

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**



**COMMON PROBLEMS FOUND
DURING AGENT INVESTIGATIONS**

**Bureau of Insurance
Agent Regulation and Administration Division**

May 1, 2010

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The State Corporation Commission's Bureau of Insurance (Bureau) has developed the following information to assist agents with compliance problems frequently found during agent investigations. It is hoped that agents will use it as a checklist to review their operations in Virginia. Its purpose is not to provide specific guidance on how an agent should conduct business in Virginia but to point out the areas in which the Bureau has found problems in the past. This list should not be considered all-inclusive, and agents should continue to review Title 38.2 of the Code of Virginia, the appropriate regulations, administrative letters, and orders to assure compliance. All of these may be accessed, without charge, through the Bureau's website at the address shown below by selecting the option for "Administrative Letters, Administrative Orders, Insurance Laws & Insurance Regulations."

Any questions regarding the contents should be addressed either in writing or by calling:

COMMONWEALTH OF VIRGINIA
State Corporation Commission
Bureau of Insurance
P. O. Box 1157
Richmond, VA 23218

Life and Health
Agent Investigations Section
(804) 371-9970

Property and Casualty
Agent Investigations Section
(804) 371-9465

<http://www.scc.virginia.gov/boi/>

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Section 38.2-310 – All fees, charges, etc., to be stated in policy.

This code section is clear in that all charges, premiums, or other consideration charged for insurance or for the procurement of insurance must be stated in the policy and that no person may charge or receive any fee, compensation, or consideration for insurance or for the procurement of insurance that is not included in the premium filed by the company or stated in the insurance policy issued by the company.

There are exceptions in cases of fidelity, surety, title, and group insurance as well as an exception for consulting services described in § 38.2-1837 of the Code of Virginia. In addition, service charges for installment payments of insurance premiums are not required to be stated in the policy if the charges are provided to the insured in writing.

The Bureau has seen instances where an agent has charged in excess of the premium filed by an insurer and has retained the excess. This is not allowed except as specifically permitted under § 38.2-1812.2.

Section 38.2- 502 – Misrepresentations and false advertising of insurance policies.

This code section states that no person shall make, issue, circulate, cause or knowingly allow to be made, a sales presentation that:

1. Misrepresents the benefits, advantages, conditions or terms of any insurance policy (including annuities);
2. Misrepresents the dividends or share of the surplus to be received on any insurance policy;
3. Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy;

4. Misrepresents or is misleading as to the financial condition of any person or the legal reserve system upon which any life insurer operates;
5. Uses any name or title of any insurance policy or class of insurance policies that misrepresents the true nature of the policy or policies;
6. Misrepresents any material fact for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion, replacement or surrender of any insurance policy;
7. Misrepresents any material fact for the purpose of effecting a pledge, assignment, or loan on any insurance policy; or
8. Misrepresents any insurance policy as being a share of stock.

The following are only some examples of situations where agents are cited for violating this statute:

- 1) Misrepresenting the amounts of the deductible, co-payment, or other relevant fact in the sales presentation, which is different from what is stated in the policy.
- 2) Misrepresenting a life insurance policy as a “savings plan.”
- 3) Misrepresenting the interest rates associated with variable products and guaranteeing higher interest rates than the policy is paying.
- 4) Misrepresenting information to an insured regarding surrender charges associated with annuities and life products.

Section 38.2-503 – False information and advertising generally.

This code section states that no person shall knowingly make, publish, disseminate, or circulate any statements or representations relating to insurance, either in newspapers, magazines, or other publications or via radio, television, or in any other way, which are untrue, deceptive, or misleading.

The following are some examples of situations where agents are cited for violating this statute:

- 1) Producing a radio or television ad that can be misleading.
- 2) Producing a newspaper or periodical ad that can be misleading.
- 3) Producing business cards that indicate that the agent is a “consultant” when the agent has no such qualifications.
- 4) Advertising on the internet that an agent or agency is licensed in the Commonwealth of Virginia when they are not licensed.

It is suggested that all marketing communications that an agent is using be sent to the insurance company for its approval prior to its use.

Section 38.2-504 – Defamation.

This code section states that no person shall make, publish, disseminate, or circulate before the public any written or oral statement that is false and maliciously critical of, or derogatory to any

person with respect to the business of insurance or with respect to any person in the conduct of their insurance business and that is calculated to injure that person. Frequently, we have found violations of this statute when an agent is trying to replace an existing policy by misleading a consumer about the financial stability of the company from which the consumer has purchased a policy. As a result, we will pursue disciplinary action against an agent who makes statements that are calculated to injure the company or the agent who had previously written the business.

Section 38.2-509 – Rebates.

Each year the Bureau of Insurance encounters a number of agents who, in an effort to attract and/or retain clients, provide some type of rebate to insureds in order to entice them to purchase an insurance policy. Subsection A 2 of this section, clearly states that no person shall:

2. Pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducement to any insurance or annuity contract, any rebate of premium payable on the contract, any special favor or advantage in the dividends or other benefits on the contract, any valuable consideration or inducement not specified in the contract, except in accordance with an applicable rating plan authorized for use in this Commonwealth.

Subsection 4 further states that no person shall:

4. Receive or accept as inducement to insurance, or annuity contracts, any rebate of premium payable on the contract, any special favor or advantage in the dividends or other benefit to accrue on the contract, or any valuable consideration or inducement not specified in the contract.

This makes it a violation of the Virginia Insurance Code for any agent to offer an inducement to an insured to purchase a contract of

insurance. Agents will commonly hand out small items to their clients such as mugs, calendars, and other related items. Such items are generally considered advertising. The violation occurs when an agent offers to give any valuable consideration or inducement to a consumer based upon the consumer's purchase of an insurance policy. The Bureau often advises agents that if they are going to give away items such as gift certificates for restaurants, t-shirts, or other such items, they should make these items available to anyone who enters their agency, whether they purchase an insurance policy or not. As long as the receipt of the item is not contingent upon the purchase of an insurance policy, there is no violation.

