



# STRUCTURING MULTINATIONAL INSURANCE PROGRAMMES

CHALLENGES AND SOLUTIONS FOR  
INTERNATIONAL COMPANIES WITH  
US EXPOSURES

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# FOCUS ON US EXPOSURES

As the world's largest economy, the United States is a market in which many multinational companies in regions such as Europe, Asia and Latin America frequently find themselves doing business. The current negotiations to develop a Trans-Pacific Partnership Agreement and the Transatlantic Trade and Investment Partnership are only likely to reinforce this pattern, despite the rapid growth of so-called 'south-south' trade between emerging economies.

Doing business in the US requires that multinationals appropriately structure their insurance programmes to cover US exposures and meet their business needs. However, there is often a perception outside the US that compliance issues associated with multinational insurance programmes are more cut and dried than they really are. The thinking often goes like this: the US is a 'non-admitted not prohibited country'. Therefore, a single policy, whether primary insurance or excess insurance, may be issued by an insurer not authorized or qualified in the US to an overseas parent corporation, which can effectively insure the parent's US risks – be it general property and casualty risks or specialty classes such as directors and officers liability, professional liability, environmental liability or travel and personal accident risks of the employees of

their US affiliates. The insurer can then directly pay claims and remit applicable premium taxes in the US and no further action is needed.

The reality, however, is quite different. This report seeks to debunk the myths and make some suggestions as to how multinationals based outside the US can best approach insuring their US exposures as part of a compliant multinational insurance programme.

Our report is consistent with other ACE reports on multinational issues. It is also consistent with ACE's view that approaching multinational insurance programmes purely through the lens of whether an insurer is 'admitted' or 'non-admitted' may miss the lion's share of the analysis needed to design and execute compliant multinational programmes

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that perform as intended.<sup>1</sup> That is because local regulations frequently address the *exporting* of risk at least as much as who is permitted to *transact* insurance. In fact, most countries allow non-admitted insurance and, in this respect, the US is no different. However, most jurisdictions set out conditions regarding the process by which risk can be *exported* to an unlicensed insurer, and the US is no different in this respect either.

This report examines how the US permits non-admitted insurance by regulating the local broker or the local insured (while reserving its right to regulate the non-admitted insurer when the insurer transacts, or is alleged to have transacted, insurance business in the US). First, it identifies the means by which risk can be exported from the US. Then it summarizes the role of the insured, insurer and broker in the placement of non-admitted insurance and export of US risk, emphasizing the benefits of implementing local US policies. It identifies contract risks behind compulsory insurance and certificates as well as the challenges faced when adjusting and paying local claims. It also examines various taxes that may be triggered and where the responsibility ultimately falls for calculating, collecting and remitting them. Finally, it concludes with a check-list of questions to consider before a multinational insures US risk.

### The multinational challenge

At the simplest level, the laws of many jurisdictions worldwide specify that a risk can be exported overseas only if there is no local capacity available. Various conditions – some more onerous than others – are then often applied as to which lines

or classes of business can be exported; whether a local broker is required for placement or is expressly prohibited from the process; whether the insured has to make representations about local capacity or local terms and conditions and what those are; and whether, and by whom, premium taxes are to be remitted in respect of the risk. Therefore, even though multinational programmes are frequently negotiated and placed centrally – with the cost of the insurance shared or allocated to those insured in various jurisdictions – a more appropriate analysis when designing one is to look at the export process itself. Any analysis should consider whether the right protocols are followed to export local risk, and not just whether the carrier itself can lawfully insure such risk. In setting out various rules on this subject, US law is not dissimilar to that of many other markets in its approach. Brazil, Canada and, from July 2013, Colombia, are all examples of countries with rules specifically addressing the export of local risk to an unlicensed insurer.<sup>2</sup>

In practice, many insurers and brokers offering multinational programmes tend to take one of three approaches towards multinational insurance:

**Option 1:** Place coverage in an entirely centralized fashion through the purchase of a single policy in the multinational's home country covering the parent, its subsidiaries, joint ventures and its interests anywhere in the world.

**Option 2:** Completely decentralize the insurance programme by purchasing insurance through individual stand-alone policies in each country where there is exposure with appropriate localized coverage grants and limits.

