



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 February 12, 2001, representing the position of the New York State Insurance Department.

**RE: Commission Reductions**

**Questions Presented:**

- 1) May an insurance agent procure insurance policies from insurers not authorized to transact business in New York State?
- 2) May an insurer file a range of commissions that it will pay to each agent or broker for each rate it files so that an insurance agent or broker may negotiate its commission, thereby reducing or increasing the premium to be charged the insured?
- 3) May an insurance agent or broker forego commission and enter into an agreement with the insured, whereby the insured compensates the agent or broker directly, for selling insurance?
- 4) How may a copy of an insurer's filed rates be obtained?

**Conclusions:**

- 1) Only a licensed excess line broker may procure insurance policies from insurers not authorized to transact business in New York State as described in N.Y. Ins. Law § 2105 (McKinney 2000), or a licensed broker under N.Y. Ins. Law § 2117(b) or (c) (McKinney 2000).
- 2) The Department does not require the filing of individual commission amounts that an insurer has contractually agreed to pay each of its agents or brokers. Insurers are required to provide only the proportion of premium that it reasonably anticipates spending on commission for all its agents or brokers combined. Regardless of the commission structures contracted for, commissions may not be negotiated during the sale of insurance in order to quote a lower (or higher) premium to a prospective insured.
- 3) While an insurance agent or broker may forego collecting its duly earned commission from an insurer, such forbearance can not reduce the premium. Moreover, an insurance agent may not receive compensation directly from an insured for selling insurance, regardless that the insured agrees to pay a fee for such sale. However, an insurance broker may receive compensation directly from an insured, in addition to commission paid by the insurer, for negotiating or procuring insurance but only as provided by N.Y. Ins. Law § 2119(c) and (d) (McKinney 2000).
- 4) Copies of filed rates, if subject to public disclosure, may be obtained by making a Freedom of Information Law request for such copies.

**Facts:**

The Department was questioned about certain acts engaged in by licensed insurance agents that also act as brokers with respect to unauthorized insurers. The inquirer contended that the insurers, both authorized and unauthorized, that the insurance agents transact business with have permitted premium negotiation and reduction of commissions for property/casualty commercial lines policies. The inquirer stated further that the insurance agents, in lieu of collecting commission, enter into "consulting" agreements with the insureds, whereby a fee is paid by the insureds directly to the agents. The inquirer stated that the insurance agents presume these fee arrangements are permissible because the insurers permit these negotiations. It was inquired of the Department whether these activities are in conflict with any provisions of the New York Insurance Law.

**Analysis:**

An insurance agent may not procure insurance policies from insurers not authorized to transact business in New York State. N.Y. Ins. Law § 2117 (a) (McKinney 2000) states:

(a) No person, firm, association or corporation shall in this state act as agent for any insurer or health maintenance organization which is not licensed or authorized to do an insurance or health maintenance organization business in this state, in the doing of any insurance or health maintenance organization business in this state or in soliciting, negotiating or effectuating any insurance, health maintenance organization or annuity contract or shall in this state act as insurance broker in soliciting, negotiating or in any way effectuating any insurance, health maintenance organization or annuity contract of, or in placing risks with, any such insurer or health maintenance organization, or shall in this state in any way or manner aid any such insurer or health maintenance organization in effecting any insurance, health maintenance organization or annuity contract.

Other than the limited circumstances described in N.Y. Ins. Law § 2117 (b) and (c) (McKinney 2000) in which a licensed broker may place insurance with an

unauthorized insurer, only a licensed excess line broker may procure insurance policies from insurers not authorized to transact business in New York State as provided by N.Y. Ins. Law § 2105 (McKinney 2000), and only with respect to the enumerated kinds of insurance described within § 2105. Hence, if an insurance agent is not also licensed as an excess line broker, or broker with respect to § 2117 (b) or (c) transactions, the agent is in violation of N.Y. Ins. Law § 2102 (a)(1) and (b)(2) (McKinney 2000), which states:

(a)(1) No person, firm, association or corporation shall act as an insurance agent, insurance broker, reinsurance intermediary or insurance adjuster in this state without having authority to do so by virtue of a license issued and in force pursuant to the provisions of this chapter.

(b)(2) No person, firm, association or corporation shall use any other designation or title which is likely to mislead the public or shall hold himself or itself out in any manner as having particular insurance qualifications other than those for which he may be otherwise licensed or otherwise qualified.

With respect to the filing of rates for property/casualty insurance, which was the inquirer's focus, the applicable statute is N.Y. Ins. Law § 2304(a) (McKinney 2000), which states:

In the making of rates, consideration shall be given to past and prospective loss experience, including the conflagration and catastrophe hazards, if any, both within and without this state, to all factors reasonably attributable to the class of risks, to a reasonable profit, to past and prospective expenses both country-wide and those specially applicable to this state, and in the case of participating insurers to policyholders' dividends, savings or unabsorbed premium deposits allowed or returned to policyholders, members or subscribers. (emphasis added)

In furtherance of § 2304, the Department requires insurers to provide information in support of their rate filings. The supporting information must include the expense portion of the rate. Commissions are part of an insurer's expenses. The Department, however, does not require an insurer to file the individual commission amounts that it has contractually agreed to pay each of its agents or brokers. The Department only requires insurers to provide the proportion of premium that it reasonably anticipates spending on commission for all of its agents and brokers combined.