Section 38.2-512 – Misrepresentation in insurance documents or communications.

The Bureau of Insurance continues to investigate a number of misrepresentation allegations each year. Subsection A of this section states that it is a violation for any person to make or allow to be made or cause to be made any false or fraudulent statements or representations relative to an application or any document or communication that relates to the business of insurance for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, premium finance company, or individual. Simply stated, no agent may make any misrepresentation relative to any communication, whether it be an application or any other document, for the purpose of obtaining any benefit.

Subsection B prohibits any person from affixing or causing or allowing to be affixed, the signature of any other person to any document pertaining to the business of insurance without the **written authorization** of the person whose signature appears on such document. Plainly stated, no agent or anyone else may sign or allow or cause to be affixed the signature of anyone to any insurance-related document without obtaining that person's written permission prior to affixing the signature. Many times an agent will claim to have the verbal authorization of an insured to sign the insured's name to an application or other insurance-related document. This is a violation of § 38.2-512 of the Code of Virginia, unless the insured has

provided prior written authorization to the agent or anyone else signing his name.

Subsection C goes further by prohibiting any person from obtaining or causing or allowing to be obtained by false pretense the signature of another person or utilizing such signature for the purpose of altering, changing or effecting the benefits, advantages, terms or conditions of any insurance contract or document. This makes it a clear and separate violation for any agent or anyone else to obtain the signature of an insured under false pretense or by misrepresentation, even if it is the insured providing the signature.

Agents should strive to communicate clearly to insureds the terms and provisions of the products they are selling and any changes made to those products. Some of the best ways an agent has to defend himself from a charge of misrepresentation are to document all of his files well, express clearly to insureds all of the provisions and/or changes being made to any policies, and only accepting original signatures of insureds on any required documents.

The Bureau sees a number of instances each year where an agent in his haste, will sign an insured's name to an application or policy change request without obtaining the proper written authorization. This has created problems for the agent when a dispute arises with the consumer and the agent cannot provide evidence the consumer ever signed the application or change request. An agent should **not** sign an insured's name without the proper written authorization.

Section 38.2-514.1 – Disclosure required.

This section requires any agent selling, soliciting or negotiating a contract of insurance in conjunction with any automobile club service agreement or in conjunction with any accidental death and dismemberment policy to provide the applicant a written disclosure at the time of application.

This disclosure must contain:

- 1) The name or type of each policy or contract of insurance and automobile club service agreement for which application has been made;
- 2) The premium quotation associated with each policy or contract of insurance;
- 3) The cost of any dues, assessments or periodic payments of money associated with each automobile club service agreement for which application has been made; and
- 4) A statement that the applicant has elected to purchase such policies, contracts, or automobile club service agreements.

The disclosure required by this section must be signed and dated by the agent and the applicant, and a copy of the signed disclosure must be given to the applicant at the time of application. If the application is made by telephone or by electronic means, a copy of the disclosure must be signed and dated by the agent and mailed to the insured within 10 calendar days of the application.

This section only applies to the original issuance of policies or contracts of insurance and automobile club service agreements covering personal, family, or household needs rather than business or professional needs. This section does not apply to the sale of group insurance. Agents should be aware of the specific provisions that must be in the disclosure and review any current disclosures being used to make sure they comply with the above-listed requirements.

The Bureau investigates numerous cases each year where agents will sell motor club contracts or accidental death and dismemberment (AD&D) policies to insureds without their knowledge. This practice, known as "sliding," has left literally hundreds of insureds paying for coverages that they do not know they have purchased. We have seen multiple policies sold to insureds without their knowledge and single widows being sold family coverage. This is an area of abuse the Bureau monitors closely.

Section 38.2-610 – Notice of adverse underwriting decision; furnishing reasons for decisions and sources of information.

This code section requires that the agent or the insurer provide information to the applicant or policyholder regarding any adverse underwriting decision (AUD) made upon submission of his application. This section of the code only applies to policies where the named insured is an individual. The insurance institution or agent that is responsible for the adverse underwriting decision must either give the specific reasons for the AUD or must give a written notice telling the applicant that he has 90 business days to make a written request for the specific reason for the AUD. The insurance institution or agent must furnish the applicant, within 21 business days from the date of the receipt of the written request from the applicant, information and specific reasons for the adverse underwriting decision. The specific items of medical-record information supplied by a medical-care institution or medical professional shall be disclosed either directly to the individual about whom the information relates or to a medical professional designated by the individual and licensed to provide medical care with respect to the condition for which the information relates.

The insurer or agent must also provide the names and addresses of the institutional sources that supplied the specific items of information. Further, the insurance institution or agent making an adverse underwriting decision shall remain responsible for compliance with the obligations imposed by this section. You should note that the insurance institution or agent is not required to furnish specific information or privileged information if it has a reasonable suspicion to believe that the applicant, policyholder, or individual proposed for coverage has engaged in criminal activity, fraud or material misrepresentation. When an adverse underwriting decision results solely from an oral request or inquiry, the explanation of reasons and summary of rights required by subsection A of § 38.2-610 of the Code of Virginia may be given orally.

Agents and companies are usually cited for violating this statute when they do not provide information to the insured for an adverse underwriting decision. It is important that the agent conform to the time requirements that are outlined by this chapter.

Section 38.2-613.2 – Information security program.

This section of the Code requires agents, insurance companies, and insurance support organizations to implement comprehensive written information security programs for their business. These programs must include administrative, technical, and physical safeguards for the protection of policyholder information. The safeguards developed are required to be appropriate to the size and complexity of the business and appropriate for the nature and scope of its activities.

Subsection B of this section states the program shall be designed to:

1. Ensure the security and confidentiality of policyholder information;
2. Protect against any anticipated threats or hazards to the security or integrity of the information; and
3. Protect against unauthorized access to or use of the information that could result in substantial harm or inconvenience to any policyholder.