“Any analysis should consider whether the right protocols are followed to export local risk, and not just whether the carrier itself can lawfully insure such risk.”



**Option 3:** Purchase a single global master insurance policy issued to the parent company of the multinational together with local policies for the parent's subsidiaries and joint ventures in each country where there is exposure. The master policy is intended to fill coverage gaps in the local policies and provide consistency to worldwide terms and conditions – also known as Differences in Condition (DIC) or Differences in Limit (DIL) insurance.

In respect of multinationals with risks located in the US, the key question is whether the insurance policy procured by the parent in their overseas jurisdiction may effectively and compliantly pay claims where the risk is located in the US – and whether applicable taxes on the premium are calculated, collected and remitted in compliance with US state and federal law. From a regulatory perspective, the US is not one single market with a homogeneous approach to insurance law. Therefore, taking a formulaic approach is simplistic at best, but may be misleading at worst because it may underestimate the utility and benefits of local US policies to the detriment of the local US broker or the local US insured itself.

## Insurance regulation in the US

### Two levels of regulation

The US has one of the most sophisticated regulatory regimes overseeing the purchase and execution of cross-border insurance. It regulates cross-border insurance on two levels: historically and primarily at the state level and increasingly also in the context of the embryonic development of federal oversight.

### State level

All the 50 states and the District of Columbia regulate the business of insurance within their own jurisdiction. The regulation of insurance transactions in the US has two primary drivers:

- First, the solvency of persons providing insurance and the manner and fairness in how insurers and insurance producers treat consumers of insurance; and
- Second, the generation of revenue for the state through taxes on insurance transactions.

Almost all states expressly permit an unlicensed insurer to insure local risks provided that the unlicensed insurer does not transact insurance business in those states without authorization. The local risk may be exported to the non-admitted market through a special broker (a surplus lines broker), or directly to an unlicensed insurer under either 'direct procurement' rules or where a 'sophisticated' insured is permitted to access the unlicensed insurer without a broker. While great progress has been made to harmonize state regulation of insurance, state insurance laws and regulations and how they are enforced continue to vary, and are subject to change from time to time.

From a multinational perspective, a non-US multinational company should therefore view the 50 states as separate, sovereign and independent of one another when regulating insurance. In order to actively sell insurance in the US, insurance companies generally must be licensed or otherwise authorized to transact insurance business. However, from the perspective of a US subsidiary of a non-



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US multinational purchasing insurance from an unlicensed insurer, the regulation and placement of risks with a non-admitted insurer will be addressed by the export rules. Much of the obligation of facilitating the placement of the insurance and the remittance of taxes and fees therefore almost always falls on the local US broker or the local US insured, rather than the non-admitted insurer itself.

### **Federal level**

At the federal level, the Nonadmitted and Reinsurance Reform Act (NRRA) includes several provisions impacting on the regulation and taxation of non-admitted insurance placements. These are discussed in more detail below and they are, by and large, specifically designed to streamline and coordinate states' taxation of insurance premiums covering US risks insured with an insurance company that is not authorized to conduct business in the state where the risk is located.

### **'Transacting' versus 'Exporting'**

#### **'Transacting' insurance business**

One of the key means of regulating insurance is the requirement that persons transacting the business of insurance in a state obtain a license.<sup>3</sup> California provides one example of what it means to transact insurance business. According to California insurance law, an insurance company that markets, advertises, has an office, uses local agents or collects premium in California, may require a license.<sup>4</sup> Furthermore, in California and in certain other states such as South Carolina and Texas, the mere act of paying a claim in those states is or may be considered to be transacting insurance, which requires the insurance company to be licensed there.<sup>5</sup>



What constitutes an act requiring licensing in a state varies from state to state and is subject to judicial and administrative interpretation and enforcement discretion. Transacting or conducting insurance business without a license and the aiding and abetting of such conduct is subject to strict fines and penalties which, in many states including Florida, may warrant criminal sanctions.<sup>6</sup>

Although a non-US insurer may compliantly insure US risk outside the US, the performance of the insurance contract – payment of covered claims in the US or remittance of appropriate taxes and fees – poses a challenge, not only for the insurer, but potentially for the local US subsidiary or the local US broker. This is because the regulatory analysis potentially shifts from how the insurance was sold to how it may have been ultimately procured by the local US subsidiary and whether rules for exporting such risk have been adhered.

