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Re: **Interpretive Opinion No. 05-15, Permissibility of Group Property or Surplus Lines Insurance Policies in Tennessee and Related Premium Tax Obligations**

Dear Mr. Igdalsky,

This letter is in response to your separate inquiries submitted to the Financial Affairs Section and the Policy Analysis Section of The Division of Insurance of the Tennessee Department of Commerce and Insurance in May 2015. Your inquiries requested guidance regarding group policies for property or surplus lines insurance in the State of Tennessee. The Division of Insurance ("Division") is treating your multiple inquiries as a request for an interpretive opinion.

Specifically, you asked whether a surplus lines insurer may write group property coverage in Tennessee. You question whether an unauthorized insurer may write group property policies through surplus lines coverage, provided the group contemplated is not a fictitious group, and the insurer abides by all other applicable Tennessee surplus lines regulations. You further ask, in the event such a group policy is permissible, if the group policy may share a combined deductible and liability limit for all certificates issued thereunder.

You additionally asked whether group policies permissible under the insurance laws of a different state may issue a certificate in that state to a Tennessee resident. In the event this practice is permissible, you ask what, if any, premium taxation requirements would the master policy be liable for paying in Tennessee.

Permissibility of Group Property or Surplus Lines Insurance Policies in Tennessee

Tennessee insurance law prohibits, as an unfair trade practice, the issuance of a property policy to any group, association, corporation, or organization if that policy creates any preference or distinction based on that grouping. Tenn. Code Ann. § 56-8-104(18)(A) (2012). The issuance of a group property surplus lines policy in itself makes a preference or distinction in favor of that

group in so offering. Accordingly, group property surplus lines insurance policies are generally barred under the Tennessee Unfair Trade Practices Act.

Nothing in Tennessee Insurance Law specifically prohibits aggregation of liability or deductibles for insurance policies. However, as the provision of group property insurance policies is largely prohibited in Tennessee, restricting certificate holders thereunder to aggregated deductible and policy limits is also generally impermissible. Absent the group property insurance policy under which the issued certificates share a common nexus, there is no mechanism by which a company could combine such claim amounts. Consequently, aggregated deductible and policy limits for all claims of certificate holders under a group property insurance policy are essentially barred under Tennessee Insurance Law.

Further forbade as an unfair trade practice is the issuance of any property policy "based upon any fictitious grouping of persons[.]" *Id.* The Division hereby defines a fictitious grouping as "any grouping by way of membership, nonmembership, license, franchise, employment, contract, agreement or any other method or means[.]" Tenn. Code Ann. § 56-8-102 (2009). Essentially, this statute bars insurance companies from establishing any rate preference based on some factor other than risk. Making property insurance available to one individual at a rate lower than that which is available to a substantially similarly situated individual on the sole basis of membership in a wholly unrelated group is unfair and impermissible under the unfair trade practices act. Property insurance policy discounts based on some fictitious grouping is a prohibited practice under Tenn. Code Ann. § 56-8-104(18)(A). In essence, writing a property insurance policy to a group, while also providing property insurance policies to individuals, is considered giving preference to the group. Thus, generally, group property insurance is prohibited as an unfair trade practice in Tennessee.

However, a company or group providing insurance "solely for the benefit of its members, or members of its parent or sponsoring organization" is excepted from this prohibition on the provision of property insurance policies to groups. § 56-8-104(18)(B). In other words, an insurance company may provide property insurance benefits to a group, so long as that company provides individual property insurance policies only to that group. Furthermore, in order for such a group to defeat the prohibition on preferences or distinctions offered to groups with regard to property insurance, membership in the group cannot be subject to prohibitively restrictive barriers; such as excessive cost. To qualify for this exemption, such a policy must be made available to all individuals in that group, and the rates must be adjusted based on each individual member's level of risk. *See* Tenn. Op. Atty. Gen. No. 13-33, 2013 WL 1856669. In so operating, provision of property insurance to a group does not unfairly benefit a member policy holder against any other member or an individual policy holder outside of the group. It is also possible a group property policy issued in this state that is open and available to any citizen herein, which issues certificates based on individual risk would fall into this exemption.

