COMMENTS

Anti-Rebating Draft NAIC Model Unfair Trade Practices Act (Model #880) Amendments

Alaska Division of Insurance

American Bankers Association Office of Insurance Advocacy (ABAOIA)

American Council of Life Insurers (ACLI)

America's Health Insurance Plans (AHIP)

American InsurTech Council (AITC)

American Property Casualty Insurance Association (APCIA)

Center for Economic Justice

Connecticut Insurance Department

Independent Insurance Agents and Brokers of America (IIABA)

John Hancock Insurance

Locke Lord LLP

McDermott Will & Emery

Minnesota Department of Commerce

National Alliance of Life Companies (NALC)

National Association of Health Underwriters (NAHU)

National Association of Insurance and Financial Advisors (NAIFA)

National Association of Professional Insurance Agents (PIA National)

Paul Zuckerman Consulting, LLC

Pennsylvania Insurance Department

Risk Management Society (RMS)

Washington State Office of the Insurance Commissioner

Alaska Division of Insurance Comments

Bingham, Rona L.

From: Murray, Chris (CED) <chris.murray@alaska.gov>
Sent: Thursday, July 2, 2020 6:15 PM
To: Matthews, Denise
Subject: RE: NAIC Request for Comments: UTPA (Model #880) Amended Language Addressing Rebating | Due by July 15

Hi Denise,
Alaska feels that the amendment is long overdue and a significant improvement over the current statutory structure and we would be in favor of adopting it. It would give insurance entities additional leeway when it comes to competition and marketing and would give regulators a clearer path to determining whether or not a particular incident could be considered rebating. Thank you for soliciting our comments.
Best,

Chris Murray **SILA-A**

Insurance Licensing Program Coordinator
Commerce, Community, & Economic Development
Division of Insurance
PO Box 110805
Juneau, AK. 99811-0805
Phone: (907) 465-2545 Fax: (907) 465-3422

Our office is telecommuting in response to COVID-19. We encourage you wherever possible to communicate and send documents through email. Thank you for your patience and understanding as we work to find alternate ways to serve you.

McIntyre & Lemon, PLLC
1015 15th Street, NW, Suite 1025
Washington, D.C. 20005
Tel: 202-659-3900

July 15, 2020

Commissioner Jon Godfread
Chair, NAIC Innovation & Technology Task Force
1100 Walnut St
Suite #1500
Kansas City, MO 64106

Re: Task Force Request for Comments on Anti-rebating Revisions to Model #880
Comments of American Bankers Association/Office of Insurance Advocacy

Dear Commissioner Godfread:

We provide these comments on behalf of the American Bankers Association Office of Insurance Advocacy ("ABAOIA") to the Innovation & Technology Task Force concerning proposed revisions to the NAIC's Model Unfair Trade Practices Act (No. 880) (the "Model Act"). The ABAOIA advocates for bank-owned insurance agencies. The proposed revisions would permit producers to offer insureds certain value-added services that otherwise might be considered illegal rebates under current state law.

The insurance agency members of the ABAOIA are charged with placing insurance coverage and, often, providing related ancillary services to commercial insureds. Commercial insureds desire producers to provide "one-stop" shopping for a variety of services connected to insurance sales and administration. New Subsection H.(2)(e)(1)(b) of the Model Act would permit a producer to provide value-added products or services that relate to the insurance coverage at no cost or at a discount as long as they also address various aspects of loss control, claims costs, risk, health and wellness, or administration of employee or retiree benefit policies. This language, focusing as it does on loss control and risk assessment, would certainly be a significant improvement over the status quo; however, we believe the language should be expanded to include value-added services offered by a producer that arise from the relationship with a *commercial* insured. Restricting the offering of value-added services simply to loss control and risk assessment does not recognize present realities, demands in the marketplace and the scope of the producer-insured relationship. So while we support the Task Force's approach to broadening what is permitted, we request that it consider adding an additional item that would apply only to value added-services provided to a commercial or institutional insured that arise from, and are designed to enhance the relationship between, the producer and the insured.

Specifically, we suggest that the Task Force add the following language as Subsection H.(2)(e)(1)(b)(9), so as to permit additional value-added services that:

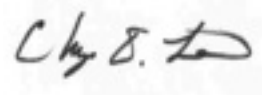
"(9) Arise out of the relationship between the producer and/or insurer and a commercial or institutional insured where the nature of the relationship and the compensation arrangement are memorialized in writing."

Examples of value-added services that would fit within this category are insurance consulting services or other related insurance advice, updates on insurance-related federal or state legislation or regulations, and in the employee benefit area, where health insurance coverage is being placed for sophisticated commercial employer/insureds, assistance with HIPAA-related matters.

The Task Force's efforts are consistent with the NAIC's "State Ahead" reform project, which is designed to ensure that regulation keeps up with the pace of development and innovation, and that state insurance regulation remains viable in an increasingly global insurance market. With this goal in mind, in thinking about the relationship between producers and commercial insureds, we urge the Task Force to be open to allowing them to agree in writing to permit the producer to provide a very broad array of products and services to enhance the commercial relationship.

We appreciate the opportunity to provide these comments.

Very truly yours,



Chrys D. Lemon

cc.: Denise Matthews

ACLI
Financial Security for Life

Commissioner Jon Godfread
North Dakota Insurance Department
Chair, NAIC Artificial Intelligence (EX) Working Group
Via email to dmatthews@naic.org

July 15, 2020

Re: ACLI Comments on Draft UTPA (Model #880) Language Addressing Rebating

Dear Commissioner Godfread:

On behalf of the American Council of Life Insurers (ACLI)[1], thank you for the opportunity to comment on the proposed amendments to the NAIC Unfair Trade Practices Act. We would like to express our appreciation to the efforts of the drafting group, and especially the leadership of Superintendent Dwyer. ACLI believes the drafting group has produced an excellent work product that appropriately balances the goals of allowing innovation, while simultaneously protecting consumers and the marketplace from the harmful effects of certain rebating practices. We have several suggested amendments below, which we believe improves the draft without altering its fundamental construction.

Section H(2)(e)(1)(b)(8) Benefits Administration

The administration of benefits may be undertaken with respect to groups comprised of individuals other than employees. Therefore, we suggest adding the word ("group") to include a broader category of potential insureds:

(8) Assists in the administration of employee, group or retiree benefit policies.

Section H(2)(e)(3) Pilot or Testing Programs

We believe the language in this Section is overly focused on property & casualty insurance. Life and health insurers may want to avail themselves of pilot or testing programs, but "material correlation to risk" and "sources of risk of loss or claims" are not terms typically applied to life

[1] The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's member companies are dedicated to protecting consumers' financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI's 280 member companies represent 94 percent of industry assets in the United States.

The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's member companies are dedicated to protecting consumers' financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI's 280 member companies represent 94 percent of industry assets in the United States.

and health offerings. We suggest the amendments below as a means to broaden the availability of this Section to all lines:

If the product or service is not made available to all policyholders, insureds or potential insureds its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner. If an insurer does not have such objective criteria ~~sufficient evidence that the product or service is cost effective or has a material correlation to risk,~~ but has a good-faith belief that the product or service meets the criteria in (H) (e) (1) ~~may mitigate, assess or identify sources of risk of loss or claims~~, the insurer or producer may provide the product or service as part of a pilot or testing program for a reasonable period of time upon approval of the Commissioner.

We appreciate the inclusion of this provision, given that pilot and testing is essential for innovation. However, we are concerned that pilot and testing programs subject to approval in each state may lead to wide process variation. This may threaten the usefulness of the programs, as pilots are often executed on a multi-state basis and would therefore necessitate numerous state filings. We urge the Task Force to consider ways to centralize this process (such as a new provision in this model, or a model directed to pilot/testing).

