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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:)	
)	No. 10-0204
WILLIAM H. TANNER and ANCHOR)	
BAY INSURANCE MANAGERS, INC.,)	FINAL ORDER ON
)	RECONSIDERATION
Licensees.)	
)	

TO: William H. Tanner, CPCU, AU, ASLI, CISC
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This Order on Reconsideration is entered on Motion for Reconsideration ("Motion") filed by the Insurance Commissioner ("OIC") on April 29, 2011, and responsive Motion for



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Reconsideration filed by William H. Tanner and Anchor Bay Insurance Managers, Inc. (“Licensees”) on April 29, 2011. [It is noted that in their communications with the Colorado Department of Regulatory Agencies, the OIC and perhaps others, the Licensees assumed pursuant to RCW 34.05.470(3) that the undersigned had denied the OIC’s and Licensees’ Motions for Reconsideration and therefore that this adjudicative proceeding was terminated. This is a reasonable assumption under RCW 34.05.470(3) had no twenty day notice been sent that the undersigned had in fact granted the OIC’s Motion for Reconsideration. However, such twenty day notice was filed but due to an administrative error it does not appear that the Licensees (and perhaps also the OIC) received a copy of that twenty day notice as required by RCW 34.05.470(3). Said notice was sent to the Licensees and resent to the OIC promptly after discovery of this oversight. The Findings of Facts, Conclusions of Law and Final Order entered April 19, 2011, as revised below after review of the OIC’s and Licensees’ Motions for Reconsideration, is the Final Order of the undersigned and this adjudicative proceeding is terminated as of the date of entry of this Order on Reconsideration.]

After detailed review of the parties’ Motions, the purpose of this Order on Reconsideration is to address only the four issues set forth below which were raised in the OIC’s Motion for Reconsideration. Reconsideration was not granted as to any other issues raised in the OIC’s Motion for Reconsideration. Reconsideration was also not granted as to the entire Licensees’ Motion for Reconsideration.

Preliminarily, however, after review of the OIC’s Motion for Reconsideration, the undersigned emphasizes that this proceeding arose because the Licensees challenged the reasonableness of the OIC’s disciplinary action against the Licensees. The OIC’s action concerned the Licensees’ handling of surplus line premium taxes the Licensees collected from insureds and which the Licensees are required to pay to the OIC annually by March 1 (hereinafter “taxes”). Specifically, the OIC suspended the Licensees’ insurance producer’s licenses effective immediately and revoked the Licensees’ insurance producer’s licenses so that they could not conduct their insurance business, based principally on the Licensees’ failure to maintain these taxes in the Licensees’ fiduciary account until the Licensees paid them to the OIC by their annual due date. The Licensees admit they did not maintain these taxes in their fiduciary account, but argue that 1) because the applicable statutes and regulations do not clearly state that it is required that they both deposit and maintain these taxes in their fiduciary account; 2) because they asked the OIC whether they were required to maintain these taxes in their fiduciary account and received no clear answer from the OIC; and 3) because there are no written OIC policies, procedures or interpretations regarding whether insurance producers are required to maintain these taxes in their fiduciary account, the OIC’s later disciplinary action based on the Licensees’ failure to maintain these taxes in their fiduciary account was not reasonable. The OIC does not deny that the Licensees tried but could not obtain an answer from the OIC regarding whether they were required to maintain these taxes in their fiduciary account. The OIC also admits that there are no written OIC policies, procedures or interpretations

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regarding whether brokers are required to maintain these taxes in their fiduciary account.

FOUR ISSUES ADDRESSED

FIRST ISSUE: *In its Motion for Reconsideration, the OIC asserts that the Findings of Facts, Conclusions of Law and Final Order (Final Order) should have, but did not, include a clear statement that surplus line premium taxes collected by a surplus line broker from insureds are held in the broker's fiduciary capacity as an insurance producer and therefore the Licensees had a legal duty to deposit and maintain these funds in their fiduciary account until paid to the OIC by the annual premium tax due date of March 1. Specifically, the OIC argues that 1) a fiduciary relationship is created between the Licensees and the OIC, with the OIC being the beneficiary, because the Licensees owe premium tax to the OIC each year (similar to income tax, the amount is based on the amount of premiums generated by the Licensees during the preceding calendar year). The OIC further argues that 2) because the Licensees have a fiduciary relationship with the OIC, the Licensees must deposit these amounts representing taxes -- on each occasion when they are collected from their various insureds throughout the year -- into the Licensees' fiduciary account and must maintain them in that fiduciary account until they are paid to the OIC by March 1 of the following year.*

In response, after careful review of the hearing file and Final Order, while this issue may be a suitable subject for a Declaratory Ruling separate from this proceeding, in making the final decision herein it is not necessary to either adopt or reject the OIC's argument on this issue. This is because the principal issue in this proceeding was whether the OIC's disciplinary action was reasonable and should be upheld, or was not reasonable and should be set aside or modified. In the Final Order herein, the undersigned determined that the OIC's action was not reasonable and should be set aside, because, while it was found that the Licensees did fail to maintain these funds in their fiduciary account, based upon the Findings of Facts and Conclusions of Law 1) the statutes and regulations governing this duty are indeed unclear; 2) the Licensees asked the OIC whether they were required to maintain these funds in their fiduciary account and received no response, and in the absence of an answer from the OIC the Licensees even reviewed the Alaska Department of Insurance's rules on this issue and found that during the years at issue Alaska actually made a distinction between funds representing premiums owed to the insurer or insured and funds representing premium taxes, and at that time actually required that premium taxes (as opposed to premiums owed to the insurer or insured) be removed from the producer's fiduciary account periodically (not maintained in the fiduciary account until paid to the state); and 3) there are no written policies, procedures or interpretation regarding this duty which could have been procured by or sent to the Licensees to interpret their duty to maintain these funds.

Therefore, it is not necessary to revise the wording of the Final Order to address the above issue.

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SECOND ISSUE: *In its Motion, the OIC takes exception to the language of Conclusion of Law No. 6 relative to the Licensees paying their 2009 taxes late, that "it is not reasonable that the Licensees in this situation should also be the subject of further penalties [in addition to paying the 20% late penalty imposed by RCW 48.14.060] imposed under RCW 48.17.480 for the same action (paying their 2009 premium taxes late)." The OIC asserts that the Licensees 1) were unable to pay their 2009 taxes on time because 2) they had appropriated the tax money and used it to pay their operating expenses – two separate activities constituting two separate actions. I.e., the OIC argues that the Licensees' activities in "transferring the subject tax funds from their fiduciary account to their operating account, and using these funds to pay their operating expenses," is not the "same action" as "paying their 2009 premium taxes late" and should be treated as separate violations.*

In response, the OIC is correct. There are indeed two alleged activities of the Licensees which are at issue in this proceeding, and which are found to have occurred: 1) the Licensees' failure to pay their 2009 taxes on time (primarily RCW 48.14.060(3), 48.15.180(1)(b), and 48.17.480(2) and (3)); and 2) the Licensees' transferring these funds from their fiduciary account to their operating account and using them to pay operating expenses (primarily 48.15(1)(c) and (3), and 48.17.480(4)). These are indeed two separate activities which should be considered as separate violations (i.e., separate actions).

Throughout the Final Order, the undersigned did consider these two activities to be two separate alleged violations of the various statutes cited in the OIC's Order: Conclusions 3, 6, 10, 11, 13 and 14, respectively, address the issue of whether the Licensees' failure to timely pay taxes was a violation of RCW 48.17.480(3), 48.15.180(1)(b)-(c) and (3), 48.14.060, WAC 284-12-080, RCW 48.15.120, and whether revocation of their insurance producer's licenses should be upheld pursuant to 48.17.530(1)(b)-(h). Conclusions 4, 5, 7, 8, 9, 10 and 12, respectively, address the issue of whether the Licensees' failure to maintain the tax funds in their fiduciary account was a violation of RCW 48.17.480(4), 48.17.600, 48.15.180(1)(c), 48.15.180(3), WAC 284-12-080 and whether revocation of their insurance producer's licenses should be upheld pursuant to 48.17.530(b)(d) and (h) and 48.15.140(1). [It is noted that Para. 6 of the OIC's Order states: "By failing to promptly pay insurance premiums received in a fiduciary capacity to the parties entitled thereto and by converting the funds to their own use, the Licensees violated RCW 48.17.480, RCW 48.17.600, RCW 48.15.180, and WAC 284-12-080." Because Para. 6 does not specify which of these statutes were being applied to which of the two activities (and, as stated in Conclusion 2, also does not specify which subsections of these statutes were being applied), it was necessary to apply each possible subsection to each of these two activities.]

