THE IMPORTANCE OF MAINTAINING THE DISTINCTIVENESS OF THE EXCESS LINE INSURANCE MARKET

The Excess Line Association of New York ("ELANY"), the nonprofit industry advisory association created by New York statute to facilitate and encourage compliance with New York's excess line insurance law, the Wholesale & Specialty Insurance Association ("WSIA"), the national organization representing the entirety of the wholesale, specialty and surplus lines industry, and the Professional Insurance Wholesalers Association of New York, Inc. ("PIWA"), which represents New York insurance wholesalers who serve retail insurance producers with specialty and excess lines markets, appreciate this opportunity to explain the critical role of New York's excess line insurance market in light of the COVID-19 pandemic.

The excess line market is fundamentally different from the licensed market in terms of risks it will write, specialized expertise, and the legal and regulatory regimen it relies on to operate. Without a robust excess line market, New York would be grievously harmed. We commend the Department of Financial Services ("DFS") for recognizing this in their recent property-casualty COVID-19 Emergency Regulation and we urge all policymakers and regulators to continue doing the same.

The public policy of New York is to encourage and cultivate the appropriate utilization of the excess line market. New York law expresses this public policy in multiple provisions throughout the insurance law. These provisions do more than simply give permission for the excess line market to operate; they provide a public policy framework to facilitate the availability of insurance for consumers that are underserved by licensed insurers. Recognition that consumers must have insurance for a sustainable economy to exist remains the bedrock of this public policy.

Excess line insurers cover risks that are typically distressed, unique, volatile, or involve new businesses or coverages without loss history. Because they are not licensed by the state, and as such are not subject to certain statutory requirements, excess line insurers have the flexibility to write what licensed insurers will not. Excess line insurers do not compete with licensed insurers because they only underwrite risks that licensed insurers reject. Without excess line insurance, construction would come to a virtual halt in the state, and nursing homes would be unable to purchase the coverage necessary to operate. A significant portion of New York's excess line placements are made by wholesale excess line brokers, who also place business with licensed companies. Wholesalers use their expertise to place difficult risks on behalf of retail brokers, particularly when retailers do not have admitted markets that will write coverage. The wholesaler's direct customer is the retail broker, not the insured.

Excess line insurers are able to cover volatile risks because they have freedom of rate and form to write coverage that meets the needs of their clients. Excess line business is required to be placed by licensed excess line brokers and these brokers operate pursuant to a fulsome regulatory structure. However, there are requirements that do not apply to excess line insurers, such as commercial insurance policy cancellation and nonrenewal restrictions, in order to afford excess line insurers the latitude they require to write risks that the licensed market cannot or will not cover. Excess line insurers rely on this prescribed legal and regulatory architecture when they choose to participate in the New York excess line marketplace; it is a core reason that they are able to cover volatile, critically important risks.

For example, in 2019 excess line insurers wrote $1.44 billion in New York construction business. Relative to coverages such as auto insurance, construction losses are infrequent but when they do occur, they are often severe, high value claims. This leads to underwriting that is necessarily based on a floor or minimum premium, which is a fundamentally different approach than used in the admitted market. This distinction is critical and allows the excess line market to say "yes" on marginal risks when the admitted market says "no." If excess line insurers were to conclude that freedom of rate and form, and a reliable legal and regulatory framework no longer adequately exist, they may well redeploy their capital elsewhere, leaving New York in the lurch.

This is not simply conjecture. In the 1990s and early 2000s, New Jersey suffered through a severe automobile insurance availability crisis due to overly burdensome regulation. Five of the six largest auto insurance writers refused to write New Jersey auto insurance, and dozens more exited the market. It took comprehensive auto insurance reform to bring market availability back to a workable level. Another example was Florida's brush with a severe property insurance availability shortage a dozen years ago when its largest property insurer threatened to exit the market due to the inability to obtain approval of adequate rates. These examples involved licensed companies writing common coverages, companies that accept a high degree of regulatory restrictions as part of their business plans. Excess line insurers are fundamentally different in that they write much more volatile, specialized risks that are unavailable from admitted insurers, and they do so in large part because they are not subject to the full array of restrictions licensed companies must adhere to.

The DFS has commendably recognized the uniqueness of the excess line market in the applicability of its Property-Casualty Emergency Regulation. Since, with the exception of fire insurance, the state's Insurance Code does not govern the cancellation and nonrenewal of commercial excess line policies, the DFS has determined that Executive Order 202.13 and its Emergency Regulation apply exclusively to personal lines policies written in the excess line market, and excess line commercial small business policies that include the peril of fire. The DFS has recognized that the vital and legally distinct structure under which the excess line market operates has been purposefully established by the state and must be respected. This will help preserve the willingness of excess line insurers to cover New York risks.

For all of these reasons, we urge policymakers and regulators to emulate the DFS in maintaining the unique long-term nature of the excess line marketplace.

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