



January 15, 2010

Matthew J. Gaul, Esq.
New York State Insurance Department
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New York, NY 10004

**PROFESSIONAL
INSURANCE
AGENTS**

**RE: CONDUCT, TRUSTWORTHINESS AND COMPETENCE OF
INSURANCE PRODUCERS, ESPECIALLY RELATING TO
COMPENSATION ARRANGEMENTS WITH INSURERS** [I.D. No. INS-48-
09-00002-P, *NYS Register*, Dec. 2, 2009—Addition of Part 30 to Title 11
NYCRR.]

Dear Mr. Gaul:

Thank you for the opportunity to submit our comments regarding the state Insurance Department's published draft of the producer compensation disclosure regulation. We appreciate the opportunity given to us to shape the formation of the proposal throughout the three previous drafts; and would like at this time to share with you a number of concerns our members continue to have with the published draft regulation.

PIANY'S GENERAL CONCERNS REGARDING THIS DRAFT. To begin, I would like to take this opportunity to reiterate some of the general objections our members, and therefore our association, have with the most recent draft:

1. THE DISCLOSURE SET OUT IN THIS DRAFT IS NOT PROPORTIONATE TO ANY DOCUMENTED HARM RESULTING FROM THE MARKET CONDUCT OF MAIN-STREET-LEVEL AGENTS OR BROKERS. As we have reiterated from the outset we, once again, feel it incumbent upon us as representatives of insurance producers across New York state to dispute the contention (inherent in this draft) that a real and verifiable problem exists relative to the steering of insurance policies by main-street independent agents and brokers and that any form of mandatory disclosure is, therefore, necessary and proportionate to a documented harm. As we've discussed with you at length, we submit that the disclosure set out in this draft (and, arguably, any type of disclosure mandated by the department) is not proportionate to any documented harm resulting from the market conduct of main-street-level agents or brokers. In fact, as we've pointed out repeatedly, the department has not offered to share any documented harm relative to the actions of main-street agents and brokers that would justify the adoption of a widespread disclosure mechanism. **We believe, therefore, the department's move toward mandated disclosure is neither supported by real and actual experiences of consumers,**

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nor is it required by law, since commissions are being paid from the companies to the producers and not by policyholders. The deletion of “actual conflicts” in the second draft’s section which outlines the regulation’s purposes [Section 30.1(b)] supports this contention. Moreover, a mention of a mere “potential conflict” in the Regulatory Impact Statement [... *but due to the differences in each insurer’s compensation arrangement, a potential conflict of interest may arise when an insurance policy that would earn the producer the greatest compensation for its sale is not the most appropriate insurance for the customer in terms of coverage, service or price.*] supports the conclusion that the promulgation of any mandatory disclosure requirement is unwarranted and unsupported by any real-world demonstration of an existing problem. The mere possibility that an incentive may be created for a producer to recommend a certain policy to a consumer does not warrant the promulgation of a compensation disclosure mandate.

2. THE INSURANCE DEPARTMENT HAS NO AUTHORITY TO IMPOSE A MANDATORY DISCLOSURE REQUIREMENT. We have reviewed the sections of the New York Insurance Law cited by the department in the proposal, and find nothing requiring disclosure of producer compensation. Thus, although this draft purports to be supported by Insurance Law Sections 201 and 301; Art. 21, we submit that there is no applicable statutory provision to be interpreted or implemented by the department. **Since the Legislature has not chosen to mandate disclosure of producer compensation, we respectfully note that the department has no authority to impose one by regulatory fiat.**

Noticeably, no specific section of Insurance Law is cited in the purposes section of the draft (§30.1 Purposes). In fact, there is no specific statutory disclosure requirement on which to base this regulation. While the Insurance Department is granted broad authorities under the Insurance Law, its authority is not absolute; and regulations are required to be grounded in some statutory provision that is both specifically cited and bears a direct relationship to the rule being proposed. We submit that this exercise of rule-making authority goes well beyond any authority granted by the Legislature.