Subsection H(2)(e)(5)

This subsection is different from the foregoing subsections, it does not explicitly refer to value-added products and services, and instead defines a *de minimis* dollar amount (bracketed as $250) for the general category of "[g]ifts or offers of gifts in connection with marketing for the sale or retention of contracts of insurance". As such, Subsection 4.H(2)(e)(5) is miscodified, could be misconstrued as a specific dollar amount limitation on value-added products and services, and could be viewed as conflicting with Subsection 4.H(2)(e)(4), which requires only that the cost of value-added products and services shall be "reasonable" in comparison to the average policy premiums or insurance coverage. Accordingly, the provision currently set forth in Subsection 4.H(2)(e)(5) does not belong in subsection 4.H(2)(e) at all, should be separated from the requirements relating to value-added products and services, and recodified as Subsection 4.H(2)(f). In turn, Subsection 4.H(2)(f) should be recodified as Subsection 4.H(2)(g).

Section H(2)(f)(1) Promotional or Advertising Items & Meals

We believe the existing language here is somewhat awkward, and therefore suggest the following modification to better align with insurer distribution models:

Offer or give promotional or advertising items or meals or charitable donations on behalf of an a ~~personal lines policyholder or potential policyholder~~ individual insured or potential insured, as long as… .

Section H(2)(f)(2) Commercial Insureds

We suggest clarifying the scope of this Section to include "group" insureds as well as commercial and institutional policyholders. A commercial policyholder may have an individual or group contract, but the current language leaves the group contact unclear:

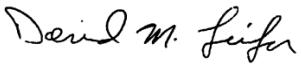
Offer or give gifts or value added services to commercial, institutional or group insureds in connection with marketing for the sale or retention of contracts of insurance, as long as the cost is reasonable in light of the relationship between the parties; or

Subsection 4(2)(f)(3)

We believe this is unduly restrictive and not in accordance with existing laws governing raffles. We would suggest having no monetary limit, provided the raffle or drawing is open to the public, free of charge and not tied to the purchase of insurance. Alternatively, we would suggest a limit tied to the number of applicants, for example, the prize cannot exceed 25 dollars per entrance.

Thank you for the opportunity to comment on the draft model language, and we look forward to participating on the conference call later this month.

Sincerely,



Dave Leifer
VP & Associate General Counsel
davidleifer@acli.com
202-624-2128

America's Health Insurance Plans

July 15, 2020

John Godfread, Chair
Innovations & Technology (EX) Task Force

Via email to Denise Matthews, dmatthews@NAIC.org

Re: Unfair Trade Practices Act Rebating Proposal

Dear Commissioner Godfread;

We appreciate the opportunity to express our support for the exposed Draft UTPA Amended Language addressing rebating. We thank you and the Task Force members for your efforts to update this language, since the existing language is somewhat dated and has long been a source of confusion among regulators and industry alike. We are especially appreciative of the clarity you've added, particularly in the distinction between actions and items to induce customers to purchase a policy and those items which are value-added and benefit policyholders. This added clarity should encourage our members to continue to offer healthy initiatives without potentially running afoul of the antiquated model. We have a few suggestions which will build upon and improve the good work already prepared on this project.

In Section H(2)(e)(1)(b), the pace of innovation tells us there may be products or services which do not fit squarely into the enumerated items (e)(1)-(8), and yet still provide value to policyholders. In the interest of interpreting this language so that it is most beneficial to policyholders, we suggest adding a new (e)(9), to read as follows:

"(9) Or otherwise enhance the value of the insurance benefits to the policyholder."

In Section H(2)(e)(3), the first sentence is reasonable and rationally related to the goal of avoiding unlawful discrimination. However, the second sentence contains language which is not defined and subject to varying interpretations, i.e., "sufficient evidence", and "material correlation." Therefore, the second sentence should be deleted.

Lastly, it appears there are some typographical errors in the wording in the opening clauses of Section H(2)(f)(1). Additionally, the language, "impliedly required" might be used to shift the burden to an insurer to disprove an allegation, rather than requiring the complainant to carry the burden. Therefore, we suggest it should be amended as follows:

(1) offer or give promotional or advertising items or meals to, or charitable donations on behalf of, ~~to~~ a personal lines policyholder or potential policyholder, as long as the total fair market value of the promotion or advertising items and/or meals does not exceed an amount set in regulation by the Commissioner per calendar year per person and no purchase or renewal of an insurance policy is ~~either expressly or impliedly~~ required;

Again, we thank you for the opportunity to offer these suggestions, congratulate you on the orderly process you used and the good work which has resulted, and we look forward to discussing our suggestions at your convenience.

Sincerely yours,

America's Health Insurance Plans

Bob Ridgeway
Bridgeway@AHIP.org
501-333-2621

July 15, 2020

Commissioner Jon Godfread
National Association of Insurance Commissioners
444 North Capitol Street NW
Suite 700
Washington, DC 20001
Attention: Denise Matthews, Director, Data Coordination and Statistical Analysis

Commissioner Godfread:

Thank you for the opportunity to provide public comments on the NAIC's Section 4(H) of NAIC Model Unfair Trade Practices Act ("Rebates"). This comment letter is submitted on behalf of the American InsurTech Council ("AITC"). AITC is the independent voice for insurtechs, traditional insurance companies and agencies, and other stakeholders sharing common goals and objectives before state insurance regulators and the NAIC, federal and state legislators, other policymakers, the media and the general public.

We are writing in support of the proposed changes to the Unfair Trade Practices Act. Rebating has been an ongoing issue with many insurtech efforts, and regulation of this area by the states has been, at best, inconsistent. Many states have had the same strict anti-rebating laws in place for decades, while some states have essentially eliminated their anti-rebating statutes. Other states have allowed for more flexibility, albeit only in a "sandbox" or through regulatory discretion. While each state's regulatory regime should reflect the values in the state, this inconsistency across state lines has created problems for the industry and has harmed some consumers.

The proposed approach in the model clearly reflects a middle ground. It provides insurers and their affiliates with certainty, creates appropriate standards and eliminates unfairly discriminatory practices while still allowing companies the flexibility to meet ever changing consumer needs. We believe any insurtech regulatory proposal should meet the following tests:

1. Protect consumers including protecting consumers from discriminatory practices
2. Provide consistent regulatory standards across the industry and across states
3. Ensure that the insurtech industry has the flexibility to meet emerging consumer needs

We understand that this is just the first step in developing a modern, uniform approach to the issue of rebates. The proposed changes to the model will assist regulators and the industry in properly managing this transformation until insurtech becomes insurance. Similarly, we note that as the pace of change in our industry continues to increase other changes to existing regulatory standards will need to be considered to keep pace with change and ensure this market continues to work for everyone.

Thank you for the opportunity to provide public comments on this important document. We look forward to working with you. If you have any questions please do not hesitate to contact us at the email addresses below.

Respectfully Submitted,

Scott Harrison (Scott@insuretechcouncil.org), Jack Friou (Jack@insuretechcouncil.org), The Hon. Thomas Mays (Tom@insuretechcouncil.org), and JP Wieske (JP@insuretechcouncil.org), Teri Hernandez (Teri@insuretechcouncil.org).
Co-Founders, American InsurTech Council

American Property Casualty Insurance Association
INSURING AMERICA apci.org

07/15/2020

Commissioner Jon Godfread, Chair
Superintendent Elizabet Kelleher Dwyer, Vice Chair
Innovation and Technology (EX) Task Force
National Association of Insurance Commissioners
1100 Walnut Street
Suite 1500
Kansas City, MO 64106

Via Electronic Mail: DMatthews@naic.org

Re: Draft UTPA Amended Language Addressing Rebating

Dear Commissioner Godfread and Superintendent Dwyer:

The American Property Casualty Insurance Association (APCIA) appreciates the opportunity to provide feedback on the "Draft UTPA Amended Language Addressing Rebating" document (draft amendments). The constructive and collaborative work of the drafting group has produced a helpful starting point for the work of the Innovation and Technology Task Force. APCIA offers a few additional thoughts and amendments for the Task Force's consideration.

Permissible Criteria

The draft amendments identify a list of permissible criteria for offering a value-added product or service at no or reduced costs when such products or services are not specified in the policy. The list is robust, but as innovation continues and companies continue to meet consumer demands, there could be some future product or service that are not yet developed or anticipated and do not fall neatly into the current list. As a signal to regulators that this list may adapt over time, APCIA offers a drafting note for the Task Force's consideration.

In addition, we believe the list would benefit from language that would allow products or services that help promote environmental causes. For example, siding or roofing materials that can help increase energy efficiency.