Agents who work for themselves or in small offices of 2-3 people may only need a page or two to detail their plan if their operation is not complex. Likewise, an agency that employs many agents, writing many different lines, and handling very complex insureds may need a full manual to outline their security program. The main thing to remember is that the program must be in writing, contain the elements listed in subsection B, and be available for the Bureau's review.

The Bureau published a guidance letter September 1, 2009 to assist agents and others in developing their information security programs, and a copy may be obtained from the Bureau's webpage.

Section 38.2-1801 – Person soliciting insurance deemed agent of insurer; prohibition against misrepresenting agency relationship.

Subsection A of this section clearly states that a licensed agent shall be held to be the agent of the insurer that issued the insurance sold, solicited, or negotiated by such agent in **any controversies** between the insured or his beneficiary and the insurer. It further states, “No licensed agent or any other person shall claim to be a representative of, authorized agent of, agent of, or other term implying an appointed relationship with a particular insurer unless such agent has become an appointed agent of that insurer.” The Bureau has seen violations of this section when agents sign certificates of insurance and binders representing themselves as authorized representatives or some other term for an insurer with whom they are not appointed. This most often occurs when agents broker business through other agents and agencies. An agent should not sign as the authorized representative on any document for an insurer for whom he or she is not appointed unless the agent has the express written permission of the company granting authorization to issue such a document. If an insured requests a certificate of insurance from an agent who brokered a policy and the agent is not appointed with the company that issued such insurance, unless the agent has the written permission of the insurer to issue documents on its behalf, the agent should instruct the insured to contact either the insurer or the agent with whom he brokered the business to obtain the needed certificate or other documents.

Subsections B and C of this section provide consumer protections and protections for premium finance companies.

Subsection B states:

A premium payment made by an insured to an agent, whether appointed by an insurer or not, or to a surplus lines broker, where the insurer or its appointed agent acknowledged specific insurance for a specific policy period by the issuance of a

policy, written binder, or other contract of temporary insurance, whether new or renewal, shall be considered payment to the insurer, and such insurer shall be liable to the insured for (i) any covered losses under the insurance and (ii) the return to the insured of any unearned premium amount due the insured except as provided in subsection D of § 38.2-1806.

Subsection C states:

Except as provided in subsection D of § 38.2-1806, where premiums for the issuance of a policy or endorsement have been financed by an insurance premium finance company and payment and evidence of financing for such policy or endorsement have been received by the insurer or its appointed agent, the insurer shall be liable for the return to the insurance premium finance company of any unearned premium due the insurance premium finance company.

The Bureau is able to assist numerous insureds each year using the provisions of this section. Insureds have made payments to agents who have failed to remit these funds, but since the agents or the insurers issued binders or policies, we have been able to secure coverage for the insureds and have their payments credited towards the policies whether the agents were appointed or not.

Section 38.2-1802 – Acting as agent for unlicensed insurer prohibited; penalties.

This section of the code addresses agents who sell insurance through unlicensed insurers in the Commonwealth of Virginia.

Subsection A states, “No person other than a licensed surplus lines broker shall sell, solicit, or negotiate contracts of insurance in this Commonwealth on behalf of any insurer which is not licensed to transact the business of insurance in this Commonwealth. Nothing in this section shall prohibit any person from obtaining insurance upon his own life or property from an unlicensed insurer.” The Bureau continues to see instances where agents will receive information concerning insurers from insureds (through the mail or from other

agents) and will, without checking whether or not these insurers are licensed to transact the business of insurance in Virginia, submit applications, write policies, and have policies issued for their insureds. A number of these companies have very limited or no financial backing, and once claims begin to add up, they merely close their doors and disappear.

This can be extremely devastating to an insured and also to an insurance agent, as subsection B specifically provides for some of the more serious penalties found under the insurance code. Subsection B states that any person who violates this section shall be guilty upon conviction of a Class 1 misdemeanor and punished for each offense. Additionally, a person who violates this section shall be liable for **any claim** against any unlicensed insurer that arises out of a contract or policy sold, solicited, or negotiated by the person or which the person assisted in selling, soliciting, or negotiating. Additionally, the agent could be punished as provided in §§ 38.2-218 and 38.2-1831 of the Code of Virginia, or he could be subject to all of the above penalties for the same offense. Every agent is strongly encouraged to contact the Bureau of Insurance and determine whether or not a company is appropriately licensed prior to placing any business with a new insurer.

This section does have several exclusions. Nothing in § 38.2-1802 of the Code of Virginia applies to the selling, soliciting or negotiating of contracts of insurance on the following:

1. Vessels or craft, their cargo, freight, marine builder's risk, maritime protection and indemnity, ship repairer's legal liability, tower's liability or other risk commonly insured under ocean marine insurance policies as distinguished from inland marine insurance policies, provided that a property and casualty or limited lines property and casualty agent licensed in this Commonwealth sells, solicits, or negotiates these classes of insurance on behalf of any insurer not licensed to transact the business of insurance in this Commonwealth; or

2. The rolling stock and operating properties of railroads used in interstate commerce or of any liability or other risks incidental to their ownership, maintenance or operation.

If a property and casualty or limited lines property and casualty agent licensed in this Commonwealth sells, solicits, or negotiates ocean marine insurance on behalf of any insurer not licensed to transact the business of insurance in this Commonwealth, the agent must comply with the provisions of subsection D of § 38.2-1802 of the Code of Virginia, which requires that a notice be given to the insured advising him that there is no protection under the Virginia Property and Casualty Insurance Guaranty Association and that he may not be protected under the insurance laws of this Commonwealth. The notice required by this section must be on a Commission-approved form. The form may be obtained and downloaded from the Bureau of Insurance's web page under the option entitled, "Information for Agents, Consultants, & Other Licensees." The agent is required to keep a copy of the notice for at least three (3) years after the effective date of the policy, and a copy of the notice must be given to the insured prior to the placement of the insurance.

Section 38.2-1804 – Blank forms.

