

NON-LICENSEE INTERNET ADVERTISING AND REFERRALS

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It has been five years since the New York Insurance Department (“New York Department”) issued Circular Letter No. 5 (2001)(the “Circular Letter”) setting forth New York’s approach to the regulation of internet advertisements and referrals by non-licensees in the insurance industry. An even longer period of time has elapsed since the National Association of Insurance Commissioners (“NAIC”) promulgated changes to the NAIC Producer Licensing Model Act (the “Model Act”) eliminating obstacles to internet advertisements and referrals by non-licensees.

Despite this passage of time, many practitioners without a background in insurance regulation still labor under the impression that any non-licensee whose website contains an advertisement for, or provides a referral to a licensed insurance company, insurance agent or broker (collectively, “insurance producers”) must itself be licensed as an insurance producer.

Since the insurance industry’s ability to fully realize the promise of the internet and achieve lower expense costs on a greater scale is hampered by the reluctance of attorneys representing non-licensees to allow their clients’ nationally viewable websites to serve as portals to the websites of licensed insurance companies and insurance producers, re-visiting the basic rules governing the regulation of internet advertisements and referrals by non-licensees is warranted.

New York Approach

Although New York did not enact the Model Act, the New York Legislature took steps in 2000 to modernize the rules governing referrals to licensed insurance agents and brokers by amending Sections 2114, 2115 and 2116 of the New York Insurance Law.¹ Under these amendments, referrals by non-licensees to licensed entities became permissible provided the non-licensee does not discuss specific insurance policy terms and conditions and is not compensated for referrals based upon an insured’s actual purchase of insurance. Prior to this change in the law, the ability of non-licensees to serve as viable sources of compensable referrals was subject to fact specific case by case examination by the New York Department for compliance with rules prohibiting non-licensees from engaging in the transaction of insurance or soliciting insurance.

Following this important change in the New York Insurance Law, the New York Department issued the Circular Letter to familiarize the insurance industry with these statutory changes and provide further encouragement for the utilization of the internet in the marketing of insurance. In support of these goals, the Circular Letter provided clear guidance as to what internet advertisements and referrals by non-licensees would be acceptable on a going forward basis in New York.

Based on the New York Department’s conclusion that the maintenance of a passive website with information concerning specific insurance products or services does not constitute solicitation under the New York Insurance Law, the Circular Letter advised the insurance industry that non-licensees would be permitted to include simple advertisements for insurance products and services on their websites and be compensated for such advertisements without becoming subject to the stricter rules governing referrals. Included within the permissible category of simple advertisements set forth in the Circular Letter were banners, frames, embedded links and hypertext links directing a website viewer to the website of a licensed insurance company or insurance producer.²

Under the Circular Letter, non-licensees allowing their websites to serve as portals to the websites of licensed entities may have their compensation calculated in any mutually acceptable commercially reasonable manner, including flat fees or fees based upon the amount of business

generated from the advertisement. The websites of the licensed entities accessed through the non-licensee's portal website are subject to all relevant statutory and regulatory guidelines applicable to advertisements appearing in other mediums. If a particular insurance product or service is not available in New York, the licensed entity's website must clearly state that fact by including appropriate disclosures and disclaimers.

If the non-licensee's portal website will recommend, endorse or promote a licensed entity to New York residents or recommend, endorse or promote the insurance product being sold by the licensed entity to New York residents, the New York Department will consider the non-licensee to be providing a referral provided the non-licensee does not discuss specific policy terms and conditions.³ Due to the prohibition in Sections 2114, 2115 and 2116 of the New York Insurance Law, a non-licensee also may not be compensated for a referral based upon an insured's actual purchase of insurance. Other than that limitation, the compensation to be received by a non-licensee for providing a referral is unlimited.

To comply with New York's restrictions in those circumstances in which a marketing arrangement with a non-licensee cannot be modified to satisfy the requirements pertaining to advertisements, practitioners would be well advised to closely review any agreement between a non-licensee and a licensed entity to ensure that the compensation received by the non-licensee is not contingent upon the actual purchase of insurance by an insured.

In the absence of such revisions, a non-licensee may run the risk of being deemed to be acting without a license by the New York Department. In such event, a licensed entity whose website has been accessed through a referral contained in a non-licensee's portal website may also be deemed to be paying commissions to a non-licensee by the New York Insurance Law. Payment of commissions to unlicensed entities is prohibited under the New York Insurance Law.⁴

Because of longstanding prohibitions against excess lines insurers and unauthorized insurers doing business in New York and because excess lines brokers are not permitted to advertise, excess lines insurers, unauthorized insurers and excess lines brokers are prohibited from selling insurance over the internet for New York based transactions.

Model Act

As a result of the surveys conducted in conjunction with the preparation of the Electronic Commerce and Regulation and Marketing Insurance Over the Internet White-Papers which were, respectively, published in 2000 and 1998, the NAIC identified a widespread lack of consistency among state insurance regulatory authorities concerning the activities deemed to require licensing as an insurance producer.