Therefore, as above, both of the two activities at issue herein were considered to be two separate alleged violations of the statutes cited in the OIC's Order. However, Conclusions 12 and 13 are revised to reflect more clearly that both activities at issue

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herein were considered to be two separate alleged violations of RCW 48.140. Finally, Conclusion 14 is revised to reflect more clearly that both activities were considered as separate alleged violations of the various statutes cited in the OIC's Order, and that it was concluded that the facts did not support the imposition of any penalties in addition to the 20% penalty imposed by RCW 48.14.060 for late payment of taxes.

THIRD ISSUE: *Relative to the Licensees paying their 2009 premium taxes late, the OIC asserts, as it did in its Order and argument at hearing, that RCW 48.15.140(1)(a) authorizes revocation "if the surplus line broker fails to file the licensee's annual statement or to remit the tax as required by this chapter," and argues that if Conclusion 6 is meant to imply that the late payment interest penalty imposed by RCW 48.14.060 is the only appropriate sanction for a surplus line broker's tax delinquency, then Conclusion 6 reads RCW 48.15.140(1)(a) out of existence. The OIC urges that the Final Order should have concluded that not only was the 20% late penalty under 48.14.060 appropriate but it should also have been concluded that in transferring these tax funds into their operating account and spending them on operating expenses the Licensees came within the meaning of RCW 48.17.480(4) and should therefore be found guilty of criminal theft as set forth in that statute.*

In response, clearly, in some factual situations, the imposition of other sanctions under other statutes for a surplus line broker's tax delinquency, which would be in addition to the late payment penalty imposed by RCW 48.14.060, are appropriate. *Conclusion 6 states "it is not reasonable that the Licensees in this situation should also be the subject of further penalties..."* [Emphasis added.] This statement is intended to mean that in these Licensees' particular situation, the facts did not support imposition of additional penalties under other statutes in addition to the OIC's imposition of the 20% penalty for late payment under 48.14.060. Although the undersigned considered the OIC's argument that the Licensees' late payment was a violation of the other statutes cited in the OIC's Order (e.g., Conclusion 3 as to 48.47.480(3); Conclusion 4 as to 48.47.480(4)), it was concluded that given the particular facts found herein concerning the Licensees' activities, these particular facts do not support a conclusion that any other penalties should be imposed. However, while Conclusion 6 already states that its conclusion is relative to these Licensees' specific factual situation, it can be revised to make more clear that in other licensees' specific situations where they have paid taxes late, disciplinary action in addition to the 20% penalty imposed by RCW 48.14.060 may certainly be appropriate.

Therefore, as above, in some factual situations, where an insurance producer has failed to pay its taxes on time, sanctions in addition to the penalties imposed by RCW 48.14.060 are appropriate. Conclusion 3, 6, 12, 13 and 14 are revised to more clearly state that in some factual situations it would be most appropriate for the OIC to impose a variety of sanctions (e.g., RCW 48.15.140(1)(a) and (c), and/or 48.15.180(1) (a) – (c), (2) and/or (3), and/or 48.17.480(1) – (4)) upon insurance producers for failing to pay their annual premium taxes to the OIC on time. Additionally, Conclusion 14 is revised to

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more clearly state generally that it would certainly be reasonable in some factual situations for the OIC to impose a variety of disciplinary actions on insurance producers including surplus line brokers, based upon, e.g., RCW 48.15.140(1)(a) and (c), and/or RCW 48.15.180(1) (a) – (c), (2) and/or (3), and/or 48.17.480(1) – (4), for failing to pay their annual premium taxes to the OIC on time, and/or failure to deposit and maintain fiduciary funds into their fiduciary account(s), and/or failing to 'promptly account for and pay them to the insured, insurer, or person entitled thereto,' and/or 'diverting or appropriating funds received in a fiduciary capacity to his own use,' with the result that these activities constitute misdemeanors and/or thefts and/or support revocation of their insurance producer's licenses as set forth in those statutes.

FOURTH ISSUE: *The OIC takes exception to Conclusion 5, advising that "the word 'promptly' in WAC 284-12-080(5)(b) creates no confusion that has anything to do with this case. This case is not about when the Licensees withdrew and spent the State premium taxes they had collected. It is about the fact they did so at all. No one testified they removed State premium taxes from their trust account and spent the money because they thought they had to act promptly and didn't know what else to do."*

In response, the OIC's concern is unclear. Conclusion 5 considers the applicability of RCW 48.17.600 on the Licensees' activities. While WAC 284-12-080 was promulgated in 1990 under the authority of RCW 48.17.600 among other statutes, WAC 284-12-080(5)(b) is specifically directed only to the proper handling of return premiums.

Therefore, it is not necessary to revise the wording of the Final Order to address the above issue.

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In response to the OIC's Motion for Reconsideration with supporting arguments, and after careful review and consideration of the entire hearing file, based on the above reasoning, the Final Order is set forth in its entirety herein below. The only changes are those words which are added (which are underlined) and those words which are deleted (which are marked as strikeouts) in response to the OIC's Motion for Reconsideration, pursuant to the reasoning above.

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Pursuant to RCW 34.05.434, 34.05.461, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons, the above-entitled matter came on regularly

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for hearing before the Office of Insurance Commissioner for the state of Washington commencing at 9:00 a.m. on December 16, 2010 and January 20, 2011. All persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner appeared pro se, by and through Charles D. Brown, Esq., Senior Staff Attorney in his Legal Affairs Division. William H. Tanner and Anchor Bay Insurance Managers, Inc. appeared pro se, by and through William H. Tanner, President of Anchor Bay Insurance Managers, Inc.

NATURE OF PROCEEDING

The purpose of the hearing was to take testimony and evidence and hear arguments as to whether the Insurance Commissioner's Order Suspending and Revoking Licenses, No. 10-0204, entered by the Insurance Commissioner on November 2, 2010, should be confirmed, set aside or modified. Said Order Suspending and Revoking Licenses suspends and revokes the insurance producer's and surplus line broker's licenses of William H. Tanner and Anchor Bay Insurance Managers, Inc. based upon the facts alleged therein. William H. Tanner requested this hearing to contest the Order insofar as it revokes the subject insurance producer's and surplus line broker's licenses of these two agents. (On November 8, 2010, the Licensees' motion for discretionary stay of the suspensions was granted through date of entry of the Final Order herein pursuant to RCW 48.04.020(2), and therefore the suspensions in the Insurance Commissioner's Order were no longer an issue in this proceeding.)

FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Order is entered pursuant to Title 34 RCW and Title 48 RCW, specifically RCW 48.04.
2. William H. Tanner ("Tanner") is an individual who is 59 years old and a resident of Poulsbo, Washington. He has held Washington insurance producer's and surplus line broker's licenses for the lines of property and casualty insurance for over 20 years. In 2000, Tanner founded Anchor Bay Insurance Managers, Inc. ("Anchor Bay"), a Washington corporation, and remains a Washington corporation headquartered in Silverdale, Washington. Mr. Tanner and his wife own Anchor Bay, and Tanner serves as its President. Anchor Bay holds Washington insurance agency and surplus line broker's licenses for property and casualty insurance. (Hereinafter, because insofar as is pertinent herein, Tanner appears to have transacted insurance business exclusively through his agency Anchor Bay, Tanner and Anchor Bay are referred to collectively as the "Licensees" unless otherwise indicated.)

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3. Anchor Bay commenced business in September 2000. Tanner concentrated Anchor Bay's business mostly in the Restaurant, Bar & Tavern Program written with Interstate Fire & Casualty Company ("Interstate"), a non admitted carrier, for Washington business (and with Interstate Indemnity Company, a sister company which is admitted carrier, for Oregon and Alaska business). In 2000, it generated \$1.2 million in premium volume; in 2001, \$4.4 million; in 2002, \$9.7 million; in 2003, \$15.7 million; in 2004 \$16.3 million; in 2005, \$17.3 million; in 2006, \$20.8 million. [OIC's Ex. 12, Declaration of Tanner; Testimony of Tanner; Ex. 28, Written Statement of Tanner.] The Licensees held an exclusive contract to sell the Interstate Restaurant, Bar and Tavern insurance product in Washington. Also during this time the Licensees expanded into other product lines because Tanner believed that they likely could not survive long term with only the single Interstate Restaurant, Bar and Tavern product, and for this reason the Licensees also transacted insurance business in the binding authority markets, Century Surety Group and Atlantic Casualty, both non-admitted, and also transacted insurance business as brokers. [Ex. 12, Declaration of Tanner.]