Taxation of Out of State Group Insurance Policies Issued to Tennessee Residents

The Nonadmitted and Reinsurance Reform Act ("NRRA"), enacted in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), grants exclusive

authority to an insured's home state to collect premium tax payments for nonadmitted insurance.[1] 15 U.S.C. § 8201(a) (2011). Accordingly, a surplus lines agent or broker must look to the laws of any given insured's home state[2] to determine compliance with respect to surplus lines premium taxation. *See* 15 U.S.C. § 8202(a) (2011). In Tennessee, the home state of an individual is simply the state of that individual's primary residence. Tenn. Code Ann. § 56-14-102(10)(A)(i) (2011); 15 U.S.C. § 8206(6) (2011). Under Dodd-Frank and the NRRA, an out-of-state group property or surplus lines policy may be issued to a Tennessee citizen, so long as it is not a prohibited preference or distinction, and provided the surplus lines agent complies with the premium taxation laws of Tennessee.

Irrespective of the requirements imposed by Dodd-Frank and the NRRA, it is long established that certificates of group insurance are regarded as insurance policies in Tennessee. Regardless of where the master policy is issued, any certificate of group insurance issued to a citizen of the State of Tennessee shall be considered a Tennessee contract of insurance and thus required to comply with the Tennessee Insurance Laws. Tenn. Code Ann. § 56-14-103(b) (2011). Certificates of group insurance policies are considered part of the insurance contract; rendering a policy as issued in Tennessee when such a certificate is issued to an insured in Tennessee. *Caspersen v. Acad. Life Ins. Co. of Denver Colo.*, No. 43, 1990 WL 20119, at *4 (Tenn. Ct. App. Mar. 7, 1990). It is wholly immaterial that the master group policy under which a certificate is delivered is issued in another state. *Id.* Consequently, group surplus lines certificates of insurance issued to citizens of the State of Tennessee are considered insurance policies in this state and are subject to Tennessee's gross premium taxation[3] payment requirements. Tenn. Code Ann. § 56-14-113 (2015).

In conclusion, the response to your inquiries is fact determinative. Group property insurance policies are generally prohibited as an unfair trade practice pursuant to Tenn. Code Ann. § 56-8-104(18). Property insurance policies issued to groups are prohibited when they permit any preference or distinction based on some fictitious grouping. However, an exception to this general prohibition exists when a company issues individual property or surplus lines insurance policies solely to a contemplated group. Definitively, group policies lawfully created in some other state are subject to premium taxation in Tennessee when certificates of that group policy are delivered to citizens of the State of Tennessee.

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[1] Nonadmitted insurance is also known as surplus lines insurance, and includes "any insurance coverage permitted by § 56-14-105 to be placed directly or through surplus lines agents with a nonadmitted insurer eligible pursuant to § 56-14-108[.]" Tenn. Code Ann. § 56-14-102(13) (2011).

[2] An exemption for affiliated groups exists where named insureds have different home states does not apply absent a showing that the group property insurance policy qualifies as such a group. *See* § 56-14-102(10)(B). An affiliated group is "a group of entities in which each entity, with respect to an insured, controls the insured, is controlled by the insured, or is under common control with the insured." § 56-14-102(3). Control with respect to affiliated groups requires entity possession of power to vote twenty-five percent (25%) or greater of any class of voting securities of another entity or entity ability to direct the election of a majority of the directors of some other entity. § 56-14-102(6).

[3] "In addition to the full amount of gross premiums charged by the insurer for the insurance, every person licensed pursuant to § 56-14-104 shall collect and pay to the commissioner a sum based on the total gross premiums charged, less any return premiums, for surplus lines insurance provided by the surplus lines agent pursuant to the license. Where the insurance covers an insured whose home state is this state, the sum payable shall be computed based on an amount equal to five percent (5%) on the gross premiums, less the amount of gross premiums allocated to this state and returned to the insured." § 56-14-113(b)(1).

Please note that the Division has not made an independent investigation into any facts, but has instead relied solely upon the general inquiries you submitted. If specific facts become available, it may be necessary for the Division to reconsider the matter. This letter expresses the Division's position on enforcement action only and does not purport to express legal conclusions on the issues presented. This position is furnished solely as guidance regarding the inquiries described herein. Please be advised that further publication or use of this position may only be made with the Division's prior written consent.

This response by the Division is to general inquiries regarding the Surplus Lines Insurance Act as codified in Tenn. Code Ann. § 56-14-101 *et seq.* and should not be construed as a legal position or opinion of the Commissioner of the Tennessee Department of Commerce and Insurance or of any other official in the Department. Please note that the conclusions contained herein are based upon a general inquiry submitted to the Division, and any expressly identified facts or conditions may require a different response. As each inquiry is reviewed on the specific facts presented, this response may not be used as precedent by any person or entity. Any detailed facts presented to the Division could result in a different conclusion than asserted herein.

If you have further questions or concerns regarding this letter, please feel free to contact me.

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