



**COMPLIANCE
ADVISOR**

**New York Excess &
Surplus Lines
Laws and Regulations**
Summary in Brief

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The following is a brief summary of New York excess line laws and regulations that affect both excess line brokers and eligible E&S insurers doing business in New York.

A) EXCESS LINE BROKER FUNDAMENTAL COMPLIANCE REQUIREMENTS

- **EXCESS LINE BROKER LICENSING**

In order for an individual or entity to obtain an excess line broker license in New York pursuant to Insurance Law [§2105](#), they or it must first be licensed as a broker under Insurance Law [§2104](#). The applications may be submitted simultaneously. If a broker operates as a corporation, LLC or partnership, the entity must be licensed with one or more individuals named as “sublicensees” of the entity, maintain the premium trust account in the entity name and receive commissions in the name of the entity. A sublicensee must be a member of the firm who is qualified to obtain a broker license.

Only an excess line broker may procure insurance from an eligible excess line insurer. A licensed New York property-casualty **broker** may obtain such insurance through a licensed excess line wholesale broker. A New York-licensed **agent** who does not have a broker’s license may not procure excess line insurance through an excess line broker.

- **DUE CARE IN SELECTING INSURER**

Insurance Law [§2118\(a\)\(1\)](#) requires excess line brokers to use “due care” when selecting an excess line insurer. [11 CRR-NY 27.13](#) sets forth a list of requirements by which an excess line broker can meet the “due care” standard.¹ Some of those requirements are waived if ELANY performs certain functions on behalf of all excess line licensees.

- **DILIGENT EFFORT/DILIGENT SEARCH**

An excess line broker, or a producing broker that has sought coverage through an excess line broker, must conduct a search of the licensed market to attempt to procure the coverage from a licensed insurer that the broker has reason to believe might consider writing the type of coverage or class of insurance ([§2118\(b\)\(3\)\(A\)](#)).

Three declinations from licensed insurers are required to meet the diligent effort requirement [§2118\(b\)\(4\)](#). There are two types of exemptions noted below that waive the diligent effort in whole or in part, **but they do not waive the affidavit filing requirements**.

- **TYPES OF COVERAGE PERMISSIBLE OR BARRED IN THE NEW YORK MARKET**

Most types of property, casualty and surety coverages can be written as excess and surplus lines subject to performing a diligent search and otherwise complying with the excess line law. Insurance Law [§2105](#) and [11 CRR-NY 27.0](#) authorize excess line brokers to place certain kinds of insurance as defined in Insurance Law [§1113](#). Please see ELANY’s

¹ 11 CRR-NY Part 27 is the formal citation for Insurance Regulation 41

Compliance Advisor titled [Limitations on Which Types of Coverage Can be Placed by Excess Line Licensees](#) for a detailed list of prohibited or restricted classes or types of coverage.

- **EXPORT LIST**

The Superintendent of the New York State Department of Financial Services (DFS) may waive the diligent effort in whole or part, upon notice and a hearing, if the Superintendent determines one or more coverages are generally unavailable from licensed insurers ([§2118\(b\)\(3\)\(E\)](#)). The list of coverages are shown on the export list and are set forth in [11 CRR-NY 27.3\(g\)](#).

- **EXEMPT COMMERCIAL PURCHASERS**

Any insured that meets the definition of an Exempt Commercial Purchaser (ECP) may give written permission to its broker to shop for excess line coverage even when such coverage may be available in the licensed market ([§2118\(b\)\(3\)\(F\)](#)). The diligent effort requirement is inapplicable in such situations. The definition of an ECP is set forth in Insurance Law [§2101\(x\)\(2\)](#) and mirrors the Nonadmitted and Reinsurance Reform Act (NRRA) definition.

- **FILING REQUIREMENTS**

For each procured policy, an excess line broker must file with ELANY:

- 1) a Part A Affidavit;
- 2) a Notice of Excess Line Placement;
- 3) a copy of the declarations page, cover note or confirmation of placement of coverage (or binder if the declaration page or cover note is unavailable) within 45 days of policy inception.

A wholesale excess line broker must also file an affidavit from the producing broker (the Part C Affidavit) if the producing broker obtained any declinations or delivered the Notice of Excess Line Placement to the insured. Subsequent premium-bearing endorsements must also be filed. The filings are submitted to ELANY under [§2118\(b\)\(1\),\(2\),\(3\)](#) and [\(e\)\(2\)\(c\)](#).

It is unlawful for a broker to deliver in New York any declarations page of an insurance policy or cover note unless the insurance document is stamped by ELANY or exempt ([§2118\(b\)\(6\)](#)).

- **NOTICES**

There are two notices for which the excess line broker and/or producing broker are responsible. At the time of placement, a Notice of Excess Line Placement must be sent to the insured, informing the insured that the placement was made with an insurer not licensed by New York State ([§2118\(e\)\(2\)\(C\)](#)). In addition, the following is required to be stamped on each policy document in not less than 10-point bold type.

