



**COMPLIANCE
ADVISOR**

***“COMPLIANCE”
BACK TO BASICS***

A PUBLICATION BY

THE EXCESS LINE ASSOCIATION
OF NEW YORK

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ELANY exists to facilitate and encourage compliance by its members with the excess line laws, rules and regulations of New York State. The following is to orient new employees of members and to keep all members abreast of fundamental compliance in light of recent revisions to the New York Insurance Law (NYIL).

FUNDAMENTAL COMPLIANCE REQUIREMENTS

The fundamental compliance requirements for a proper excess line transaction when the insured's home state is New York (NY) can be summarized as follows:

- I. Coverage must be placed by a NY licensed excess line broker. Only a NY licensed broker (**NOT** an agent) can place excess line insurance through a NY licensed excess line broker (wholesale broker).
- II. A "diligent search" of the licensed market must be made before you can place coverage in the excess line market.
- III. "Due care" must be exercised in the selection of financially secure NY "eligible" excess line insurer(s).
- IV. Coverage must be only the types/kinds of insurance that can legally be placed in the excess line market.
- V. Proper excess line placement disclosure notifications must be provided to insureds.
- VI. Excess line affidavit(s) and transaction documentation must be submitted to ELANY for review and stamping within 45 days of policy effective date. It is illegal to deliver a binder or policy to an insured unless it is first stamped by ELANY.
- VII. Excess line premium taxes must be paid as of March 15th.

Remember you are the licensee, and the legal burden for properly adhering to New York excess line laws, rules and regulations is yours. In the majority of cases, compliance is not that difficult. Being aware of your duties and responsibilities as a New York licensed excess line broker will aid in your endeavor to avoid the majority of consequences arising from noncompliance.

I. YOU MUST BE PROPERLY LICENSED

1. **Make sure you are currently and properly licensed as a NY excess line broker.**
 - All **excess line broker business entity licenses** (corporation, LLC, or partnership) expire on October 31 of even numbered years.
 - All **individual excess line broker licenses** expire on the licensee's birthday in even numbered years for individuals born in even numbered years and in odd numbered years for those born in odd numbered years.
 - If you operate as a corporation, LLC or partnership, do not use your individual excess line broker license to place business. When an entity is selling, soliciting or negotiating insurance contracts, gets paid commissions and holds premium trust funds in its name, the entity must be licensed

to be in compliance with New York law. If the incorporated entity that employs you fails to obtain a business entity license and instead operates under your individual excess line broker's license, you have violated the law because it is illegal to pay commission to an unlicensed person or entity. The licensee must hold the premiums received in a premium trust account in its name and under its control.

- NY will license an entity from a state which only licenses individuals under certain circumstances (Illinois).
- NY will only issue a "limited" non resident excess line broker's license to licensee's with a declared home state of Florida, Montana, or Missouri (entities). A 'limited' license only allows you to transact purchasing group (PG) business. If you are placing non-PG business using a "limited" license, you are violating NY law.
- **(For more details on licensing requirements, please view the "Excess Line Broker Licensing Requirements" video located in the Education/ Training Section of ELANY's website www.elany.org).**

2. If you are a NY "wholesale" excess line broker:

- Verify that your retail producer has a **current NY broker's license** and **not an agent's license**. Only a NY licensed broker (**NOT** an agent) can place excess line insurance through a NY licensed excess line broker. Do this in advance of placement.
- Additionally, all "wholesale transactions" submitted to ELANY should include a Part C Affidavit prepared and signed by the retail producing broker.
- In NY, the retail producing broker must be licensed as an entity if it operates as a corporation, LLC or partnership.
- Accommodation or courtesy filings where the excess line broker makes the filing but did not make the placement are prohibited and a violation of the law.
- **To verify the licensing status of your retail producer broker, log onto the NYS Department of Financial Services (DFS) website www.dfs.ny.gov and click on the "INSURANCE INDUSTRY" Section, next click on the "Agents & Brokers" Section, and finally click on the "Producer/Licensee Search" Section.**

II. MAKE A "DILIGENT SEARCH" OF THE LICENSED MARKET

1. A diligent search of the licensed market (3 declinations) must be made before placing the risk with a NY eligible excess line insurer.