This section specifically states, "No agent shall sign or allow an applicant or insured to sign any incomplete or blank form pertaining to insurance in this Commonwealth." A common problem found when reviewing agency files is when agents sign or allow an insured to sign a blank or incomplete form dealing with insurance. Compliance with this section of the code protects not only the insured but also the agents. By having agents, applicants, or insureds sign only forms that are completed in their entirety, no mistake can be made as to what is represented on the forms by either party. This is an extremely common problem found during agent examinations and one that can be easily remedied.

Section 38.2-1806 – Interest with respect to credit extended or money lent on certain policies.

This section of the code allows certain agents in the Commonwealth to charge interest for credit extended to their insureds. The code states:

- A. Any agent licensed in this Commonwealth to sell, solicit or negotiate property and casualty insurance, mutual assessment property and casualty insurance, or ocean marine insurance may charge interest on credit extended by the agent to the holder of any fire, casualty, surety or marine insurance policy, written or being serviced by or through such agent, for the premium due on such policy. The rate of interest shall not exceed one and one-half percent per month of the unpaid balance. However, the extension of credit or the making of the loan shall not be in conflict with the contract between the agent and the insurer that issues the policy.

This section also has provisions that allow the agent to request cancellation of the policy if the insured fails to discharge any of his obligations related to the repayment of the credit, and it also gives the agent a lien on any return premium from the insurer. The Code describes how an agent may request cancellation, and within ten business days of the receipt of such a request, the insurer must deliver or mail a cancellation notice to the named insured. If any return premium is available, within 30 calendar days of the mailing of the insurer's cancellation notice, the insurer shall forward the amount due the agent to the agent. The remaining premium shall be forwarded to the insured. Agents must remember that this section applies only to those licensed to sell the types of insurance listed in subsection A.

Section 38.2-1808 – All agreements to be expressed in contract.

This statute states, "No agent shall make any contract of insurance or agreement with respect to the insurance that is not

plainly expressed in the policy or contract issued.” It is important for agents to remember that they cannot make promises concerning the benefits of insurance policies that are not clearly outlined in writing in the policies. In many cases, we have found that an agent will give a consumer misinformation concerning the benefits of a policy, and as a result, a complaint is generated against the agent because this information is not contained in the policy.

Section 38.2-1809 – Power of Commission to investigate affairs of persons engaged in insurance business; penalties for refusal to permit investigation.

Subsection A of this section outlines the State Corporation Commission’s powers to examine and investigate the business affairs of any person engaged or alleged to be engaged in the business of insurance in this Commonwealth. This includes all agents. The goal of the investigation is to determine whether or not the person has engaged or is engaging in any violation of Title 38.2 of the Code of Virginia. Investigators with the Commission have the right to examine all records relating to the writing or alleged writing of insurance. Any person who refuses to permit the Commission or any of its employees or agents, including employees of the Bureau of Insurance, to make an examination, or fails or refuses to comply with the provisions of this section may, after notice and an opportunity to be heard, be subject to any of the penalties relating to licensees under this title, including the denial, suspension, or revocation of his license.

Subsection B of § 38.2-1809 of the Code of Virginia requires every licensed agent to retain all of his records relative to insurance transactions for the three (3) previous calendar years. For example, if it is currently 2002, then the agent must maintain his or her records for 2001, 2000, and 1999. The only exception to this rule is that records of premium quotations that are **not** accepted by an insured or prospective insured need not be kept. Additionally, this section provides that these records shall be made available promptly upon request for examination by the Commission or its employees without notice during normal business hours.

A considerable number of agents are cited each year for not being able to provide copies of their files and related documents to investigators. Common items include bank statements and cancelled checks, applications, and declaration pages. Bureau investigators routinely work with agents who do not have the records immediately available. For example, if bank records are located at the CPA's office in order to prepare the annual tax return, the Bureau recognizes that the agent may not be able to obtain same day access; however, every effort must be made to provide the investigators access to these records as soon as possible.

Section 38.2- 1812 – Payment and sharing of commissions.

The purpose of this section is to prohibit the illegal payment and sharing of commissions. This section provides that no insurer may pay directly or indirectly any commission or other valuable consideration to any person for services as an agent or surplus lines broker unless the person is a duly appointed agent of that insurer, and at the time the transaction took place, he held a valid license as an agent or surplus lines broker for the class of insurance involved. This section also provides that no person other than a duly licensed and appointed agent or surplus lines broker may accept any such commission or other valuable consideration unless at the time of the transaction he held a valid license as an agent or surplus lines broker for the class of insurance involved. In short, no company may pay commission to an individual unless he is properly licensed and appointed and no individual may accept such commission unless he is properly licensed and appointed at the time of the transaction.

This section does not prevent the payment or receipt of renewal or other deferred commissions or compensation to or by any person if the person was properly licensed and appointed at the time of the transactions out of which arose the right to such renewals or deferred commissions or compensation. This section also does not prevent payment of commissions to a trade name that has been filed with the Bureau of Insurance pursuant to the provisions of subsection E of § 38.2-1822 of the Code of Virginia.

In addition to the above prohibitions, subsection F of this section provides that no agent or surplus lines broker may directly or indirectly share his commissions or other compensation with anyone not also licensed for the class of insurance involved in the transaction. Furthermore, no agent or surplus lines broker not licensed and qualified for the same class of insurance shall receive any commission or other compensation. These provisions do not affect the payment of the regular salaries due employees of a licensee. A number of agents are cited each year for inappropriately sharing their commissions with individuals who are not properly licensed. If a question arises as to whether or not a person with whom an agent wishes to share commissions is properly licensed, he may contact the Bureau of Insurance's Agents Licensing Section to verify what licenses and appointments are currently held. Likewise, if an agent is not properly licensed, he must not accept commissions from any other agent or insurer.

Section 38.2-1812.2 – Administrative charges in excess of premium prohibited; exceptions.