#### **'Exporting' risk**

When certain conditions have been satisfied, a non-admitted insurer may directly insure US risks without complying with state licensing requirements. The most commonly recognized means of doing this is by issuing insurance policies on a surplus lines basis. In addition, a number of states also allow a qualified commercial insured to directly procure insurance for its risks from an insurer not licensed in that state. In both of these circumstances, the burden of compliance with state insurance regulation and taxation almost always falls on the local surplus lines broker or the local insured, and not on the non-admitted insurer.

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## Routes to export

### Surplus lines

US risk may be exported to a non-admitted insurer in most states when (i) the non-admitted insurer is 'qualified' in a state to insure local risk without a license, and (ii) when a special broker, a surplus lines broker, satisfies the state's requirements for exporting the local risk to a non-admitted insurer and collect and remits the applicable premium tax.<sup>7</sup>

The non-admitted insurer may not solicit such insurance because it is the surplus lines broker that has to access the non-admitted market after determining that local insurance is unavailable. There are almost no regulatory approvals or filings required for rates or policy wordings and, typically, a qualified surplus lines broker must actively demonstrate that the insurance cannot be placed in the licensed (or admitted) market.

In some states, however, the insurance regulator maintains an export list of lines or classes of insurance that are generally believed to be unavailable from licensed insurers. These may be placed with a surplus lines insurer without separate evidence that the coverage could not be placed in the admitted market. The general intent is that surplus lines insurers write only business that cannot be placed with a licensed insurer.

Once the surplus lines placement is made in compliance with applicable state law, the non-admitted insurer may directly adjust and pay covered claims in states where the risk is located.

For multinationals outside the US, US risks may be insured with a non-admitted insurer that typically must be qualified in the state where the risk is located. Today, few international insurance groups are both domiciled outside the US and either admitted or qualified to insure US risks. Local policies issued by an admitted insurer may therefore provide the most efficient and effective way for non-US multinationals to insure US risks in such cases.

### Direct procurement

Almost 40 states have direct procurement laws, which permit a resident of a state to purchase insurance for such residents' risks located in that state directly from an insurer not licensed in that state. The principle of direct procurement or independent procurement is based on jurisdictional limitations of states<sup>8</sup> as well as based on express statutory rights.<sup>9</sup> Direct procurement laws are very narrowly tailored. They do not permit the involvement of a local broker in the placement; prohibit the insurer from transacting insurance in the state where the risk is located; and place the responsibility on the local insured to remit the applicable premium taxes.<sup>10</sup>

For US subsidiaries or US locations of a non-US multinational, this rule once again highlights the efficacy of deploying local US policies. To satisfy the direct procurement rules, the local US manager must physically leave the state and procure insurance outside the state. In order to mitigate this inconvenient and cumbersome requirement, a local policy is the optimal solution for direct payment of covered claims and remittance of premium taxes and fees.



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**Industrial insureds and commercial purchaser exemption**

A large number of states also expressly allow large, sophisticated commercial insureds to purchase insurance from unlicensed insurers without satisfying the surplus lines placement requirements.<sup>11</sup> Commercial insureds, however, have to meet certain criteria that demonstrate that they are sophisticated buyers of insurance and don't need the protection of state insurance laws in regulating the assuming insurer. The sophisticated commercial buyer, not the non-admitted insurer, is the person that is regulated under the exemption.

For example, Illinois provides an exemption for sophisticated commercial buyers to purchase insurance from an insurer not licensed or qualified in Illinois. A sophisticated commercial or industrial insured is an insured (a) which procures the insurance of any risk or risks other than life and annuity contracts by use of the services of a full-time employee acting as an insurance manager or buyer or the services of a regularly and continuously retained qualified insurance consultant; (b) whose aggregate annual premiums for insurance on all risks, except for life and accident and health insurance, total at least \$100,000; and (c) which either (i) has at least 25 full-time employees, (ii) has gross assets in excess of \$3,000,000, or (iii) has annual gross revenues in excess of \$5,000,000.<sup>12</sup>

