

Bulletin No. 2014-07

March 19, 2014

**Re: FEES WHICH CAN BE INCLUDED ON AN EXCESS LINE INSURANCE BINDER
OR POLICY DECLARATIONS (DEC.) PAGE**

From time to time ELANY is asked by members if it is permissible for an excess line insurer to include the New York excess line premium tax, the ELANY stamping fee and any broker service fees on a binder or policy declarations (dec.) page.

Only premium and other taxable consideration for the insurance policy should be included on a binder or dec. page.

Section **9101(b)** of the New York Insurance Law (NYIL) **defines premium as “...all amounts received as consideration for insurance contracts ... and includes premium deposits, assessments, policy fees, membership fees, and every other compensation for such contract.”** Additionally, the New York State Department of Financial Services (DFS) has opined that installment fees, reinstatement fees, and under certain conditions inspection fees paid directly to the insurer or the insurer’s designated inspector are considered part of the premium under Section 9101(b) of the NYIL and therefore subject to the excess line premium tax and ELANY stamping fee.

When an excess line insurer includes the NY excess line premium tax and the ELANY stamping fee on the binder or dec. page it wrongfully implies that the **insured** has the legal obligation to pay the tax and stamping fee. The legal obligation to pay the tax and stamping fee is on the excess line broker. The excess line broker may charge them back to the insured provided the insured consents in writing under a memorandum (Total Cost Form) to pay such charges pursuant to Section 2119 of the NYIL. Also, the insurer sometimes calculates tax and fees incorrectly.

Similarly, Section 2119 of the NYIL allows an excess line broker to charge an insured a broker service fee provided there is a written memorandum (Total Cost Form), signed by the insured, and specifying or clearly defining the amount or extent of the fee. The memorandum must be retained by the broker for at least 3 years after the performance of the services.

It should be noted that **broker service fees are not subject to** either the excess line **premium tax or the ELANY stamping fee** since they are not included in the definition of “premium” under Section 9109(b) of the NYIL and are not received as consideration for an insurance contract by the insurer. Also, the DFS has opined that any broker service fees charged the insured should be reasonable in relation to the services rendered and similar insureds seeking similar coverage should be charged the same amounts for the same services.

Accordingly, an excess line insurer should **not** include on binders or dec. pages the NY excess line premium tax, the ELANY stamping fee or any broker service fee. These charges should only be disclosed to the insured by the broker on the Total Cost Form (Section 2119 memorandum).

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