This section expressly prohibits any agent from charging, demanding, or receiving from an applicant or a policyholder any money or consideration for performing services associated with a contract of insurance, when the consideration is in addition to the premium for such contract, **unless**:

1. The applicant or policyholder consents in writing before any services are rendered. Consent shall be provided on a form that includes the applicant's or policyholder's signature, the duration of services and amount of fees to be charged, the services for which the fees are charged, and a statement that the agent is entitled to receive a commission from the insurer for selling, soliciting, or negotiating the insurance; and
2. A schedule of fees and documentation for services rendered is maintained in the agent's office and made available to applicants or policyholders upon request.

To put it simply, agents may not charge insureds fees for rendering services associated with a contract of insurance that are in excess of the premium unless they comply with the above-listed contract requirements. Each of the items listed under subsection 1 must be in the contract and clearly stated. This section does not apply to charges for services described in subsection C of § 38.2-4608 of the Code of Virginia when provided by title insurance agents. This section does apply to new and renewal policies.

The Bureau continues to cite a number of agents each year who improperly charge fees for things such as completing the application, making copies, mailing payments, and filing SR-22s. An agent can charge for these services, but he must have the written consent of the insured **before** charging these fees. Agents are also encouraged to review their fee contracts to ensure that all of the required provisions are included.

Section 38.2-1813 – Reporting and accounting for premiums.

Fiduciary Responsibility

Section 38.2-1813 of the Code of Virginia provides the framework that agents must follow when reporting for and accounting for premiums received from insureds. One common problem occurs when agents fail to maintain funds in a fiduciary capacity. Subsection A of § 38.2-1813 of the Code of Virginia states that all premiums, return premiums, or other funds received in any manner by an agent or a surplus lines broker shall be held in a fiduciary capacity and shall be accounted for by such agent or surplus lines broker. This means that any funds received by the agent shall be held in a fiduciary or trust capacity and shall not be used for purposes other than those for which they were originally intended. These funds must be accounted for in the agent's books and records. When reviewed, the agency's books and records should provide a clear picture of how the funds were handled from the time they were received in the agency until such time as they were disbursed to the appropriate party. Holding funds in a fiduciary capacity means that the funds may not be

borrowed by the agent, loaned to other insureds, or used to pay operating expenses of the agency.

In addition, this section also requires that funds be paid to the insured or his assignee, insurer, insurance premium finance company, or agent entitled to the payment in the ordinary course of business. The ordinary course of business is often identified in the agent's contract. If the agent is given two days from receipt of the premium to remit it to an insurer per the contract between them, then this would be considered the ordinary course of business. Likewise, if an agent is given 45 days from the receipt of premium to remit it on an account-current basis, that would be considered the ordinary course of business. Anything that exceeds the agency contract would be considered a violation of this section. If the agent's contract is silent on this matter, then the ordinary course of business would be for the agent to collect the premiums and upload or forward them to the company as soon as possible. When an agent holds funds for a week or more and cannot provide any explanation as to the delay in remitting them to the company, this could place the agent in violation of this section.

Commingling

Section 38.2-1813 B of the Code of Virginia, with certain exceptions, also requires agents to maintain funds received in a fiduciary account separate from all other business and personal funds. It further states that funds deposited into the separate fiduciary account may not be commingled or combined with other funds except for the purpose of:

1. Advancing premiums;
2. Establishing reserves for the payment of return premiums; or
3. Establishing funds to maintain a minimum balance or to guarantee the adequacy of the account.

Funds placed in an agent's fiduciary account may not be mixed with the agent's personal funds or the agent's business operating funds unless the requirements of § 38.2-1813 D of the Code of

Virginia, which are described below, are met. Agents all too often in the hurried pace of business, will issue a check from the agency's premium escrow account to pay for an agency operating expense, such as rent, or a personal expense of the agent, such as a vehicle repair. If an agent keeps excess funds in his account, it may only be used for those three items listed above. Subsection B of § 38.2-1813 of the Code of Virginia also requires that the agent or surplus lines broker maintain an accurate record and itemization of funds deposited into the escrow account. The commission portion of any premiums deposited into this separate account may be withdrawn at the discretion of the agent or surplus lines broker. Many agents will remove the commission portion of any funds deposited into the agency's escrow account and transfer those commission funds to the agency's operating account to pay personal expenses and agency operating expenses.

Agency Accounts

Subsection C of § 38.2-1813 of the Code of Virginia states that a separate fiduciary account of a licensed business entity (agency) shall be considered the fiduciary account of an individual agent or surplus lines broker acting on behalf of the licensed business entity. This means that if five agents form an agency, they all may maintain one premium escrow account for that agency.

Premiums for Appointed Companies

Subsection D of § 38.2-1813 of the Code of Virginia provides an exception for agents who wish to keep agency operating expenses with premiums collected from insureds. This section does not require an agent to maintain a separate fiduciary account for premium funds as long as the agent is a duly appointed agent of an insurer **and has a written contractual relationship with the insurer, which includes provisions regarding remittance of funds**. Consequently, an agent who is appointed and has a contract with an insurer that clearly states how the agent is to handle all funds received on behalf of that insurer may keep his business related funds and insureds' premiums for that company only in a separate fiduciary account. If an agent is not appointed with an insurer, he may not combine business funds and insureds' premiums. Likewise,

if the agent does not have a contractual relationship with an insurer, which includes provisions regarding remittance of funds, he may not commingle business funds and insureds' premiums. This section further states that any funds in this fiduciary account shall be held separately from any **personal** or **non-business** funds and shall be reasonably ascertainable from the books of accounts and records of the agent. Even though the agent may be allowed to commingle these premiums with business funds, they are still required to be maintained in a fiduciary capacity, be reasonably ascertainable or identifiable from the books and records of the agent, and shall not be commingled with any personal or non-business funds.

Those agents who appear to have been most successful in avoiding problems with § 38.2-1813 of the Code of Virginia are generally agents who maintain all insured premiums in a separate fiduciary account and do not commingle any business-related funds in that account. The agent maintains a pure premium account as well as an agency operating account to pay agency operating and personal expenses.

