ~~(1)~~ In addition to the full amount of gross premium~~s~~ charged by the insurer for the insurance, every person licensed pursuant to Section 5I~~H~~ of this Act shall collect and pay to the commissioner a sum equal to [insert number] percent of the gross premium~~s~~ charged, less any return premium~~s~~, for surplus lines insurance 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 state, the 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 h~~H~~ome s~~S~~tate of the insured. The tax on any portion of the premium unearned at termination of insurance having been credited by the state to the licensee shall be returned to the policyholder directly by the surplus lines licensee or through the producing broker, if any. The surplus lines licensee 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 surplus lines licensee shall pay the premium 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:~~

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(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 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 surplus lines licensee 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 commissioner against the surplus lines licensee and the surety on the bond filed under Subsection HI of this section. The commissioner may charge interest at the rate of [insert number] percent per year for the unpaid tax.

IH. Surplus Lines Licenses

(1) A person shall not procure a contract of surplus lines insurance with a nonadmittedsurplus lines insurer unless the person possesses a current surplus lines insurance producer license issued by the commissioner.

(2) The commissioner 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 agentproducer has:

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

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

(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 commissioner, 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 state in the penal sum of $[insert amount] aggregate liability, with corporate sureties approved by the commissioner. 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 commissioner;

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 states. Some states 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 state,; and

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~~(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 person shall receive a nonresident surplus lines license if:

(a) The person is currently licensed as a surplus lines licensee and in good standing in his or her home state;

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

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

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

Drafting Note: In accordance with Public Law No. 106-102 (the "Gramm-Leach-Bliley Act") states 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 NAIC~~ational Association of Insurance Commissioners~~, its affiliates or subsidiaries.~~.~~

(5) A nonresident surplus lines licensee who moves from one state to another state or a resident surplus lines licensee who moves from this state to another state shall file a change of address and provide certification from the new resident state 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 home state, except the requirements imposed by this subsection, if the applicant's home state awards nonresident surplus lines licenses to residents of this state on the same basis.

(7~~6~~) 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 surplus lines licensee 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 states allow surplus lines licensees to hold binding authorities on behalf of ~~s~~eligible surplus lines insurers. States which allow such binding authorities might want to establish minimum standards for the related agreements. In addition, states might want to consider requiring surplus lines licensees with such binding authorities to submit the related agreements to state regulators for review and approval.

J~~I~~. Suspension, Revocation or Nonrenewal of Surplus Lines Licensee's License

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The commissioner may suspend, revoke or refuse to renew the license of a surplus lines licensee 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 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 eligible surplus lines insurer may be sued upon a cause of action arising in this state under a surplus lines insurance contract made by it or evidence of insurance issued or delivered by the surplus lines licensee. A policy issued by the eligible surplus lines insurer shall contain a provision stating the substance of this section and designating the person to whom the commissioner 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 surplus lines insurance, each producing broker shall execute and each surplus lines licensee shall execute where appropriate, and file a written report regarding the insurance which shall be kept confidential by the commissioner, 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 premium charged for the insurance;

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

(6) An affidavit on a standardized form promulgated by the commissioner as to the diligent efforts to place the coverage with admitted insurers 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 surplus lines insurer with whom the insurance was to be placed is not licensed in this state and is not subject to its supervision; and

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(b) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state 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, states may wish to recognize that, as a result of communications passing through the producing broker, the surplus lines licensee 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.

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 commissioner. 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 states, however, may choose not to establish a surplus lines advisory organization; in those states Subsection M would not be necessary.

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

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

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

(5) The commissioner 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 commissioner 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 commissioner 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 commissioner finds the association to be in violation of this section, the commissioner may issue an order requiring the discontinuance of the violation. A director may be removed from the association's board of directors by the commissioner 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 premium charged;

(c) The name of the nonadmitted insurer; and

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(d) The class of insurance procured.

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

(8) It shall be unlawful for an insurance agent, broker or surplus lines broker to deliver in this state 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 commissioner may declare a nonadmitted insurer ineligible and order the association not to stamp insurance documents issued by the nonadmitted insurer and issue any other appropriate order.

N~~M~~. Evidence of the Insurance and Subsequent Changes to the Insurance

(1) Upon placing surplus lines insurance, the surplus lines licensee 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 surplus lines licensee and shall show the description and location of the subject of the insurance, coverages including any material limitations other than those in standard forms, a general description of the coverages of the insurance, the premium and rate charged and taxes to be collected from the insured, and the name and address of the insured and surplus lines insurer or insurers and proportion of the entire risk assumed by each, and the name of the surplus lines licensee and the licensee's license number.

(2) A surplus lines licensee 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~~ surplus lines insurer~~,~~ or a nonadmitted insurer ~~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 surplus lines licensee 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 surplus lines licensee 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.~~

(5~~6~~) The surplus lines licensee shall give the following consumer notice to every person~~, other than exempt commercial purchasers,~~ applying for insurance with a nonadmitted insurer. 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 surplus lines licensee shall maintain

the signed notice in its file for a period of five (5) years from expiration of the policy. The surplus lines licensee shall tender a copy of the signed notice to the insured at the time of delivery of each policy the licensee transacts with a nonadmitted insurer. The copy shall be a separate document affixed to the policy.

*"**Notice**: ~~1. A~~ ~~n~~ "nonadmitted" or "surplus lines insurer ~~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 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 lists. 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 state 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 surplus lines licensee under this Act shall be binding upon the insured and no premium charged shall be due and payable until the surplus lines licensee or the producing broker ~~shall have~~has notified the insured in writing, in a form acceptable to the commissioner, 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 the insurance is not licensed by this state and is not subject to its supervision; and

(b) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state 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 commissioner might want to establish criteria related to readability, ~~type face~~font, and ~~type~~ size of the notice.

P~~O~~. Effect of Payment to Surplus Lines Licensee

A payment of premium to a surplus lines licensee acting for a person 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.

Q~~P~~. Surplus Lines Licensees May Accept Business from Other Producers

A surplus lines licensee may originate surplus lines insurance or accept such insurance from any other producing broker duly licensed as to the kinds of insurance involved, and the surplus lines licensee may compensate the producing broker for the business.

R~~Q~~. Records of Surplus Lines Licensee

(1) Each surplus lines licensee shall keep ~~in this state~~ a full and true record of each surplus lines insurance 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;

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

(3c) Gross premium charged;

(4d) Any return premium paid;

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

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

(7g) Name and address of the insured;

(8h) Name and address of the insurer;

(9i) 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

(11j) 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 commissioner without notice for a period not less than five (5) years following termination of the contract. In lieu of maintaining offices in this state, each nonresident surplus lines licensee shall make available to the commissioner any and all records that the commissioner 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.

SR. Reports—Summary of Exported Business

On or before the end of the month following each [insert month, quarter, year], each surplus lines licensee shall file with the commissioner, on forms prescribed by the commissioner, a verified report in duplicate of all surplus lines insurance transacted during the preceding period, showing:

(1) Aggregate gross premium~~s~~ written;

(2) Aggregate return premium~~s~~;

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

(4) Amount of aggregate tax due or remitted to each other state for which an allocation is made pursuant to Subsection G~~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) ~~(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 follows:

(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 state, who procures or continues or renews insurance with a nonadmitted insurer ~~on properties, risks or exposures located or to be performed in whole or in part in this state~~, other than insurance procured through a surplus lines licensee, shall, within [insert number] days after the date the insurance was so procured, continued or renewed, file a written report with the commissioner, upon forms prescribed by the commissioner, 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 premium currently charged, and additional pertinent information reasonably requested by the commissioner. ~~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 states exempting from taxation insurance procured by nonprofit educational institutions and their employers, from nonprofit educational insurers.

B. ~~Gross~~ Premiums charged for the insurance, less any return premiums, is subject to a tax at the rate of [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 taxable p~~P~~remium to the commissioner, who shall transmit the same for distribution as provided in this Act.

Drafting Note: Existing state laws and procedures may require that the tax report be forwarded to another state agency, such as the Department of the Treasury, rather than to the commissioner. In addition, some states 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 states.

~~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.~~

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

D~~E~~. 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 person who in this state represents or aids a nonadmitted insurer 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 states 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 person, firm, association or corporation violating any provision

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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 state.