Federal law also provides that surplus lines brokers shall not be required to establish that insurance is not available in the admitted market for insureds meeting the definition of an 'exempt commercial purchaser', provided that certain required disclosures are made by the broker to the insured.<sup>13</sup> An exempt commercial purchaser is an insured that employs or retains a 'qualified risk manager' to negotiate insurance, paid aggregate nationwide property and casualty premiums in excess of \$100,000 in the last year, and meets certain size requirements.<sup>14</sup> Moreover, a state may not prohibit a surplus lines broker from placing non-admitted insurance with, or procuring non-admitted insurance from, a non-admitted insurer domiciled outside the US that is listed on the

Quarterly Listing of Alien Insurers maintained by the International Insurers Department of the National Association of Insurance Commissioners – the US association of state insurance commissioners which recommends regulations to promote uniformity and consistency of state insurance regulation.<sup>15</sup>

For non-US multinationals, their US subsidiaries or US locations must either have a dedicated risk management team or procure insurance from a qualified insurer in order to meet these exemptions. Many US subsidiaries or their overseas insurers may not qualify, necessitating the consideration of local US policies to compliantly insure US risks.

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**Other issues to consider****Compulsory insurance, contractual requirements and certificates**

Businesses with employees in the US are required by law to maintain insurance for certain lines of business from licensed insurers (except in limited cases where they qualify in a state to self-insure). Compulsory insurance includes workers' compensation insurance and, in a few states, medical and disability insurance. If the business owns and operates motor vehicles in the US, it will be required to maintain commercial automobile insurance. These lines and classes of insurance may not be exported. Generally, it will be impermissible to provide direct insurance coverage for these risks other than through admitted insurance and local policies will likely be required.

In addition to regulatory considerations, a multinational will frequently be subject to contractual obligations related to insurance. It is standard business practice in the US to require that tenants, contractors, vendors and other types of business associates maintain appropriate insurance. These requirements often not only address the nature and amount of the insurance, but also require that the insurer be locally licensed and meet specified financial criteria (such as size and financial rating) and may require that the coverage be issued on specified policy forms with appropriate local certificates.

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## Questions to consider for US multinational risks:

The US provides as much clarity and certainty about non-admitted insurance as any country in the world. Taking comfort from this premise, the following is a checklist of questions that should be asked and answered before insuring US risks of a non-US multinational for non-compulsory coverages:

### 1 May one policy issued to the parent outside the US insure all US risks?

Yes. However, although one policy may insure US risks, the non-US insurer may not be able to adjust or pay a claim in the US or remit applicable premium taxes in the US unless it is licensed or qualified in the US.

### 2 Are separate local policies necessary for each state in which US risks are located?

No. Many US insurers have broad licensing authority covering the US. ACE USA, the ACE Group's US retail division, is authorized to write insurance in all 50 states plus Puerto Rico, for example. A single policy, with appropriate state amendatory endorsements, will provide the appropriate insurance coverage needed across the US.

### 3 Could the US view DIC-DIL policies issued outside the US as non-compliant with US insurance laws?

No. However, the US may view DIC-DIL policies issued by non-US insurers to non-US multinationals as non-compliant with applicable state law if (i) the non-US insurer transacts insurance business in the US without a license or (ii) the US risk is non-compliantly exported to the non-US insurer.

### 4 May a non-US multinational purchase a local policy in the US and supplement it with an excess DIC-DIL policy in its jurisdiction?

Yes. If an excess policy is necessary, this is the optimal solution. The US is a very sophisticated market with broad, comprehensive local insurance available for complex risks. In case of uncertainty, an excess DIC-DIL policy, in the local language, may be purchased by the non-US parent in its jurisdiction. However, the requirement of local certificates evidencing valid and collectible insurance may be limited to the local policy only.

### 5 How and to whom may US claims under the excess DIC-DIL policy be paid?

The local US policy will pay covered local claims. Any claims under the excess DIC-DIL policy issued in the parent's jurisdiction outside the US will either be paid to the parent (or paid locally if the insurer is licensed in the state where the risk is located or if the risk fits certain exemptions that permit the unlicensed insurer to directly remit the claim).

### 6 How and to whom may applicable US taxes be paid?

Under US insurance laws, a licensed insurer should remit state premium taxes, fees and assessments on premiums it writes in each state where required by state and US federal law (see the NRRRA). Taxes on premiums paid to a non-admitted insurer are the responsibility of either the surplus lines broker or the insured depending on how local risk is exported to the non-admitted insurer. The IRS generally holds the person making the premium payments liable for the Federal Excise Tax. However, the liability for remitting the tax is joint and several between and among the insured, the policyholder, the insurance company, and any broker involved.

