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Practical Licensing Challenges & Solutions for Producers, Brokers, Adjusters & Other Intermediaries

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Anyone in the insurance brokerage world generally knows the three magic words that require an insurance producer license: the “sale,” “solicitation,” or “negotiation” of insurance. For too many, this is the end of the equation. Most state insurance codes do not expand on what these words truly mean beyond providing general definitions derived in whole or in part from the Producer Licensing Model Act (PLMA) promulgated by the National Association of Insurance Commissioners (NAIC). As a result, the market is saturated with inconsistent treatment of licensing practices, both at the individual and entity levels.

Who needs to hold a license? What licenses need to be held? These questions, and related deficiencies, are among the most common compliance gaps we identify when assisting our insurance intermediary clients or otherwise conducting due diligence on potential insurance producer and intermediary mergers and acquisitions.

This article strives to answer 10 questions relating to insurance intermediary licensing nuances in the insurance marketplace that we see come up in our practice.

1. **Who needs to be licensed as an insurance producer?**

The short answer is all individuals and entities that “sell,” “solicit,” or “negotiate” insurance need an insurance producer, broker, agent, and/or surplus lines broker license as and where applicable. This requirement generally applies to both individuals and the entities for which such individuals produce insurance and, moreover, in every state where such activities will be conducted (i.e., not just the resident state of the individual or his or her employer).

The PLMA provides broad definitions of these terms as follows:

- “Sell” means “to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurance company.”
- “Solicit” means “attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company.”
- “Negotiate” means “the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from

insurers for purchasers."

Sounds simple enough, but where confusion can set in is when states take more specific (and sometimes differing) positions on whether discrete activities fall into one of these definitions.

2. **Do states offer more specific guidance than the PLMA as to what activities require an insurance producer, broker, or agent license?**

Many do not, but some provide very granular guidance.

For example, New York has opined that solicitation is "to ask for the purpose of receiving" and "to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing," see Circular Letter 2001-5.

In California, simply disseminating an email that "mentions" a policy provision, conveys premium quotes, or otherwise requests premium or underwriting information requires an insurance producer license and, moreover, the California license number of that person must be stated in the email, see CA Notice Dated November 14, 2022.

Pennsylvania has promulgated Department Notice 2013-09 detailing certain activities that require an insurance producer license, including but not limited to initiating sales over the telephone or otherwise; collecting premiums in person at other than a recorded place of business; disseminating policy information other than requests for buyer's guides or applications; and making or proposing to make an insurance contract.

In Virginia, under Administrative Letter 2002-9, being compensated on a commission basis requires an insurance producer license as does, among other activities, even soliciting sales on behalf of a licensed agent.

In West Virginia, under Informational Letter 202, an insurance producer license is required for, among other things, recording information on an insurance application in any manner or otherwise interviewing customers for the purpose of developing information as part of the completion of an insurance application.

The central takeaway is there are many states that deem certain activities require an insurance producer license, which the industry sometimes assumes otherwise.

3. **What about insurance producer, broker, and agent licensing exceptions?**

There are a number of insurance producer licensing exceptions. The most widely-used exception is often referred to as the "Administrative Actions Exception." This exempts a person from licensure if they are an officer, director, or employee of an insurer or insurance producer, provided that the person (i) does not receive commissions and (ii) conducts activities that are generally administrative in nature (including relating to underwriting, loss control, or certain claims activities) or where the individual acts in a special agent or agency supervisor capacity providing technical advice only.

The issue with the Administrative Actions Exception is how attractive it can be to simply characterize employees as "administrative staff" or "customer service representatives" (CSRs). In reality, however, activities must be

analyzed on a case-by-case basis.

For example, the term “underwriting” means different things to different people, and being involved in the underwriting process generally (such as consulting on the generation of underwriting guidelines) is often treated differently than the actual “binding” of insurance coverage, with the latter almost universally requiring insurance producer licensure.

Insurance companies are, for the most part, exempt from insurance producer licensure, but such exemption does not always expressly extend to employees of insurance companies who are acting in an insurance production capacity. There is also the “Group Enroller Exception” to insurance producer licensing in many states, allowing for individuals to, among other things, enroll insureds into group policies and to issue related certificates.

