

# VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

## CHAPTER 498

*An Act to amend and reenact §§ 38.2-1857.1, 38.2-1857.2, 38.2-1857.4 through 38.2-1857.7, 38.2-1857.9, 38.2-4806, 38.2-4807, 38.2-4809, 38.2-4810, and 38.2-4811 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 38.2-4805.1 and 38.2-4805.2, relating to surplus lines insurance; licensing of brokers and premium tax liability.*

[H 2286]

Approved March 24, 2011

### **Be it enacted by the General Assembly of Virginia:**

**1. That §§ 38.2-1857.1, 38.2-1857.2, 38.2-1857.4 through 38.2-1857.7, 38.2-1857.9, 38.2-4806, 38.2-4807, 38.2-4809, 38.2-4810, and 38.2-4811 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 38.2-4805.1 and 38.2-4805.2 as follows:**

§ 38.2-1857.1. Property and casualty insurance agents may be licensed as surplus lines brokers for certain insurance from unlicensed insurers.

The Commission may issue a surplus lines broker's license to any individual or business entity actively licensed as a property and casualty insurance agent for the procuring of insurance of the classes enumerated in §§ 38.2-109 through 38.2-122 38.2-122.2 and §§ 38.2-124 through 38.2-134 from insurers not licensed to transact insurance business in this Commonwealth. However, nothing in this ~~chapter~~ *article* or in Chapter 48 (§ 38.2-4806 et seq.) of this title shall apply to the sale, solicitation or negotiation of (i) the contracts of insurance cited in subsection C of § 38.2-1802 or (ii) *contracts of insurance for any insured whose home state, as defined in § 38.2-4805.2, is a state other than this Commonwealth.*

§ 38.2-1857.2. Applications for surplus lines brokers' licenses.

A. Every original applicant for a surplus lines broker's license shall apply for such license in a form and manner prescribed by the Commission, and containing any information the Commission requires.

B. Prior to issuance of a license, the applicant shall file with the Commission a certification or attestation that the applicant has, and thereafter shall keep in force for as long as the license remains in effect, a bond in favor of this Commonwealth in the amount of \$25,000 with corporate sureties licensed by the Commission. The bond shall be conditioned that the broker will conduct business under the license in accordance with the provisions of the surplus lines insurance law and that he will promptly remit the taxes provided by such law. The bond shall not be terminated unless at least thirty calendar days' prior written notice of the termination is filed with the Commission. If, prior to the expiration date of the bond, the licensed surplus lines broker fails to file with the Commission a certification or attestation that a new bond satisfying the requirements of this section has been put into effect, the surplus lines broker license shall terminate and the licensee shall be required to apply for a new surplus lines broker license.

C. Notwithstanding any other provisions of this title, a person licensed as a surplus lines broker in his home state ~~or province~~, *as defined in § 38.2-1800*, shall receive a nonresident surplus lines broker license subject to meeting the requirements set forth in § 38.2-1857.9.

D. Except where prohibited by state or federal law, by submitting an application for license, the applicant shall be deemed to have appointed the clerk of the Commission as the agent for service of process on the applicant in any action or proceeding arising in this Commonwealth out of or in connection with the exercise of the license. Such appointment of the clerk of the Commission as agent for service of process shall be irrevocable during the period within which a cause of action against the applicant may arise out of transactions with respect to subjects of insurance in this Commonwealth. Service of process on the clerk of the Commission shall conform to the provisions of Chapter 8 (§ 38.2-800 et seq.) of this title.

E. A business entity acting as a surplus lines broker is required to obtain a surplus lines broker license. In addition to the other requirements in this section, and before approving the application, the Commission shall find that:

1. The business entity has paid the fee set forth in ~~this section~~ § 38.2-1857.3; and

2. ~~The If:~~

*a. A resident of this Commonwealth, the business entity has designated a licensed Virginia Property and Casualty insurance agent to be responsible for the business entity's compliance with the insurance laws, rules and regulations of this Commonwealth; or*

*b. Not a resident of this Commonwealth, the business entity has designated a producer licensed in his home state to be responsible for the business entity's compliance with the insurance laws, rules and regulations of this Commonwealth.*

F. The Commission may require any documents reasonably necessary to verify the information contained in an application.

§ 38.2-1857.4. Term of licenses; renewal.

