

QUESTION: A 2021-2022 Business Owners Policy issued by an admitted carrier in New York State was audited and produced an extremely large additional premium due to audited domestic and international sales. The insured was not aware the policy was auditable as it appears the policy provision was changed without notification prior to an automatic renewal. When we questioned the carrier about a conditional renewal notice (CRN), the response was “we sent the insured a conditional renewal notice in 2019 noting that the policy could be audited. There is no additional requirement in New York to notify of auditable status each year.” We also found the policy following the CRN issued in 2019 was NOT auditable, only the 21-22 policy. we find it difficult to believe this is acceptable without notification to the policyholder prior to the policy term.

ANSWER: This is a difficult one because it involves two separate requirements under New York law and regulations.

First, the conditional renewal notice requirement. [Subsection \(e\) of Section 3426 of the New York Insurance Law](#), titled *Commercial lines insurance; cancellation and renewal provisions*, states:

(e)(1) A covered policy shall remain in full force and effect pursuant to the same terms, conditions and rates unless written notice is mailed or delivered by the insurer to the first-named insured, at the address shown on the policy, and to such insured's authorized agent or broker, indicating the insurer's intention: ...

(B) to condition its renewal upon

- change of limits,
- change in type of coverage,
- reduction of coverage,
- increased deductible or addition of exclusion, or
- upon increased premiums in excess of ten percent (exclusive of any premium increase generated as a result of increased exposure units, pursuant to subsection (d) of this section, or as a result of experience rating, loss rating, retrospective rating or audit),

except that with respect to an excess liability policy, the insurer may also, consistent with regulations promulgated by the superintendent, condition its renewal upon requirements relating to the underlying coverage, in which event the conditional renewal notice shall be treated as an effective notice of nonrenewal if such requirements are not satisfied as of the later of the expiration date of the policy or sixty days after mailing or delivery of such notice; ...

There does not appear to be a requirement that an insurer provide a conditional renewal notice because of a change in audit status. Also, the insurer is correct in that a CRN is required only for the first renewal that includes a change.

In addition, [Section 161.10 of New York Insurance Regulation 129](#), titled *Flexible-Rating System; Rating Plans; Tort Reform Refiling Requirements*, requires insurers to conduct premium audits unless the total annual premium attributable to the auditable exposure base is not reasonably expected to exceed \$1500. Consequently, every BOP that insures New York risks must include an endorsement similar to ISO endorsement BP 01 15 12 18, *New York Changes*, which changes the Premium Audit condition in the Common Policy Conditions section to say:

J. Premium Audit

1. This policy is subject to audit if a premium designated as an advance premium is shown in the Declarations. We will compute the final premium due when we determine your actual exposures.
2. Premium shown in this Policy as advance premium is a deposit premium only. At the close of each audit period, we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit premiums is the date shown as the due date on the bill. An audit to determine the final premium due or to be refunded will be completed within 180 days after the expiration date of the Policy and may not be waived, except when:

- a. The total annual premium attributable to the auditable exposure is not reasonably expected to exceed \$1,500; or
- b. The Policy requires notification to the insurer with specific information of any additional exposure units (e.g., buildings) for which coverage is requested.

If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

Except as provided in this Paragraph 2., Paragraph D. Examination Of Your Books And Records continues to apply.

3. The first Named Insured must keep records of the information we need for premium computation and send us copies at such times as we may request.

If you review the forms and endorsements in your client's policy, I expect you will find text similar or identical to this. Therefore, we have a situation where:

- The insurer sent a conditional renewal notice three years ago informing the insured that the policy was subject to premium audit
- They failed to conduct the audit in 2020 and 2021, which was a violation of Regulation 129 if the anticipated premium was greater than \$1500
- They included a provision in the policy, which the insured has at least a partial legal duty to read, stating that the policy would be audited and the insured may owe an additional premium
- It appears the insured did not read that provision

In short, we have a mess.

My guess (and it's only a guess) is that the insurer has the legal right to charge the additional audit premium because the premium audit condition is part of the policy, and they sent a CRN to that effect in 2019. The insurer is also vulnerable to disciplinary action if it failed to comply with the audit requirement in Section 161.10. So, the insurer can bill your insured, your insured can submit a complaint to the New York State Department of Financial Services, and DFS might fine the insurer for not auditing the last two policies. Both sides lose.

I don't know how the two sides can resolve this dispute to their mutual satisfaction, but I hope they'll look for a way.