To facilitate electronic commerce in the insurance industry, the NAIC undertook to provide a greater uniformity among the states by making changes to the Model Act confirming that non-licensees which do not sell, solicit or negotiate insurance are permitted to advertise insurance products or services and provide referrals on behalf of licensed entities, and receive compensation for such services. These important changes to the Model Act were set forth in the following two provisions:

A person whose activities in this state are limited to advertising without the intent to solicit insurance in this state through communications in printed publications or other forms of electronic mass media whose distribution is not limited to residents of the state, provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be performed in this state;

NAIC Producer Licensing Model Act, § 4(b)(5)

An insurer or insurance producer may pay or assign commissions, service fees, brokerages or other valuable consideration to an insurance agency or to persons who do not sell, solicit or negotiate insurance in this state, unless the payment would violate [insert appropriate reference to state law, i.e. citation to anti-rebating statute, if applicable] .

NAIC Producer Licensing Model Act, § 13(D)

Although a small handful of states (California, Florida, New Mexico, Texas and Washington) have not yet incorporated Section 4(b)(5) of the Model Act into their regulatory schemes, the overwhelming vast majority of states have adopted this provision during the past several years.⁵ As a result, the approach to internet advertising by non-licensees first espoused by New York in the Circular Letter is now established law throughout the U.S. By adopting this provision, legislatures in conjunction with the insurance regulatory authorities which they supervise settled the issue once and for all in their respective jurisdictions that internet advertisements on non-licensee websites which serve as portals to licensed entities' websites do not require the non-licensee to obtain a license as an insurance producer

A similarly large number of states have either adopted Section 13(D) of the Model Act⁶ or have enacted laws authorizing the payment to non-licensees of referral fees that are not dependent on the actual purchase of insurance by insureds.⁷ Of the seven states which have enacted laws authorizing referral fees not dependent on the actual purchase of insurance, four of these states (Ohio, Pennsylvania, South Dakota and Virginia) have chosen not to adopt New York's approach allowing for unlimited compensation, but instead have chosen to limit the payment of referral fees to one time fixed dollar amounts. The remaining states have either been silent on the issue or have elected not to address which types of referral fees may be permissible under their laws.⁸

Although the exact analytical distinctions made by the New York Department between advertisements and referrals are not specifically set out in Sections 4(b)(5) and 13(D) of the Model Act, it is likely that the states which have adopted these provisions would, except where indicated, be inclined to follow the New York approach. This is because the two key elements in the New York Department's analysis which convert a referral into a solicitation (*i.e.*, (i) discussing specific insurance policy terms and conditions; and, (ii) conditioning payment on an insured's actual purchase of insurance) are inherent in the definitions of "sell," "solicit," and "negotiate" employed in the Model Act.⁹ Absent these two key elements, it is likely that state insurance regulatory authorities may be inclined to agree that a non-licensee is not engaged in selling, soliciting or negotiating insurance in their state by recommending, endorsing or promoting a licensed entity to residents or recommending, endorsing or promoting the insurance product being sold.

¹ See, *N.Y. Ins. Law*, §§ 2114(a)(4), 2115(a)(1), and 2116().

² See, e.g., *New York Insurance Department OGC Opinion*, No. 03-02-15 (“An insurance licensee’s hypertext link that is posted on a non-licensee’s website is considered an advertisement where the wording of the link, and that which frames it, does not include recommendations, endorsements or promotions from the non-licensee concerning the insurance products sold by the licensee. Examples of the type of link that the Department would consider to be an advertisement is one that just contains the name of the insurance company, or states “insurance” or “Interested in Insurance?” If the link is an advertisement, compensation to the non-licensee can be based on per lead or per sale of an insurance policy.”).

³ See, e.g., *New York Insurance Department OGC Opinion*, No. 03-02-15 (“Where the wording of the link, or that which frames it, recommends, endorses or promotes a New York State licensed insurance agent or broker, but does not discuss specific insurance policy terms and conditions, and the website owner is not compensated for posting the link based on a user’s purchase of insurance, such act is considered a referral as provided in N.Y. Ins. Law 2114, 2115 and 2115 (McKinney Supp. 2000). There is no monetary limitation stated in the Insurance Law or regulations promulgated thereunder regarding the amount of the referral fee.”).

⁴ See, e.g., *New York Insurance Law*, § 2116 (“No insurer authorized to do business in this state, and no...representative thereof, shall pay any money...to any person, firm, association or corporation for or because of his or its acting in this state as an insurance broker, unless such person, firm, association or corporation is authorized to do so by virtue of a license...”).

