February 1, 2024

2024-01A
ERISA
29 CFR 2580.412-26

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Dear Mr. Howard:

This is in response to your inquiry on behalf of Lloyd's of London (Lloyd's) regarding the conditions of the exemption in the Department of Labor's (Department) regulations at 29 CFR 2580.412-25 and 412-26 under which Lloyd's underwriters may serve as the surety for purposes of the bonding requirement in section 412 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Section 412(a) of ERISA requires that "[a]ny bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304–9308 of title 31." A list of the companies holding such Certificates of Authority is published annually in the Federal Register, usually in May or June. Changes in the list, occurring between May 1 and April 30, either by addition to or removal from the list of companies, are also published in the Federal Register following each such change.

The Department's implementing regulations at 29 CFR Part 2580 provide a conditional exemption from this requirement for underwriters at Lloyd's. The exemption's conditions include, among other things, a requirement that Lloyd's underwriters "continue to be licensed in a state of the United States to enter into bonding arrangements of the type required by the Act." 29 CFR 2580.412-26(b)(1). In addition, Lloyd's underwriters must file with the Department "copies of each annual statement required to be made to the Commissioner of Insurance of those states in which Underwriters at Lloyd's, London are licensed." 29 CFR 2580.412-26(b)(2).

Lloyd's underwriters are currently licensed in Kentucky, Illinois and the U.S. Virgin Islands (State(s)) to provide insurance. Syndicates comprised of Lloyd's underwriters are also authorized to sell surplus lines insurance and reinsurance in all U.S. states and territories based on registrations with the National Association of Insurance Commissioners (NAIC). Lloyd's underwriters contemplate letting the State insurance licenses lapse and would rely on the NAIC authorization to sell surplus lines insurance as the basis for selling fidelity bonding coverage to ERISA plans and satisfying the condition in 29 CFR 2580.412-26(b)(1) to be licensed in a state of the United States to enter into bonding arrangements of the type required by the Act. Lloyd's intends to file and make available information confirming the NAIC authorization to meet the annual statement filing condition in 29 CFR 2580.412-26(b)(2).

The NAIC through its International Insurers Department (IID) functions on behalf of state departments of insurance by maintaining, monitoring and enforcing qualifying standards for insurers domiciled outside of the U.S., including Lloyd's syndicates, seeking eligibility to write direct surplus lines, such as surety bonds. While the NAIC initially acted "only as a repository for alien insurer financial records, the NAIC has transitioned over the years to its present role as the recognized authority for alien insurers (. . . [which includes] alien domiciled companies and Lloyd's syndicates) seeking approval to write direct surplus lines business in all U.S. states and U.S. territories."[1] Specifically, the NAIC issues the IID Plan of Operation, which "details the standards and processes which insurers must meet to gain and maintain inclusion on the [NAIC] Quarterly Listing of Alien Insurers ([NAIC] Quarterly Listing)."[2] The 2010 Dodd-Frank Wall Street and Consumer Protection Act recognizes the NAIC Quarterly Listing as identifying insurers for which states may not prohibit brokers from placing or procuring non-admitted insurance in the U.S.[3] Once approved, the insurer appears in the NAIC Quarterly Listing along with its "alien identification number."

Thus, to write fidelity bonding coverage as surplus lines business in the United States, Lloyd's syndicates must be listed as eligible surplus lines insurers on the NAIC Quarterly Listing. To appear on the NAIC Quarterly Listing, Lloyd's files with the NAIC aggregate market-level information (described in detail below), and syndicates wishing to be included on the list will pay a fee and complete an application with the NAIC IID that includes comprehensive syndicate-level documentation, including financial statements or projections, business plans, and details of U.S. trust accounts. In lieu of the shareholder's equity requirement applicable to other alien insurers, Lloyd's maintains a U.S. trust fund deposit of $100 million aggregate at market-level which is available for the benefit of the Lloyd's U.S. surplus lines policyholders. In order to remain on the Quarterly Listing, Lloyd's syndicates must file information including statements of actuarial opinion, net world-wide reserves, gross surplus lines trust fund reserves, the syndicates' annual reports and accounts (which include auditor's reports), any changes in the managing agent's holding company structure, appointments to and resignations from senior positions, and material changes to information previously filed.

