

**NEW YORK STATE
INSURANCE DEPARTMENT**

**FIRST AMENDMENT TO REGULATION NO. 120
(11 NYCRR 33)**

MANAGING GENERAL AGENTS

I, GREGORY V. SERIO, Superintendent of Insurance, pursuant to the authority granted by sections 201, 301, 308, 2101, 2102 and 2103 of the Insurance Law of the State of New York, do hereby promulgate the following First Amendment to Part 33 of Title 11 of the Official Compilation of Codes, Rules and Regulations (Regulation No. 120), to take effect upon publication in the State Register.

(NEW MATTER IS UNDERSCORED. MATTER IN BRACKETS IS DELETED)

Part 33 is hereby amended to read as follows:

§ 33.0 Preamble.

Some insurance companies have entered into contracts with individuals or organizations, commonly referred to as managing general agents or managers, to manage all or part of their insurance business. This may represent a shifting of an insurance company's responsibilities to a person, firm, association or corporation outside of its organization. This Part is promulgated because the Insurance Department is concerned that such delegation of authority has been subject to abuses detrimental to both insurance companies and insureds.

§ 33.1 Applicability.

This Part shall apply to all [licensed] insurers that enter into contracts with managing general agents as defined in section 33.2(c) of this Part[, acting in such capacity on or after the effective date (December 18, 1985) of this Part]. Sections 33.3(c), 33.5 and 33.6 of this Part are effective January 1, 2002.

§ 33.2 Definitions.

As used in this Part, the following terms shall have the following meanings:

(a) *Insurer* means an authorized insurer as defined in section 107(a)(10) of the Insurance Law, and, for purposes of this Part, shall also include every group, association or other organization of insurance companies that engages in joint underwriting or joint reinsurance in accordance with section 2317(a) of the Insurance Law.

(b) *Domestic insurer* shall have the same meaning as set forth in Insurance Law, section 107(a)(19), and shall also include every group, association or other organization of insurance companies that engages in joint underwriting or joint reinsurance if such group, association or other organization has its principal office in this State.

(c) *Managing general agent (MGA)* means any person, firm, association or corporation [who or which] that:

(1) manages all or part of the insurance business of an insurer (including the management of a separate division, department or underwriting office) [and];

(2) acts as an insurance agent as defined in section 2101(a) of the Insurance Law for such insurer, whether known as a managing general agent, manager, or other similar term, or acts as an insurance broker as defined in section 2101(c) of the Insurance Law; and

(3) with or without the authority, either separately or together with affiliates, produces, directly or indirectly, and accepts or rejects risks on behalf of the insurer (underwrites) an amount of gross direct written premium equal to or more than five percent of the policyholder surplus as reported in the last annual statement of the insurer in any one quarter or year together with one or more of the following activities related to the business produced:

(i) Adjusts or pays claims in excess of \$25,000, or

(ii) Negotiates reinsurance on behalf of the insurer.

§ 33.3 Requirements.

(a) No insurer shall appoint or continue to use the services of [any managing general agent] an MGA to act for it in this State, either directly or indirectly through subagents of the [managing general agent] MGA, unless the [managing general agent] MGA has an insurance agent's license issued by this State to represent said insurer for the appropriate kinds of insurance.

(b) (1) [An insurer that currently has managing general agents acting for it in this State, either directly or indirectly through subagents of the managing general agent, shall complete and file Form 1 (see subdivision [c] of this section), with this department, within 30 days of the effective date (December 18, 1985) of this Part.

(2) A domestic insurer that currently has managing general agents acting for it in any state or foreign country, shall complete and file Form 1, herein, with this department, within 30 days of the effective date (December 18, 1985) of this Part.

(3) An insurer that appoints [a managing general agent] an MGA to act for it in this State, either directly or through subagents of the [managing general agent] MGA, shall complete and file [Form 1, herein,] the form required by subdivision (c) of this section with this department within 30 days of the appointment. An amended form shall be filed within 30 days after any change including termination of appointment.

[(4)] (2) A domestic insurer that appoints [a managing general agent] an MGA to act for it in any state or foreign country, shall complete and file [Form 1, herein,] the form required by subdivision (c) of this section with this department, within 30 days of the appointment. An amended form shall be filed within 30 days after any change, including termination of appointment.

