

To: Risk Retention (C) Working Group

From: NAIC Legal Division

Date: November 22, 2011

Re: RRGs & Superfund Amendments Reauthorization Act of 1986

The Part A Standards of the NAIC Financial Regulation Standards and Accreditation Program became effective for captive risk retention groups ("RRGs") on January 1, 2011, and included a requirement that the NAIC Business Transacted with Producer Controlled Property/Casualty Insurers Act (Model #325) should apply to RRGs as defined under the Risk Retention Act, 15 U.S.C. Section 3901, *et seq.* However, it was subsequently discovered that Section 2.E(1) of the Model specifically exempts RRGs from the definition of "licensed insurer." It was decided to delay the effective date of this accreditation standard for further consideration.

At the recently completed Fall National Meeting, it was also noted that Section 2.E(1) of Model #325 further provides that RRGs as defined in the Superfund Amendments Reauthorization Act of 1986 ("SARA") are not considered to be "licensed insurers" under Model #325. The question has been raised as to why Model #325 specifically excludes these types of RRGs. The NAIC Proceedings surrounding the adoption of Model #325 do not address why this particular language was chosen. However, SARA Section 401(3), 42 U.S.C. Section 9671(3) (copy attached) does contain a definition of risk retention groups as any RRG "whose primary activity consists of assuming and spreading all, or any portion, of the pollution liability of its group members", while SARA Section 403, 42 U.S.C. Section 9673 (copy attached) provides an exemption from state law for these type of RRGs. The following analysis may provide some insights into this issue:

Superfund Amendments Reauthorization Act of 1986

In 1981, Congress passed the Product Risk Retention Liability Act, which was amended in 1986 as the Liability Risk Retention Act ("LRRRA"), 15 U.S.C. Section 3901, *et seq.* The LRRRA authorizes the creation of risk retention groups to increase the availability and affordability of commercial liability insurance. In 1986, Congress also passed SARA, in which Congress directed the Environmental Protection Agency ("EPA") to adopt regulations requiring owners or operators of petroleum underground storage tanks ("USTs") to maintain financial responsibility for bodily injury and property damage caused by accidental releases from operating a UST. Owners and operators of USTs must demonstrate that they have an EPA-approved source of funds to pay clean-up costs and to compensate third parties for petroleum leaks.

Owners and operators of USTs can meet these financial responsibility requirements through a variety of methods under SARA: insurance, guarantee, surety bond, letter of credit, qualification as a self-insurer, or participation in an EPA approved state financial responsibility program. 40 CFR Section 280.97(a) (copy attached) specifically provides that an owner or operator may satisfy the financial responsibility requirements by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group.

It appears likely that the drafters of Model #325 may have considered SARA-RRGs and LRRRA-RRGs to be two different types of entities, thus causing the distinction in the model. No opinion is given as to whether this language and distinction are still currently relevant under either SARA or the LRRRA.

Attachments