

Commonwealth of Virginia

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Obsolete Letter Replaced By Administrative Letter 2002-09

STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

March 10, 1997

Administrative Letter 1997-1

TO: ALL INSURANCE COMPANIES, HEALTH SERVICES PLANS, AND HEALTH MAINTENANCE ORGANIZATIONS LICENSED IN VIRGINIA

RE: INSURANCE ACTIVITIES REQUIRING PERSONS TO BE LICENSED

Note: This Administrative Letter is intended to replace Administrative Letter 1982-11, dated May 27, 1982

The Bureau of Insurance receives a great many inquiries regarding what activities require agents/agencies to be licensed in Virginia and what activities are and are not permitted for those who are not licensed as insurance agents in Virginia. Because Administrative Letter 1982-11 appears not to be readily accessible for agents and agencies, in particular, I am sending this new administrative letter to all insurers with the request that they provide copies of it to their appointed agents in Virginia. I am also requesting that such insurers include a copy of this administrative letter in materials provided to newly appointed agents in Virginia from this point forward. Bureau of Insurance staff will review whether companies have carried out this request during regular and special market conduct examinations, and as part of consumer complaint and agent investigations conducted by the Bureau. Finally, I am sending copies of this administrative letter to the various agents associations in Virginia, with the request that they, too, attempt to disseminate this information to their members.

WHO NEEDS TO BE LICENSED?

The analysis begins with § 38.2-1822 of the Code of Virginia, as amended, which states, in subsection A:

A. , No person shall act, and no insurer or licensed agent shall knowingly permit a person to act, in this Commonwealth as an agent of an insurer licensed to transact the business of insurance in this Commonwealth without first obtaining a license in a manner and in a form prescribed by the Commission. As used in this section, *act as an agent* means soliciting, negotiating, procuring, or effecting- contracts of insurance or annuity on behalf of an insurer licensed in this Commonwealth or receiving or sharing, directly or indirectly, any commission or other valuable consideration arising therefrom. No person shall submit business to any joint underwriting association or any plan established under this title for the equitable distribution of risks among insurers unless the person holds a valid license to transact the class of insurance involved.
(underlining added)

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It has consistently been the Bureau's position that the above section clearly requires any person or entity that solicits, negotiates, procures, or effects contracts of insurance or annuity in Virginia on behalf of an insurer licensed in Virginia to hold a valid insurance agent's license in Virginia. We also consistently maintain that any entity, be it an insurer, agency or agent, that receives a commission from an insurer, directly or indirectly (whether characterized as an "override," "fee," or otherwise), arising from the sale of a contract of insurance or annuity, even if there was no active "soliciting, negotiating, procuring, or effecting" by that entity, must be licensed and appointed in Virginia. It should be noted that the word "or", not the word "and" appears immediately before the word "receiving" in the statute quoted above. This means, to us, that satisfying either of the two criteria defining the term act as an agent" will suffice. We have, over the years, noted that a number of insurers and agencies, especially large agencies located outside of Virginia, but that recruit agents to sell for them in Virginia, do not appear to be aware of this licensing requirement. The Bureau has initiated disciplinary proceedings against such agencies and insurers where it could be demonstrated that the above law had been violated.

The more common question, however, appears to be the extent to which **individuals who are not licensed insurance agents**, but who are employed by a licensed insurance agency, may participate in the transaction of insurance matters.

Perhaps if we establish the authority and responsibility of a person who is **licensed as an insurance agent**, the limitations of what may be done by a person who is **not licensed as an insurance agent** will become clear.

As stated in the statute quoted above, anyone who "solicits, negotiates, procures, or effects" contracts of insurance or annuity must be licensed as an agent. The Bureau's position with regard to the meaning of each of these terms is as follows-

- To "solicit" is to appeal for something; to ask for the purpose of receiving.

This term implies approaching an individual with a request that he do a particular thing, such as to apply for an insurance contract. If one is asking or suggesting to people that they apply for a particular kind of insurance or insurance from a particular company, and if the person doing the soliciting is doing so in relation to his or her job, that person is likely to fall within the definition of "soliciting."

- To "negotiate" is to transact business; to bargain with another respecting a purchase and sale; to communicate or confer with another so as to arrive at the settlement of some matter.

