COMPLIANCE
ADVISOR

NEW YORK STATE'S IMPLEMENTATION OF THE NONADMITTED AND REINSURANCE REFORM ACT (NRRA)

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 • www.elany.org

Revised/Reissued July '15

The following information is intended to provide the Detailed Guidance you will need for a smooth implementation of the NRRA provisions incorporated into New York's Insurance Law. This Compliance Advisor discusses the following NY/NRRA Compliance issues in detail:

1) **Home State of the Insured**
2) **New York Taxes 100% of Written Premium Except for International Exposures**
3) **The Insured/Exempt Commercial Purchaser (ECP)**
4) **Excess Line Insurer Eligibility Criteria**
5) **States Must Join a National Producer Database**
6) **NRRA Implementation by Other States**

1) HOME STATE OF THE INSURED

For risks incepting on or after July 21, 2011, only one state, the "home state of the insured," is permitted to regulate the placement of any single E&S policy. This means that an excess line broker only has to comply with the home state of the insured's excess/surplus line regulatory requirements: diligent search, due care, disclosure language, affidavit filing, the licensing requirements and premium tax requirements.

This is particularly important when it comes to licensing. The placing broker must have an E&S license in each state which is the "home state" of any insured whose coverage the broker placed.

In wholesale transactions, the producing, or retail, broker on each such account must have the appropriate license in the "home state of the insured" for each state where placements are made. In New York, this is a "brokers license".

"IDENTIFYING THE HOME STATE OF THE INSURED"

Identifying the "home state of the insured" should be straightforward for 90+% of the placements you make. This is because ELANY statistics suggest more than 95% of all transactions submitted historically are for risks with exposures exclusively in New York. It becomes more challenging when trying to determine the "home state" of a multi-state risk for an affiliated group of entities.

Generally under a personal lines policy – the **"home state"** is the state in which the individual insured maintains his/her **"principal residence."** However, if **100%** of the risk is located outside of that state, the "home state" will be the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.

With respect to determining an insured's "home state," New York has added the definition of **"principal residence"** to mean:

a) the state where the individual resides for the greatest number of days during a calendar year; or
b) if the insured's "principal residence" is located outside any state, the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated. The law does not specify how the "greatest percentage" is determined.

The most likely scenario you will encounter is a dwelling policy which insures a vacation home or other property risk in another state. If that is the case, such as a New Yorker with a Florida condo, Florida is the home state for such a dwelling policy.

For a **"Commercial insured"** where the insured is a single standalone entity **–** the **"home state"** of a commercial insured is the state in which the insured maintains its **"principal place of business,"** unless **100%** of the insured risk is located outside that state. In this event, the "home state" will be the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated. Once again, how you determine greatest percentage is not defined.

With respect to determining an insured's "home state," New York has added to the home state definition the following: An insured's **"principal place of business"** means:

a) the state where the insured maintains its headquarters and where the insured's high level officers direct, control, and coordinate the business activities; or
b) if the insured's high level officers direct, control, and coordinate the business activities in more than one state, or if the insured's principal place of business is located outside any state, then the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.

For an "**Affiliated Group"** of insured entities, the **"home state**" is the **"principal place of business"** of the group member to which the largest percentage of premium is allocated.

The term **"Affiliated Group"** means "any group of entities that are all affiliated." [See footnote for the definition of **"Affiliate"**].[1]

The NRRA does not address, nor define, **"unaffiliated group"** or **"group policies."** However, the New York Insurance Law addresses this type of group policy. Historically, New York law prohibited unaffiliated entities from purchasing property/casualty insurance as a group. Over time, there have been some exceptions carved out of this blanket prohibition, namely with regard to 1) purchasing groups under the National Risk Retention Act; and 2) employer sponsored group personal excess insurance.

The New York Insurance Law provides that for these types of unaffiliated **"group"** insureds, the "home state of the insured" will be determined as follows:

- When the group policyholder pays one hundred percent of the premium from its own funds, then the insured's home state is considered the principal place of business of the group policyholder. [This may be the case with many "employer sponsored group excess policies".]
- When the group policyholder does not pay one hundred percent of the premium from its own funds [PG risks], then the home state is that of each group member.