4. In 2004, the Licensees lost their Interstate Restaurant, Bar and Tavern insurance business. There is no evidence, nor does the Insurance Commissioner ("OIC") assert, that loss of this Interstate business was due to any activity on the part of the Licensees. Rather, the sole testimony shows, and it is here found, that Interstate and its parent, Fireman's Fund, reorganized and had their own program departments to transact this Interstate Restaurant, Bar and Tavern insurance business and no longer needed the Licensees to sell it for them. [Testimony of Tanner; Written Statement of Tanner.] Because the Licensees had lost the right to sell the Interstate product, Tanner replaced it with a Century Surety Company (Century Surety) Restaurant, Bar & Tavern product, that was in the beginning (i.e. 2004 and onward) unproductive due to new relations between the Licensee and Century Surety. In addition, at the same time, the Licensees began to write more residential contractors insurance, principally with one carrier, First Specialty Insurance Company (First Specialty), and their contractor book grew rapidly – so rapidly that their total production grew to \$17.3 million in 2005, \$20.8 million in 2006 in spite of running off most of their \$9 million Restaurant, Bar & Tavern business. [Ex. 12, Declaration of Tanner; Testimony of Tanner; Written Statement of Tanner.]

5. In 2004, before the Licensees lost the Interstate contract, some 70% of the Licensees' total book of insurance business consisted of the Restaurant, Bar and Tavern insurance business and 30% was other (binding and brokerage) insurance business. However, by the end of 2006 (the Licensees having lost the Interstate contract in 2004), the Licensee's Restaurant, Bar and Tavern business had fallen to some 10% of its writings, with their other (binding and brokerage) business at some 90%. Of that 90%, a large percentage was residential contractors insurance through First Specialty, which was a volatile market, particularly in 2006 when the residential contracting business dropped with the economy.

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6. In 2007, Anchor Bay began to experience financial difficulty due to several factors, including perhaps most significantly, the recession in the residential contracting business. First Specialty terminated their binding authorities nationwide at the end of 2006, and the Licensees were First Specialty's largest general agent nationwide, with production that exceeded \$9 million which they lost. [Ex. 12, Declaration of Tanner; Testimony of Tanner; Written Statement of Tanner.] These events, along with \$300,000 in expenditures for technological innovations for the Licensees' business, were the most significant reasons that the Licensees suffered significant losses in the years 2007, 2008, and 2009, which are the years at issue in this proceeding. [Ex. 12, Declaration of Tanner.]

7. In 2009, as they were losing money, the Licensees opted to sell off their contractor-driven and other portions of their business, which constituted more than 70% of their business, to Hull & Company, retaining a little over \$1 million in Restaurant, Bar & Tavern Program business (and a smaller amount in environmental business). The Licensees did this because Tanner felt they should return to their core product, the Restaurant, Bar and Tavern business, which offered a more stable marketplace for the Licensees and one in which the Licensees were among the top agents. Tanner believed selling off the contractor-driven portion of the Licensees' business, together with staff reductions which Tanner also made, offered the Licensees the best opportunity to retrench to where the Licensees were in 2000 and onward, and to once again grow the Licensees' insurance business profitably. Thus, as of October 2010 the Licensees' book of business was approximately \$1.5 million in-force [Ex. 12, Declaration of Tanner], but Tanner states that at the present time, in the last few 10 months, the Licensees' insurance business has almost doubled in size and Tanner states he believes that the Licensees' Restaurant, Bar & Tavern business through Century Surety has now grown to be as strong as the Interstate program was. [Testimony of Tanner; Written Statement of Tanner.] The Licensees believe that they are again well positioned to be stable and lucrative and believe that although they are still struggling [Testimony of Sally Cabbell, GPA, CFO, and Corporate Treasurer of Anchor Bay], their 2011 production should triple, generating an operating profit. [Ex. 12, Declaration of Tanner; Testimony of Tanner; Ex. 28, Written Statement of Tanner.] No findings can be made regarding the financial status of the Licensees as of November 2010, the date of the hearing, because the OIC was not able to provide any information in response to questions from the undersigned on this issue. [Testimony of Tunis.]

8. Anchor Bay owed the OIC Washington State insurance premium taxes for the 2009 calendar year by March 1, 2010 (with no penalty if the annual tax statement is filed and taxes paid by March 31, 2010). The Licensees apparently did file their 2009 Washington premium tax statement with the OIC as required, stating that they had received \$4,466,231.89 in total Washington premiums, which amount is not disputed by the OIC. On March 8, 2010, Tanner contacted the OIC (OIC Examiner Ken Combs) and requested a meeting with Mr. Combs *at your office or mine, either way. We have not paid our taxes for last year yet and I need to discuss our options in some detail.* Combs referred him to OIC Budget Analyst Kriscinda Hansen, who was authorized to

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work with premium taxes, and Combs was in the process of retirement). All on the same day, March 8, the following emails were sent between Tanner and OIC Budget Analyst Kriscinda Hansen: Tanner advised the OIC, correctly, that the Licensees owed approximately \$105,000 in taxes for 2009 but that *We encountered a problem that we didn't expect and basically cannot pay the taxes at this time. ... I'm hoping that there is a way of making some arrangements to pay this amount over time -- something like paying \$5,000 a month with a balloon payment at the end of ... you tell me. Unfortunately, it comes at a time where, between the economy and the soft market, it caught us off guard. Please advise what our options are in this kind of a situation.* The OIC promptly responded *...[the OIC's] statutes do not have any provisions for extensions on filing or payment due. Payments not made by March 31 are subject to 5% penalties on the balance due; it is another 5% if not paid by April 15 and a final 10% for any payments not made by April 30. According to the reporting from the Surplus Line Association, your taxes due are \$89,325. Please file your return using E-Tax.* Tanner responded 40 minutes later: *We will try to make payment by the end of the month – whether or not we can depends upon the size of a profit sharing check that we are expecting in a couple of weeks. Thanks and regards....* And the OIC 30 minutes later: *Thanks Bill. Sorry there's not more we can do.* And Tanner 6 minutes later: *Just out of curiosity, what would happen if we just couldn't pay? I've never been late on taxes before – of any kind – so I'm not really sure what would happen? Would I end up in jail? At what point would the state shut down the business? I can see everything from allowing me to sell the book off and paying you out of proceeds to shutting me down and selling it yourselves – and paying me the remainder. I've just never heard of the subject coming up.* And the OIC, correctly citing the statute, 45 minutes later: *I looked at the statute before I responded, and it says the Commissioner may revoke, suspend or refuse to renew a license as long as there are taxes due. Taxes and fines may be collected by distraint, or by an auction instituted by the Commissioner. Those are things the Commissioner can do; I would have to ask, but I would think there are intermediate steps. If you are not able to pay the taxes in full by the end of the month, please let me know and I will research to find out options.* On April 5, 2010, the OIC emailed the Licensees: *The Washington State Office of Insurance Commissioner has not yet received your 2009 premium tax payment of \$89,325, which was due March 1, 2010. Additionally, there is a penalty of \$4,466 due. Please login to E-Tax to retrieve your invoices and remit payment as soon as possible to avoid further penalties.* To which Tanner responded the following day: *Kriscinda: ... Regrettably, we do not have the ability to pay the taxes at this time and do not expect to have that ability until sometime in the last quarter of the year. At that point, we will receive both a profit sharing check and the final installment on the sale of much of our book of business to Hull and will be able to make full payment – including penalties. Or at least we will if we are allowed to continue to operate until that time. What do we do now?* And the OIC responded 10 minutes later: *Bill, This is an unusual situation; I will have to work with licensing to determine how to proceed. I will let you know what we determine.* Kriscinda

9. There is no evidence presented that there were further communications between the OIC and Tanner. The next activity in evidence is the OIC mailed its Order Suspending

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and Revoking Licenses on November 2, 2010, with the suspension becoming effective November 5 and the revocation effective November 20, thereby requiring the Licensees to cease conducting their insurance business. At the same time, the OIC sued the Licensees in Superior Court to collect the 2009 taxes owed and asked for a restraining order restricting the Licensees from conducting their insurance business. (The Licensees applied to the undersigned for a discretionary stay which was granted on November 5, and granted again on November 8, with specific conditions imposed therein; said discretionary stay is documented in her Notice of Hearing and Order Granting Discretionary Stay entered November 23. Shortly thereafter, the Superior Court action was decided apparently in accordance with the conditions imposed in the undersigned's Order Granting Discretionary Stay.)

10. Subsequently, as the OIC admits, on December 15, 2010, as the Licensees had promised the OIC in its letter [Ex. 30], the Licensees did pay the 2009 premium taxes to the OIC in full, plus the 20% late fee of \$17,865 required by RCW 48.14.060(1), for a total of \$107,190, just as the OIC had warned Tanner in their March 8 communications. Thus the Licensees paid their 2009 premium taxes in full on December 15. [Testimony of Tunis; Testimony of Tanner; Written Testimony of Tanner.]

