

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

OFFICE OF SOLVENCY REGULATION

Exportable List

Proposed Amendment: N.J.A.C. 11:1-34.6

Authorized By: Thomas B. Considine, Commissioner, Department of Banking and
Insurance.

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

Calendar Reference: See Summary below for explanation of exception to the calendar
requirement.

Proposed Number: PRN 2011-183.

Submit comments by November 5, 2011 to:

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The agency proposal follows:

Summary

N.J.S.A. 17:22-6.43 provides that the Commissioner of the Department of Banking and Insurance (Department) may declare eligible for export certain lines or classes of insurance for which, after a hearing, he or she determines that there exists no reasonable or adequate market among authorized carriers in this State. This list of lines or classes of insurance is known as the exportable list. Pursuant to N.J.S.A. 17:22-6.43(c), the Department annually holds a hearing on the list.

Among other things, admitted or authorized insurers that choose to write commercial coverages included on the list are exempt from the rate and form filing requirements of N.J.S.A. 17:29AA-1 et seq., and insurance producers are relieved of the requirement imposed by N.J.A.C. 11:1-33.3 to obtain three declinations in cases where no reasonable or adequate market among authorized insurers exists. On January 31, 2011, the Department held the annual Exportable List hearing for 2010. At that hearing, no testimony was provided as to why items on the exportable list should be added or deleted. The proposed amendments are a result of testimony received during the hearing for 2009 held on January 12, 2010. The Department's 2009 Hearing Officer's Report was approved by the Commissioner and issued on December 3, 2010 (see Order No. A10-121 and Hearing Officer's Report). Several amendments were made to the Exportable List based on testimony received at the 2009 Exportable List Public Hearing. The Department received additional testimony and comments seeking further amendments and clarification regarding ambulatory surgery centers and "Special Risk Disability and Personal Accident Coverage." As a result, the proposed amendments address the comments and concerns raised during this hearing and addressed in the Hearing Officer's Report for the 2009 Hearing.

N.J.A.C. 11:1-34.6(a)22ii(2)(I) is being added to reflect and clarify the Department's policy that ambulatory surgery centers are included as an exception on this list.

N.J.A.C. 11:1-34.6(b) is being amended to respond to concerns raised by commenters at the Department's Exportable List hearing seeking clarification regarding Special Risk Disability and Personal Accident Coverage that is eligible for export.

N.J.A.C. 11:1-34.6(b)3iii is being amended to delete the phrase "and with a policy period not to exceed 24 months," while N.J.A.C. 11:1-34.6(b)3iv is being amended to include that phrase. The amendments reflect the Department's conclusion, based upon information adduced at the 2009 Exportable List hearing, that the 24-month limitation is more applicable to coverage with respect to a contractual obligation as referenced in subparagraph (b)3iv, which are generally short-term in nature, than it is to the accidental death coverage referenced in subparagraph (b)3iii, which generally is not of a limited duration. A new paragraph (b)4 is being added to provide that insurance coverage on a person that is not a professional athlete, professional musician or entertainer, or executive or other person essential to a business operation, may be placed with an eligible surplus lines insurer after a diligent effort has been made by a licensed New Jersey insurance producer.

Additionally, the Department is proposing to amend N.J.A.C. 11:1-34.6(d) to reflect that the list of Unauthorized Insurers that Qualify as Eligible Surplus Lines Insurers in New Jersey will be updated on the Department's website, instead of published annually in the New Jersey Register.

A 60-day comment period is provided for this notice of proposal and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the proposal is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

As a result of clarifying Special Risk Disability and Personal Accident Coverage for professional athletes, professional musicians, entertainers and essential executives on the exportable list, insurance producers are able to go directly to unauthorized insurers that qualify as eligible surplus lines insurers in New Jersey to place these coverages. The proposed amendments are beneficial to those who seek such coverage but are unable to obtain it due to an inadequate market among authorized carriers in this State. Because the proposed amendments will open the surplus lines market to such prospective insureds, their ability to procure the coverage they need will increase, which will favorably impact their ability to conduct business in this State.