A. Every license issued pursuant to this ~~chapter~~ *article* shall be for a term expiring on June 30 next following the date of its issuance and may be renewed for the ensuing license year, upon the filing of an application in the form prescribed by the Commission and payment of the nonrefundable renewal application processing fee prescribed in § 38.2-1857.3.

~~B. Any licensed resident surplus lines broker who has moved his residence from this Commonwealth shall have all licenses immediately terminated by the Commission.~~

§ 38.2-1857.5. Requirement to report to Commission.

A. Each licensed surplus lines broker shall report within thirty calendar days to the Commission any change in his residence or name.

B. In addition to the requirements of §§ 59.1-69 and 59.1-70, any individual or business entity licensed as a surplus lines broker in this Commonwealth and operating under an assumed or fictitious name shall notify the Commission, at the earlier of the time the application for a surplus lines broker license is filed or within thirty calendar days from the date the assumed or fictitious name is adopted, setting forth the name under which the surplus lines broker intends to operate in Virginia. The Commission shall also be notified within thirty calendar days from the date of cessation of the use of such assumed or fictitious name.

C. Each licensed surplus lines broker convicted of a felony shall report within thirty calendar days to the Commission the facts and circumstances regarding the criminal conviction.

D. Each licensed surplus lines broker shall report to the Commission within thirty calendar days of the final disposition of the matter any administrative action taken against him in another jurisdiction or by another governmental agency in this Commonwealth. Such report shall include a copy of the order, consent to order or other relevant legal documents.

~~E. The license authority of any~~ Any licensed resident surplus lines broker ~~shall terminate immediately when such surplus lines broker~~ who has moved his residence from this Commonwealth *shall have all licenses immediately terminated by the Commission*, whether or not the *surplus lines broker has notified the Commission has been notified* of such move. *Nothing shall prohibit such surplus lines broker from applying for a license as a nonresident surplus lines broker.*

F. The license authority of any business entity licensed as a surplus lines broker shall terminate immediately if the sole licensed responsible producer designated pursuant to subdivision E 2 of § 38.2-1857.2 for the business entity's compliance with the insurance laws, rules and regulations of this Commonwealth is removed for any reason, and a new responsible producer has not been ~~appointed~~ *designated* and the Commission notified within ~~thirty~~ 30 calendar days of such removal and of the newly designated responsible producer.

§ 38.2-1857.6. Accepting and placing surplus lines business.

No surplus lines broker shall accept surplus lines business from any person other than an applicant for insurance or a duly licensed property or casualty insurance agent, nor shall such surplus lines broker compensate any person other than a duly licensed property or casualty insurance agent for such business. No person other than an applicant for insurance or a duly licensed property or casualty insurance agent shall place surplus lines business with a surplus lines broker licensed under this ~~chapter~~ *article* nor shall any person other than a duly licensed property or casualty insurance agent accept compensation for such business.

§ 38.2-1857.7. Grounds for placing on probation, refusal to issue or renew, revocation, or suspension of license.

The Commission may, in addition to or in lieu of a penalty imposed under § 38.2-218, place on probation, suspend, revoke or refuse to issue or renew any surplus lines broker's license for any one or more of the following causes:

1. Providing materially incorrect, misleading, incomplete or untrue information in the license application or any other document filed with the Commission;
2. Violating any insurance laws, or violating any regulation, subpoena or order of the Commission or of another state's insurance regulatory authority;
3. Obtaining or attempting to obtain a license through misrepresentation or fraud;
4. Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing business;
5. Engaging in the practice of rebating;
6. Engaging in twisting or any form thereof, where "twisting" means inducing an insured to terminate an existing policy and purchase a new policy through misrepresentation;
7. Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance;
8. Having been convicted of a felony;
9. Having admitted or been found to have committed any insurance unfair trade practice or fraud;
10. Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, or

untrustworthiness in the conduct of business in this Commonwealth or elsewhere, or demonstrating financial irresponsibility in the handling of applicant, policyholder, agency, or insurance company funds;