Section 8. Violations

Whenever there is evidence satisfactory to the commissioner ~~believes, from evidence satisfactory to him or her,~~ that a person is violating or about to violate the provisions of this Act, the commissioner may cause a complaint to be filed in the [insert appropriate court] Court for restitution and to enjoin and restrain the person 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 person or a nonadmitted insurer is equivalent to and shall constitute an irrevocable appointment by the unauthorized person or insurer, binding upon it, its executor or administrator, or successor in interest of the [insert title of appropriate state official] or his or her successor in office, to be the true and lawful attorney of the unauthorized person or insurer upon whom may be served all lawful process in any action, suit or proceeding in any court by the commissioner or by the state and upon whom may be served any notice, order, pleading or process in any proceeding before the commissioner and which arises out of transacting insurance in this state by the unauthorized person or insurer. Any act of transacting insurance in this state by a nonadmitted insurer 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 commissioner so served shall be of the same legal force and validity as personal service of process in this state upon the unauthorized person or insurer.

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

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.

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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~~Except with regard to exempt commercial purchasers, independently procured insurance, [aviation], and wet marine and transportation insurance, conditions or stipulations in the policy or contract notwithstanding, 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~~ in the home state of the insured.

Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the prior ~~sub~~Ssection 9H. States should consider adoption or modification of ~~priors~~Section 9H in light of their own laws on arbitration or other alternative dispute resolution in insurance and commercial transactions. States should cross-reference their state insurance code to verify the inclusion of "Aviation" within this provision.

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:

(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 commissioner, cash or securities, or file with the clerk or commissioner a bond with good and sufficient sureties, to be approved by the clerk or commissioner in an amount to be fixed by the court or commissioner 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 state. In considering the application of an insurer for a certificate of authority, for the purposes of this paragraph the commissioner need not assert the provisions of [insert sections of insurance laws relating to retaliation] against the insurer with respect to its application if the commissioner 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 commissioner'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 nonadmitted insurer 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 nonadmitted insurer has not done any of the acts enumerated in the pleadings.

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D. Nothing in Subsection A of this section shall apply to placements of insurance which were lawful in the home state of the insured ~~in which the placement took place~~ and which were not unlawful placements under the laws of this state. 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 commissioner shall have the authority to proceed in the courts of this state or any other United States jurisdiction to enforce an order or decision in any court proceeding or in any administrative proceeding before the commissioner 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.~~

~~(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 commissioner 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 commissioner may enforce an order lawfully issued by other officials provided the order does not violate the laws or public policy of this state.

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Section 12. Suits by Nonadmitted Insurers

A nonadmitted insurer may not commence or maintain an action ~~in~~at 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 insured~~written in this state~~;

B. Liquidation of assets and liabilities of the insurer (other than collection of new premium), 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 lines insurance 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;

~~e~~

G. Servicing of policies written by an admitted insurer 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 wet marine and transportation insurance;

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.

Section 13. ~~Separability~~ Severability ~~Clauseof Provisions~~

If any provisions of this Act, or the application of the provision to any person or circumstance, shall be held invalid, the remainder of the Act and the application of the provision 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).

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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. 1 6, 36, 834, 899-900, 923-926 (adopted).

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Draft 3/1/23

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 state;

B. Permitting surplus lines insurance to be placed with reputable and financially sound nonadmitted insurers and exported from this state pursuant to this Act;

C. Establishing a system of regulation which will permit orderly access to surplus lines insurance in this state and encourage admitted insurers to provide new and innovative types of insurance available to consumers in this state;

D. Providing a system through which persons may purchase insurance other than surplus lines insurance, from nonadmitted insurers pursuant to this Act;

E. Protecting revenues of this state; and

F. Providing a system pursuant to this Act which subjects nonadmitted insurance activities in this state to the jurisdiction of the insurance commissioner and state and federal courts in suits by or on behalf of the state.

Section 3. Definitions

As used in this Act:

A. "Admitted insurer" means an insurer licensed to engage in the business of insurance 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.

D. "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.

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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, that may write insurance in this state on a surplus lines basis.]

G. "Eligible surplus lines insurer" 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) Has paid aggregate nationwide commercial property and casualty insurance premiums in excess of $100,000 in the immediately preceding 12 months; and

(2) (a) Meets at least one of the following criteria:

(i) Possesses a net worth in excess of $20,000,000;

(ii) Generates annual revenues in excess of $50,000,000;

(iii) 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) Is a not-for-profit organization or public entity generating annual budgeted expenditures of at least $30,000,000; or

(v) Is a municipality with a population in excess of 50,000 persons.

(b) Effective on July 21, 2010, every five years on January 1, the amounts in subsections (i), (ii), and (iv) of Section 3H(2)(a) shall be adjusted to reflect the percentage change for such five 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: The 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.

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

J. "Home state" with respect to an insured, means:

(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 Section 3J(1), the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated; or

(3) If the insured is an affiliated group with more than one member listed as a named insured on a single

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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.

Comment: The NRRA definition of "home state" includes Subsections (1), (2), and (3) of Section 3J. The NRRA definition does not expressly cover unaffiliated groups. States have taken different approaches to the taxation of unaffiliated group policies. Some states tax based on the "home state" of the group policyholder. Other states tax based on the "home state" of the group member or certificate holder under the unaffiliated group policy. Some states assess tax on the "home state" of the person that pays the premium. Not all states have an express provision to address unaffiliated group policies.

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 business of insurance in this state [or a domestic surplus lines insurer].

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

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

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

O. "Principal place of business" means:

(1) The state where a person maintains its headquarters and where the person's high-level officers direct, control, and coordinate 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. "Principal residence" means:

(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. "Surplus lines insurance" means any insurance permitted to be placed through a surplus lines licensee with an eligible surplus lines insurer, pursuant to Section 5 of this Act.

R. "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.

S. "Surplus lines licensee" means any person licensed under Section 5 of this Act to place surplus lines insurance in this state with an eligible surplus lines insurer.

T. "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.]

U. "Transaction of insurance"

(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;

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(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;

(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 the 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."

V. "Wet marine and transportation insurance" 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

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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:

(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.

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 transaction of insurance unless authorized by a license in force pursuant to the laws of this state or exempted by this Act or the insurance laws of this state.

B. A person shall not directly or indirectly engage in a transaction of insurance with or on behalf of a nonadmitted insurer in this state.

C. A person who represents or aids a nonadmitted insurer 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 state, to the same degree those rights would have been enforceable had the contract been lawfully procured.

D. If the nonadmitted insurer fails to pay a claim or loss within the provisions of the insurance contract and the laws of this state, a person 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 person in regard to an insured who independently procures insurance as provided under Section 6. This section shall not apply to a person, properly licensed as an agent or broker in this state 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 person does not, directly or indirectly, participate in the solicitation, negotiation or procurement of insurance on behalf of the insured.

Drafting Note: If a state 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 nonadmitted insurance.

Drafting Note: Some states permit other licensed professionals to engage in these activities as provided in their insurance statutes or other state statutes. Those states 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 person acting in material compliance with the insurance laws of this state in the placement of the types of insurance identified in Paragraphs (1), (2), (3) and (4) below:

(1) Surplus lines insurance 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 state, unless the licensee committed a violation of Section 5 that proximately caused loss to the insured;

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

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

(a) The assuming insurer is authorized to engage in the business of insurance or reinsurance 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 state of domicile of the ceding insurer;

(4) The property and operation of railroads or aircraft engaged in interstate or foreign commerce, wet marine and transportation insurance;

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

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 states allow other insurance transactions with nonadmitted insurers. Examples include certain aviation and railroad risks. Other states 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 lines insurance may be placed by a surplus lines licensee if:

(1) Each insurer is eligible to write surplus lines insurance; and

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

(3) Other than for exempt commercial purchasers, the full amount or type of insurance cannot be obtained from insurers who are admitted to engage in the business of insurance in this state. The full amount or type of insurance may be procured from eligible surplus lines insurers, 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 state if any are writing it; and

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

Drafting Note: The diligent search requirement of Section 5A(3) must be satisfied in accordance with the statutes and regulations of the governing state. Diligent search statutes and regulations 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 changing diligent search requirements in light of electronic transactions. 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.