Economic Impact

The proposed amendments should not require insurers or surplus lines producers to add additional staff. In addition, those risks that cannot obtain individual disability coverage in the admitted market may be able to obtain coverage through a surplus lines insurer. By procuring such coverage in the surplus lines market, such risks will be able to avoid the adverse economic affects that would result were they to be rendered disabled without coverage. The Department believes that the proposed amendments should help insureds avoid gaps in coverage and the disruption in their businesses and professional activity that can result from such gaps. Thus the benefits of the proposed amendments are substantial while their costs to New Jersey insurers and insureds are negligible or non-existent, since the coverage in question is not currently available. The amendment to N.J.A.C. 11:1-34.6(a)22ii explicitly referencing surgery centers professional liability insurance will have no impact, as the additional text merely makes explicit what has previously been the Department's interpretation of the current rule text.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendments relate to the business of insurance and are not subject to any Federal requirements and standards.

Jobs Impact

The Department does not believe that the proposed amendments will cause any jobs to be generated or lost. However, to the extent that the rules in this subchapter help promote a healthy insurance marketplace in New Jersey, the climate for business and job growth is improved.

The Department invites interested parties to submit any data or studies concerning the job impact of the proposed amendment together with their written comments on other aspects of the proposal.

Agriculture Industry Impact

The Department does not expect any agriculture industry impact from the proposed amendments.

Regulatory Flexibility Analysis

Currently, all surplus lines insurers are non-domestic companies; therefore, none of these insurers are “small businesses” as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

The Department’s proposed amendment at N.J.A.C. 11:1-34.6(b)4 does require surplus lines producers to provide the Department with quarterly reports through December 31, 2012, in instances where coverage is placed with an eligible surplus lines insurer after a diligent effort has been made to procure the insurance from authorized or admitted insurers pursuant to the requirements of N.J.A.C. 11:1-34.6(b). The report shall include a copy of the certification of a

diligent effort and a description of the nature of the risk and the basis for its export. The Department does not believe that any professional services will be needed in order to comply with the proposed amendments.

The Department notes that N.J.S.A. 17:22-6.40 et seq. does not provide exemptions or different compliance requirements based on a surplus lines agent's or insurance producer's business size. In order to ensure that New Jersey insureds on surplus lines policies receive the protections afforded to them by that law, the proposed amendments provide no differentiation in compliance requirements based on business size.

Smart Growth Impact

The proposed amendments will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact Analysis

The proposed amendments will not have an impact on housing affordability because the proposed amendments relate to surplus lines insurance.

Smart Growth Development Impact Analysis

The Department believes that there is an extreme unlikelihood that these amendments would evoke a change in housing production in Planning Areas 1 and 2 or with the designated centers under the State Development and Redevelopment Plan in New Jersey because the proposed amendments address surplus lines insurance.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

11:1-34.6 Exportable list

(a) The exportable list is as follows:

1. – 21. (No change.)

22. Professional Liability insurance as follows:

i. (No change.)

ii. Professional Liability except:

(1) (No change.)

(2) Medical malpractice liability

(A) – (H) (No change.)

(I) Surgery Centers Professional Liability;

23. – 34. (No change.)

(b) With the exception of Special Risk Disability and Personal Accident Coverage as set forth in (b)3 **and 4** below, the following kinds of insurance, if sold by eligible surplus lines insurers, are specifically not eligible for export, since the Department has determined that they are procurable from authorized or admitted insurers after a diligent effort:

1. – 2. (No change.)

3. “Special Risk Disability and Personal Accident Coverage” means insurance providing coverage on a professional athlete, a professional musician or entertainer, or an executive essential to the insured’s business operations obtained by a policyholder who procures insurance:

i. - ii. (No change.)

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 operations 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 (b)3i through iv 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 placed 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 No. SLPS-6CERT) and a description of the nature of the risk and the basis of export. This reporting requirement shall apply to placements made through December 31, 2012.

(c) (No change.)

(d) The Department shall [annually] publish **and update** [a notice in the New Jersey Register, which lists] **on its website a list of** Unauthorized Insurers that qualify as Eligible Surplus Lines Insurers in New Jersey.