11. In addition to taking the above actions in November 2010, prompted by the above premium tax filing for 2009, in October 2010 the OIC initiated a financial examination of the Licensees. The audit reflected, the Licensees admitted, and it is here found, that between January 2007 and October 2009, the Licensees engaged in the pattern of collecting funds representing state premium taxes from their clients and depositing them into their premium trust account and then on occasion transferring them from their premium trust account into their operating account, then using the money from the operating account to pay for the Licensees' operating expenses. In 2007, 2008 and 2009, the Licensees transferred funds representing premium taxes from their premium trust account to their operating account and used these funds to pay wages and other operating expenses: it is unclear whether the 4 transfers in 2007, totaling \$205,000, were premium tax funds because in 2007 the Licensees had apparently not identified the source of the 4 transfers in their financial records from which the OIC reconstructed the summary of transfers [Ex. 10, OIC's summary of cash transfers from Licensees' premium trust account to their operating account based on Licensees' financial records and certified as accurate by Cabbell; Ex. 25B, same as Ex. 10 with amendment added by Cabbell on same date as certification] and the Licensees also routinely deposited other fees into their premium trust account as well as funds representing premium taxes e.g. inspection fees (approximately \$5,000 per month); other states' premium taxes; some earnings; broker fees. [Testimony of Cabbell.] In 2008 this was done 5 times totaling \$175,000 (with the Licensees' separate annotations *from tax reserve in trust to operating; from tax fund to be repaid; SLA taxes transfer*, and in 2009 this was done 5 times totaling \$144,000 (with the notations *from WA SLA tax reserve; Taxes to be returned to Trust; WA SLA tax funds on loan to operating; Cash – Premium Trust 8397; and Borrow from Taxes*. [Ex. 10, Ex. 25B, account recap certified by Cabbell.] [Exs. 10 and 25B are identical except Licensees amended Ex. 10 on October 21, 2010, the date

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Cabbell certified it, to reflect that on April 8, 2009 \$145,069 was taken out of the operating account to pay 2009 taxes; however, this does not appear to change the Finding herein regarding the number of occasions Licensees transferred funds representing premium taxes from their premium trust account to their operating account, or the amounts of these funds which were transferred.] Subsequently, twice in December 2009 and once in January 2010, amounts totaling \$123,000 were transferred back [original underline] into the Licensees' premium trust account with the annotations *Transfer partial tax funds back to Trust; Transfer tax reserve to Trust; and Transfer to Trust Operating capital*. [Testimony of Tunis; Testimony of Cabbell; Ex. 10; Ex. 25B.] All annotations were made by Cabbell with the knowledge of Tanner. [Testimony of Cabbell.]

12. The Licensees admit, and it is here found, that during 2007 and 2008, while they did transfer the subject funds from their premium trust account to their operating account and used these funds to pay their operating expenses, they made sure they had enough funds available in their operating or premium trust accounts on March 1 of 2008 and 2009 to pay the taxes for 2007 and 2008, respectively, and therefore it is undisputed that the Licensees paid their 2007 and 2008 premium taxes to the OIC on time. However, the Licensees admit, and it is here found, that when the 2009 taxes were due on March 1, 2010, the Licensees had insufficient funds available in their operating account and insufficient funds in their premium trust account to pay the 2009 taxes on time. [Testimony of Cabbell.]

13. The OIC asserts (detailed specifically in Conclusions of Law below) that when the Licensees received funds from clients which represented premium taxes, they received funds in their fiduciary capacity and were required to promptly pay the funds to the person (the OIC) entitled to the funds; that they instead unlawfully diverted, appropriated or converted the funds to their own use; that because premium taxes are part of premiums they were required to deposit and maintain these funds in their premium trust account separate from their operating account and failed to do so; and that in so doing they demonstrated incompetence, untrustworthiness, or financial irresponsibility.

14. It is here found that the Licensees did receive funds representing premium taxes and deposited them into their premium trust (fiduciary) account. As found above, on some occasions the Licensees did transfer some of these funds into the Licensees' operating account and used these funds to pay the Licensees' operating expenses. The Licensees knew there was a question about how to handle premium trust accounts, and Tanner inquired of the OIC without receiving a definite answer; the Licensees' staff (Cabbell) conducted more thorough inquiry into the proper means of handling of funds representing premium taxes was, and did not receive clear guidance on this issue (see below). [Ex. 12, Declaration of Tanner; Testimony of Cabbell; Ex. 11, Declaration of Cabbell.] Further, the Licensees discovered, and the OIC admits, and it is here found, that the OIC has no written policy, procedure, technical advisory or other written materials explaining to insurance producers or surplus line brokers how they are to

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maintain premium taxes received from clients. [Testimony of Tanner; Testimony of Cabbell; Testimony of Tunis; Testimony of Azevedo; Written Statement of Tanner.]

15. In 2004, Sally Cabbell, ~~CPA~~, who is CFO and Corporate Treasurer for Anchor Bay, and who handled and accounted for the funds received by the Licensees at all times pertinent hereto as well as currently, determined that it was necessary to ascertain clearly how to handle the premium trust account with regard to deposits and withdrawals, including funds representing premium taxes payable to the OIC annually, and so she went on what she termed an "investigation": she reviewed information provided by the OIC on the OIC's website and consulted the Washington State Surplus Line Association and found no answers to her questions. The Surplus Line Association, along with ~~another CPA~~ a Certified Public Accountant with whom she spoke advised her to telephone the OIC and so she then telephoned the OIC. When she called the OIC, she was transferred from one staff person to another within the OIC and finally a man gave her a formula which did not require premium taxes to be deposited and maintained in their premium trust account. She had no reason to doubt this information. [Testimony of Cabbell.] Therefore Cabbell did not realize that funds representing premium taxes must be deposited and maintained in the premium trust account until paid to the OIC annually. When she consulted the applicable statute(s) and regulation, she did not realize that the definition of "premiums" in those rules included "premium taxes" governing premium trust accounts and are therefore, required to be maintained in the premium trust account until they are paid annually on March 1. [Ex. 12, Declaration of Tanner; Testimony of Tanner; Testimony of Cabbell.]

16. It cannot be found that Tanner's or Cabbell's (i.e. the Licensees') reasonable reading of the statutes and regulation on this issue should have made the answer clear to the Licensees. Absent an OIC written policy, procedure, technical advisory or other written materials - or clear answer from OIC staff to the Licensees upon their inquiry - a reasonable reading of these statutes and regulation leaves a valid question as to the handling of these premium tax funds, i.e. are "premium taxes" [original underline] included in the definition of "premiums" and/or "funds" in reading the statutes and regulation in the insurance code governing maintenance of premium trust accounts? [Testimony of Tanner; Testimony of Cabbell; Ex. 11, Declaration of Cabbell.]

17. The Licensees deposited the funds representing premium taxes which they collected from clients into their premium trust account, not because they believed they were required to deposit them into that account, but because they tried to be conservative in their accounting. In fact, the Licensees also deposited other types of funds into their premium trust account as well, e.g. funds representing 1) inspection fees (approx. \$5,000 per month); 2) other states' premium taxes collected by the Licensees from clients; 3) broker's fees; and other funds into their premium trust account and later transferred some of them into their operating account to pay e.g. 1) inspectors; 2) other states' insurance departments for premium taxes; 3) wages and operating expenses, respectively. [Testimony of Cabbell.] Therefore, when exigent circumstances occurred, the Licensees believed they were only departing from their normally conservative

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procedure and not violating a requirement of the OIC. [Testimony of Cabbel; Testimony of Tanner.]

18. The OIC asserts, the Licensees admit, and it is here found, that the Licensees failed to remit the 2009 premium taxes to the OIC when due on March 1, 2010. As found above, Tanner filed Anchor Bay's 2009 premium tax statement as required, and at the same time advised the OIC that he would pay the 2009 premium taxes – along with funds representing the late penalty he knew would be imposed on his late payment - by December 15, 2010. On December 15, 2010, as promised, the Licensees did pay the OIC \$89,325 which was the correct amount of premium taxes due for 2009, plus \$17,865 in required 20% late fees, for a total of \$107,190. As of December 15, 2010 therefore, and as admitted by the OIC, the Licensee has fully paid the subject 2009 premium taxes. [Testimony of Tunis; Testimony of Tanner; Written Testimony of Tanner.]

19. In Anchor Bay's ten years transacting business as an insurance producer and surplus line broker, Anchor Bay has never paid its annual premium taxes late except for the 2009 taxes, which are the subject of this proceeding. Further, in Tanner's approximately twenty years that he has acted as an insurance producer and surplus line agent, there is no evidence that he has ever filed his premium taxes late except for the 2009 taxes which are the subject of this proceeding.

20. No insured, insurer or any other individual or entity were harmed by the acts of the Licensees which are the subject of this proceeding. The Licensees assert, and there is no evidence to the contrary, that the Licensees ever failed to promptly pay their insured clients, or any insurer, or the OIC (except for their late payment of the 2009 premium taxes) or to perform any other duty expected to these individuals or entities in their transaction of insurance business.

