

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
6.6.2801, 6.6.2803, 6.6.2804,) PROPOSED AMENDMENT
6.6.2808, 6.6.2809, and 6.6.2810)
regarding Surplus Lines Insurance)
Transactions)

TO: All Concerned Persons

1. On October 13, 2011, at 10:00 a.m., the Commissioner of Insurance, Office of the State Auditor, Monica Lindeen, will hold a public hearing in the 2nd floor conference room, at the State Auditor's Office, 840 Helena Ave., Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Commissioner of Insurance, Office of the State Auditor, Monica Lindeen, will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing, or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., October 6, 2011, to advise us of the nature of the accommodation that you need. Please contact Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3499; or e-mail dsautter@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

6.6.2801 PURPOSE AND SCOPE (1) remains the same.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-304, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-309, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-314, 33-2-315, 33-2-316, 33-2-317, 33-2-321, 33-2-326, MCA, Chap. 350, sections 3, 4, 16, 17, L. of 2011

6.6.2803 FILING OF SUBMISSIONS, EXAMINATION OF SUBMISSIONS AND RECORDS RETAINED (1) Every Montana-licensed surplus lines insurance producer and insured who independently procured insurance 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~~ are standardized submission forms available from the department. Submissions may be made by:

(a) through (3) remain the same.

(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 or insured who independently procured insurance 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~~ completed and signed affirmation 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~~ affirmation section of the submission form to the surplus lines insurance producer. These records shall be retained by the producing insurance producer and the 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) If coverage is procured through a surplus lines insurance producer, that surplus lines insurance producer shall stamp or notate each insurance contract, cover note, declarations page, or certificate of insurance procured and delivered as surplus lines insurance with the following completed statement:

NOTICE: This coverage is issued by an unauthorized insurer that is an eligible surplus lines insurer. If this insurer becomes insolvent, there is no coverage by the Montana Insurance Guaranty Association under the Montana Insurance Guaranty Association Act.

Printed Name of Surplus Lines Insurance Producer Montana License Number

Signature of Surplus Lines Insurance Producer

(6) remains the same but is renumbered (7).

~~(7)~~(8) Producing insurance producers and surplus lines insurance producers may create and retain electronic records to meet the records retention requirements in ~~(5) and (6)~~ 33-2-310, MCA, and these rules, provided that the electronic records are:

(a) and (b) remain the same.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, 33-2-326, MCA, Chap. 350, sections 3, 4, 16, 17, L. of 2011

6.6.2804 COLLECTION OF STAMPING FEE (1) Pursuant to 33-2-321~~(5)~~, MCA, the department shall collect a stamping fee on the base premium, including any monied endorsement, payable for each surplus lines insurance policy transacted in the state.

(2) through (2)(a) remain the same.

(b) one-half percent of the base premium for electronically filed submissions via the surplus lines business portal via the department's web site;

~~(i) subsection (2)(b) will be effective~~

(3) Effective January 1, 2010 2012, the stamping fee is equal to: Before January 1, 2010, any electronically filed submissions via the surplus lines business portal via the department's web site will be assessed a stamping fee of one one-half percent of the base premium.

(a) one-quarter percent of the base premium for paper (hard copy) submissions; and

(b) no charge for electronically filed submissions via the surplus lines business portal via the department's web site.

~~(3)(4) Such~~ The stamping fee on the underlying surplus lines insurance policy shall be earned in full as soon as any portion of the premium payable for the underlying policy is earned. The commissioner may, by rule, set the stamping fee commensurate with the department's expenses for implementing the surplus lines insurance law, 33-2-301, et seq., MCA. For any monied endorsement, the stamping fee shall be earned in full as soon as any portion of the premium payable for the endorsement is earned.

(4) through (7) remain the same, but are renumbered (5) through (8).

~~(8)(9)~~ The department shall may collect a penalty from any surplus lines insurance producer, or any insured who independently procured insurance, and who does not pay the stamping fees by April 1 for all transactions during the preceding year. Such penalty shall equal 25 percent of the amount overdue plus 1.5 percent per month from the time of delinquency until the stamping fees are paid in full.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, MCA, Chap. 350, sections 3, 4, 16, 17, L. of 2011

6.6.2808 ELIGIBLE SURPLUS LINES INSURERS LIST (1) remains the same.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, 33-2-326, MCA, Chap. 350, sections 3, 4, 16, 17, L. of 2011

6.6.2809 APPROVED RISK LIST -- INSURANCE PRESUMED UNOBTAINABLE FROM AUTHORIZED INSURERS (1) through (5) remain the same.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, MCA, Chap. 350, sections 3, 4, 16, 17, L. of 2011

6.6.2810 ANNUAL REPORTING PERIOD – TAX AND FEE STATEMENT

(1) The reporting period for surplus lines insurance premium taxes and stamping fees shall be the calendar year.

