STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

Andrew M. Cuomo
Governor

James J. Wrynn
Superintendent

Circular Letter No. 9 (2011)
July 22, 2011

TO: All Insurers Eligible to Write Excess Line Insurance in New York, All Licensed Excess Line Brokers, and the Excess Line Association of New York

RE: Amendments to the New York Insurance Law to Conform to the Federal Nonadmitted and Reinsurance Reform Act of 2010

STATUTORY REFERENCES: Insurance Law §§ 201, 301, 1113(a), 2101, 2102, 2105, 2117, 2118, and 9102; Tax Law Article 33-A; 11 NYCRR Parts 27 (Regulation 41) and 153 (Regulation 135); 15 U.S.C. § 8201 et seq.

The purpose of this Circular Letter is to provide guidance and clarification to all insurers eligible to write excess line insurance in New York and to all excess line brokers regarding the federal Nonadmitted and Reinsurance Reform Act of 2010 (the "NRRA") and Chapter 61 of the Laws of 2011, which amends the New York Insurance Law and the New York Tax Law to conform to the NRRA. Starting July 21, 2011, the NRRA significantly changes the paradigm for excess line insurance placements in the United States, and excess line brokers should familiarize themselves with how the NRRA and Chapter 61 will impact excess line placements effective on and after July 21.

I. Background -- NRRA

On July 21, 2010, President Obama signed into law the federal Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which contains the NRRA (codified at 15 U.S.C. § 8201 et seq.). As set forth in 15 U.S.C. § 8201, the NRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for nonadmitted insurance.[1] Further, 15 U.S.C. § 8201 provides that states may enter into a compact or otherwise

[1] Although New York law does not generally use the term "nonadmitted insurance," the term is commonly used to refer to insurance written by an insurer not authorized to do business in the state. The phrases "nonadmitted insurer"

establish procedures to allocate among themselves the premium taxes paid to an insured's home state. 15 U.S.C. § 8202 also subjects the placement of nonadmitted insurance solely to the statutory and regulatory requirements of the insured's home state, and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to such insured. "Nonadmitted insurance," as defined in 15 U.S.C. § 8206(8), applies only to property/casualty insurance (excluding workers' compensation insurance).

15 U.S.C. § 8206(6) generally defines "home state" as: (1) the state in which an insured maintains its principal place of business or, in the case of an individual, the individual's principal residence; or (2) if 100% of the insured risk is located outside such state, then the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated. If more than one insured from an affiliated group is a named insured on a single nonadmitted insurance contract, then the term "home state" means the home state, as determined pursuant to the foregoing, of the member of the affiliated group that has the largest percentage of premium attributed to it under the insurance contract. See 15 U.S.C. § 8206(6)(B). 15 U.S.C. § 8206(16) defines "state" as any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa.

A. Uniform Standards for Excess Line Eligibility

The NRRA prohibits a state from imposing eligibility requirements on, or otherwise establishing eligibility criteria for, nonadmitted insurers domiciled in a United States jurisdiction, except in conformance with the requirements and criteria set forth in sections 5A(2) and 5C(2)(a) of the National Association of Insurance Commissioners' ("NAIC's") Nonadmitted Insurance Model Act, unless the state has adopted nationwide uniform requirements, forms, and procedures developed in accordance with 15 U.S.C. § 8201(b) that include alternative nationwide uniform eligibility requirements. See 15 U.S.C. § 8204(1). Further, a state may not prohibit an excess line broker from placing nonadmitted insurance with, or procuring nonadmitted insurance from, a nonadmitted insurer domiciled outside the United States that is listed on the quarterly listing of alien insurers maintained by the International Insurers Department of the NAIC. See 15 U.S.C. § 8204(2).