11. Having an insurance producer, surplus lines broker, or consultant license, or its equivalent, denied, suspended or revoked in any other state, province, district or territory;

12. Forging another's name to an application for insurance or to any document related to an insurance transaction;

13. Improperly using notes or any other reference material to complete an examination for an insurance license;

14. Knowingly accepting insurance business from an individual who is not licensed;

15. Failing to comply with an administrative or court order imposing a child support obligation; or

16. Failing to pay state income *or premium license* tax or comply with any administrative or court order directing payment of state income tax.

§ 38.2-1857.9. Licensing nonresidents; clerk of the Commission to be appointed agent for service of process; reciprocal agreements with other states and Canadian provinces.

A. An individual or business entity who is not a resident as defined in § 38.2-1800, but who is a resident of another state, territory, or province of Canada, shall receive a nonresident surplus lines broker license if:

1. The applicant presents proof in a form acceptable to the Commission that the applicant is currently licensed or otherwise authorized as a resident surplus lines broker and is in good standing in his home state;

2. The applicant has submitted the proper application for licensure, or in lieu thereof has submitted a copy of the application for a Surplus Lines Broker license submitted to the home state, and has paid the fees required by § 38.2-1857.3; and

3. The applicant's home state issues nonresident surplus lines broker licenses to residents of this Commonwealth on the same basis, or will permit a resident of this Commonwealth to act as a surplus lines broker in such state without requiring a license.

B. For the purposes of this ~~chapter~~ *article*, any individual whose place of residence and place of business are in a city or town located partly within the Commonwealth and partly within another state may be considered as meeting the requirements as a resident of this Commonwealth, provided the other state has established by law or regulation similar requirements as to residence of such individuals.

C. The Commission may enter into a reciprocal agreement with an appropriate official of any other state or province of Canada if such an agreement is required in order for a Virginia resident to be similarly licensed as a nonresident in that state or province.

D. The Commission may verify the surplus lines broker's licensing status through the Producer Database maintained by the NAIC, its affiliates or subsidiaries.

E. A nonresident surplus lines broker who moves from one state or province to another state or province shall file a change of address ~~and provide a certification from the new home state or province~~ within ~~thirty~~ 30 calendar days of the change of legal residence. No fee or license application is required.

F. Any licenses issued to nonresidents pursuant to this section shall be terminated at any time that the nonresident's equivalent authority in his home state is terminated, suspended, or revoked.

G. As used in this section, "home state" has the same meaning that is ascribed to the term in § 38.2-1800.

§ 38.2-4805.1. Application of chapter.

*Except as provided in subsection C of § 38.2-1802, this chapter shall apply to the sale, solicitation, and negotiation of surplus lines insurance coverage for insureds whose home state, as defined in § 38.2-4805.2, is this Commonwealth.*

§ 38.2-4805.2. Definitions.

*As used in this chapter, unless the context requires a different meaning:*

"Eligible nonadmitted insurer" or "eligible surplus lines insurer" means a nonadmitted insurer approved by the Commission pursuant to § 38.2-4811 with which a surplus lines broker may place surplus lines insurance.

"Home state" means (i) the state in which an insured maintains its principal place of business or, in the case of an individual, the individual's principal residence or (ii) if 100 percent of the insured risk is located out of the state referred to in clause (i) of this definition, "home state" means the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated. When more than one insured from an affiliated group are named insureds on a single insurance contract, "home state" means the state of the member of the affiliated group that has the largest percentage of premium attributed to it under such insurance contract.

"Licensed insurer" or "admitted insurer" means an insurer licensed in this Commonwealth to engage in the business of insurance.

"NAIC" means the National Association of Insurance Commissioners.