Section 38.2-1821.1 – Exceptions to licensing.

A number of agents inquire each year as to whether or not they are permitted to pay referral fees to unlicensed individuals. Section 38.2-1821.1 B 8 of the Code of Virginia specifically allows for the payment of referral fees to an unlicensed individual provided certain requirements are met. This section states that a license as an insurance producer shall not be required of the following:

8. Any person who refers a customer who seeks to purchase any insurance product to a licensed agent and receives compensation for the referral of a customer, provided that:
 - a. The referral does not include a discussion of specific insurance policy terms and conditions;
 - b. The compensation is in the form of a one-time nominal fee of a fixed dollar amount for each referral; and

- c. The compensation does not depend on whether the referral results in the purchase of insurance by the customer.

Agents who wish to pay referral fees to unlicensed individuals should carefully comply with these provisions in order to avoid any violation of the Code of Virginia. With regard to what is considered a “one time nominal fee,” it is the Bureau’s position that a “one time nominal fee” cannot exceed \$25 per referral.

Section 38.2-1822 – License required of individual and business entity agents; individual acting for business entity licensee.

Section 38.2-1822 of the Code of Virginia, is a commonly violated section. Subsection A states in part, “No person shall act, and no insurer or licensed agent shall knowingly permit a person to act, in this Commonwealth as an agent of an insurer licensed to transact the business of insurance in this Commonwealth without first obtaining a license in a manner and in a form prescribed by the Commission.” This simply means that a person may not act as an agent, and no company may allow a person to act as an agent, unless that person holds the proper license from the Bureau of Insurance. The term “acting as an agent” in this section means selling, soliciting, or negotiating contracts of insurance or annuities on behalf of an insurer licensed in this Commonwealth or receiving or sharing, directly or indirectly, any commission or other valuable consideration arising from the sale, solicitation, or negotiation of any such contract, or both. Additionally, subsection A prohibits any person from submitting business to any joint underwriting association or any plan, such as the Virginia Automobile Insurance Plan (VAIP) or the Virginia Property Insurance Association (VPIA), unless that person holds a valid license to transact the class of business involved.

Subsection B prohibits any individual from acting as an agent on behalf of a business entity (agency) unless the individual is licensed as an agent and appointed, if appointment is required by statute.

Subsection C states that no business entity (agency) may act as an agent in the Commonwealth unless it is properly licensed and appointed. The existence of the business entity or agency shall be recorded pursuant to law.

An additional requirement of § 38.2-1822 of the Code of Virginia provides that any individual or business entity conducting the business of insurance in Virginia, and using an assumed or fictitious name, must notify the Bureau of Insurance either at the time the application for a license to do business is filed or within 30 calendar days from the date the assumed or fictitious name is adopted, advising the Bureau of the name under which such business is to be conducted. When the business of insurance is no longer conducted under an assumed or fictitious name, notification to the Bureau is required within 30 calendar days from the date the agent or agency ceases to use the assumed or fictitious name.

Section 38.2- 1826 – Requirement to report to Commission.

This section of the Code of Virginia has three separate and distinct reporting requirements for agents.

Subsection A requires that each licensed agent report within 30 calendar days to the Commission and to every insurer for which he is appointed any change in his residence or name. This requirement also applies to agencies that change their agency address.

Subsection B requires each licensed agent who has been convicted of a felony to report to the Commission within 30 calendar days the facts and circumstances regarding the criminal conviction.

Subsection C requires each licensed agent to report to the Commission any administrative action taken against him in another jurisdiction or by another governmental agency in this Commonwealth within 30 calendar days of the final disposition of the matter. This report must include a copy of the order, consent to order, or other relevant legal documents. This means that if any action is taken

against an agent by another state insurance department, a federal regulatory agency, or any governmental agency located in the Commonwealth, it must be reported to the Bureau.

Section 38.2-1826 of the Code of Virginia also clarifies that the license authority of any licensed agent will terminate immediately when the agent moves outside of Virginia. This termination will occur whether or not the Commission has been notified of such move.

Section 38.2-1833 – Appointments of agents.

This is a section of the Virginia Code that is commonly violated by both agents and companies. The Bureau has a number of methods for identifying violations of § 38.2-1833 of the Code of Virginia. Agents are encouraged to review the appointment requirements carefully.

Subsection A of § 38.2-1833 of the Code of Virginia contains the most relevant information pertaining to agents. It states in part:

...every licensed agent may sell policies and solicit applications for insurance for any one or more of the classes of insurance for which he is licensed on behalf of an insurer (i) also licensed in this Commonwealth for those classes of insurance and (ii) by which the licensed agent has not yet been validly appointed, **subject to the following requirements:**

- 1) The insurer has 30 calendar days from the date the first insurance application is executed or first policy is submitted by a licensed but not yet appointed agent to either reject such application or policy or file with the Commission a notice of appointment.
- 2) The insurer has to provide the licensed agent, within the same 30-day period, verification that a notice of appointment has been filed with the Commission.

- 3) When the notice of appointment is received, the Commission will verify that the agent holds a valid license and that the notice has been properly completed and submitted. The Commission shall notify the appointing insurer if the appointment of the agent is invalid within five business days of its receipt of the appointment notice, and the insurer shall notify the agent in writing of the invalid appointment within five business days of receiving such notice from the Commission. Any agent who sells or solicits insurance on behalf of the insurer after being notified of an invalid appointment shall be in violation of this section and shall be subject to penalties as prescribed in §§ 38.2-218 and 38.2-1831.

- 4) An agent whose appointment by an insurer has been terminated by the insurer shall be prohibited from selling or soliciting applications or policies on behalf of that insurer unless and until reappointed by the insurer. Any such selling or solicitation on behalf of that insurer subsequent to the appointment being terminated and prior to such reappointment constitutes a violation of this section.

Section 38.2-1838 – License required of consultants.