Regulatory Authority

While well intentioned, the addition of "especially instances where third party vendors require policyholder data as a condition of receiving the value-added product" in Section (e)(2) adds some confusion. A simpler way to get at this issue may be to replace this phrase with "privacy."

Offer to Less than "all" Policyholders or Applicants

APCIA recommends adding language that would clarify, for example, that the same water leak detector would not need to be offered to **all** property policies sold by an underwriting company. An insurer might justify offering a water leak detector above MRI machines on a hospital property but not for a property account insuring an empty warehouse. We recognize this could be included in the objective criteria; however, recognizing such permissible decisions in the statute will help improve the efficiency and speed that insurers can bring products to market.

Testing

We appreciate the drafting group's effort to help promote offering innovative solutions through a testing environment in subsection (e)(3). However, after further contemplation, APCIA believes this paragraph is not necessary and may lead to confusion and conflict with state laws that establish a sandbox. We respectfully, recommend eliminating this language.

Cost Factor

As drafted (e)(4) also creates an arbitrary "eye-of-the-beholder" reasonableness standard that could be connected to the requirements in (e)(5). Therefore, APCIA suggests the following alternative language be added to the drafting note after (e)(5). : "The insurer or producer should have a good faith belief that the cost of providing the value-added product or service has a reasonable relationship to the intended benefits of the product or service."

Marketing and Promotional Material

Finally, APCIA recommends amendments to section (f) that would clarify that nothing in this section would prohibit an insurer or producer from conditioning a gift or entrance into the raffle on obtaining a quote.

Thank you again for the opportunity to comment and we look forward to discussing these issues during the Task Force.

Respectfully,

Angela Gleason

American Property Casualty Insurance Association (APCIA) Suggested Edits 7/15/20

Section 4(H) of NAIC Model Unfair Trade Practices Act

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

H. Rebates.

(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any ~~insurance~~ company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

(2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;

(c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year; or

(d) Engaging in an arrangement that would not violate Section 106 of the Bank Holding Company Act Amendments of 1972 (12 U.S.C. 1972), as interpreted by the Board of Governors of the Federal Reserve System, or Section 5(q) of the Home Owners' Loan Act, 12 U.S.C. 1464(q).

(e) (1) The offer or provision by insurers or producers, by or through employees, affiliates or third party representatives, of value-added products or services at no or reduced costs when such products or services are not specified in the policy of insurance if the product or service:

(a) Relates to the insurance coverage and

(b) Is primarily intended to satisfy one or more of the following:

(1) Provide loss control;

(2) Reduce claims costs or claim settlement costs;

(3) Educate about risk of loss to persons or property;

(4) **Provide for or educate about methods for mitigating environmental impacts;**

(5) Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;

(6) Enhance health or financial wellness;

(7) Provide post-loss services;

(8) Incent behavioral changes that improve the health or reduce the risk of death of the insured; or

(9) Assists in the administration of employee or retiree benefit policies.

Drafting Note: As innovation evolves and new products and services become available, states may identify additional benefits for permissible value-added products or services.

(2) The Commissioner may adopt regulations when implementing the permitted practices set forth in (2)(e)(1) to ensure consumer protection. **Such regulations may address, among others,** ~~**Issues include, but are not limited to**~~, consumer data protections **and privacy**, ~~**especially instances where third party vendors require policyholder data as a condition of receiving the value added product or service**~~, consumer disclosure, **and** unfair discrimination consistent with applicable law.

(3) If the product or service is not made available to all policyholders or applicants its availability must be based on ~~**written**~~ objective criteria and offered in a fair and nondiscriminatory manner **including, by example, offering the product or service based on perceived risk characteristics of a policyholder or applicant.**

~~**If an insurer does not have sufficient evidence that the product or service is cost effective or has a material correlation to risk, but has a good-faith belief that the product or service may mitigate, assess or identify sources of risk of loss or claims, the insurer or producer may provide the product or service as part of a pilot or testing program for a reasonable period of time upon approval of the Commissioner.**~~

~~**(4) The cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to the average policy premiums or the insurance coverage.**~~

(5) Gifts or offers of gifts in connection with marketing for the sale or retention of contracts of insurance is considered *de minimus* and not in violation of this statute as long as the cost does not exceed [two hundred and fifty dollars] per person per year;

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment. ***The insurer or producer should have a good faith belief that the cost of providing the value-added product or service has a reasonable relationship to the benefits of the products or service.***

(f) Notwithstanding any other provision, an insurer or a producer may:

(1) offer or give promotional or advertising items or meals or charitable donations on behalf of to a personal lines policyholder or potential policyholder, as long as the total fair market value of the promotion or advertising items and/or meals does not exceed an **[two hundred and fifty**

dollars] ~~**amount set in regulation by the Commissioner**~~ per calendar year per person and no purchase or renewal of an insurance policy is either expressly or impliedly required. **Conditioning the gift on obtaining a quote shall not be considered an express or implied purchase or renewal of an insurance policy**;

(2) offer or give gifts or value added services to commercial or institutional insureds in connection with marketing for the sale or retention of contracts of insurance, as long as the cost is reasonable in light of the relationship between the parties; ~~**or**~~

(3) Pursue marketing campaigns for products and services that name or endorse commercial clients; or

(4) conduct raffles or drawings to the extent permitted by state law, as long as there is no participation cost to entrants, the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance and the prizes are not valued in excess of five hundred dollars. **A participation cost shall not include conditioning entrance into the raffle on obtaining a quote**.

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

Drafting Note: Section 104 (d)(2)(B)(viii) of the Gramm-Leach-Bliley Act provides that any state restrictions on anti-tying may not prevent a depository institution or affiliate from engaging in any activity that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System. The Board of Governors of the Federal Reserve System has stated that nothing in its interpretation on combined-balance discount arrangements is intended to override any other applicable state and federal law. FRB SR 95-32 (SUP). Section 5(q) of the Home Owners' Loan Act is the analogous provision to Section 106 for thrift institutions. The Office of Thrift Supervision has a regulation 12 C.F.R. 563.36 that allows combined-balance discounts if certain requirements are met.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

CENTER for ECONOMIC JUSTICE | FAIR ACCESS FAIR TREATMENT

Comments of the Center for Economic Justice

to the NAIC Innovation and Technology Task Force

Proposed Revisions to Anti-Rebating Provisions of NAIC Unfair Trade Practices Act

July 15, 2020

CEJ submits the following comments on the proposed revisions to the anti-rebating provisions of the UTPA.

As a preliminary matter, we have great concern that the proposed changes will result in unfair discrimination against vulnerable populations. One of the core purposes of the current anti-rebating provisions is to prevent such unfair discrimination resulting from arbitrary rebates to favored customers. Our concern over such outcomes is exacerbated by insurers' use of big data analytics to assess customers' profitability through a variety of unaccountable algorithms, including customer lifetime value, price optimization or propensity for fraud. ***The absence of any meaningful regulatory oversight over systemic bias in insurers' big data algorithms means that the proposed changes create new flexibility for insurers and producers without adequate accountability to regulators or consumers.*** Innovation that benefits consumers is a great thing, but the innovation must be accompanied by accountability and such accountability is missing in current insurance market regulation.

CEJ's remaining comments are our effort to improve the accountability of the proposed changes while honoring the Task Force's desire for change. A narrative description of, and rational for, the proposed changes follows. Our proposed changes are shown in redline at an attached document.

1. **Include all requirements on insurers and producers in section (e)(1), particularly fair and non-discriminatory treatment of consumers.**

   The current draft section (e) has five sections and section (f) has three sections.

   (e)(1) permits the offer of "value-added" products or services not specified in the policy if the product or service:

   a. relates to the insurance coverage, and,

   b. is "primarily" related to one or more of a list of loss prevention, loss control or loss service activities.

   (e)(2) authorizes the Commissioner to adopt regulations.

   (e)(3) adds a requirement for fair and non-discriminatory treatment and adds a provision for pilot testing.

   (e)(4) adds a requirement that the cost of the product or service be reasonable in relation to the premium..

   (e)(5) sets out a guideline for de minimum gifts.

