



***COMPLIANCE  
ADVISOR***

***EXCESS LINE BROKER /  
THE MOST IMPORTANT DOCUMENT***

A PUBLICATION BY

**THE EXCESS LINE ASSOCIATION  
OF NEW YORK**

ONE EXCHANGE PLAZA • 55 BROADWAY

29TH FLOOR

NEW YORK, NEW YORK 10006-3728

TELEPHONE: (646) 292-5500

E-MAIL: [elany@elany.org](mailto:elany@elany.org) • [www.elany.org](http://www.elany.org)

## COMPLIANCE

The acquisition of an excess line license appears to suggest the licensee is capable of meeting the compliance requirements of the law when making excess line placements. Unfortunately, this is not always the case. The Excess Line Association of New York (ELANY) exists to help you meet these legal requirements when accessing the E&S market, but keep in mind **Rule No. 1 – you are the licensee and the legal burden is yours**. ELANY is here to help, but this association cannot comply on your behalf. Therefore, please take the following to heart. Help your staff understand how documents can be returned to you by ELANY, stamped on the first try and avoid committing mistakes which will only slow the process and frustrate you.

Every initial excess line transaction involves the filing of a batch file report, one or two affidavits, a notice of excess line placement and a document evidencing coverage.

Let's focus on the **MOST IMPORTANT DOCUMENT**.

### **DECLARATIONS PAGE, COVER NOTE, BINDER OR CONFIRMATION OF PLACEMENT OF COVERAGE**

The document which evidences coverage is the key document for all interested parties, the insured, the insurer(s), the excess line broker and other producers (where applicable) as well as ELANY.

The law requires the excess line broker to file a copy of the declarations page or cover note within 45 days of the inception of coverage. (If you will not have the final policy within 45 days you can file a copy of a binder or confirmation of placement (discussed below) and then file the copy of the declarations page or cover note subsequently).

Documents other than those described above are not acceptable. ELANY will reject "applications", "quotes", "proposed wordings", "invoices" and other documents because they do not confirm, nor represent on anyone's behalf, that coverage has been bound and is in effect. The use of white out and a pen to add the word binder or confirmation at the top does not change the effect of the document and therefore cannot be processed by ELANY. ELANY has also recently started to receive Reinsurance Cover Notes. Advise your staff that just because it is a Lloyds Cover Note, it does not necessarily mean it is an excess line transaction. ELANY does not process reinsurance transactions since by definition, a transaction can never be both excess line insurance and reinsurance at the same time.

### **(a) EXCESS LINE INSURER IDENTIFICATION**

While this would appear to be an easy piece of information to capture, ELANY's records contradict that thought. Documents are regularly submitted with insurer

names which are so incomplete or inaccurate that the documents cannot be processed. Here are some examples of the problem: Axis, Lexington, Ace Westchester and AIG have all appeared as the excess line insurer on documents. The problem is Axis has licensed insurers, eligible excess line insurers and insurers with no standing to issue policies in New York, so which Axis company is providing this coverage? **The proper legal name of the insurer must be set forth for the insured in order to obtain the ELANY stamp.** While the affidavit contains the specific insurer names, the insurance document nevertheless remains ambiguous and is not corrected by correct information in the affidavit. ELANY can only stamp documents wherein it is certain that the excess line insurer(s) are eligible at the time coverage incepts.

For those excess line brokers which make more complicated placements where both eligible excess line and admitted (licensed) insurers are used, you should know that ELANY is required to verify that the insurers other than the excess line insurer(s) are in fact licensed in New York. When multiple insurers appear on the coverage document ELANY cannot stamp a document which includes ineligible unauthorized insurers because the stamp indicates the transaction complies with the excess line law regarding carrier eligibility.

Also, where multiple carriers are involved, the insuring document must clearly indicate gross premium and also premium by each insurer especially where the coverage is layered. In layered coverage, the premiums are not proportional so the insuring document needs to specify each carrier's proportion of each layer and the premium for the layer or for each insurer.

Finally, remember any placement with Lloyds must show each eligible syndicate by number and the percentage of risk assumed by each syndicate.

### **(b) INSURED'S NAME AND ADDRESS**

Two additional fields of information which are required create occasional problems. The named insured and addresses on all documents (affidavits, notice of excess line placements, etc.) should match.

ELANY requires the mailing address of the insured and the location of risk address in New York if it is different from the mailing address.

