



**STATE OF NEW YORK  
INSURANCE DEPARTMENT**  
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NEW YORK, NEW YORK 10004

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The Office of General Counsel issued the following opinion on January 7, 2003, representing the position of the New York State Insurance Department.

**N.Y. Ins. Law § 2122(a)(2) (McKinney 2000) – Advertisements**

**Questions Presented:**

1. What constitutes an "advertisement" or "public announcement" under N.Y. Ins. Law § 2122(a)(2) (McKinney 2000)?
2. What is meant by an "unauthorized insurer" under N.Y. Ins. Law § 2122(a)(2) (McKinney 2000)?
3. Under what circumstances may an authorized insurer include the name of its direct or ultimate parent, an unauthorized insurer, in its advertisements?

**Conclusions:**

1. The terms "advertisement" and "public announcement" are not defined in N.Y. Ins. Law § 2122(a)(2) (McKinney 2000). The focus of that provision is on whether the advertisement or public announcement calls attention to an unauthorized insurer. N.Y Comp. Codes R. & Regs. tit. 11, § 219.1 – 219.7 (2002) (Regulation 34-A), which sets forth the Rules Governing Advertisements of Life Insurance and Annuity Contracts, defines the term "advertisement" in § 219.3(a).
2. An "unauthorized insurer" is one that is not licensed or chartered to do an insurance business in New York or is not exempt from licensing. N.Y. Ins. Law § 107(10) (McKinney 2000).
3. The exceptions to the prohibition against calling attention to an unauthorized insurer by any advertisement or public announcement are explained below.

**Facts:**

The inquirer's letter recounts conversations that he had with Department personnel when ABC Life Insurance Company ("ABC") met with the Department to review the findings of the Triennial Examination. Rather than recount those conversations, the "questions presented" were formulated to address the issues that the inquirer raised.

**Analysis:**

**Question 1:**

N.Y. Ins. Law § 2122(a)(2) (McKinney 2000) provides:

No insurance agent, insurance broker or other person, shall by any advertisement or public announcement in this state, call attention to any unauthorized insurer or insurers.

The purpose of Section 2122(a)(2) is to prohibit the solicitation of business in New York by unauthorized insurers. The focus of that provision is on whether the advertisement or public announcement calls attention to an unauthorized insurer. The terms "advertisement" and "public announcement" are not defined in Section 2122(a)(2). However, N.Y Comp. Codes R. & Regs. tit. 11, § 219.1 – 219.7 (2002) (Regulation 34-A), which sets forth the Rules Governing Advertisements of Life Insurance and Annuity Contracts, broadly defines the term "advertisement" in § 219.3(a) as:

(F)or the purpose of this Part, shall include, but not necessarily be limited to the following, when designed to be used or are actually used, to induce the public to purchase, increase, modify, reinstate or retain a policy:

(1) printed and published material, audio, visual material and descriptive literature of an insurer used in direct mail, newspapers, magazines, radio scripts, television scripts, billboards and similar displays;

(2) descriptive literature and sales aids of all kinds, including but not limited to circulars, leaflets, booklets, depictions, illustrations and form letters, issued by an insurer, agent, broker, solicitor or organization sponsoring the insurance for presentation to members of the insurance buying public;

(3) prepared sales talks, presentations and material for use by agents, brokers and solicitors;

(4) material used for the recruitment, training and education of an insurer's sales personnel, agents, brokers and solicitors.

The inquirer provided a sample rate card to this Office and asked whether it would come under the definition of "advertisement". The inquirer states that rate cards are not designed to generate interest in ABC or its products, include no product-related information such as terms, conditions, benefits or available riders and are not designed for agent training. Rate cards are used by the agent, in lieu of software, to determine the amount of premium an applicant will need to pay based on the coverage chosen. The inquirer characterizes a rate card as nothing more than a calculation tool and, for these reasons, believes that a rate card would not come within the definition of an advertisement or public announcement.