This exception, however, does not necessarily allow individuals to discuss terms and conditions of such group plans or otherwise be paid commissions.

4. **Is there a general consensus as to what requires a license, or do states differ?**

While certain activities consistently require an appropriate license, some tasks are treated differently with regard to insurance producer licensing requirements between states.

Perhaps the biggest divide is seen with respect to the collection of premium. In New York, under N.Y. OGC Opinion dated March 11, 2004, the collection of premium does not require an insurance broker or agent license. By contrast, Texas treats collection of premium as a licensable activity, and some states take a middle-ground approach, such as Ohio, where a license is only required for acceptance of the “initial” premium (see Ohio Rev. Code Ann. § 3905.03(A)(9)(a)).

What can further complicate matters is that some states require money transmitter licenses to collect premium as well (although most, but not all, recognize exceptions for insurance producers who, among other criteria, contractually agree that payment of premium to them will be deemed payment to the insurer).

The collection of information is an activity treated differently among the states as well. As noted above, some states, such as West Virginia, require an insurance producer license to interview customers in order to obtain information for an application, and Texas indicates that any individual who “receives or transmits other than on a person’s own behalf an application for insurance or an insurance policy to or from the insurer” requires an insurance producer license, see Tex. Ins. Code Ann. § 4001.051.

Many states also have separate insurance “consultant” licensing requirements. Some of such jurisdictions require insurance producers to hold both an insurance producer and an insurance consultant license (see, e.g., Utah’s Bulletin 2012-3, June 20, 2012).

5. **Do wholesale brokers and agents really need licenses even when they do not interact with insureds?**

Usually, yes, and sometimes even more licenses and registrations than retail brokers.

Conceptually, the “sale” of insurance does not require that the “sale” occur as between the selling person and the prospective policyholder but rather, per the PLMA, that an exchange of an insurance contract occurs “by any means,” which reasonably would include the exchange of a contract of insurance to a retail broker representing the insured.

Furthermore, many states require the licensing or registration of “managing general agents” (MGAs). Such a term has a technical definition under the law. In particular, under the NAIC Managing General Agents Act, an “MGA” is defined as any person who (i) manages certain insurance business for an insurer, (ii) acts as an agent for that insurer, (iii) underwrites gross written premium equal to or exceeding 5% of the insurer’s policyholder surplus in any one quarter or year, and (iv) either adjusts claims or negotiates reinsurance for such insurer.

Some states differ substantially in their definitions of an MGA.

For example, in Texas, every individual and entity that is authorized by an insurer to accept policies sold by the retail market needs a separate and distinct MGA license in addition to an insurance agent license, unless certain exceptions apply.

Accordingly, not only is a traditional insurance agent or agency license required to act as an MGA, but often additional MGA licenses, registrations, or carrier appointments are required (along with required contracts between the MGA and the insurer with specific provisions), and in each and every jurisdiction where the agent qualifies as an MGA, irrespective of the insurer’s domestic state.

6. **Do the same standards apply in the excess and surplus lines markets as to surplus lines broker licensing?**

Yes, with some nuance.

Let’s start with the “good” news. Most states generally allow for retail brokers to “refer” (although not necessarily actively solicit) coverage through a surplus lines broker without themselves holding surplus lines broker licenses. Moreover, unlike the admitted market, not all states license surplus lines brokerage firms and, accordingly, in such states, an entity acts by and through its designated responsible licensed producer or “DRLP.”

Otherwise, as set forth under the NAIC Nonadmitted Insurance Model Act (NIMA), any person or entity that solicits, negotiates, procures, or effectuates an insurance contract or a renewal thereof, including forwarding of applications, must hold a surplus lines broker license in the “home state” of the insured. Such terms are defined under the Nonadmitted and Reinsurance Reform Act of 2010 (NRRA), as the principal place of business or residence of the insured (unless 100% of the risk is outside of such state). The central takeaway is that an insurance producer may need to hold surplus lines broker licenses in every state where insureds reside, not simply in the broker’s “resident” state or his or her employer’s headquartered state.

7. **Hold on, the surplus lines market often utilizes non-U.S. brokers. There must be some exceptions for them.**

There are some narrow, limited exceptions to the rule that everyone who engages in the sale of surplus lines insurance must hold a surplus lines broker license.