ELANY RECOMMENDATION

The "home state" definition is the driving force of NRRA implementation. ELANY recommends you adjust operational procedures to identify the "home state of the insured" on all accounts, incepting on and after July 21, 2011. Make sure you have an E&S license in each state which is the home state of any of your insureds. If you are a wholesaler, you must also verify that your producing broker has the appropriate license in each home state of any of your insureds.

2) NEW YORK TAXES 100% OF WRITTEN PREMIUM EXCEPT FOR NON-US EXPOSURES

New York has decided to tax 100% of each excess line policy's written premium when New York is the "home state of the insured" except for non-US exposures.

All policies with an effective date prior to July 21, 2011 will continue to be subject to existing tax allocation rules on written premiums, additional premiums and return premiums as contained in Appendix 4 of Regulation 41.

When New York is the "home state of the insured" under an excess line insurance policy with an **effective date on and after July 21, 2011,** 100% of all written premium is subject to taxation, even when the policy covers risks or property located in other states as well as New York.

However, when New York is the "home state of the insured" on an excess line policy with an **effective date on and after July 21, 2011,** and where the policy covers risks or property located both in the United States and outside the United States, only that portion of the premium attributable to the risks or property located in the United States is subject to the 100% taxation. An excess line broker should utilize the premium tax allocation rules and schedule contained in **Appendix 5 of Regulation 41** when determining the premium allocable to the United States risks or property.

3) THE INSURED EXEMPT COMMERCIAL PURCHASER (ECP) PROVISION

An Exempt Commercial Purchaser is defined as any person purchasing commercial insurance, that at the time of placement:

a) employs or retains a **"qualified risk manager,"**[2] **and**
b) in the aggregate paid at least $100,000 of property and casualty premium in the immediately preceding 12 months, and
c) meets at least **one** of the following criteria:
   - possesses net worth greater than $22,040,000*****,
   - generates annual revenues in excess of $55,100,000*****,
   - employs more than 500 full-time employees or more than 1,000 employees if the insured is an affiliated group,
   - is a not-for-profit/public entity organization with $33,060,000 of annual budgeted expenditures*****, or
   - is a municipality with a population of at least 50,000.

***These items are inflation indexed.**

Any insured, which meets the definition of an exempt commercial purchaser, can essentially sign a waiver permitting its excess line broker to access the E&S market without first making a diligent search of the admitted market.

ELANY, in conjunction with the New York State Department of Financial Services, (DFS) has added a question to the Part A and Part C affidavit to identify Exempt Commercial Purchaser transactions. ELANY has also created an Exempt Commercial Purchaser waiver form for such transactions which can be found on ELANY's website, **www.elany.org** by clicking on the "Forms" navigation bar and scrolling down to the form titled "ECP Written Disclosure Form".

ELANY RECOMMENDATION

For excess line brokers who believe they have a volume of business where insureds qualify as Exempt Commercial Purchasers, identify those insureds and adopt a procedure to obtain the necessary signed waiver for new and renewal business incepting on and after July 21, 2011.

4) EXCESS LINE INSURER ELIGIBILITY CRITERIA AND DUE CARE REQUIREMENTS

The NRRA prohibits states from imposing state specific eligibility requirements upon excess and surplus line insurers [unless nationwide uniform requirements, forms and procedures are developed] other than the following requirements:

- **Alien insurer** [an insurer that is domiciled in another country] will be eligible automatically if it is listed on the NAIC International Insurers Department’s Quarterly Listing of Alien Insurers.
- **Foreign insurer** [an insurer that is domiciled in another state or U.S. jurisdiction] will need to meet two substantive requirements under the NAIC Non-Admitted Insurance Model Act. It must i) be “authorized to write in its domiciliary jurisdiction the type of insurance to be placed on an excess line basis, and ii) maintain capital and surplus equal to the greater of $15,000,000 or an amount set by each particular state as the minimum standard for E&S eligibility.

The New York Insurance Law and Regulation 41 were revised to incorporate these NRRA excess line insurer requirements.

In New York, the minimum capital and surplus requirements to be maintained by foreign insurer is currently $45,000,000. Starting as of January 1, 2016 and every 3 years thereafter, the minimum surplus to policyholder requirements will be increased by $1,000,000.

