



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

The Office of General Counsel issued the following opinion on October 21, 2005, representing the position of the New York State Insurance Department.

**Re: Excess Line Premium Tax**

**Questions Presented:**

1) A New York domiciled corporation maintains facilities and operates its business in a foreign country. May an excess line broker place a "political risk insurance" policy for this corporation in New York with an unauthorized insurer, which policy insures the corporation's foreign assets against:

- a) confiscation by a foreign country's government;
- b) strikes, riots, political violence, or war;
- c) inability to convert or transfer currency?

2) A New York domiciled bank provides loans to foreign governments and foreign government-owned businesses. May an excess line broker place a policy with an unauthorized insurer that insures the non-payment of the loans?

3) A New York domiciled corporation operating in a foreign country sells, on credit, its foreign made goods to companies located within and outside the United States. May an excess line broker place a policy with an unauthorized insurer that insures the risk of default on such transactions?

4) With regard to questions 1 - 3, where insurance may be placed by an excess line broker with an unauthorized insurer in New York, would the placement be subject to excess line tax?

**Conclusion:**

1) An excess line broker may place such a political risk insurance policy for a New York domiciled corporation, which insures the corporation's foreign assets against such contingencies, with an unauthorized insurer pursuant to N.Y. Ins. Law § 2105(a) (McKinney Supp. 2005) and N.Y. Comp. Codes R. & Regs. tit. 11, § 16.12(e) (Regulation 86).

2) An excess line broker may not place with an unauthorized insurer a policy that insures the non-payment of bank loans made by a New York domiciled bank to foreign governments or foreign government-owned businesses because such insurance constitutes financial guaranty insurance, which is not an enumerated kind of insurance an excess line broker may place under N.Y. Ins. Law § 2105 (McKinney Supp. 2005).

3) An excess line broker may place a policy with an unauthorized insurer that insures the risk of default on such transactions as credit insurance pursuant to N.Y. Ins. Law § 2105 (McKinney Supp. 2005).

4) Yes, where insurance may be placed by an excess line broker with an unauthorized insurer in New York, placement would be subject to excess line tax.

**Facts:**

The inquirer is conducting a survey of several states regarding the collection of excess line tax on the placement of insurance that was described as political risk insurance and trade credit insurance. The inquirer stated:

Political Risk Insurance (PRI) comes in different forms. Here are the most common types we sell:

1. It protects a U.S. company's asset in an emerging market country against (1) confiscation by the foreign country's government; (2) strikes, riots, and political violence or war which damages the foreign asset; and (3) inability to convert local currency into hard currency and then transfer said hard currency out of the foreign country.

2. It protects a U.S. bank on a loan to an emerging market government or government-owned company against non-payment.

In all cases, the insured asset is located in an emerging market country outside the U.S. Since the assets are located outside of the U.S. (and of course outside of NY State), we have historically taken the view that political risk insurance is not subject to surplus lines tax. We surveyed underwriters and other brokers and they have taken the same view.

We also sell trade credit insurance. Sometimes trade credit covers domestic U.S. receivables. For domestic receivables, we file and pay U.S. surplus lines tax when an insurer is not authorized. For export receivables, we don't file since the asset (foreign buyer receivables) is located outside of the states.

## **Analysis:**

### Political Risk Insurance

The New York Insurance Law does not define "political risk insurance." However, N.Y. Comp. Codes R. & Regs. tit. 11, § 16.12(3) (Regulation 86) includes such coverage as a kind of N.Y. Ins. Law Article 63 special risk insurance, and it states:

### Political Risk Insurance

Coverage for losses arising out of the actions of a foreign government. This includes:

- (1) loss of use or destruction of property located in a foreign country;
- (2) loss of income from operations or uncompleted contracts in a foreign country;
- (3) nonpayment on contract due to the inability to convert foreign currency into "contract" currency;
- (4) termination of contracts due to license cancellations and embargoes;
- (5) war, civil war, revolution, rebellion or insurrection within a foreign country or along the route of shipment which prevents completion of contracts; or
- (6) expropriation, confiscation, naturalization, seizure, requisition or arbitrary and selective intervention by a foreign government preventing completion of contracts or otherwise affecting business operations of the insured in such country.

An excess line broker may, under N.Y. Ins. Law § 2105 (McKinney Supp. 2005), place insurance risks with unauthorized insurers only for the kinds of insurance specified in N.Y. Ins. Law § 1113(a)(4)-(14), (16), (17), (19), (20), (22), (27), and (28). The Department considers various aspects of political risk insurance to constitute certain kinds of insurance as defined within these paragraphs. Therefore, political risk insurance conforming to the description in Regulation 86 may be placed by an excess line broker with an unauthorized insurer.

