

## **SURPLUS LINES (E) TASK FORCE**

Surplus Lines (C) Task Force March 21, 2023, Minutes

*Nonadmitted Insurance Model Act #870* (Attachment One)

Model #870 Project History (Attachment Two)

## Draft Pending Adoption

Draft: 3/24/23

Surplus Lines (C) Task Force  
Louisville, Kentucky  
March 21, 2023

The Surplus Lines (C) Task Force met in Louisville, KY, March 21, 2023. The following Task Force members participated: James J. Donelon, Chair, Stewart Guerin, and Tom Travis (LA); Larry D. Deiter, Vice Chair, represented by Tony Dorschner (SD); Lori K. Wing-Heier represented by David Phifer (AK); Mark Fowler represented by Willard Smith (AL); Ricardo Lara represented by Libio Latimer (CA); Michael Conway represented by Rolf Kaumann (CO); Michael Yaworsky represented by Virginia Christy (FL); Doug Ommen represented by Travis Grassel (IA); Dean L. Cameron represented by Randy Pipal (ID); Dana Popish Severinghaus represented by Susan Berry (IL); Vicki Schmidt represented by Jessica Lillibridge (KS); Gary D. Anderson represented by John Turchi (MA); Kathleen A. Birrane represented by Erin Nickles (MD); Troy Downing represented by Bob Biskupiak (MT); Mike Causey represented by Robert Croom (NC); Scott Kipper (NV); Glen Mulready represented by Eli Snowbarger (OK); Michael Humphreys represented by Shannen Logue (PA); Michael Wise represented by Rachel Moore (SC); Carter Lawrence represented by Trey Hancock (TN); and Cassie Brown represented by Jamie Walker (TX). Also participating was: Robert Wake (ME).

### 1. Adopted its 2022 Fall National Meeting Minutes

Walker made a motion, seconded by Hancock, to adopt the Task Force's Dec. 12, 2022, minutes (see *NAIC Proceedings – Fall 2022, Surplus Lines (C) Task Force*). The motion passed unanimously.

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

Guerin reported that the Surplus Lines (C) Working Group met March 9 in regulator-to-regulator session, pursuant to paragraph 3 (specific companies, entities, or individuals) of the NAIC Policy Statement on Open Meetings, to discuss two applications seeking approval for listing on the NAIC *Quarterly Listing of Alien Insurers*. One application was approved.

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

### 3. Adopted Amendments to Model #870

Commissioner Donelon commented that before considering adoption of the *Nonadmitted Insurance Model Act* (#870) (Attachment One), an update from the drafting group and a summary of the project history would be provided by Travis.

Travis stated that since the 2022 Fall National Meeting, the Model 870 Drafting Group met twice. First, it met Jan. 18 to address comments and expose Model #870 as directed by the Task Force at the 2022 Fall National Meeting. Then, it met Feb. 10 to discuss a few lingering comments received from the exposure. Travis stated that as a result of the exposure, a couple of edits have been made to the draft model. He indicated that those edits are highlighted in yellow in the redlined version. He stated that Section 5D received several comments to remove the statement "with the exception of workers' compensation insurance, excess workers' compensation insurance, and accident and health insurance," and the drafting group concurred with removing it. He said following a discussion with Maine, the drafting group added a drafting note that Daleo circulated to the Task Force. He indicated that the drafting note covers Section 522(d) of the federal Nonadmitted and Reinsurance Reform Act of 2010 (NRRRA) with regard to exceptions to the home state authority. Second, he commented that regarding Section 9H on arbitration,

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“Aviation” was added to the draft, bracketed to reflect as optional. He concluded by summarizing the Model #870 project history (Attachment Two).

Wake commented that he believes there was consensus during the last meeting that there would be a carve-out for workers’ compensation and disability regarding Section 5D. He commented that he was surprised to hear that the drafting group had pushback on this and it was removed. He indicated that he would urge the Task Force to reinstate that provision. He stated that if the Task Force thinks that reinstatement is too much of a heavy lift at this late stage, the proposed drafting note is a good compromise. He commented that Lloyd’s summarized it best by stating that the carve out for workers’ compensation, excess workers’ compensation, and accident and health (A&H) is unnecessary because the model law already memorialized that states have the ability to decide for themselves which lines of business are permitted to be placed in surplus lines insurance. He indicated that Congress said 13 years ago that the states no longer have that ability after Section 5D was added as an exception. He stated that if it were not for Section 5D, Section 3 would give states that ability. He commented that within Section 522 of the NRRRA, Congress allowed states to reserve the authority to control, as the non-home state, the placement of workers’ compensation and excess workers’ compensation; and because of the way nonadmitted insurance is defined, the power to control A&H insurance was never taken away. The carve-out would exercise that right; without the carve-out, that right is not being exercised. Wake indicated that that is why the carve-out was proposed; however, he understands that the drafting note may be the best that the Task Force can do at this late date. However, he proposed going back to the carve-out language.

