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MEMORANDUM 2011-4E

TO: All insurers eligible to write nonadmitted insurance in Hawaii, all licensed surplus lines brokers, and all insureds independently procuring nonadmitted insurance

FROM: Insurance Commissioner Gordon I. Ito

DATE: October 18, 2011

RE: Implementation of federal Nonadmitted and Reinsurance Reform Act in Hawaii

The purpose of this memorandum is to outline nationwide regulatory changes that will affect the placement of nonadmitted insurance in Hawaii. The Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA"), 15 U.S.C. § 8201 *et seq.*, provides that only an insured's "Home State" may require the payment of premium tax for nonadmitted insurance. 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 such insured. 15 U.S.C. § 8202(a), (b). "Nonadmitted insurance," as defined in 15 U.S.C. § 8206(9), applies only to property and casualty insurance (excluding workers' compensation).

The NRRA became effective on July 21, 2011. Hawaii adopted legislation, Act 68, Session Laws of Hawaii 2011 ("Act 68") in conformance with the NRRA and to implement the provisions of the federal act. The full text of Hawaii's legislation can be found at: http://www.capitol.hawaii.gov/session2011/bills/GM1171_.PDF. For nonadmitted insurance business placed on or after July 21, 2011, the following information is provided for the benefit of insurers, producers, and insureds:

**What is the scope of the NRRA?**

The NRRA states that "the placement of nonadmitted insurance is subject to the statutory and regulatory requirements solely of the insured's home state" and 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." 15 U.S.C. § 8202. 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 offered by insurers licensed or authorized in this state.

**What is the insured's Home State for purposes of a particular placement?**

Hawaii 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. If Hawaii is considered the insured's Home State, only Hawaii's requirements regarding the placement of such business will apply. If 100% of the insured risk is located outside of Hawaii, then the insured's Home State 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 affiliate group are named insureds on a single nonadmitted insurance placement, Hawaii will be considered the Home State for that placement if Hawaii is the Home State of the member of the affiliated group that has the largest percentage of premium attributed to it under such insurance contract.

**How will these laws be applied?**

New and renewal policies with an effective date prior to July 21, 2011 will be subject to the laws and rules of Hawaii and other jurisdictions, as applicable, as of the policy effective date. The laws and regulations of Hawaii and other jurisdictions, as applicable, as of the effective date of such a 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 Hawaii if Hawaii is the Home State of the insured.

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

As of July 21, 2011, the NRRA permits only the insured's Home State to require the payment of premium tax for nonadmitted insurance. Until July 20, 2011, the pre-NRRA laws and regulations of Hawaii and other jurisdictions, as applicable, will apply to premium tax due on multi-state placements.

It is the intent of the Department to issue additional bulletins as more information becomes available. Until additional bulletins are issued, the Hawaii tax rate should be applied to new and renewal policies with an effective date on or after July 21, 2011, when Hawaii is the insured's Home State. The tax rate of each state affected by multi-state policies shall be applied to the premium apportioned to each state to determine the aggregate tax on the policy.

Tax reports and payments shall follow this schedule:

- For calendar quarters ending September 30, the filing and payment due date shall be on or before November 15, and
- For calendar quarters ending December 31, the filing and payment due date shall be on or before February 15, and
- For calendar quarters ending March 31, the filing and payment due date shall be on or before May 15, and
- For calendar quarters ending June 30, the filing and payment due date shall be on or before August 15.

**What are the license requirements for brokers?**

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 a particular placement. If Hawaii is the insured's Home State, the surplus lines broker must be licensed in Hawaii. The NRRA provides that Hawaii may not collect licensing fees for surplus lines brokers as of July 21, 2012, unless Hawaii participates in the NAIC's national insurance producer database or any other equivalent uniform national database. 15 U.S.C. § 8203. Hawaii participates in the National Insurance Producer Registry (NIPR), which provides such a database.

**What are the requirements for a diligent search and when is a diligent search not required?**

A diligent search is required prior to placement of surplus lines insurance. The requirements are explained in Haw. Rev. Stat. § 431:8-301.

On or after July 21, 2011, a surplus lines broker 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 broker has disclosed to the exempt commercial purchaser that insurance may or may not be available from the admitted market that may provide

greater protection with more regulatory oversight; and 2) the exempt commercial purchaser has subsequently requested in writing for the broker to procure or place such insurance from a nonadmitted insurer. "Exempt commercial purchaser" is defined in Act 68 and the definition is consistent with the NRRA.

**What are the eligibility requirements for nonadmitted insurers?**

The NRRA restricts the eligibility requirements a state may impose on nonadmitted insurers. *See* 15 U.S.C. § 8204. For nonadmitted insurers domiciled in a U.S. jurisdiction, a broker is permitted to place nonadmitted insurance with such insurers provided they are authorized to write such business in their state of domicile and maintain minimum capital and surplus of $15 million.

For nonadmitted insurers domiciled outside the U.S., a broker may place business with such insurers provided the insurer is listed on the Quarterly Listing of Alien Insurers maintained by the International Insurers Department of the NAIC.

**What are the key definitions from the NRRA?**

The NRRA includes several definitions relevant to Hawaii implementation of its requirements. Act 68 adopts definitions that are consistent with the NRRA. Key definitions include the following:

- **"Exempt commercial purchaser"**: 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. 15 U.S.C. § 8206(5).

- **"Home State"**:

(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. 15 U.S.C. § 8206(6).

- **"Independently procured insurance"**: The term ''independently procured insurance'' means insurance procured directly by an insured from a nonadmitted insurer. 15 U.S.C. § 8206(7).

- **"Nonadmitted insurance"**: 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. 15 U.S.C. § 8206(9).

- **"Nonadmitted insurer"**: 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)). 15 U.S.C. § 8206(11).

- **"Premium tax"**: 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. 15 U.S.C. § 8206(12).

- **"Qualified risk manager"**: 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. 15 U.S.C. § 8206(13).

- "**Surplus lines broker**": 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. 15 U.S.C. § 8206(15).

- "**State**": 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. 15 U.S.C. § 8206(16).