While the Insurance Law does not require an insurance agent or broker to collect its earned commission from the insurer (since that is a contractual agreement between the agent or broker and the insurer), such refusal to collect commission can not affect the premium to be charged the insured. A premium is based on the filed rate. A filed rate includes commission expenses, which are an indivisible component of the filed rate. Hence, the refusal to collect commission can not result in the insured paying a lower premium. N.Y. Ins. Law § 2314 (McKinney 2000) states:

No authorized insurer shall, and no licensed insurance agent, no employee or other representative of an authorized insurer, and no licensed insurance broker shall knowingly, charge or demand a rate or receive a premium which departs from the rates, rating plans, classifications, schedules, rules and standards in effect on behalf of the insurer, or shall issue or make any policy or contract involving a violation thereof.

Additionally, an insurance agent or broker, including an excess line broker, that foregoes collecting its duly earned commission may not reduce the premium because reducing the premium would constitute rebating in violation of N.Y. Ins. Law § 2324 (a) (McKinney 2000), which states:

No authorized insurer, no licensed insurance agent, no licensed insurance broker, and no employee or other representative of any such insurer, agent or broker shall make, procure or negotiate any contract of insurance other than as plainly expressed in the policy or other written contract issued or to be issued as evidence thereof, or shall directly or indirectly, by giving or sharing a commission or in any manner whatsoever, pay or allow or offer to pay or allow to the insured or to any employee of the insured, either as an inducement to the making of insurance or after insurance has been effected, any rebate from the premium which is specified in the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or shall give or offer to give any valuable consideration or inducement of any kind, directly or indirectly, which is not specified in such policy or contract, other than any article of merchandise not exceeding fifteen dollars in value which shall have conspicuously stamped or printed thereon the advertisement of the insurer, agent or broker, or shall give, sell or purchase, or offer to give, sell or purchase, as an inducement to the making of such insurance or in connection therewith, any stock, bond or other securities or any dividends or profits accrued thereon, nor shall the insured, his agent or representative knowingly receive directly or indirectly, any such rebate or special favor or advantage, provided, however, a licensed insurance agent or a licensed insurance broker may retain the usual commission or underwriting fee on insurance placed on his own property or risks, if the aggregate of such commissions or underwriting fees will not exceed five percent of the total net commissions or underwriting fees received by such licensed insurance agent or insurance broker during the calendar year. (emphasis added)

An insurance agent may not receive compensation directly from an insured for selling insurance, regardless that the insured agrees to pay a fee for such sale. N.Y. Ins. Law § 2101(a) (McKinney 2000) states in relevant part:

In this article, "insurance agent" means any authorized or acknowledged agent of an insurer, fraternal benefit society or health maintenance organization issued a certificate of authority pursuant to article forty-four of the public health law, and any sub-agent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or procurement or making of, an insurance, health maintenance organization or annuity contract, other than as a licensed insurance broker... (emphasis added)

By its definition, an insurance agent represents and acts on behalf of an insurer. Because an insurance agent represents the insurer, an insurance agent may not charge an insured a fee for placing insurance and may be compensated for placing such insurance only by the insurer. See *Friedman v. Markman*, 11 A.D.2d 57, 201 N.Y.S.2d 743 (1<sup>st</sup> Dep't 1960); *Angstreich v. Beck*, 165 N.Y.S. 449 (App. Term 1917); *Townsend v. Tompkins*, 10 N.Y.S. 797 (Sup. Ct. 1890); *Monat v. Ettinger*, 194 Misc.692, 87 N.Y.S.2d 488 (City Ct. 1947). Additionally, the Department has considered such agent fees to be a deviation from the filed rate in violation of N.Y. Ins. Law § 2314 (McKinney 2000).

An insurance broker may receive compensation directly from an insured that it represents, in addition to the commission it collects from the insurer, for negotiating or procuring an insurance policy but only as provided by N.Y. Ins. Law § 2119 (c) and (d) (McKinney 2000), which states:

(c) (1) No insurance broker may receive any compensation, other than commissions deductible from premiums on insurance policies or contracts, from any insured

or prospective insured for or on account of the negotiation or procurement of, or other services in connection with, any contract of insurance made or negotiated in this state or for any other services on account of such insurance policies or contracts, including adjustment of claims arising therefrom, unless such compensation is based upon a written memorandum, signed by the party to be charged, and specifying or clearly defining the amount or extent of such compensation.

(2) A copy of every such memorandum shall be retained by the broker for not less than three years after such services have been fully performed.

(3) This subsection shall not affect the right of any such broker to recover from the insured the amount of any premium or premiums for insurance effectuated by or through such broker.

(4) This subsection shall not affect the requirements of subsection (a) or (b) hereof, subsection (g) of section two thousand one hundred one or section two thousand one hundred eight of this article.

(d) No insurance broker shall, in connection with the negotiation, procurement, issuance, delivery or transfer in this state of any contract of insurance made or negotiated in this state, directly or indirectly charge, or receive from, the insured or prospective insured therein any greater sum than the rate of premium fixed therefor by the insurer obligated as such therein, unless such broker has a right to compensation for services created in the manner specified in subsection (c) hereof.

With respect to obtaining copies of an insurer's filed rates, such filings are records of the Insurance Department and are subject to the public disclosure provisions contained in N.Y. Pub. Off. Law Art. 6 (McKinney 1988 & Supp. 2001), which is commonly known as the Freedom of Information Law ("FOIL"). Any member of the public may make a FOIL request for records by submitting a written request to the Department via postal service, e-mail, fax, or personal delivery. Based on FOIL, or other state or federal statutes, the records may or may not be subject to public disclosure. If the requested records are subject to public disclosure, the requestor may view the records and/or obtain copies of the records. There is a charge for the provision of copies, which varies depending upon the copy-medium provided (i.e., photocopy, fax, electronic diskette).

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