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 surplus lines licensee may place any coverage with an eligible surplus lines insurer, unless specifically prohibited by the laws of this state.

[Alternative Subsection B]

[B. Subject to Section 5A(3) of this Act, a surplus lines licensee may place only the following types of coverage with an eligible surplus lines insurer: (list acceptable coverage).]

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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 surplus lines licensee shall not place surplus lines insurance, unless, at the time of placement, the surplus lines licensee has determined that the insurer

1. **Drafting Note**: Current numbering is retained in this Model to remain consistent with the reference within the NRRA.

2. Is eligible to write surplus lines insurance under one of the following subsections:

(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) Capital and surplus or its equivalent under the laws of its domiciliary jurisdiction that equals the greater of:

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

(B) $15,000,000;

(II) The requirements of Subparagraph (b)(i) may be satisfied by an insurer possessing less than the minimum capital and surplus upon an affirmative finding of acceptability by the commissioner. 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 commissioner make an affirmative finding of acceptability when the nonadmitted insurer'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]

(c) [For an insurer domiciled in this state, the insurer is a domestic surplus lines 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. Insurance procured under this section shall be valid and enforceable as to all parties.
.

F. If at any time the commissioner has reason to believe that a surplus lines insurer is no longer eligible under Section 5C, the commissioner may, after notice and an opportunity for a hearing, declare it ineligible. The commissioner shall promptly publish notice of all such declarations in a timely manner reasonably calculated to reach to each surplus lines licensee or surplus lines advisory organization, for distribution to all surplus lines licensees.

Drafting Note: Individual states 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. Surplus Lines Tax

(1) In addition to the full amount of gross premium charged by the insurer for the insurance, every person licensed pursuant to Section 5I of this Act shall collect and pay to the commissioner a sum equal to [insert number] percent of the gross premium charged, less any return premium, for surplus

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lines insurance 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 state, the sum payable shall be paid entirely to the home state of the insured. The tax on any portion of the premium unearned at termination of insurance having been credited by the state to the licensee shall be returned to the policyholder directly by the surplus lines licensee or through the producing broker, if any. The surplus lines licensee 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 of this section, each surplus lines licensee shall pay the premium tax due for the policies written during the period covered by the report.

H. Collection of Tax

If the tax owed by a surplus lines licensee 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 commissioner against the surplus lines licensee and the surety on the bond filed under Subsection I of this section. The commissioner may charge interest at the rate of [insert number] percent per year for the unpaid tax.

I. Surplus Lines Licenses

(1) A person shall not procure a contract of surplus lines insurance with a surplus lines insurer unless the person possesses a current surplus lines insurance producer license issued by the commissioner.

(2) The commissioner may issue a resident surplus lines license to a qualified holder of underlying property and casualty licenses, but only when the producer has:

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

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

(c) In the case of a resident agent, filed with the commissioner, 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 state in the penal sum of $[insert amount] aggregate liability, with corporate sureties approved by the commissioner. The bond or E&O policy shall be conditioned that the Surplus Lines Licensee 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 commissioner;

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 states. Some states 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 Control over possibly unscrupulous nonresident agents.

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

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

(a) The person is currently licensed as a surplus lines licensee and in good standing in his or her home state;

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

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

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

Drafting Note: In accordance with Public Law No. 106-102 (the "Gramm-Leach-Bliley Act") states 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 NAIC, its affiliates or subsidiaries.

(5) A nonresident surplus lines licensee who moves from one state to another state or a resident surplus lines licensee who moves from this state to another state shall file a change of address and provide certification from the new resident state 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 home state, except the requirements imposed by this subsection, if the applicant's home state awards nonresident surplus lines licenses to residents of this state 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 surplus lines licensee 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 states allow surplus lines licensees to hold binding authorities on behalf of surplus lines insurers. States which allow such binding authorities might want to establish minimum standards for the related agreements. In addition, states might want to consider requiring surplus lines licensees with such binding authorities to submit the related agreements to state regulators for review and approval.

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

The commissioner may suspend, revoke or refuse to renew the license of a surplus lines licensee after notice and an opportunity for a hearing as provided under the applicable provision of this state's laws for:

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

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

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

(1) An eligible surplus lines insurer may be sued upon a cause of action arising in this state under a surplus lines insurance contract made by it or evidence of insurance issued or delivered by the surplus lines licensee. A policy issued by the eligible surplus lines insurer shall contain a provision stating the substance of this section and designating the person to whom the commissioner 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.

L. Duty to File Evidence of Insurance and Affidavits

Within [insert number] days after the placing of any surplus lines insurance, each producing broker shall execute and each surplus lines licensee shall execute where appropriate, and file a written report regarding the insurance which shall be kept confidential by the commissioner, including the following:

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(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 premium charged for the insurance;

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

(6) An affidavit on a standardized form promulgated by the commissioner as to the diligent efforts to place the coverage with admitted insurers 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 surplus lines insurer with whom the insurance was to be placed is not licensed in this state and is not subject to its supervision; and

(b) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state 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, states may wish to recognize that, as a result of communications passing through the producing broker, the surplus lines licensee 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.

M. 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 commissioner. 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 states, however, may choose not to establish a surplus lines advisory organization; in those states Subsection M would not be necessary.

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

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

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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

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

(5) The commissioner 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 commissioner 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 commissioner 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 commissioner finds the association to be in violation of this section, the commissioner may issue an order requiring the discontinuance of the violation. A director may be removed from the association's board of directors by the commissioner 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

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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 premium charged;

(c) The name of the nonadmitted insurer; and

(d) The class of insurance procured.

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

(8) It shall be unlawful for an insurance agent, broker or surplus lines broker to deliver in this state 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 commissioner may declare a nonadmitted insurer ineligible and order the association not to stamp insurance documents issued by the nonadmitted insurer and issue any other appropriate order.

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

(1) Upon placing surplus lines insurance, the surplus lines licensee 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 surplus lines licensee and shall show the description and location of the subject of the insurance, coverages including any material limitations other than those in standard forms, a general description of the coverages of the insurance, the premium and rate charged and taxes to be collected from the insured, and the name and address of the insured and surplus lines insurer or insurers and proportion of the entire risk assumed by each, and the name of the surplus lines licensee and the licensee's license number.

(2) A surplus lines licensee 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 surplus lines insurer or a nonadmitted insurer 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 surplus lines licensee 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.

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(4) As soon as reasonably possible after the placement of the insurance, the surplus lines licensee 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) The surplus lines licensee shall give the following consumer notice to every person, applying for insurance with a nonadmitted insurer. 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 surplus lines licensee shall maintain the signed notice in its file for a period of five (5) years from expiration of the policy. The surplus lines licensee shall tender a copy of the signed notice to the insured at the time of delivery of each policy the licensee transacts with a nonadmitted insurer. The copy shall be a separate document affixed to the policy.

*"**Notice**: A nonadmitted or surplus lines insurer is issuing the insurance policy that you have applied to purchase. These insurers do not participate in insurance guaranty funds. The guaranty funds will not pay your claims or protect your assets if the insurer becomes insolvent and is unable to make payments as promised. 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 state 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. Licensee's Duty to Notify Insured

(1) No contract of insurance placed by a surplus lines licensee under this Act shall be binding upon the insured and no premium charged shall be due and payable until the surplus lines licensee or the producing broker has notified the insured in writing, in a form acceptable to the commissioner, 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 the insurance is not licensed by this state and is not subject to its supervision; and

(b) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state 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 commissioner might want to establish criteria related to readability, font, and size of the notice.

P. Effect of Payment to Surplus Lines Licensee

A payment of premium to a surplus lines licensee acting for a person 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.

Q. Surplus Lines Licensees May Accept Business from Other Producers

A surplus lines licensee may originate surplus lines insurance or accept such insurance from any other producing broker duly licensed as to the kinds of insurance involved, and the surplus lines licensee may compensate the producing broker for the business.