THE INSURER(S) NAMED HEREIN IS (ARE) NOT LICENSED BY THE STATE OF NEW YORK, NOT SUBJECT TO ITS SUPERVISION, AND IN THE EVENT OF THE INSOLVENCY OF THE INSURER(S), NOT PROTECTED BY THE NEW YORK STATE SECURITY FUNDS. THE POLICY MAY NOT BE SUBJECT TO ALL OF THE REGULATIONS OF THE DEPARTMENT OF FINANCIAL SERVICES PERTAINING TO POLICY FORMS.

The above language must be stamped on every document that evidences coverage for delivery to the insured such as a binder, confirmation of placement of coverage, cover note or declarations page. This language mirrors the language contained in the Notice of Excess Line Placement.

- **TAXES**

An excess line broker must pay a tax of 3.6% on the gross premium minus premiums returned to insureds when New York is the Home State of the insured ([§2118\(d\)\(1\)](#)). It is the legal obligation of the excess line broker to file tax returns and pay taxes. When New York is the Home State on a multistate risk, there is no allocation of premium; the tax is on 100% of the gross premium with no reduction on premium for risk exposures outside of New York. However, when the risk contains exposures outside of the United States, the premium can be allocated as set forth in [11 CRR-NY 27.9](#). New York applies the excess line tax to each member of an Unaffiliated Group such as purchasing group members when the home state of the individual member of the group is New York unless 100% of the premium is paid by the group from its own funds.

Excess line brokers must electronically file a tax statement with DFS on or before March 15 of the following year and pay taxes due at that time ([11 CRR-NY 27.8](#)). ELANY provides summary reports to each excess line licensee and to DFS to facilitate preparation of these tax statements.

- **AUTHORITY TO CHARGEBACK TAXES AND FEES TO INSURED**

New York permits brokers to charge producer service fees to insureds as long as the insured signs a memorandum (also known as a “[Total Cost Form](#)”) consenting to those charges (Insurance Law [§2119](#)). Brokers are also permitted to chargeback excess line taxes, ELANY stamping fees and inspection fees to the insured in the same manner as noted above. DFS has interpreted policy fees payable to the insurer as premium subject to the 3.6% tax. Policy fees are reportable to ELANY in the same manner as endorsements.

Producer service fees are not subject to the tax. Inspection fees are not taxable unless the insurer selects the inspection service and the insured pays the fee directly to the insurer.

- **BINDING AUTHORITIES**

Excess line brokers are permitted to exercise binding authorities delegated by excess line insurers, provided the agreements are in writing, signed by both parties, contain provisions required by statute and are filed by the broker with ELANY (Insurance Law [§2118\(f\)](#)). The DFS interprets this authority as facilitating the transaction of excess line business but not changing the legal duty of loyalty an excess line broker owes to an insured. Therefore, the term “agent” should not be used to describe an excess line broker in such agreements.

- **INDEPENDENT OR DIRECT PROCUREMENT LAW**

Independently procured insurance is defined by the NRRA as insurance procured directly by the insured from a nonadmitted insurer. If a broker is involved in selling, soliciting or negotiating the coverage, it does not constitute an independent or direct procurement. The transaction must take place substantially outside the borders of New York State so that the insurer is not conducting business in New York State for which a license is required.

The insured in a direct procurement is subject to a tax of 3.6% upon the gross premium paid pursuant to [Tax Law Article 33-A](#) and must be reported and paid to the Commissioner of Taxation and Finance within 60 days of the end of the calendar quarter in which the policy became effective.

Certain entities are exempt from the tax. The tax is allocable on international risks in the same manner as excess line premiums are for such risks.

- **NRRA**

While New York adopted both the NRRA definition of “Home State” [§2101\(x\)](#) and “Affiliate” [§2101\(x\)\(1\)\(A\)](#), it expanded the definition of Home State to further explain:

- 1) what constitutes a principal place of business;
- 2) which state is the Home State when the principal place of business is outside the United States; and
- 3) which state is the Home State for a group of insureds who are not affiliated.

B) EXCESS LINE INSURER FUNDAMENTAL COMPLIANCE REQUIREMENTS

- **ELIGIBILITY**

Excess line insurers must meet eligibility standards in order to underwrite risks presented by excess line brokers. These insurers are not licensed by the state because of an exception to the insurer licensing requirements. (Insurance Law [§1101\(b\)\(2\)\(F\)](#)).

Insurers should be aware that the exception applies to transactions placed by New York licensed excess line brokers but does not extend to business conducted directly in New York by the insurer or through parties not licensed as excess line brokers (Insurance Law [§2117](#)). New York has adopted by regulation the eligibility requirements set forth in the NRRA for foreign and alien insurers respectively in 11 CRR-NY 27.13.

Foreign insurers must maintain a minimum of \$47,000,000 (\$48,000,000 as of 1/1/22) of policyholders’ surplus and be licensed in their state of domicile for the lines of business they plan to write as excess line risks in New York. Alien insurers must be published on the NAIC International Insurer Department’s most recent quarterly listing to be eligible.