"Nonadmitted insurer" means an insurer not licensed to engage in the business of insurance in this Commonwealth. "Nonadmitted insurer" does not include a risk retention group as defined in § 38.2-5101.

*"Principal place of business" means the state where the insured maintains its headquarters and where the insured's high-level officers direct, control, and coordinate the business activities of the insured.*

*"Property and casualty insurance" means the classes of insurance defined in §§ 38.2-109 through 38.2-122.2 and §§ 38.2-124 through 38.2-134.*

*"Surplus lines broker" means an individual or business entity licensed pursuant to Article 5.1 of Chapter 18 to sell, solicit, or negotiate insurance on properties, risks, or exposures located or to be performed in this Commonwealth with nonadmitted insurers.*

*"Surplus lines insurance" means any property and casualty insurance permitted to be placed directly by an insured or through a surplus lines broker with an eligible nonadmitted insurer.*

§ 38.2-4806. Notice to insured that insurance is not placed with a licensed insurer required.

A. For all policies of insurance procured under this chapter, the surplus lines broker procuring such policies shall execute an affidavit in form and content as prescribed by the Commission affirming that the insured was given the notice required and prescribed under subsection B of this section. The affidavit shall be filed with the Commission within 30 calendar days after the end of the calendar quarter in which any such insurance has been procured. The affidavit shall accompany the reports required by subsection C of this section and subsection A of § 38.2-4807 and shall be considered a sworn statement as to the validity and accuracy of such reports.

"Class" of insurance shall mean those classes enumerated in §§ 38.2-109 through 38.2-122 and §§ 38.2-124 through 38.2-134.

A company is authorized to write the insurance coverage sought when it is licensed for that class of insurance in this Commonwealth and has complied with the applicable provisions of Chapters 3 (§ 38.2-300 et seq.), 19 (§ 38.2-1900 et seq.), 20 (§ 38.2-2000 et seq.), and 26 (§ 38.2-2600 et seq.) of this title concerning rules, rates and policy forms providing the insurance coverage sought, unless such insurance has been exempted from filing by Commission order.

B. A notice in a form prescribed by the Commission shall be given to the insured under the provisions of a policy procured pursuant to this chapter by the surplus lines broker procuring the policy or by any duly licensed property and casualty insurance agent placing surplus lines business with the surplus lines broker. The notice shall contain, but not be limited to, statements that the policy is being procured from or has been placed with an insurer approved by the Commission for issuance of surplus lines insurance in this Commonwealth, but not licensed or regulated by the Commission and that there is no protection under the Virginia Property and Casualty Insurance Guaranty Association, established under Chapter 16 (§ 38.2-1600 et seq.) of this title, against financial loss to claimants or policyholders because of the insolvency of an unlicensed insurer. The notice shall also set forth the name, license number and mailing address of the broker. The notice shall be given prior to placement of the insurance. In the event coverage must be placed and become effective within 24 hours after referral of the business to the surplus lines broker, the notice may be given promptly following such a placement. In addition, a copy of the notice shall be affixed to the policy.

C. Within 30 calendar days after the end of each calendar quarter, each licensed surplus lines broker shall file a report with the Commission summarizing the business transacted during that quarter. Such report shall be on a form prescribed by the Commission and shall include for each surplus lines policy written the direct gross premium, the policy number, the name of the insured, the policy period and the name of the insurer from which coverage has been procured and any other information required by the Commission.

§ 38.2-4807. Licensees to keep records and file annual statement of policies.

A. Every licensed surplus lines broker shall keep in his office a complete record of, and file on a form prescribed by the Commission in the office of the Commission annually on or before March 1, subject to § 38.2-1304 a statement setting forth (i) each policy of insurance procured by him under this chapter during the previous calendar year; (ii) the name and address of the insurer or insurers; (iii) the inception and expiration dates of each policy; (iv) the perils insured against; (v) the location of each risk so insured and the premium rate and the gross premium charged for each such policy of insurance; (vi) the amount of premium returned; and (vii) any other information the Commission requires.