21. Tanner has had no prior complaints or disciplinary actions against him in the over thirty years in which he has transacted business as an insurance producer and surplus line broker (except an insignificant issue arising in the California Insurance Department in 1985, which that agency determined was resolved).

22. Anchor Bay has had no prior complaints or disciplinary actions against it in the ten years it has transacted insurance as an insurance producer and surplus line broker.

23. The OIC presented no evidence on the financial status of the Licensees, and upon questioning stated that it is not known. [Testimony of Tunis.]

24. Sally Cabbell, CPA, the CFO and Corporate Treasurer of Anchor Bay, appeared as a witness on behalf of the Licensees. She performs the bookkeeping/accounting work for the Licensee and was working for the Licensees during all times pertinent hereto. Ms. Cabbell was a particularly credible witness. She received her degree in accounting from Delphi University in New York, and is a very well experienced CPA bookkeeper

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and accountant, having worked 10 years for Coopers and Lybrand (now Price Waterhouse), then worked as a private consultant before becoming employed by the Licensees in 2000. In the normal course of her employment with the Licensees, she prepared many of the accounting and other financial documents which were admitted into evidence in this proceeding and she had a complete grasp of each detail provided in those documents. Further, she was apparently the primary individual who worked with the OIC's auditors, Mary Tunis and Marianne Azevedo, for the duration of the audit as well as the primary person communicating with them after the audit. In particular, she recalled the history of the pertinent years, had done the Licensees' accounting and prepared the financial documents for all pertinent years, had personally communicated with the OIC regarding the proper handling of trust accounts, and in general has had significant experience both with the Licensees and in this field. Further, she exhibited no apparent biases.

25. William H. Tanner, the Licensee, appeared as a witness on his own behalf. Mr. Tanner presented his testimony in a clear, detailed and credible manner and, while occasionally emotional, appeared to present the facts accurately and certainly in a detailed manner. Mr. Tanner appears to be an individual who has had a very long and successful record as an insurance and surplus line producer, who was caught in a difficult economic situation caused in part by outside circumstances beyond his control. It cannot be found that Mr. Tanner is other than well meaning and honest, particularly given his and his staff's communications with the OIC regarding requirements governing premium trust accounts and certainly also, long before the 2009 premium taxes were due without penalty, his written communications with the OIC about his inability to pay his 2009 premium taxes and attempts to meet and reach some arrangement with the OIC. This signaled his interest in being forthcoming and honest about his situation. After considering the evidence presented at hearing, given Mr. Tanner's efforts, voluntary and revealing communications with the OIC, retention of qualified staff to handle the Licensees' financial accounting, the fact that no insured or insurer were harmed by the Licensees' actions, and the situation in which he found himself in the times at issue herein, it cannot be found that Mr. Tanner is unqualified to act as insurance producer and surplus line producer in Washington.

26. Mary Tunis, Financial Examiner Supervisor employed by the OIC, appeared as a witness on behalf of the OIC. Ms. Tunis was in charge of the financial examination of the Licensees, some findings of which are at issue herein, communicated with the Licensees on site and via emails, wrote the preliminary and final notes concerning this examination, and was either significantly involved with or wrote the Draft Report and Final Reports of the financial examination. Ms. Tunis also supervised OIC Investigator Marianne Azevedo in her work on the examination. Ms. Tunis is a CPA; however, she just commenced employment with the OIC in September 2010 (just at the time the financial examination of the Licensees began). Prior to September 2010, for approximately 2 years she was Supervisor of Examinations for Compliance with the Washington State Department of Labor and Industries, which required a knowledge of the Industrial Insurance Code and not the Insurance Code, and for approximately 5

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years prior to that she was Audit Supervisor for the Muckleshoot Gaming Commission. [Testimony of Tunis.] Therefore, she has had very little experience working with the Insurance Code or in conducting financial examinations of insurance producers or agencies such as the Licensees. While the Washington State Surplus Line Association advised its member surplus line producers that she is their liaison to the OIC before the time of this examination, this was her first financial examination of a surplus line producer and she had had no training in conducting financial examinations of surplus line producers at the time she conducted this financial examination. [Testimony of Tunis.] Ms. Tunis presented her testimony in a somewhat clear manner, however it appeared that she was reluctant to answer quite a few reasonable questions directly without repeatedly being asked them and/or without the undersigned having to assist in the questioning. Also, when asked under cross examination whether she had ever had training in conducting surplus line financial examinations, she replied that she had attended surplus line training; not until after she was asked the second question whether she had received that training prior to conducting the Licensees' financial examination did she provide the information that she had actually received that training after the Licensees' examination. [Original underline.] Further, her recitation of the communications between Tanner and the OIC were not entirely accurate and presented a fairly stark contrast from the actual communications which were in writing and were reviewed by the undersigned following the hearing [Ex. 30].

27. Marianne Azevedo, an Investigator with the OIC who assisted in the audit of the Licensees under the supervision of Mary Tunis, appeared as a witness on behalf of the OIC. Ms. Azevedo, who is not an accountant, presented her testimony in a clear, detailed and credible manner and exhibited no apparent biases.

28. Jeff Baughman, Licensing and Education Program Manager with the OIC, appeared as a witness on behalf of the OIC. Mr. Baughman presented his testimony in a clear, detailed and credible manner and exhibited no apparent biases.

29. Joe Stanton, of Portland, OR, appeared as a witness on behalf of the Licensees. Mr. Stanton presented his testimony in a clear, detailed and credible manner and exhibited no apparent biases.

30. Based upon the above Findings of Facts, to the effect that the law regarding maintenance of surplus line premium tax funds is unclear, and there is no available written advice from the OIC in the form of Bulletins, Technical Advisories or other written material, and the Licensees were unable to secure a clear interpretation from the OIC's website, from the Surplus Lines Association, or from their telephone calls to the OIC, and based upon the fact that the Licensee's failure to pay his annual premium taxes on one occasion and did pay them along with the required 20% late fee on December 15, 2010 as promised, it is reasonable that the OIC's Order Suspending and Revoking Licenses of William H. Tanner and Anchor Bay Insurance Managers, Inc. should be set aside. Further, based upon the above Findings of Facts and specifically, the OIC's position on the proper handling of premium taxes received by a producer which the

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producer must pay to the OIC when due, conditions should be imposed that, absent other direction or interpretation from the OIC: 1) commencing on the date of entry of the Final Order herein, the Licensees are to deposit all funds representing premium taxes in their premium trust account and maintain those funds there until they are paid to the OIC with their annual Washington premium tax return on the date they are due; 2) commencing 30 days from the date of entry of the Final Order herein, the Licensees are to deposit all funds representing premium taxes for calendar year 2011 in their premium trust account and maintain those funds there until they are paid to the OIC with their annual Washington premium tax return on the date they are due; and 3) should there be any time in which these conditions are not strictly followed, or should the OIC have any future concerns about the handling of money by the Licensees and/or any other entities with which William H. Tanner is affiliated, the OIC may consider the facts found herein in imposing any future disciplinary action against these Licensees and/or any other entity with which William H. Tanner is affiliated.

CONCLUSIONS OF LAW

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Order is entered pursuant to Title 48 RCW and specifically RCW 48.04; and Title 34 RCW.

2. *In the OIC's Order which is challenged in this proceeding, the OIC alleges that By failing to promptly pay insurance premiums received in a fiduciary capacity to the parties entitled thereto and by converting the funds to their own use, the Licensees violated RCW 4.17.480, 48.17.600, 48.15.180 and WAC 284-12-080. While no specific sections of these rules are identified in the Order as being those the Licensees violated, with regard to RCW 48.17.480 in its arguments, briefs and testimony the OIC argues that RCW 48.17.480(3) and (4) apply, and are addressed in this order below:*

3. RCW 48.17.480(3) provides that, *Any person licensed under this chapter who receives funds which belong to or should be paid to another person as a result of or in connection with an insurance transaction is deemed to have received these funds in his fiduciary capacity. The licensee shall promptly account for and pay the funds to the person entitled to the funds.* The OIC asserts the Licensees' failure to promptly pay the premium taxes to the OIC is in violation of RCW 48.17.480(3). The OIC asserts that 1) *funds* for purposes of this section includes premium taxes [original underline] and not just *premiums*; and 2) the OIC was the *person* entitled to receive these *funds*. However, first, RCW 48.17.480, entitled "Reporting and accounting for premiums," applies specifically in (1) to funds representing *premiums* and in (2) to *premiums or return premiums* which are to be paid to the *insured, insurer, ... or insurance producer* [and so do not include premium taxes as they are payable to the OIC and not to an *insured, insurer or insurance producer*]: lacking any written interpretation from the OIC or any other authoritative source, for purposes of this matter, whether (3) includes premium taxes is unclear. Second, the OIC argues that the OIC is *the person entitled to the funds* and so under (3) the Licensees should have "promptly accounted for and paid

