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New York State Senate Passes Domestic Excess Lines Bill

The New York State Senate has passed a bill authorizing the formation and licensing of New York domestic excess lines insurance companies.¹ The bill would allow such companies to write insurance in New York on the same basis as unlicensed excess lines insurers even though incorporated in New York.

Currently, U.S. domestic surplus lines insurers are required to be licensed as admitted insurers in at least one state (typically its state of domicile). This requirement for admitted status generally prevents a U.S. domestic surplus lines insurer from insuring surplus lines risks in its state of domicile. Surplus lines insurers writing multistate risks have traditionally been required to provide coverage on the portion of the risk attributable to their state of domicile from a second insurer, often an affiliate domiciled in another jurisdiction. This creates unnecessary inefficiencies and additional costs which are eventually passed on to the insured. By comparison, under the Nonadmitted and Reinsurance Reform Act, which came into effect on July 21, 2011 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), non-U.S. surplus lines companies that appear in the quarterly listing of alien insurers published by the NAIC International Insurers Department (or "IID-listed alien insurers") can write insurance as surplus lines in all fifty states and can write nationwide coverage for multistate risks without the need to separate any portion of the risk.

Several states have crafted a solution to the admitted status problem through the adoption of "domestic" surplus lines insurer statutes. Domestic surplus lines insurer laws treat electing insurers organized in the state as nonadmitted for certain purposes, including the ability to write surplus lines insurance business in the state. Thus, a surplus lines company domiciled in a state with a domestic surplus lines insurer law can write surplus lines business across all states, including in its state of domicile. Six states (Arkansas, Delaware, Illinois, New Hampshire, New Jersey and Oklahoma) have enacted domestic surplus lines insurer laws, and the proposed legislation would add New York to this growing list of states. Illinois was the first state to enact such a law and had licensed thirteen domestic surplus lines insurance companies as of November 18, 2010 when such information was most recently reported.² The Delaware and New Jersey statutes became effective in 2011, and New Jersey has since licensed one domestic surplus lines insurer.³

The proposed New York legislation exempts domestic excess line carriers from rate and form filing requirements and requirements related to the New York guaranty funds, and transactions by domestic excess line insurance companies will not constitute doing an insurance business under the New York Insurance Law. Each domestic excess line carrier would, however, continue to be subject to the New York Insurance Law requirements regarding admitted assets, deposits and reinsurance (Article 13); permitted investments (Article 14); holding companies (Article 15); subsidiaries (Article 16); merger, consolidation, redomestication and acquisition of assets and shares (Article 71); and rehabilitation,

¹ S.B. 6808 was introduced by Sen. James Seward on March 23, 2012; and A.B. 9783 was introduced by Assemb. Joseph Morelle on April 2, 2012.

² Bulletin #16a Reminder: domestic Surplus Line Insurers, Surplus Line Association of Illinois, revised November 18, 2010, available at <http://www.slai.org/bulletins/Bulletin16a.pdf>.

³ "Eligible Surplus Lines Insurers (White List)," New Jersey Department of Banking and Insurance, effective May 2, 2012, available at http://www.state.nj.us/dobi/sleo_whitelist.pdf.

liquidation, conservation and dissolution (Article 74). Taxes on excess line placements by domestic excess line insurers would continue to be paid by the excess line broker pursuant to Article 21. Domestic excess lines insurers will be exempt from premium taxes, state corporation tax and franchise taxes.

Importantly, the proposed legislation provides that domestic excess line insurance companies will be deemed nonadmitted insurers for purposes of the Dodd-Frank Act, which defines nonadmitted insurer “with respect to a State, [as] an insurer not licensed to engage in the business of insurance in such State.” Under the Dodd-Frank Act, states may not impose eligibility requirements on nonadmitted insurers domiciled in another U.S. state (with a limited exception to require certain minimum capital and surplus). New York domestic excess line insurance companies will technically not be “licensed” in New York, but will be given a “certificate of eligibility.”

Under the proposed legislation, in order to obtain a certificate of eligibility by the New York Superintendent of Financial Services, an applicant would be required to have and maintain minimum capital and surplus of equal to or exceeding the greater of (x) \$45 million or (y) the minimum amount required by New York for foreign and alien excess line eligibility. Currently, the minimum amount required for foreign and alien incorporated excess lines insurers is \$35 million, which increases to \$45 million on January 1, 2013 and thereafter increases by \$1 million each year starting January 1, 2016. Therefore, the effective minimum capital and surplus requirement for a certificate of eligibility will be \$45 million until January 1, 2016, when the minimum requirement will increase by \$1 million each year. Domestic excess line insurance companies will make an identical application under Article 12 as a domestic authorized insurance company, with the additional requirement that the application contain a certified resolution adopted by the board of directors that the insurer intends to act as a domestic excess line insurance company.

The bill as passed by the Senate has now been delivered to the Assembly, which has referred it to the Insurance Committee. Whether the bill will pass the Assembly remains to be seen.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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