

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

OFFICE OF SOLVENCY REGULATION

Exportable List

Adopted Amendments: N.J.A.C. 11:1-34.6

Proposed: October 5, 2009 at 41 N.J.R. 3778(a).

Adopted: June 23, 2010 by Thomas B. Considine, Commissioner, Department of Banking and Insurance.

Filed: June 24, 2010 as R. 2010 d. 159, **without change**.

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17:22-6.43

Effective Date: July 19, 2010.

Expiration Date: July 30, 2011.

Summary of Public Comments and Agency Responses:

The Department received two written comments from the Independent Insurance Agents and Brokers of New Jersey and Kimberly A. Mrvica.

COMMENT: One commenter stated that it is in support of the Department's regulatory amendments to include Livestock Gross Margin Policies for Dairy Cattle and Special Risk Disability and Personal Accident Policies (with specific high value policy requirements) on the Exportable List.

The commenter stated that there does not appear to be a reasonable or adequate marketplace available for these two products in the admitted marketplace.

A second commenter stated that the Department's proposal with respect to Special Risk Disability and Personal Accident Policies, if adopted, would permit professional athletes, professional musicians and entertainers, and executives or other persons essential to business

operations to obtain coverage in the surplus lines market for any of the risks identified in subparagraphs i through iv of paragraph (b)3 of N.J.A.C. 11:1-34.6. The commenter stated that if the proposed amendments are adopted, the coverages for any of these risks could be exported to the surplus lines market automatically without the need for a New Jersey insurance producer to first make a diligent effort to procure the coverage from authorized insurers. The commenter stated that it supported this change as an important improvement to the Department's current requirements.

RESPONSE: The Department appreciates both commenters' support for the proposed amendments.

COMMENT: One commenter stated that they understand that the Department's intent in the rule proposal is to allow automatic export to the surplus lines market of specified types of disability and personal accident insurance that provide coverage on a professional athlete, professional musician or entertainer, or executive or other person essential to a business. The commenter noted that the current Exportable List generally prohibits the export of "health insurance" to the surplus lines market (subject to the specified exception). The Exportable List provides that health insurance, which the commenter understands includes disability and personal accident coverage, is "specifically not eligible for export, since the Department has determined that [it is] procurable from authorized or admitted insurers after a diligent effort...." N.J.A.C. 11:1-34.6(b). The commenter agreed that certain types of disability and personal accident insurance are in fact available from authorized/admitted insurers – that is, standard risks – and thus should not and can not be placed in the surplus lines market. The commenter noted that there are, however, other New Jersey citizens who are unable to procure disability and

personal accident insurance from authorized/admitted insurers, such as those in the medical profession and other high income professionals, who do not fit in the rule proposal as currently drafted. The commenter stated that for those citizens, the presumption in the current Exportable List that such insurance is procurable from authorized/admitted insurers is not correct, and will result in these citizens being left without coverage.

The commenter referenced a comment letter regarding the 2008 Exportable List Hearing dated December 24, 2008, submitted by Edward A. Tafaro, CEO of Exceptional Risk Advisors, LLC, which provided examples of some of these New Jersey citizens: a pediatric neurosurgeon who sought to insure his \$1,500,000 income against a loss due to a disability, and a dentist with health issues who was in need of similar disability income protection, neither of whom could obtain the necessary coverage in the admitted market because of the narrow standard market risk selection and underwriting criteria.

The commenter stated that, as written, the rule proposal would not permit these New Jersey citizens or others like them who are not professional athletes, professional musicians or entertainers, or business executives/essential persons to obtain the insurance they need to protect themselves and their families and businesses against potential financial hardship. The commenter believes that the Department's important reforms in this area should also address this segment of our State's population.

The commenter attached proposed modifications to the Rule Proposal/Exportable List as an Appendix. The proposed changes appear in **bold and underlined** or ~~strikethrough~~ to appear separate from the Department's rule proposal. The commenter contends that these changes would permit a New Jersey citizen who is not a professional athlete, professional musician or entertainer, or executive or other person essential to a business to procure insurance with an

eligible surplus lines insurer for any of the risks set forth in subparagraphs i through iv of paragraph (b)3 of the rule proposal after a diligent effort has been made to procure the insurance from authorized/admitted insurers. The commenter stated that this would bring New Jersey law generally into line with the laws in the majority of United States jurisdictions.