Moreover, the Regulatory Impact Statement purports to grant wide-ranging authority to the department through these underlying statutes; “*provided the regulation is not inconsistent with some specific statutory provision, the superintendent may broadly interpret, clarify and implement legislative policy and effectuate any powers that the Insurance Law reasonably implies.*” We submit that the promulgation of this regulation is, in fact, inconsistent with a specific statutory provision. The well-established statutory construction canon *unius est exclusio alterius* (the mention of one thing implies the exclusion of another) supports the conclusion that the promulgation of this regulation is outside the authority of the department. Simply stated, since relevant disclosure requirements already exist in New York Insurance Law (Article 21, Section 2119), the failure of the Legislature to include a compensation disclosure mandate beyond the requirements of Section 2119 may be fairly construed as an indication that its

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exclusion was intended. (see *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (N.Y. 1982)). Moreover, according to federal case law (*Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002))), when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.

3. THE COST OF COMPLIANCE IS DISPROPORTIONATE TO ANY PURPORTED BENEFIT PROVIDED THE PURCHASER. Despite improvements, the disclosures required by this section remain a major compliance challenge. The costs and difficulty of preparing a fully compliant disclosure, in terms of time expended, are enormous—particularly with respect to the requirements outlined in Section 30.3(b). Notably, they grow greater the more diligent the producer is in obtaining a wide range of competitive quotes. Accordingly, the regulation actually serves as a disincentive to exercising the full strength of PIANY members—namely, their independence to conduct a market-wide search in the process of obtaining alternatives, so they may present the best value available to the customer.

Although the raw materials for disclosure may be retained by the producer, in the form of quotes presented, if “more information” is requested pursuant to Section 30.3(b) or (c), a laborious process still must be undertaken to fully and accurately comply with the terms of the regulation. Again, the more quotes obtained and presented to the ultimate policyholder, the more time-consuming the process.

Moreover, we question whether the “safe harbor” provided by Section 30.3(d) would apply to situations where, arguably, by expending enough time, the “amount or value” of compensation probably could be calculated. For example, in lines like workers’ compensation, commission is likely to be “tiered,” or calculated at different percentage rates for different layers; moreover, the tiers are not standard from company to company. A lengthy mathematical process would be involved to calculate the amount of commission that would have been paid on multiple quotes; yet, the producer could not use Section 30.3(d), since the exact product of those calculations, if not “known,” is at least “knowable.”

PIANY’S SPECIFIC CONCERNS REGARDING THIS DRAFT. In addition to the aforementioned general objections, we have specific concerns with the most recent draft and would like to share them with you at this time:

§30.2 Definitions. (a) Compensation means anything of value, including money, credits, loans, interest on premium, forgiveness of principal or interest, vacations, prizes, or gifts, whether paid as commission or otherwise. Compensation does not mean tangible goods with the insurer name, logo or other advertisement and having an aggregate value of less than \$100 per year per insurer.

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THE CURRENT DEFINITION OF COMPENSATION IS OVERLY BROAD AND OVERLY INCLUSIVE. While we appreciate the department’s incorporation of a de minimus standard as an attempt to mitigate problems associated with allocating these types of items to the placement of individual insurance policies, we believe the draft does not go far enough to offer regulated entities any confidence in their ability to fully comply with the requirements in this regard. The current definition of compensation is overly broad and inclusive to the point of making compliance on the part of producers fundamentally impossible. **The definition of compensation in this draft regulation should, therefore, be confined to “straight commissions” directly attributable to the sale of an individual policy.** Retaining this overly broad definition of compensation (anything of value) and then premising the disclosure of this type of compensation upon its allocation to a particular policy (or group of policies) (*Section 30.3(b)(1)—“based in whole or in part on the sale”*) will subject well-meaning producers to an impossible standard and, therefore, an inordinate exposure for noncompliance. Whether, and the extent to which, a particular vacation, prize or gift can be allocated to a specific policy (or number of policies) is not normally within the regular knowledge of an individual producer. Therefore, the quest for absolute compliance would necessitate multiple inquiries to carriers, and the reliance upon the receipt of timely and accurate information from these carriers, to enable producers to fully comply with this disclosure requirement. If it is truly the department’s intention to investigate and disclose the receipt of gifts, vacations, prizes and the like (or for that matter, anything of value beyond simple and easily identified commissions), the mandate for qualifying these items of compensation (and, arguably, the mandate for disclosing them as well) should logically be placed upon the donor as opposed to the recipient. This concern applies equally to the application of the definition of compensation to contingent compensation, which by its nature is always unknown to the producer at the time of policy placement.