### Insurance on Bank Loans

Absent from the definition of political risk in Regulation 86 is insurance for the non-payment of loans made by a bank to a foreign government or enterprise, which the Department considers a kind of financial guaranty insurance as defined in N.Y. Ins. Law § 6901(A)(1)(a) (McKinney 2000), which states:

(a) (1) "Financial guaranty insurance" means a surety bond, an insurance policy or, when issued by an insurer or any person doing an insurance business as defined in paragraph one of subsection (b) of section one thousand one hundred one of this chapter, an indemnity contract, and any guaranty similar to the foregoing types, under which loss is payable, upon proof of occurrence of financial loss, to an insured claimant, obligee or indemnitee as a result of any of the following events:

(A) failure of any obligor on or issuer of any debt instrument or other monetary obligation (including equity securities guaranteed under a surety bond, insurance policy or indemnity contract) to pay when due to be paid by the obligor or scheduled at the time insured to be received by the holder of the obligation, principal, interest, premium, dividend or purchase price of or on, or other amounts due or payable with respect to, such instrument or obligation, when such failure is the result of a financial default or insolvency or, provided that such payment source is investment grade, any other failure to make payment, regardless of whether such obligation is incurred directly or as guarantor by or on behalf of another obligor that has also defaulted;

Thus, an excess line broker may not place in New York, with an unauthorized insurer, a policy that insures the non-payment of bank loans made by a New York domiciled bank to foreign governments or foreign government-owned businesses. Such coverage may only be written in New York by an authorized insurer.

### Credit Insurance

Credit insurance is defined, in part, in N.Y. Ins. Law § 1113(a)(17)(A) (McKinney Supp. 2005) as:

Indemnifying merchants or other persons extending credit against loss or damage resulting from non-payment of debts owed to them, for goods and services provided in the normal course of their business, including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to such insurer or to the insured, but no insurance may be written as credit insurance if it falls within the definition of financial guaranty insurance as set forth in paragraph one of subsection (a) of section six thousand nine hundred one of this chapter[.]

It was stated in the inquiry that the firm places trade credit insurance for a U.S. domiciled corporation (presumably domiciled in New York) that does business overseas, and which sells, on credit, its overseas-made products to its overseas customers and New York customers. The trade credit insurance covers the risk of non-payment by customers who purchased on credit. An excess line broker may place such insurance as it constitutes credit insurance under N.Y. Ins. Law § 1113(a)(17), which is enumerated as a kind of insurance that may be sold by excess line brokers under N.Y. Ins. Law § 2105(a) (McKinney Supp. 2005).

### Excess Line Tax

Under N.Y. Ins. Law § 2117(b)(2) (McKinney Supp. 2005), an insurance broker may place insurance with an unauthorized insurer without using the excess line

market where the situs of the property is permanently located outside New York. In that case, there would be no excess line tax due as the insurance would not have been written through the excess line market. However, this section is not applicable in this instance because § 2117(b)(2) applies only to tangible property permanently located outside New York. Political risk insurance, as discussed earlier, is really a combination of various kinds of insurance and is not specifically insurance covering tangible property. Hence, it does not apply to this inquiry.

N.Y. Ins. Law § 9102 (McKinney 2000) states in relevant part:

(a) In determining the amount of direct premiums taxable in this state, all such premiums written, procured, or received in this state shall be deemed written on property or risks located or resident in this state except such premiums properly allocated and reported as taxable premiums of any other state or states.

(b) (1) In determining the amount of gross premiums taxable in this state pursuant to paragraph one of subsection (d) of section two thousand one hundred eighteen of this chapter, where a placement of excess line insurance covers property or risks located or resident both in and out of this state, the sum paid to the superintendent shall be computed on that portion of the policy premium that is attributable to property or risks located or resident in this state, as determined by reference to an allocation schedule prescribed by the superintendent in a regulation.

(2) If the allocation schedule does not identify a classification appropriate to the property or risk being insured, an alternative method of equitable allocation shall be used for such coverage. In that circumstance, documented evidence of the underwriting bases and other criteria used by the insurer shall be given significant weight by the superintendent.

Thus, excess line premium tax is due on all premiums written, procured or received in New York as the statute deems such premium to have been written on property or risks located or resident in New York. The only exception made is for allocation of premiums that are taxable by another state or states. This statute does not allow for allocation based on property or risks located in another country where the premium was written, procured or received in New York.

For further information you may contact Associate Attorney Sally Geisel at the New York City Office.