For example, in New York, guidance implicitly stands for the position that if a program manager, administrator, MGU, or similar actor (i) is not physically in New York and (ii) only accepts submissions from the surplus lines broker of record rather than handling any transactions with a downstream retail producer or underlying insured, then such person is "standing in the shoes" of the surplus lines insurer and does not need to also hold a surplus lines broker license. See ELANY Bulletin No. 2014-08.

We note that this rule is not expressly codified nationwide, and we caution clients when taking this approach to surplus lines broker licensing.

8. **Can I borrow or trade under my colleague's license or my employer's license?**

The default rule is no, but some states show leniency in practice.

There have been a number of states in recent years that have subjected brokers to enforcement actions for such activities, including six-figure fines in North Carolina for individuals who sold surplus lines insurance under the DRLP's authorization only and a seven-figure fine in New York for similar activity in the admitted market.

By contrast, there are some states that have promulgated guidance allowing for limited "borrowing" of licenses, although sometimes without statutory support for such positions.

For example, in Virginia, on its State Corporation Commission website, "Individuals with a Property and Casualty license, who transact Surplus Lines business exclusively through an agency Surplus Lines Broker, are not required to hold an individual Surplus Lines Broker license."

There are also narrow exceptions in other licensing areas.

For example, many states grant "limited lines" licenses to sell travel insurance, rental car insurance, portable electronics insurance, as well as other limited lines.

Under such licensing standards, many states allow for individuals to trade under the "supervision" of a separate licensee. Moreover, in the reinsurance intermediary space, reinsurance intermediary broker and manager licenses are often granted to entities listing all individual "transactors" under such licenses.

9. **I'm licensed everywhere that I (think) I should be to transact insurance. Do I really need an adjuster license as well to adjust claims for carriers?**

It depends on the state. About 18 states have no "independent adjuster" licensing standards. In the remaining states, generally speaking, any person or entity that contracts for compensation with an insurer to investigate, negotiate, or settle property, casualty, or workers' compensation claims may need an independent adjuster license.

What do these terms mean? Just as in the insurance producer world, states have gotten into the weeds as to what activities "cross the line" and require independent adjuster licensing. As a general rule, exercising "discretionary authority" over a particular claim, as opposed to performance of strictly ministerial tasks, is often seen as the

threshold activity that requires an independent adjuster license (see NY OGC Opinion No. 06-08-04).

Such standards apply to individuals and companies located outside the U.S., as well, as the test for whether a license is required relates to where the underlying claims has occurred and/or where the insured is located, not where the person performing the services resides (see NY OGC Opinion No. 2003-56).

Some states do exempt licensed insurance producers from needing to obtain independent adjuster licenses, but some of these exceptions are limited in scope, such as for claims on policies they have produced or for the admitted (rather than surplus lines) market only. Some states also exempt attorneys from adjuster licensing, but often only for activities within the scope of their duties as an attorney or for where they are licensed.

Further, most states require a separate and distinct third-party administrator or “TPA” license to adjust accident and health or life claims, or otherwise collect premiums on such policies, and a few states require a TPA license to adjust property and casualty claims as well. Where TPA licenses are required to be held on a state-by-state basis can become a tricky question.

For example, TPA licenses may need to be held in states where premium is paid by an individual to a primary-named insured, employer, or master policyholder, even if it is that first-named insured that actually remits premium to the TPA.

10. **This sounds as though everyone and their cousin needs a license, which does not seem practical. What can I do to manage compliance risk while acting responsibly and within the boundaries of the law?**

For the large national brokerage firms, the administrative and financial burden of licensing up thousands of individuals is simply not practical. Accordingly, bespoke strategies need to be adopted to mitigate the licensing burden. While licenses traditionally cannot be “borrowed,” activities can be rerouted to properly licensed individuals.

For example, administrative assistants can be trained not to “cross the line” and instead re-route questions to licensed agents. Moreover, sometimes the DRLP can “batch bind” policies, although the DRLP may need to actually review such policies and perform the licensable activities rather than delegating them.

There are many other client-tailored strategies deployed in the marketplace as well. Every insurance operation is unique, and every licensing strategy requires a bespoke approach to ensure maximum regulatory compliance while considering practical realities.

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