- **ELANY INSURER LIST**

A voluntary list of excess line insurers is maintained by ELANY, which conducts a thorough financial examination of every foreign insurer listed. The ELANY list is composed of insurers that request to be listed and are approved by ELANY following a thorough analysis of the insurer’s financial security. This list does not reflect all insurers that are legally eligible to write excess line insurance in New York.

- **FREEDOM OF RATE AND FREEDOM OF FORM**

While New York licensed insurers must file rates and file forms with the DFS under [Article 23](#) of the Insurance Law, eligible excess line insurers are not subject to those requirements. As noted below however, the DFS has interpreted certain statutory provisions and regulatory provisions as applying to eligible insurers. With one exception, excess line policies are expressly exempt from [Part 73](#) (Regulation 121) and [Part 71](#) (Regulation 107) of the Insurance Regulations regarding claims made policies and defense within policy limit provision limitations. [11 CRR-NY 27.10](#) expressly provides that excess line group transportation network policies are subject to both regulations.

- **CONSENT TO SERVICE OF PROCESS AND PRE-ANSWER SECURITY**

Insurance Law [§1213](#) deems a number of actions by an unauthorized insurer, including a catch-all “any other transaction of business,” as consent to service of process. Insurance Law [§1213\(c\)\(1\)](#) also provides that an unauthorized insurer shall deposit securities or a bond in any court proceeding prior to filing an answer or other responsive pleading in any proceeding against such insurer. However, Insurance Law [§1213\(e\)](#) exempts excess line transactions from these pre-answer security requirements, provided the policy designates the Superintendent or their successors as agent for service of process.

- **LAWS APPLYING TO CONTRACT INTERPRETATION/CHOICE OF LAW CONFLICTS**

Insurance Law [§3103\(b\)](#) provides that, except for marine insurance, no policy of insurance delivered or issued for delivery in New York upon property that is in the state at the time shall be governed by the laws of any jurisdiction other than New York.

- **CANCELLATION/NONRENEWAL PROVISIONS**

Excess line policies are expressly exempt from the commercial lines cancellation/nonrenewal provisions of Insurance Law [§3426](#). However, Insurance Law [§3425](#), which applies to personal lines cancellations and nonrenewals, has no express exemption and the DFS has opined that it applies to excess line personal lines policies. The DFS has [stated](#) that the five-day notice of cancellation provision in the Standard Fire policy applies to excess line policies.

In addition, the [OGC Opinion of May 5, 2003](#), states that automobile liability policies that satisfy the financial responsibility requirements of the New York Vehicle and Traffic Law cannot be cancelled except in accordance with statutorily mandated procedures. Excess line insurers must comply with the cancellation and nonrenewal provisions of Insurance Law [§3458](#) for group insurance for peer-to-peer car sharing programs, and Insurance Law [§3455](#) for transportation network company group insurance policies.

- **OTHER APPLICABLE STATUTES, REGULATIONS AND EXEMPTIONS**

The DFS has opined that Insurance Law [§3404](#), the New York standard fire policy statute, applies in total to excess line policies and Insurance Law [§3420](#) insurance standard provisions, applies at least partially.

Excess line policies are expressly exempt from Regulation 121 and 107 regarding claims made policies and defense within policy limit offset provisions with the exception of excess line group transportation network policies.

- **DEPOSITS/TRUST FUND REQUIREMENTS**

In response to the passage of the NRRA, New York eliminated the foreign insurer trust fund deposit requirement. However, alien insurers are still required to deposit funds in trust pursuant to the [NAIC International Insurer Department Plan of Operation](#), which protects claimants in the event that a final nonappealable judgment remains unpaid beyond a set time frame.

- **NEWYORK TAX ON ELIGIBLE INSURERS**

In an Advisory Opinion dated June 10, 2016, the New York State Department of Taxation and Finance Office of Counsel concluded that eligible E&S insurers are “unauthorized non-life insurance corporations” and are therefore subject to taxation pursuant to [§1501](#) of the tax law. This opinion is currently the subject of an administrative law proceeding challenging that interpretation.

- **INSURER FILING REQUIREMENTS**

[11 CRR-NY 27.14](#) requires each eligible insurer to file a report electronically by March 15 each year, setting forth the prior calendar year’s premiums, insureds, excess line brokers placing business, addresses and other policy details.

- **NEWYORK OFFICES FOR ELIGIBLE EXCESS LINE INSURERS**

A New York-eligible excess line insurer may operate from the New York offices of an affiliated licensed insurer provided the excess line insurer only entertains risks submitted by excess line brokers and places a specific disclosure on each policy as per Insurance Law [§2117\(i\)](#). The disclosure notice, as prescribed by [11 NY-CRR 27.16](#), must be in no less than 10-point type as follows:

“This insurer is not licensed in the State of New York and is not subject to its supervision.”



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