§30.3(a) Disclosure of producer compensation, not later than application. Except as provided in Section 30.5 of this Part, an insurance producer selling or renewing an insurance contract shall disclose the following information to the purchaser orally or in a prominent writing not later than application for the insurance contract or the renewal.

THE RELIANCE ON “TIME OF APPLICATION” FAILS TO RECOGNIZE A RELIABLE AND CONSISTENT POINT IN AN INSURANCE TRANSACTION, AS APPLIED TO ALL MARKETS AND DISTRIBUTION CHANNELS. PIANY members have expressed concerns relative to the reliance on the “time of application” as the operative point in an insurance transaction that triggers the disclosure requirement. While we appreciate the department’s efforts to identify a specific point in the transaction prior to which disclosure must be accomplished, we respectfully submit that time of application does not establish a consistent or reliable (or even in many cases, an identifiable) point. Many times, application forms are used strictly to solicit quotes and not to consummate purchase of a particular coverage;

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and in some insurance transactions, applications are not used at all. We respectfully request, therefore, that the time at which disclosure is required to be completed in the regulation be amended to contemplate and incorporate these many different scenarios. In some transactions this may well be the time of application, but in others, prior to the time of binding (or some other operative, and identifiable, point in the transaction) may be more appropriate.

§30.3(a)(1) Disclosure of producer compensation, role in the insurance transaction.

Whether the insurance producer represents the purchaser or the insurer for purposes of the sale

THE DRAFT MUST CONTEMPLATE SITUATIONS IN WHICH AN INSURANCE PRODUCER ACTS AS BOTH AN AGENT AND A BROKER IN A CUSTOMER RELATIONSHIP. PIANY members have repeatedly brought to our attention every-day insurance scenarios in which an individual producer in the independent insurance producer world acts as both an agent and a broker relative to the cumulative placement transaction. This scenario is not clearly contemplated in the draft regulation and, as currently drafted, producers would be required to arbitrarily characterize their role vis-à-vis the overall placement. We suggest that a simple modification to this section of the regulation would adequately address this scenario; change “or” to “and/or,” to allow for situations in which insurance producers are acting as both an agent and a broker in placing the insurance on a single account.

§30.3(b) Disclosure of producer compensation, ownership interests. (3) *a description of any material ownership interest the insurance producer or any parent, subsidiary or affiliate has in the insurer issuing the insurance contract or any parent, subsidiary or affiliate;* (4) *a description of any material ownership interest the insurer issuing the insurance contract or any parent, subsidiary or affiliates has in the insurance producer or any parent, subsidiary or affiliate;*

THE DRAFT MUST INCORPORATE A DEFINITION OF MATERIAL OWNERSHIP INTEREST. PIANY believes that in order to allow producers to adequately and completely comply with the provisions of this section with any confidence, **a definition or description of what the department deems a “material ownership interest” should be provided.** Absent guidance in this respect, compliance with this provision is difficult, if not impossible, as “material ownership interest” remains a vague and ambiguous term. Additionally, the term “*affiliates*” in paragraph 4 should be changed to the singular “*affiliate*” to be consistent with paragraph 3.