This term implies the discussion and settling of terms and conditions of a business transaction, such as the terms, conditions, benefit amounts, and rates of an insurance contract if one is discussing the potential purchase of insurance in other than the most general terms, one is likely to fall within the definition of "negotiating," if not the definition of "soliciting."

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- To "procure" is to initiate a proceeding; to cause a thing to be done; to instigate; to bring about, effect, or cause.

This term implies the obtaining of an insurance contract or offer to contract for a client from an insurance company, whether directly or indirectly.

- To "effect" is to do; to produce or to make; to put into force, to consummate the insurance process.

This term implies putting insurance coverage in effect, such as "binding" an insurance contract or issuing a binding or conditional receipt for an insurance application.

When an insurance company is issued a license to transact business in Virginia, the insurer is, in theory, authorized to solicit, negotiate, procure, and effect contracts of insurance. Insurers generally appoint individuals, partnerships, limited liability companies, or corporations to act as their agents in carrying out these functions. This authority (appointment) creates an agent-principal relationship in which an act by an agent becomes, in general terms, binding upon the insurer. This agent-principal relationship is created by an agreement between the insurer and the agent. The Bureau is made aware of this relationship by the process of the insurer filing a notification of appointment. The Bureau records the appointment, provided that the appointed agent holds a valid license for the type of appointment being recorded. The Bureau will then issue to the agent an "Acknowledgment of Appointment" (currently in the form of a wallet-sized card) and will also notify the appointing insurer when the appointment has been recorded (currently in the form of a computer-produced list of appointments processed for each insurer on a daily basis, and sent to each insurer for each day during which appointments are processed for that insurer). Although there are some minor variations, especially when a licensed agent first begins to represent an insurer, it is with the Acknowledgment of Appointment that the agent is fully authorized to solicit, negotiate, procure, and effect insurance on behalf of the appointing insurer in Virginia.

Public interest is involved in the competent and trustworthy transaction of insurance. The proper analysis of a client's exposure to risks and the recommendation of appropriate insurance to cover that exposure are of paramount importance. Pursuant to statutory requirements, individuals must be licensed as insurance agents prior to soliciting, negotiating, procuring, or effecting contracts of insurance or annuity. In most cases, depending on the kinds of insurance they propose to transact, individuals must complete a prelicensing study course and pass an examination demonstrating sufficient knowledge of the classes of insurance that will be involved in the transactions. Further, again with certain exemptions, licensed insurance agents must continue to demonstrate such knowledge by completing continuing education requirements on a biennial basis.

In contrast to licensed agents, unlicensed persons have not established that they have either the **required knowledge of insurance** (by having completed the prelicensing study course, examination, and continuing education requirements) or the authority to solicit, negotiate, procure, or effect contracts of insurance or annuity (by having obtained the appropriate license).

An unlicensed person may discuss, in general, insurance matters regarding both coverage and rates. If, however, such discussion develops into an explanation of options (negotiation), then insurance knowledge is necessary and licensure is required. The matter should be turned over immediately to a licensed agent. A licensed agent is not prohibited from using an unlicensed person in a clerical capacity under his or her direct supervision, nor does the Code of Virginia prohibit the unlicensed person from receiving or passing on to the agent for his or her attention any insurance inquiries or requests of a particular nature. Later in this administrative letter you will find a chart showing some examples of insurance activities in which an unlicensed person may or may not engage.

It is, admittedly, difficult to specify all acts that may be done legally by a person who is not a licensed agent. Where there is any doubt regarding the activities of an unlicensed person, the following question should be asked:

Does the action involve the areas of soliciting, negotiating, procuring, or effecting contracts of insurance or annuity as those terms are described in this letter?

If the answer is "Yes," the matter should be handled by a licensed insurance agent. If the answer is not clear, additional guidance should be sought by appropriate legal advisors, or the matter should be handled by a licensed insurance agent.

A license authorizes an agent to solicit, negotiate, procure, and effect certain types of insurance. If an agent exceeds his authority, he is in violation of Virginia law. Insurers and agents are advised to review § 38.2-1833 of the Code of Virginia which states, in part, that "every licensed agent may solicit applications for insurance for any one or more of the classes of insurance for which he is licensed ..." Therefore, it is not only the agent's responsibility to make sure that he is properly licensed for the classes of insurance he is selling, but it is also the responsibility of the insurer to verify that an agent is properly licensed before appointing that agent. This should include not only verification that the agent holds a valid and current Virginia license, but that the agent holds the **appropriate Virginia** license. If an insurer accepts an application from an agent, issues a policy, and subsequently learns that the agent is not licensed for the class of insurance involved in the transaction, the insurer has violated Virginia law.

