RECOMMENDATIONS FOR THE COMMERCIAL LINES MULTI-STATE EXEMPTION AND COMMISSION SHARING LAWS

ADOPTED BY THE PRODUCER LICENSING WORKING GROUP: NOVEMBER 17, 2008
ADOPTED BY THE D COMMITTEE; NOVEMBER 20, 2008

TO: NAIC Officers and the Market Regulation & Consumer Affairs (D) Committee

FROM: Anne Marie Narcini, Chair of the Producer Licensing Working (D) Group

RE: Commercial Lines Multi-State Exemption and Commission Sharing Laws

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As part of the 2008 charges for the Producer Licensing (D) Working Group (PLWG), the NAIC officers asked the working group to evaluate the key findings and issues regarding full adoption, and uniform interpretation of the commercial lines multi-state exemption and the commission sharing exemption across all states; provide further guidance on areas of disparate interpretations and applications and continue to encourage all states to adopt these exemptions

Process for Completion of Charge

During July and August, a team of regulators from Alaska, District of Columbia, Virginia, Maryland, Kentucky, Utah, Mississippi, Michigan, California and New Jersey met by conference call to discuss the aggregate findings, review prior surveys and prepare recommendations. Linda Brunette of Alaska led the Task Team. The draft was then posted for public comment on the NAIC website and the Working Group discussed the document during conference calls in November of 2008.

Commercial Lines Multi-State Exemption

The task team observed that most problems with the multi state exemption appeared related to surplus lines rather than the admitted market. In 2007 the Surplus Lines Subgroup of PLWG reviewed this issue and reported that the majority of states require a non-resident property and casualty license in order for a surplus lines placement to be made. Of the states responding to a survey at that time, only seven (7) included surplus lines in the commercial multi-state exemption. Issues surrounding the inclusion of surplus lines in a commercial multi-state exemptions and the perceived need for a license due to payment of premium taxes may affect other Committees such as the Surplus Lines (C) Task Force. We therefore recommend that any consideration of expanding the exemption to include surplus lines be coordinated with the Task Force.

The Producer Licensing Assessment Aggregate Report states that at least forty five (45) states have adopted the commercial lines multi-state exemption. It is our recommendation that the adoption of this language be considered a Uniformity Standard. We recommend the following new standard:

<u>38. Commercial Line Multi-State Exemption</u>

The state must adopt Section 4B (6) of the Producer Licensing Model Act which states:

> A person who is not a resident of this state who sells, solicits or negotiates a contract of insurance for commercial property and casualty risks to an insured with risks located in more than one state insured under that contract, provided that that person is otherwise licensed as an insurance producer to sell, solicit or negotiate that insurance in the state where the insured maintains its principal place of business and the contract of insurance insures risks located in that state;

This exemption applies at a minimum to admitted business.

Commission Sharing

Subsection 13D of the Producer Licensing Model Act sets forth the following:

> An insurer or insurance producer may pay or assign commissions, service fees, brokerages or other valuable consideration to an insurance agency or to persons who do not sell, solicit or negotiate insurance in this state, unless the payment would violate [insert appropriate reference to state law (i.e., citation to anti-rebating statute, if applicable)].

The Producer Licensing Assessment Aggregate Report stated that while the application of this exemption will be fact-specific, states should review this exemption and work toward a general statement of interpretation to help eliminate the current confusion in the marketplace.

We view the problem as two fold: 1) Not all states have adopted Subsection 13D of the PLMA and 2) States that have adopted it may not all interpret the provision in a uniform manner.

In a survey conducted by the PLWG in 2006, forty four (44) jurisdictions responded and twenty eight (28) reported they adopted this provision of PLMA. We believe that the lack of uniform implementation of this provision results in confusion in the marketplace as well as inefficiencies and a burden on resources both for regulators and the industry. This confusion may be eliminated in part if it is clarified that the reference to the anti-rebating statute is not exclusive but may refer to other state laws that limit the scope of Subsection 13D. Therefore, we recommend that the requirement to adopt Section 13D of the PLMA be added as a Uniform Standard and that the Uniformity Subgroup of PLWG work with the states that have not adopted this provision to identify the barriers to adoption and encourage legislative change to incorporate the provision.

We recommend the following new standard:

39. Commission Sharing

The state must adopt Section 13D of the Producer Licensing Model Act which states:

> An insurer or insurance producer may pay or assign commissions, service fees, brokerages or other valuable consideration to an insurance agency or to persons who do not sell, solicit or negotiate insurance in this state, unless the payment would violate [insert appropriate reference to state law (i.e., citation to anti-rebating statute, if applicable)].

Reference to the anti-rebating statute is not exclusive but may refer to other state laws that limit the scope of Subsection 13D.

It has been reported anecdotally that some states that have already adopted this provision, make a distinction between so called “override commissions” and other forms of compensation, or allow individuals to receive commissions if they do not sell, solicit or negotiate, but prohibit agencies from doing the same, or limit the exemption to particular lines of insurance.

Subsection 13D of the Producer Licensing Model Act is clear. Any individual or agency can receive commissions, service fees or *any* valuable consideration without a license as long as doing so does not violate any other state law, such as anti-rebating, and the individual or entity does not sell, solicit or negotiate insurance. Individual circumstances may be fact specific simply because the person or agency must examine the particular conduct and whether the activity involves selling, solicitation or negotiation as defined in PLMA; however, if it is determined that the activity does not involve the sale, solicitation or negotiation of insurance, any jurisdiction that has adopted this subsection should not require a license.

The following are three examples of scenarios where a license would not be required to receive commission or other valuable consideration.

Example 1

A person authorized by the insurer to oversee or supervise producers with no involvement whatsoever in the sale, solicitation, or negotiation of insurance who receives only an override commission for business produced by the producer whom the person oversees or supervises, is not required to be licensed or hold an appointment with the insurer paying the commission.

Example 2

An insurer or producer may pay or assign a commission, service fee, brokerages or other valuable consideration to a business entity or an individual that does not sell, solicit, or negotiate insurance as long as the payment does not violate the state's insurance laws.

Example 3

If an individual does not use a business entity's name for any sales, solicitations, or negotiations for insurance business, the business entity would not be required to be licensed as long as the business entity does not sell, solicit or negotiate insurance. Solicitation would include any written or verbal communication as well as executed contracts issued in the business entity's name that authorize the producer to act as the insurer's agent or the client's broker.

It is our recommendation that states use this guidance and examples of when a license is not required to receive commissions or other valuable consideration in rendering determinations regarding a need for licensure.

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