   (f)(1) sets out limits for promotional or advertising items, meals or charitable donations on behalf of a policyholder.

   (f)(2) sets out value added services for commercial insureds for marketing or retention

   (f)(3) sets out raffles and drawings.

The current organization of the edits mixes and mismatches requirements for the offer of the "value-added" products or services with other provisions and mismatches provisions for gifts with provisions for "value-added" services.

We suggest that **all** the requirements for the offer be included in section (e)(1) including

- Relates to the insurance coverage
- Satisfies one or more of the enunciated activities
- Offered in a fair and non-discriminatory manner
- Cost be reasonable in relation to the premium

This reorganization would clearly assemble in on section all the requirements on insurers and producers. The remaining sections would be related provisions, but other than requirements on the insurer or producer.

Section (e)(2) continues to be rulemaking authority for the commissioner

Section (e)(3) would be the pilot testing provision only – the fair and nondiscriminatory requirement moved to (e)(1).

Section (e)(4) would be moved to (e)(1) – the reasonable cost requirement.

Section (e)(5) relating to gifts be moved to section (f) with the other gift and promotion provisions.

2. Move Gift Provisions in Section (f) and Add Nondiscrimination Requirement.

As noted above, proposed section (e)(5) is not related to "value-added" services and should be moved from section (e) to section (f).

We suggest two revisions to this subsection, in addition to moving it to section (f). First, the intent of this provision is to allow producers and insurers to give *de minimus* gifts for marketing, sale or retention of insurance. However, the suggested figure of $250 is clearly not *de minimus* for the average auto or home insurance policy. That amount -- $250 – would be 25% of a $1,000 policy premium or 12.5% of a $2,000 premium – not *de minimus* by any standard.

We suggest that instead of a single dollar value, the model utilize the lesser of 5% of the current or projected policyholder premium or $250 as the cap for the gift. With this approach, the model will ensure that the gift is not outsized in relation to the premium.

Second, this section also needs a provision for fair and nondiscriminatory treatment and practice. Recent events have highlighted the systemic bias in our society and how that manifests itself in intentional and unintentional discrimination against minority consumers. Of equal concern is insurers' and producers' use of new algorithms designed to assess "customer lifetime value" based on factors others the costs of the transfer of risk. Consequently, it is even more important to include a provision for fair and nondiscriminatory treatment according to documented and objective criteria for gifts than it is for "value-added" services.

3. Eliminate Inconsistencies between Proposed Sections (e)(5) and (f)(1) in the Exposure Draft

The references to (e)(5) and (f)(1) are in the exposure draft and have been renumbered to (f)(1) and (f)(2) in our redline proposal.

Proposed section (e)(5) deals with gifts for marketing, sale or retention. Proposed section (f)(1) deals with promotional or advertising items, meals or charitable donations on behalf of the policyholder or potential policyholder. As meals and charitable donations are gifts, the exposure draft includes two differing provisions addressing gifts.

We suggest that means or charitable donations are clearly gifts and are covered by proposed section (e)(5) which is presented as section (f)(1) in the CEJ redline proposal below.

It is important to cover all gifts – as opposed to promotional or advertising items – is the gifts section to ensure the gifts are offered in a fair and nondiscriminatory manner and to have one limit on total value apply all gifts.

4. **Delete Section (f)(2) "value-added" services or gifts to commercial or institutional insureds.**

This section should be deleted because it is already covered in section (e) for purposes of "value-added" services. More important, this section would permit gifts to commercial insureds for purposes of policy retention without regard to loss control or any of the other characteristics of "value-added" services. Consequently, this provision would permit the types of kickbacks seen in title insurance and force-placed insurance that insurance and financial regulators have attempted to stop. This provision would unfairly increase costs for consumers in those lines of insurance subject to reverse competition as the insurers would compete for the lender's or loan servicer's business by bidding up the gifts followed by the lender or servicer passing the costs of those gifts onto the consumer through inflated premiums or insurance charges paid by the consumer.

This provision is not needed for purposes of promoting innovation and would harm consumers.

Center For Economic Justice Suggested Edits (July 15, 2020) to Exposure Draft

Section 4(H) of NAIC Model Unfair Trade Practices Act

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

H. Rebates.

(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any ~~insurance~~ company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

(2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;

(c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year; or

(d) Engaging in an arrangement that would not violate Section 106 of the Bank Holding Company Act Amendments of 1972 (12 U.S.C. 1972), as interpreted by the Board of Governors of the Federal Reserve System, or Section 5(q) of the Home Owners' Loan Act, 12 U.S.C. 1464(q).

(e) (1) The offer or provision by insurers or producers, by or through employees, affiliates or third party representatives, of value-added products or services at no or reduced costs when such products or services are not specified in the policy of insurance if the product or service:

(a) Relates to the insurance coverage; ~~and~~

(b) Is offered in a fair and nondiscriminatory manner to applicants or policyholders according to documented and objective criteria;

~~(a)~~(c) Has a cost that is reasonable in relation to the premium for the insurance coverage or the average premium for the insurance coverage if the actual premium is unknown ; and

~~(b)~~(d) Is primarily intended to satisfy one or more of the following:

(1) Provide loss control;

(2) Reduce claims costs or claim settlement costs;

(3) Educate about risk of loss to persons or property;

(4) Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;

(5) Enhance health or financial wellness;

(6) Provide post-loss services.

(7) Incent behavioral changes that improve the health or reduce the risk of death of the insured; or

(8) Assists in the administration of employee or retiree benefit policies.

(2) The Commissioner may adopt regulations when implementing the permitted practices set forth in (2)(e)(1) to ensure consumer protection. Issues include, but are not limited to, consumer data protections, especially instances where third party vendors require policyholder data as a condition of receiving the value added product or service, consumer disclosure, unfair discrimination consistent with applicable law.

(3) ~~If the product or service is not made available to all policyholders or applicants its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner.~~ If an insurer does not have sufficient evidence that the product or service is cost effective or has a material correlation to risk, but has a good-faith belief that the product or service may mitigate, assess or identify sources of risk of loss or claims, the insurer or producer may provide the product or service as part of a pilot or testing program for a reasonable period of time upon approval of the Commissioner.

~~(4) The cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to the average policy premiums or the insurance coverage.~~

~~(5)(2) Gifts or offers of gifts in connection with marketing for the sale or retention of contracts of insurance is considered *de minimus* and not in violation of this statute as long as the cost does not exceed [two hundred and fifty dollars] per person per year;~~

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

(f) Notwithstanding any other provision, an insurer or a producer may:

(1) Gifts or offers of gifts in connection with marketing for the sale or retention of contracts of insurance is considered *de minimus* and not in violation of this statute as long as the cost does not exceed [the lesser of 5% of the current or projected policyholder premium or two hundred and fifty dollars] ~~per person~~ per year. Such gifts or offers shall be made in a fair and nondiscriminatory manner to applicants and policyholders according to documented and objective criteria;

~~(1)~~(2) offer or give promotional or advertising items ~~or meals or charitable donations on behalf of~~ to a personal lines policyholder or potential policyholder, as long as the total fair market value of the

promotion or advertising items ~~and/or meals~~ does not exceed an amount set in regulation by the Commissioner per calendar year per person and no purchase or renewal of an insurance policy is either expressly or impliedly required;

~~(2) offer or give gifts or value added services to commercial or institutional insureds in connection with marketing for the sale or retention of contracts of insurance, as long as the cost is reasonable in light of the relationship between the parties~~; or

(3) conduct raffles or drawings to the extent permitted by state law, as long as there is no participation cost to entrants, the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance and the prizes are not valued in excess of five hundred dollars.

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

STATE OF CONNECTICUT

INSURANCE DEPARTMENT

July 10, 2020

(via email: dmatthews@naic.org)
Denise Matthews
National Association of Insurance Commissioners

RE: Draft UTPA Amended Language Addressing Rebating

Denise,

The Connecticut Insurance Department (CID) appreciates the opportunity to respond and hereby submits the following technical comments concerning the draft UTPA amended language addressing rebating.

Section (e)(2)

(e)(2) The Commissioner may adopt regulations when implementing the permitted practices set forth in (2)(e)(1) to ensure consumer protection. Issues include, but are not limited to, consumer data protections, especially instances where third party vendors require policyholder data as a condition of receiving the value added product or service, consumer disclosure, and unfair discrimination consistent with applicable law.