R. Records of Surplus Lines Licensee

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(1) Each surplus lines licensee shall keep a full and true record of each surplus lines insurance 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:

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

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

(c) Gross premium charged;

(d) Any return premium paid;

(e) Rate of premium charged upon the several items of property;

(f) Effective date and terms of the contract;

(g) Name and address of the insured;

(h) Name and address of the insurer;

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

(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 commissioner without notice for a period not less than five (5) years following termination of the contract. In lieu of maintaining offices in this state, each nonresident surplus lines licensee shall make available to the commissioner any and all records that the commissioner 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.

S. Reports—Summary of Exported Business

On or before the end of the month following each [insert month, quarter, year], each surplus lines licensee shall file with the commissioner, on forms prescribed by the commissioner, a verified report in duplicate of all surplus lines insurance transacted during the preceding period, showing:

(1) Aggregate gross premium written;

(2) Aggregate return premium;

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

(4) Amount of aggregate tax due or remitted to each other state for which an allocation is made pursuant to Subsection G 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:

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(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 the following:

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

(ii) Regulation of rates and forms;

(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 this state, who procures or continues or renews insurance with a nonadmitted insurer, other than insurance procured through a surplus lines licensee, shall, within [insert number] days after the date the insurance was so procured, continued or renewed, file a written report with the commissioner, upon forms prescribed by the commissioner, 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 premium currently charged, and additional pertinent information reasonably requested by the commissioner.

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

B. Premium charged for the insurance, less any return premium, is subject to a tax at the rate of [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 taxable premium to the commissioner, who shall transmit the same for distribution as provided in this Act.

Drafting Note: Existing state laws and procedures may require that the tax report be forwarded to another state agency, such as the Department of the Treasury, rather than to the commissioner. In addition, some states 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 states.

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

D. 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 person who in this state represents or aids a nonadmitted insurer 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 states 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 person, 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 state.

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Section 8. Violations

Whenever there is evidence satisfactory to the commissioner that a person is violating or about to violate the provisions of this Act, the commissioner may cause a complaint to be filed in the [insert appropriate court] Court for restitution and to enjoin and restrain the person 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 person or a nonadmitted insurer is equivalent to and shall constitute an irrevocable appointment by the unauthorized person or insurer, binding upon it, its executor or administrator, or successor in interest of the [insert title of appropriate state official] or his or her successor in office, to be the true and lawful attorney of the unauthorized person or insurer upon whom may be served all lawful process in any action, suit or proceeding in any court by the commissioner or by the state and upon whom may be served any notice, order, pleading or process in any proceeding before the commissioner and which arises out of transacting insurance in this state by the unauthorized person or insurer. Any act of transacting insurance in this state by a nonadmitted insurer 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 commissioner so served shall be of the same legal force and validity as personal service of process in this state upon the unauthorized person or insurer.

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

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.

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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. 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. Except with regard to exempt commercial purchasers, independently procured insurance, [aviation], and wet marine and transportation insurance, conditions or stipulations in the policy or contract notwithstanding, a nonadmitted insurer subject to arbitration or other alternative dispute resolution mechanism shall conduct the arbitration or other alternative dispute resolution mechanism in the home state of the insured.

Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the prior Section 9H. States should consider adoption or modification of Section 9H in light of their own laws on arbitration or other alternative dispute resolution in insurance and commercial transactions. States should cross-reference their state insurance code to verify the inclusion of "Aviation" within this provision.

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:

(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 commissioner, cash or securities, or file with the clerk or commissioner a bond with good and sufficient sureties, to be approved by the clerk or commissioner in an amount to be fixed by the court or commissioner 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 state. In considering the application of an insurer for a certificate of authority, for the purposes of this paragraph the commissioner need not assert the provisions of [insert sections of insurance laws relating to retaliation] against the insurer with respect to its application if the commissioner 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 commissioner'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 nonadmitted insurer 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 nonadmitted insurer 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 state of the insured and which were not unlawful placements under the laws of this state. 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 commissioner shall have the authority to proceed in the courts of this state or any other United States jurisdiction to enforce an order or decision in any court proceeding or in any administrative proceeding before

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the commissioner of Insurance.

B. It shall be the policy of this state that the insurance commissioner 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 commissioner 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 insurer may not commence or maintain an action at 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 insured;

B. Liquidation of assets and liabilities of the insurer (other than collection of new premium), 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 lines insurance 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 admitted insurer 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 wet marine and transportation insurance;

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.

Section 13. Severability

If any provisions of this Act, or the application of the provision to any person or circumstance, shall be held invalid, the remainder of the Act and the application of the provision 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).

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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. 1 6, 36, 834, 899-900, 923-926 (adopted).

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PROJECT HISTORY

***NONADMITTED INSURANCE MODEL ACT* (#870)**

1. Description of the Project, Issues Addressed, etc.

The 2023 revisions to the NAIC *Nonadmitted Insurance Model Act* (#870) are intended to conform Model #870 to the federal Nonadmitted and Reinsurance Reform Act of 2010 (NRRA), which was part of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The current Model #870 was adopted in 1994 to combine three NAIC models that date as far back as 1969: 1) the Unauthorized Insurers Model Act; 2) the Model Surplus Lines Law; and 3) the Model Nonadmitted Insurance Act. Since the adoption of Model #870 on Sept. 18, 1994, the NAIC has amended it on the following dates: 1) Dec. 16, 1996; 2) March 18, 1998; 3) Dec. 6, 1999; and 4) Sept. 10, 2002. The 2002 modifications resulted from the passage of the federal Gramm-Leach-Bliley Act (GLBA) by the U.S. Congress (Congress). Currently, 31 states have adopted Model #870.

The most recent activity regarding Model #870 is related to the NRRA. Model #870 was not modified as a result of the implementation of the NRRA. On Oct. 11, 2011, the *Nonadmitted Insurance Reform Sample Bulletin* (Bulletin), which was distributed to the state insurance departments, was adopted by the Executive (EX) Committee and Plenary. The Bulletin outlined federally mandated regulatory changes that affect the placement of nonadmitted insurance. Specifically, the Bulletin addressed the scope of the NRRA, the application of "Home State" for the purposes of jurisdictional authority and paying premium tax, licensure requirements for brokers, diligent search requirements, and eligibility requirements for nonadmitted insurers.

During the implementation of the NRRA, the Surplus Lines (C) Task Force and NAIC staff were working on state tax allocation proposals. The leading proposals were the Surplus Lines Insurance Multistate Compliance Compact (SLIMPACT), which pre-dated the NRRA, and the Nonadmitted Insurance Multistate Agreement (NIMA), which was developed by the Task Force in response to the NRRA. The SLIMPACT failed to obtain the 10 states needed to become operative. The NIMA clearinghouse operated for only a few years before the NIMA was dissolved in 2016. With the focus on achieving a system of tax allocation before the NRRA deadline in July 2012, the decision was made to draft the Bulletin rather than amend Model #870.

During the 2020 Summer National Meeting of the Task Force, the chair directed staff to develop a drafting group to produce a summary document that outlined significant updates needed to modernize Model #870 and present a recommendation to the Task Force at a future national meeting. The drafting group consisted of Tom Travis (LA), Jeff Baughman (WA), Eli Snowbarger (OK), Andy Daleo (NAIC), and Dan Schelp (NAIC). The drafting group met Sept. 30 and Oct. 27, 2020. As a result of those meetings, the drafting group outlined numerous proposed revisions to Model #870.

During the 2020 Fall National Meeting, the Task Force adopted the Request for NAIC Model Law Development. During the 2021 Spring National Meeting, the Executive (EX) Committee approved the Request for NAIC Model Law Development.

2. Name of Group Responsible for Drafting the Model and States Participating

The Surplus Lines (C) Task Force and the drafting group consisting of Louisiana, Chair; Colorado; Illinois; Texas; and Washington.

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3. Project Authorized by What Charge and Date First Given to the Group

The charges of the Surplus Lines (C) Task Force state, "Develop or amend relevant NAIC model laws, regulations, and/or guidelines." Also, as described in charge #1, the Request for NAIC Model Law Development was approved by the Executive (EX) Committee during the 2021 Spring National Meeting.

4. A General Description of the Drafting Process (e.g., drafted by a subgroup, interested parties, the full group, etc). Include any parties outside the members that participated

During the 2021 Summer National Meeting, the Surplus Lines (C) Task Force formally developed the Model #870 Drafting Group that consisted of Travis, chair; Rolf Kaumann (CO); Marcy Savage (IL); Jamie Walker (TX); and Jeff Baughman (WA). The Drafting Group began its work on Model #870 on Aug. 19, 2021. During that call the Drafting Group discussed the overall approach to updating the model, initial comments received, and a timeline.

