THE COUNCIL
The Council of Insurance Agents & Brokers

WSIA WHOLESALE & SPECIALTY INSURANCE ASSOCIATION

July 12, 2023

VIA ELECTRONIC MAIL

Mr. Scott J. Kipper
Insurance Commissioner
Nevada Division of Insurance
1830 College Parkway
Suite 100
Carson City, NV 89706

RE: Request To Clarify That AB398 Does Not Apply to Non-Admitted Insurance Procured By or For Nevada Insureds

Dear Commissioner Kipper:

The Council of Insurance Agents and Brokers ("The Council") and the Wholesale & Specialty Insurance Association ("WSIA") write to request that the Nevada Division of Insurance issue guidance clarifying that AB398 – an act which bars an "insurer" from issuing or renewing a policy of "liability insurance" that limits the availability of coverage for defense costs or that reduces the policy liability limits by such costs – does not apply to "non-admitted insurance" policies or to the non-admitted carriers which are not authorized to do business in the State of Nevada and that issue such policies. We are making this request because questions about the application of the law to non-admitted insurance have been raised and are starting to cause havoc in the marketplace. The Division's clarification that the law does not on its own terms – and, for the reasons outlined below – cannot be applied to non-admitted insurance is critically needed to quell these concerns.

Non-Admitted Insurance

The non-admitted market serves as a safety net to the standard, or admitted, insurance market when the admitted market is unable or unwilling to insure risks. Non-admitted carriers therefore require the freedom of rate and form to ensure the risk can be individually underwritten and tailored to the customer's need. By stepping in to provide coverage, non-admitted surplus lines insurers allow consumers and businesses to avoid self-insuring against their risk or going without the necessary financial protection. The non-admitted market plays a significant role in underwriting new business ventures, innovative products and technology, and niche or catastrophic risks. Interpreting AB398 as applying to non-admitted carriers would insert massive instability and uncertainty in the market, as many carriers are already considering not offering coverage to Nevada insureds given the potential for unlimited defense costs that would need to be covered in these policies. Significant components of the market in Nevada are at risk and clarification of this issue is therefore critical.

Non-admitted insurance, including non-admitted surplus lines policies, is universally recognized as an important component of the commercial property and casualty insurance marketplace in all States. Nevada relies on the stability and accessibility of non-admitted policies to provide both excess and primary coverage for its constituents. In essence, non-admitted insurance policies are:

(1) sold by insurance carriers that are not admitted to do business in a State
(2) to sophisticated commercial policyholders located in that State
(3) for insurance coverages that are not available from insurers admitted to do business in that State.

As a general matter, the State of Nevada – like every other State – has not historically attempted to regulate such "non-admitted insurance" or "non-admitted insurers" in part because, as noted below, any such efforts would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Nevada defines a "non-admitted insurer" to mean "an insurer not authorized to engage in the business of insurance in this State."[1] And "non-admitted insurance" is defined to mean "property and casualty insurance permitted to be placed directly or through a non-admitted insurer with a non-admitted insurer eligible to accept this coverage."[2]

Under this framework – which is materially identical to the framework every other state deploys – it is the broker that procures and places the coverage on behalf of a Nevada policyholder that is regulated and not the non-admitted insurer or the terms or conditions of the non-admitted policies that the non-admitted insurers issue. A broker thus must –

- Not procure non-admitted coverage until it has first determined that comparable coverage is not available in the regulated admitted marketplace in Nevada and it must file a report documenting satisfaction of that "diligent search" requirement.[3]

- Make the determination regarding whether a non-admitted insurer satisfies the State's "eligibility" requirements before procuring coverage from that non-admitted insurer.[4]

- "Conspicuously stamp" on any non-admitted coverage it "procure[s] and deliver[s]" the following statement: "This contract is issued pursuant to Nevada insurance laws by an insurer neither licensed by nor under the supervision of the Division of Insurance of the Department of Business and Industry of the State of Nevada. If the insurer is found insolvent, a claim under this contract is not covered by the Nevada Insurance Guaranty Association Act."[5]

[1] Nev. Rev. Stat. § 685A.038.
[2] *Id*. § 685.37.
[3] *Id*. §§ 685.040 and .050.
[4] *Id*. § 685.070.
[5] *Id*. § 685.090.

- Pay the premium taxes for non-admitted insurance procured for insureds whose "home state" is the State of Nevada. (NRS 685A.180(1))[6]

Federal law also specifically incorporates this framework for the regulation of the non-admitted insurance market[7] and it limits the State's regulatory purview to only allowing the insured's "home state" to regulate the *placement* of such coverage.[8]

AB398 Does Not Apply To Non-Admitted Insurance

As noted at the outset, Assembly Bill 398 ("AB398") bars "insurers" from ***issuing or renewing*** a "policy of liability insurance"[9] that contains a provision that would reduce the policy liability limits by any legal defense related costs or that otherwise would limit the amount of coverage available to cover such costs.

