

SURPLUS LINES INSURANCE MODIFICATIONS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jerry W. Stevenson

House Sponsor: James A. Dunnigan

LONG TITLE

General Description:

This bill modifies the Insurance Code to address surplus lines of insurance.

Highlighted Provisions:

This bill:

- ▶ repeals certain audit requirements for surplus lines insurers;
- ▶ repeals provisions related to earned premiums; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

31A-15-103, as last amended by Laws of Utah 2014, Chapter 224

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **31A-15-103** is amended to read:

31A-15-103. Surplus lines insurance -- Unauthorized insurers.

(1) Notwithstanding Section **31A-15-102**, a foreign insurer that has not obtained a certificate of authority to do business in this state under Section **31A-14-202** may negotiate for



28 and make an insurance contract with a person in this state and on a risk located in this state,
29 subject to the limitations and requirements of this section.

30 (2) (a) For a contract made under this section, the insurer may, in this state:

31 (i) inspect the risks to be insured;

32 (ii) collect premiums;

33 (iii) adjust losses; and

34 (iv) do another act reasonably incidental to the contract.

35 (b) An act described in Subsection (2)(a) may be done through:

36 (i) an employee; or

37 (ii) an independent contractor.

38 (3) (a) Subsections (1) and (2) do not permit a person to solicit business in this state on
39 behalf of an insurer that has no certificate of authority.

40 (b) Insurance placed with a nonadmitted insurer shall be placed with a surplus lines
41 producer licensed under Chapter 23a, Insurance Marketing - Licensing Producers, Consultants,
42 and Reinsurance Intermediaries.

43 (c) The commissioner may by rule prescribe how a surplus lines producer may:

44 (i) pay or permit the payment, commission, or other remuneration on insurance placed
45 by the surplus lines producer under authority of the surplus lines producer's license to one
46 holding a license to act as an insurance producer; and

47 (ii) advertise the availability of the surplus lines producer's services in procuring, on
48 behalf of a person seeking insurance, a contract with a nonadmitted insurer.

49 (4) For a contract made under this section, a nonadmitted insurer is subject to Sections
50 [31A-23a-402](#), [31A-23a-402.5](#), and [31A-23a-403](#) and the rules adopted under those sections.

51 (5) A nonadmitted insurer may not issue workers' compensation insurance coverage to
52 an employer located in this state, except for stop loss coverage issued to an employer securing
53 workers' compensation under Subsection [34A-2-201\(3\)](#).

54 (6) (a) The commissioner may by rule prohibit making a contract under Subsection (1)
55 for a specified class of insurance if authorized insurers provide an established market for the
56 class in this state that is adequate and reasonably competitive.

57 (b) The commissioner may by rule place a restriction or a limitation on and create
58 special procedures for making a contract under Subsection (1) for a specified class of insurance

59 if:

60 (i) there have been abuses of placements in the class; or

61 (ii) the policyholders in the class, because of limited financial resources, business
62 experience, or knowledge, cannot protect their own interests adequately.

63 (c) The commissioner may prohibit an individual insurer from making a contract under
64 Subsection (1) and all insurance producers from dealing with the insurer if:

65 (i) the insurer willfully violates:

66 (A) this section;

67 (B) Section [31A-4-102](#), [31A-23a-402](#), [31A-23a-402.5](#), or [31A-26-303](#); or

68 (C) a rule adopted under a section listed in Subsection (6)(c)(i)(A) or (B);

69 (ii) the insurer fails to pay the fees and taxes specified under Section [31A-3-301](#); or

70 (iii) the commissioner has reason to believe that the insurer is:

71 (A) in an unsound condition;

72 (B) operated in a fraudulent, dishonest, or incompetent manner; or

73 (C) in violation of the law of its domicile.

74 (d) (i) The commissioner may issue one or more lists of unauthorized foreign insurers

75 whose:

76 (A) solidity the commissioner doubts; or

77 (B) practices the commissioner considers objectionable.

78 (ii) The commissioner shall issue one or more lists of unauthorized foreign insurers the
79 commissioner considers to be reliable and solid.

80 (iii) In addition to the lists described in Subsections (6)(d)(i) and (ii), the commissioner
81 may issue other relevant evaluations of unauthorized insurers.

82 (iv) An action may not lie against the commissioner or an employee of the department
83 for a written or oral communication made in, or in connection with the issuance of, a list or
84 evaluation described in this Subsection (6)(d).