5. A General Description of the Due Process (e.g., exposure periods; public hearings; or any other means by which widespread input from industry, consumers, and legislators was solicited)

The Drafting Group met Aug. 19, 2021, for a regulator-only planning session. Following the initial meeting, the Drafting Group met in open session Sept. 28, Oct. 20, Nov. 4, and Dec. 1, 2021. During these sessions, interested state insurance regulators and parties submitted comment letters to the Drafting Group. The Drafting Group held regulator-only discussion and planning calls on Jan. 10, March 15, and May 3, 2022. During a Surplus Lines (C) Task Force call on May 23, 2022, Model #870 was exposed for a 60-day public comment period. Comments were received from the American Property Casualty Insurance Association (APCIA), CRC Group: Wholesale and Specialty Insurance; Lloyd's of London; McDermott Will & Emery; the National Risk Retention Association (NRRA); Surplus Line Association of Illinois (SLAI); the Council of Insurance Agents & Brokers (CIAB); and the Wholesale & Specialty Insurance Association (WSIA). The Drafting Group held a regulator-only discussion and planning call on Aug. 3, 2022 and the Task Force held a call on Oct. 17 to discuss the comments received and on Oct. 27, 2022 it exposed Model #870 for a 30-day public comment period. Comments were received from the Maine Bureau of Insurance; the APCIA; Lloyd's of London; and the WSIA. During the Fall National Meeting, the Task Force heard a summary of the comments received. The Drafting Group held a regulator-only discussion and planning call on Jan. 18, 2023 to discuss comments received and on Jan. 23 exposed a new draft of Model #870 for a 14-day public comment period. Comments were received from the California Department of Insurance; the APCIA; the CIAB; Lloyd's of London; McDermott Will & Emery; and the WSIA. On Feb. 10 the drafting group held a regulatory-only discussion and planning call and integrated edits into Model #870.

6. A Discussion of the Significant Issues (e.g., items of some controversy raised during the due process and the group's response)

The most significant issue raised was related to the methodology of determining the "Home State" for unaffiliated groups as outlined within Section 2 of the model. Following comments from various interested parties and discussion among Drafting Group members, an agreed-upon revision resulted in clarification via a drafting note.

7. List the Key Provisions of the Model (e.g., sections considered most essential to state adoption)

Section 5C(2)(b) – Non-U.S. Insurers

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- For a Nonadmitted Insurer domiciled outside the U.S., the insurer shall be listed on the *Quarterly Listing of Alien Insurers* maintained by the International Insurers Department (IID) of the NAIC.

Section 5G – Surplus Lines Tax

- In addition to the full amount of gross Premium charged by the insurer for the insurance, every Person licensed pursuant to Section 5J of this Act shall collect and pay to the commissioner a sum equal to [insert number] percent of the gross Premium charged, less any return Premium, for Surplus Lines Insurance 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 state, the sum payable shall be paid entirely to the Home State of the insured. The tax on any portion of the Premium unearned at the termination of insurance having been credited by the state to the licensee shall be returned to the policyholder directly by the Surplus Lines Licensee or through the producing broker, if any. The Surplus Lines Licensee is prohibited from rebating, for any reason, any part of the tax.

Section 5T – Domestic Surplus Lines Insurer

- 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 $15 million. (Although this was added to the model as optional, it remains an important part of the model.).

8. Any Other Important Information (e.g., amending an accreditation standard)

There were no discussions held regarding making Model #870 an accreditation standard.

