



**COMPLIANCE
ADVISOR**

**NEW YORK EXCESS & SURPLUS LINES
LAWS AND REGULATIONS
SUMMARY IN BRIEF**

A PUBLICATION BY

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The **Nonadmitted and Reinsurance Reform Act** (“NRRA”) was signed into law on July 21, 2010 as part of the larger Dodd-Frank Act. The NRRA made fundamental changes to state excess and surplus lines laws by preemptions and implementation of uniform state standards.

Perhaps the most fundamental changes made were:

- 1) Limiting the placement of excess/surplus lines insurance solely to the statutory and regulatory requirements of the home state of the insured;
- 2) Requiring taxation only by the home state of the insured;
- 3) Providing that only the home state of the insured may require an excess/surplus lines broker to be licensed to sell, solicit, or negotiate excess/surplus lines insurance with respect to such insured; and
- 4) Prohibiting states from imposing state specific insurer eligibility requirements other than those set forth in the NRRA.

Part 1 of Chapter 61 of the Laws of 2011 amended the New York Insurance Law to conform to the NRRA.

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, one must first be licensed as a broker under § 2104. The applications may be submitted simultaneously. If you operate as a corporation, LLC or partnership, the entity must be licensed with one or more individuals licensed as “sublicensees” of the entity and maintain the premium trust in the entity name and receive commission in the name of the entity.

Only an excess line broker may procure insurance from an eligible excess line insurer. A licensed New York broker may obtain such insurance through a licensed excess line wholesale broker. A New York licensed agent (P/C license) may **not** procure excess line insurance through a licensed 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. Insurance Regulation 41 (11 NYCRR 27) at § 27.13 sets forth a list of requirements by which an excess line broker can meet the “due care” standard. Some of those requirements are waived if ELANY performs certain functions for all excess line licensees.

● **DILIGENT EFFORT/DILIGENT SEARCH**

An excess line broker or a producing broker which 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, who 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 Insurance Regulation 41 (11 NYCRR 27) at § 27.0 authorizes excess line brokers to place certain “kinds” of insurance as defined in Insurance Law §1113. The “kinds” of insurance not listed in §2105 cannot be placed by excess line brokers. Please see ELANY’s 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 currently on the Export List are set forth in Insurance Regulation 41 (11 NYCRR 27) at § 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 definition of an ECP is set forth in Insurance Law § 2101(x)(2) and mirrors the NRRA definition.

● **FILING REQUIREMENTS**

An excess line broker must file for each insurance policy procured:

- 1) an 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 are unavailable) within 45 days of policy inception.

A wholesale excess line broker must also file an affidavit of the producing broker (the Part C Affidavit) if the producing broker obtained any declinations or delivers the Notice of Excess Line Placement to the insured. Subsequent premium bearing endorsements must also be filed. The filings are submitted to ELANY (§ 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)). That is the first notice requirement. The other notice is required to be stamped on each policy document.

The Notice of Excess Line Placement language mirrors the “Notice” language that must be stamped on a document which evidences coverage for delivery to the insured such as a binder, confirmation of placement of coverage, cover note or declarations page. The language must be in not less than ten 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.

● TAXES

An excess line broker must pay a tax of 3.6% on the gross premium less premiums returned to insureds when New York is the home state of the insured (§ 2118(d)(1)). 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 Regulation 41 (11 NYCRR 27) at § 27.9 and the Appendix of allocation formulas whereby New York only taxes the premium for exposures in the United States.

Excess line brokers must file a tax statement on or before March 15 of the following year electronically with the DFS and pay taxes due at that time (Regulation 41 (11 NYC RR 27)) at § 27.8. ELANY provides summary reports to each excess line licensee and to the DFS to facilitate preparation of these tax statements.

● **AUTHORITY TO CHARGEBACK TAXES AND FEES TO INSUREDS**

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 charge back to the insured excess line taxes, ELANY stamping fees, and inspection fees in the same manner as noted above. (Also see Regulation 41 (11 NYCRR 27) at § 27.12). The 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 insurers select 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 (§ 2118(f)). The DFS interprets this authority as facilitating the transaction of excess line business but as 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**

New York Insurance Law § 1101(b)(2)(E) permits an insured to acquire insurance coverage “directly” or “indirectly” from an insurer not authorized to do an insurance business in New York. 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 is subject to a tax of 3.6% upon the gross premium paid pursuant to New York Tax Law Article 33-A and must be reported and paid within 60 days of the end of the calendar quarter in which the policy became effective, to the Commissioner of Taxation and Finance.