This code section states that no person, unless he holds an appropriate license, shall represent to members of the public that he provides planning or consulting services beyond those within the normal scope of activities as an insurance agent. This statute further states that no person other than a licensed insurance consultant may charge fees for insurance advice other than the commissions the agent would typically receive on the policy that he is selling. It further states that any individual who acts in the capacity of an insurance consultant as an officer, director, principal, or employee of a business entity shall be required to hold the appropriate individual license as an insurance consultant. Therefore, any individual acting as an insurance advisor and charging a fee for insurance advice must obtain the proper consultant's license.

Section 38.2-1839 – Contract required.

In addition to the requirement that a consultant be properly licensed prior to acting as a consultant, it is also mandatory that a written contract be entered into with the client **prior to** the purchase of any insurance. If a licensed insurance consultant does not sell, solicit or negotiate insurance as part of his services then he must enter into a written contract with his client **prior** to any act as a consultant. Section 38.2-1839 A of the Code of Virginia also states that the contract must include the amount and basis of any consulting fee and the duration of employment. If the insurance consultant also receives commissions, incentives, bonuses, overrides, or any other form of remuneration, either directly or indirectly, as a result of his services for selling, soliciting, or negotiating insurance, such information must be disclosed in the contract.

It is important to remember that the contract must be entered into prior to placing insurance if you are also selling insurance and prior to acting as a consultant if you are not selling insurance. Agents are also encouraged to carefully review the above-listed contractual provisions to ensure they are included in any consultant contract being used.

Virginia Insurance Regulation 14 VAC 5-30-10 et seq. – RULES GOVERNING LIFE INSURANCE REPLACEMENTS.

This regulation explains in detail the requirements involved in the replacement of life insurance policies.

Duties of agents. (Virginia Insurance Regulation 14 VAC 5-30-40)

As a licensed life and health agent, there are many requirements that need to be fulfilled when an agent is replacing a life insurance policy. The agent is required to have a replacement form signed by the insured at the time that the transaction occurs. The replacing company provides this form to the agent, and it is required to be submitted with the application when applying for insurance.

Duties of insurers that use agents. (Virginia Insurance Regulation 14 VAC 5-30-60)

According to the regulation, the replacing company is required to provide a copy of the replacement form (notice) to the company that is being replaced in order to give the company an opportunity to conserve the existing policy. This regulation requires the agent and the insured to sign a form informing the insured that he is replacing his existing coverage.

It is advisable for any agent selling life insurance in the Commonwealth of Virginia to obtain a copy of this regulation in order to fulfill all the requirements outlined in the regulation. In many cases, the Bureau of Insurance receives complaints from agents when their policies are replaced and the replacement notices are not completed. As a result, disciplinary action may be taken against the agents who replaced the policy since they failed to complete the replacement forms. Disciplinary action may also be taken against the company if it does not forward the replacement notice to the company whose policy is being replaced. It is important that agents know to complete this form because, in many cases, competing agents become upset when their policies are replaced, and they will subsequently complain if the transaction is not properly documented. Therefore, it is advisable that agents review this regulation before selling life insurance products in this state.

**Virginia Insurance Regulation 14 VAC 5-40-10 et seq. –
RULES GOVERNING LIFE INSURANCE AND ANNUITY
MARKETING PRACTICES.**

This regulation goes into great detail concerning the marketing communications and materials that are used in the selling of life insurance and annuities.

Marketing communication standards and requirements.
(Virginia Insurance Regulation 14 VAC 5-40-40)

It is important that agents understand what kind of verbiage can be used in the marketing materials they use for advertisements. There are many sections of this regulation that explain in detail what words and what verbiage can be used in advertising in newspapers, magazines, and television scripts. The regulation also discloses words that cannot be used in marketing materials to describe life insurance policies. In many cases, the Bureau of Insurance has taken disciplinary action against agents who have marketed life insurance policies as “savings plans.” It is the agent’s responsibility to explain to the consumer at the time of the transaction that he is purchasing a life insurance policy, and as a result, it may accumulate cash-value features over the course of the contract. However, it is very important that the consumer understands that he is purchasing a life insurance policy. If an agent uses marketing materials that are not in compliance with this regulation, the agent is subject to disciplinary action based on the printed materials as well as oral presentations used during his sales presentation. Again, it is advisable that agents selling life insurance and annuities in this Commonwealth review this regulation to understand the rules and regulations that must be followed when selling these products.

Virginia Insurance Regulation 14 VAC 5-170-10 et seq. –
RULES GOVERNING MINIMUM STANDARDS FOR
MEDICARE SUPPLEMENT POLICIES.

The regulation governing Medicare supplement policies is very specific in some areas as it relates to the standards of marketing for agents. Agents should review the section of the regulation that explains the standards and expectations for agents marketing Medicare supplement policies. In addition, many provisions outlined in this regulation specify requirements for companies that are selling Medicare supplement insurance and the types of benefits that are offered with each different Medicare supplement plan.

Standards for Marketing. (Virginia Insurance Regulation 14 VAC 5-170-180)

Twisting

Twisting occurs when an agent makes misleading or fraudulent comparisons of policies when attempting to induce a consumer to forfeit, surrender, terminate, or exchange a Medicare supplement policy.

High-Pressure Tactics

It is illegal for an agent to use any method of marketing that would frighten, threaten, or apply any undue pressure upon a consumer when recommending the purchase of insurance.

Cold Lead Advertising

Agents and agencies often use telemarketing agencies to produce leads for prospective insureds. Agents must make sure that these telemarketers disclose in a conspicuous manner that the purpose of the call is the solicitation of insurance and that an agent of the company may contact the insured. It is imperative during the original call the telemarketer discloses to the insured that the purpose of the call is the solicitation of insurance. We have taken disciplinary action against many companies and agencies for failing to follow this provision of the regulation.

Agents should also be careful not to sell multiple policies to policyholders, since it is required on the application that the agent disclose all other coverages that the insured has. In many cases agents do not disclose that the insureds have several other policies, and as a result, misrepresentations are made on the applications, which could result in disciplinary action being taken against the agents.