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Attachment Two

Ref.	Commenter	Date of Ltr.	Section	Comment	Resolution
1	CA Department of Insurance	2/6/2023	Section 5D - Surplus Lines Insurance	Given that the Model defines "Surplus Lines Insurance" as "any insurance permitted to be placed by through a surplus lines licensee with an eligible surplus lines insurer, pursuant to Section 5 of this Act" (emphasis added), the additional language is unnecessary. Under this definition, placement of insurance that State law, rule, or regulation restricts to admitted insurers, be it workers' compensation insurance, accident and health insurance, or any others, is permitted and State law operates. Alternatively, if it is thought that an explicit statement regarding applicable exceptions is desirable, it may be preferable to revise 5D as follows, or a variation of it: The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, subject to exceptions as provided in, or allowed by, the federal Nonadmitted and Reinsurance Reform Act. The benefit of this language is that it would effectively conform to the NRRA, which could conceivably be updated in the future, and prevent possible inadvertent omissions. As proponent's comment letter indicates, there might be other exceptions to §8202(a) in addition to workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance. Therefore, the proposed additional language, depending on the State, may not be all-inclusive. However, under statutory construction rules, it might be taken to be so. Lastly, the additional language may mistakenly be read to mean that workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance are exempt from the "solely" language, thus making them subject to Home State law and some other authority, or just not subject to the Home State.	The Drafting Group Concurs and has eliminated the following: **..with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance.**
2	Lloyd's	2/2/2023	Section 5D - Surplus Lines Insurance	In Lloyd's view, the revisions to Section 5(D), which were suggested in December 2022, are a solution in need of a problem. Lloyd's recommends returning to the language of Section 5(D) which existed prior to the January 2023 exposure draft. This language read, "The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State." It is not necessary to add, "with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance" because the Model Act already memorializes that states have the ability to decide for themselves which lines of insurance are permitted to be placed as surplus lines insurance. This power is contained in Section 3(R) which defines surplus lines insurance as only that which is "permitted to be placed though a surplus lines licensee." This language acknowledges that states have the inherent authority to classify a line of insurance as impermissible for export to the surplus lines market. Section 522(d) of the NRRA acknowledges this power by memorializing that the NRRA does not "preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a non-admitted insurer."	
3	International Underwriting Assn.	2/6/2023	Section 5D - Surplus Lines Insurance	Section 5.D. which, as proposed, reads as follows: "The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance." Retaining all of the highlighted language of course would to the extent retained gut the signature change of the Nonadmitted and Reinsurance reform Act ("NRRA") that only a single state's laws can regulate and impose tax on nonadmitted insurance transactions. Section 522 (a) of the NRRA could not be clearer: (a) Home State Authority. - Except as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State.	
4	The Council of Ins. Agents & Brokers Wholesale & Specialty Ins. Assn.	2/6/2023	Section 5D - Surplus Lines Insurance	We suggest removing the language in section 5(D). Surplus Lines Insurance: "The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance. We believe this language should be excluded from the model, given that section 3(R) of the model defines surplus lines as only those lines determined by the home state as "permitted to be placed through a surplus lines licensee."	
	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 5D - Surplus Lines Insurance	This provision raises a number of questions. What happens to Workers Compensation & Accident & Health? Are they not subject to the statutory and regulatory requirements or are those lines not eligible to be written on a SL basis at all?	
5	CA Department of Insurance	2/6/2023	Section 9 - Service of Process	We do not support the additional language. The NRRA's definition of Exempt Commercial Purchasers and the Model's definition that follows it include objective elements that ensure that the purchasers are sophisticated (retains a qualified risk manager to negotiate the coverage, has paid premiums in excess of $100,000 in the preceding 12 months, and meets 1 of other quantified criteria regarding net worth, revenues, number of employees, etc.). This is clearly not the case with purchasers of Independently Procured Insurance, and Wet Marine and Transportation Insurance. Neither the NRRA nor the Model list have similar objective criteria that ensure that they will always be sophisticated. The addition would be based solely on the assertion that they are typically sophisticated commercial entities, which is inadequate given important considerations including but not limited to consumer protection. If it were accepted that purchasers of Independently Procured Insurance and Wet Marine and Transportation Insurance are as sophisticated as Exempt Commercial Purchasers, the NRRA, and consequently the Model, would show this and treat them similarly. They do not. Also, the inclusion of Independently Procured Insurance and Wet Marine and Transportation Insurance in this paragraph may create confusion regarding the scope of applicability of the Model to them. Due to these reasons, we believe that the additional language should be deleted.	No Change recommened by the Drafting Group.
6	International Underwriting Assn.	2/6/2023	Section 9 - Service of Process	Section 9. : "Except with regard to Exempt Commercial Purchasers, Independently Procured Insurance, and Wet Marine and Transportation Insurance, conditions or stipulations in the policy or contract notwithstanding, a Nonadmitted insurer subject to arbitration or other alternative dispute resolution mechanism shall conduct the arbitration or other alternative dispute resolution mechanism in the home state of the insured." We believe the revised language should explicitly include "aviation insurance" if only to be consistent with other mentions of MAT business in the Model Act (see Section 4. F. (4)).	"Aviation" was added as well as sentence within the drafting note.
	Nat. Assn. of Mutual Ins. Companies	44978	Section 9 - Service of Process	It is unclear whether the intent of this modification is to exempt commercial purchasers (and others) from arbitration or other alternative dispute resolution; additional clarifying language may be appropriate.	Previously Addressed by the Drafting Group
7	Lloyd's	2/2/2023	Section 5(N)(5) - Surplus Lines Insurance	Comments submitted on the eve of the last Task Force meeting suggest that an existing exclusion for Exempt Commercial Purchasers ("ECPs") should be removed from the notice requirement of Section 5(N)(5) because such a notice would not be burdensome for brokers to provide. Lloyd's agrees that a notice to ECPs is not burdensome – indeed a notice is required to be provided to ECPs under federal law. The problem with requiring that ECPs receive the notice described in the Model Act is that the Model Act notice does not align entirely with the ECP notice required under federal law. Brokers providing the Model Act notice to ECPs would not satisfy federal requirements. It is understandable that after 18 months of drafting concerned parties might lose sight of drafting decisions which were previously considered in a thoughtful way and made for legally sound reasons. In this case, the drafting group had properly excluded ECPs from the Model Act's notice requirement because ECPs are already subject to a separate notice requirement. Lloyd's wishes to remind the Task Force and drafting group that it had already made the legally sound drafting decision and need not deviate from that now. Removing the ECP notice exclusion would create duplicative notice requirements for the most sophisticated insurance purchasers in the United States.	No Change recommened by the Drafting Group
8	Amer. P/C Insurance Assn.	2/6/2023	Section 5(N)(5) - Surplus Lines Insurance	APCIA recommends the Drafting Group consider keeping Exempt Commercial Purchasers in the Notice section, thereby not requiring insurers to provide the Notice. By definition (Section 3. H), Exempt Commercial Purchasers are sophisticated risk management professionals who are well-versed on the differences between the admitted and nonadmitted insurance markets. Requiring the notice to these professionals is redundant and unnecessary.	
9	The Council of Ins. Agents & Brokers Wholesale & Specialty Ins. Assn.	2/6/2023	Section 5(N)(5) - Surplus Lines Insurance	We suggest removing the Exempt Commercial Purchasers (ECP) Notice Requirement in 5(N)(5): Brokers are already required to provide a notice to ECPs under federal law. Therefore, a separate model act notice, in addition to the federal notice, seems unnecessary for these types of commercial insurance purchasers.	
10	International Underwriting Assn.	2/6/2023	Section 3 - Definitions	Section 3. Q., the U.S. Virgin Islands would doubtless appreciate adding an "s" to the word "Island."	The Drafting Group Concurs
11	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 4 - Placement of Insurance	This is very broad; initially it was intended to prohibit someone from aiding or abetting an unauthorized insurer but this seems to prohibit any communication.	No Change recommened by the Drafting Group
12	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 5(A)3 - Surplus Lines Insurance	For exempt commercial purchasers, the NRRA just exempts the broker from doing the diligent search. This seems to say that surplus lines may be placed on risks where the potential insured is not an exempt commercial purchaser, which may then mean that surplus lines cannot be placed for exempt commercial purchasers – this does not seem to be the likely intention.	No Change recommened by the Drafting Group
13	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 5(C)2ai - Surplus Lines Insurance	While the domiciliary state rules govern under the NRRA, there may not ever have been a mandate that the non-domiciliary jurisdiction check to make sure that the surplus lines insurer can write the "type of insurance" in its domicile. Also, kindly consider the situation where the surplus lines insurer is eligible to write another type of insurance at a later time.	No Change recommened by the Drafting Group
14	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 5F - Surplus Lines Insurance	There is some confusion regarding commissioners' authority and jurisdiction to make a nonadmitted company subject to notice and hearing. Additional clarification around this issue would be helpful.	No Change recommened by the Drafting Group
15	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 5(I)2 - Surplus Lines Insurance	Is the intent of this modification to require that the underlying agent/broker license be a resident license as well? Clarifying language here may be appropriate.	No Change recommened by the Drafting Group
16	Nat. Assn. of Mutual Ins. Companies	2/21/2023	Section 5(M)5 - Surplus Lines Insurance	Additional understanding of why exempt commercial policyholders were removed from this provision and the implications of doing so would be greatly appreciated, perhaps through a drafting note or, as appropriate, at a future meeting of the Task Force.	No Change recommened by the Drafting Group

RICARDO LARA
CALIFORNIA INSURANCE COMMISSIONER

February 6, 2023

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 continued 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 to modernize it.

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

1. **Section 5D – Surplus Lines Insurance**

As shown in the 1/18/23 Exposure Draft, this section reads:

> The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, *with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance*.

As explained in the comment letter proposing this change, reasons for the additional language (in italicized text above) include:

- The additional language was intended to mirror NRRA language below and to cure the otherwise omitted exceptions set forth in §8202(d):

> 15 U.S.C.A. §8202:
> (a)Home State authority. Except as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State.
>
> . . .
>
> (d) Workers' compensation exception. This section may not be construed to preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer.

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- To cure the implicit exceptions arising from "nonadmitted insurance," which the NRRA (§8202(a)) uses and defines as "any property and casualty insurance" and, in comparison, "Surplus Lines Insurance" which section the Model (5D) uses and defines as "any insurance permitted to be placed by through a surplus lines licensee with an eligible surplus lines insurer, pursuant to Section 5 of this Act."

We think that the additional language is unnecessary, needs improvement, or is confusing, as explained below.

Given that the Model defines "Surplus Lines Insurance" as "any insurance *permitted to be placed by through a surplus lines licensee with an eligible surplus lines insurer*, pursuant to Section 5 of this Act" (emphasis added), the additional language is unnecessary. Under this definition, placement of insurance that State law, rule, or regulation restricts to admitted insurers, be it workers' compensation insurance, accident and health insurance, or any others, is permitted and State law operates.

Alternatively, if it is thought that an explicit statement regarding applicable exceptions is desirable, it may be preferable to revise 5D as follows, or a variation of it:

> The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, subject to exceptions as provided in, or allowed by, the federal Nonadmitted and Reinsurance Reform Act.

The benefit of this language is that it would effectively conform to the NRRA, which could conceivably be updated in the future, and prevent possible inadvertent omissions. As proponent's comment letter indicates, there might be other exceptions to §8202(a) in addition to workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance. Therefore, the proposed additional language, depending on the State, may not be all-inclusive. However, under statutory construction rules, it might be taken to be so.[1]

Lastly, the additional language may mistakenly be read to mean that workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance are exempt from the "solely" language, thus making them subject to Home State law and some other authority, or just not subject to the Home State.

2. Section 9H – Service of Process

As shown in the 1/18/23 Exposure Draft, pertinent part of this section reads:

> ~~Not withstanding~~Except with regard to Exempt Commercial Purchasers, *Independently Procured Insurance, and Wet Marine and Transportation Insurance,* conditions or stipulations in the policy or contract notwithstanding, a N~~n~~onadmitted I~~i~~nsurer 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~~ in the home state of the insured.

As explained in the comment letter proposing this change, reasons for the additional language (in italicized text above) include that purchasers of Independently Procured Insurance and Wet Marine and Transportation Insurance are "typically sophisticated commercial entities."