B. Exempt Commercial Purchasers

In addition, an excess line broker seeking to procure or place nonadmitted insurance in a state for an exempt commercial purchaser ("ECP") need not satisfy any state requirement to make a due diligence search to determine whether the full amount or type of insurance sought by the ECP may be obtained from admitted insurers if: (1) the broker procuring or placing the excess line insurance has disclosed to the ECP that the insurance may be available from the admitted market, which may provide greater protection with more regulatory oversight; and (2) the ECP has subsequently requested in writing that the broker procure the insurance from or

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and "unauthorized insurer" are generally synonymous. Similarly, while the NRRA uses the term "surplus lines broker," that term is generally interchangeable with the term "excess line broker," which the Insurance Law uses.

place the insurance with a nonadmitted insurer. See 15 U.S.C. § 8205. An "exempt commercial purchaser" is defined in 15 U.S.C. § 8206(5) to mean:

> any person purchasing commercial insurance that, at the time of placement, meets the following requirements:
>
> (A) The person employs or retains a qualified risk manager[2] to negotiate insurance coverage.
>
> (B) The person has paid aggregate nationwide commercial property and casualty insurance premiums in excess of $100,000 in the immediately preceding 12 months.
>
> (C)(i) The person meets at least 1 of the following criteria:
>
> (I) The person possesses a net worth in excess of $20,000,000, as such amount is adjusted pursuant to clause (ii).[3]
>
> (II) The person generates annual revenues in excess of $50,000,000, as such amount is adjusted pursuant to clause (ii).
>
> (III) The person employs more than 500 full-time or full-time equivalent employees per individual insured or is a member of an affiliated group employing more than 1,000 employees in the aggregate.
>
> (IV) The person is a not-for-profit organization or public entity generating annual budgeted expenditures of at least $30,000,000, as such amount is adjusted pursuant to clause (ii).
>
> (V) The person is a municipality with a population in excess of 50,000 persons.

Moreover, 15 U.S.C. § 8203 prohibits a state from collecting any fees relating to the licensing of an individual or entity as an excess line broker in the state unless the state has in effect by July 21, 2012 laws or regulations that provide for participation by the state in the NAIC's national insurance producer database or any other equivalent uniform national database for the licensure of excess line brokers and the renewal of such licenses.

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[2] 15 U.S.C. § 8206(13) defines "qualified risk manager."

[3] Clause (ii) requires the amounts set forth in 15 U.S.C. § 8206(5)(C) to be adjusted annually to reflect the percentage change in the five-year period in the Consumer Price Index for All Urban Consumers published by the United States Department of Labor's Bureau of Labor Statistics.

II. Chapter 61 of the Laws of 2011

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the New York Insurance Law to conform to the NRRA.[4]

A. Insured's Home State

The NRRA significantly changes state laws regarding nonadmitted insurance by establishing the insured's home state as the sole jurisdiction permitted to regulate the transaction or impose any tax. Prior to the NRRA, nonadmitted insurance placements were generally subject to the laws of the state where the policy was solicited, issued, or delivered, and the broker would have to be licensed in such state (a situation that generally remains the case for all other insurance transactions). While the location of the risk may have been a factor in how the laws applied, including those governing premium tax obligations, generally, the law of the home state of the insured was not relevant to the placement.

Under the new NRRA paradigm, an excess line broker now must ascertain an insured's home state before placing any property/casualty nonadmitted business. Thus, if the insured's home state is not New York, even though the insured goes to the broker's office in New York, the excess line broker must be licensed in the insured's home state in order for the broker to procure the excess line coverage for that insured. Conversely, a person who is approached by an insured outside of New York must be licensed as an excess line broker in New York in order to procure excess line coverage for a New York home-stated insured.

Chapter 61 incorporates into the Insurance Law the definitions set forth in the NRRA. However, the NRRA does not define "principal place of business" or "principal residence," terms that are used in the definition of "home state," nor does the NRRA provide for a circumstance when the insured's principal place of business or principal residence is located outside of the United States, such as in Canada or England. In addition, the NRRA does not address how the insured's home state is determined when there is a group insurance policy.

Thus, Chapter 61 fills in the gaps in the NRRA by including definitions of "principal place of business" and "principal residence," providing for a circumstance when the insured's principal place of business or principal residence is located outside of the United States, and setting forth how the insured's home state is determined when there is a group insurance policy. Based upon a series of NAIC meetings, the Department expects other states to interpret the foregoing definitions in a similar manner.

