

Social Media and Surplus Lines

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The use of social media by surplus lines insurers and agents to promote business is advertising.

Despite the casual nature of social media sites such as Facebook and LinkedIn, the use of social media is subject to state insurance laws that govern advertising and unfair trade practices.

Although people often think of surplus lines insurance as an unregulated part of the industry, the reality is that many states have specific advertising restrictions for surplus lines insurance and unfair trade practices laws that apply. Those in the surplus lines market who take advantage of social media to promote their insurance business need to be aware of these laws.

State insurance regulators have yet to issue any formal compliance guidance on the subject. In their defense, they are once again left with the unenviable task of applying old laws to new issues and technology.

The unfair trade practice laws of every state prohibit the making of any unfair, false or misleading statement about insurance and persons in the business. Any statement, including advertising in any medium, is subject to this standard.

Some, but not all, states further restrict the content of advertising by surplus lines brokers. Not too surprisingly, the laws vary significantly among states and the laws of the states in which one does business should be reviewed.

In states that specifically restrict surplus lines insurance advertising, a surplus lines broker is permitted to announce the broker's ability to place surplus lines insurance and to provide a general description of the types of products that are available. In some states, brokers are expressly prohibited from mentioning the name of any surplus lines insurer and may not identify specific products or coverages.

The state of New York prohibits any producer or broker, including surplus lines brokers, from calling attention to an unauthorized insurer.

Prohibitions against providing rate or premium information are fairly common.

- New York also prohibits a surplus lines broker from including a list of unauthorized insurers from which the broker may procure coverage.
- Hawaii has a law prohibiting the publication of any advertising in Hawaii for or on behalf of any unauthorized insurer.
- In California, the name of a nonadmitted insurer may be included in a surplus lines

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broker's advertisement so long as no products are mentioned and the unlicensed status of the insurer is disclosed.

Of particular importance and what should be a best practice for brokers as well as carriers is to disclose the states in which one is licensed. This can be helpful in avoiding allegations of soliciting insurance in states in which one is not licensed or eligible to write.

Also, some states have laws that purport to regulate any advertising that might be seen or heard in that state even if the person is not doing business in that state. To avoid problems and to comply with specific disclosure requirements that exist in some states, both surplus lines insurers and brokers should consider including disclosures about licensing on their social media sites.

Other commonly required disclosures include the full name of the insurer, the states in which the insurer is licensed and the location of its principal place of business. A few states have very specific requirements for websites that regulators may try to apply to social media sites.

For example, California wants insurers to include their California license number.

While these requirements may not apply to surplus lines brokers and perhaps not to surplus lines insurers, complying with these requirements may avoid confusion and provide some measure of protection in the event of a regulatory inquiry.

Facebook may have enough "real estate" on a page to include disclosures, but a 140-character limit on Twitter presents a challenge. Insurance regulators have generally permitted required disclosures on websites to be made via a link. One can only hope that they will go one step further and allow a page on LinkedIn or Facebook to contain a link to the entity's website. Of course, the appropriate disclaimers must actually be on the entity's website.

It goes without saying that every insurance agency and carrier should have policies and procedures for the development and review of advertising, and those may need to be revised if social media is used. Particular attention should be paid to the currency of information on the sites and to third-party postings. Outdated information and inappropriate third-party postings should be removed.

Regulators will have to decide how to apply old laws to new technology when it comes to the use of testimonials and record retention requirements for social media.

The ability of another person to post comments on what is essentially an advertisement of a broker or insurer creates some risk. If a "fan" of an insurance agency posts a false or derogatory comment about an insurer, is it attributable to the agency?

Maybe, if insurance regulators take their lead from the Financial Industry Regulatory Authority. Earlier this year, FINRA issued formal guidance regarding the use of social media by brokers and dealers in the securities industry (Regulatory Notice 10-06) and indicated that forwarding or commenting on a third-party post could be an implicit endorsement of the content, thereby making it the broker dealer's own statement.

There are Facebook pages and websites for insurance agencies that contain the names of surplus lines insurers and specific products. While such content is not prohibited in all states, surplus lines insurers may want to limit the use of their names and products

on social media sites that belong to brokers in order to protect their brand and to avoid regulatory issues.

Regulators will have to decide how to apply old laws to new technology when it comes to the use of testimonials and record retention requirements for social media. The use of testimonials is regulated in many states, and it is not clear whether becoming a fan of an agency will be considered a testimonial.

It is also not clear whether regulators will expect the industry to maintain a copy of every change made to a LinkedIn page or every comment on Facebook.

Surplus lines brokers, like all insurance agents, should recognize that using social media has the potential to create errors and omissions exposures, particularly if clients and potential clients are able to request coverage or changes via a post to a Facebook page. Agencies should consider a disclaimer prohibiting this practice, similar to voice mail messages that remind callers that coverage cannot be bound by leaving a message.

Social media sites should be checked regularly for client communications.

The Dodd-Frank Wall Street Reform and Consumer Protection Act will streamline certain aspects of doing business in the surplus lines market, but it does not exempt the surplus lines industry from advertising law and unfair trade practice laws. State laws will continue to apply to advertising and the use of social media by surplus lines brokers and insurers.

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About the Author

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