We do not support the additional language. The NRRA's definition of Exempt Commercial Purchasers and the Model's definition that follows it include objective elements that ensure that the purchasers are

[1] Under the "Expressio unius est exclusio alterius" canon of statutory construction, "where a constitution or statute specifies certain things, the designation of such things excludes all others."

sophisticated (retains a qualified risk manager to negotiate the coverage, has paid premiums in excess of $100,000 in the preceding 12 months, and meets 1 of other quantified criteria regarding net worth, revenues, number of employees, etc.). This is clearly not the case with purchasers of Independently Procured Insurance, and Wet Marine and Transportation Insurance. Neither the NRRA nor the Model list have similar objective criteria that ensure that they will always be sophisticated. The addition would be based solely on the assertion that they are *typically* sophisticated commercial entities, which is inadequate given important considerations including but not limited to consumer protection. If it were accepted that purchasers of Independently Procured Insurance and Wet Marine and Transportation Insurance are as sophisticated as Exempt Commercial Purchasers, the NRRA, and consequently the Model, would show this and treat them similarly. They do not.

Also, the inclusion of Independently Procured Insurance and Wet Marine and Transportation Insurance in this paragraph may create confusion regarding the scope of applicability of the Model to them.

Due to these reasons, we believe that the additional language should be deleted.

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

Sincerely,

Libio B. Latimer
Attorney IV

cc: Kathryn Taras, CDI
Camilo Pizarro, CDI
Michelle Lo, CDI
Kim Hudson, CDI

American Property Casualty Insurance Association
INSURING AMERICA apci.org

February 6, 2023

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

Re: Non-Admitted 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 as well as update the Model after being in place for nearly 20 years are commendable. The majority of updates appear to support these goals.

APCIA greatly appreciates the collaborative process undertaken by the Surplus Lines Task Force and Working Group in developing the recently exposed draft Model Law. The suggested edit provided below is intended to add clarity and maximize the insurance purchase experience and benefits.

Section 5 Evidence of the Insurance and Subsequent Changes to the Insurance, paragraph N.

APCIA recommends the Drafting Group consider keeping Exempt Commercial Purchasers in the Notice section, thereby not requiring insurers to provide the Notice. By definition (Section 3. H), Exempt Commercial Purchasers are sophisticated risk management professionals who are well-versed on the differences between the admitted and nonadmitted insurance markets. Requiring the notice to these professionals is redundant and unnecessary.

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,

Gary P. Sullivan
Sr. Director, Emerging Risks
APCIA
gary.sullivan@apcia.org
202.828.7161

THE COUNCIL
The Council of Insurance Agents & Brokers

WSIA WHOLESALE & SPECIALTY INSURANCE ASSOCIATION

February 6, 2023

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 January 2023 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 revisions to the 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). We are writing to echo the views outlined in the February 2d letter submitted on behalf of Underwriters at Lloyd's, London ("Lloyd's") and, like Lloyd's, we urge adoption of the version of the Model Act that was circulated last Fall and that was subject to extensive notice and comments. Our comments below focus solely on two changes in the January 2023 exposure draft that we, like Lloyd's, find particularly problematic and we incorporate by reference Lloyd's more extensive analysis of these issues. We look forward to continued discussion with the Task Force.

1. ***We suggest removing the language in section 5(D). Surplus Lines Insurance:***
"The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance.

We believe this language should be excluded from the model, given that section 3(R) of the model defines surplus lines as only those lines determined by the home state as "permitted to be placed through a surplus lines licensee."

2. ***We suggest removing the Exempt Commercial Purchasers (ECP) Notice Requirement in 5(N)(5):***

[1] *See* January 2023 model #870 draft

Brokers are already required to provide a notice to ECPs under federal law. Therefore, a separate model act notice, in addition to the federal notice, seems unnecessary for these types of commercial insurance purchasers.

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,

Joel Kopperud

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February 6, 2023

VIA EMAIL

Andy Daleo
Senior Manager
P/C Domestic and International Analysis
Financial Regulatory Affairs
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

Re: Proposed Revisions to the NAIC Nonadmitted Insurance Model Act (#870)
Comments from the International Underwriting Association

Dear Mr. Daleo,

Further to your January 23rd email, thank you on behalf of the International Underwriting Association ("IUA") for this latest opportunity to submit comments on the proposed revised Nonadmitted Insurance Model Act (the "Model Act"). As you well know, many members of the IUA appear on the International Insurers Department's Quarterly Listing of Alien Insurers and, collectively, those members write the full range of risks that state laws permit surplus lines brokers to "export" to surplus lines brokers. In addition to those risks or classes of business, many IUA members write large volumes of marine, aviation and transportation business, colloquially referred to in the London Market as "MAT" business.

Our first comment concerns the revised Section 5.D. which, as proposed, reads as follows:

> "The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance."

Retaining all of the highlighted language of course would to the extent retained gut the signature change of the Nonadmitted and Reinsurance reform Act ("NRRA") that only a single state's laws can regulate and impose tax on nonadmitted insurance transactions. Section 522 (a) of the NRRA could not be clearer:

> (a) Home State Authority. - Except as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State.

We understand that there is a proviso in the NRRA with respect to workers' compensation business. Section 522 (d) provides:

(d) Workers' Compensation Exception. - This section may not be construed to preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer.

This exception recognizes the universal (we believe) state law prohibition on exporting primary workers' compensation coverages and recognizes too that states that permit self-insurance of workers' compensation have detailed statutory frameworks governing such arrangements. But this is as far as the NRRA goes with respect to these two types of business---there is nothing else in the NRRA that carves out an exception to the fundamental principle that if the business can be exported as surplus lines, only one state's regulations and taxation rules apply. So, other than "workers' compensation insurance" and "excess insurance for self-funded workers' compensation plans," we believe that the proposed changes directly contradict the NRRA and therefore the proposed changes ought to be withdrawn.

Returning to MAT business, our final comment concerns proposed revised Section 9. :

> "Except with regard to Exempt Commercial Purchasers, Independently Procured Insurance, and Wet Marine and Transportation Insurance, conditions or stipulations in the policy or contract notwithstanding, a Nonadmitted insurer subject to arbitration or other alternative dispute resolution mechanism shall conduct the arbitration or other alternative dispute resolution mechanism in the home state of the insured."

We believe the revised language should explicitly include "aviation insurance" if only to be consistent with other mentions of MAT business in the Model Act (see Section 4. F. (4)). While we appreciate that the definition of "Wet Marine and Transportation Insurance" (insofar relevant) in the Model Act touches upon aviation-related insurance, some might argue that it is limited essentially to aviation cargo risks:

> "Wet Marine and Transportation Insurance" 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…."

As mentioned at the outset, IUA members include some of the world's (and the country's) leading aviation insurers, writing hull and third party liability coverages for fixed wing aircraft and helicopters used by scheduled and charter airlines as well as by corporations. Insurers and these categories of insureds ought to be free to negotiate dispute resolution provisions in their contracts and their choices of locations in which to conduct arbitrations ought to be respected.

Finally, as to Section 3. Q., the U.S. Virgin Islands would doubtless appreciate adding an "s" to the word "Island."

Thank you as always for the opportunity to submit comments. Please let us know if you, colleagues or members of the Task Force have any questions about these comments.

Yours sincerely,

Thomas M. Dawson

cc: Helen Dalziel, IUA
Dave Matcham, IUA
Andrea Best, McDermott Will & Emery, LLP U.K.

LLOYD'S

February 2, 2023

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, encompassing business from all 50 states. We appreciate the opportunity to provide these comments.

Lloyd's very much wishes to conclude the process of revising the Model Act, but we also recognize the need for a finished product that is legally sound and can stand the test of time. As such, we are offering two suggestions in response to the latest exposure draft. In both cases, Lloyd's believes the Task Force and drafting group had utilized the best and most appropriate language in the versions of the revised Model Act that were circulated last Fall and were subject to extensive notice and comment. Lloyd's sees no need to deviate from this heavily vetted language and urges the Task Force to return to it.

Section 5(D)

As you know, integrating the "home state" concept into the Model Act has been one of the key objectives of the drafting group since work began on this project in Fall 2021. This issue has received more scrutiny from regulators and interested parties throughout the nearly 18 months of drafting than any other. It is fair to say that Lloyd's and other interested parties believed that by December 2022 the language of Section 5(D) had been thoroughly vetted and approved.

In Lloyd's view, the revisions to Section 5(D), which were suggested in December 2022, are a solution in need of a problem. Lloyd's recommends returning to the language of Section 5(D) which existed prior to the January 2023 exposure draft. This language read, "The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State."

