

BULLETIN 378

Changes to the Nonadmitted Insurance Laws

The purpose of this Bulletin is to outline nationwide regulatory changes that will affect the placement of nonadmitted insurance on Maine risks. One of the provisions of last year's Dodd-Frank Wall Street Reform and Consumer Protection Act is the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA"),¹ which establishes federal standards for surplus lines coverage and other nonadmitted insurance. On June 14, 2011, Governor LePage signed "An Act To Implement the Requirements of the Federal Nonadmitted and Reinsurance Reform Act of 2010,"² which provides for the implementation of the NRRA in Maine and conforms Maine's nonadmitted insurance laws to federal law. Both the NRRA and the Maine Implementation Act take effect July 21, 2011.³

The NRRA provides that only an insured's "Home State" may require the payment of premium tax for nonadmitted insurance.⁴ Moreover, the NRRA subjects the placement of nonadmitted insurance solely to the statutory and regulatory requirements of the insured's Home State, and provides that only the insured's Home State may require a surplus lines broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to that insured.⁵

What is the scope of the NRRA?

"Nonadmitted insurance," as defined in the NRRA, includes both surplus lines and independently procured insurance, but is restricted to property and casualty insurance.⁶ In addition, the NRRA does not preempt state laws requiring primary or excess workers' compensation insurance to be placed in the admitted market.⁷ Maine's laws prohibiting the sale of life, health, and workers' compensation insurance in the nonadmitted market, and regulating the reinsurance market for workers' compensation self-insurers, remain in effect and are not preempted, modified, or repealed by the NRRA or by the Maine Implementation Act.⁸

Specifically, the NRRA states that "the placement of nonadmitted insurance is subject to the statutory and regulatory requirements solely of the insured's home state," but that the NRRA "may not be construed to preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer."⁹ The NRRA does not expand the scope of the kinds of insurance that an insurer may write in the nonadmitted insurance market, and each state continues to determine which kinds of insurance an insurer may write in that state. Although the NRRA preempts certain state laws with respect to nonadmitted insurance, it does not have any impact on insurance on Maine risks offered by insurers licensed or authorized in Maine.

When is Maine the insured's Home State for purposes of a particular placement?

If Maine is considered the insured's Home State, only Maine's requirements regarding the placement of nonadmitted business will apply.

Maine is the insured's Home State if the insured maintains its principal place of business here or, in the case of an individual, the individual's principal residence is here, unless 100% of the insured risk is located outside Maine. In addition, if 100% of the insured risk is located outside the state of the insured's principal place of business or principal residence, then Maine is the insured's Home State if it is 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 are named insureds on a single nonadmitted insurance placement, and the insureds have different Home States, Maine will be considered the Home State for that placement if Maine is the Home State of the insured that has the largest percentage of premium attributed to it under the insurance contract.

How will these rules be applied?

New and renewal policies with an effective date before July 21, 2011 will be subject to the laws and regulations of Maine and other jurisdictions, as applicable, as of the policy effective date. The laws and regulations of Maine and other jurisdictions, as applicable, as of the effective date of any such policy will also apply to any modification to that policy during the policy period, such as all endorsements (including risk- and premium-bearing endorsements), installment payments, and premium audits. New and renewal policies with an effective date on or after July 21, 2011, and any modifications thereto, will be subject only to the laws and regulations of Maine, as amended by the Maine Implementation Act, if Maine is the Home State of the insured. If Maine is not the Home State of the insured, and the insurer is not admitted in Maine, then Maine law will not apply to property and casualty insurance, with the exception of primary or excess workers' compensation insurance covering benefits under the Maine Workers' Compensation Act.

What are the requirements for premium tax allocation and payment in Maine?