The Bureau urges insurers to stop asking agents to provide copies of their licenses a proof of current licensing in Virginia, as this is not valid proof of current status. Remember that, unlike other states, agents' licenses in Virginia are perpetual, so asking to see a license is not going to provide current information. Instead, insurers should require an agent to provide a recent Letter of Certification issued by the Bureau. This letter shows the agent's current name, residence address, licenses held and the date of issue for each, and the agent's current continuing education compliance status, if applicable. This information is far more reliable than a copy of a license that may have been issued many years ago.

If an insurer fails to submit to the Bureau a notification of appointment of an agent who has solicited, negotiated, procured, or effected a contract of insurance on the insurer's behalf, within 30 days of the date of execution of the first insurance application submitted by that agent, the insurer is in violation of Virginia law. If an agent continues to solicit, negotiate, procure, or effect contracts of insurance on behalf of an insurer beyond a period 45 days after the date of execution of the first insurance application submitted to that insurer by the agent, where the agent has not received an Acknowledgment of Appointment card from the Bureau, the agent is in violation of Virginia law. If the insurer continues to accept such applications, the insurer, too, is in violation of Virginia law. Finally, if an agent or insurer allows (whether purposefully or unwittingly) an unlicensed person to "act as an agent" in this Commonwealth, the agent or insurer (or both) are in violation of Virginia law.

The following chart provides some examples of what the Bureau believes are acceptable activities for those who do not hold licenses,, and examples of activities that are not acceptable. This list is by no means intended to be all-inclusive, and, obviously, there are lines that may be crossed in what is categorized as acceptable activities that will render the activities unacceptable. As with anything else, a reasonable and common sense standard needs to be applied to each situation. Perhaps, however, the following chart will provide at least some guidance:

AN UNLICENSED PERSON

May

- Assist with completion of applications
- Quote rates as general information
- Receive requests for coverage for transmittal to a licensed agent
- Receive payments for coverage (receipt must show agent or company for which payment is received)
- Arrange appointments for licensed agent
- Be compensated on a "unit of time or work" basis

May Not

- Counsel or advise what coverage to buy
- Urge or advise insuring with any particular insurance company
- Indicate that requested coverage is or will be bound or issued
- Solicit additional business when receiving payment
- Solicit sales for an agent over the phone or otherwise
- Be compensated on a commission basis, i.e. contingent upon the sale of an insurance contract, percentage of premium generated, or the amount of commission earned.

OTHER UNLICENSED PERSONS

No insurance company should accept, or act upon, any request for coverage submitted by a person purporting to be the agent making the request or application for coverage (other than a person seeking to buy coverage on himself or on property of his own or his employer) without first ascertaining that such person is properly licensed for the class of insurance involved in the transaction. No agent or agency should accept a request for such coverage without ascertaining that such person is properly licensed for the class of insurance that is involved in the transaction. Section 38.2-1812 of the Code of Virginia, as amended, specifies that no insurance company shall pay commission to an agent unless the person is a duly appointed agent of the insurance company (except agents who produce residual market coverage) and was, at the time of the transaction giving rise to the commission, a validly licensed (and appointed, if appointment is called for) agent in Virginia for the class of insurance involved. No agent or agency should split or share a commission with any person not also licensed for the same class of insurance involved in the transactions.

We would urge insurers to require verification of current licensure of an agent or agency prior to appointing that agent or agency. We suggest that a Virginia resident agent be required to furnish to the insurer a current (no more than 90 days old) CERTIFICATION from the Bureau. A certification is a more valid means of proof of licensure than is a copy of the agent's original license, because a certification indicates the agent's or agency's CURRENT status, including continuing education compliance.

"ENROLLERS"

The following explains the Bureau's position on whether those who "enroll" individuals under a group master insurance policy (including all types of credit insurance) are required to be licensed as agents. It is clear that the person who sells the group master contract must be a licensed and appointed agent, but the licensing requirement is not as clear for the person whose responsibility it is to enroll people under the existing group contract.

