WEST VIRGINIA CODE: §33-12C-5

§33-12C-5. Surplus lines insurance.

(a) The placement of surplus lines insurance is subject to this section only if this state is the insured's home state.

(b) Surplus lines insurance may be placed by a surplus lines licensee if:

(1) Each insurer is an eligible surplus lines insurer; and

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

(3) The full amount or line of insurance cannot be obtained from insurers who are admitted to do business 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 by the individual insurance producer 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: Provided, That such a search is not required when the licensee is seeking to procure or place nonadmitted insurance for an exempt commercial purchaser if the licensee disclosed to such purchaser that such insurance may or may not be available from the admitted market that may provide greater protection with more regulatory oversight and that such purchaser has subsequently requested in writing that the licensee procure or place such insurance from a nonadmitted insurer; and

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

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

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

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

(2) Qualifies under one of the following paragraphs:

(A) Has capital and surplus or its equivalent under the laws of its domiciliary jurisdiction which equals the greater of:

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

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(II) $15 million;

(ii) The requirements of subparagraph (i), paragraph (A) of this subdivision 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 underwriting profit and investment income trends, market availability and company record and reputation within the industry. In no event shall the commissioner make an affirmative finding of acceptability when the nonadmitted insurer's capital and surplus is less than $4,500,000; or

(B) 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 million in the aggregate; and

(ii) The exchange shall maintain under terms acceptable to the commissioner not less than fifty percent 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 million 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 million; or

(II) For insurance exchanges which do not maintain funds in an amount of not less than $15 million 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 million, whichever is greater; or

(C) In the case of a Lloyd's plan or other similar group of insurers, which consists of unincorporated individual insurers, or a combination of both unincorporated and incorporated insurers:(i) The plan or group maintains a trust fund that shall consist of a trusteed account representing the group's liabilities attributable to business written in the United States; and

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

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

(iv) The trust funds shall be maintained in an irrevocable trust account in the United States in a qualified financial institution, consisting of cash, securities, letters of credit or investments of substantially the same character and quality as those which are eligible investments for the capital and statutory reserves of admitted insurers to write like kinds of insurance in this state and, in addition, the trust required by subparagraph (ii) of this subdivision shall satisfy the requirements of the standard trust agreement required for listing with the National Association of Insurance Commissioners (NAIC) International Insurers Department or any successor thereto; 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 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 billion; and

(ii) The group shall maintain in trust a surplus in the amount of $10 billion; 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 million per company.

(iv) The trust funds shall satisfy the requirements of the standard trust agreement requirement for listing with the NAIC International Insurers Department or any successor thereto, 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 paragraph (B), (C) or (D) of this subdivision, an insurer not domiciled in one of the United States or its territories shall satisfy the capital and surplus requirements of paragraph (A), subdivision (2), subsection (d) of this section and shall have in force a trust fund of not less than the greater of:

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(i) $5,400,000; or

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

(I) The liabilities are maintained in an irrevocable trust account in the United States in a qualified financial institution, on behalf of U.S. policyholders consisting of cash, securities, letters of credit or other investments of substantially the same character and quality as those which are eligible investments pursuant to article eight of this chapter 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 or any successor thereto; 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 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;

(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 years from the date of enactment to meet the requirements of paragraph (E) of this subdivision, as follows:

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

(G) The commissioner shall have the authority to adjust, in response to inflation, the trust fund amounts required by paragraph (E) of this subdivision.

(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 on the NAIC's quarterly listing of alien insurers. The commissioner may waive the requirement in this subdivision or the requirements of subparagraph (ii), paragraph (E), subdivision (2), subsection (d) of this section may be satisfied by an insurer's possessing less than the trust fund amount specified in subparagraph (ii), paragraph (E), subdivision (2), subsection (d) of this section 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 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 (B), subdivision (2) of this subsection, the statement may be an aggregate combined statement of all underwriting syndicates operating during the period reported; and

(5) In addition to meeting the requirements in subdivisions (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 annually. Nothing in this subdivision shall require the commissioner to place or maintain the

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name of any nonadmitted insurer on the list of eligible surplus lines insurers.(6) Notwithstanding subsection (a) of this section, 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 subdivision (5) of this subsection but nonetheless meets the requirements set forth in subdivisions (1) and (2), subsection (d) of this section 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 thirty days after placing the coverage, the surplus lines licensee shall also send written notice to the insured that the insurance, or a portion thereof, has been placed with the nonadmitted insurer.

(e) Insurance procured under this section shall be valid and enforceable as to all parties.

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