It is not necessary to add, "with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance" because the Model Act already memorializes that states have the ability to decide for themselves which lines of insurance are permitted to be placed as surplus lines insurance. This power is contained in Section 3(R) which defines surplus lines insurance as only that which is "permitted to be placed though a surplus lines licensee." This language acknowledges that states have the inherent authority to classify a line of insurance as impermissible for export to the surplus lines market. Section 522(d) of the NRRA

acknowledges this power by memorializing that the NRRA does not "preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a non-admitted insurer."

Lloyd's is not aware of any state that permits primary workers' compensation insurance to be written by a surplus lines or other nonadmitted carrier. All state laws require this coverage to be written by a licensed/admitted/authorized insurer. However, several states do allow the export of excess workers' compensation insurance to the surplus lines market. Additionally, as the Task Force and drafting group have discussed at length, many states do permit certain A&H products to be exported to the surplus lines market, most notably high limit disability coverage. The problem with excluding workers' compensation insurance, excess workers' compensation insurance, and A&H insurance categorically from the home state rule of Section 5(D) is that it eliminates a taxation and compliance regime for these products which is working smoothly and has no known regulatory issues in states which allow export of these products. If this new language is retained then these products – which are currently flowing to consumers who need them – would be left with an extremely unclear regulatory and taxation framework.

In Lloyd's view, the drafting group and Task Force had it right with the version of Section 5(D) that had been in existence for many months prior to the late January 2023 exposure draft. It is noteworthy that the Model Act does not address life insurance or personal motor vehicle insurance, which are also classes of insurance which all states deem impermissible for export to the surplus lines market. Presumably, this is because concerned parties recognize that states have existing statutory tools to restrict the exportability of these classes and that, therefore, the Nonadmitted Model Act does not need to memorialize this restriction or exclude these classes from the home state rule. The same is true for workers' comp., excess workers' comp., and A&H. States can limit these classes to authorized insurers as they see fit, but excluding these classes from the home state rule will only frustrate the taxation and compliance regimes in states that permit their export, without providing any additional protections to states that prohibit their export.

Section 5(N)(5)

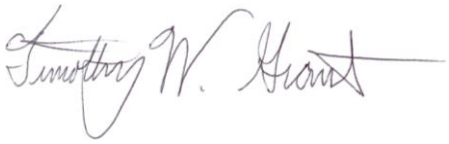
Comments submitted on the eve of the last Task Force meeting suggest that an existing exclusion for Exempt Commercial Purchasers ("ECPs") should be removed from the notice requirement of Section 5(N)(5) because such a notice would not be burdensome for brokers to provide. Lloyd's agrees that a notice to ECPs is not burdensome – indeed a notice is *required* to be provided to ECPs under federal law. The problem with requiring that ECPs receive the notice described in the Model Act is that the Model Act notice does not align entirely with the ECP notice required under federal law. Brokers providing the Model Act notice to ECPs would not satisfy federal requirements.

It is understandable that after 18 months of drafting concerned parties might lose sight of drafting decisions which were previously considered in a thoughtful way and made for legally sound reasons. In this case, the drafting group had properly excluded ECPs from the Model Act's notice requirement because ECPs are already subject to a separate notice requirement. Lloyd's wishes to remind the Task Force and drafting group that it had already made the legally sound drafting decision and need not deviate from that now. Removing the ECP notice exclusion would create duplicative notice requirements for the most sophisticated insurance purchasers in the United States.

It was only after significant consideration that Lloyd's decided to submit another comment letter – we all want to conclude this process. However, the changes made in the latest exposure draft, at the eleventh hour, on issues that had already been discussed at length and decided necessitated a further comment. Regarding both Section 5(D) and Section 5(N)(5) Lloyd's urges the drafting group and the Task Force to return to the previous language which had been vetted by all concerned parties for nearly 18 months.

Lloyd's appreciates the opportunity to offer these comments and would like to again thank the Task Force and the Drafting Group for their dedication throughout the duration of these revisions.

Very truly yours,



Sabrina Miesowitz
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February 21, 2023

National Association of Insurance Commissioners
Surplus Lines (C) Task Force
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197
Via email to Andy Daleo (NAIC)

Re: Nonadmitted Insurance Model Act
Exposure Draft Dated 1/18/2023

Dear Commissioner Donelon and the Surplus Lines (C) Task Force:

On behalf of the National Association of Mutual Insurance Companies (NAMIC)[1] members, thank you for the opportunity to review exposure draft amendments to the Nonadmitted Insurance Model Act (#870). NAMIC understands that the task force has spent considerable time developing proposed revisions to this model and we provide the following comments for your consideration. On behalf of NAMIC members engaged in Surplus Lines markets, we are committed to constructive engagement with the Task Force moving forward as you continue your important efforts.

This letter walks through comments received by NAMIC, outlining concerns in the order presented in the Model. It is structured to show the provision at issue followed by the concern expressed.

Section 4(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.~~

Feedback: This is very broad; initially it was intended to prohibit someone from aiding or abetting an unauthorized insurer but this seems to prohibit any communication. This was identified as a concern to emphasize to the Task Force.

[1] NAMIC membership includes more than 1,500 member companies. The association supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members write $323 billion in annual premiums.

Section 5(A)(3)

Other than for e~~E~~xempt c~~C~~ommercial p~~P~~urchasers, 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 state. The full amount or type of insurance may be procured from E~~e~~ligible S~~s~~urplus L~~l~~ines I~~i~~nsurers, 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 state if any are writing it; and

Feedback: For exempt commercial purchasers, the NRRA just exempts the broker from doing the diligent search. This seems to say that surplus lines may be placed on risks where the potential insured is not an exempt commercial purchaser, which may then mean that surplus lines cannot be placed for exempt commercial purchasers – this does not seem to be the likely intention. This was identified as a concern to emphasize to the Task Force.

Section 5(C)(2)(a)(i)

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

Feedback: While the domiciliary state rules govern under the NRRA, there may not ever have been a mandate that the non-domiciliary jurisdiction check to make sure that the surplus lines insurer can write the "type of insurance" in its domicile. Also, kindly consider the situation where the surplus lines insurer is eligible to write another type of insurance at a later time. This was identified as a concern to emphasize to the Task Force.

Section 5(D)

The placement of Surplus Lines Insurance shall be subject to the statutory and regulatory requirements solely of the insured's Home State, with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance.

Feedback: This provision raises a number of questions. What happens to Workers Compensation & Accident & Health? Are they not subject to the statutory and regulatory requirements or are those lines not eligible to be written on a SL basis at all?

Section 5(F) …

~~The~~the commissioner may after notice and an opportunity for a hearing declare it ineligible. The commissioner shall promptly ~~mail~~publish notice of all such declarations in a timely manner reasonably calculated to reach to each S~~s~~urplus L~~l~~ines L~~l~~icensee or surplus lines advisory organization, for distribution to all surplus lines licensees.

Feedback: There is some confusion regarding commissioners' authority and jurisdiction to make a nonadmitted company subject to notice and hearing. Additional clarification around this issue would be helpful. This was identified as a concern to emphasize to the Task Force.

Section 5(I)(2)

The commissioner 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:

Feedback: Is the intent of this modification to require that the underlying agent/broker license be a resident license as well? Clarifying language here may be appropriate.

Section 5(M)(5)

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.

Feedback: Additional understanding of why exempt commercial policyholders were removed from this provision and the implications of doing so would be greatly appreciated, perhaps through a drafting note or, as appropriate, at a future meeting of the Task Force.

Section 9(H)

~~Not withstanding~~Except with regard to Exempt Commercial Purchasers, Independently Procured Insurance, and Wet Marine and Transportation Insurance, conditions or stipulations in the policy or contract notwithstanding, a Nnonadmitted Iinsurer 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~~ in the home state of the insured.

Feedback: It is unclear whether the intent of this modification is to exempt commercial purchasers (and others) from arbitration or other alternative dispute resolution; additional clarifying language may be appropriate.

* * *

NAMIC appreciates your consideration of these comments and we look forward to working with the Task Force as the process of modernizing the model law continues.

Respectfully,

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