B. The record of each policy of insurance shall be kept open at all reasonable times to examination by the Commission without notice for a period of not less than five years following termination of the policy.

§ 38.2-4809. Licensees to pay assessments and license taxes on insurers.

A. 1. Every licensed surplus lines broker or any person required to be licensed as a surplus lines broker shall be subject to the annual assessment, penalties, and other provisions of §§ 38.2-400 and 38.2-403 and shall also be subject to the annual taxes, license taxes, penalties, and other provisions of Article 1 (§ 58.1-2500 et seq.) of Chapter 25 of Title 58.1 on each policy of insurance procured by him during the preceding calendar year with an insurer not licensed to transact insurance business in this Commonwealth. *For policies effective on or after July 1, 2011, such payments shall be made based on the direct gross premium income derived from policies for insureds whose home state is this Commonwealth.*

2. Every surplus lines broker subject to the provisions of this chapter shall, on or before March 1 of each year, report under oath to the Commission, upon a form prescribed by the Commission, the direct gross premium income derived from policies for insureds whose home state is this Commonwealth during the preceding year ending December 31.

3. Every surplus lines broker failing to file the report required by this section shall be fined \$50 for each day's failure to file the report.

4. Upon the failure of any such surplus lines broker to pay the premium license tax within the time required by this section, there shall be added to such tax a penalty of 10 percent of the amount of the tax and interest at a rate equal to the rate of interest established pursuant to § 58.1-15 for the period between the due date and the date of full payment. The Commission shall notify the surplus lines broker of all additional amounts owed, and the surplus lines broker shall pay such amounts within 14 days of the date of the notice.

5. Upon good cause shown, the Commission may accept late payment of the premium license tax exclusive of penalties; however, interest shall be paid on such tax as prescribed in subdivision A 4.

2 6. If any person overestimates and overpays the assessment or annual taxes, the Commission shall order a refund of the amount of the overpayment to the person. The overpayment shall be refunded out of the state treasury on the order of the Commission upon the Comptroller.

B. Each licensed surplus lines broker or any person required to be licensed as a surplus lines broker whose annual premium license tax liability can reasonably be expected to exceed \$1,500 shall file a quarterly tax report with the Commission. Such report shall be in a form prescribed by the Commission. This report shall be filed no later than thirty calendar days after the end of each calendar quarter. Notwithstanding any provision to the contrary, each such person shall pay the premium license tax owed for the direct gross premiums adjusted for additional and returned premiums shown by each quarterly tax report when such report is filed with the Commission.

C. In addition to other penalties provided by law, any licensed surplus lines broker or any person required to be licensed as a surplus lines broker who willfully fails or refuses to pay the full amount of the tax or assessment required by this chapter, either by himself or through his agents or employees, or who makes a false or fraudulent return with intent to evade the tax or assessment hereby levied, or who makes a false or fraudulent claim for refund shall be guilty of a Class 1 misdemeanor.

D. If any licensed surplus lines broker or any person required to be licensed as a surplus lines broker charges and collects from the insured the taxes and assessments required by this section, such person shall be a fiduciary to this Commonwealth for any taxes and assessments owed to this Commonwealth under this chapter.

§ 38.2-4810. Issuance and delivery of surplus lines policies; prior authority or information required.

Each policy or other written evidence of insurance procured pursuant to this chapter shall be delivered promptly to the ~~Insured~~ named insured shown on the policy's declarations page. No surplus lines broker shall issue or deliver any policy or other written evidence of insurance or represent that insurance will be or has been granted by an unlicensed insurer unless (i) he has prior written authority from such insurer for the insurance, (ii) he has received information from the insurer in the regular course of business that the insurance has been granted, or (iii) an insurance policy providing the insurance actually has been issued by the insurer and delivered to the ~~Insured~~ named insured shown on the policy's declarations page.

§ 38.2-4811. Surplus lines coverage to be placed only with unlicensed insurers approved by Commission.

