

October 19, 1976

SUBJECT: INSURANCE

CIRCULAR LETTER NO. 16 (1976)

TO: ALL AUTHORIZED INSURERS, AGENTS AND BROKERS

SUBJECT: RETURN OF UNEARNED PREMIUMS ON NON FINANCED INSURANCE POLICIES

It has come to the attention of the Department that there is a prevailing practice of insurers sending or crediting net unearned premiums to producers on the cancellation of insurance policies which are not financed. The producers often merely forward the net unearned premium to the insured without adding the amount required to equal a gross unearned premium. The insured is thereby not receiving the gross unearned premium which is due to him according to the provisions of Section 153(1) of the Insurance Law which states that:

"Whenever an insurance contract made or issued in this state is cancelled or otherwise terminated by the insured before the expiration thereof in accordance with the terms of such contract, the earned premium to be retained by the insurer shall be determined by the applicable rate filing, if any, otherwise in accordance with the provisions of such contract."

After an insurance policy is cancelled, Section 153(1) of the Insurance Law mandates that the insurer may retain only its earned premium. By remitting a net unearned premium to its producer who forwards the same to the insured without adding the amount necessary to constitute a gross return premium, the insurer is in violation of Section 153 (1) of the Insurance Law. The insurer also imposes the burden upon the insured to attempt to collect the balance of the unearned premium from the producer, who may or may not be contractually bound to return the unearned portion of his commission to the insurer and which often results in complaints being made to the Insurance Department for collection of the same.

In order to assure compliance with Section 153(1) of the Insurance Law and to avoid unnecessary complaints to be lodged with the Insurance Department covering violations of said section insurers should return the unearned premium to the insured within a reasonable time. The following permissible procedures may be used in returning unearned premiums in compliance with Section 153(1) of the Insurance Law.

On non-financed policies an insurer may:

a) send directly to its insured its gross unearned premium check or draft made payable to the insured,  
or

b) send its check or draft for the gross unearned premium to the producer, made payable to the insured, for transmittal to the insured, or

c) send its check or draft for the gross unearned premium to the producer, made payable to the producer for his transmittal or credit of the proceeds of this check or draft to the insured, or

d) if the producer maintains an account with the insurer, by crediting the producers account with the gross unearned premium.

e) if the insurer proceeds by methods (c) or (d) it must send a notice or statement to the insured indicating the amount of the gross unearned premium which is being returned to the producer.

The payment of commissions on the sale of insurance policies and the return of unearned commissions upon the cancellation of insurance policies prior to expiration is a matter of agreement or contract between the producer (agent or broker) and the insurer. The insured is not a party to such agreement and is not obligated or responsible in any way for the payment of earned commissions or for the return of unearned commissions which is solely a matter of concern between the insurer and the producer.

In general a broker has earned his commission in full when the policy has been issued and the premium paid. Under these circumstances the broker is under no obligation to make any refund of a portion of his commission to the insurer.  
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\* Exceptions to this general rule, as set forth in the case *Western National Insurance Co. v. Haph*, 277 App. Div. 6, 97 N.Y.S. 2d 447 (1st Dept. 1950), aff'd 302 N.Y. 678 (1951), may apply where the broker has made an agreement to refund a portion of his commission in the event of cancellation or where the policy is an audit policy, or where the broker has induced the cancellation.

The New York Automobile Insurance Plan and the New York Property Insurance underwriting Association furnish two examples of refund agreements. The rules of both facilities provide that, in the event of the cancellation of a policy placed through them, the producer of record shall return the unearned portion of the commissions. The application forms contain such a provision which is signed by the producer.

The right of an agent to retain commissions under like circumstances would be dependent upon the terms of the agency contract between himself and the insurer.

The producer must either credit or forward the gross unearned premium to the insured or return the unearned premium to the company for direct payment of the gross unearned premium to the insured. A net return premium cannot be sent to the insured.

It is expected that all of the above licensees will advise their employees and personnel to comply with the instructions contained in this Circular Letter in order to effectuate compliance with Section 153(1) of the Insurance Law and to avoid unnecessary complaints being made to the Insurance Department.

Very truly yours,

[SIGNATURE]

Thomas A. Harnett

Superintendent of Insurance