

License Tax On Insurance Companies

COMMONWEALTH OF KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET FRANKFORT, KENTUCKY

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Office of Insurance (the "Office") on the specified issue. The Advisory Opinion is not legally binding on either the office or the reader.

Kentucky Office of Insurance Advisory Opinion 2005-05

RE: KRS 91A.080 LICENSE TAX ON INSURANCE COMPANIES, AS AMENDED BY 2005 HOUSE BILL 18

**PENALTY FOR WILLFUL FAILURE TO COLLECT AND REMIT THE FEE OR TAX ON INSURANCE PREMIUM
SECTION 1 (7)(c)**

REFUND OF OVERPAID FEE TO INSURANCE COMPANY OR BROKER SECTION 1 (9)

RELEVANT FACTS, ISSUES, AND STATUTES:

Several questions have emerged regarding the Kentucky Office of Insurance's interpretation of KRS 91A.080, Section 1, as amended by HB 18 (2005 Kentucky Acts Ch. 31).

HB 18, Section 1 amends KRS 91A.080, License Tax on Insurance Companies, to add a new subparagraph (c) to paragraph (7), and also to add new language to existing paragraph (9).

KRS 91A.080 Section 1, Paragraph (7)(c) states:

If the Office of Insurance finds that an insurance company has willfully engaged in a pattern of business conduct that fails to properly collect and remit the fee or tax imposed by a city, county, charter county, consolidated local government, or urban-county government pursuant to the authority granted by this section, the Office of Insurance may assess the responsible insurance company an appropriate penalty fee no greater than ten percent (10%) of the additional license fees or taxes determined to be owed to the city, county, charter county, consolidated local government, or urban-county government. The penalty fee shall be collected by the Office of Insurance and payable to the city, county, charter county, consolidated local government, or urban-county government owed the license fee or tax less any administrative costs of the Office of Insurance in enforcing this section. Any insurance company or agent held responsible for a penalty fee may request a hearing with the Office of Insurance to be conducted pursuant to KRS 304.2-310 to 304.2-370 regarding the finding of a willful violation and the subsequent penalty fee.

THE KENTUCKY OFFICE OF INSURANCE POSITION: Every insurance company and/or surplus lines broker issued a license to conduct business in the state of Kentucky is potentially subject to an examination at the discretion of the Executive Director of the Office of Insurance to determine the company's

compliance with all Kentucky insurance laws. Typically, one of the areas reviewed during the course of an examination is compliance with KRS 91A.080, which now includes the amendment made in HB 18.

In addition to discretionary examinations, KRS 91A.080 authorizes the Kentucky Office of Insurance to examine compliance with the statute at the request of a taxing authority. The cost of such a compliance examination is borne by the requesting taxing authority. The purpose of the compliance examination is to determine whether the fees or taxes imposed on insurance companies and brokers pursuant to KRS 91A.080 are being properly collected and remitted.

If during the course of an examination of an insurance company or surplus lines broker as described above, the Kentucky Office of Insurance finds that the insurance company willfully engaged in a pattern of conduct that fails to collect and remit the fee or tax set by a taxing authority on insurance premiums, the Kentucky Office of Insurance has the authority to take any combination of the following administrative actions:

- The Office may assess a penalty no greater than 10% of the fees and taxes owed, if the amount of fees and taxes owed can be determined by the Office;
- The Office may require the insurer or surplus lines broker to pay interest on any tax not paid by or on the due date. Any penalty assessed will be separate, and in addition to any interest due on any license fee or tax not paid on or before the due date as defined in KRS 131.010(6) from the date due until paid; and
- The Office may pursue additional administrative remedies authorized by KRS Chapter 304, Subtitle 99 including civil penalties, a revocation or suspension of the insurer's or broker's license, remedial measures, or any combination of these administrative remedies.

The Kentucky Office of Insurance will oversee the collection and payment of penalties due in accordance with HB 18, Section 1, Paragraph (7)(c) and any applicable interest, and will order such payments to be made directly to the taxing authority.

KRS 91A.080 Section (9) as amended states:

Any insurance company or agent that overpays any license fee or tax to a city, county, charter county, consolidated local government, or urban-county government shall be refunded the amount overpaid. If it is determined that an insurance company or agent paid a license fee or tax to a city, county, charter county, consolidated local government, or urban-county government based upon premiums collected upon lives or risks which are discovered to be located outside the legal corporate limits of the city, county, charter county, consolidated local government, or urban-county government which was paid the license fee or tax, the insurance company or agent shall be refunded those license fees and taxes within ninety (90) days of notice to the governmental entity paid.

THE KENTUCKY OFFICE OF INSURANCE POSITION: The amendment in paragraph (9) of KRS 91A.080 requires that a fee or tax, which was overpaid, or incorrectly paid, based upon premiums collected outside of the taxing authority, be refunded back to the insurance company or broker within ninety (90) days of the notice to the governmental entity paid.

It is the opinion of the Kentucky Office of Insurance that KRS 91A.080 does not prevent an insurer from taking a "refund" in the form of credits against future taxes owed. In the past, taxing authorities were allowed to take credits against future taxes owed for overpayments. Continuing the practice of using credits to off-set payment of taxes owed is an acceptable form of "refund" that is consistent with the language of KRS 91A.080.

In the alternative, KRS 91A.080 clearly grants an insurer that has made an overpayment the ability to provide notice to a taxing authority of overpayment and to request a refund from the taxing authority. In an attempt to minimize confusion, the Office expects an insurer or broker to provide a clear and obvious refund "notice" that will provide the taxing authority with a reasonable understanding that a refund is due. Should the taxing authority disagree that a refund is owed, it would be the responsibility of the requesting insurance company or broker to show proof that in fact, a refund is appropriate.

Please be advised that any taxes or fees refunded to the insurer or broker that have been paid by a policyholder must be returned to the policyholder. KRS 304.12-190(3) provides as follows:

No person shall willfully or knowingly fail to return to the person entitled thereto within a reasonable time any sum collected as premium or charge for insurance in excess of the amount actually expended for insurance...applicable to the subject on account of which the premium or charge was collected.

The failure of an insurer or broker to return any taxes or fees overpaid by the policyholder constitutes illegal dealing in premium, a violation of KRS 304.12-190(3). Should the Office of Insurance determine that a violation of KRS 304.12-190 exists, the Office is authorized to take appropriate administrative action in accordance with KRS Chapter 304, Subtitle 99.

Any questions concerning these matters should be directed to Brenda Smith, Consumer Protection & Education Division, Kentucky Office of Insurance at (502) 564-1649.

/s/ R. Glenn Jennings

R. Glenn Jennings, Executive Director
Kentucky Office of Insurance

August 25, 2005

Date