A. No surplus lines broker shall procure a policy of insurance with any insurer not licensed to transact insurance business in this Commonwealth, unless such unlicensed insurer has prior approval of the Commission to issue surplus lines insurance.

B. Any unlicensed foreign insurer wishing to be approved by the Commission to issue surplus lines coverage may receive such approval upon providing:

1. ~~Satisfactory evidence of good repute and financial integrity~~ Evidence that it is authorized to write the type of insurance in its domiciliary jurisdiction; and

2. Proof that it ~~qualifies under a, b or c of this subdivision:~~

a. ~~The unlicensed insurer~~ has capital and surplus or its equivalent under the laws of its domiciliary jurisdiction, which equal the greater of (i) the minimum capital and surplus requirements under §§ 38.2-1028, 38.2-1029, 38.2-1030 or § 38.2-1031, or (ii) \$15 million.

(1) ~~The~~ C. Notwithstanding the capital and surplus requirements of this subdivision B 2 a, an unlicensed foreign insurer may be satisfied by an unlicensed insurer possessing less than the aforementioned capital and surplus receive approval upon an affirmative finding of acceptability by the Commission. 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 Commission make an affirmative finding of acceptability when the surplus lines insurer's capital and surplus is less than \$4.5 million.

(2) An unlicensed alien insurer also shall provide evidence that it maintains in the United States an

irrevocable trust fund in a qualified U.S. financial institution on behalf of U.S. policyholders. This trust fund at all times shall be valued at not less than \$2.5 million and shall consist of cash, securities, letters of credit, or investments of substantially the same character and quality as those that are eligible investments for the capital and statutory reserves of admitted insurers authorized to write like classes of insurance in this Commonwealth. Such trust fund, which shall be included in any calculation of capital and surplus or its equivalent, shall have an expiration date which at no time shall be less than five years; and

b. In the case of any Lloyd's or other similar group, including incorporated and individual unincorporated underwriters, the incorporated members of which 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, the Lloyd's or other similar group maintains a trust fund of not less than \$50 million as security to the full amount thereof for all policyholders and creditors in the United States of each member of the group, and such trust shall likewise comply with the terms and conditions established in subdivision 2 a (2) for alien insurers; and

c. In the case of an "insurance exchange" created by the laws of individual states, the insurance exchange maintains capital and surplus, or the substantial equivalent of capital and surplus, of not less than \$50 million in the aggregate. For insurance exchanges that maintain funds for the protection of all insurance exchange policyholders, each individual syndicate shall maintain minimum capital and surplus, or the substantial equivalent of capital and surplus, of not less than \$3 million. If the insurance exchange does not maintain funds for the protection of all insurance exchange policyholders, each individual syndicate shall meet the minimum capital and surplus requirements of subdivision 2 a.

*C D. An unlicensed alien insurer shall be deemed approved by the Commission if such insurer is listed on the Quarterly Listing of Alien Insurers maintained by the NAIC International Insurers Department.*

*E. Any such unlicensed foreign insurer approved by the Commission shall cause to be provided to the Commission, not later than March 1 or the later date established by the insurer's state of domicile or entry, a copy of its current annual statement certified by the insurer. Such later date established by the insurer's state of domicile or entry shall not be later than August 31. The report shall be:*

- 1. Filed with and approved by the regulatory authority in the domicile of the nonadmitted insurer; or*
- 2. Certified by an accounting or auditing firm licensed in the jurisdiction of the insurer's domicile.*

*In the case of an insurance exchange, such report may be an aggregate combined statement of all underwriting syndicates operating during the period reported upon.*

*The Commission, at its discretion, may extend the period for filing an annual statement by a maximum of two months.*

*D F. If at any time the Commission has reason to believe that an eligible surplus lines insurer (i) is in unsound financial condition, (ii) is no longer eligible under subdivision B 2 this section, (iii) has willfully violated the laws of this Commonwealth, or (iv) does not make reasonably prompt payment of just losses and claims in this Commonwealth or elsewhere, the Commission may declare it ineligible. The Commission shall promptly mail notice of all such declarations to each surplus lines licensee.*