Comment: CID recommends a technical edit that the word "and" should precede "unfair" in this section.

Section (f)(1)

(f) Notwithstanding any other provision, an insurer or a producer may: (1) offer or give promotional or advertising items or meals or charitable donations on behalf of to a personal lines policyholder or potential policyholder, as long as the total fair market value of the promotion or advertising items and/or meals does not exceed an amount ~~set in regulation~~ reasonably determined by the Commissioner per calendar year per person and no purchase or renewal of an insurance policy is either expressly or impliedly required;

Comment: The draft language includes the phrase "an amount set in regulation" with regards to setting a fair market value for a number of items. CID prefers not to mandate regulations whenever possible as the regulatory process in Connecticut is not conducive to the changes in fair value that may be required for this and would instead desire that the fair market value be reasonably determined by the Commissioner.

We hope that these comments are helpful. Please feel free to contact me should you have any questions.

Andrew N. Mais
Connecticut Insurance Commissioner

BIG i SM

Independent Insurance Agents & Brokers of America.

July 15, 2020

The Honorable Jon Godfread
Chairman
Innovation and Technology Task Force
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106

Re: Draft Revisions to Section 4(H) of the NAIC Model Unfair Trade Practices Act

Dear Commissioner Godfread:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), I write to comment on the draft revisions to the Unfair Trade Practices Act. IIABA is the largest association of insurance producers in the United States and represents hundreds of thousands of insurance professionals, and our members have great interest in the work of your task force. The agent and broker community is large and diverse, which means there is no unanimous perspective about how to address every aspect of the rebating framework, but there are areas where greater consensus exists. We will continue to voice that perspective to your task force and others and offer our recommendations, and we thank you for the opportunity to address your proposal.

The initial proposal is a credible first draft, and it attempts to achieve the task force's stated goal of modernizing and bringing clarity to this area of the law without overstepping and taking a chainsaw to state rebating statutes. We have questions about and concerns with numerous provisions of the draft and look forward to learning more about your thinking and the rationale behind certain elements during next week's call. IIABA anticipates providing additional and more informed feedback as the consideration of this document unfolds, but we have offered our initial recommended revisions and outlined the basis for those suggestions in the pages that follow.

IIABA thanks you for the opportunity to submit these comments, and we are happy to assist the task force's consideration of this proposal in any way you deem appropriate. Please feel free to contact me at 202-302-1607 or via email at wes.bissett@iiaba.net if we can assist in any way.

Very truly yours,

Wesley Bissett

Wesley Bissett
Senior Counsel, Government Affairs

IIABA's Proposed Revisions to the NAIC Rebating Draft
Submitted July 15, 2020

(e) (1) ~~The offer or provision~~ Giving or offering by insurers or producers, by or through employees, affiliates or third party representatives, ~~of value-added~~ products or services ~~at no or reduced costs~~ for free, at a discount, or at market value when such products or services are not specified in the policy of insurance if the product or service:

IIABA Comments:

- *IIABA proposes replacing "[t]he offer or provision" with "[g]iving or offering because the latter phrase is used in the core provision (i.e. Section (4)(H)(1)) and in other places in the proposal.*
- *The phrase "value added" seems superfluous, so we propose its deletion here and when used elsewhere.*
- *We also propose an additional clarifying revision to this provision.*

(a) Relates to the insurance coverage and

(b) Is primarily intended to satisfy and performs one or more of the following:

IIABA Comment: This proposed revision addresses the actual effect of the product or service in question.

(1) Provide loss mitigation or loss control;

IIABA Comment: IIABA suspects this provision is intended to address loss mitigation-related products and services (which are arguably different from those that would be used to control or manage a loss after one occurs), so we have recommended the inclusion of an explicit reference here.

(2) Reduce claims costs or claim settlement costs;

(3) Educate about risk of loss to persons or property;

(4) Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;

(5) Enhance health or financial wellness;

(6) Provide post-loss services;

(7) Incent behavioral changes that improve the health or reduce the risk of death of the insured; or

(8) Assists in the administration of employee or retiree benefit policies.

(2) The Commissioner may adopt regulations when implementing the permitted practices set forth in (2)(e)(1) to ensure consumer protection. Issues include, but are not limited to, consumer data protections, especially instances where third party vendors require policyholder data as a condition of receiving the ~~value added~~ product or service, consumer disclosure, unfair discrimination consistent with applicable law.

IIABA Comment: It is unclear what the intended purpose of this particular provision is, and there is no guidance for policymakers that might consider this proposal in the future. If the goal, for example, is to prohibit vendors from conditioning the receipt of a product or service in some way (such as by requiring the insured to authorize the vendor to collect and sell information about the insured), then the provision should be revised to state this explicitly.

(3) If the product or service is not made available to all policyholders or applicants its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner.

IIABA Comment: Section 4(H)(e)(3) would address two separate issues, and we propose splitting it into two standalone provisions. We also note that, from a drafting perspective, this provision should probably be revised further and perhaps crafted as a new subclause to Section 4(H)(2)(e)(1).

( ) If an insurer or producer does not have sufficient evidence that the product or service is cost effective or has a material correlation to risk, but has a good-faith belief that the product or service ~~may~~ mitigate~~s, assess or identify sources of~~ the risk of loss or claims, the insurer or producer may provide the product or service as part of a pilot or testing program for a reasonable period of time of up to one year upon approval of the Commissioner.

IIABA Comments:

- *This is a provision that will likely require further review and discussion, but we have proposed several initial revisions. IIABA is unclear about certain aspects of this provision and looks forward to learning more about what is intended.*
- *We propose adding the words "or producer" where appropriate in order to achieve consistency with earlier provisions.*
- *The draft creates a framework that allows an entity to offer an otherwise prohibited product or service if the entity believes the product or service might mitigate risk, and it is a low hurdle to merely require that a product or service could conceivably achieve such an outcome. It would be better to require that there be a reasonable expectation that the product or service will achieve the result. For this reason, we propose deleting the word "may" where highlighted above and making a conforming change to the word "mitigate."*
- *The pilot or testing program referenced in this provision should be limited in duration, and we have proposed a one-year period.*

- *We also urge the task force to consider adding a requirement, prior to approving a pilot or test program, that the Commissioner conclude that there is a reasonable expectation that the product or service will indeed mitigate loss.*

(4) The cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to the ~~average~~ policy premiums or the insurance coverage.

IIABA Comment: It is unclear why the word "average" has been included here, and we propose its deletion.

~~(5) Gifts or offers of gifts in connection with marketing for the sale or retention of contracts of insurance is considered de minimus and not in violation of this statute as long as the cost does not exceed [two hundred and fifty dollars] per person per year;~~

IIABA Comment: This provision is out of place, has no connection to Section 4(H)(2)(e), and should be deleted here. We also note that the subject matter this provision addresses is addressed in Section 4(H)(2)(f)(1), and we urge the task force to tackle these issues in a later provision and outside of the framework of subparagraph (e).

~~*Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.*~~

IIABA Comment: A subsection-specific drafting note of this nature also appears at the end of the of the proposed text, so we propose deleting this duplicative item here.

~~(f) Notwithstanding any other provision, an insurer or a producer may:~~

IIABA Comment: The proposed addition of subparagraph (f) and its associated clauses do not fit the manner in which the statute is framed and creates unnecessary confusion. The three new exemptions to the rebating law that the proposed revisions would add as Section 4(H)(2)(f)(1-3) should more appropriately be added as new subparagraphs to existing Section 4(H)(2). Section 4(H)(2) already provides a number of such exemptions, and the new exemptions should be added as (f), (g), (h), etc.

