



**Supplement No. 1 to
Insurance Circular Letter No. 9 (2011)
March 12, 2012**

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: Unauthorized Foreign or Alien Insurer's Termination of Trust Fund

STATUTORY REFERENCES: 11 NYCRR Part 27 (Regulation 41); 15 U.S.C. § 8201 et seq.

I. Summary

Under the federal Nonadmitted and Reinsurance Reform Act of 2010 (the "NRRA"), a state¹ may not require an unauthorized insurer domiciled in another state (an "unauthorized foreign insurer") to establish and maintain a trust fund to be eligible to write excess line insurance in New York, and may not prohibit an excess line broker from placing excess line insurance with an unauthorized insurer domiciled outside the United States (an "unauthorized alien insurer"), provided that the insurer is listed on the quarterly listing of alien insurers maintained by the International Insurers Department ("IID") of the National Association of Insurance Commissioners ("NAIC"). However, the NRRA does not void the obligations under a trust fund agreement into which an insurer and a trustee entered prior to the NRRA's effective date. Therefore, if an unauthorized foreign or alien insurer wishes to terminate a trust that was established pursuant to 11 NYCRR Part 27 (Regulation 41) prior to the NRRA's July 21, 2011 effective date, then the insurer must do so in conformance with the trust fund agreement.

II. Discussion

The purpose of this supplement to Circular Letter No. 9 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 termination of trusts established pursuant to Regulation 41 prior to the NRRA's July 21, 2011 effective date.

15 U.S.C. § 8204(1) prohibits a state from imposing eligibility requirements on, or otherwise establishing eligibility criteria for, unauthorized foreign insurers, except in conformance with the requirements and criteria set forth in sections 5A(2) and 5C(2)(a) of the

¹ 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 America Samoa."

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. Section 8204(2) provides that a state may not prohibit an excess line broker from placing excess line insurance with, or procuring excess line insurance from, an unauthorized alien insurer that is listed on the quarterly listing of alien insurers maintained by the IID of the NAIC.

With regard to unauthorized foreign insurers, the establishment and maintenance of a trust fund is not a requirement or criterion set forth in sections 5A(2) and 5C(2)(a) of the NAIC's Nonadmitted Insurance Model Act. Therefore, a state may not require an unauthorized foreign insurer to establish and maintain a trust fund to be eligible to write excess line insurance in that state. With respect to an unauthorized alien insurer, a state may not prohibit an excess line broker from procuring excess line insurance from the insurer if it is on the IID list. However, the alien insurer must establish and maintain a trust fund consistent with criteria set forth in the "plan of operation for listing of alien non-admitted insurers" in order to be on the IID list.

The NRRA does not void the obligations under a trust fund agreement entered into by an unauthorized foreign or alien insurer and a trustee prior to the NRRA's July 21, 2011 effective date. A trust fund agreement establishes the rights and responsibilities of the parties. It is a private agreement that, once established, governs for the protection of the beneficiary policyholders. While the NRRA prospectively preempts certain state laws as of July 21, 2011, it does not obviate a private agreement between parties entered into prior to that date. Therefore, if an unauthorized foreign or alien insurer wishes to terminate a trust that it established pursuant to Regulation 41 prior to July 21, 2011, then the insurer must do so in conformance with the trust fund agreement.

Neither the Insurance Law nor Regulation 41 requires an unauthorized foreign or alien insurer to obtain the permission of the Superintendent of Financial Services ("Superintendent") to terminate the trust, but pursuant to § 27.14(j)(5) of Regulation 41, the trust agreement had to require the trustee to notify the Superintendent and the Excess Line Association of New York ("ELANY") within 30 days of the trustee's receipt of notice from the insurer that a trust has been amended or will not be renewed or replaced.

III. Conclusion

If an unauthorized foreign or alien insurer wishes to terminate a trust that it established pursuant to Regulation 41 prior to July 21, 2011, then the insurer must do so in conformance with the trust fund agreement.

Please direct any questions or comments regarding this Circular Letter to Joana Lucashuk, Senior Attorney, at (212) 480-2125 or joana.lucashuk@dfs.ny.gov.

Very truly yours,

Martha A. Lees
General Counsel for Insurance