(2) The department shall produce for each surplus lines insurance producer, and insured who independently procured insurance, in a form approved by the commissioner, an annual report tax and fee statement complying with the requirements of 33-2-310(2), MCA, for a surplus lines insurance producer's annual statement.

(3) By March 1 of each year, The the department shall distribute such annual reports tax and fee statements for the preceding calendar year to surplus lines insurance producers and insureds who independently procured insurance prior to March 1 of each year for their review and submission to the commissioner.

(4) By April 1 of each year, surplus lines insurance producers and insureds who independently procured insurance shall file with the commissioner the annual tax and fee statement for the preceding calendar year and pay the taxes and fees.

(5) Insureds who independently procured insurance may pay the associated taxes and fees to the department when filing the surplus lines submission with the department.

(6) Nothing in this section or in the annual report tax and fee statement prepared by the department shall relieve a surplus lines insurance producer or an insured who independently procured insurance from the duties and obligations imposed by 33-2-310, MCA, and 33-2-311, 33-2-312, and 33-2-321, MCA.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-315, 33-2-316, 33-2-321, MCA, Chap. 350, sections 3, 4, 16, 17, L. of 2011

4. REASONABLE NECESSITY STATEMENT: The Commissioner of Securities and Insurance, Montana State Auditor, Monica J. Lindeen, (Commissioner) is the statewide elected official responsible for administering the Montana Insurance Department and regulating the business of insurance including the transaction of surplus lines insurance. See generally The Surplus Lines Insurance Law, 33-2-301, MCA, et seq., of the Montana Insurance Code, 33-1-101, MCA, et seq.

The federal Nonadmitted and Reinsurance Reform Act of 2010 (NRRA), Title V, Subtitle B, of Public Law 111-203, provides that the home state of the insured has exclusive taxing and regulatory authority over surplus lines insurance transactions. Previously, each state would tax and regulate the surplus lines insurance covering the portion of the risk located in or to be performed in that state whether the covered risk was in a single state or multiple states. The NRRA allows for revenue

generated from surplus lines insurance transactions covering multistate risks to be allocated and distributed among states if the states have entered a compact or other agreement.

In 2011, the Montana Legislature passed SB 331 revising the surplus lines insurance laws for consistency with the federal NRRRA. SB 331 also granted the Commissioner authority to enter a cooperative or reciprocal agreement for collecting, allocating and distributing taxes and fees attributable to multistate risks provided that certain requirements were met and the Commissioner engaged in negotiated rulemaking pursuant to Title 2, chapter 5, MCA. See Chap. 350, section 17, L. of 2011.

If the Commissioner pursues an agreement with other states to collect, allocate, and distribute premium taxes and fees attributable to surplus lines insurance covering multistate risks, the Commissioner will engage in negotiated rulemaking as required. In the interim, however, amendments to the existing administrative rules pertaining to surplus lines insurance are necessary for consistency with SB 331 and do not require negotiated rulemaking.

With regard to the history section for each rule, the list of statutes implemented would be amended to include references to the new sections in SB 331, specifically, sections 3, 4, 16 and 17. This is necessary because the specific codification of these new sections in Title 33, chapter 2, part 3, MCA, is not yet known and therefore cannot be listed.

The proposed amendments to ARM 6.6.2803(1) include changing "surplus lines producers" to "surplus lines insurance producers." This is necessary for consistency with The Surplus Lines Insurance Law, 33-2-201, MCA, et seq.

Another proposed amendment to ARM 6.6.2803(1) provides that insureds who independently procured insurance must submit information to the department regarding the surplus lines insurance transactions. The amendment is necessary because SB 331 revised The Surplus Lines Insurance Law to provide for independently procured insurance and to require that those insureds report the transaction and pay all associated premium taxes and fees.