Sabrina Miesowitz (Lloyd’s) commented that Lloyd’s supports the drafting note, and the comment letter indicated that there was some disagreement regarding the interpretation of what the NRRRA says. She said Lloyd’s believes states have the authority to decide whether workers’ compensation or A&H are allowed to be exportable to the surplus lines market. She indicated that that is why Lloyd’s supports preserving that language, so that possibility is not being closed for states where A&H can be exportable.

Commissioner Donelon commented that the Task Force has come a long way with Model #870, and it has reached the finish line. He offered a special thanks to the drafting group, specifically Colorado, Illinois, Louisiana, Texas and Washington, and he commended them on all the hard work. Before moving forward to consider adoption, he inquired about any questions or comments. Given that none were raised, he asked for a motion to adopt the proposed amendments to Model #870, including the drafting note.

Walker made a motion, seconded by Kaumann, to adopt the proposed amendments to Model #870, including the drafting note. The motion passed unanimously.

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 ~~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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DC. “Commissioner” means the insurance commissioner of [insert name of state], or the commissioner’s deputies or staff, or the ~~c~~Commissioner, ~~d~~Director or ~~s~~Superintendent of insurance in any other state.

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

E. “Control” means with respect to an insured:

- (1) A person, either directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity; or
- (2) The entity controls in any manner the election of a majority of the directors or trustees of the other entity.

F. ~~[OPTIONAL: “Domestic surplus lines insurer” means a surplus lines insurer domiciled in this state, 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) ~~It 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~~+~~ 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~~s a not-for-profit organization or public entity generating annual budgeted expenditures of at least \$30,000,000; or-
  - (v) ~~The person-i~~s 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(32)(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:** ~~This~~ definition of “Exempt commercial purchaser” follows the language of the federal Nonadmitted and Reinsurance Reform Act (NRRA). ~~Some states have chosen not to adopt the inflation adjustment. The NRRA uses the term “municipality,” which some states may find limiting. States may choose to use terminology consistent with state law to expand this provision to include counties and other public entities.~~

EI. “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:

- (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 ~~subParagraph (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 for addition of that are expressly covering unaffiliated group 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.~~ “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.~~ “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 Northern Mariana Islands, the Virgin Islands, and American Samoa. “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.R.N.~~ “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.

~~SFO.~~ “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 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;

- (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.F.~~ “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

~~(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 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;

~~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~~ insurance or reinsurance ~~business by~~ 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~~The 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

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“~~E~~export ~~L~~ist” maintained by the commissioner. The ~~e~~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 ~~nonadmitted~~eligible surplus lines insurer ~~eligible to accept the insurance~~, unless specifically prohibited by the laws of this state.

[Alternative Subsection B]

- [~~E~~B. 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 is eligible to write surplus lines insurance under one of the following subparagraphs:~~

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

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

~~(I) ~~(i)~~ ~~(IA)~~ The minimum capital and surplus requirements under the law of this -state; or~~

~~(II) ~~(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 NRRRA.~~

~~(iii) 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)e] 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.

~~(e) 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 trustee 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~~

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- ~~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:~~
- ~~(1) The liabilities are maintained in an irrevocable trust account in the United States in a qualified financial institution, on behalf of U.S. policyholders consisting of cash, securities, letters of credit or other investments of substantially the same character and quality as those which are eligible investments pursuant to [cite insurance investment law] for the capital and statutory reserves of admitted insurers to write like kinds of insurance in this state. The trust fund, which shall be included in any calculation of capital and surplus or its equivalent, shall~~

- ~~satisfy the requirements of the Standard Trust Agreement required for listing with the NAIC International Insurers Department; and~~
- (II) ~~The insurer may request approval from the commissioner to use the trust fund to pay valid surplus lines claims; provided, however, that the balance of the trust fund is never less than the greater of \$5,400,000 or thirty percent (30%) of the insurer's current gross U.S. surplus lines liabilities, excluding aviation, wet marine and transportation insurance 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:~~

