

## Forecast: Cloudy With Lack of Clarification

Shame on AIG! It has now joined the growing list of insurance companies in NY that have agreed to pay substantial fines for their sins. These are not the fines of our predecessor administrations, where the largest fines were in the hundreds of thousands. No, now we are talking about fines in the tens of millions

to an important industry issue in this era of expanding cyber communication capabilities.

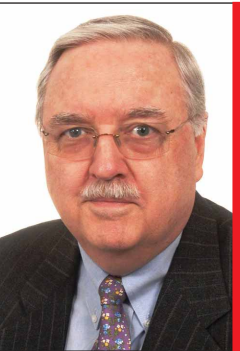
In the press release announcing the fine, Superintendent Lawsky states: “No company has a right to ignore the laws that every other insurer has to follow. This type of misconduct is unfair to its competitors

licensed. Over the years, as computer and electronic communication portability and capabilities have expanded and blurred borders, there have been a progression of regulatory opinions addressing the extent of permissible supporting activities. These rulings, however, are hard pressed to keep pace with an ever changing and expanding cyber world, and fining companies tens of millions of dollars is not the way to clarify or catch up.

In its abandoned lawsuit AIG argued, among other things, that the activity alleged by the regulators to be illegal did not involve New York insureds and therefore were outside the scope of the law and the New York regulators’ jurisdiction. In its extensive recitation of facts, the AIG consent order is replete with phrases like “multinational companies,” “sales meetings,” group insurance products,” “multinational clients,” “deliveries of multinational pooling reports,” “providing entertainment” and “Road Shows.” What’s missing, however, are operative words like “New York residents,” “New York individuals,” “New York companies” or “New York insureds.” These absences are most conspicuous because of their importance to the issue of doing an insurance business in the state without a license.

If in fact the activities of AIG, Met Life and their affiliates actually involved soliciting New York individuals or entities, it would have been so easy – and conclusive – to include those references. But there are no such references and their absence is deafening.

If the complained-of activities did not target any New York individuals or entities, then there is a legitimate, unaddressed issue of the propriety of the activities within the scope of the law. By failing to address this argument in the consent order, both AIG and the NY regulators have passed on an opportunity to clarify an important issue, particularly in this era of cyber-communications. This failure also has the potential for unintended consequences such as chasing businesses and jobs out of the state. So long as NY resi-



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or more: in this latest case \$35 million for allegedly conducting an unlicensed insurance business in the state.

Back in March NY’s Department of Financial Services fined Met Life and a couple of non-New York life insurance affiliates that had been acquired from AIG \$50 million for illegally soliciting insurance business in New York without a license. Although prominently “featured” in the consent order with Met Life, AIG did not participate in that settlement and even filed a lawsuit against the regulators for, among other things, denying it due process. (See my *Insight* column, “Motivational Misdirection,” IA, April 28, 2014). Now AIG has apparently abandoned its arguments and has entered into a consent order that includes findings that it violated the insurance law.

The consent order and the accompanying DFS press release emphasize AIG’s misrepresentations and omissions in its responses to and filings with the regulators regarding its activities soliciting business for non-NY licensed companies from NY locations. Plain and simple, AIG lied about its activities and got caught in the lies. This is a shame because it is yet another lost opportunity to provide clarity

and puts consumers at risk.” It would be hard to argue against this seeming truism. The problem, however, is that a central underlying issue, raised by AIG in its lawsuit opposing the regulator’s action, has been clouded by the consent orders and AIG’s own actions. The consent orders agreed to by Met Life and now AIG recite facts at length to support a conclusion that the companies violated the laws prohibiting “doing an insurance business” in the state without a license. But there is one fact that is glaringly missing from these consent orders: whether or not the companies solicited the sale of insurance to New York residents.

New York law – like the laws of most if not all other states – focuses on protecting its own residents from improper solicitation and sale of insurance products. You cannot do so without a NY license, and you cannot aid and abet a non-licensed entity from doing so: protect our own from insurance companies that are not beholden to our laws!

There has always been a somewhat fuzzy line regarding aiding and abetting, particularly where members of a group share “back office” facilities in one state regardless of where the group members are

## [INSIGHT]

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dents are protected, NY's regulators should be encouraging not discouraging legitimate cyber businesses providing all kinds of promotional support to entities worldwide. But why should these businesses locate in NY and risk the wrath of NY's long arm of the regulator?

It is likely that AIG abandoned its arguments in light of having been caught in significant misrepresentations and omis-

sions regarding its actual conduct. On the other side, the DFS seems to have gone out of its way to ignore these issues. This result further underscores the reality that NY's DFS no longer issues opinion letters even though authorized to do so by statute. As a consequence, there is no mechanism short of litigation for companies, agencies, other licensees, insurance consumers, or their providers and advisors to formally seek answers to ambiguous or unclear questions. Was the old system of routinely

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issuing opinions overused and abused? Possibly. But even if a cutback was warranted, to shut down the statutorily authorized process altogether is an overreaction that fosters uncertainty and could encourage licensees (i.e., AIG?) to provide misleading or incomplete information to the regulators in fear of crossing some undefined line.

Let me be clear: it is never a good idea (not to mention being contrary to law) to lie to or mislead your regulator. But it is also inappropriate for regulators to impose penalties on licensees without a clear line between acceptable and unacceptable conduct. Penalties and fines should not be the insurance regulators' equivalent to speed traps for the unwary. They should also not be the only mechanism for a regulated company to learn the parameters of a regulator's interpretation of the rules.

AIG was wrong to mislead the regulators. The regulators are equally wrong in not using or providing for an opportunity to clarify the rules. [A]

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