(c) [Form 1 is repealed in its entirety.] A filing required by subdivision (b) of this section, relative to the appointment of an MGA, shall be in a form prescribed by the superintendent.

§ 33.4 Exemptions.

(a) The provisions of this Part shall not apply to:

(1) [a person whose acts as an insurance agent for an insurer are purely incidental to his/her duties as a salaried employee of such insurer;

(2) a person who is an agent of an insurer, provided such agent does not have authority to:

- (i) underwrite and either appoint sub-agents or accept sub-produced business; or
- (ii) cede or assume reinsurance on behalf of the insurer;

(3)] a person who is a member of the same holding company system (as defined in section 1501(a)(6) of the Insurance Law) as the insurer;

[(4)] (2) a person acting as a U.S. manager of a licensed U.S. branch of an alien insurer (as defined in section 107(44) of the Insurance Law); and

[(5) an underwriting manager designated by underwriting members of the New York Insurance Exchange, Inc., provided that:

(i) such designation shall have been filed with the New York Insurance Exchange, Inc. in its register of approved underwriting managers;

(ii) the New York Insurance Exchange, Inc. adopts rules to accomplish the intent and purposes of this Part; and

(iii) this exemption shall not apply to any cessions or retrocessions handled by such underwriting manager of the New York Insurance Exchange, Inc. outside of the New York Insurance Exchange, Inc.]

(3) the attorney-in-fact authorized by and acting for the subscribers of a reciprocal insurer or inter-insurance exchange under powers of attorney.

(b) Nothing contained in this [section] Part shall exempt any [such] person from any requirement to be licensed as an insurance agent, reinsurance intermediary or otherwise under the Insurance Law or from being subject to examination by the Insurance Department.

(c) No person shall be a manager in this State within the meaning of Insurance Law Section 2101(g)(1) unless that person is an MGA and licensed as an insurance agent.

§ 33.5 Required contract provisions.

No person, firm, association or corporation acting in the capacity of an MGA in this State shall place business with an insurer; no insurer shall utilize an MGA in this State; and no domestic insurer shall utilize an MGA outside of this State; unless there is in force a written contract between the parties that sets forth the responsibilities of each party. Where both parties share responsibility for a particular function, the contract shall specify the division of such responsibilities. The contract shall contain the following minimum provisions:

(a) The insurer may terminate the contract for cause upon written notice to the MGA. The insurer may suspend the underwriting authority of the MGA during the pendency of any dispute regarding the cause for termination;

(b) The MGA will render accounts to the insurer detailing all transactions and remit all funds due under the contract to the insurer on not less than a monthly basis;

(c) All funds collected for the account of an insurer will be held by the MGA in a fiduciary capacity in accordance with Section 20.3 of this Title (Regulation 29). This account shall be used for all payments on behalf of the insurer. The MGA may retain no more than three months of estimated claims payments and estimated allocated loss adjustment expense payments;

(d) Separate records of business written by the MGA will be maintained. The insurer shall have access and right to copy all accounts and records related to its business in a form usable by the insurer and the superintendent shall have access to all books, bank accounts and records of the MGA in a form usable to the superintendent. Such records shall be retained according to Part 243 of this Title (Regulation 152);

(e) The contract may not be assigned in whole or part by the MGA;

(f) The MGA will follow appropriate insurer underwriting guidelines, including:

(1) the maximum annual premium volume;

(2) the basis of the rates to be charged;

(3) the types of risks which may be written;

(4) maximum limits of liability;

(5) applicable exclusions;

(6) territorial limitations;

(7) policy cancellation provisions; and

(8) the maximum policy period;

(g) The insurer shall have the right to cancel or non-renew any policy of insurance, subject to applicable laws and regulations concerning cancellation and non-renewal of insurance policies;

(h) If the contract permits the MGA to settle claims on behalf of the insurer:

(1) All claims must be reported to the insurer in a timely manner;

(2) A copy of the claim file must be sent to the insurer at its request or as soon as it becomes known that the amount of the claim, before application of any reinsurance:

(i) has the potential to exceed one percent of the insurer's surplus to policyholders, as reported in its last filed annual statement, or exceeds the limit set by the company; whichever is less;

(ii) involves a coverage dispute;

(iii) may exceed the MGA's claims settlement authority;

