



**COMPLIANCE
ADVISOR**

**A Beginner's Guide
To Excess Line
Compliance**

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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. The following provides an overview of compliance fundamentals with which excess line brokers should be familiar.

FUNDAMENTAL COMPLIANCE REQUIREMENTS

When the insured's Home State is New York, the fundamental compliance requirements for a proper excess line transaction can be summarized as follows:

- I. Coverage must be placed by a New York-licensed excess line broker. **Only a New York-licensed broker (NOT an agent) can place excess line insurance through a New York-licensed excess line broker (wholesale broker).** For more on this distinction, please see the *ELANY Elaborates: What's in a Name*.
- II. A Diligent Search of the licensed market must be made before a broker can place coverage in the excess line market.
- III. Due Care must be exercised in the selection of financially secure eligible excess line insurer(s).
- IV. Coverage must only be a type/kind of insurance that can legally be placed in the excess line market.
- V. Compliant 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 the 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 brokers must file excess line premium tax returns by March 15 of every calendar year even if no business was placed under the excess line broker license.
- VIII. The Home State of the insured must be determined by the excess line broker.
- IX. Filings made with ELANY must include the correct information.

For excess line business, the broker is the licensee, not the insurer, and the legal burden for properly adhering to New York excess line laws, rules and regulations belongs to the broker.

I. BROKERS MUST BE PROPERLY LICENSED

1. Excess line brokers must ensure they are currently and properly licensed as New York excess line brokers.

- All excess line broker business entity licenses (corporation, LLC or partnership) expire on June 30 of odd 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 odd numbered years for those born in odd numbered years.
- If a broker operates as a corporation, LLC or partnership, it should not use an individual excess line broker license to place business. When an entity sells, solicits or negotiates insurance contracts, gets paid commissions and holds premium trust funds in its name, the entity must be licensed. If the incorporated entity that employs an individual broker fails to obtain a business entity license and instead operates under the individual excess line broker's license, the entity has violated the law because it is illegal to pay commission to, or receive commissions as, an unlicensed person or entity. The actual licensee must hold the premiums received in a premium trust account in its name and under its control.
- New York will only issue a limited nonresident excess line broker's license to individual or entity licensees with a declared Home State of Florida or Montana. A limited license only allows a broker to transact Risk Purchasing Group (RPG) business. If a broker places non-RPG business using a limited license, it is violating New York law.

2. If a New York-licensed excess line broker is a wholesale excess line broker:

- The retail producer on an excess line placement must have a current New York broker's license. **Only a New York-licensed broker (NOT an agent) can place excess line insurance through a New York-licensed**

excess line broker. Excess line brokers are advised to confirm this in advance of placement by logging onto the Department of Financial Services' (DFS) [Insurance License Search Portal](#).

- The retail producing broker must be licensed as an entity if it operates as a corporation, LLC or partnership.
- All wholesale transactions submitted to ELANY should include a Part C Affidavit, prepared and signed by the retail-producing broker.
- Accommodation or courtesy filings, where the excess line broker makes the filing but not the placement, are prohibited.

II. BROKERS MUST MAKE A DILIGENT SEARCH OF THE LICENSED MARKET

1. A Diligent Search of the licensed market (three declinations) must be made before placing the risk with a New York 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 licensed insurers whom they have “reason to believe might consider writing the type of coverage or class of insurance involved....” Declinations from licensed insurers are not required if the coverage type appears either on the [Export List](#) or the insured meets the definition and criteria of an [Exempt Commercial Purchaser \(ECP\)](#).
- Declination Date Verification — The DFS has expressed concerns where notice of excess line placement dates or policy inception dates preceded one or more declination dates. It 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, licensees are advised to review internal procedures to avoid any problems.
- Affidavit(s) and related excess line insurance documents must always be submitted to ELANY for review even if a risk qualifies for the Export List or ECP status.

For more details, please see the ELANY educational video, “[Diligent Search and Reason to Believe Standard](#).”

III. BROKERS MUST 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 insurers.

- 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 New York, an excess line broker must 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 and adequate to its financial needs. A foreign excess line insurer must maintain surplus to policyholders of not less than \$49,000,000;
 - (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, appears on the quarterly listing of alien insurers published by the International Insurers Department (IID) of the NAIC.
- ELANY will assist brokers in verifying financial security upon request.

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

1. Coverage must be only the types/kinds of insurance that can legally be placed in the New York 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. However, there are coverages that may not be written in the excess line market. Insurance Law [§2105](#) authorizes excess line brokers to place certain “kinds” of insurance as defined in Insurance Law [§1113](#).
- New York is stricter than many states in limiting types/kinds of permissible coverage. Brokers should not assume that a coverage is permissible in New York just because they can place that coverage in other states.
- Certain types/kinds of insurance not listed in Insurance Law §2105 cannot be placed by an excess line broker, including 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.
- 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; excess medical malpractice insurance for doctors, dentists and general hospitals—and primary medical malpractice insurance for insureds not eligible for coverage from the Medical Malpractice Insurance Pool (residual market); group coverage/master policy is 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, see ELANY’s *Compliance Advisor*: [Limitations on Which Types of Coverage Can be Placed by Excess Line Licensees](#).