- The diligent search standard is very simple. Either the excess line broker or producing broker, where applicable, must attempt to place the risk with three (3) licensed insurers whom you have "reason to believe might consider writing the type of coverage or class of insurance involved..." Three (3) declinations from licensed insurers are **not** required if the

coverage type appears either on the so called "Export List" or the insured meets the definition and criteria of an "Exempt Commercial Purchaser" (ECP).

- **Declination date verification** — The Department of Financial Services (DFS) has expressed concerns where notice of excess line placement dates or policy inception dates preceded one or more declination dates. The DFS asserts that if declinations are acquired after an excess line placement is made, the placement may violate the excess line law. While such date issues may be only an administrative error, it would be wise for licensees to review internal procedures and avoid any negative inferences drawn by the DFS.
- A few brokers mistakenly believe that if a risk is on the so called "export list" or an "ECP", then affidavit(s) and related insurance documents do not have to be filed with ELANY. **This is absolutely not true.** Affidavit(s) and related excess line insurance documents **must** always be submitted to ELANY for review, filing and stamping.
- **(For more details please view the "Diligent Search and Reason to Believe Standard" video located in the Education/Training Section of ELANY's website www.elany.org.)**

III. USE "DUE CARE" AND SELECT ONLY FINANCIALLY SECURE EXCESS LINE INSURERS

1. Due care must be exercised in the selection of financially secure eligible excess line insurer(s).

- The excess line broker has the duty to obtain certain documents and certifications from an insurer in order to meet the "due care" standard when selecting an excess line insurer. The broker's duty to obtain the documents and certifications is relieved if the insurer files all of the required documents and certifications with ELANY.
- Prior to placing business with an unauthorized insurer, when the insured's home state is this State, an excess line broker shall ascertain and verify that the insurer:
 - (1) is solvent, financially stable and otherwise substantially complies with the solvency requirements for authorized insurers;
 - (2) has surplus to policyholders sufficient to support its writings, reasonable in relation to its outstanding liabilities, adequate to its financial needs and if a foreign insurer must maintain surplus to policyholders of not less than \$45,000,000 as of January 1, 2013;
 - (3) demonstrates it has and continues to process claims in a satisfactory manner;
 - (4) demonstrates that its management is trustworthy and competent; and
 - (5) if an alien insurer, evidence that it appears on the quarterly listing of alien insurers published by the International Insurers Department (IID) of the NAIC.

- ELANY has a full time professional staff, who will assist you in verifying financial security at your request.

IV. TYPES/KINDS OF INSURANCE PERMITTED TO BE PLACED IN THE NY EXCESS LINE MARKET

1. Coverage must be only the types/kinds of insurance that can legally be placed in the NY excess line 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 Section 2105 authorizes excess line brokers to place certain "kinds" of insurance as defined in Insurance Law Section 1113.
- New York is stricter than many states in limiting types/kinds of coverage permissible; and brokers, particularly non resident brokers, mistakenly assume if you can place coverage in one state, it is permissible in NY.
- Certain types/kinds of insurance omitted from Section 2105 cannot be placed by an excess line broker. The following identifies products that **cannot** be written in the excess line market: life insurance, annuities, accident and health, accidental death and dismemberment, workers' compensation and employers' liability insurance, excess workers' compensation, title insurance, mortgage guaranty insurance, credit unemployment insurance, financial guaranty insurance, GAP insurance, legal services insurance and involuntary unemployment insurance.
- Additionally, a number of coverages can be written as excess line products but are subject to limitations and restrictions as follows: automobile liability insurance — only excess of mandatory primary coverage; medical malpractice insurance — for doctors, dentists and general hospitals — only excess of primary coverage offered by the MMIP; group coverage/master policy — generally prohibited except for Risk Purchasing Groups or employer sponsored group excess coverage.
- **(For a more detailed explanation of which types/kinds of insurance coverage can or cannot be placed in the excess line market, please see ELANY's May 2007 Compliance Advisor "Limitations on Which Types of Coverage Can be Placed by Excess Line Licensees" located in the Hot News Section of ELANY's website www.elany.org).**