(iv) is open for more than six months; or

(v) is closed by payment of one percent of the insurer's surplus to policyholders, as reported in its last filed annual statement, or an amount set by the company, whichever is less;

(3) All claim files will be the joint property of the insurer and MGA. However, upon an order of liquidation of the insurer, such files shall become the sole property of the insurer or its estate and the MGA shall have reasonable access to and the right to copy the files on a timely basis; and

(4) Any settlement authority granted to the MGA may be terminated for cause upon the insurer's written notice to the MGA or upon the termination

of the contract. The insurer may suspend the settlement authority during the pendency of any dispute regarding the cause for termination;

(i) Where electronic claims files exist, the contract must address the timely transmission of the data;

(j) If the contract provides for a sharing of interim profits by the MGA, and the MGA has the authority to determine the amount of the interim profits by establishing loss reserves or controlling claim payments, or in any other manner, interim profits will not be paid to the MGA until one year after they are earned for property insurance business and five years after they are earned on casualty insurance business, and not until the profits have been verified pursuant to Section 33.6 of this Part;

(k) The MGA shall not:

(1) bind reinsurance or retrocessions on behalf of the insurer, except that the MGA may bind facultative reinsurance contracts pursuant to obligatory facultative agreements if the contract with the insurer contains reinsurance underwriting guidelines, including, for both reinsurance assumed and ceded, a list of reinsurers with which such automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured and commission schedules;

(2) commit the insurer to participate in insurance or reinsurance syndicates;

(3) appoint any producer without assuring that the producer is lawfully licensed to transact the kinds of insurance for which the producer is appointed;

(4) without prior approval of the insurer, pay or commit the insurer to pay a claim over a specified amount, net of reinsurance, which shall not exceed one percent of the insurer's policyholder's surplus as of December 31st of the last completed calendar year;

(5) collect any payment from a reinsurer or commit the insurer to any claim settlement with a reinsurer without prior approval of the insurer. If prior approval is given, a report must be promptly forwarded to the insurer;

(6) Permit its subproducer to serve on the insurer's board of directors;

(7) Jointly employ an individual who is employed with the insurer; or

(8) Appoint a sub-MGA.

§ 33.6 Duties of insurers.

(a) The insurer shall have on file an independent financial audit, in a form acceptable to the superintendent, of each MGA with which the insurer has done business.

(b) If an MGA establishes loss reserves, the insurer shall annually obtain the opinion of an actuary who is a member in good standing of the American Academy of Actuaries, attesting to the adequacy of loss reserves established for losses incurred and outstanding on business produced by the MGA. This opinion shall be in addition to any other required loss reserve certification.

(c) The insurer shall at least semi-annually conduct an on-site review of the underwriting and claims processing operations of the MGA.

(d) Binding authority for all reinsurance contracts or participation in insurance or reinsurance syndicates shall rest with an officer of the insurer, who shall not be affiliated with the MGA, except that the MGA may bind facultative reinsurance contracts pursuant to obligatory facultative agreements if the contract with the insurer contains reinsurance underwriting guidelines, including, for both reinsurance assumed and ceded, a list of reinsurers with which such automatic agreements are in effect, the coverages and amounts or percentages that may be reinsured and commission schedules;

(e) An insurer shall not appoint to its board of directors an officer, director, employee, subproducer or controlling shareholder of its MGAs. This subsection shall not apply to relationships governed by Article 15, 16, or 17 of the Insurance Law, or, if applicable, Subpart 80-2 of this Title (Regulation 52).

I, Gregory V. Serio, Superintendent of Insurance of the State of New York, do hereby certify that the foregoing is the First Amendment to 11 NYCRR 33 (Regulation 120), promulgated by me on January 31, 2003, pursuant to the authority granted by sections 201, 301, 308, 2101, 2102 and 2103 of the Insurance Law, to take effect upon upon publication in the State Register. This regulation was previously promulgated on an emergency basis on June 7, 2001, September 5, 2001, and November 2, 2001, with some different provisions, and on December 27, 2001, and February 26, 2002 with materially the same provisions, and on May 28, 2002 and August 22, 2002, with materially the same provisions and on November 21, 2003, with the same provisions.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed regulation was published in the State Register on December 11, 2002. No other publication or prior notice is required by statute.

Gregory V. Serio
Superintendent of Insurance

January 31, 2003