Specifically, new Insurance Law § 2101(x)(4) defines "principal place of business" as (1) the state where the insured maintains its headquarters and where the insured's high-level officers direct, control, and coordinate the business activities; or (2) if the insured's high-level officers direct, control, and coordinate the business activities in more than one state, or if the insured's principal place of business is located outside any state, then as the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.

[4] Part I also amends the New York Tax Law in a similar manner, with regard to independently procured insurance.

This definition of "principal place of business" is derived from the U.S. Supreme Court's decision in Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010), which adopted the "nerve center" test for determining the "principal place of business" for diversity jurisdiction purposes.

New Insurance Law § 2101(x)(5) defines "principal residence" as (1) the state where the individual resides for the greatest number of days during a calendar year; or (2) if the insured's principal residence is located outside any state, the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.

Further, Chapter 61 adds a new Insurance Law § 2101(x)(3), which defines "insured's home state." Subparagraph (D) of this paragraph states that in the case of a group policy where the group policyholder pays 100% of the premium from its own funds, "insured's home state" means the home state of the group policyholder as determined by subparagraph (A) of the paragraph. In the case of a group policy where the group policyholder does not pay 100% of the premium from its own funds, then "insured's home state" means the home state of the group member as determined by subparagraph (A) of the paragraph. This method of determining an insured's home state is equally applicable to purchasing groups.[5]

Moreover, if more than one insured from an affiliated group is a named insured on a single insurance contract, then "insured's home state" means the insured's home state, as determined pursuant to subparagraph (A) of the paragraph, of the member of the affiliated group that has the largest percentage of premium attributed to it under the insurance contract. See 15 U.S.C. § 8206(6)(B); Ins. Law § 2101(x)(3)(C). "Affiliated group" means "any group of entities that are all affiliated." See 15 U.S.C. § 8206(3); Ins. Law § 2101(x)(1). "Affiliate" means, with respect to an insured, any entity that controls, is controlled by, or is under common control with the insured; and an entity that has control over another entity, if the entity directly or indirectly or acting through one or more other persons owns, controls, or has the power to vote 25% or more of any class of voting securities of the other entity or controls in any manner the election of a majority of the directors or trustees of the other entity. See 15 U.S.C. § 8206(2) and (4); Ins. Law § 2101(x)(1).[6]

B. Scope

15 U.S.C. § 8202 states that "the placement of nonadmitted insurance is subject to the statutory and regulatory requirements solely of the insured's home state" and that 15 U.S.C. § 8202 "may not be construed to preempt any State law, rule, or regulation that restricts the

[5] 11 NYCRR § 301.1(f) defines "purchasing group" as any group, formed pursuant to the federal Liability Risk Retention Act of 1986, that: (1) has as one of its purposes the purchase of liability insurance on a group basis; (2) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in paragraph (3) of this subdivision; (3) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar or common business, trade, product, services, premises or operations; and (4) is domiciled in any state.

[6] Pursuant to 11 NYCRR § 153.1(g) (Regulation 135), which sets forth standards for property/casualty insurance group and quasi-group policies, an insurance contract covering an affiliated group is not considered a "group policy."

placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer."

As noted, 15 U.S.C. § 8206(9) defines "nonadmitted insurance" as "any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a nonadmitted insurer eligible to accept such insurance." However, "property and casualty insurance" is not defined. As a result, Chapter 61 adds a new Insurance Law § 2101(x)(6), which defines "property/casualty insurance" as any kind of insurance as specified in Insurance Law § 1113(a), except insurance issued pursuant to § 1113(a)(1) (life insurance), (2) (annuities), (3) (accident and health insurance), (15) (workers' compensation and employers' liability insurance), (18) (title insurance), or (31) (salary protection insurance) or insurance substantially similar thereto.