~~(1) offer or give promotional or advertising items or meals or charitable donations on behalf of to a personal lines policyholder or potential policyholder, as long as the total fair market value of the promotion or advertising items and/or meals does not exceed an amount set in regulation by the Commissioner per calendar year per person and no purchase or renewal of an insurance policy is either expressly or impliedly required;~~

(f) Giving or offering gifts or items, including meals, to personal lines insureds or potential insureds in connection with the marketing, sale, purchase, or retention of contracts of insurance, as long as the total cost of all gifts or items does not exceed [two hundred and fifty dollars] per named insured or potential named insured per year;

IIABA Comments:

- *As noted earlier, the draft proposal includes two separate provisions that address items provided in connection with marketing efforts. We propose consolidating those provisions here as subparagraph (f) and in the manner outlined above.*

- *One of the revisions we propose is imposing a per policy or named insured restriction.*

- *Some IIABA members have expressed concern that a $250 annual threshold is too high for personal lines transactions. We do note, however, that this is only a bracketed recommendation.*

~~(2)~~ (g) ~~offer or giving gifts or value added services~~ Giving or offering gifts or items, including meals, to commercial or institutional insureds in connection with the marketing, ~~for the~~ sale, purchase, or retention of contracts of insurance, as long as the cost is reasonable in light of the relationship between the parties and the cost and nature of the insurance coverage; or

IIABA Comments:

- *IIABA proposes the revisions highlighted above to ensure greater clarity and consistency with other provisions.*

- *Some IIABA members have expressed concern that the reasonableness test contemplated in this provision is both limitless and subjective.*

~~(3)~~ (h) C~~c~~onducting raffles or drawings to the extent permitted by state law, as long as there is no participation cost to entrants, the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance and the prizes are not valued in excess of [five hundred dollars].

IIABA Comment: We propose a conforming change at the beginning of this provision and recommend the inclusion of brackets in connection with the proposed dollar threshold.

(i) [POSSIBLE CHARITABLE CONTRIBUTIONS PROVISION]

IIABA Comment: The question of how to address charitable contributions is distinct from the other items addressed here, and we urge the task force to consider it separately. While we offer no specific recommendation at this time, we are question any provision that would restrict the ability of insurers and producers to make contributions to charitable causes in the manner proposed by the initial draft.

Drafting Note: States may wish to alter the ~~financial limitations~~ monetary thresholds set forth in this subsection depending upon each state's economic environment.

IIABA Comment: We propose two clarifying revisions to the drafting note that would be added to this subsection.

Brooks E. Tingle
President & CEO
John Hancock Insurance
T: 617-572-5871 Ext. 725871
E: btingle@jhancock.com

July 15, 2020

Commissioner John Godfread, Chair
Innovation & Technology (EX) Task Force
Sent via email to Denise Mathews: dmatthews@naic.org

RE: Draft UTPA Amended Language Addressing Rebating Exposure

Dear Commissioner Godfread:

We write to express our support for the exposed Draft UTPA Amended Language Addressing Rebating. We very much appreciate your personal efforts to advance this workstream, which concerns antiquated language that has been the cause of no small amount of confusion within regulatory and industry circles for some time. The efforts of this Task Force and the additional clarity brought through this project will have a lasting positive impact on consumers for years to come.

John Hancock has developed an innovative national program called "John Hancock Vitality" which is designed to reward policyholders who take steps to maintain their health through regular checkups, keeping their weight and other biometrics in healthier ranges, and engaging in healthy lifestyle choices, including maintaining a good diet, regular exercise and getting enough sleep. We know that poor lifestyle choices are major contributors to Cardiovascular & Respiratory disease, cancer and diabetes, which collectively make up 54% of the deaths in the U.S. We know that encouraging better health will yield benefits across the population through lower incidence of disease in the aggregate, and that on an individual level, people who make healthier choices enjoy a better quality of life and live longer—which benefits both our customers and John Hancock.

Our program provides Vitality points for activities like exercising, eating well, annual health screenings, biometric readings in range and well doctor visits. The program provides actively participating members with a Fitness Tracking Device to record and transmit their activity and access to educational materials to help promote healthy behaviors. By participating in activities designed to improve their health, members can also earn discounts on healthy gear and healthy food and other incentives to encourage participation in the program.

Importantly, we don't provide anyone "freebies" – if you do nothing, you get nothing under our program. All our incentives are geared toward encouraging healthy behaviors, which we believe will result in our policyholders living longer. Our experience to date has shown the popularity of the program, with our participants taking 2 times as many steps as the average population.

We are proud that the John Hancock Vitality program has been recognized as an innovative insurance product by both regulators and industry alike.

We believe programs that incent healthy behaviors should enjoy active support and promotion from regulators and other policymakers, as not only are there innumerable benefits associated with individuals making good choices, but we all collectively reap societal benefits from a healthier population as well through lower utilization of expensive health care interventions.

Accordingly, we strongly support the current draft of the UTPA amendments as set forth in the July 15, 2020 exposure draft, and in particular Sections 4(H)(2)(e)(5) and 4(H)(2)(e)(7).

We are happy to provide you with additional information as required and thank you again for your work on these important public policy initiatives.

John Hancock Insurance
200 Berkeley Street Boston, MA 02116
www.johnhancock.com

Locke Lord LLP

111 South Wacker Drive
Chicago, IL 60606
Telephone: 312-443-0700
Fax: 312-443-0336
www.lockelord.com

NAIC'S INNOVATION AND TECHNOLOGY (EX) TASK FORCE

Comments on the Proposed Amendments to the Unfair Trade Practice Act (Model #880)

July 15, 2020

Locke Lord LLP is a global law firm with more than 85 insurance lawyers and professionals addressing the needs of the insurance industry. In serving our clients in this role, we are often called upon to advise insurance carriers, agencies and start-ups on the myriad of insurance regulations impacting the distribution of insurance to consumers and commercial insureds. Of those issues, by far the most misunderstood and frustrating to both industry incumbents and disrupters is in the area of anti-inducement / anti-rebating laws affecting and restricting the ability to provide value-added services and products to insurance customers, enhancing the delivery of insurance products and claims services, improved risk underwriting and better customized insurance solutions.

To that end, we fully support the work of the NAIC Innovation and Technology (EX) Task Force (the "Task Force") to modernize the NAIC's Unfair Trade Practice Act (Model #880) (the "UTPA") to reflect the influx of innovation within the insurance industry and society in general. While we highlight certain areas below where additional clarity would be beneficial to the industry, we want to make clear that the language of the Task Force's proposed amendments to the UTPA shows that it understands the concerns of the industry and that they have taken previous comments and testimony to heart.

First, while we appreciate the flexibility provided to each state under Subsection H(2)(e)(2), we are concerned that a non-uniform approach to consumer data protection, consumer disclosure and similar issues, will result in the very patchwork regulatory regime that the Task Force is attempting to solve through these amendments to the UTPA. A preferred approach would be to have strong and fair consumer protection requirements clearly stated in these revisions.

Similarly, the requirement found in Subsection H(2)(e)(4) and Subsection H(2)(f)(2) that the cost of the product, service or gift (in the case of commercial and institutional insureds) be "reasonable" in comparison to the policy premiums, provides a less than precise standard and could invite regulators to develop inconsistent interpretations of what each deems "reasonable." Consequently, we propose that the Task Force instead work with the insurance industry to develop a specific premium ratio based limit.

We also note that the language provided in Subsection H(2)(e)(5) and Subsection H(2)(f)(3) appear to address overlapping concepts (*e.g.* when is a "meal" not a "gift"), while providing differing standards (i.e., hard dollar limit in statute *vs.* amount set by regulation). Consequently, we urge the Task Force to combine these two Subsections into a single clear standard.

Locke Lord LLP

111 South Wacker Drive
Chicago, IL 60606
Telephone: 312-443-0700
Fax: 312-443-0336
www.lockelord.com

We also request that the Task Force consider adding "group policyholders" to the list of entities to which Subsection H(2)(f)(3) is applicable. In certain states, it is unclear whether a group policy would be considered issued to a commercial or institutional insured, even if it is issued to a major corporation. As such, the additional clarity in the UTPA would ensure uniform application across the states.

Finally, while we were very pleased with the Task Force's recognition of the use of raffles or drawings in the promotion of insurance pursuant to Subsection H(2)(f)(3), it is our view that the proposed hard limit of $500 on any gift or prize is not the correct threshold. Instead, the more accurate approach would be to tie the $500 limit to the reasonable expected value of each entry. This provides for a more mathematically sound approximation of the value received by the consumer.