§30.4 Certification and retention of disclosure. (a) *An insurance producer shall retain a copy of any written disclosure provided to the purchaser pursuant to Section 30.3 of this Part for not less than three years after the disclosure is given.* [Section 30.3 incorporates the

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original “boilerplate disclosure of §30.3(a) as well as (if requested) a description of the nature, amount and source of compensation to be received and a description of any alternative quotes presented including the coverage, premium and compensation that the producer would have received pursuant to §30.3(b)].

THE RECORD RETENTION REQUIREMENTS IMPOSE CONSIDERABLE COSTS IN BOTH STAFF TIME AND DATA AND DOCUMENT STORAGE THAT AGENCIES ARE NOT ABLE TO RECOUP. The fact that the Regulatory Impact Statement concludes that “[p]roducers are not required to keep any additional information that they do not already maintain in the ordinary course of business” illustrates what we believe is a misconception on the part of the department with reference to how independent producers conduct business. Contrary to this statement, compliance with this regulation would entail considerable cost and time burdens upon agencies, particularly small agencies in rural geographic regions with limited staff. Agencies do not typically retain data relative to alternative quotes or the compensation associated with them beyond the point at which the policy is selected and the coverage bound. At that point, the information becomes instantly outdated and useless to the consumer. The requirement that producers retain a copy of the disclosure for not less than three years (*Section 30.4 Certification and retention of disclosure*) brings with it considerable costs in both staff time and data and document storage that agencies are not able to recoup.

§30.5 Exceptions. This Part shall not apply: (d) to a sale of insurance by a person who is not required to be licensed as an insurance producer under Insurance Law Section 2102(a)(1) for the purposes of the sale.

ANY MANDATORY DISCLOSURE SHOULD APPLY TO ALL DISTRIBUTION CHANNELS. PIANY raised this issue during discussions with the department relative to the application of the regulation to both “captive” insurance agents as well as “direct writers.” Simply stated; we believe that any mandatory disclosure that were to be adopted should apply to all distribution channels, whether they are required to be licensed or not. **This position is fundamental to PIA’s view of any draft.**

The department has argued cogently that, even within the exclusive/captive-agent/employee sales model, there likely will be differential compensation based on different products the company makes available, and that disclosure of this fact has material value to the purchaser equal to that of disclosing compensation differentials within the independent producer model.

Moreover, as we have argued previously, even within the “exclusive/captive” agent model, we believe it is an extremely common business practice for such agents, with or without the

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knowledge and authorization of their principal, to place business through other insurance producers if it cannot be placed with the company the agent normally does business with, or to use a residual market in these situations. Accordingly, the pure “exclusive/captive” sales model may not be as prevalent as it may appear.

Mandatory disclosure, applied to one market segment but not to others, would lead to the public perception that one distribution method entails costs that are not present in other distribution systems—whereas, in fact, all distribution systems include costs for acquisition and servicing of policies.

Further, the additional compliance costs associated with this disclosure, if imposed upon one market segment but not upon others, would place independent insurance producers at a marked competitive disadvantage from the standpoint of the expenses associated with serving the public’s insurance needs.

All insurance producers, including licensed, salaried employees, receive some type of compensation that is part of the cost structure of providing the insurance product. We maintain it would be a rare salaried employee who is not eligible for some type of incentive compensation from the employer based on volume, risk quality or type and/or differential of products sold.

Moreover, when a purchaser approaches an insurance producer who can always and only represent a single company, this is a significant point of information. Therefore, we support inclusion of all producers should a mandatory disclosure ultimately be required.

Therefore, with specific reference to the exception carved out in this draft, we are troubled by unclear wording. (*This Part shall not apply [30.5(d)] to a sale of insurance by a person who is not required to be licensed as an insurance producer under Insurance Law Section 2102(a)(1) for the purposes of the sale.*)

A literal reading suggests that a licensed insurance producer would be exempt from disclosure, if the producer was not REQUIRED to be licensed. This potential loophole is extremely problematic, with respect to employee-producers, for example at call centers providing auto insurance quotes, who are not paid commissions. These individuals still interact with the public and they enter into substantive conversations about insurance. We argue that they ARE required to be licensed and thus would be subject to the disclosure.