The NRRA does not expand the scope of the kinds of insurance that an insurer may write in the excess line market and each state continues to determine which kinds of insurance an insurer may write in that state. As such, an excess line broker in New York continues to be able to place excess line insurance only with respect to the kinds of insurance specified in Insurance Law § 2105(a), specifically, the kinds set forth in Insurance Law § 1113(a)(4 through 14), (16), (17), (19), (20), (22), (27), (28) and (31), as well as coverage permitted under Insurance Law § 2105(h).[7]

Note that the exclusion of salary protection insurance from the definition of "property/casualty insurance" does not prohibit salary protection insurance from being sold in New York's excess line market or otherwise impose additional requirements on the sale of such coverage. Although salary protection insurance is considered a type of accident and health insurance and, as a result, was excluded from the definition of "property/casualty insurance," excess line brokers in New York may continue to procure, and insurers may continue to offer, salary protection insurance in the New York. Indeed, Chapter 61 adds a new Insurance Law § 2105(i) to stress this point. Section 2105(i) states that pursuant to § 2105(a), an excess line broker may procure policies of salary protection insurance from insurers that are not authorized to transact business in New York. Similarly, an insurer may continue to offer insurance under § 2105(h). Placement of these coverages, however, does not fall within the scope of the NRRA, including its preemption of state law with respect to the insured's home state.

Although the NRRA preempts state laws with respect to nonadmitted insurance, it does not have any impact on insurance offered by insurers licensed or authorized in a state. In some circumstances, an insured may seek to purchase insurance covering risks or operations in New York from an insurer that is authorized to do business in New York, but not in the insured's home state. In such a case, the insurer remains subject to all applicable New York laws and the coverage should not be considered to be nonadmitted insurance in New York. In addition, where the excess line broker engages in activities in New York under such a scenario, the broker shall be subject to all applicable New York laws as well.

[7] Section 2105(h) authorizes the placement of personal accident insurance and accident disability insurance for non-residents where the nature of the risk is related to the operation of motor vehicles at high speeds for the enjoyment of spectators.

C. Licensing

As stated previously, 15 U.S.C. § 8202 subjects the placement of nonadmitted insurance solely to the statutory and regulatory requirements of the insured's home state, and also declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to such insured. Thus, Chapter 61 amends Insurance Law § 2102(a)(1) to state that a person, firm, association, or corporation may not act as an excess line broker in New York without having authority to do so by virtue of a license issued and in force pursuant to Insurance Law § 2105, provided, however, that such person or entity is not required to be licensed as an excess line broker where the insured's home state is a state other than New York and the person or entity is otherwise licensed to sell, solicit, or negotiate excess line insurance in the insured's home state. Chapter 61 also adds a new Insurance Law § 2117(j), which provides that nothing in section 2117 prohibits a person who is not a resident of New York from selling, soliciting, or negotiating a property/casualty insurance contract of an insurer not authorized to do business in New York, provided that the insured's home state is a state other than New York and the person is licensed to sell, solicit, or negotiate excess line insurance in the insured's home state.

In addition, Chapter 61 amends the definitions of "insurance broker" and "insurance producer" as set forth in Insurance Law § 2101(c) and (k), respectively, to exclude from the definition of "insurance broker" and "insurance producer" a person who is not a resident of New York who sells, solicits, or negotiates a contract of property/casualty insurance of an insurer not authorized to do business in New York, provided that the insured's home state is a state other than New York and the person is otherwise licensed to sell, solicit, or negotiate excess line insurance in the insured's home state.

However, the foregoing exception to the licensing requirement is limited to any person or entity that has contact with an unauthorized insurer only. If the person or entity has any contact with an authorized insurer in New York, including obtaining declinations from authorized insurers, then the person or entity would be selling, soliciting, or negotiating a contract of insurance of an insurer authorized to do business in New York and would need to be licensed in New York as an insurance broker, unless otherwise exempted from licensing under Article 21 of the Insurance Law.

Any person who solicits, negotiates, or effectuates any policy of insurance with an unauthorized insurer on behalf of a New York home-stated insured, or who otherwise in any way or manner aids such insured, must be licensed in New York as an excess line broker. Insurance will be deemed to be independently procured only if the insured purchased or renewed the excess line insurance policy directly from an unauthorized insurer without any assistance from an insurance producer.

