

September 12, 2006

Robert J. Melillo, Chief
Legislative and Regulatory Affairs
Department of Banking and Insurance
20 West State Street
PO Box 325
Trenton, NJ 08625-0325

**RE: PRN 2006-221, Insurance Producer Standards of Conduct:
Commissions and Fees; Proposed Amendments N.J.A.C. 11:17B-1.2,
1.3, 2.1, 3.1 and 3.2.**

Dear Mr. Melillo:

PIANJ thanks the department for the opportunity to provide comments regarding its proposed amendments to the rules concerning commissions and fees. The department's proposal seeks to accomplish two main purposes, as well as making various other technical changes. First, it would impose a new requirement upon an originating broker making a surplus lines placement to disclose to an insured the fact that he will receive a portion of the commission paid to the surplus lines producer. The second purpose is to clarify the existing rules regarding fees charged by surplus lines producers pursuant to N.J.S.A. 17:22A-38b.

PIANJ opposes the proposed new compensation disclosure requirement, as well as the proposed change to the definition of "commission," because both changes would unnecessarily expand the current disclosure requirement. PIANJ also questions the need for the proposed changes that attempt to clarify existing statutory rules concerning fees charged to originating brokers by surplus lines producers. PIANJ believes the department has not clarified the existing rule, but has unnecessarily caused confusion about its application.

1. Commission disclosure requirements

A. Proposed 11:17B-2.1(f)

The department proposes a new requirement that brokers placing a policy through a surplus lines producer disclose to insureds the fact that the broker will receive a portion of the commission paid to the surplus lines producer by the insurer. The department alleges that the proposed amendment will help ensure that insureds are made aware of the long-standing practice that originating producers may share in the commission paid to the surplus lines producer.

However, the department does not offer any compelling reason for requiring such disclosure, other than to make insureds aware of a practice that has been in existence for decades. PIANJ opposes the imposition of a new administrative requirement upon producers for no justifiable purpose.

All insurance producers in New Jersey are currently subject to a regulation that requires them to disclose to insureds and prospective insureds whether they will be receiving commissions with respect to a particular placement. N.J.A.C.

11:17B-3.1(b) currently requires that any insurance producer charging a fee to an insured or prospective insured must first obtain a written agreement from such insured or prospective insured which includes a clear statement as to whether a commission will be received from the purchase of insurance.

The current regulation is a reasonable approach to disclosure that recognizes in cases where an applicant or an insured is being charged a fee by the producer, they should be made aware of the fact that the producer may also be receiving a commission from the insurer for the placement.

The department's proposal would take the current rule a step further and require that with respect to surplus lines placements, the originating broker must also inform an insured of the fact that they will be receiving commission from the surplus lines producer, *even in cases where the originating broker is not charging a fee to the insured.*

PIANJ opposes the new requirement because we do not believe there is a valid reason for requiring such a disclosure. It is simply an administrative burden being placed upon producers that will offer no benefit to the insurance consumers of this state.

On a technical note, while PIANJ maintains its opposition to the proposed disclosure rule, we would like to point out an apparent drafting error. The department's summary of the proposal states that, "N.J.A.C. 11:17B-2.1 is proposed to be amended to include a new subsection (f) to provide that in a case of surplus lines insurance the originating broker shall disclose to an insured the fact that it 'may' receive a portion of the commission from a surplus lines producer for placing the policies." However, the rule itself provides that, "...an originating broker shall disclose in writing to an insured the fact that...the originating broker 'will' receive a portion of the commission paid to the surplus lines producer by the insurer." The word "will" should be changed to "may" to reflect the department's explanation of the rule. Additionally, the department has proposed changing the word "will" to "may" in subsection 11:17B-3.1(b)(3). Therefore it appears the word "may" was actually intended.

B. Proposed change to definition of “commission”

PIANJ opposes the proposed change in the definition of “commission” because it will expand the current rule regarding commission disclosure.

The department’s proposed change to the definition of “commission” would include payments from an insurance producer as well as payments from an insurer. The department states that this change will reflect that commissions may be shared among producers.

However, the definition change does more than simply reflect this fact. It also expands the current disclosure requirement.

By changing the definition of commission, the department has now imposed a requirement upon producers that charge fees to applicants or insureds to disclose whether they will be receiving a payment from another producer through whom they have worked to obtain coverage from an insurer. Under the current rules, producers charging fees are only required to indicate whether they will be receiving a commission from the insurance company. PIANJ questions whether the department intended this particular consequence when it revised the definition of “commission.”

Additionally, by changing the definition of “commission”, the department has accomplished part of its goal in requiring compensation disclosure on surplus lines placements. If the definition of commission is changed to include payments received from a producer, this would include payments received by an originating broker from a surplus lines producer. An originating broker charging a fee to an insured would be required to disclose whether he would be receiving a payment from the surplus lines producer for the placement, because a “commission” would include payments from producers.

