STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

The Office of General Counsel issued the following informal opinion on October 7, 2002, representing the position of the New York State Insurance Department.

Re: Excess Line Premium Tax and Stamping Fee

Questions Presented:

1. Is an insured, which is a tax-exempt unit of another state government, required to pay excess line premium taxes to the Superintendent and stamping fees imposed by the Excess Line Association of New York ("ELANY")?

2. If the broker does not use its New York excess line license to place insurance on New York risks but the insurance transaction is negotiated in California between the insured domiciled there and the California office of the nationwide broker, is a New York premium tax imposed on the insured?

Conclusions:

1. No. Said taxes and fees in New York are imposed on the New York licensed excess line broker, although such brokers commonly pass on the cost to the insured by means of a written service fee memorandum signed by the insured.

2. If this were a non-New York transaction, there would be no New York excess line tax and stamping fee. However, N. Y. Tax Law § 1551 (McKinney 2000) imposes a tax on an insured that obtains insurance from an insurer not authorized in New York covering risks in New York. If the policy covers risks located both in New York and out-of-state, the Section 1551 taxes are allocated based on the amount of premiums pertaining to the New York risks.

Facts:

The XYZ Retirement System ("XYZ") is a unit of state government and is exempt from Federal taxation. Its investments include real estate located within New York, which properties are insured through two large brokerages. The insurance on New York property is issued through various insurers, including those not authorized by this Department. Such insurance may be procured under a brokers' New York excess line licenses. Excess line brokers have submitted "surplus lines tax/fee forms" indicating that XYZ must pay taxes and fees associated with the purchase of the insurance. Copies of invoices from one of the brokers was provided but it is unclear from the invoices whether the business was placed in California or New York. It was also indicated that XYZ has never signed a New York service fee agreement and that the California brokers place the names of the insurers, policy numbers, effective date, type of taxes and stamping fees on their invoices to XYZ. There is no indication on the invoices as to where the risks are or what percentage of any premium comprises a New York risk.

Analysis:

Based on the invoices provided, it is impossible to determine where the placements were made, the amount of premium allocable to New York risks, and the consequential proportionate taxes and fees. Accordingly, the discussion that follows addresses two possible scenarios involving risks located in New York: placements made in New York by New York excess line brokers and placements made outside New York.

An excess line broker is obligated to pay to the Superintendent the excess line premium tax of a sum equal to three and six-tenths percent of the gross premiums charged the insured by the insurer for insurance procured by using its New York excess line license under N. Y. Ins. Law § 2105 (McKinney Supp. 2002). N.Y. Ins. Law § 2118(d)(1) (McKinney Supp. 2002).

Assuming that the placement was made under New York excess line insurance laws, it appears that XYZ is not being asked by the broker to pay a tax imposed upon XYZ but rather to reimburse the excess line broker for the tax imposed on the broker by N. Y. Ins. Law § 2118(d) (McKinney Supp. 2002). In order for a New York excess line broker to recoup that expense from the insured, there must be a written memorandum signed by the insured, pursuant to N.Y. Ins. Law § 2119(c) (McKinney 2000). The insured is not required to sign such a memorandum and without this, the broker may not collect additional compensation from the insured. If an insured such as XYZ agrees to sign the memorandum, the payment to the broker is not a tax, but a service fee payment, although the amount of money collected would equal the amount of tax due from the excess line broker to the Superintendent. If an insured such as XYZ does not agree to sign the memorandum, it would be a business decision for the New York broker to agree to place excess line insurance for such insured without receiving additional compensation, since the broker is obligated to pay the premium tax, notwithstanding the possible tax-exempt status of the insured.

Further, ELANY is a statutory non-profit association established pursuant to N. Y. Ins. Law § 2130(a) (McKinney Supp. 2002) and cannot impose a tax. ELANY stamps all excess line insurance documents and performs other services that are funded by a stamping fee.

N. Y. Ins. Law § 2130(f) (McKinney Supp. 2002) provides in relevant part:

The stamping fee shall be paid by the excess line licensee. Provided, however, the licensee shall be allowed to receive and collect from the insured the stamping fee if the licensee obtains a written memorandum, signed by the insured, specifying the amount and the insured's agreement to pay the stamping fee.

Here, too, the broker must decide if it is interested in doing business for a client who won't sign a written memorandum necessary to allow the broker to be reimbursed for the amount it paid as a stamping fee.

On the other hand, if a California broker places the coverages in California using its California license, then there would be no New York excess line premium taxes or ELANY stamping fees. However, a tax would be imposed on New York allocable premiums pursuant to N.Y. Tax Law § 1551 (McKinney 2000). Under this law, exemptions from this tax are limited to New York State and its subdivisions, Federal and foreign governments, and other entities specified in N. Y. Tax Law § 1553 (McKinney 2000) with no tax exemption for a state and its subdivisions other than New York. Unlike the New York Insurance Law, the Tax Law imposes the tax on insureds, not brokers.

For further information, you may contact Associate Attorney Jeffrey A. Stonehill at the New York City Office.