The New York Insurance Law and Regulation 41 require that excess line brokers use “due care” in the selection of an unauthorized insurer from whom they procure insurance. The “due care” standard requires that excess line brokers verify that the insurer meets the minimum eligibility criteria with regard to financial solvency, surplus requirements, claims handling practices and management competency and trustworthiness. It also requires that excess line brokers obtain, review and retain certain financial and other documents for each foreign unauthorized insurer with whom it does business. A broker need not obtain and retain copies of these documents if ELANY maintains a library of such information and makes it available to members.

ELANY will continue to obtain such documents and will inform members to obtain such documents if necessary. ELANY will continue to analyze insurer financials, and list insurer financial information on our website, and perform other services to assist brokers in meeting the “due care” standards.

5) STATES MUST JOIN THE NAIC NATIONAL PRODUCER DATABASE OR ANY OTHER NATIONAL PRODUCER DATABASE BY JULY 21, 2012.

The purpose of this provision is to make states fully implement an electronic licensing system for E&S brokers (particularly to expedite issuance of nonresident licenses) by July 21, 2012. If a state fails to implement this process, the NRRA bars such state from charging fees for such licenses. New York has successfully met this obligation.

6) NRRA IMPLEMENTATION BY OTHER STATES

Most states have passed NRRA conforming legislation.

Notwithstanding inaction by any state, the NRRA mandatory provisions (home state of the insured, ECP exemption, eligibility limitations and joining a national producer database) will go into effect because the federal law supersedes the state laws on these issues. Also, the states are permitted by Congress to adopt a national uniform system to allocate and share taxes but are not required to do so.

Five states and Puerto Rico have a tax sharing arrangement which applies only when one of these states is the home state of the insured. At the time of this publication, Louisiana had legislation pending to withdraw from the tax sharing arrangement.

CONCLUSION

Uniform standards brought on by the NRRA, particularly the mandate that only one single state, the home state of the insured can regulate any single E&S placement has reduced the regulatory burdens and costs of compliance.

[1] “Affiliate” means: (A) with respect to an insured, any entity that controls, is controlled by, or is under common control with the insured; and (B) an entity has control over another entity if the entity: (i) directly or indirectly or acting through one or more other persons owns, controls, or has the power to vote twenty-five percent or more of any class of voting securities of the other entity; or (ii) controls in any manner the election of a majority of the directors or trustees of the other entity.

[2] “Qualified Risk Manager” means: with respect to a policyholder of commercial insurance, a person who meets all of the following requirements: (A) The person is an employee of, or third-party consultant retained by, the commercial policyholder. (B) The person provides skilled services in loss prevention, loss reduction, or risk and insurance coverage analysis, and purchase of insurance. (C) The person – (i)(I) has a bachelor’s degree or higher from an accredited college or university in risk management, business administration, finance, economics, or any other field determined by the Superintendent to demonstrate minimum competence in risk management; and (II) (aa) has 3 years of experience in risk financing, claims administration, loss prevention, risk and insurance analysis, or purchasing commercial lines of insurance; or (bb) has (aaa) a designation as a Chartered Property and Casualty Underwriter (in this clause referred to as “CPCU”) issued by the American Institute for CPCU/ Insurance Institute of America; (bbb) a designation as an Associate in Risk Management (ARM) issued by the American Institute for CPCU/Insurance Institute of America; (ccc) a designation as Certified Risk Manager (CRM) issued by the National Alliance for Insurance Education & Research; (ddd) a designation as a Risk and Insurance Management Society (RIMS) fellow (RF) issued by the Global Risk Management Institute; or (eee) any other designation, certification, or license determined by the superintendent to demonstrate minimum competency in risk management; (ii)(I) has at least seven years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; and (II) has any one of the designations specified in subclauses (aaa) through (eee) of subitem (bb) of clause (II) of item (i) of this subparagraph; (iii) has at least ten years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; or (iv) has a graduate degree from an accredited college or university in risk management, business administration, finance, economics or any other field determined by the superintendent to demonstrate minimum competence in risk management.

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 • www.elany.org