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

- (g) ~~The commissioner shall have the authority to adjust, in response to inflation, the trust fund amounts required by Subparagraph (e).~~
- (3) ~~In addition to all of the other requirements of this subsection, an insurer not domiciled in the United States or its territories shall be listed by the NAIC International Insurers Department. The commissioner may waive the requirement in Paragraph (3) or the requirements of Section 5C(2)(e)(ii) may be satisfied by an insurer's possessing less than the trust fund amount specified in Section 5C(2)(e)(ii) upon an affirmative finding of acceptability by the commissioner if the commissioner is satisfied that the placement of insurance with the insurer is necessary and will not be detrimental to the public and the policyholder. In determining whether business may be placed with the insurer, the commissioner may consider such factors as:~~
- (a) ~~The interests of the public and policyholders;~~
- (b) ~~The length of time the insurer has been authorized in its domiciliary jurisdiction and elsewhere;~~
- (c) ~~Unavailability of particular coverages from authorized insurers or unauthorized insurers meeting the requirements of this section;~~
- (d) ~~The size of the company as measured by its assets, capital and surplus, reserves, premium writings, insurance in force or other appropriate criteria;~~
- (e) ~~The kinds of business the company writes, its net exposure and the extent to which the company's business is diversified among several lines of insurance and geographic locations; and~~
- (f) ~~The past and projected trend in the size of the company's capital and surplus considering such factors as premium growth, operating history, loss and expense ratios, or other appropriate criteria; and~~

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

~~E.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

- ~~(1) (4)~~—In addition to the full amount of gross premiums charged by the insurer for the insurance, every person licensed pursuant to Section 51H of this Act shall collect and pay to the commissioner a sum equal to [insert number] percent of the gross premiums charged, less any return premiums, 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 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 5R 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.

HH. Surplus Lines Licenses

- (1) A person shall not procure a contract of surplus lines insurance with a ~~nonadmitted~~ 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 ~~a current underlying property and casualty agent's or broker's or general agent's licenses,~~ but only when the ~~broker or agent~~ producer has:
  - (a) Remitted the \$[insert amount] annual fee to the 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;~~
  - ~~(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, ~~;~~ and

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

(3) A nonresident 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 National 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) 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 ~~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.

**H.** 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

- (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.

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- (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

- (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.

~~NM.~~ 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.~~
- ~~(56)~~ (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

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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. An “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. These 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.

QN. 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.

PQ. 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.

QP. 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.

RQ. 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:

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

- (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 premiums written;
- (2) Aggregate return premiums;
- (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 ~~GF~~ 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 following:
  - ~~(i) Premium taxes, fees, and assessments applicable to admitted insurance;~~
  - ~~(ii) \_\_\_\_\_Regulation of rates and formss requiring the filing of rates and forms for approval;~~
  - ~~(iii) \_\_\_\_\_Assessment or coverage by insurance guaranty funds.]~~~~

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

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

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

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

## Section 7. Penalties

- A. A 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.

## 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. ~~Notwithstanding~~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. ~~Notwithstanding~~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~~Section 9H. States should consider adoption or modification of prior~~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 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.

**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 ~~written in this state;~~ 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. ~~Separability~~ Severability Clause of 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].

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

- 1994 Proc. 3<sup>rd</sup> Quarter 14, 16-17, 24, 28-46 (adopted).*
- 1996 Proc. 3<sup>rd</sup> Quarter 9, 42, 1110, 1168, 1169-1173, 1189-1190 (amended).*
- 1997 Proc. 4<sup>th</sup> Quarter 25, 27-28, 1004, 1029 (amended).*
- 1999 Proc. 3<sup>rd</sup> Quarter 25, 26, 1080, 1135, 1151-1153 (amended).*
- 2002 Proc. 2<sup>nd</sup> 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. I 6, 36, 834, 899-900, 923-926 (adopted).*

## 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 (NRRRA), 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 NRRRA. Model #870 was not modified as a result of the implementation of the NRRRA. 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 NRRRA, 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 NRRRA, 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 NRRRA, and the Nonadmitted Insurance Multistate Agreement (NIMA), which was developed by the Task Force in response to the NRRRA. 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 NRRRA 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.

## Nonadmitted Insurance Model Act (#870)

### Project History

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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 (NRRRA); 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



## Nonadmitted Insurance Model Act (#870)

### Project History

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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.