Virginia Insurance Regulation 14 VAC 5-200-10 et seq. – RULES GOVERNING LONG TERM CARE INSURANCE.

The responsibilities outlined in this regulation are very similar to the Medicare supplement regulation. The regulation governing long-term care is very specific in some areas as it relates to the standards of marketing for agents.

Standards for Marketing. (Virginia Insurance Regulation 14 VAC 5-200-170)

Twisting

It is illegal for agents to twist the benefits or mislead insureds as to the benefits of the policies.

High-Pressure Tactics

It is illegal for agents to frighten, threaten, or use excessive force when recommending the purchase of insurance.

Cold Lead Advertising

Agents and agencies must disclose in a conspicuous manner that the purpose of calls or visits by agents are for the purpose of soliciting insurance.

It is important that agents understand that this is a very vulnerable market and the Bureau of Insurance takes the enforcement of this regulation very seriously when complaints are received.

Agents must disclose on long-term care insurance applications all other coverages that the insureds have so that the companies issuing the policies have a chance to review the appropriateness of the coverages before issuing the policies.

Medicare Advantage Plans

In recent years, the Centers for Medicare and Medicaid Services (CMS) have charged the Bureau of Insurance with the review of agents' sales practices in the Commonwealth of Virginia. While the CMS regulates the Medicare Advantage plans, the Bureau of Insurance is responsible for agent enforcement. As a result, the agents are regulated under §§ 38.2-502, 38.2-503, and 38.2-512 of the Code of Virginia concerning their sales practices in the sales of these products. Many agents are participating in the sales of these Medicare plans and are required to adhere to several rules and regulations set forth by the CMS.

Agents are required to be trained by the plans' administrators prior to marketing these products in Virginia. The open enrollment period for these plans generally runs from October to December of the calendar year. The commission structure that is paid to the agents is regulated by the CMS to prevent the constant churning by agents of the various plans in question.

The Bureau of Insurance expects agents who are marketing these plans in Virginia to know the CMS rules and regulations as well as the laws that govern their behavior in the Commonwealth. The Bureau of Insurance has taken disciplinary action against numerous agents for the inappropriate sale of these products. The Bureau of Insurance has been very proactive in its review of these sales practices and has a good working relationship with the various VICAP offices throughout the State of Virginia in reviewing these problems in a prompt manner.

The Bureau of Insurance expects agents who offer these plans to continually review the CMS guidelines for updates. Rules and regulations have been updated by the CMS each year since these plans have been established, and it is very important for agents to diligently review the rules and regulations that govern their activities.

Section 38.2-218 – Penalties and restitution payments.
Section 38.2-1831 – Grounds for placing on probation, refusal to issue or renew, revocation, or suspension of license.

Section 38.2-218 of the Code of Virginia outlines the penalties that an agent, agency, or unlicensed individual faces for violating the provisions of Virginia's insurance statutes. Any person who knowingly or willfully violates any provision of Title 38.2 or any regulation issued pursuant to Title 38.2 can face penalties for each violation of up to \$5,000. Any person who violates, without knowledge or intent, any provision of Title 38.2, or any rule, regulation, or order issued pursuant to this title, may be punished for each violation by a penalty of not more than \$1,000. A series of similar unintentional violations resulting from the same act shall be limited to a penalty in the aggregate of not more than \$10,000.

This section also allows the Commission to require a person to make restitution for improperly withholding, misappropriating, or converting any money or property received in the course of doing business.

In addition to or in lieu of the penalties that may be imposed upon an agent under § 38.2-218 of the Code of Virginia, the Commission may, pursuant to § 38.2-1831, place on probation, suspend, revoke, or refuse to issue or renew any person's license for any one or more of the following causes:

1. Providing materially incorrect, misleading, incomplete or untrue information in the license application or any other document filed with the Commission;
2. Violating any insurance laws, or violating any regulation, subpoena or order of the Commission or of another state's insurance regulatory authority;
3. Obtaining or attempting to obtain a license through misrepresentation or fraud;

4. Engaging in the practice of rebating;
5. Engaging in twisting or any form thereof, where “twisting” means inducing an insured to terminate an existing policy and purchase a new policy through misrepresentation;
6. Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;
7. Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance;
8. Having admitted or been found to have committed any insurance unfair trade practice or fraud;
9. Having been convicted of a felony;
10. Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, or untrustworthiness in the conduct of business in this Commonwealth or elsewhere, or demonstrating financial irresponsibility in the handling of applicant, policyholder, agency, or insurance company funds;
11. Having an insurance producer license, or its equivalent, denied, suspended or revoked in any other state, province, district or territory;
12. Forging another’s name to an application for insurance or to any document related to an insurance transaction;
13. Improperly using notes or any other reference material to complete an examination for an insurance license;
14. Knowingly accepting insurance business from an individual who is not licensed;

15. Failing to comply with an administrative or court order imposing a child support obligation; or
16. Failing to pay state income tax or comply with any administrative or court order directing payment of state income tax.

FEDERAL STATUTES

18 U.S.C. § 1033 – Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce.

The Violent Crime Control and Law Enforcement Act of 1994 (“the Act”) became effective September 13, 1994. It provides criminal and civil enforcement provisions for insurance fraud committed by persons in the insurance industry.

This section of the federal code specifically prohibits an individual, who has been convicted of a criminal felony involving dishonesty or a breach of trust or who has been convicted of insurance fraud under this section, from participating in the business of insurance. It also prohibits anyone in the insurance business from willfully allowing someone who has been convicted of a criminal felony involving dishonesty or a breach of trust, or convicted of an offense under this section, to participate or work in the business of insurance.

An individual who has been convicted as described above may participate in the business of insurance only if they have written consent from the Commissioner of Insurance. Insurers, officers, directors, agents, and employees of insurance companies and agencies are subject to this act, and there are substantial penalties for both the individual and the employer who fail to comply with this provision of the federal code. Agents, agencies, and companies are encouraged to verify that their employees are in compliance with this section.