Again, we thank the Task Force for their hard work on this very important issue and for allowing us to comment. Should the Task Force wish to discuss any of our comments, we are of course happy to provide additional information at its upcoming meeting.

Thank you-

Brian Casey
Partner
Locke Lord LLP

Ben Sykes
Partner
Locke Lord LLP

Dan Brown
Attorney at Law
danbrown@mwe.com
+1 628 218 3820

July 15, 2020

VIA EMAIL

Denise Matthews
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197
dmatthews@naic.org

Re: Proposed Amendments to Model Unfair Trade Practices Act Addressing Rebating

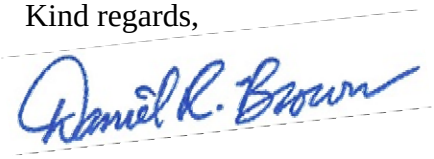
Dear Ms. Matthews:

We greatly appreciate the National Association of Insurance Commissioners (NAIC) circulating proposed amendments to the above-referenced Model Act, and seeking comments on the draft. We represent many companies in the insurance industry, including insurers and producers, both incumbent and startup InsurTechs, all of whom support the modernization of the regulatory framework in which they operate. As such, we and they well recognize that state laws regarding rebating are in particular need of updating to (a) be more uniform, (b) reflect the way consumers have grown accustomed to doing business more generally, and (c) meet consumer expectations on how insurers and producers conduct business. We are grateful for the NAIC's innovative leadership with respect to these issues.

We respectfully submit proposed revisions to the draft, as highlighted in the attached. In particular, we believe the Model Act should be in a form that provides uniformity upon adoption by state legislatures, without the need for supplemental legislation or regulation. The more the draft relies on each state adopting regulations, the more likely it is that state laws will not be uniform. This would be detrimental to both consumers and industry.

Thank you again for taking a leadership role on these issues, and please let us know if we can be of any further assistance.

Kind regards,



Dan Brown

McDermott Will & Emery Suggested Edits 7/16/20

Section 4(H) of NAIC Model Unfair Trade Practices Act

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

H. Rebates.

(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance, or any other line or class of insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any ~~insurance~~ company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

(2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and in the best interests of the company and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;

(c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year; or

(d) Engaging in an arrangement that would not violate Section 106 of the Bank Holding Company Act Amendments of 1972 (12 U.S.C. 1972), as interpreted by the Board of Governors of the Federal Reserve System, or Section 5(q) of the Home Owners' Loan Act, 12 U.S.C. 1464(q).

(e) (1) The offer or provision by insurers or producers, by or through employees, affiliates or third party representatives, of value-added products or services at no or reduced costs when such products or services are not specified in the policy of insurance if the product or service:

(a) Relates to the insurance coverage and

(b) Is primarily intended to satisfy one or more of the following:

(1) Provide loss control;

(2) Reduce claims costs or claim settlement costs;

(3) Educate about risk of loss to persons or property;

(4) Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;

(5) Enhance health or financial wellness;

(6) Provide post-loss services;

(7) Incent behavioral changes that improve the health or reduce the risk of death of the insured;

(8) Incent consumer referrals of insurance products that they already obtained and for which they are current insureds; or

(9) Assists in the administration of employee or retiree benefit policies.

(2) The Commissioner may adopt regulations implementing the permitted practices set forth in (2)(e)(1).

(3) If the product or service is not made available to all policyholders or all applicants, its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner. If an insurer does not have sufficient evidence that the product or service is cost effective or has a material correlation to risk, but has a good-faith belief that the product or service may mitigate, assess or identify sources of risk of loss or claims, the insurer or producer may provide the product or service as part of a pilot or testing program for up to one (1) year, after which time the approval of the Commissioner shall be required to continue the program.

(4) The cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to the average policy premiums or the insurance coverage.

(5) Gifts or offers of gifts of any kind in connection with marketing for the sale or retention of contracts of insurance is considered *de minimus* and not in violation of this statute as long as the cost does not exceed [two hundred and fifty dollars] per person per year;

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

(f) Notwithstanding any other provision, an insurer or a producer may:

(1) offer or give promotional or advertising items, meals, or cash or cash equivalents to, or charitable donations on behalf of, a personal lines policyholder or potential policyholder, as long as (i) the total fair market value of the gift or donation does not exceed fifty dollars ($50.00) or such greater amount set in regulation by the Commissioner per calendar year per person and (ii) no purchase or renewal of an insurance policy is either expressly or impliedly required;

(2) offer or give gifts or value added services to insureds in connection with marketing for the sale or retention of contracts of insurance, as long as the cost is reasonable in light of the relationship between the parties; or

(3) conduct raffles or drawings to the extent permitted by state law, as long as there is no participation cost to entrants, the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance and the prizes are not valued in excess of five hundred dollars.

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

Drafting Note: Section 104 (d)(2)(B)(viii) of the Gramm-Leach-Bliley Act provides that any state restrictions on anti-tying may not prevent a depository institution or affiliate from engaging in any activity that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System. The Board of Governors of the Federal Reserve System has stated that nothing in its interpretation on combined-balance discount arrangements is intended to override any other applicable state and federal law. FRB SR 95-32 (SUP). Section 5(q) of the Home Owners' Loan Act is the analogous provision to Section 106 for thrift institutions. The Office of Thrift Supervision has a regulation 12 C.F.R. 563.36 that allows combined-balance discounts if certain requirements are met.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

COMMERCE DEPARTMENT

NAIC Model Unfair Trade Practices Act – REBATES

Upon reviewing the June 23, 2020 draft of revisions to the UTPA Model Law addressing rebates, Minnesota raises the following concerns:

1. Could you please provide some background as to who was involved in drafting this proposal?

2. Section H.(2)(e) is excessively broad in the following respects:

a. The products or services are permitted to be offered by not just the insurer or producer, but also employees, affiliates or 3rd party representatives. There needs to be some relationship between the insurer or producer and the individual or entity offering the product or service to ensure accountability. In the alternative, the product or service must be offered or provided by a licensed entity.

b. The term "value added service" should be defined.

c. The list of functions the service or product is "primarily" intended to satisfy is too broad. The service or product should be directly related to the underlying insurance coverage and serve to mitigate or prevent losses. These items should be more narrowly drawn or defined. If there is no relationship between the third party and the insurer, this should be clearly disclosed and the insured should be made aware that there what, if any assistance the insurer will provide if there is a problem with these products or services. The contract should also disclose that these services are not a part of the insurance contract and have not been approved by the regulatory authority.

d. 2.(e) (3) This section should be broken into two sections. First, the insurer should be required to make a showing of how the product or service is cost effective or has a material correlation to risk. Failure to do so could permit damage or losses to the insured that may not be able to be recouped once the deficiency of the product or service is discovered. This is particularly true if there is no relationship between the insurer and the party offering the product or service. Likewise, if the third party is not licensed by the state regulatory authority.

The second part should address the pilot program. We would propose the following language: "If the insurer has a good faith belief that the product or service may mitigate risk, the insurer may provide the product or service as a part of a pilot or testing program for a reasonable period of time upon approval by the Commissioner."

e. 2.(e)(4) The cost to the insurer or producer of providing the product or service should be reasonable in comparison to the average policy premiums or the insurance coverage. This seems to be permitting

discriminatory treatment in the benefits available to insureds as it seems to be saying that an insured with a higher premium or a larger amount of coverage would be entitled to more expensive products or services. This section should either be deleted or revised to read: “The cost to the insurer or producer of providing the product or service to any given policyholder cannot exceed the cap in H.(2)(e)(5)”

f. In section f.(2) regarding commercial or institutional insureds, the phrase “cost reasonable in light of the relationship between the parties” either need to be defined or this section should be deleted.

NATIONAL ALLIANCE OF LIFE COMPANIES

An Association of Life and Health Insurance Companies

July 15, 2020

The Honorable Jon Godfread
Commissioner, North Dakota Insurance Department
Chair, NAIC Innovation and Technology (EX) Task Force

Re: Draft UTPA Amended Language Addressing Rebating

Dear Commissioner Godfread:

I am writing on behalf of the members of the National Alliance of Life Companies (the NALC), an association of more than 50 life and health insurance companies and associate members. Our members focus on addressing the life insurance needs of middle income and working class Americans. We appreciate the opportunity to comment on the draft changes to the NAIC Model Unfair Trade Practices Act (#880) (referred to as the Model, or UTPA).

