



STATE OF NEW YORK
INSURANCE DEPARTMENT
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NEW YORK, NEW YORK 10004

Eliot Spitzer Eric R. Dinallo
Governor Acting Superintendent

The Office of General Counsel issued the following opinion on March 12, 2007 representing the position of the New York State Insurance Department.

Re: Clarification Concerning Inspection Fees Charged by Excess Line Insurers

Question Presented:

1. When are inspection fees considered part of the premium, and thus are subject to the excess line premium tax established by N.Y. Ins. Law § 2118(d)(1) (McKinney 2006)?
2. What other fees or charges paid by the insured – such as installment payment charges and reinstatement fees - are considered part of the premium, and thus are subject to the excess line tax?

Conclusion:

1. There is no definitive answer; it depends on who performs the inspection. If the inspection is conducted by the insurer itself or on behalf of an insurer, and the insured pays a fee directly to the insurer or the insurer's inspector for that inspection, then that fee is considered part of the premium, even if such fee is a separate charge from the premium. As such, the fee is subject to the excess line premium tax. On the other hand, if an insurer requires an inspection but does not dictate who performs it, and the insured pays the inspection fee directly to the party who performs the inspection, then that fee is not part of the premium. In that circumstance, the fee is not subject to the excess line premium tax.
2. While there is no bright line definition of all the fees or charges paid by the insured that are considered part of the premium, both an installment payment fee and a reinstatement fee are subject to the excess line tax, because under the broad definition of premium set forth in Insurance Law § 9101(b), the fees constitute "consideration" and "compensation" to the insurer for the insurance contract.

Facts:

The inquirer seeks clarification of a September 25, 2006 opinion that the Department's Office of General Counsel issued to him, which opined that fees charged by an insurer, such as policy fees and inspection fees, are part of the premium, and thus are subject to the excess line premium tax of Insurance Law § 2118(d)(1). Specifically, the inquirer asks which inspection fees are subject to the excess line tax and which are not, since the opinion suggests that other inspection fees are not taxable if they are not charged by the insurer.

Analysis:

Inspection Fees

Insurance Law § 2118(d)(1) applies to the inquiry. It requires that all excess line brokers:

[p]ay to the superintendent a sum equal to three and six-tenths percent of the gross premiums charged the insureds by the insurers for insurance procured by such licensee pursuant to such license, less the amount of such premiums returned to such insureds. Where the insurance covers property or risks located or resident both in and out of this state, the sum payable shall

be computed on that portion of the gross premiums allocated to this state pursuant to subsection (b) of section nine thousand one hundred two of this chapter less the amount of gross premiums allocated to this state and returned to the insured.

Thus, Insurance Law § 2118(d)(1) requires every excess line broker to pay to the Superintendent of Insurance a tax on gross premiums charged insureds.

To determine the amount of gross premiums that are taxable, Insurance Law § 9102(b)(1) provides that the sum is calculated on the portion of the policy premium that is attributable to property or risks located or resident in the state. Insurance Law § 9102(b)(1) reads as follows:

In determining the amount of gross premiums taxable in this state pursuant to paragraph one of subsection (d) of section two thousand one hundred eighteen of this chapter, where a placement of excess line insurance covers property or risks located or resident both in and out of this state, the sum paid to the superintendent shall be computed on that portion of the policy premium that is attributable to property or risks located or resident in this state, as determined by reference to an allocation schedule prescribed by the superintendent in a regulation.

As used in Insurance Law § 9102(b)(1), "premium" is defined to include:

all amounts received as consideration for insurance contracts or reinsurance contracts, other than for annuity contracts, and includes premium deposits, assessments, policy fees, membership fees, and every other compensation for such contract.

Insurance Law § 9101(b).

This Department recently opined that fees that are charged by the insurer, such as policy fees and inspection fees, are considered part of the premium, and thus are subject to the excess line premium tax. Opinion of General Counsel No. 06-09-16 (September 25, 2006).¹ That opinion noted:

Inspections are normally carried out by the insurer itself (via their agents or other employees). Even when the inspection fee is a separate charge, it is still considered consideration for the insurance contract under [Insurance Law §] 9101(b), and is subject to the excess line premium tax.

In the wake of that opinion, the inquirer specifically asks which inspection fees are subject to the excess line tax, and which are not. If the inspection is performed by the insurer itself or on behalf of an insurer, and the insured pays a fee directly to the insurer or the insurer's inspector for that inspection, then that fee is considered part of the premium, even if such fee is a separate charge from the premium. As such, the fee is subject to the excess line premium tax. On the other hand, if an insurer requires an inspection but does not dictate who performs it, and the insured pays the inspection fee directly to the party who performs the inspection, then that fee is not part of the premium. In that circumstance, the fee is not subject to the excess line premium tax.²

Other Fees

The inquirer also asks what other fees or charges paid by the insured – such as installment payment charges and reinstatement fees - are considered part of the premium, and thus are subject to the excess line tax. While there is no bright line definition of all the fees that are considered part of the premium, Circular Letter No. 6 (1967), which remains the Department's position, addressed the issue of whether service charges are taxable premium. That Circular Letter states:

[A]ll additional charges for service, except such as are derived from direct financing of premiums by the company upon a premium finance agreement...made by an insurer to an insured in connection with the voluntary extension of credit to the latter in payment of any insurance premium, is deemed part of the premium collected and, therefore, taxable...

An installment payment fee is a fee that an insured pays to the insurer if payment of the premium is made in installments. See Opinion of the General Counsel 03-04-31 (April 29, 2003).³ A reinstatement fee is a fee associated with the reinstatement of a policy after the cancellation date, or after the time in which an insurer may reject premium payment. *Id.* Both an installment payment fee and a reinstatement fee are subject to the excess line tax, because under the broad definition of premium set forth in Insurance Law § 9101(b), the fees constitute "consideration" or "other compensation" to the insurer for the insurance contract. In short, the Department believes that the entire cost to the policyholder arising out of the issuance and performance of the contract of insurance constitutes the taxable premium. If the insured chooses to pay the premium in installments, the fee for such a privilege is part of the cost of the insurance coverage. Likewise, a reinstatement

fee is incurred because of, among other things, an insured's lateness in paying the premium. Thus, the fee to reinstate a policy is part of the cost for the insurance coverage.

Please note that although this opinion addresses which fees are considered part of the premium for excess line premium tax purposes, this opinion is not limited just to excess line premium tax; it applies to all taxes paid by insurers under Article 91 of the Insurance Law.

For further information you may contact Senior Attorney Elizabeth Barrett at the New York City Office.

1 The opinion is available on the Department's website at <http://www.ins.state.ny.us/ogco2006/rg060916.htm>.

2 If the fee is collected by a broker, or if the inspection is conducted on a broker's behalf, such fee would constitute compensation within Insurance Law § 2119, and would require a service fee agreement in accordance with that section.

3 The opinion is available on the Department's website at <http://www.ins.state.ny.us/ogco2003/rg030431.htm>.