With regard to ARM 6.6.2803(2), a proposed amendment would remove the reference to surplus lines insurance producers. This amendment is necessary for consistency with SB 331, which recognized independently procured insurance, and the proposed amendment to ARM 6.6.2803(1) requiring both surplus lines insurance producers and insureds who independently procured insurance to submit information to the department regarding surplus lines insurance transactions.

Another proposed amendment to ARM 6.6.2803(2) would indicate that there may be more than one standardized submission form. The amendment is necessary because SB 331 amended 33-2-303, MCA, to allow for different submission forms to be used by surplus lines insurance producers and by insureds who independently

procured insurance. Additionally, the department plans to develop a separate submission form to be used by insureds who independently procured insurance.

The department proposes amending ARM 6.6.2803(5) to remove the references to a notarized affidavit and instead refer to the affirmation to be completed and retained by the producing insurance producer. This amendment is necessary because SB 331 amended 33-2-310, MCA, to remove the requirement that the producing insurance producer complete an affidavit before a notary. Instead, under amended 33-2-303, MCA, the producing insurance producer must affirm on the submission form that, prior to placing coverage in the surplus lines market, the producer made a diligent search for coverage in the admitted market, or else indicate the exception to the diligent search relied upon, and that the producer expressly advised the insured that: the surplus lines insurer with whom the insurance is placed is not authorized in Montana; and if the surplus lines insurer becomes insolvent, the Montana property and casualty guaranty fund will not provide any coverage.

The proposed amendment to ARM 6.6.2803, to add new (6) would provide the form and content of the notation to be made by the surplus lines insurance producer that procured the coverage. The proposed language is substantially similar to the notation required under 33-2-303, MCA, prior to enactment of SB 331. Section 33-2-303, MCA, was amended by SB 331 to provide that the Commissioner may require surplus lines insurance producers to affix a notation on each insurance contract, cover note, or certificate of insurance procured and delivered as surplus lines insurance to advise insureds that the coverage is issued by an unauthorized insurer that is not covered by the property and casualty guaranty fund in Montana if the insurer becomes insolvent. The notation could be made with a stamp or printed on the forms. The proposed notation is necessary to provide important information to the insured and does not appear to be overly burdensome or difficult for surplus lines insurance producers.

The proposed amendment to ARM 6.6.2803(7), renumbered as ARM 6.6.2803(8), would include referencing "33-2-310, MCA, and these rules" pertaining to the records that must be retained, but may be stored electronically. The amendment is necessary for consistency with SB 331 and other proposed amendments.

With regard to ARM 6.6.2804(1), the proposed amendment removes the reference to the specific subsection of 33-2-321, MCA, regarding the stamping fee. Removing the specific subsection reference is necessary to eliminate the need to amend this rule if the statute is amended, and the subsections are renumbered in the future.

In ARM 6.6.2804(2), and proposed new ARM 6.6.2804(3), the proposed amendments lower the stamping fee to reflect the department's lower costs. In 2010, the department implemented an electronic filing system which has significantly decreased the staff time necessary to review and process these submissions. SB 331 amended 33-2-321, MCA, to provide that the stamping fee be commensurate with the expenses of regulating surplus lines insurance. The proposed amendments are necessary for consistency with SB 331.

In proposed new ARM 6.6.2804(3), a delayed effective date for the lower stamping fee is necessary to accommodate the needed information technology changes to the department's surplus lines insurance submission system. Further, a delayed effective date would also be necessary for surplus lines insurance producers making similar information technology and programming changes, and would be beneficial for surplus lines insurance producers preparing bids for coverage. Using January 1, 2012, as the effective date is consistent with the reporting period (and payment period) for taxes and stamping fees. Additionally, using January 1, 2012, as the effective date will be beneficial for both the department and surplus lines insurance producers in their bookkeeping and auditing of stamping fees. The remaining sections of ARM 6.6.2804 would be renumbered.

A proposed amendment to current ARM 6.6.2804(3), renumbered as ARM 6.6.2804(4), provides that the stamping fee on a monied endorsement shall be earned in full as soon as any portion of the premium payable for the endorsement is earned. Under the current rule, if a monied endorsement was cancelled before the effective date for the endorsement, the stamping fee for the endorsement could be retained by the department as long as the underlying policy became effective. The proposed amendment is necessary for consistency regarding the return of stamping fees if the surplus lines insurance transaction generating the stamping fee, such as the underlying policy or a monied endorsement, is cancelled before becoming effective and before the associated premium is earned.