V. PROVIDE INSURED PROPER EXCESS LINE PLACEMENT DISCLOSURE NOTIFICATIONS

1. Provide each insured a written "notice of excess line placement" and other disclosures (total cost form) that informs the insured about the nature of the excess line placement.

- The required "Notice of Excess Line Placement" disclosure memo provides notification to the insured consumer that the excess line insurer

providing insurance coverage is not protected by the state security funds in case of insolvency and not subject to all of the supervision and regulatory requirements of the Department of Financial Services (DFS).

- It should be noted that the **“Notice of Excess Line Placement”** memo also provides protection/evidence to the excess line broker and producing broker if at a later date the insured complains to the DFS that they were never advised that their insurance policy was being placed with an eligible excess line insurer.
 - A **“Total Cost Form”** is required in order for an excess line broker or producing broker to charge the insured any amount (including reimbursement for premium taxes, stamping fees or broker fees) other than the premiums for the policy or insurer's policy fee. An excess line broker or producing broker must obtain a written memorandum (**total cost form**) signed by the insured, specifying the amount and purpose of each charge pursuant to the requirements of Section 2119 of the NYIL and NY Regulation 41.
 - Remember, ELANY does not need a signed copy of the “total cost form” for its file so you need not wait for the insured to return a signed total cost form to file with ELANY. However, per Section 2119 of the NYIL, a signed copy of the “total cost form” memorandum must be retained by the broker for not less than three years.
 - **(For more details on “Notice of Excess Line Placement/Total Cost Form” see the Lexicon/FAQ Topics Section of ELANY’s website www.elany.org).**
2. **Every excess line insurance policy, memorandum, certificate, confirmation of coverage or other document evidencing insurance coverage given to an insured must contain the 10 point (broker stamp) legend disclosing the nature of the excess line insurance placement.**
- The excess line broker is responsible for placing the disclosure legend required by Regulation 41 on each coverage document given to an insured.
 - This required disclosure language provides notification to the insured consumer that the excess line insurer providing them insurance coverage is not protected by the state security funds in case of insolvency and not subject to all of the supervision and regulatory requirements of the Department of Financial Services (DFS).
 - **(For more details about the “Broker disclosure language” legend, see the ELANY October 2012 E&S Empire Express located in the Hot News/ Newsletters Section of ELANY’s website www.elany.org).**

VI. FILING REQUIREMENTS AND OTHER DOCUMENTATION

1. **Excess line affidavits and related insurance documents must be submitted to ELANY for review, examination and stamping within 45 days of policy effective date.**

Every initial excess line transaction involves the filing of the following documents (paper or electronic submission):

- **Batch filing report** containing one to ten transactions,
- **Affidavit(s) — Part A** (Excess Line Broker) and, if applicable, **Part C** (Producing Broker) — **current** versions of the forms only,
- **Declarations page, Cover note, Binder or Confirmation of Coverage,**
- **Notice of Excess Line Placement,**
- **Premium Tax Allocation form(s) — if applicable.**
- **(For a more detailed explanation regarding required filing documents, please see ELANY Compliance Advisor “Excess Line Broker/The Most Important Document” located in the Hot News Section of ELANY’s website www.elany.org).**

For those members who use the ELANY EEFS fully electronic affidavit filing system with the exception of the insurance coverage document and Affidavit Part C, all of the above noted documents can be automatically generated for you.