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the funds to the OIC.” Whether the OIC is included as a person entitled to the funds is also unclear, particularly given the wording of (2) which precedes it and which directs itself solely to payments to *insureds, insurers and insurance producers* and not to *the OIC*. For these reasons, the most that can be concluded concerning the OIC’s argument that the Licensees violated 48.17.480(3) is that 1) if RCW 48.17.480(3) can be construed to include *premium taxes* in its definition of *funds*; and 2) if the OIC can be construed as the *person entitled to the [premium tax] funds*, then the OIC was entitled to those funds only beginning on March 1, 2009, the due date pursuant to RCW 48.14.060. [Original underlines.] Even accepting these conclusions, while the Licensee did not pay these funds until December 15, delayed payment of these funds is actually contemplated in RCW 48.14.060(1) which simply requires that in the event of payment made after March 31 a 5% penalty is assessed; if not paid within 45 days after the due date a 10% penalty is assessed; and if not paid within 60 days of the due date a total penalty of 20% is assessed. While in some situations insurance producers should be held to have violated RCW 48.17.480(2) and (3) for paying their taxes late, the Licensees herein did pay the required 20% late fee along with their his 2009 taxes on December 15, and it is not reasonable that the these specific Licensees in this specific situation should also be the subject of further penalties imposed under 48.17.480 for the same action (paying their 2009 premium taxes late).

4. RCW 48.17.480(4) provides that *Any insurance producer ... who, not being lawfully entitled thereto, diverts or appropriates funds received in a fiduciary capacity ... to his ... own use, is guilty of theft under chapter 9A.56 RCW*. The OIC asserts that in transferring these premium tax funds from their premium trust account to their operating account and using them to pay their operating expenses, the Licensees unlawfully diverted or appropriated funds received in a fiduciary capacity to their own use, and thereby violated 48.17.480(4). As above, and for the same reasons, including the fact that it is unclear whether the meaning of *funds* includes *premium taxes*, and it is unclear whether the OIC is a *person to whom the funds belong or should be paid* as set forth in (3) and referred to in (4), and the fact that the Licensees could obtain no guidance and there is no written guidance from the OIC on proper compliance with these sections, it cannot be concluded that the Licensees *diverted or appropriated* these premium tax funds to their own use in the manner which is contemplated to support a conclusion that the Licensees are guilty of the crime of theft under Chapter 9A.56 RCW.

5. In its Order, the OIC asserts that by failing to promptly pay insurance premiums received in a fiduciary capacity to the parties entitled thereto and by converting the funds to their own use, the Licensees violated RCW 48.17.600. While no specific sections of 48.17.600 are identified as those the Licensees violated, from its arguments and briefs the OIC argues that 48.17.600(1) and (2) apply. RCW 48.17.600(1) and (2) provide that, *All funds representing premiums received by an insurance producer... in the insurance producer’s ... fiduciary capacity shall be accounted for and maintained in a separate account from all other business and personal funds* and that the Licensees should not have *commingled or combined premiums with any other moneys*. The OIC asserts that by transferring the premium tax funds from their premium trust account to

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their operating account and using them to pay their operating expenses, the Licensees received these tax funds in their fiduciary capacity and failed to maintain them in a separate account from all other business and personal funds and thereby, violated RCW 48.17.600(1) and (2). As above, given the wording of this statute and lack of a written OIC interpretation or other authorities, or other guidance from the OIC, it cannot be concluded that a reasonable reading of *funds representing premiums* clearly includes *funds representing premium taxes*. [Original underline.] The most that can be concluded is that 1) if funds representing premiums does include funds representing premium taxes, [original underlines] then the Licensees did violate RCW 48.17.600(1) and (2), but the mitigating circumstances surrounding the situation, including this statute's lack of clarity on the issue herein and the Licensees' efforts to obtain clarification of their obligation, lead to a reasonable conclusion that no penalty for this violation should be imposed.

It should be noted that, in attempting to clarify the issue whether premium taxes must be deposited and maintained in a separate trust account, the parties reviewed Alaska's rules. This review lends more weight to the Licensees' position, and at a minimum underscores the lack of clarity in this area: during 2007, 2008 and 2009, the years at issue herein, and the years when the Licensees consulted this statute when seeking guidance on how to handle their premium taxes, Alaska's statute read: *A licensee may only commingle premium taxes and fees, premiums, and return premiums with additional money for the purpose of advancing premiums, establishing reserves for the payment of return premiums or reserves for receiving and transmitting premium or return premium money. Money collected for the payment of premium taxes, policy or filing fees, late payment charges, and interest from fiduciary money on deposit [i.e. miscellaneous funds (including premium taxes) collected, as opposed to funds representing premiums and return premiums] may be commingled in a fiduciary account, but shall be separately accounted for and periodically removed from the fiduciary account.* [Licensees' Ex. 24, AS 21.27.360(d)] ... Pursuant to this statute, therefore, Alaska requires that premium taxes be periodically removed from the fiduciary account; Alaska explains this statute further: *The monies left in the [premium trust account] can only be used for advancing premium or payment of return premium or service charges deducted directly from the account and any other use of the reserve funds is not allowed. ... The purpose of the trust money account is to hold premium or return premium until forwarded to the insurer or insured....*[Licensees' Ex. 24, Alaska Division of Insurance Bulletin 94-09.] Therefore Alaska 1) makes a distinction between "*premiums and return premiums*" and "*premium taxes*, [original underline] *policy or filing fees, late payment charges, and interest...*"; and, further, 2) requires that premium taxes (and other miscellaneous fees such as filing fees) be removed from the trust account periodically because the trust account is only to hold premiums or return premiums until forwarded to the insurer or insured. The premium trust account is clearly not to hold premium taxes which are distinguished from premiums in this statute – premium taxes are specifically required to be removed from the trust account which must only be used to pay premiums to the insurer/insured. (While the second sentence of AS 21.27.360(d) was eliminated by the 2010 Alaska Legislature, the statute as quoted above with that

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second sentence was effective during 2007, 2008 and 2009, the years at issue herein when the Licensees were seeking guidance in this area, and further, the OIC presented no evidence that in eliminating that second sentence the 2010 Alaska Legislature had any intent to change the interpretation of the statute nor any evidence that Bulletin 94-09 is withdrawn and/or replaced.) Finally, the OIC requested and received an email interpretation from the Alaska Division of Insurance during the hearing herein: said interpretation unreasonably strains the wording of both its pre-2010 statute and current statute to the point that it lacks credibility. [OIC Ex. 35, email from Alaska Division of Insurance to OIC.]

6. In its Order, the OIC asserts, and it has been found, that the Licensees failed to pay their 2009 surplus line premium taxes to the OIC on time and therefore violated RCW 48.15.180. Specifically, the OIC asserts that the Licensees, as surplus line brokers, received these funds representing premiums which belonged to or should be paid to another person [here, the OIC] as a result of, or in connection with, an insurance transaction and therefore, these funds were deemed to have been received in the surplus line brokers' fiduciary capacity. As such, the OIC argues, the Licensees were required to promptly account for and pay to the person entitled to the funds [the person entitled to the funds being the OIC]. While no specific section of RCW 48.15.180 is identified as that which the Licensees have violated, in its argument and briefs, the OIC bases its argument on RCW 48.15.180(1)(b), (1)(c) and (3). These sections provide:

- (1) *A surplus line broker ... who receives any funds representing premiums or return premiums which belong to or should be paid to another person as a result of ... an insurance transaction is deemed to have been received in the surplus line broker's fiduciary capacity and shall:*
- ...
- (b) *Be promptly accounted for and paid to the insured, insurer, or person entitled to the funds;*
- (c) *Be accounted for and maintained in a separate account from all other business and personal funds and not commingle or otherwise combine premiums with any other moneys,...*
- (3) *Any surplus line broker ... who, not being lawfully entitled thereto, diverts or appropriates funds received in a fiduciary capacity ... to his... own use, is guilty of theft under chapter 9A.56 RCW.*

Relative to the OIC's argument ~~The OIC argues that in failing to pay their 2009 premium taxes on time, the Licensees violated RCW 48.15.180(1)(b), just—~~Just as concluded above (Conclusion 3) with regard to the application of RCW 48.17.480(3) to the Licensees' failure to pay their taxes on time, it cannot be concluded that a reasonable reading of *funds representing premiums or return premiums* clearly includes *funds representing premium taxes*. [Original underline.] The most that can be concluded is that 1) if RCW 48.15.180(1)(b) can be construed to include *premium taxes* in its definition of *premiums or return premiums*; and 2) if the OIC can be construed as the