The failure to maintain qualifying coverage could not only result in a breach of contract, but could also prohibit a multinational from doing business with a valuable business associate in the first place.

For compulsory insurance and for certain lines that require mandatory policies, local certificates become a critical element for the multinational's local business activities. An unlicensed insurer, although insuring US risk compliantly, may not always be able to certify that the insurance is valid and collectible locally – once again demonstrating the value and benefits of local policies.

### **Claims adjustment and claims payments**

As discussed previously, an unlicensed insurer – unless it is also qualified as a surplus lines insurer – may not be able to adjust and pay claims directly in the US. In some states, New York for example, the mere payment of claims without authorization is transacting insurance business without a license. The importance of effective claims handling therefore further highlights the value of having local policies. Multinationals based outside the US with US exposures expect seamless servicing of claims for the premium that they pay for a compliant global multinational insurance programme. Locally-admitted policies in the US provide the compliant claims handling and payment required under most state insurance laws.

### **Tax implications**

A US state can tax an insurance transaction in three different ways: (a) through a premium tax imposed on the licensed/admitted insurance company; (b) via a surplus lines tax on the surplus lines broker; or (c) by direct procurement taxes on the insured. The rates for each type of tax may differ and they also vary by state so a complete analysis and understanding of the transaction is recommended. In addition to state premium taxes, fees and assessments, surplus lines taxes and direct procurement taxes, one additional US statutory consideration affecting multinational insurance structure is the federal excise tax on insurance premium. The US government imposes a tax of 4% for non-life direct insurance and 1% for reinsurance premiums paid to non-US insurers. Tax treaties between the US and certain countries may exempt the application of the federal excise tax.<sup>16</sup> The US Internal Revenue Service (IRS) generally holds the person making the premium payments liable for the tax. However, the liability is joint and several between and among the insured, the insurance company and any broker obtaining the insurance.<sup>17</sup>



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### Conclusions

**When developing a multinational insurance programme that has US touch-points, specific attention must be paid to the following:**

**1** Both state and federal laws impose a cost for placing US risks with an insurer that is not licensed in the US.

In order to effectively design a multinational programme insuring US risks, it is necessary to have an awareness and clear understanding of state and federal requirements as well as the regulation of the insurer, broker and insured in transacting insurance as well as exporting risk.

**2** The US cannot be regarded as a single insurance market from a regulatory perspective.

Close attention must be paid to the exact locations of any US risks, because regulations and penalties for non-compliance differ, sometimes considerably, between states.

**3** US federal and state insurance regulations are not designed to directly regulate the foreign unlicensed insurer.

The exception to this is if the unlicensed insurer were to directly solicit, negotiate terms and conditions, collect premium, issue policies, or adjust and pay claims in the US. In such circumstances, the foreign insurer often must be licensed or qualified in the state where the risk is located.

**4** It is vital to consider the specific obligations imposed by states where risk is located on the multinational's local US affiliate and the local US broker.

The obligations depend upon the route by which risk is exported to the unlicensed/non-admitted insurer. The obligations may encompass (i) a diligent search for local capacity by a qualified surplus lines broker and qualification of the

insurer as a non-admitted insurer in the state where risk is located; (ii) physical travel outside the state where the risk is located; or (iii) for qualifying sophisticated buyers of insurance, the ability to procure non-admitted insurance without a broker.

**5** Careful consideration must also be given to state insurance tax laws as well as the federal excise tax.

These laws ultimately govern how US risks may be added compliantly as part of the greater global insurance programme. In reviewing the applicable regulatory framework, it is important to recognize that tax law may not be administered consistently with insurance law and discrepancies between the two may exist. Although these rules may appear cumbersome at first, they are specifically articulated in state regulations as well as in federal law and ultimately hinge on the course of conduct of the insured, the broker and the insurer.

**6** Buyers and brokers of any multinational programme should work with a global insurer and independent financial, legal and tax advisers that maintain a local presence in the major jurisdictions where the multinational enterprise has interests.