V. BROKERS MUST PROVIDE THE INSURED PROPER EXCESS LINE PLACEMENT DISCLOSURE NOTIFICATIONS

1. Each insured must be provided with 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 provides notification to the insured that the excess line insurer providing insurance coverage is not protected by state security funds in case of insolvency and not subject to all of the supervision and regulatory requirements of the DFS.
 - The Notice of Excess Line Placement also provides protection/evidence to the excess line broker and producing broker if, at a later date, the insured asserts 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 premiums for the policy or an insurer’s policy fee. An excess line broker or producing broker must obtain the insured’s signature on a Total Cost Form specifying the amount and purpose of each charge pursuant to the requirements of Insurance Law [§2119](#) and [11 CRR-NY 27.12](#).
 - ELANY does not need a signed copy of the Total Cost Form, so a broker need not wait for the insured to return a signed Total Cost Form before filing with ELANY. However, as per Insurance Law §2119, a signed copy of the Total Cost Form must be retained by the broker for not less than three years.

For more details, see ELANY Says: [Notice of Excess Line Placement/Total Cost Form](#).

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, bold legend (broker stamp) disclosing the nature of the excess line insurance placement.
 - The excess line broker is responsible for placing the disclosure legend required by [11 CRR-NY 27.15](#) on each coverage document given to an insured.
 - This required disclosure language provides notification to the insured that the excess line insurer providing insurance coverage to them 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 DFS.

VI. BROKER FILING REQUIREMENTS AND OTHER DOCUMENTATION

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

Every initial excess line transaction involves the filing of the following:

- Batch filing report containing one to 10 transactions;
- Affidavit(s) – Part A (Excess Line Broker) and, if applicable, Part C (Producing Broker) (current versions of the forms only);
- Declaration's 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, see the **ELANY Compliance Advisor: Excess Line Broker/The Most Important Document**.

The ELANY electronic affidavit filing system can automatically generate all required forms with the exception of the insurance coverage document.

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 different from the broker stamp disclosure noted in Section V above.

- Insurance Law [§2118](#) and [11 CRR-NY Part 27](#) state that it is unlawful for an excess line broker to deliver any declarations page or cover note in New York unless they are stamped by ELANY.¹
- The ELANY stamp indicates that affidavits and related insurance documents submitted to ELANY by New York-licensed excess line brokers were examined and the transaction was determined to be in compliance with the applicable excess line laws and regulations of New York.

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

- Insurance Law §2118 and 11 CRR-NY Part 27 require that binding authority agreements be in writing, contain minimum terms, be signed by both parties and be filed electronically with ELANY prior to use.

For more details, see ELANY Says: [Binding Authorities](#).

VII. EXCESS LINE BROKERS MUST PAY PREMIUM TAXES TO THE DFS BY MARCH 15 ANNUALLY.

- Insurance Law §2118 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 insured's Home State as defined by New York Insurance Law [§2101\(x\)\(3\)](#), 100% of the premium is subject to taxation even when the policy insures risk exposures located in other states as well.
- Where New York is the insured's Home State 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 New York premium tax.
- Excess line premiums attributable to tax-exempt insureds are still subject to the premium tax and must be paid by the excess line broker. Excess line brokers may charge tax-exempt insureds for the excess line tax if the insured signed a Total Cost Form that includes the premium tax.
- In early March of each year, ELANY issues a data report to each excess line broker 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 that the excess line broker must file electronically by March 15 for the preceding year.

- **Every licensee must electronically file a tax return with the DFS even if no excess line business was produced.**

For more details, see the ELANY educational video, “[How to Complete and File an Excess Line Premium Tax Statement](#).”

VIII. DETERMINING THE HOME STATE OF THE INSURED

Under the federal [Nonadmitted Reinsurance and Reform Act \(NRRA\)](#), only the Home State of the insured can regulate and tax an excess & surplus line placement. New York law conforms to the NRRA by requiring compliance with the excess line law when New York is the Home State. It is a simple process to identify the Home State for most insureds.

Commercial Risks

If the insured is a single entity, person or firm and its [principal place of business](#) is New York, then New York is the Home State unless 100% of the risk is located outside of New York. If 100% of the insured risk is located outside New York, then the Home State is the state to which the greatest percentage of the insured’s taxable premium for that policy is allocated. “Principal place of business” means the state where the insured maintains its headquarters and where its high-level officers direct, control and coordinate the insured’s business activities. In the event an insured’s high-level officers perform these functions in more than one state, or if the principal place of business is located outside any state, then “principal place of business” is the state to which the greatest percentage of the insured’s taxable premium for that insurance contract is allocated.

Where the insured is an [affiliated group](#) of entities, the Home State is the principal place of business of the insured affiliate to which the largest percentage of premium is allocated. Though New York generally prohibits excess line insurance policies from insuring unaffiliated groups, there are exceptions such as purchasing groups and employer-sponsored group excess insurance.

If an excess line policy insures an unaffiliated group of insureds, the separate Home State of each insured is the Home State for compliance purposes unless the group pays 100% of the premium from its own funds. In that case, the Home State is the Home State of the group.

Personal Lines Risks

For personal lines risks, the Home State of the insured is the state of the insured’s [principal residence](#) unless:

1. No state is the principal residence of the insured, in which case the Home State is the state to which the greatest percentage of the insured’s taxable premium is allocated;
2. 100% of the risk is located outside the state of the insured’s principal residence, in which case the Home State will be the state to which the greatest percentage of the insured’s taxable premium for that insurance policy is allocated.

IX. INFORMATION REQUIRED WHEN FILING INSURANCE DOCUMENTS WITH ELANY

Every insurance document submitted to ELANY for stamping must 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. Quotes, applications and submission documents are not binders and cannot serve as one.



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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.