

## **Unauthorized Insurers Questions Every Agent and Broker Should Ask**

The North Carolina Department of Insurance is very concerned about unauthorized insurers in the state of North Carolina. This document is provided to warn agents and brokers of some of the risks associated with representing unauthorized insurers and to help agents and brokers identify and avoid these arrangements.

### **Risks for Individual Agents and Brokers**

All agents and brokers should understand that the sale of unauthorized insurance products can have devastating consequences which may include the following:

#### **Personal Liability on Claims**

If the insurer involved is unauthorized, no safety net exists if the insurer becomes insolvent. The individual agent / broker will potentially be required to pay any outstanding claims. In situations such as these, North Carolina General Statute 58-33-95 provides that:

“(a) Any person or entity who solicits, negotiates, or sells insurance in this State for an unauthorized insurer: (1) Is the representative of that insurer and shall be strictly liable for any losses or unpaid claims if an unauthorized insurer fails to pay in full or in part any claim or loss within the provisions of any insurance contract sold, directly or indirectly, by or through that person or entity on behalf of the unauthorized insurer.”

#### **Criminal Charges**

North Carolina General Statute 58-33-95 also makes it a crime to sell unauthorized insurance products in this state. The statute reads in pertinent part as follows:

“(a) Any person or entity who solicits, negotiates, or sells insurance in this State for an unauthorized insurer: (2) Shall be guilty of a Class 1 misdemeanor if the person or entity does not know that the insurer is an unauthorized insurer... (3) Shall be guilty of a Class H Felony if the person or entity knew or should have known that the insurer is an unauthorized insurer...”

#### **Adverse Administrative Actions**

The citizens of North Carolina depend on insurance agents / brokers to protect them by providing insurance coverage through bona fide insurance carriers. It is the responsibility of the Department of Insurance to take administrative action against agents / brokers that sell consumers health plans or products offered by unauthorized insurers. These actions may include license revocations, license suspensions and/or fines.

### **How to Identify and Avoid Unauthorized Insurers**

The simplest and most reliable way to avoid unauthorized insurer problems is to ask the North Carolina Department of Insurance whether the entity is licensed to conduct the business of insurance in North Carolina. If the answer is yes and the company is selling a product that is within the scope of its license, the agent's / broker's unauthorized insurer inquiry is finished. If the answer is no, the agent / broker can avoid potential unauthorized insurer issues by simply refusing to do business with unlicensed companies or entities regardless of any claims of exemption from state insurance regulation.

In the event an agent / broker decides to further consider representing such an unlicensed entity, the agent should understand that he or she is assuming the responsibility for thoroughly investigating the entity, and is assuming the responsibility for engaging in a complex legal analysis of whether such an entity is an unauthorized insurer. If the agent's / broker's analysis turns out to be erroneous and a court or government agency later determines that the entity was an unauthorized insurer, the agent / broker is left with the risks of being sued for outstanding claims, being charged criminally and being subject to adverse administrative proceedings.

In the event that an agent / broker is willing to assume these risks, the following questions may be relevant to detecting unauthorized insurers:

#### **Questions Applicable to all Products**

- 1 Does the entity sell a product which it claims is not insurance, but which still has the characteristics of insurance and which is sold primarily by insurance agents / brokers?
- 2 Is the entity unable or unwilling to provide detailed audited financial statements?
- 3 Does the entity have sufficient reserves and can it demonstrate that it is operating in an actuarially sound manner?
- 4 Does the entity require that agents / brokers avoid using certain insurance terminology, even though the substance of the transaction is similar to insurance transactions?
- 5 Are guaranteed coverage inducements offered?

#### **Questions Applicable to Health Products**

- 1 If the entity claims to be exempt from state insurance regulation under ERISA, can the entity provide a written certificate or document issued by the U.S. Department of Labor (USDOL), in which the Secretary of Labor explicitly and specifically finds that the entity is exclusively subject to the jurisdiction of the USDOL? The mere fact that the entity may have filed documents with the USDOL does not mean the USDOL approves of this entity. It does not establish that the entity is subject to the exclusive jurisdiction of USDOL. It does not establish that the entity is exempt from state insurance regulations.
- 2 Does the entity rely on a North Carolina Secretary of State Certificate of Authority as evidence that it is authorized to do business in North Carolina? Such a certificate simply indicates that the entity is registered with the Secretary of State. It is not evidence that the entity is authorized to conduct insurance business in North Carolina. The Department of Insurance is the only state agency that can issue a certificate of authority or license to conduct insurance business in this state.
- 3 Does the entity offer a health benefit plan (that is not fully insured by a licensed company) that covers the employees of multiple employers, and does it claim to be exempt from state regulations under ERISA?

- 4 Does the entity's health plan claim to be pursuant to a collective bargaining agreement and exempt from state regulations under ERISA? The use of agents / brokers to sell such a plan is an indication that the arrangement may not be the result of bona fide collective bargaining and may be an unauthorized insurer.
- 5 Does the health plan target small groups with pre-existing conditions that make it difficult to find other coverage?
- 6 Does the health plan have little or no employee participation requirements?
- 7 Does the health plan require little or no employer contribution?
- 8 Is premium pricing substantially lower than most market rates for comparable benefit packages?
- 9 Does the health plan offer unusually generous benefits, co-pays and/or access to out-of-network providers?
- 10 Does the program reference little or no underwriting guidelines?
- 11 Are pre-existing conditions covered with no waiting period under the program?
- 12 Are Third Party Administrators who are not licensed or registered in North Carolina used for claims administration?

Affirmative responses to any of the foregoing questions should raise concerns that merit further investigation and analysis prior to marketing such a product. The foregoing list is by no means an exhaustive list of questions that should be asked prior to marketing a product offered by an unlicensed entity. If you are at all unsure of an unlicensed arrangement, or do not have a detailed and complete understanding of the arrangement and the applicable law, ask yourself again if you are willing to assume the risks of being wrong. If you are not willing to assume these risks, then you should only represent licensed insurers.

The Consumer Services Division of the North Carolina Department of Insurance can be reached at (919) 733-2032 or (855) 408-1212. With the help of agents and brokers, the Department hopes to eliminate potential problems citizens may experience with unauthorized insurers.