We note that the NYSID has ruled on this question in OGC Opinion 06-03-01 “Licensing Requirements for Foreign Call Centers Offering Insurance Quotes.” In relevant part, the NYSID’s Office of General Counsel said: “[I]t is the department’s belief that the [call center] employees will, out of necessity, have to discuss policy terms and conditions, among other things, with the callers in an effort to provide

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proper quotes ... [I]t is the department's position that ... unlicensed individuals or entities who quote premiums act in the capacity of an insurance agent and must be licensed, because in offering quotes they will be required to interview potential insureds and to discuss policy terms, benefits and conditions."

We ask that clarification of the language of Section 30.5 be incorporated into the draft to affirmatively state that the department stands by the reasoning expressed in this opinion with respect to those who provide auto insurance quotes to the public and that, being REQUIRED to be licensed, such individuals staffing call centers are NOT exempt from disclosure.

Again, we reiterate that **any mandatory disclosure adopted should apply across the board to all distribution channels.**

§30.5 Exceptions. This Part shall not apply: (e) to renewals when the producer has no sales or solicitation contact with the purchaser in connection with the renewal.

MANDATORY DISCLOSURE SHOULD NOT APPLY TO RENEWALS. The cost and difficulty associated with compliance with these disclosure requirements are exponentially increased when applied to policy renewals. PIANY appreciates the department's recognition of this fact as reflected in the intent of this section of exclusions. Absent a clearer description of what would qualify as sales or solicitation contact with a purchaser, however, this section suggests to producers that this exception is essentially illusory. Inherent in the renewal process is an inquiry by a producer relative to whether the coverage afforded in the policy continues to meet the needs and expectations of the policyholder. In the event that coverage needs have changed, a responsible producer will then seek to provide the desired level of coverage at that time, through modification of the underlying policy terms or by the addition or deletion of endorsements. Since it is not clear whether this action would qualify as "sales or solicitation contact," this exclusion remains vague and ambiguous and, therefore, illusory. We strongly believe that, since modification of coverage terms or the addition or deletion of policy endorsements may only insignificantly affect the overall compensation associated with the policy, all policy renewals should be excluded from this regulation.

As these examples show, there are many, many compliance questions that are of tremendous concern and consequence to PIANY members—and more questions surface all the time, as more agents look at the draft and map out the practical steps they would need to go through in order to comply. In many cases, it's just not clear WHAT they would need to do. For example, as PIA represents producers not just in New York state, but also in the bordering and neighboring states of Connecticut, New Jersey and New Hampshire, our members are left inquiring how this draft regulation would apply to out-of-state risks with incidental New York coverage aspects.

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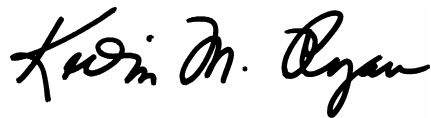
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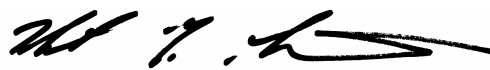
We formally object to the promulgation of this regulation on the grounds presented. Should a mandatory disclosure ultimately be required, however, we respectfully request that the NYSID agree to substantially extend the six-month phase-in period prior to implementation. During this time, the department should work with PIANY to establish a dialogue with the producer community about what its standards of compliance would be, in various real-world scenarios the industry would bring forward.

We thank you for taking these comments into consideration. Moreover, we continue to offer our association as a resource to you, and your staff, in the event you would like to further discuss the issues and concerns of our members relative to this undertaking.

Sincerely,



KEVIN M. RYAN, CIC
President, PIANY



MATTHEW F. GUILBAULT, ESQ.
Director of Government and Industry Affairs

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