Moreover, 15 U.S.C. § 8203 prohibits a state from collecting any fees relating to licensing of an individual or entity as an excess line broker in the state unless the state has in effect by July 21, 2012 laws or regulations that provide for participation by the state in the NAIC's national insurance producer database or any other equivalent uniform national database,

for the licensure of excess line brokers and the renewal of such licenses. The Department intends to participate in the NAIC's insurance producer database on or before July 21, 2012.

D. Exempt Commercial Purchaser

As stated previously, 15 U.S.C. § 8205 states that an excess line broker seeking to procure or place nonadmitted insurance in a state for an ECP need not satisfy any state requirement to make a due diligence search to determine whether the full amount or type of insurance sought by the ECP may be obtained from admitted insurers if: (1) the broker procuring or placing the excess line insurance has disclosed to the ECP that the insurance may be available from the admitted market, which may provide greater protection with more regulatory oversight; and (2) the ECP has subsequently requested in writing that the broker procure or place the insurance from a nonadmitted insurer.

As a result, Chapter 61 adds a new Insurance Law § 2118(b)(3)(F), which incorporates the language set forth in 15 U.S.C. § 8205 into the Insurance Law. In order for Insurance Law § 2118(b)(3)(F) to apply, the insured must be an ECP at the time of placement of the insurance. The excess line broker is responsible for verifying that the insured is an ECP as defined in 15 U.S.C. § 8206(5) and Insurance Law § 2101(x)(2). If the ECP does not make a written request to the broker, as discussed in the above paragraph, then the broker must make the due diligence search.

E. Taxation

15 U.S.C. § 8201(a) prohibits any state, other than the insured's home state, from requiring a premium tax payment for nonadmitted insurance. Thus, if New York is the insured's home state, New York is the only state that may require any premium tax on the policy. As a result, Chapter 61 amends Insurance Law § 9102 to delete the allocation formulas set forth in subsections (b) and (c) and amends Insurance Law § 2118(d)(1) to remove the cross reference to section 9102(b).[8] Accordingly, where New York is the insured's home state under an excess line policy, 100% of the premium under the policy is subject to taxation, even though the policy covers risks or property located both inside and outside of New York.

Further, by deleting Insurance Law § 9102(b) and (c), with respect to policies that have an effective date prior to July 21, 2011, Chapter 61 deletes the allocation formulas for all kinds of excess line insurance (including salary protection insurance and insurance under § 2105(h)) and not just for property/casualty insurance.

However, with respect to policies that have an effective date on or after July 21, 2011, where the policy covers risks or property located both in the United States and outside the United States, 100% of the premium attributable to the risks or property located in the United States is subject to taxation. An excess line broker should utilize the appropriate allocation schedule set forth in Regulation 41 for determining the premium attributable to the United States risks or property.

[8] The Department also intends to amend 11 NYCRR Part 27 (Regulation 41) accordingly.

While 15 U.S.C. § 8201 provides that states may enter into a compact or otherwise establish procedures to allocate among themselves the premium taxes paid to an insured's home state, New York has not entered into such a compact or other arrangement. Thus, unless and until such time as New York enters into a compact or other arrangement, New York will collect tax on 100% of the premium on all kinds of excess line insurance contracts where the insured's home state is New York and will no longer allocate any portion of that tax to other states.

Chapter 61 makes corresponding changes to Article 33-A of the Tax Law, with respect to independently procured insurance.

F. Effective Date

The sections of Part I of Chapter 61 that amend the Insurance Law to bring New York into conformance with the NRRA take effect on July 21, 2011, which is when the NRRA takes effect. Moreover, the amendments to Insurance Law §§ 2118(d)(1) and 9102, as well as the Tax Law amendments, apply to any insurance contract or renewal thereof that has an effective date on or after July 21, 2011.

G. Additional Guidance

As noted above, the Department intends to amend Regulation 41 to conform the regulation to the NRRA. The Department will provide additional guidance in the form of supplements to this Circular Letter, as necessary.

Please direct any questions or comments regarding this circular letter to Joana Lucashuk, Senior Attorney, at jlucashu@ins.state.ny.us or (212) 480-2125.

Very truly yours,

Paul A. Zuckerman
Assistant Deputy Superintendent and Counsel