85 (e) A foreign unauthorized insurer shall be listed on the commissioner's "reliable" list
86 only if the unauthorized insurer:

87 (i) delivers a request to the commissioner to be on the list;

88 (ii) establishes satisfactory evidence of good reputation and financial integrity;

89 (iii) (A) delivers to the commissioner a copy of the unauthorized insurer's current

90 annual statement certified by the insurer; and

91 (B) continues each subsequent year to file its annual statements with the commissioner
92 within 60 days of the day on which it is filed with the insurance regulatory authority where the
93 insurer is domiciled;

94 (iv) (A) (I) is in substantial compliance with the solvency standards in Chapter 17, Part
95 6, Risk-Based Capital, or maintains capital and surplus of at least \$15,000,000, whichever is
96 greater; and

97 (II) maintains in the United States an irrevocable trust fund in either a national bank or
98 a member of the Federal Reserve System, or maintains a deposit meeting the statutory deposit
99 requirements for insurers in the state where it is made, which trust fund or deposit:

100 (Aa) shall be in an amount not less than \$2,500,000 for the protection of all of the
101 insurer's policyholders in the United States;

102 (Bb) may consist of cash, securities, or investments of substantially the same character
103 and quality as those which are "qualified assets" under Section 31A-17-201; and

104 (Cc) may include as part of the trust arrangement a letter of credit that qualifies as
105 acceptable security under Section 31A-17-404.1; or

106 (B) in the case of any "Lloyd's" or other similar incorporated or unincorporated group
107 of alien individual insurers, maintains a trust fund that:

108 (I) shall be in an amount not less than \$50,000,000 as security to its full amount for all
109 policyholders and creditors in the United States of each member of the group;

110 (II) may consist of cash, securities, or investments of substantially the same character
111 and quality as those which are "qualified assets" under Section 31A-17-201; and

112 (III) may include as part of this trust arrangement a letter of credit that qualifies as
113 acceptable security under Section 31A-17-404.1; and

114 (v) for an alien insurer not domiciled in the United States or a territory of the United
115 States, is listed on the Quarterly Listing of Alien Insurers maintained by the National
116 Association of Insurance Commissioners International Insurers Department.

117 (7) (a) Subject to Subsection (7)(b), a surplus lines producer may not, either knowingly
118 or without reasonable investigation of the financial condition and general reputation of the
119 insurer, place insurance under this section with:

120 (i) a financially unsound insurer;

121 (ii) an insurer engaging in unfair practices; or

122 (iii) an otherwise substandard insurer.

123 (b) A surplus line producer may place insurance under this section with an insurer
124 described in Subsection (7)(a) if the surplus line producer:

125 (i) gives the applicant notice in writing of the known deficiencies of the insurer or the
126 limitations on the surplus line producer's investigation; and

127 (ii) explains the need to place the business with that insurer.

128 (c) A copy of the notice described in Subsection (7)(b) shall be kept in the office of the
129 surplus line producer for at least five years.

130 (d) To be financially sound, an insurer shall satisfy standards that are comparable to
131 those applied under the laws of this state to an authorized insurer.

132 (e) An insurer on the "doubtful or objectionable" list under Subsection (6)(d) or an
133 insurer not on the commissioner's "reliable" list under Subsection (6)(e) is presumed
134 substandard.

135 (8) (a) A policy issued under this section shall:

136 (i) include a description of the subject of the insurance; and

137 (ii) indicate:

138 (A) the coverage, conditions, and term of the insurance;

139 (B) the premium charged the policyholder;

140 (C) the premium taxes to be collected from the policyholder; and

141 (D) the name and address of the policyholder and insurer.

142 (b) If the direct risk is assumed by more than one insurer, the policy shall state:

143 (i) the names and addresses of all insurers; and

144 (ii) the portion of the entire direct risk each assumes.

145 (c) A policy issued under this section shall have attached or affixed to the policy the
146 following statement: "The insurer issuing this policy does not hold a certificate of authority to
147 do business in this state and thus is not fully subject to regulation by the Utah insurance
148 commissioner. This policy receives no protection from any of the guaranty associations created
149 under Title 31A, Chapter 28."

150 (9) Upon placing a new or renewal coverage under this section, a surplus lines
151 producer shall promptly deliver to the policyholder or the policyholder's agent evidence of the

152 insurance consisting either of:

153 (a) the policy as issued by the insurer; or

154 (b) if the policy is not available upon placing the coverage, a certificate, cover note, or
155 other confirmation of insurance complying with Subsection (8).

156 (10) If the commissioner finds it necessary to protect the interests of insureds and the
157 public in this state, the commissioner may by rule subject a policy issued under this section to
158 as much of the regulation provided by this title as is required for a comparable policy written
159 by an authorized foreign insurer.

160 (11) (a) A surplus lines transaction in this state shall be examined to determine whether
161 it complies with:

162 (i) the surplus lines tax levied under Chapter 3, Department Funding, Fees, and Taxes;

163 (ii) the solicitation limitations of Subsection (3);

164 (iii) the requirement of Subsection (3) that placement be through a surplus lines
165 producer;

166 (iv) placement limitations imposed under Subsections (6)(a), (b), and (c); and

167 (v) the policy form requirements of Subsections (8) and (10).

168 (b) The examination described in Subsection (11)(a) shall take place as soon as
169 practicable after the transaction. The surplus lines producer shall submit to the examiner
170 information necessary to conduct the examination within a period specified by rule.

171 (c) (i) The examination described in Subsection (11)(a) may be conducted by the
172 commissioner or by an advisory organization created under Section 31A-15-111 and authorized
173 by the commissioner to conduct these examinations. The commissioner is not required to
174 authorize an additional advisory organization to conduct an examination under this Subsection
175 (11)(c).