The commenter also stated that they understand the Department's interest in proceeding carefully with modifications to the Exportable List, particularly in the area of disability and personal accident coverage. The commenter stated that their proposal as outlined above and in the Appendix, if adopted, would not result in the export of disability and personal accident coverage to the surplus lines market that otherwise would have been procured from authorized/admitted insurers. The commenter noted that any disability and personal accident risks in addition to the coverage that would be placed in the surplus lines market would be coverage that is not available from authorized/admitted insurers. The commenter stated that authorized/admitted insurers have standard, filed products that are locked into a risk for a period of time and provide coverage only up to a specified maximum benefit amount, which does not allow for the underwriting of volatile occupations and/or high limit risks. The commenter contends that coverage in the standard market is guaranteed renewable and non-cancelable until the insured reaches age 65, while specialty risk disability and personal accident policies are shorter in duration, sometimes for a period as brief as six months. Further, the compensation paid to producers for placing such coverage in the authorized/admitted market is more favorable than the compensation paid to producers for a surplus lines placement. In sum, the surplus lines market will not be competing with the authorized/admitted market for the risks currently being written in the authorized/admitted market.

The commenter stated that in order to address the Department's immediate concerns, they have offered an additional process that will enable the Department – specifically the Department's Life and Health Office – to monitor the types of risks being placed in the surplus lines market under the usual diligent search process – that is, for insurance providing coverage on persons who are not professional athletes, musicians or entertainers, etc. For an interim, trial period – for placements made through 2011, surplus lines licensees would submit quarterly reports with the Life and Health Office with basic information about the placement of these risks in the surplus lines market after a diligent search. To the extent the Life and Health Office has questions about the diligent search for a particular placement, the quarterly reports would promptly facilitate further inquiry. The commenter contends that this would enhance the transparency of the surplus lines placement process for these risks to account for the change in Department policy in this area of New Jersey law. The commenter suggested the following language as a further amendment to N.J.A.C. 11:1-34.6(b)3 for the Department's consideration:

“iii. For risk of accidental death in an amount equal to or exceeding \$1,000,000 in face amount only ~~and with a policy period not to exceed 24 months~~, where no reasonable or adequate market exists among admitted insurers; or

iv. For risk of financial loss caused by a contractual requirement to pay an executive or other person essential to the insured's business operation who can no longer perform his or her duties due to death. Such coverage, where no reasonable or adequate market exists among admitted insurers, must be purchased in an amount equal to or exceeding \$1,000,000 in face amount only and with a policy period not to exceed 24 months.

4. Insurance providing coverage on a person that is not a professional athlete, professional musician or entertainer, or executive or other person essential to a business operation, for any of the risks listed in subparagraphs i. – iv. of paragraph 3 above may be placed with an eligible surplus lines insurer after a diligent effort has been made by a licensed New Jersey insurance producer to procure the insurance from authorized or admitted insurers. The New Jersey surplus lines producer that places such insurance shall submit a separate report to the Life and Health Office of the Department of Banking and Insurance of placements made during each calendar quarter, within 15 days after the end of such calendar quarter. Such report shall include a copy of the certification of diligent effort (Form N. SLPS-6-CERT1) and a description of the nature of the risk and the basis for export. This reporting requirement shall apply to placements made through December 31, 2011.”

RESPONSE: N.J.S.A. 17:22-6.43 provides that the Commissioner may declare eligible for export any class or classes of insurance coverage or risk for which, after a hearing, he or she determines that there exists no reasonable or adequate market among authorized carriers in New Jersey. The Department notes that some of the commenter’s suggested amendments were part of written comments that were received as part of the testimony and comments submitted in the course of the 2008 Annual Public Hearing Regarding the Surplus Lines Exportable List. The purpose of the Exportable List hearing is to receive testimony and public comment from interested parties that support the addition or deletion of items on the current Exportable List. After reviewing the relevant information submitted, the Commissioner decides which items, if any, should be added to the Exportable List, based upon a conclusion that there does not exist a reasonable or adequate market among authorized carriers in the State of New Jersey for those

particular lines, risks or classes of insurance, and which items, if any, should be deleted from the list based upon a conclusion that such a market does exist for them in New Jersey. See N.J.A.C. 11:1-34.