⁵ See, Ala. Code, §27-7-4.2(b)(5); Alaska Stat., § 21.27.010(j)(5); Ariz. Rev. Stat., § 20-283(B)(5); Ark. Code Ann., § 23-64-504(b)(5); Colo. Rev. Stat., § 10-2-105(2)(h); Conn. Gen. Stat., § 38a-702c(b)(5); Del. Code Ann., § 1704(b)(5); D.C. Code, § 31-1131.04(b)(5); Ga. Code Ann., § 33-23-4(h)(2)(E); Haw. Rev. Stat., § 431:9A-104(b)(5); Idaho Code Ann., § 41-1005(2)(e); Ill. Comp. Stat., 215 § 5/500-20(b)(5); Ind. Code, § 27-1-15.6-4(c)(5); Iowa Code, § 522B.3(2)(e); Kan. Stat. Ann., § 40-4904(b)(5); Ky. Rev. Stat. Ann., § 304.9-090(2)(e); La. Rev. Stat. Ann., § 22:1134(B)(5); Me. Rev. Stat. Ann., § 1420-C(2)(E); Md. Code Ann. (Ins.), § 10-103(b)(6); Mass. Gen. Laws ch. 175, § 162J(b)(5); Mich. Comp. Laws, § 500.1202(2)(e); Minn. Stat., § 60K.34 (2)(6); Miss. Code Ann., § 83-17-57(2)(e); Mo. Rev. Stat., § 375.014(3)(5); Mont. Code Ann., § 33-17-103(8); Neb. Rev. Stat., § 44-4051(2)(e); Nev. Rev. Stat., § 683A.211(5); N.H. Rev. Stat. Ann., § 402-J:4(II)(e); N.J. Stat. Ann., § 17:22A-30(b)(5); N.C. Gen. Stat., § 58-33-26(n)(5); N.D. Cent. Code, § 26.1-26-09(2)(e); Ohio Rev. Code Ann., § 3905.03(A)(6); Okla. Stat., § 36-1435.5(B)(5); Or. Rev. Stat., § 744.056 (2)(e); 40 P.S. § 310.3(b)(6); R.I. Gen. Laws, § 27-2.4-5 (b)(6); S.C. Code Ann., § 38-43-20(D)(5); S.D. Codified Laws, § 58-30-144(5); Tenn. Code Ann., § 56-6-104(b)(5); Utah Code Ann., § 31A-23a-201(1)(f); Vt. Stat. Ann., § 4813d(b)(5); Va. Code Ann., § 38.2-1821.1.(B)(5); W. Va. Code, § 33-12-4(b)(5); Wis. Admin. Code, § 6.595(2)(f); and, Wyo. Stat. Ann., § 26-9-204(b)(v).

⁶ See, Ala. Code, § 27-7-35.1(d); Alaska Stat., § 21.27.370(d); Ariz. Rev. Stat., § 20-298(D); Ark. Code Ann., § 23-64-513(d); Colo. Rev. Stat., § 10-2-702(2); Conn. Gen. Stat., § 38a-702l(d); Del. Code Ann., § 1714(d); D.C. Code, § 31-1131.13(d); Haw. Rev. Stat., § 431:9A-113(d); Idaho Code Ann., § 41-1017(4); Ill. Comp. Stat., 215 § 5/500-80(d); Ind. Code, § 27-1-15.6-13(d); Iowa Code, § 522B.12(4); Kan. Stat. Ann., § 40-4910(f); Me. Rev. Stat. Ann., § 1420-L(4); Md. Code Ann. (Ins.), § 10-130(c); Mich. Comp. Laws, § 500.1240(4); Minn. Stat., § 60K.48 (3)(b); Miss. Code Ann., § 83-17-73.(4); Mo. Rev. Stat., § 375.076(4); Neb. Rev. Stat., § 44-4060(4); Nev. Rev. Stat., § 683A.361(4); N.H. Rev. Stat. Ann., § 402-J:13(IV); N.J. Stat. Ann., § 17:22A-41(d); N.D. Cent. Code, § 26.1-26-04(4); Okla. Stat., § 36-1435.14(D); Or. Rev. Stat., § 744.076 (4); R.I. Gen. Laws, § 27-2.4-15(d); Tenn.

Code Ann., § 56-6-113(d); Vt. Stat. Ann., § 4796(d); W. Va. Code, § 33-12-23(d); and, Wyo. Stat. Ann., § 26-9-212(d).

⁷ See, Ky. Rev. Stat. Ann., § 304.9-425(5); Ohio Rev. Code Ann., §3905.18(D); 40 P.S. § 310.72(b)(2); S.D. Codified Laws, § 58-30-174; Utah Code Ann., § 31A-23a-504(4); Va. Code Ann., § 38.2-1821.1.(B)(8); and, Wash. Rev. Code, §48.17.490(1).

⁸ See, e.g., La. Rev. Stat. Ann., §§ 22:1143 and 22:1148; Mass. Gen. Laws ch. 175, § 177; Mont. Code Ann., § 33-17-1103; N.M. Stat., § 59A-12-24; N.C. Gen. Stat., § 58-33-82(e); S.C. Code Ann., §38-43-200; Tex. Ins. Code, §§ 4001.051(d) and 4005.053; W. Va. Code, § 33-12-23(d); and, Wis. Stat., § 628.61.

⁹ See, *NAIC Producer Licensing Model Act*, § 2(K, M, N)(“K. ‘Negotiate’ means the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers...M. ‘Sell’ means to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurance company. N. ‘Solicit’ means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company.”).