176 (ii) The commissioner's authorization of one or more advisory organizations to act as
177 examiners under this Subsection (11)(c) shall be:

178 (A) by rule; and

179 (B) evidenced by a contract, on a form provided by the commissioner, between the
180 authorized advisory organization and the department.

181 (d) (i) (A) A person conducting the examination described in Subsection (11)(a) shall
182 collect a stamping fee of an amount not to exceed 1% of the policy premium payable in

183 connection with the transaction.

184 (B) A stamping fee collected by the commissioner shall be deposited in the General
185 Fund.

186 (C) The commissioner shall establish a stamping fee by rule.

187 (ii) A stamping fee collected by an advisory organization is the property of the advisory
188 organization to be used in paying the expenses of the advisory organization.

189 (iii) Liability for paying a stamping fee is as required under Subsection 31A-3-303(1)
190 for taxes imposed under Section 31A-3-301.

191 (iv) The commissioner shall adopt a rule dealing with the payment of stamping fees. If
192 a stamping fee is not paid when due, the commissioner or advisory organization may impose a
193 penalty of 25% of the stamping fee due, plus 1-1/2% per month from the time of default until
194 full payment of the stamping fee.

195 (v) A stamping fee relative to a policy covering a risk located partially in this state
196 shall be allocated in the same manner as under Subsection 31A-3-303(4).

197 (e) The commissioner, representatives of the department, advisory organizations,
198 representatives and members of advisory organizations, authorized insurers, and surplus lines
199 insurers are not liable for damages on account of statements, comments, or recommendations
200 made in good faith in connection with their duties under this Subsection (11)(e) or under
201 Section 31A-15-111.

202 (f) An examination conducted under this Subsection (11) and a document or materials
203 related to the examination are confidential.

204 ~~§~~ → [H] (12) (a) For a surplus lines insurance transaction in the state entered into on or after
205 May 13, 2014, if an audit is required by the surplus lines insurance ~~§~~ → [transaction] policy ← ~~§~~ , a
205a surplus lines

206 insurer: [H]

207 [H] (i) shall exercise due diligence to initiate an audit of an insured, to determine whether
208 additional premium is owed by the insured, by no later than six months after the expiration of
209 the term for which premium is paid; and [H]

210 [H] (ii) may not audit an insured more than three years after the surplus lines insurance
211 ~~§~~ → [transaction] policy ← ~~§~~ expires. [H]

212 [H] (b) A surplus lines insurer that does not comply with this Subsection (12) may not
213 charge or collect additional premium in excess of the premium agreed to under the surplus ⚠

214 ☉ lines insurance ~~§~~ → ~~[transaction] policy~~ ← ~~§~~ . [H] ← ~~§~~

215 ~~[(13) (a) For purpose of this Subsection (13), "initial premium" is the premium paid by~~
 216 ~~an insured under an auditable surplus lines insurance contract on the basis of estimated~~
 217 ~~exposure covered by the surplus lines insurance contract.]~~

218 ~~[(b) For an auditable surplus lines insurance transaction in this state entered into on or~~
 219 ~~after May 13, 2014, the following apply:]~~

220 ~~[(i) A surplus lines insurer may not consider as earned premium an amount in excess of~~
 221 ~~50% of the initial premium paid by an insured until the earlier of:]~~

222 ~~[(A) when an audit is completed; or]~~

223 ~~[(B) the term of the surplus lines insurance contract has expired and the time to~~
 224 ~~conduct an audit has lapsed.]~~

225 ~~[(ii) If a surplus lines insurance contract provides for an audit, the audit shall be~~
 226 ~~conducted as provided under Subsection (12), and after the audit is completed:]~~

227 ~~[(A) if the actual exposure covered by the auditable portion of the surplus lines~~
 228 ~~insurance contract exceeds the estimate upon which the initial premium is based, the surplus~~
 229 ~~lines insurer is entitled to additional premium; and]~~

230 ~~[(B) if the actual exposure covered by the auditable portion of the surplus lines~~
 231 ~~insurance contract is less than the estimate upon which the initial premium is based, the insured~~
 232 ~~is entitled to a refund of that portion of the initial premium that represents the reduction of~~
 233 ~~exposure.]~~

234 ~~[(c) An insured may request an audit under an auditable surplus lines insurance~~
 235 ~~contract described in this Subsection (13), if the insured believes that the actual exposure is~~
 236 ~~less than the estimated exposure used to determine the initial premium, by no later than six~~
 237 ~~months after the expiration of the term for which initial premium is paid. If the surplus lines~~
 238 ~~insurer does not complete an audit as provided in Subsection (12) after a request from the~~
 239 ~~insured, the surplus lines insurer shall accept the insured's statement of actual exposure and~~
 240 ~~refund that portion of the initial premium that represents the reduction of exposure stated by~~
 241 ~~the insured.]~~

242 ~~[(d) The commissioner may impose penalties for a violation of this Subsection (13) in~~
 243 ~~accordance with Section [31A-2-308](#).]~~

244 ~~[(14) Subsections (12) and (13) apply to the extent permitted by federal law.]~~

Legislative Review Note
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Office of Legislative Research and General Counsel