Pending the outcome of the hearing and a determination by the Commissioner, the current Exportable List may remain in effect. If the Commissioner determines that any items on the Exportable List should be added or deleted, an amendment to N.J.A.C. 11:1-34.6 will be proposed and published in the New Jersey Register. If an amendment is proposed, it may include more, all, some or none of the classes of insurance set forth on the current list. The Commissioner must be satisfied by the evidence and testimony presented that the best interests of New Jersey's policyholders will be served by the elimination, and/or the addition, of one or more classes or lines of insurance from the current list. The Department accepted some of the commenter's suggestions made in the course of the 2008 Exportable List hearing, which are reflected in this adoption. The Department also notes that the commenter's suggested item 4 addition to the regulation was not part of the commenter's 2008 hearing submission. The Department cannot adopt these amendments as part of this proposal because the process in which items may be added to or deleted from the Exportable List is prescribed by law, as set forth above. Moreover, such changes would constitute a substantive change to this proposal, requiring additional public notice and opportunity for comment. See N.J.A.C. 1:30-6.3

The Department notes that the 2009 Annual Exportable List Hearing was held on January 12, 2010, and the commenter submitted written testimony which included the suggested replacement provision for paragraph (b)4, and some examples of persons who have difficulty obtaining appropriate insurance protection because, the commenter contends, no reasonable or adequate market exist to cover such risks. In accordance with N.J.S.A. 17:22-6.43, the

Department will make a determination based on evidence and testimony presented at the 2009 hearing whether there exists a reasonable adequate market among authorized carriers in New Jersey for such coverages and propose amendments to these rules if necessary.

COMMENT: One commenter noted that in their comment at the 2008 Exportable List hearing they suggested the 24-month policy period limitation be included in subparagraph (b)3iv, regarding risk of financial loss caused by a contractual requirement to pay a person essential to a business who can no longer perform their duties due to death. The commenter noted that the limitation now appears in the rule proposal in subparagraph (b)3iii, which concerns risk of accidental death in an amount equal to or exceeding \$1,000,000 in face amount only. The commenter respectfully requested that the 24-month policy period limitation be moved from subparagraph (b)3iii to subparagraph (b)3iv to more closely reflect the nature of these two risks. The commenter believes such a policy period limitation is more appropriate for a business covering itself against the possibility of having to fulfill a contractual obligation to an essential person in the event of that person's death, as in subparagraph (b)3iv, because such contractual obligations are generally short-term in nature. In contrast, the risk of accidental death, as in subparagraph (b)3iii, is not generally a risk of limited duration. The commenter noted that the policies covering the risks in the rule proposal are short-term in nature, with duration of no more than 60 months.

The commenter stated that as an alternative to moving the 24-month policy period limitation to subparagraph subparagraph (b)3iv, a 60-month policy period limitation would be appropriate for all of these risks. Therefore, the 24-month policy period limitation could be removed and a 60-month policy period limitation could be applied to all risks.

RESPONSE: The Department will consider the commenter's suggested amendment. However, such a revision would be a substantive change that cannot be made upon the adoption of the instant proposal.

The Department also notes that the commenter raised this issue as part of the 2009 Exportable List Hearing. The Department will examine the merits of the commenter's suggested amendments as part of the 2009 Annual Exportable List Hearing process and will make a determination on them consistent with the requirements of N.J.S.A. 17:22-6.43(c) and the procedure set forth in N.J.A.C.11:1-34.

Federal Standards Statement

A Federal standards analysis is not required because although this coverage is subject to Federal requirements and standards at 7 U.S.C. § 1523(b), the U.S. Department of Agriculture Risk Management Agency has listed New Jersey as a state that can provide Livestock Gross Margin Policies for Dairy Cattle. The Department's adopted amendments place this coverage on the exportable list thereby making it eligible to be exported. There are no Federal standards or requirements applicable to Special Risk Disability and Personal Accident Coverage.

Full text of the adoption follows:

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