An experienced, independent team of accounting, legal, tax and financial specialists, including an insurance broker with international experience, can help structure a comprehensive and global insurance programme that fits the specific needs and goals of a multinational enterprise. Ultimately, giving adequate attention to the requirements of US state and federal laws – and the need for documentation and supporting contractual arrangements – should result in an international insurance programme that addresses the issues in this report and which satisfies the collective objectives of the client, the broker and the insurance carrier.

## Endnotes

1. *Beyond 'admitted' and 'non-admitted': it's time to focus on how risk is 'exported.'* Article published in Strategic Risk at <http://www.strategic-risk.eu/beyond-admitted-and-non-admitted-its-time-to-focus-on-how-risk-is-exported/1400569.article> January 17, 2013.
2. **Canada:** See *Structuring Multinational Insurance Programs: Insights into Cross-Border Insurance Regulations In Canada* at [http://gps.acegroup.com/src/ace\\_focuson\\_canada-final2.pdf](http://gps.acegroup.com/src/ace_focuson_canada-final2.pdf); In **Brazil**, the condition is satisfied when ten refusals of cover can be evidenced. Circular SUSEP No. 392/2009 provides that, for contracts related to risks for which the insured has not been able to obtain coverage in the country, SUSEP may at any time require that the insured and/ or broker submit the following documents: (i) Copy of the consultations made to at least ten insurance companies operating in Brazil in the business at hand; (ii) Copies of documents issued by insurers mentioned in the previous item, with their negative for the insurance coverage, with the justification presented thereby; (iii) A copy of the consultation made to the insurer abroad in the same conditions as those found in the consultation made to local insurers. Therefore, the purchase of insurance abroad will only be compliant with local regulations if the insurance has been sought from at least ten Brazilian insurance companies (or with the existing companies, in the event that less than ten insurers offer this product in the local market) and the risk was declined by all of them. Taxes will be withheld on the remittance of premium abroad. In **Colombia**, Artículo 61 de la Ley 1328 del 15 de julio de 2009) que empezará a regir el 15 de julio de 2013 (English translation) – Except for the provisions of the current paragraph, unlicensed insurance companies can not offer, promote or advertise their services in the Colombian territory or to its residents. Parágrafo 2. Any 'natural' person or legal entity, domiciled in the country, can buy abroad any type of insurance. Subject to the following exclusions: A) insurance related to the social security system such as previsional life or disability, 'vitalicias' rents or workers' compensation insurance; B) compulsory insurance; C) insurance where the 'taker/buyer', the insured or the beneficiary need to demonstrate previous to the acquisition of the insurance that they have a compulsory insurance in force or that they have not any outstanding payments related to social security, and D) insurance contracts where the 'buyer/taker', the insured or the beneficiary is a government entity. However, the Colombian National Government could set guidance via general regulations the events and conditions in which governmental entities could contract insurance with foreign companies.
3. The laws of every state require that a person maintain a certificate of authority in order to engage in the business of insurance and impose consequences for conducting business without a license. For example, California law provides that "[a] person shall not transact any class of insurance business in this state without first being admitted for that class." Subject to certain exceptions, "admission is secured by procuring a certificate of authority." Cal. Ins. Code § 700(a). The establishment of a means by which an insurance company could have its insurance business regulated by the US federal government rather than by individual states has been a topic of consideration in the US for well over a decade. In 2010, the US enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1, *et seq.*, 124 Stat. 1376 (2010), which, among other things, commissioned a study of the costs and benefits of the potential federal regulation of insurance. 31 USC. § 313(p).
4. "Transact" is defined in the California Insurance Code as "(a) Solicitation. (b) Negotiations preliminary to execution. (c) Execution of a contract of insurance. (d) Transaction of matters subsequent to execution of the contract and arising out of it." Cal. Ins. Code § 35. "The unlawful transaction of insurance business ... in willful violation of the requirement for a certificate of authority is a public offense punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in a county jail not exceeding one year, or by fine not exceeding one hundred thousand dollars (\$100,000), or by both that fine and imprisonment, and shall be enjoined by a court of competent jurisdiction on petition of the commissioner." Cal. Ins. Code § 700(b). In addition, Section 1616 of the California Insurance Code imposes restrictions on the right of an unlicensed insurer to defend any suit against it in California. Cal. Ins. Code § 1616.
5. See, S.C. Code Ann. § 38-25-130; Tex. Ins. Code Ann. § 101.051; Cal. Ins. Code § 35(d).
6. The Florida Insurance Code provides:
 

