



National Association of Professional Surplus Lines Offices, Ltd.

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Richard M. Bouhan
Executive Director

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Mr. John W. Bauer
Chief Counsel, Regulatory Affairs
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108

RE: MT NARAB Working Group Reciprocity Checklist

Dear Mr. Bauer:

NAPSLO would like to comment about Montana's responses to the NARAB working group reciprocity checklist. Question 4.a. asks if non resident surplus lines producers are required to obtain an underlying P&C license as a condition to surplus lines licensure. The Montana's response was "yes" but the response is contrary to section 33-17-401, which specifically provides:

A person licensed as a surplus lines producer in that person's home state must receive a non resident surplus lines producer license upon meeting the requirements of subsection (1). Except for subsection (1), this section does not amend or supersede any provision of the surplus lines insurance law established in Title 33, chapter 2, part 3.

The legislature has decided that no P&C license is required for a non-resident surplus lines license. To comply with their code, Montana should have provided a "no" response to question 4.a.

There are provisions of the Montana code that require a P&C license but they were modified by section 33-17-401 in providing that "except for subsection 1, this section does not modify . . . the surplus lines law. Even if the code sections are inconsistent, they were modified by the more recently adopted and more specific provisions of 33-17-401. The code provisions that require a license would likely be interpreted to apply to resident agents. It provides:

33-2-305. Licensing of surplus lines insurance producer--fee

(1) If a person places a contract of surplus lines insurance with an unauthorized insurer, the person placing the contract must be licensed as a property and casualty insurance producer and possess a current surplus lines insurance producer's license issued by the commissioner.

Section 33-17-401 would control section 33-2-305 because section 33-17-401 was made controlling by its language; it is more recent and more specific in addressing non-resident surplus lines licenses. It would need to be construed to give effect to all provisions of the code. In other words, section 33-17-401 would be rendered meaningless if 33-2-305 requires a P&C license for non-resident wholesale brokers. Section 33-2-305 would continue to apply to resident agents and would likely apply to retail brokers.

The pertinent parts of sections **33-17-401** are as follows:

. Nonresident insurance producer--license

(1) A nonresident person, unless denied licensure pursuant to 33-17-1001, must be granted a license if:

(a) the person is currently licensed as a resident and is in good standing in the person's home state;

(b) the person has submitted the proper request for licensure and has paid the fees required by 33-2-708;

(c) the person has submitted or transmitted to the commissioner the application for licensure that the person submitted to the person's home state or a completed application in a form approved by the commissioner; and

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

(2) A person licensed as a surplus lines producer in that person's home state must receive a producer upon meeting the requirements of subsection (1). Except for subsection (1), this section does not amend or supersede any provision of the surplus lines insurance law established in Title 33, chapter 2, part 3.

.....

(4) If a nonresident insurance producer's state of residence suspends, revokes, or terminates the insurance producer's insurance license in that state, the insurance producer's Montana nonresident license automatically terminates. The nonresident insurance producer shall notify the commissioner that the insurance producer's state of residence has suspended, revoked, or terminated the insurance producer's insurance license in that state.

Section 33-17-401 provides the rules for licensing non-resident surplus lines brokers following Gramm Leach Bliley. It should not be construed to be meaningless. To give effect to Section 33-17-401, Montana's response to question 4.c. should have been either "no" or "only if the surplus lines broker conducts a diligent search of the admitted markets."

NAPSLO would also like to comment about Montana's response to question 4.c. which asks: "is the surplus lines producer required to perform the diligent search of the admitted market in your state?" The question could have been more specific in distinguishing between the obligations of a retail surplus lines broker (where they are the only producer in the transaction) and a wholesale surplus lines broker (where they are the intermediary between the retail producer and the company). Montana has recognized that in a wholesale distribution system, the retail broker (known as a producing producer) would conduct the diligent search. Montana code section 33-2-302 and .6.2803 specify the duties of a producing insurance producer:

33-2-302. Conditions precedent to sale of surplus lines insurance

(1) A producing insurance producer may request a surplus lines insurance producer to place or a surplus lines insurance producer may place a contract of insurance with an unauthorized insurer if:

(a) the insurer is an eligible surplus lines insurer;

(b) the line of insurance or the full amount of the line of insurance cannot be obtained from authorized insurers or, in the case of a renewal, the line of insurance has not become available from an authorized insurer;

(c) the producing insurance producer makes a diligent effort to place the business with a minimum of three insurers authorized and actually transacting that line of business in this state. If fewer than three insurers are authorized and actually transacting the line of business in this state, diligent effort must be met by searching this lesser market.