Until July 21, 2011, the laws and regulations of Maine and other jurisdictions, as applicable, will continue to apply to premium tax due on multi-state placements. Under current Maine law, only the portion of the premium attributable to Maine risk is subject to Maine premium tax, and this applies whether or not Maine is the insured's Home State.¹⁰ As of July 21, 2011, the NRRA permits only the insured's Home State to require the payment of premium tax for nonadmitted insurance. When Maine is the insured's Home State, Maine's 3% nonadmitted insurance premium tax will apply to the entire premium.¹¹ The changes made by the Maine Implementation Act to the procedures for reporting and collecting premium taxes take effect on July 21, 2011, and apply to all premiums received by the insurer or its representative on or after July 1, 2011.¹²

Under current law, surplus lines tax returns and tax payments are submitted to Maine Revenue Services by the surplus lines producer or surplus lines brokerage (in industry terminology, the "wholesaler"), while insureds independently procuring nonadmitted insurance report premiums and pay taxes to the Bureau of Insurance.¹³ Beginning July 21, 2011, Maine Revenue Services will handle all premium tax reporting and payments with respect to nonadmitted insurance

premiums.¹⁴ Premium tax forms and information may be found on the Maine Revenue Services Web site at the following address:

http://www.maine.gov/revenue/incomeestate/insurance_premium/insurance_premium.htm

The NRRA authorizes states to enter into a compact or agreement for allocation of premium taxes on multistate risks.¹⁵ The Maine Implementation Act gives the State Tax Assessor the authority to enter into a multistate agreement on behalf of the State of Maine, after consultation with the Bureau of Insurance, if the Assessor has:

- A. Completed a fiscal analysis of the impact of the agreement that examines the expected effects on the State's gross receipt of premium tax; and
- B. Concluded, after consultation with representatives of surplus lines insurers, admitted insurers and surplus lines producers, that entering into the agreement:
 1. Is in this State's financial best interest;
 2. Does not significantly increase administrative burden and cost to the State, surplus lines insurers and insureds; and
 3. Is consistent with the requirements of the federal Nonadmitted and Reinsurance Reform Act of 2010, Public Law 111-203.¹⁶

The Bureau will issue additional guidance if Maine enters into a tax allocation agreement.

What are the license requirements for surplus lines producers?

Only the insured's Home State may require a surplus lines producer to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to a particular placement.¹⁷ If Maine is the insured's Home State, the surplus lines producer must be licensed in Maine. The NRRA provides that Maine may not collect licensing fees for surplus lines producers on or after July 21, 2012, unless Maine participates in the NAIC's national insurance producer database or any other equivalent uniform national database.¹⁸ 15 U.S.C. § 8203. Maine complies with this requirement by participating in the National Insurance Producer Registry (NIPR).

What are the requirements for a diligent search and when is a diligent search required?

With limited exceptions (wet marine and transportation, out-of-state risks, railroad and aircraft operations in interstate commerce), Maine law currently provides that coverage may only be placed in the surplus lines market if "The insurance is not available after diligent effort has been made to place the coverage with authorized insurers."¹⁹ Maine does not mandate any specific procedures for performing a diligent search.

On or after July 21, 2011, the NRRA provides that a surplus lines producer seeking to procure or place nonadmitted insurance on behalf of an "exempt commercial purchaser" is not required to perform a diligent search if: 1) the producer has disclosed to the exempt commercial purchaser that insurance that may provide greater protection with more regulatory oversight may or may not be available from the admitted market; and 2) the exempt commercial purchaser has subsequently requested in writing for the producer to procure or place the insurance from a nonadmitted insurer. The Maine Implementation Act provides that when these conditions are

met, a surplus lines producer may procure “insurance from eligible surplus lines insurers without adherence to the procedures set forth in section 2004 or any other requirement to determine whether the full amount or type of insurance sought can be obtained from admitted insurers,” and incorporates by reference the NRRA’s definition of “exempt commercial purchaser.”²⁰

What are the eligibility requirements for nonadmitted insurers?

Under current Maine law, the Superintendent maintains a list of eligible surplus lines insurers, and a surplus lines producer may not place Maine business with an insurer that is not listed.²¹ The NRRA restricts the eligibility requirements a state may impose on nonadmitted insurers. Nonadmitted insurers domiciled outside the U.S. are eligible if they are listed on the Quarterly Listing of Alien Insurers maintained by the International Insurers Department of the NAIC. For nonadmitted insurers domiciled in the United States, state eligibility requirements must be in conformance with the financial criteria of the NAIC Nonadmitted Insurance Model Act.²² Accordingly, the Maine Implementation Act adds new Subsections 3 through 5 to 24-A M.R.S.A. § 2007, providing that as of July 21, 2011:

3. The superintendent shall approve a United States insurer’s request for eligibility if the insurer:
 - A. Is authorized to write such insurance in its domiciliary jurisdiction;
 - B. Has established satisfactory evidence of good repute and financial integrity; and
 - C. Maintains capital and surplus, or its equivalent under the laws of its state of domicile, in an amount at least equal to the greater of:
 1. The minimum capital and surplus that would be required if the insurer were licensed in this State; and
 2. \$15,000,000
4. The superintendent may list an insurer as eligible if it does not meet the minimum capital and surplus requirements of subsection 3 upon an affirmative finding of acceptability by the superintendent. The finding must be based upon such factors as quality of management, capital and surplus of any parent company, company underwriting profit and investment income trends, market availability and company record and reputation within the industry. The superintendent may not make an affirmative finding of acceptability if the nonadmitted insurer's capital and surplus is less than \$4,500,000.
5. A non-United States insurer is considered eligible to write insurance on an unauthorized basis in this State if it is listed on the quarterly listing of alien insurers maintained by the National Association of Insurance Commissioners.

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NOTE: This bulletin is intended solely for informational purposes. It is not intended to set forth legal rights, duties, or privileges, nor is it intended to provide legal advice. Readers should consult applicable statutes and rules and contact the Bureau of Insurance if additional information is needed.

[1](#) Dodd-Frank Act, Title V, Subtitle B (§§ 511 *et seq.*). The provisions regulating the nonadmitted insurance market, NRRA §§ 521–525 & 527, are codified at 15 U.S.C. §§ 8201–8206.

[2](#) P.L. 2011, ch. 331 (L.D. 1352).

[3](#) With the exception of the provision of the Maine Implementation Act authorizing the State Tax Assessor to enter into a multistate tax allocation agreement, which took effect on June 14, 2011.

[4](#) NRRA § 521(a) (15 U.S.C. § 8201(a)); 36 M.R.S.A. § 2531(1) (*effective July 21, 2011*).

[5](#) NRRA §§ 522(a) & (b) (15 U.S.C. § 8201(a) & (b)); 24-A M.R.S.A. § 2001-A (*effective July 21, 2011*).

[6](#) NRRA § 527(9) (15 U.S.C. § 8206(9)); 24-A M.R.S.A. § 2003(8) (*effective July 21, 2011*).

[7](#) NRRA § 522(d) (15 U.S.C. § 8202(d)).

[8](#) 24-A M.R.S.A. § 2002-A(1); 39-A M.R.S.A. §§ 102(19) & 403(10)–(11); Bureau of Insurance Rule 730.

[9](#) NRRA § 522 (15 U.S.C. § 8202).

[10](#) 24-A M.R.S.A. § 2016(2) (*repealed July 21, 2011*).

[11](#) 36 M.R.S.A. § 2513 (*as amended effective July 21, 2011*).

[12](#) P.L. 2011, ch. 331, §§16–17.

[13](#) 24-A M.R.S.A. § 2113 (*repealed July 21, 2011*); 36 M.R.S.A. §§ 2513 & 2521-A.

[14](#) 36 M.R.S.A. §§ 2513 (*as amended effective July 21, 2011*) & 2531(*effective July 21, 2011*).

[15](#) NRRA §§ 521(b) & (c) (15 U.S.C. §§ 8201(b) & (c)).

[16](#) 36 M.R.S.A. § 2532(2) (*effective June 14, 2011*).

[17](#) NRRA § 522(b) (15 U.S.C. § 8202(b)). The NRRA uses the term “broker” in place of “producer.”

[18](#) NRRA §§ 523 (15 U.S.C. § 8203).

[19](#) 24-A M.R.S.A. §§ 2002-A(3) & 2004(4).

[20](#) 24-A M.R.S.A. §§ 2002-A(3)(E) & 2003(6) (*effective July 21, 2011*).

[21](#) 24-A M.R.S.A. § 2007.

[22](#) NRRA § 524 (15 U.S.C. § 8204).

Appendix: Key Definitions from the NRRA

“Exempt commercial purchaser” (NRRA § 527(5) (15 U.S.C. § 8206(5); *see* 24-A M.R.S.A. § 2003(6)): The term “exempt commercial purchaser” means 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 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).

(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.