If there is no risk/exposure in New York, it is possible that the policy falls under one of the exemptions under Insurance Law §2117. For instance, coverage for real property located entirely in another state does not come within the excess line law even when the policy is delivered to a New York address. (see §2117 on the ELANY website (<http://www.elany.org>)). These exemptions are interpreted narrowly, so if you have any doubt, do not assume one applies.

Also, under Insurance Law §2118 as recently amended, when a multistate risk has been placed, an analysis based on the new law should be made to determine which state's excess or surplus line law applies.

*SECTION 2118(b) states the following:*

*(8) For purposes of this article, unless exempt under the provisions of section two thousand one hundred seventeen of this article, a policy of insurance obtained from an insurer not authorized to transact business in this state must be procured pursuant to an excess line license when the entire property or risk exposure insured or any part thereof, is located in this state and:*

- (A) the insured negotiated to acquire the coverage from within this state;*
- or*
- (B) the policy was delivered to the insured in this state.*

*(9) Nothing in this article shall prohibit an excess line licensee from placing risks under the excess or surplus line law of another state provided that the excess line licensee:*

- (A) is licensed under the applicable state law as an excess or surplus line broker or places such risk through a licensed excess or surplus line broker in such state; and*
- (B) either no portion of the property or risk exposure is in this state, or the insured has property or risk exposure both in this state and in another state where the insured maintains a bona fide office from which it negotiated to acquire the coverage and to which the policy is delivered.*

### **(c) TYPE OR CLASS OF COVERAGE**

Again information which by all appearances should be easy to set forth correctly creates pitfalls.

First, the insuring documents are not always clear as to what type of coverage is being provided. ELANY needs to verify the type of coverage because, first and foremost, not all coverages can be placed nonadmitted. (For example, workers compensation cannot be placed for New Yorkers in the excess line market. If an ELANY examiner sees Employer Liability included in the types of coverage provided, the transaction cannot be processed). ELANY also needs to verify the type of coverage for correct coding purposes.

The types of coverage and the applicable coverage codes are prominently displayed on ELANY's website and are built into fields in ELANY's online affidavit creation system.

As with each of these requirements, brokers need to communicate with their customer service assistants who may not understand different types of coverage and may not possess all the necessary technical insurance knowledge.

#### **(d) TERM OF COVERAGE**

The term of coverage is the inception date to the expiration date. For affidavit purposes which require the number of months of coverage, you must round upward by one month for any number of days which exceed the number of whole months. (ELANY's web-based software calculates this for you).

Excess line policies can be issued for any number of years or periods of time. However, the Excess Line Tax and Stamping Fee are applicable/payable for the entire coverage period for the year in which the policy is first reported. If the policy shows a three year term, you cannot file the affidavit for the first year and treat the next two years as renewals or installments. When a policy document is internally inconsistent regarding the policy term, ELANY cannot process it.

#### **(e) GROSS PREMIUM**

The gross premium must be set forth on the coverage document and not combined with taxes, stamping fees, or other charges. For most policies, this is straightforward where there is one insurer. If the insured has risk exposures or locations in more than one state, the tax allocation formula for the type of coverage provided is applied to the gross premium to calculate net taxable premium.

International risks, layered risks, risks involving multistate risk exposures and multiple insurers are more complicated. On international risks the non U.S. premiums and U.S. premiums need to be set forth separately and they need to equal the total gross premium. The U.S. gross premium can then be allocated for New York's taxable premium.

Similarly, for layered risks and risks involving multiple insurers, the premium for each layer must be stated and the sum must equal the gross premium. Each participating insurer's percentage (and percentage of each layer) along with the applicable proportion of the premium should be set forth. If the document does not make it clear which premium is apportioned to each layer and each insurer, the transaction cannot be processed due to inadequate information.

#### **(f) BOLD DISCLOSURE LEGEND/ORIGINAL DOCUMENT**

The excess line broker is responsible for placing the disclosure legend required by Regulation 41 on each coverage document which you forward to ELANY for stamping.

Now that you submit copies, not original, coverage documents to ELANY, the New York State Insurance Department wants to verify that you have put the bold legend language on the original document.

### (g) AVOID HANDWRITTEN CHANGES TO ORIGINAL COVERAGE DOCUMENTS

ELANY will reject declarations pages and cover notes when they are marked with handwritten changes. It is never clear who made the changes, when the changes were made, and whether or not the changes were made with the permission of the insurer. At best, a sloppy ambiguous trail has been created, at worst, ELANY and all parties to the transaction may be made party to unauthorized changes to the terms of coverage.