Nevada defines an "insurer" as any "person engaged as principal and as indemnitor, surety or contractor *in the business of entering into contracts of insurance*."[10] As outlined at length above, non-admitted insurers are – by definition – explicitly "not authorized to engage in the business of insurance in this State"[11] and they do not "issue or renew" insurance policies in the State of Nevada.

Non-admitted policies are instead "placed" with non-admitted insurers and the Nevada statute defines such placements as "***exports***," **not** "***issuances***."[12] Through that "export" process, the insured thus goes to the non-admitted carrier either directly or through its insurance broker whose placement activities are fully regulated by the State of Nevada.

AB398 should not be read to expand the State's regulatory reach extraterritorially to the issuance of non-admitted policies beyond its regulatory purview and there is no indication that the Nevada legislature intended to dictate otherwise.

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[6] Nev. Rev. Stat. § 685.180(1). A separate provision requires insureds who procure non-admitted coverage directly without the assistance of a broker to pay the premium taxes associated with that purchase directly. Nev. Rev. Stat. § 685.180(2).
[7] *See* The Non-Admitted and Reinsurance Reform Act, 15 U.S.C. §§ 8201-8206.
[8] *See* 15 U.S.C. § 8202(a).
[9] There is a separate question regarding the scope of the prohibition. "Liability insurance" is a defined term under Nev. Rev. Stat. § 681A.20(b) (.20 generally defines different types of "casualty insurance") and specifically covers "insurance against legal liability for the death, injury or disability of any human being, or for damage to property… ." It appears that any other type of defined coverage (including "property insurance" and other types of "casualty insurance") are not covered by the prohibition. "Vehicle insurance," for example, specifically includes insurance for "legal liability of the insured" to third parties. Nev. Rev. Stat. § 681A.020(1)(a).
[10] Nev. Rev. Stat. § 679A.100 (emphasis added).
[11] *Id.* § 685A.038.
[12] *Id.* § 685A.033 ("'Export' means to place insurance in an unauthorized insurer[.]").

Applying AB398 To Non-Admitted Insurance Would Be Unconstitutional

Even if AB398 could be read to apply to non-admitted insurance policies procured for Nevada insureds, it should not be so construed because that construction would be unconstitutional. It is a fundamental canon of statutory construction that a statute should be interpreted in a manner that does not compromise its constitutionality if at all possible.[13]

The United States Supreme Court has made clear that a State does not have any power to regulate or tax non-admitted insurers or the non-admitted policies that insureds procure from them. In *Allgeyer v. Louisiana*, for example, the Court held that a Louisiana law making it a crime to effect insurance on Louisiana risks with an insurance company not licensed to do business in Louisiana where the insured procured the policy by mail violated the Due Process Clause of the Fourteenth Amendment.[14] Similarly, in *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922), the Court, relying on *Allgeyer*, found that an Arkansas tax on a non-admitted insurer for the premiums paid for a policy on Arkansas risks made with that carrier which was not authorized to do business in Arkansas also violated the due process clause.[15]

And in *State Board of Insurance v. Todd Shipyards*, the Court, relying in part on *Allgeyer* and *St. Louis Cotton Compress Co.*, again ruled that a State's attempt to tax a non-admitted insurer that issued a policy insuring risks in that State violates the Constitution's due process clause when the policy was not procured in that State even though risks insured under that policy were in the State.[16] In so holding, the Court quoted with approval this McCarran-Ferguson Act[17] legislative history:

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co. v. Johnson* (303 U.S. 77), which hold, inter alia, that ***a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or***

[13] *See, e.g., Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 817 (9th Cir. 2016) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 249 (Nev. 2001) ("We decline to assume that the legislature intended a construction of a statute that would compromise its constitutionality.")

[14] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

[15] *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922).

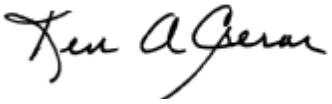
[16] *See State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

[17] 15 U.S.C. §§ 1011-1015.

corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.[18]

For these reasons, The Council and WSIA encourage you to resolve the market confusion and issue guidance clarifying that AB398 does not apply to non-admitted coverage which is procured by or for Nevada insureds through the highly regulated export process. We appreciate your work on this important issue and your consideration of our comments.

Respectfully submitted,



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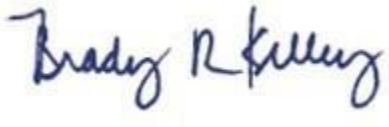

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[18] *Todd Shipyards Corp.*, 370 U.S. at 455-56 (quoting H.R.Rep. No. 143, 79th Cong., 1st Sess., p. 3.).