You represent that as part of the IID process, Lloyd's files with the NAIC on an annual basis Lloyd's aggregate market-level information including the Lloyd's market's annual financial report and copies of financial filings made with its domiciliary regulator, the UK Prudential Regulatory Authority (PRA),[4] including (1) a Solvency and Financial Condition Report with an Auditor's Report and a regulatory compliance certification from Lloyd's governing body, the Council of Lloyd's, (2) a certificate signed by the Chairman of Lloyd's and the PRA which certifies that in respect of the prior year Lloyd's has submitted to the PRA a report on its

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[1] NAIC International Insurers Department Plan of Operation as Approved by NAIC Executive/ Plenary on 12/16/2022. Available at https://content.naic.org/sites/default/files/inline-files/IID%202022%20Plan%20of%20Operation.pdf. The NAIC has a history of supporting state insurance departments' regulatory efforts regarding insurers domiciled outside of the United States (alien) participating in the U.S. non-admitted market. *See id.*

[2] The Plan of Operation includes "a description of the roles NAIC staff and selected state regulators perform in the oversight of alien insurers writing surplus lines business in the U.S." *Id.*

[3] *See* Section 524(2) of the Nonadmitted and Reinsurance Reform Act of 2010, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (July 21, 2010).

[4] The Prudential Regulation Authority (PRA) is a part of the Bank of England and is responsible for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms. It sets standards and supervises financial institutions at the level of the individual firm, and has two statutory objectives: to promote the safety and soundness of these firms and, specifically for insurers, to contribute to the securing of an appropriate degree of protection for policyholders. For information about the PRA, see https://www.bankofengland.co.uk/prudential-regulation.

financial situation and solvency, (3) a year-end statement by Lloyd's Chief Actuary, and (4) year-end surplus lines trust fund valuations, including the $100 million market-level surplus lines trust fund deposit. You represent that the annual statements Lloyd's files with the States in which its underwriters are currently licensed, and provides to the Department under 29 CFR 2580.412-26(b)(2), are also comprised of aggregate information about the syndicates writing insurance on an admitted basis in those States. Under Lloyd's capital structure, known as the Lloyd's Chain of Security, in the event that the member or members supporting a syndicate become insolvent, in addition to syndicate-level assets and members' capital, withdrawals from Lloyd's Central Fund can be made subject to a governance process and approval by the Council of Lloyd's to ensure the claim is valid. Lloyd's Central Fund thus stands behind all policies written by Lloyd's syndicates and provides an additional layer of financial support to ensure valid claims are paid.

When the NAIC IID determines an insurer is not in compliance with the Plan of Operation or the trust fund and/or poses solvency concerns, the NAIC IID may present the insurer to its Internal Review Committee to determine a de-listing recommendation. Upon determination of non-compliance and/or solvency concerns by the Surplus Lines Working Group, the insurer will be de-listed and notified via letter.

Based on the above, it appears the NAIC IID acts on behalf of the state departments of insurance to, in effect, license Lloyd's underwriters to "enter into bonding arrangements of the type required by the Act." Accordingly, the Department will treat the NAIC authorization as satisfying the condition in 29 CFR 2580.412-26(b)(1) that Lloyd's underwriters "be licensed in a state of the United States to enter into bonding arrangements of the type required by the Act." Similarly, the Lloyd's annual market-level filings that are required to enter and remain on the NAIC IID Quarterly Listing provide transparency and disclosure functions like the filing of annual statements with the state departments of insurance. In the Department's view, submitting to the Department the website address through which the NAIC Quarterly Listing is available to confirm the Lloyd's underwriters NAIC IID-approved status and a copy of the annual Lloyd's market-level filings with the NAIC will satisfy the regulatory condition in 29 CFR 2580.412-26(b)(2) that the Lloyd's underwriters file with the Department "copies of each annual statement required to be made to the Commissioner of Insurance of those states in which Underwriters at Lloyds, London are licensed."

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates solely to the application of Title I of ERISA and is not determinative of any particular treatment under any other federal or state law.

Sincerely,

Eric Berger
Chief, Division of Coverage Reporting & Disclosure
Office of Regulations and Interpretations