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person entitled to the [premium tax] funds, then the OIC was entitled to those funds only beginning on March 1, 2010, the due date pursuant to RCW 48.14.060. [Original underlines.] Even accepting these conclusions, while the Licensees did not pay these funds until December 15, delayed payment of these funds is actually contemplated in RCW 48.14.060(1), which simply requires that in the event of late payment the payor must also pay a 5% late fee if paid by March 31, 10% if paid within 45 days, and 20% if paid within 60 days. The Licensees did pay the required 20% late fee along with its 2009 taxes on December 15, and in this specific situation, it is not reasonable that these specific the Licensees in this situation should also be the subject of further penalties imposed under RCW 48.17.480 or 48.15.180(1)(b) for the same action (paying their 2009 premium taxes late). However, it is very reasonable that the OIC may take action against insurance producers who fail to pay their annual premium taxes on time and that, depending on their specific situation, it would be reasonable that producers should be concluded to be in violation of some or all of the statutes cited in the OIC's Order and therefore in some situations should have their producer's licenses revoked pursuant to RCW 48.15.140. Given the particular factual situation at issue herein, however, and based upon the reasoning above, the facts found do not support a conclusion that the OIC's revocation of these Licensees' producer's licenses for failure to pay their 2009 premium taxes on time was reasonable.

7. The OIC asserts that when the Licensees, as surplus line brokers, received the funds representing premium taxes they were required to maintain them in a separate account from all other business and personal funds and not commingle or otherwise combine premiums with any other moneys. The OIC asserts that therefore, when the Licensees transferred the funds representing premium taxes to their operating account and used them to pay their operating expenses, the Licensees violated RCW 48.15.180(1)(c). Just as concluded above regarding RCW 48.17.600(1), given the wording of RCW 48.15.180(1)(c) and the lack of a written OIC interpretation or other authorities to clarify its meaning, or advice from the OIC, it cannot be concluded that a reasonable reading of *funds representing premiums or return premiums* clearly includes *funds representing premium taxes*. [Original underline.] The most that can be concluded is that 1) if funds representing premiums or return premiums does include funds representing premium taxes, [original underlines] then the Licensees did violate RCW 48.15.180(1)(c), but the mitigating circumstances surrounding the situation, including this statute's lack of clarity on the issue herein and the Licensees' efforts to obtain clarification of their obligation, lead to a reasonable conclusion that no penalty for this violation should be imposed and it cannot be concluded that the Licensees, "not being lawfully entitled thereto, divert[ed] or appropriate[d] funds received in a fiduciary capacity ... to his or her own use" such that they would be considered to be guilty of criminal theft as contemplated by RCW 48.15.180(3).

8. The OIC asserts that when the Licensees transferred these tax funds from their fiduciary account into their operating account and used those funds to pay operating expenses they violated RCW 48.15.180(3). Specifically, the OIC asserts that when the Licensees, as surplus line brokers, received these funds representing premium taxes

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and failed to maintain them in their fiduciary account, that the Licensees, as surplus line brokers, did, not being lawfully entitled thereto, divert or appropriate funds received in their fiduciary capacity as surplus line brokers to their own use and pursuant to RCW 48.15.180(3), are guilty of theft under chapter 9A.56 RCW. Just as concluded above regarding RCW 48.17.480, the OIC bases its argument on the fact that *funds* in RCW 48.15.180(3) includes *premium taxes*, and, just as with RCW 48.17.480, 48.15.180(3), is unclear. Therefore, for purposes of this matter, the most that can be concluded is that *funds* in RCW 48.15.180(3) might [original underline] include premium taxes, particularly where (3) follows (1) which refers to *premiums or return premiums* and not *premium taxes*. For this reason, the most that can be concluded concerning the OIC's argument that the Licensees violated 48.15.180(3) is that if [original underline] *funds* in RCW 48.15.180(3) can be construed to include *premium taxes*, then the Licensees may have violated RCW 48.15.180(3). However, given the fact that RCW 48.15.180(3) is not clear, and the fact that there is no written interpretation from the OIC or any other authoritative source, or correct and clear advice given by the OIC to the Licensees, it cannot be concluded that the Licensees diverted or appropriated these premium tax funds to their own use in a manner which is contemplated to support a finding that the Licensees are guilty of the crime of theft under RCW 9A.56 RCW.

9. In its Order, the OIC asserts that by failing to promptly pay insurance premiums received in a fiduciary capacity to the parties entitled thereto and by converting the funds to their own use, the Licensees violated WAC 284-12-080. WAC 284-12-080 provides:

- (1) *The purpose of this section is to effectuate RCW 48.15.180, 48.17.600 and 48.17.480 with respect to the separation and accounting of premium funds by insurance producers...and surplus line brokers, collectively referred to ... as "producers." ...*
- (2) *All funds representing premiums ... received on Washington business by a producer in his ... fiduciary capacity ... shall be deposited in one or more identifiable separate accounts...*
 - (a) *A producer may deposit no funds other than premiums ... to the separate account ...*
- (3) *Disbursements or withdrawals from a separate account shall be made for the following purposes only, ...*
 - (a) *For payments of premiums, directly to insurers or other producers entitled thereto;*
 - (b) *For payments of return premiums, directly to the insureds*
 - (c) *For payments of commissions and other funds belonging to the separate account's producer, directly to another account maintained by such producer as an operating or business account; and*
 - (d) *For transfer of fiduciary funds, directly to another separate premium account which meets the requirements of this section.*
- (4) *The entire premium received (including a surplus lines premium tax if paid by the insured) must be deposited into the separate account. Such funds shall be paid*

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promptly to the insurer or to another producer entitled thereto, in accordance with the terms of any applicable agreement between the parties...

10. As stated in (1), this regulation was promulgated specifically to clarify and effectuate RCW 48.15.180, 48.17.600 and 48.17.480. These three statutes are the exact statutes which the OIC asserts the Licensees have violated. It has been concluded above that said statutes are sufficiently unclear to the extent that it cannot be concluded that the activities of the Licensees were in violation of any of these three statutes and that, if it is assumed that they did violate some portions thereof, mitigating circumstances concerning lack of clarity, lack of written clarification from the OIC and lack of ability of the Licensees to obtain clear and correct advice from the OIC serve to reach a conclusion, that the Licensees should not be penalized for those violations. In addition, WAC 284-12-080(2) refers to *funds representing premiums* and so does not help to clarify whether *funds representing premiums* includes *funds representing premium taxes*. [Original underline.] The most relevant section is (5)(a) which is the first time in this review where *surplus lines premium taxes* are specifically referenced: (5)(a) requires that surplus lines premium taxes must be deposited into the separate account and then must be paid promptly to the insurer or another producer— entirely excluding from this requirement the prompt payment of those premium taxes which must be paid to the OIC. [Original underlines.] As written, on the one hand the Licensees are required to deposit the subject funds representing premium taxes in to their separate account (the first time premium taxes are specifically mentioned in regard to depositing funds into separate accounts), but on the other hand they are not required to promptly pay them to the OIC. Therefore, while one would hope a regulation would clarify their enabling statutes toward effective interpretation and application, section (5)(a), as written, cannot be concluded to adequately clarify the issues raised by the statutes cited by the OIC herein.

11. In its Order, the OIC asserts that by failing to remit premium taxes when due, the Licensees violated RCW 48.15.120 and 48.14.060. RCW 48.15.120 provides that (1) On or before the first day of March of each year each surplus line broker shall remit ... a tax on the premiums ... on surplus line insurance ... transacted by him ... during the preceding calendar year [underline in original Order] RCW 48.15.060, entitled "Failure to pay tax – Penalty," addresses the consequences of failing to pay said tax: *(1) Any insurer or taxpayer ... failing to file its tax statement and to pay the specified tax ... by the last day of the month in which the tax becomes due shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not paid within forty-five days after the due date, the insurer [sic - should include noninsurer taxpayers as well] will be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not paid within sixty days of the due date, the insurer [sic – should include noninsurer taxpayers as well] will be assessed a total penalty of twenty percent of the amount of the tax.* Based upon the facts found above, the Licensees did violate RCW 48.15.120 in that they failed to pay their 2009 premium taxes to the OIC by March 31, 2010 (but certainly did not violate RCW 48.14.060 which simply sets forth the penalties for violations of 48.15.120). Because, however, RCW 48.14.060 contemplates that

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taxpayers might on occasion fail to pay their taxes by March 31 in a given year and provides the consequences of failing to pay their taxes by March 31, the Licensees met and satisfied the statute's consequences for late payment, by paying their taxes on December 15, 2010 along with the 20% penalty required by RCW 48.14.060. While RCW 48.14.060(3) authorizes the OIC to revoke the certificate of authority of any delinquent taxpayer, and provides that the certificate of authority will not be reissued until all taxes have been fully paid: those taxes were fully paid on December 15 along with the statutory consequences for late payment so no further violation has occurred to be addressed by RCW 48.14.060(3).