Although, as noted above, the term advertisement is not defined in Section 2122, in the past the Department has applied the Regulation 34-A definition. Office of General Counsel opinion letter dated March 15, 1995. In so doing, the analysis focuses on whether the materials are designed to be used or are actually used, to induce the public to purchase, increase, modify, reinstate or retain a policy. The rate card that the inquirer provided contains the phrase "Agent Use Only" in small print on the back page of the pamphlet. However, the first page of this rate card addresses the insurance applicant directly and, consequently, is support for the view that the prospective insured may be furnished with the rate card. As such, this rate card would come within Section 219.3(a)(4) of Regulation 34-A.<sup>1</sup>

#### Question 2:

The term "authorized insurer" is defined in N.Y. Ins. Law § 107(10) (McKinney 2000) as:

(A)n insurer authorized as such to do an insurance business in this state in compliance with this chapter, by reason of a license so to do issued and in force pursuant to the laws of this state or of a corporate charter granted and in force pursuant to the laws of this state, but not including any insurer herein exempted from compliance with the requirement that it obtain a license to do business.

An "unauthorized insurer" is one that is not licensed or chartered to do business as an insurer under the laws of New York or is not exempt from such licensing requirement. The inquirer suggests that a discussion of N.Y. Ins. Law § 1101(b)(1) (McKinney) is relevant to this analysis. However, the fact that an unauthorized insurer does none of the enumerated acts does not alter the fact that it is an unauthorized insurer.

#### Question 3:

Although the language in Section 2122(a)(2) seemingly imposes an absolute prohibition against any advertisement or public announcement in New York State that calls attention to an unauthorized insurer, a review of past opinions of the Office of General Counsel demonstrates that the Department has recognized certain exceptions. First, the Department has permitted such advertisements addressed to the insurance industry in insurance trade publications, reasoning that such advertisements are directed to insurance brokers and not prospective insureds.

Additionally, an advertisement or public announcement in a national publication may call attention to the unauthorized insurer, so long as a disclaimer is made stating that the unauthorized insurer is not licensed in New York State and does not solicit business in New York State. However, if the advertisement or public announcement were intentionally aimed at New York State residents, such as placing an advertisement in a New York newspaper, the calling of attention to an unauthorized insurer would be prohibited regardless of any disclaimer. These are narrow exceptions to the general prohibition and, other than as so specified, a disclaimer does not nullify the Section 2122(a)(2) prohibition against calling attention to an unauthorized insurer.

The inquirer asks whether advertising material that references ABC's unauthorized direct or ultimate parent, could be distributed to insurance agencies that are owned by national banks, which would then be re-distributed to local agencies including New York. The inquirer states that he believes this is analogous to the exception for advertisements in national publications and that it would be cost effective. While the Department appreciates that it may be cost effective, the Department disagrees that it is analogous to the exception for national advertisements. The exception for national advertising applies to a newspaper or magazine that has national distribution. It does not apply to the dissemination of an advertisement by the insurer or its agent on a national level to other entities that would distribute it locally. Unlike national advertisements on television or in periodicals, such distribution can be controlled to comply with Section 2122(a)(2).

A statement in an advertisement that the company is solely responsible for its obligations could address the N.Y. Comp. Codes R. & Regs. tit. 11, § 219.4(p) (1995) (Regulation 34-A) requirement that:

An advertisement shall not use a trade name, an insurance group designation, name of the parent company or affiliate of the insurer, name of a particular

division of the insurer, service mark, slogan, symbol or other device or reference if such use would have the tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligation under a policy.

However, if the parent or affiliate is unauthorized and the advertisement did not come within one of the exceptions discussed above, it would violate Section 2122(a)(2). Accordingly, the use of such a disclaimer in advertisements, other than in advertisements directed to insurance brokers or those placed in national publications or announcements, does not overcome a violation of Section 2122(a)(2), even if it meets the requirement of Section 219.4(p) of Regulation 34-A. Although the memorandum from the Department's examiner to Mr. A, ABC's AVP of Compliance, does not clearly express this distinction, the Life Bureau has advised this Office that this has been communicated to the company in other correspondence.

For further information you may contact Supervising Attorney Joan Siegel at the New York City Office.

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<sup>1</sup> The rate card that the inquirer submitted was not a subject of the examination (it is dated 4/02), which is after the examination closed. This rate card has the logos of both ABC and its unauthorized direct or ultimate parent, but makes no reference to an unauthorized insurer. Accordingly, despite its coming within the definition of an advertisement or announcement, it is not violative of the regulation.