Another proposed amendment to current ARM 6.6.2804(3), renumbered as ARM 6.6.2804(4), removes the last sentence. The amendment is necessary because this sentence duplicates the language in the statute at 33-2-321(1), MCA, which provides that the Commissioner will establish the stamping fee commensurate with the expenses of regulating surplus lines insurance.

With regard to current ARM 6.6.2804(8), renumbered as ARM 6.6.2804(9), the proposed amendments are necessary to make the penalty for late payment of stamping fees applicable to insureds who independently procured insurance and to give the Commissioner discretion to impose the late penalty on a case-by-case basis by changing the "shall" to "may." SB 331 allowed insureds to independently procure surplus lines insurance, and imposed the obligation to pay the associated premium taxes and stamping fees on that insurance. The amendment allows the Commissioner to consider the specific circumstances involved in cases of nonpayment of stamping fees and determine whether to impose a late penalty.

The proposed amendments to ARM 6.6.2810 include adding new language to (1) to establish the calendar year as the reporting period. Previously, the reporting period was the calendar year under 33-2-310, MCA; however, SB 331 removed the annual period and provided that the Commissioner would establish the reporting period by rule. Proposed new ARM 6.6.2801(1) is necessary to establish a reporting period and retaining the annual reporting period would be consistent and convenient.

Other proposed amendments to ARM 6.6.2810 specify that the rule is applicable to insureds who independently procured insurance. These amendments are necessary for consistency with SB 331 which recognized and allowed independently procured insurance and applied the same tax and fee payment obligations to these insureds.

Further proposed amendments to ARM 6.6.2810 clarify that the annual report is an annual tax and fee statement for surplus lines transactions during the annual reporting period. SB 311 changed the language in The Surplus Lines Insurance Law from annual report or annual statement to tax and fee statement. The proposed amendments are necessary to make the language in the rule consistent with the language in the statutes.

Another proposed amendment to ARM 6.6.2810 would add new (4) to establish April 1 as the deadline for payment of taxes and fees for the preceding calendar year. Previously, under 33-2-310 and 33-2-312, MCA, the deadline for payment of taxes and fees was April 1 for the preceding calendar year; however, SB 331 removed the payment deadline and provided that the Commissioner would establish the payment deadline by rule. New (4) is necessary to establish the payment deadline and retaining the April 1 deadline would be consistent and convenient.

The proposed amendment to ARM 6.6.2810 to add new (5) would allow insureds who independently procured insurance to pay the taxes and fees when filing the surplus lines submission with the department. These insureds will likely have very few submissions during an annual reporting period; therefore, little or no tax and fee reconciliation at the end of the reporting period would be required for these insureds when compared to surplus lines insurance producers with numerous surplus lines submissions, including cancellations and endorsements, during the reporting period. The amendment is necessary to allow these insureds to pay the taxes and fees when filing the surplus lines submission as a convenience.

Another proposed amendment to ARM 6.6.2810 is adding 33-2-312, MCA, and 33-2-321, MCA, to the list in ARM 6.6.2810(6). Section (6) provides that nothing in the rule or the tax and fee statement prepared by the department relieves a surplus lines insurance producer or insured who independently procured insurance from complying with 33-2-310, MCA, regarding records and tax and fee statements, and 33-2-311, MCA, regarding the tax on surplus lines insurance. References to 33-2-312, MCA, regarding the penalty for failing to pay the tax or fee, and 33-2-321, MCA, regarding imposition of the fee, are necessary to clarify that the imposition of the fee and of any late penalties applied to the tax or fee are not affected by ARM 6.6.2810.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Jennifer L. Massman, Staff Attorney, Office of the Commissioner of Securities and Insurance, State Auditor, Monica Lindeen, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2040; fax (406) 444-3499; or e-mail jmassman@mt.gov, and must be received no later than 5:00 p.m., October 21, 2011.

6. Jennifer L. Massman, Staff Attorney, has been designated to preside over and conduct this hearing.

7. The department maintains a list of concerned persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to Darla Sautter, Office of the Commissioner of Securities and Insurance, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2726; fax (406) 444-3499; or e-mail dsautter@mt.gov or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor for SB 331 (2011), Senator Larry Jent, was notified by regular mail on July 22, 2011, at his home address.

/s/ Brett O'Neil
Brett O'Neil
Rule Reviewer

/s/ Jesse Laslovich
Jesse Laslovich
Chief Legal Counsel

Certified to the Secretary of State September 12, 2011.