(d) the insurance is not procured for the purpose of securing:

. . .

(i) a lower premium rate than would be accepted by an authorized insurer unless the premium rate quoted by the authorized insurer is at least 10% higher and at least \$1,500 greater than the premium rate quoted by the unauthorized insurer; or

(ii) an advantage in terms of the insurance contract; and

(e) all other requirements of this part are met.

(2) A contract of insurance may not be placed with an unauthorized insurer under subsection (1)(d)(i) unless the unauthorized insurer is the equivalent of A-rated or better and the unauthorized insurer or the surplus lines insurance producer that placed the contract of insurance with the unauthorized insurer has provided the insured with disclosure information in a form and content approved by the commissioner.

6.6.2803. FILING OF SUBMISSIONS, EXAMINATION OF SUBMISSIONS AND RECORDS RETAINED

(1) Every Montana licensed surplus lines producer shall submit to the department all information required to be filed by 33-2-301, et seq., MCA, and these rules.

(2) Surplus lines submissions to the department shall be made by Montana-licensed surplus lines producers and shall be made in a manner and form approved by the commissioner. There is a standardized submission form available from the department. Submissions may be made by:

(a) sending paper submissions to the department; or

(b) electronically filing submissions via the surplus lines business portal via the department's web site.

(3) All surplus lines submissions must be made to the department within 60 calendar days of the effective date of the policy.

(4) All surplus lines submissions must be complete. Incomplete submissions will not be accepted by the department, and will be returned for correction and resubmission within the foregoing 60 calendar day deadline from the effective date of the policy. If the 60 calendar day deadline has passed when the incomplete submission is returned, the surplus lines insurance producer shall resubmit the corrected submission form within ten calendar days from the date the department rejected the incomplete submission.

(5) For electronically filed submissions, the producing insurance producer shall keep a true and correct copy of the notarized affidavit section of the paper submission form showing the original signatures of the producing insurance producer and the notary regarding the diligent search and the information provided to the insured under 33-2-310, MCA. The producing insurance producer shall provide a true and correct copy of the notarized affidavit section of the submission form to the surplus lines insurance producer. These records shall be retained by the producing insurance producer and the

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surplus lines insurance producer for five years after the issuance of the surplus lines insurance policy to which they relate, and shall be subject to inspection by the department in accord with 33-2-310, MCA.

(6) Surplus lines insurance producers shall retain records of, and supporting documentation for, all inspection fees charged to insureds under 33-2-306, MCA, and any assessment, membership, or similar fee or charge to insureds to obtain surplus lines insurance if such assessment, membership, or similar fee or charge was payable separately by the insured in consideration of the policy.

(7) Producing insurance producers and surplus lines insurance producers may create and retain electronic records to meet the records retention requirements in (5) and (6), provided that the electronic records are:

(a) archival in nature, such as a scanned copy, so as to preclude the alteration of the record after it is initially stored in the electronic medium; and

(b) capable of duplication to a paper copy that is as legible as the original.

The wholesale surplus lines broker would normally rely upon the diligent search conducted by the retail agent. The retail agent is typically an independent insurance agent and typically does not have a surplus lines broker's license. The retail agent is the expert in the admitted markets. The surplus lines wholesale broker is an intermediary between the retail agent and the surplus lines company. The surplus lines wholesale broker is an expert in surplus lines markets and would have little or no contacts in the admitted markets.

There is a second production model where the retail surplus lines brokers directly access the surplus lines markets without a wholesaler. Retail surplus lines brokers would conduct a diligent search of the admitted markets. They are the only broker in the transaction and the only broker who could conduct the diligent search. A retail surplus lines broker would need both a P&C license and a surplus lines broker's license.

We believe it is in the best interest of the States, the NAIC, and NAPSLO to have as many states certified as reciprocal as possible. Great strides have been made in the area of reciprocal licensing and in this would be one more step in the direction of reciprocal licensing. If there is anything NAPSLO can do to further this overall objective, please let me know.

Yours truly,



Steven P. Stephan, J.D., CPCU, ARe
Director of Government Relations