12. In its Order, the OIC asserts that it may revoke the Licensees' licenses based upon RCW 48.15.140(1) and 48.17.530 for either of the subject activities: 1) for paying their taxes late; and/or 2) for withdrawing the tax funds from their fiduciary account and transferring them to their operating account and spending these funds on operating expenses.

RCW 48.15.140(1) provides:

(1) The commissioner may ... revoke ... any surplus line broker's license ... for any one or more of the following causes:

(a) If the surplus line broker fails to file the Licensee's annual statement or to remit the tax as required; or

...

(c) For any of the causes for which an insurance producer's license may be revoked under chapter 48.17 RCW.

In addition, RCW 48.17.530(1) provides:

(1) The commissioner may ... revoke ... an insurance producer's license, ... for any one or more of the following causes:

(b) Violating any insurance laws, or violating any rule, ... of the commissioner...;

(c) Improperly withholding, misappropriating, or converting any moneys ... received in the course of doing insurance business;

(h) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in this state

~~(b)(d) and (h), in combination with RCW 48.15.140(1), provide that a surplus line broker's license may be revoked for any one or more of the following causes: (b) Violating any insurance laws, or violating any rule ... of the commissioner...; (d) Improperly withholding, misappropriating, or converting any moneys ... received in the course of doing insurance business; and (h) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility....~~

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With regard to the Licensees' depositing the funds representing taxes into their fiduciary account then transferring these funds into their operating account and using them to pay operating expenses, it has been concluded above that the OIC has provided insufficient authority to support its allegations that the Licensees violated RCW 48.17.480, 48.17.600, 48.15.180 or WAC 284-12-080 when they deposited the subject funds representing premium taxes into their premium trust account and then transferred them to their operating account and used them to pay operating expenses and/or that the Licensees should be penalized for their activities. For this reason, and based upon the facts found above regarding the Licensees' attempts to clarify their duties in handling tax funds and other facts found above relative to this activity, it cannot be concluded that they improperly withheld, misappropriated, or converted moneys received in the course of doing insurance business or in so doing that they used fraudulent, coercive, or dishonest practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility as contemplated by RCW 48.17.530(1)(d) and (h).

With regard to the Licensees' failing to pay their 2009 taxes on time, the Licensees did fail to pay their taxes on time in violation of RCW 48.15.120 and as contemplated by RCW 48.17.530(1)(a). However, it has been concluded above that the OIC has provided insufficient authority to support its allegation that in paying their 2009 taxes late the Licensees violated RCW 48.17.480, 48.15.180 or WAC 284-12-080, and based upon the facts found above including the fact that the Licensees have never before paid their taxes late, it cannot be concluded or that their licenses should be revoked pursuant to RCW 48.15.140(1)(a) or RCW 48.17.530(1)(b).

It is very reasonable that the OIC may take action against insurance producers who fail to pay their annual premium taxes on time and/or fail to properly maintain fiduciary funds in their fiduciary accounts and pay these fiduciary funds to an insured, insurer or other person entitled thereto, and it is very reasonable that those producers should be found to have violated some or all of the statutes cited in the OIC's Order and therefore in some situations should be concluded to be guilty of a misdemeanor and/or a theft for these activities. However, given the particular factual situation at issue herein, and based upon the reasoning above, the facts found herein do not support a conclusion that the OIC's disciplinary action against the Licensees should be upheld.

13. It was concluded that the Licensees violated RCW 48.15.120 when they failed to pay their 2009 premium taxes by March 1, 2010. However, it cannot also be fairly concluded that in so doing these specific Licensees, given the facts found in this specific situation, demonstrated that they improperly withheld moneys received in the course of doing insurance business: the Licensees paid the \$17,865 consequences of late payment set forth in RCW 48.14.060. It would be unreasonable in this specific situation to conclude that even though the Licensees paid the very expensive consequences of late payment prescribed under RCW 48.14.060 (i.e., \$17,865), that the Licensees must also suffer revocation of their licenses. For the same reason, in this

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situation it would also be unreasonable to conclude that in paying their 2009 premium taxes late the Licensees in this specific situation, used fraudulent, coercive, or dishonest practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility as contemplated by RCW 48.17.530.

14. For the above reasons, the OIC has not provided sufficient bases to conclude that in paying their 2009 premium taxes late the Licensees should be found to have violated RCW 48.15.180, 48.17.480, 48.15.180 or WAC 284-12-08 or that the Licensees' producer's licenses should be revoked pursuant to RCW 48.17.530 or 48.15.140. Likewise, for the above reasons, the OIC has not provided sufficient bases to conclude that in transferring tax funds from their fiduciary account into their operating account and using them to pay operating expenses the Licensees' licenses should be revoked based upon RCW 48.15.140, or that in so doing they violated RCW 48.15.180, 48.17.600, 48.17.480, or WAC 284-12-080, or that they used fraudulent, coercive, or dishonest practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility as contemplated by 48.17.530, or that their licenses should be revoked pursuant to RCW 48.15.140(1). However, while this is the conclusion in this specific matter, it is very reasonable, and often upheld, that the OIC may take action against insurance producers who fail to pay their annual premium taxes on time and/or fail to properly maintain fiduciary funds in their fiduciary accounts and promptly pay these fiduciary funds to an insured, insurer or other person entitled thereto, and it is very reasonable, and often upheld, that that producer should be concluded to be clearly in violation of the statutes cited in the OIC's order and often therefore guilty of a misdemeanor and/or a theft for these activities. However, given the particular factual situation at issue herein, and based upon the reasoning above, the facts found do not support a conclusion that the OIC's disciplinary action against the Licensees should be upheld.

ORDER

On the basis of the foregoing Findings of Facts and Conclusions of Law,

IT IS HEREBY ORDERED that, the Insurance Commissioner's Order Suspending and Revoking License, No. 10-0204, to the effect that the insurance producer's and surplus line broker's licenses of William H. Tanner and Anchor Bay Insurance Managers, Inc. is suspended and revoked, is hereby set aside.

IT IS FURTHER ORDERED that, based upon the Findings of Facts and Conclusions of Law set forth above and particularly evidence supporting the OIC's position relative to the deposit and maintenance of premium tax funds received by insurance producers, and absent any other directive from the OIC: 1) when the Licensees receive funds from clients representing premium taxes, they must be deposited in the Licensees' premium trust account; and 2) when the Licensees receive funds from clients representing premium taxes, they must also be maintained in the Licensees' premium trust account

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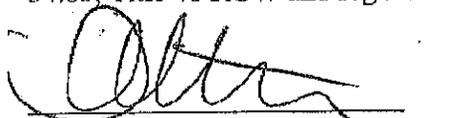
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until the time that they are paid to the OIC along with the producer's annual premium tax return for the year for which these premium taxes are received.

IT IS FURTHER ORDERED that William Tanner and Anchor Bay Insurance Managers, Inc. shall strictly comply with these rules without exception. Commencing on the date of entry of this Final Order, the Licensees are to deposit all funds representing premium taxes in their premium trust account and shall maintain those funds there until they are paid to the OIC with their annual Washington premium tax return on the date they are due. Failure to strictly comply with these rules from the date of entry of this Order may be the basis of any future disciplinary action taken by the OIC against William Tanner and/or Anchor Bay Insurance Managers, Inc. Further, the OIC shall take the facts of this instant case into account in any future audit or disciplinary action the OIC performs on William Tanner, Anchor Bay Insurance Managers, Inc. and/or any other entity William Tanner may operate in the future.

This Order is entered at Tumwater, Washington, this 19th day of April, 2011, pursuant to RCW 34.05, Title 48 RCW and regulations applicable thereto.


PATRICIA D. PETERSEN
PRESIDING OFFICER

This Order on Reconsideration is entered at Tumwater, Washington, this 7th day of September, 2011, pursuant to RCW 34.05 and particularly RCW 34.05.470, Title 48 RCW and regulations applicable thereto.


PATRICIA D. PETERSEN
PRESIDING OFFICER

Pursuant to RCW 34.05.461(3), the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order on reconsideration may be appealed to Superior Court, within 30 days after date of service (date of mailing) of this order, by 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney

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General in the United States mail. For further information or to obtain copies of the applicable statutes, the parties may contact Kelly A. Cairns, Paralegal to the undersigned at the above address, email address or telephone number.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: LICENSEES, Mike Kreidler, Michael G. Watson, Carol Sureau, Esq., Charles Brown, Esq., and John F. Hamje.

DATED this 7th day of September, 2011.



KELLY A. CAIRNS