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

● **NRRA**

While New York adopted both the NRRA definition of “Home State” § 2101(x) (3) and “affiliate” § 2101(x)(1)(A), it expanded the definition of Home State to further explain:

- 1) what constitutes a principal place of business, and
- 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 specially licensed excess line brokers. These insurers are not licensed by the state because of an exception to the insurer licensing requirements. (See 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 (See Insurance Law § 2117). New York has adopted by regulation the eligibility requirements set forth in the NRRRA for foreign and alien insurers respectively in Regulation 41(11 NYCRR 27) at § 27.13.

Foreign insurers must maintain a minimum of \$46,000,000 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 and alien insurers must be published on the NAIC International Insurer Department's most recent quarterly listing to be eligible.

● **INSURER ELIGIBILITY LIST**

A voluntary list of eligible insurers is maintained by ELANY, the state created service provider to excess line brokers who among other things, eases the burden on excess line brokers in meeting their obligations under the Insurance Law. ELANY conducts a thorough financial examination of every foreign insurer listed.

● **FREEDOM OF RATE AND FREEDOM OF FORM**

While New York licensed insurers must file rates and file forms and some are subject to approval by the DFS, eligible excess line insurers are not subject to those insurance law provisions set forth in Article 23.

As noted below, however, the DFS has interpreted certain statutory provisions and regulatory provisions as applying to eligible insurers. Excess line policies are expressly exempt from Insurance Regulations 121 and 107 regarding claims made policies and defense within policy limit provision limitations.¹

● **CONSENT TO SERVICE OF PROCESS**

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. § 1213 also provides that such an 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. § 1213(e) exempts excess line

¹ *[A current emergency regulation makes an exception to this long standing rule by applying both regulations to group excess line insurance policies issued pursuant to section 3455 of the Insurance Law (Transportation Network Company Group Insurance Policies)].

transactions from these pre-answer security requirements provided the policy designates the Superintendent or his successors as agent for service of process.

● **PRE-ANSWER SECURITY**

See Consent to Service of Process above.

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

Insurance Law § 3103(b) states that “No policy of insurance...upon property then in this state or the liabilities to be incurred by the insured as a result of activities then carried on by the insured in this state, shall be governed by the laws of any jurisdiction other than this state...except for policies of marine insurance.”

● **CANCELLATION/NONRENEWAL PROVISIONS**

Excess line policies are expressly exempt from the commercial lines cancellation/nonrenewal provisions of Insurance Law § 3426. However, § 3425 which applies to personal lines cancellations and nonrenewals has no express exemption, moreover the DFS opines that § 3425 applies to excess line, personal lines policies.

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

The DFS opines that § 3404, the New York Standard Fire policy statute and § 3420 - Liability Insurance Standard Provisions apply in total as to the former and at least partially, as to the latter to excess line policies.

Excess line policies are expressly exempt from Regulation 121 and 107 regarding claims made policies and defense within policy limit offset provisions.²

● **DEPOSITS/TRUST FUND REQUIREMENTS**

In response to the passage of the NRRRA, New York eliminated the foreign insurer trust fund deposit requirement. Alien insurers, however, are still required to deposit funds in trust pursuant to the NAIC, International Insurer Plan of Operation which protects claimants in the event that a final non appealable judgment remains unpaid beyond a set time frame.

● **NEW YORK 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 excess and surplus lines insurers are “unauthorized non-life insurance corporations” and are therefore subject to taxation pursuant to § 1501 of the tax law.

² *ibid.*

- **INSURER FILING REQUIREMENTS**

Insurance Regulation 41 (11 NYCRR 27) at § 27.14 requires each eligible insurer to file a report electronically by March 15th each year, setting forth the prior calendar years premiums, insureds, excess line broker, addresses and other policy detail.

- **ELIGIBLE EXCESS LINE INSURERS/NEW YORK OFFICES**

An eligible New York excess line insurer may operate from the offices in New York State 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 (Insurance Law § 2117(i)).

In no less than 10 point type, a policy shall include a Notice as follows:

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

(See Regulation 41 (11 NYCRR 27) at § 27.16)



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