

Controlling Information

"When you control the mail you control . . . information."

- Newman

It has been almost twenty years since Seinfeld's mailman Newman uttered that threat and, even with the passage of time and the ensuing digital age, it is

Now that the contractual obligations of ELNY have been transferred to a District of Columbia captive, Guaranty Association Benefits Corporation (GABC), owned by the various state guaranty associations, the NY superintendent as liquidator has successfully washed his hands of further responsibility for payment to

guaranty associations at the expense of those annuitants with slashed benefits. But who will be monitoring GABC's continuing financial viability or excesses? Early indications are that neither the ELNY liquidator nor the ELNY liquidation court will be doing so, distancing themselves even further from the already disenfranchised annuitants.

As I stated, embarrassment over ELNY is an example of an understandable (but not excusable) failure to continue to monitor and report pertinent information. On the other end of the spectrum is the ever-shrinking and untimely availability of pertinent industry information through, among other sources, the statutorily required annual report of the superintendent to the governor and legislature. This annual report has not only been shrunk to a mere fraction of its former self, it is also now published so late in the year that what information is presented is stale upon delivery. DFS excuses some of this reduction by touting interactive links in the report to materials that used to be included in the report. These links, however, are few and far between and mask the significant reduction in published information. Despite the intimation, the DFS annual report does not provide a new delivery system for the full information previously provided – it is unmistakably a pronounced reduction in disclosure and retreat from transparency.

Consider, for instance, DFS's reporting – or absence of reporting - on surplus lines and domestic Free Trade Zone business.

While surplus lines and Free Zone business is a small part of the overall insurance writings in the state, it is a significant market that is extremely important to insurance consumers, particularly commercial insureds. These are also the markets most susceptible to foreign or alien competition and loss of premium to other jurisdictions. One would think that these would be markets that regulators would be interested in helping to promote for the benefit of domestic insureds. Instead, the DFS annual reports no longer include

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still a timeless reminder of the importance of availability and access to information. Even today with seemingly unfettered access to information on just about every imaginable topic through the web, there are those in government who still appear to go out of their way to limit access to important information about their actions and programs. While Newman famously hid bags of mail in his apartment because the mail "never stops. It just keeps coming and coming," the motives for most governmental restriction of access are often less obvious. Sometimes the reasons for limiting access to officially collected information are clear, usually because of actual privacy or security issues, or because disclosure would be an embarrassment on some level. But just as often the reason is elusive and seems to defy common sense.

Two recent examples involving the NY Department of Financial Services, both of which I have commented on in the past, illustrate this dichotomy: the understandable lack of openness with regard to the Executive Life (ELNY) embarrassment, and the baffling lack of disclosure of basic information about the insurance business in, among other places, the superintendent's annual report.

ELNY's annuitants. Additionally, he also seems to have avoided any responsibility for monitoring and reporting on the operations or financial soundness of GABC for the benefit of those annuitants to whom he repeatedly claimed to owe a fiduciary responsibility. Current financial information on GABC is not readily available from the ELNY receiver, the ELNY liquidation court, the NAIC or GABC itself. However, after a pleasant conversation with the Freedom of Information Law officer in the DC Department of Insurance, Securities and Banking (Note Insurance comes first!), I applied for and received the 2013 filed annual statement for GABC in less than 24 hours. After dealing so many times with NY's cumbersome, time insensitive FOIL system, it was a pleasant change of pace working with the DC bureaucrats.

There are few surprises in the report. With \$1 billion in annuity obligations removed from the books, GABC's financials show assets of \$1.571 billion and liabilities of \$1.488 billion, with total capital and surplus of about \$83 million. Because GABC did not start paying out benefits to annuitants until mid-2013, it is far too soon to tell whether the assets will be sufficient to cover the reduced obligations, or whether a sweet deal has been made by the

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information on either market! For those interested, timely, complete information on the NY excess and surplus market can be obtained through the reports and website of the Excess Line Association of NY (ELANY), NY's surplus lines stamping facility. For some inexplicable reason, however, Free Zone business goes totally unreported by DFS.

Through the wonders of FOIL, I have obtained DFS prepared summaries of Free Zone information gleaned from the required filings of individual Free Zone licensees. Unfortunately, the last period available is calendar year 2012, which is the first full year to include the new large commercial insured category added as a result of the Dodd-Frank Non-Admitted and Reinsurance Reform Act. The early returns do not show much support for the new category, with total Class 3 writings

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in 2012 of about \$7 million out of total Free Zone writings of \$2.8 billion. It may take a few more years to fully understand the interest in or value of the new category, and whether restrictive regulations are thwarting an otherwise valuable industry tool (See my discussion of the new Free Zone category in the May 26, 2014 issue of IA, "Extra! Extra! Read it Here First!"). Unfortunately, it does not appear that the data and analysis for this understanding will come willingly from the DFS.

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If it were not for Freedom of Information Laws the secretive conduct of many agencies would be even more impenetrable. Which is why I have a particular soft spot for the web portal SeeThroughNY (www.SeeThroughNY.net) that uses a number of tools including FOIL to collect and make publically available for free data from NY state and local government at all levels from the executive, legislature and judicial branches through counties, cities, towns, villages, school districts and public authorities. The site, which is sponsored by the non-profit Empire Center for Public Policy in Albany, includes easily searchable databases on payrolls, pensions, contracts and expenditures at all levels (Where else could one learn that the superintendent of financial services is far from the highest paid employee of the DFS?).

SeeThroughNY is a truly remarkable site that demonstrates what government could do if it really had an interest in transparency other than as a meaningless political catch phrase. [A]