If you currently submit paper copies of affidavits and related insurance documents and would like to sign up to use the ELANY EEFS fully electronic affidavit filing system, **please view the “Signing Up to Use ELANY’s Electronic Filing System” video and the “Using the e-filing Affidavit System” video located in the Education/Training Section of ELANY’s website www.elany.org**

2. It is illegal to deliver evidence of excess line insurance coverage in New York unless such document is stamped by ELANY. The “ELANY stamp” is a separate stamp and is different from the broker stamp disclosure noted in Section V above.

- The NYIL and Regulation 41 state that it is unlawful for an excess line broker to deliver any declarations page or cover note in NY unless they are stamped by the Excess Line Association.
- This stamp indicates that the affidavits and related insurance documents submitted to ELANY by the New York licensed excess line broker for review and filing were examined, and it was determined that the excess line transaction was in compliance with the applicable excess line laws and regulations of New York.
- **(For more details on the “ELANY Stamp” see the ELANY October 2012 E&S Empire Express located in the Hot News/Newsletters Section of ELANY’s website www.elany.org)**

3. Where applicable, a copy of each binding authority agreement must be submitted to ELANY prior to use.

- The NYIL and NY Regulation 41 require that binding authority agreements be in writing, contain minimum terms, be signed by both parties, include

a completed binding authority submission form, and be filed with the Excess Line Association of New York prior to use.

- **(For more details on “Binding Authorities” see the Lexicon/FAQ Topics Section of ELANY’s website www.elany.org).**

VII. EXCESS LINE PREMIUM TAXES MUST BE PAID BY MARCH 15TH

1. File and pay excess line premium taxes by March 15 to the Department of Financial Services (DFS).

- NYIL imposes a tax equal to 3.6% of the written excess line premium charged. The tax is imposed on the excess line broker.
- Where New York is the “home state of the insured”, 100% of the premium is subject to taxation, even when the policy insures risk exposures located in other states as well.
- Additionally, where NY is the “home state of the insured” and the policy covers risks located both inside and outside the United States, only the portion of the premium attributable to the risk inside the United States is subject to 100% taxation.
- ELANY issues to each excess line broker in early March a data report reflecting the taxable premiums reported by that excess line broker for the prior year. If the excess line broker has properly reported all transactions to ELANY, the report makes easy work of the tax return, which the excess line broker must file electronically by March 15th each year for the preceding year.
- **EVERY** licensee must file electronically a tax return with the DFS even if you produced no excess line business or a penalty will be imposed.
- **(For more details see the “How to Complete and File an Excess Line Premium Tax Statement” video located in the Education/Training Section of ELANY’s website www.elany.org).**

VIII. MISCELLANEOUS

1. Determine that New York is the “Home State of the insured.”

- **(For more details see the ELANY April 2011 Compliance Advisor “New York State’s Implementation of the Nonadmitted and Reinsurance Reform Act” located in the Hot News Section of ELANY’s website www.elany.org.)**

2. Minimum Information Required When Filing Insurance Documents With ELANY For Stamping.

Every insurance document submitted to ELANY for stamping shall include the following information:

- the name and address of the insured

- the policy term
- the gross premium charged
- the name of the eligible excess line insurer; and
- the kind of insurance procured

The document must unequivocally assert that coverage has been bound. Do not attempt to convert a quote, application or submission document into a binder.

CONCLUSION

Compliance with the New York excess line law is not that difficult. Being aware of your duties and responsibilities as a New York licensed excess line broker will aid in your endeavor to avoid the majority of consequences arising from noncompliance and you will have eliminated many of the regulatory pitfalls that exist for licensees.

While ELANY is here to assist and help you understand your legal requirements when accessing the excess line market, keep in mind **Rule No. 1 — You are the licensee, and the legal burden for properly complying with New York excess line laws, rules and regulations is yours.**



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**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.**