1. If all the person is doing is enrolling an employee or customer under a group master policy for which the "enrollee" receives no commission, the person does not need to be licensed. This position is based upon the statutory language found in § 38.2-1822, which was quoted earlier in this administrative letter. The key phrase here is that the term "act as an agent" includes soliciting, negotiating, procuring, or effecting contracts of insurance, and the certificate issued to an individual obtaining coverage under a group contract is not considered to be a contract of insurance.
2. However, if the person doing the enrolling receives a commission for enrolling employees or customers under the group contract, the employee must be licensed. This position is also based upon the language in § 38.2-1822, which further provides that the phrase "act as an agent" applies where the person is "receiving or sharing, directly or indirectly, any commission or other valuable consideration..." (underlining added). In addition, § 38.2-1812 provides that:

No insurer shall pay directly or indirectly any commission or other valuable consideration to any person for services as an agent ... within this Commonwealth unless the person is then a duly appointed agent of such insurer and, at the time of the transaction out of which arose the right to such commission or other valuable consideration, held a valid license as an agent ... for the class of insurance involved. No person other than a duly licensed and appointed agent may accept any such commission or other valuable consideration unless such person, at the time of transaction out of which arose the right to such commission or other valuable consideration, held a valid license as an agent .for the class of insurance involved. (underlining added)

The Bureau has taken the position that if the commission or valuable consideration is tied to the enrollment, i.e. the enroller is paid a certain percentage of the premium for each individual enrolled, we would require the enroller to be licensed. If the enroller is simply paid a salary, and one of the job duties is enrolling, the enroller need not be licensed. If the enroller is given a bonus, and the bonus can be tied to the number of enrollments or the premium volume resulting from the enrollments, we would consider this to be commission and the enroller would need to be licensed. Obviously, we cannot address each and every potential situation, but the above should provide sufficient guidance.

3. With regard to a store, bank or dealership providing its customers with the opportunity to purchase credit insurance coverage, our position would be similar. If the store, bank or dealership is being paid a commission, it would need to be licensed as an agency. There is, however, an exception provided in § 38.2-3733.A of the Code of Virginia, which states:

A portion of the premium for credit life insurance or credit accident and sickness insurance may be allowed by the insurer to a creditor for providing and servicing such insurance.

HOME OFFICE EMPLOYEES OR CONTRACTORS

The last subject that we want to address is what activities may or may not be performed by home office employees (or those contracted to perform such services). **Virginia law contains no general exemption from licensing requirements just because a person is a home office employee.** The only exceptions to this can be found in the chapters of Title 38.2 dealing with health services plans (§ 38.2-4224), health maintenance organizations (§ 38.2-4313), legal services plans (§ 38.2-4415), and dental or optometric services plans (§ 38.2-4519). For example, § 38.2-4224 provides as follows-

Subscription contracts may be solicited only through health agents or life and health insurance agents licensed in accordance with Chapter 18 of this title. Home office salaried officers whose principal duties and responsibilities do not include negotiation or solicitation of subscription contracts shall not be required to be licensed. (underlining added)

Accordingly, other employees of the entities authorized under Chapters 42, 43, and 45 who solicit, negotiate, procure, or effect contracts of insurance MUST be licensed agents. Further, home office salaried officers whose principal duties and responsibilities DO include negotiation or solicitation of contracts of insurance must be properly licensed.

It must be noted, however, that THERE ARE NO SIMILAR EXEMPTIONS IN TITLE 38.2 APPLICABLE TO ANY OTHER TYPES OF CARRIERS.

Therefore, with the exceptions noted above, the basic premise is substantially the same as outlined earlier in this administrative letter. Whether the individual involved is an officer, employee, independent contractor, telephone solicitor, or the like, if the person is either soliciting, negotiating, procuring, or effecting contracts of insurance (including additional coverage on existing contracts), and/or is receiving direct or indirect commission or other valuable consideration, the person must be licensed as an agent.

We take the position that those who, on behalf of an insurer, are making or receiving telephone calls or sending or receiving telefaxes, or utilizing the Internet, must, if they fall within the parameters set forth in this administrative letter, be properly licensed and appointed in Virginia, regardless of whether they reside in Virginia.

It is our hope that the contents of this administrative letter will provide useful information to the insurers, agent, and agencies who receive it. Questions regarding the content of this letter should be directed to the Bureau's Agents Licensing Section at (804) 371-9631.

Sincerely,

Alfred W. Gross
Commissioner of Insurance