### (h) CONFIRMATION OF PLACEMENT OF COVERAGE

At the finger tips of every excess line broker is an easy answer to any documentation problem described above. An excess line broker is allowed to confirm the terms of coverage to an insured consistent with the commitments made to you by the insurers. It differs from a binder in that a binder is used when an insurance producer has authority to commit or bind an insurer to a transaction. An excess line broker with a filed binding authority can issue a binder. For open market placements, the excess line broker can “confirm” the essential terms of the placement to an insured by setting forth in appropriate detail the information referred to above and have ELANY stamp that document for delivery to the insured. Copies of the declarations page or cover note can be submitted subsequently.

Issuing Confirmations of Placement of Coverage is a method by which you, as an excess line broker can control your own fate. You don't have to wait on someone else to send you documents which might have minor deficiencies. Therefore, you can control the timing and the quality of the submission and stamping of these documents.

### (i) ENDORSEMENTS, STAMP ONLYS AND SUSPENSE ITEMS

Copies of all premium bearing endorsements must be submitted to ELANY for stamping in order to track changes to the premium upon which you must pay excess line taxes. Other types of endorsements need not be stamped. Endorsements are submitted with a batch file report identifying the affidavit number, policy number and positive/negative premium amount and coded as an 'E' transaction on the batch file report.

**Stamp Onlys** After having submitted the initial transaction as a binder or confirmation of placement, submit copies of the declarations pages or cover notes received subsequently. On the batch file report you code the transaction as an 'X' item and include the original affidavit number, policy number and show the premium as \$0 because you previously reported the premium.

Finally, a suspended item is one which is rejected by ELANY and returned to you unstamped. These must be resubmitted with a new batch file report. Failure to correct and resubmit suspended items is likely to result in omissions of premiums from your year end tax report. (This could result in an underpayment of taxes with penalties and interest owed when you eventually catch the mistake). Suspense items will be returned to you electronically (unstamped) if you have registered with ELANY. All suspense

items resubmitted to ELANY should be sent with the part "A" affidavit bearing a new original/wet signature with the following notation set forth near the new signature: "SUSPENSE ITEM RESUBMITTED FOR PROCESSING".

When you resubmit a suspense item include a copy of the ELANY suspense letter. On the batch file it is coded as an 'S' transaction and should include the **original** affidavit number and policy number if available. The premium should be shown as \$0 on the batch file report.

### CONCLUSIONS:

By obtaining and exercising the privileges associated with an excess line license, excess line brokers are burdened by the mandates of the law.

Submission of documents to ELANY is part and parcel of the obligations of your excess line license.

Insurance Regulation 41 states "No excess line broker shall deliver, nor provide to any producing broker for delivery, an excess line insurance policy declarations page or cover note unless the first page of the declarations page or cover note bears the stamp applied by the Excess Line Association of New York or a duplicate copy of the declarations page or cover note bearing the stamp is attached to the original."

Copies of all declarations pages and cover notes should be submitted for stamping even when a binder or confirmation of coverage on the same transaction was previously stamped.

Insurance Law §109 states "Every violation of any provision of this chapter [the entire insurance law] shall, unless the same constitutes a felony, be a misdemeanor."

This Compliance Advisor is designed to highlight the obvious pitfalls in documenting excess line transactions. The focus is on the insuring document because by and large, if the insuring document is correct, the other documents, the affidavits, notice of excess line placement, etc. need only mirror the coverage document. [For more information on preparing other required documents, obtain the instructions for correctly completing excess line documents from the ELANY website].

Incomplete and erroneous documents bottleneck the process at your office and at ELANY. Good staff supervision and close attention to document detail will avoid most of these errors.

If you keep your eye on the ball and avoid making the obvious mistakes referred to above, you will have eliminated the major problems which frustrate you, your employees and the filing process.

**THIS ADVISOR IS NOT INTENDED TO BE NOR SHOULD IT BE CONSTRUED AS LEGAL ADVICE.  
THESE GUIDELINES ARE PROVIDED FOR YOUR CONSIDERATION AND FOR USE  
IN CONSULTATION WITH YOUR LEGAL COUNSEL.**



**THE EXCESS LINE ASSOCIATION  
OF NEW YORK**

ONE EXCHANGE PLAZA • 55 BROADWAY

29TH FLOOR

NEW YORK, NEW YORK 10006-3728

TELEPHONE: (646) 292-5500

E-MAIL: [elany@elany.org](mailto:elany@elany.org) • [www.elany.org](http://www.elany.org)