"(1) In addition to any other penalties provided in the insurance code: (a) Any insurance agent licensed in this state who in this state knowingly represents or aids an unauthorized insurer in violation of s. 626.901 commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (b) Any person other than an insurance agent licensed in this state who in this state represents or aids an unauthorized insurer in violation of s. 626.901 commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (c) Any person who commits a subsequent violation of this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
- (2) In addition to the penalties provided for in subsection (1), such violator shall be liable, personally, jointly and severally with any other person or persons liable therefor, for payment of taxes payable on account of such insurance under s. 626.938." Fla. Stat. § 626.902.
7. See, eg, Cal. Ins. Code §1775.5 and §1780.56(b); Fla. Stat. §626.932 and §626.921(f); 215 ILCS §5/445; N.Y. Ins. Laws §2118(d)(1); Tex. Ins. Code §25.004.
8. This exception arises under the US Constitution as recognized in *State Board of Insurance v. Todd Shipyards Corp.*, 370 US 451 (1962). In *Todd Shipyards*, the US Supreme Court held that a tax imposed by the State of Texas on an insured for property insurance placed with a non-admitted insurer covering a risk located in Texas is invalid under the Due Process Clause of the US Constitution where the location of the risk in Texas was the only contact between the non-admitted insurer and the State of Texas. The *Todd Shipyards* Court recited the following important facts in reaching its decision: "The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas. The insured is not a domiciliary of Texas, but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents, but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas."

The applicability and scope of this exception is not certain. It appears to qualify for the direct procurement exception in a state, the insured must not involve a locally licensed agent or broker in the transaction, the non-admitted insurer must not engage in activities related to the making or performance of the policy in the state and the insured must take essentially all acts to obtain the insurance from without the state. However, the exception enunciated in *Todd Shipyards* was based on all of the facts and circumstances of that case, including the nature of the underlying insurance coverage. There can be no certainty that a state's attempt to exert its jurisdiction over a transaction covering local risks but placed and performed entirely outside of the state will be held to be unconstitutional in all cases.

9. See, eg, Cal. Ins. Code §1760(a); Fla. Stat. §626.938; Tex. Ins. Code §101.053(3). Such laws generally require that the insured pay a tax with respect to such coverage. See, eg, Cal. Ins. Code §1760(b); Fla. Stat. §626.938(3); N.Y. Tax Law §1551 and 1554; Tex. Ins. Code §226.053.
10. One of the central requirements of the exemption imposed by many states is that the acquisition of the insurance must occur entirely outside of the state in which the insured or the risk is located. Some states have adopted laws clearly recognizing the right to directly procure insurance from non-admitted insurers and/or providing for the reporting and taxation of those transactions. For example, North Carolina Insurance Code provides: "Any person in this State may directly procure or directly renew insurance with an eligible surplus lines insurer, as defined in G.S. 58-21-10(3), without the involvement of an agent, broker, or surplus lines licensee, on a risk located or to be performed, in whole or in part, in this State." N.C. Gen. Stat. § 58-28-5(b) (notably, such non-admitted insured must be an "eligible surplus lines insurer"). The Kentucky Insurance Code provides: "(1) It shall be unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this state, as set forth in subsection (2) of this section without a certificate of authority from the commissioner; provided, that this subsection shall not apply to: ... (d) Transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid." Ky. Rev. Stat. Ann. § 304.11.030.
11. See, eg, Cal. Ins. Code §1764.1(c)(1); 40 P.S. §991.1610.
12. 215 ILCS §5/121-2.08.
13. 15 USC. § 8205
14. 15 USC. § 8206
15. 15 USC. § 8204.
16. For example, the Convention Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains (Treaty Doc. No. 107-19 (2001)) has such an exemption.
17. I.R.C. § 4374 and § 4372(d). See also IRS Excise Tax – Foreign Insurance Audit Techniques Guide at [http://www.irs.gov/pub/irs-mssp/foreign\\_insurance.pdf](http://www.irs.gov/pub/irs-mssp/foreign_insurance.pdf).

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