Therefore, the proposed compensation disclosure rule on surplus lines placements would be somewhat redundant, since the change in the definition of “commission” would require originating brokers to disclose whether they may be receiving a commission from the surplus lines producer, at least in cases where a fee is being charged to the insured or applicant.

2. Proposed clarification of N.J.S.A. 17:22A-38b

The department notes in its summary, that the proposed amendments are made to clarify the application of the N.J.S.A. 17:22A-38b and that the amendments will help minimize confusion among producers, insurers and insureds regarding the fees that may be charged by surplus lines producers acting in that capacity. PIANJ is unaware of any confusion regarding this statute that needs to be remedied.

However, in its attempt to alleviate confusion the department obviously feels exists, it has unintentionally created some ambiguity.

N.J.S.A. 17:22A-38b is a very clear and understandable statute that provides, “no surplus lines producer shall charge any fee to an originating broker in connection with the negotiation or procurement of any contract of surplus lines insurance that shall exceed \$50 plus the actual costs incurred for any services preformed by a person that is not associated with the surplus lines producer, such as inspection services.”

The department has muddied the waters by incorporating this statutory rule which applies to fees charged *to an originating insurance broker* into the regulations that apply to fees charged *to insureds or prospective insureds*.

The department notes that N.J.A.C. 11:17B-3.1(b) is proposed to be amended to provide that the requirements of that subsection do not apply to fees charged as surplus lines producers pursuant to N.J.S.A. 17:22A-38b insofar as the statute authorizes these fees to be charged without the requirement of a written agreement between the producer and the insured.

11:17B-3.1(b) provides that when an insurance producer charges a fee, “**to an insured or prospective insured,**” the producer must first obtain a written agreement which includes various provisions outlined in the regulation. Subsection (b) applies only when fees are charged **to an insured or prospective insured**. This subsection does not apply when a fee is charged by a surplus lines producer **to an originating broker**. Therefore, PIANJ is unclear why the department feels a clarification is necessary.

In the department’s attempt to clarify the statute, PIANJ now questions whether the department intends to allow originating brokers to pass on the fee charged by the surplus lines producer to the insured without obtaining a written fee agreement that complies with 11:17B-3.1(b).

The department also suggests that N.J.A.C. 11:17B-3.2(a) be amended to delete a reference to “personal lines/surplus lines insurance” to reflect that the particular limitations in this subsection do not apply to fees charged in accordance with N.J.S.A. 17:22A-38b. PIANJ again is unclear as to why the department needs to clarify that this regulatory provision does not apply to fees charged by surplus lines producers to originating brokers pursuant to the statute.

11:17B-3.2(a) is a regulation that deals with fees charged by an insurance producer **to an insured or prospective insured**. It seems obvious that this particular regulation does not apply when a surplus lines producer is charging a fee **to an originating broker** pursuant to the statute.

While PIANJ does not understand the need to clarify that this subsection does not apply to fees under 17:22A-38b, we agree that the phrase, “personal lines/surplus lines insurance,” is probably unnecessary in this particular provision since, “personal lines property/casualty,” is a phrase which would encompass both surplus lines policies as well as those placed in the voluntary market.

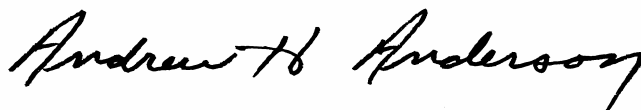
The department’s proposed change to 11:17B-3.2(a) has left PIANJ unclear as to whether the rule change now would allow an originating broker who is passing on the fee charged by the surplus lines producer to an insured to avoid the limitations in this subsection, such as the \$20 per policy fee limit.

The department has also added a new subsection (b) which is proposed to reflect the ability of surplus lines producers to charge fees in accordance with N.J.S.A. 17:22A-38(b). It also provides that “if the surplus lines producers is also acting as the originating broker, the fees charged by the producer in the capacity of originating broker shall be subject to the requirements of N.J.A.C. 11:17B-3.1, in the case of commercial lines and this section, [11:17B-3.2] in the case of personal lines.

It appears the department has unintentionally omitted reference to the fact that in the case of a personal lines placement, the originating broker would be subject to the requirements of N.J.A.C. 11:17B-3.1, as well as the requirements of 11:17B-3.2. If this is not the case, then an originating broker charging fees to insureds or prospective insureds on personal lines would not be required to obtain a written service fee agreement, but would only be subject to the fee limitations in 11:17B-3.2. Presumably, the department would want an originating broker charging a fee to an insurance consumer to obtain a written service fee agreement from the consumer whether the placement is for a commercial or personal lines policy. Therefore, PIANJ suggests that if this provision is adopted that a reference be made that originating brokers must comply with the requirements of 11:17B-3.1 in the case of both commercial lines and personal lines placement.

PIANJ thanks the department for the opportunity to provide comments on this proposal. If you have any questions, you may contact me or PIANJ’s Government Affairs Counsel, Jill Muratori.

Sincerely,

A handwritten signature in black ink that reads "Andrew H. Anderson". The signature is written in a cursive, flowing style.

Andrew H. Anderson, CIC
PIANJ President