



STATE OF NEW YORK
INSURANCE DEPARTMENT
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Andrew M. Cuomo
Governor

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Superintendent

Circular Letter No. 6 (2011)
April 13 , 2011

TO: All Authorized Life Insurers and Licensed Life Insurance Producers

RE: Sale of Unapproved Insurance Policies or Contracts to Residents of New York State

STATUTORY REFERENCE: Sections 1101, 1102, 2110, 2117, 2122, 3103, 3201, 7703, and Article 24 of the New York Insurance Law.

As a result of several investigations, the Department has become aware of instances in which licensed insurance agents and brokers (collectively "producers") have aided unauthorized insurers in the sale of annuity contracts and life insurance policies to New York residents in this state. In many instances, these producers submitted applications on behalf of New York residents that falsely stated that the transactions had taken place outside of New York, even though the producers in fact solicited applicants, completed applications, or delivered the policies or contracts in New York. Unauthorized insurers have accepted these applications and issued the policies and contracts, even when they knew or should have known about patterns of irregularities. Due to these improper cross-border sales practices, many New Yorkers have been issued or delivered policies or contracts that: 1) do not comply with New York requirements, 2) provide account values, cash surrender values, death benefits and/or annuity income benefits that do not meet the minimum protections set forth in the New York Insurance Law, and 3) are not subject to New York's guaranty fund protection.

The purpose of this circular letter is to remind all insurers and producers of the following:

1. Insurance Law § 1102 prohibits any person, firm, association, corporation or joint-stock company from doing an insurance business in this state unless authorized by a license, or exempted from licensing.
2. Insurance Law § 2117(a) prohibits any person, firm, association, or corporation from acting for or aiding unlicensed or unauthorized insurers or health maintenance organizations in this state.
3. Insurance Law § 3103 provides that, except as specifically provided in the Insurance Law, any insurance policy or annuity contract that is delivered or issued for delivery in this state in violation of any provisions of the Insurance Law shall be valid and binding upon the insurer issuing the same, but in all respects in which its provisions are in violation of the requirements or prohibitions of the Insurance Law, shall be enforceable as if it conformed with the requirements or prohibitions.

4. Insurance Law § 3201 requires all life insurance and annuity policy or contract forms that are delivered or issued for delivery in this state, or are deemed to have been delivered in this state, to be filed with and approved by the Superintendent as conforming to the requirements of the Insurance Law and not inconsistent with the law.

Article 77 of the Insurance Law, which governs the Life Insurance Company Guaranty Corporation of New York, does not apply to unauthorized insurers.

Unauthorized Insurance Business and Aiding an Unauthorized Insurer

Insurance Law § 1101 defines the acts that constitute doing an insurance business in this state, and Insurance Law § 1102 prohibits unauthorized insurers from doing an insurance business in this state.

Insurance Law § 1101 does not prohibit an insurer from soliciting, making or proposing to make, issuing or delivering an insurance policy or contract to a person outside of New York, even though the person is a New York resident, provided that those activities occur outside of this state. However, an unauthorized insurer that notices repeated transactions from specific producers involving New York residents should question the legitimacy of those transactions.

A producer that acts for or aids an unauthorized insurer in the solicitation, negotiation or effectuation of any insurance policy or contract by falsely claiming that the solicitation and other transactions took place outside of New York violates: 1) Insurance Law § 2117, which prohibits any person, firm, association, or corporation from acting as an insurance agent or broker for any insurer not licensed to do an insurance business in New York, 2) Insurance Law § 2122, which prohibits an insurance agent, insurance broker, or other person from calling attention to any unauthorized insurer by any advertisement or public announcement, and 3) Insurance Law § 2403, which prohibits any person from engaging in unfair methods of competition or unfair and deceptive acts or practices.

In addition, an authorized insurer that shares an office or employees with an unauthorized insurer outside of New York may violate Insurance Law § 2117 if the authorized insurer in this state in any way aids the unauthorized insurer in effectuating an insurance policy or contract in New York.

Any licensee of the Department that violates these, or other applicable provisions of the Insurance Law, will be subject to disciplinary action by the Department and the penalties provided therein, which may include monetary penalties, suspension or revocation of the producer's or insurer's license, or other penalties set forth in the Insurance Law. In addition, every violation of the Insurance Law is, unless a felony, a misdemeanor.

Unapproved Contracts

The Department is equally concerned with authorized insurers and licensed agents selling unapproved life insurance policies and annuity contracts. The sale of unapproved life insurance policies and annuity contracts in New York violates Insurance Law § 3201. Producers and insurers share the responsibility of preventing the sale of unapproved policies and contracts in New York. Department licensees should implement reasonable controls to ensure that the Department has approved the policies and contracts offered for sale in New York. These safeguards should also apply to certificates deemed to have been delivered in New York—even by unauthorized insurers—regardless of the place of actual delivery. See Insurance Law § 3201(b).

Non-Conforming Contracts

If an insurance policy or contract sold in New York, whether by an authorized or an unauthorized insurer, is not in compliance with the Insurance Law then, pursuant to Insurance Law § 3103, the policy or contract is enforceable as if it conformed with any requirements or prohibitions provided in the Insurance Law. For example, an insurer may have promised higher participation rates or caps under an equity index annuity contract because the insurer was providing lower minimum guaranteed interest rates, cash surrender values, or death benefits. However, an equity index annuity contract that conforms with New York Law must offer New York's higher minimum interest rates, cash surrender values and death benefits, which, coupled with the higher participation rates or caps promised in the contracts, could result in a very expensive contract for the insurer. Conforming unapproved policies and contracts to New York law pursuant to Insurance Law § 3103

often results in unique hybrid products, and insurers may incur significant administrative costs as a result.

Insurers should implement reasonable controls in order to prevent the sale of unapproved insurance products, for example, by using specific disclosure forms, providing outreach to policyholders, and monitoring incoming data.

Anyone who has any questions concerning the approval status of an insurance policy or annuity contract offered for sale in New York should contact the insurer offering the policy or contract for sale, or the Department, for assistance.

Although this Circular Letter is directed to certain practices involving the sale of life insurance and annuity contracts, many of the provisions of the law discussed apply equally to other kinds of insurers. In addition, certain other Insurance Law provisions and regulations promulgated thereunder may have corresponding applicability to other kinds of insurance. The focus in this Circular Letter on life insurance and annuity contracts should not be construed to imply that similar prohibitions do not apply to, or that corrective action should not be implemented for, other types of insurers or other kinds of insurance.

All questions regarding this circular letter should be directed to Peter Dumar, Associate Insurance Attorney, Life Bureau, at (518) 474-4552 or by email at pdumar@ins.state.ny.us.

Sincerely,

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