(ii) Effective on the fifth January 1 occurring after the date of the enactment of this subtitle and each fifth January 1 occurring thereafter, the amounts in subclauses (I), (II), and (IV) of clause (i) shall be adjusted to reflect the percentage change for such 5-year period in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

“Home State” (NRRA § 527(6) (15 U.S.C. § 8206(6); *see* 24-A M.R.S.A. § 2003(4)–(5) & (7)):

(A) In General.—Except as provided in subparagraph (B), the term “home State” means, with respect to an insured—

- (i) 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
- (ii) if 100 percent of the insured risk is located out of the State referred to in clause (i), the State to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.

(B) **Affiliated Groups.**—If more than 1 insured from an affiliated group are named insureds on a single nonadmitted insurance contract, the term “home State” means the home State, as determined pursuant to subparagraph (A), of the member of the affiliated group that has the largest percentage of premium attributed to it under such insurance contract.

“Independently procured insurance” (NRRA § 527(7) (15 U.S.C. § 8206(7); *see* 24-A M.R.S.A. § 2101(2)(F)): The term “independently procured insurance” means insurance procured directly by an insured from a nonadmitted insurer.

“Nonadmitted insurance” (NRRA § 527(9) (15 U.S.C. § 8206(9); *see* 24-A M.R.S.A. § 2003(8)): The term “nonadmitted insurance” means 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.

“Nonadmitted insurer” (NRRA § 527(11) (15 U.S.C. § 8206(11); *see* 24-A M.R.S.A. § 2003(9)): The term “nonadmitted insurer”—

(A) means, with respect to a State, an insurer not licensed to engage in the business of insurance in such State; but

(B) does not include a risk retention group, as that term is defined in section 2(a)(4) of the Liability Risk Retention Act of 1986 (15 U.S.C. 3901(a)(4)).

“Premium tax” (NRRA § 527(12) (15 U.S.C. § 8206(12)): The term “premium tax” means, with respect to surplus lines or independently procured insurance coverage, any tax, fee, assessment, or other charge imposed by a government entity directly or indirectly based on any payment made as consideration for an insurance contract for such insurance, including premium deposits, assessments, registration fees, and any other compensation given in consideration for a contract of insurance.

“Qualified risk manager” (NRRA § 527(13) (15 U.S.C. § 8206(13)): The term “qualified risk manager” means, with respect to a policyholder of commercial insurance, a person who meets all of the following requirements:

(A) The person is an employee of, or third-party consultant retained by, the commercial policyholder.

(B) The person provides skilled services in loss prevention, loss reduction, or risk and insurance coverage analysis, and purchase of insurance.

(C) The person—

(i) (I) has a bachelor's degree or higher from an accredited college or university in risk management, business administration, finance, economics, or any other field determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competence in risk management; and

(II) (aa) has 3 years of experience in risk financing, claims administration, loss prevention, risk and insurance analysis, or purchasing commercial lines of insurance; or

(bb) has—

(AA) a designation as a Chartered Property and Casualty Underwriter (in this subparagraph referred to as “CPCU”) issued by the American Institute for CPCU/Insurance Institute of America;

(BB) a designation as an Associate in Risk Management (ARM) issued by the American Institute for CPCU/Insurance Institute of America;

(CC) a designation as Certified Risk Manager (CRM) issued by the National Alliance for Insurance Education & Research;

(DD) a designation as a RIMS Fellow (RF) issued by the Global Risk Management Institute; or

(EE) any other designation, certification, or license determined by a State insurance commissioner or other State insurance regulatory official or entity to demonstrate minimum competency in risk management;

(ii) (I) has at least 7 years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; and

(II) has any 1 of the designations specified in subitems (AA) through (EE) of clause (i)(II)(bb);

(iii) has at least 10 years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; or

(iv) has a graduate degree from an accredited college or university in risk management, business administration, finance, economics, or any other field determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competence in risk management.

“Surplus lines broker” (NRRA § 527(15) (15 U.S.C. § 8206(15); *see* 24-A M.R.S.A. § 2003(1)): The term “surplus lines broker” means an individual, firm, or corporation which is licensed in a State to sell, solicit, or negotiate insurance on properties, risks, or exposures located or to be performed in a State with nonadmitted insurers.

“State” (NRRA § 527(16) (15 U.S.C. § 8206(16)): The term “State” includes 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.