NALC members have followed the work of the NAIC Innovation and Technology (EX) Task Force and related subgroups with great interest. We strongly support efforts to modernize existing regulatory requirements intended to expand technology-related innovation in products and services that benefit consumers.

We support the proposed changes to the UTPA in principle. The approach to rebating embodied in the Model was developed over a century ago when insurance products, methods of distribution, and consumer protection concerns were very different than today. Consumers stand to benefit from a modern approach that permits insurers to develop and provide value added products and services that educate consumers about risk and risk management. We believe that the proposed changes to the UTPA strike the proper balance between facilitating innovation while ensuring data privacy and protecting consumers from potentially abusive practices.

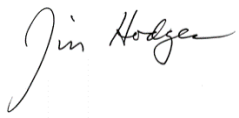
We do have questions about the language in subsection 2(e) granting individual Commissioners the discretion to approve pilot programs. We recognize the need for a mechanism allowing innovative companies to work cooperatively with their regulators to proof-test new product

designs and/or processes on limited basis that improve the consumer experience. We also see the benefit of states having a uniform set of "guardrails" to guide the exercise of individual commissioner discretion on a situation by situation basis.

Finally, we cannot overstate the importance that these changes to the Model are applied uniformly in every state. The current patchwork quilt of anti-rebating requirements among the states is not working. The adoption of various state-specific exemptions and exceptions through the years significantly increases the effort required by companies and producers attempting to ensure compliance in every state. Further, level playing field concerns arise when those exemptions and exceptions are not consistently applied. The problems associated with this lack of uniformity is well documented in the white paper "*Time to Dust Off the Anti-Rebate Laws"* appearing in the 2017 edition of the NAIC's Journal of Insurance Regulation.

Thank you for allowing the NALC to comment. We look forward to the public discussion of these changes at your upcoming meeting.

Sincerely,



Jim Hodges
Executive Director
NALC

cc: Denise Matthews, NAIC

FORWARD HEALTH
CONSULTING

July 15, 2020

Commissioner Jon Godfread,
Chair, NAIC Innovation and Technology (EX) Task Force
North Dakota Insurance Department
600 E. Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Godfread:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants, and employee benefits specialists nationally, in response to the Innovation and Technology (EX) Task Force's request for interested party comments on proposed changes to Section 4(H) of the National Association of Insurance Commissioner's Model Unfair Trade Practices Act concerning rebating. NAHU appreciates the Innovation and Technology (EX) Task Force's willingness to consider stakeholder input on this critical issue.
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The members of NAHU work daily to help millions of individuals and employers of all sizes purchase, administer, and utilize health insurance coverage. Health insurance agents, brokers, and consultants provide valuable services to their clients that extend far beyond mere sales and enrollment assistance. Particularly when it comes to our members that serve group health insurance clients, the professional expertise of NAHU members concerns the technicalities of health plan administration.

Over time, the role of the health benefits broker has become more comprehensive as technology has changed, and new and innovative means of providing higher quality and lower cost care have evolved. Health insurance agents and brokers have become an ever-increasing resource for the development and long-term management of benefit plans. Furthermore, as legal requirements for employer-sponsored plans have increased and changed significantly in recent years, brokers are a leading source of compliance information and support for the business community. Some of the areas where group health plan administrators routinely expect health insurance agents and brokers to provide them with information and support include: Employee Retirement Income Security Act (ERISA) plan document and notice requirements, Form 5500 filings as they relate to employee health benefit arrangements, IRC Section 125 plan administration and nondiscrimination testing, IRC Section 105(h) nondiscrimination testing, Medicare secondary payer rules, Medicare creditable coverage notification and certification requirements, Consolidated Omnibus Budget Reconciliation Act (COBRA) and state continuation requirement administration, managing the Affordable Care Act's employer

shared responsibility requirements (including the related employer reporting requirements), compliance with other ACA group health plan requirements, Form W-2 health insurance cost reporting, wellness program administration and compliance, ACA Section 1557 nondiscrimination requirements, Health Insurance Portability and Accountability Act (HIPAA) and Health Information Technology for Economic and Clinical Health (HITECH) Act privacy and data security rules, Mental Health Parity and Addiction Equity Act compliance, calculation and payment of the Patient-Centered Outcomes Research Institute fees, account-based plan administration and compliance concerns, compliance issues related to qualified small employer health reimbursement arrangements and individual coverage health reimbursement arrangements, and many more.

Most recently, health insurance brokers have helped hundreds of thousands of American business owners gather the health insurance cost information needed to apply for Paycheck Protection Program loans and manage the PPP loan forgiveness process. NAHU members also are assisting huge numbers of employers with the premium calculations and reporting needed to claim the employee retention and paid leave tax credits created by the Coronavirus Aid, Relief and Economic Security (CARES) Act, and the Families First Coronavirus Response Act (FFCRA). Brokers will undoubtedly take on even more significant and changing roles as the health insurance marketplace, and related public policy measures evolve.

Our association believes that the rebating provisions in the NAIC's Model Unfair Trade Practices Act prevent insurance companies and brokers from providing an unfair cash incentive to potential customers to entice them to do business with them. The goal of the model has never been to prevent insurance producers from offering services that improve employers' ability to develop innovative group health insurance arrangements and ensure compliance with both state and federal laws. As such, NAHU members appreciate the efforts of this task force to modernize the model legislation.

Concerning the proposed draft changes specifically, NAHU members appreciate the addition of section (e)(1)(B)(8). This provision allows insurers or producers to offer value-added products or services at no or reduced costs when such products or services are not specified in the policy of insurance if the product or service “assists in the administration of employee or retiree benefit policies." In addition to this provision, NAHU suggests adding a point to cover "assisting with compliance with a state or federal law or regulatory requirement." While the bulk of the compliance assistance concerns the employee benefits space, health insurance producers who work in the individual marketplace need to support customers as well. They routinely help people obtain ACA health insurance tax credits and help them navigate health insurance marketplace requirements. Due to the creation of new health reimbursement arrangements that blend the individual and employer markets, direct consumer compliance assistance is required for those clients too. In many cases, due to the "no wrong door" coverage policy promoted by the ACA, producers who help individual market clients also assist with Medicaid and CHIP applications and related coverage issues. Furthermore, agents that specialize in the senior marketplace routinely assist clients with Medicare-related questions.

Concerning section (e)(3), NAHU members understand the desire of the NAIC to ensure that producers offer value-added services to clients on a fair and equitable basis. This section states that "If the product or service is not made available to all policyholders or applicants, its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner." However, we want to point out that particularly when it comes to helping clients navigate new state and federal health insurance policy requirements, health insurance agents and their clients are frequently "drinking from the firehose." There is often no time for health insurance agencies to develop written policies and objective criteria for the services they provide to clients when new laws or rules related to their health insurance coverage go into effect. Instead, our members are compelled to help as many clients who ask, expediently as possible. So, we would ask the task force members to consider the addition of a safe harbor for health insurance producers in these cases.

NAHU believes that state legislators and insurance regulators are best suited to determining the requirements to regulate rebating in their respective jurisdictions. However, brokers who go the extra mile shouldn't be penalized for providing these valuable services to consumers, as the biggest loser would be the consumer, especially the business consumer. Virtually every American business and individual health insurance consumer depends on a licensed health insurance producer in some form for health plan advice and support services. Individual consumers should continue to have the opportunity to choose brokers who offer what they need and value.

NAHU truly appreciates the opportunity to provide comments on the proposed changes to Section 4(H) of the Model Unfair Trade Practices Act concerning rebating. If you have any questions or would like more information, please do not hesitate to contact me at (703) 496-0796 or Jessica@forwardhealthconsulting.com.

Sincerely,

Jessica F. Waltman

Jessica Waltman
Principal, Forward Health Consulting

cc: Denise Matthews

July 3, 2020

Via e mail to dmatthews@naic.org

John Godfread, Commissioner
North Dakota Insurance Department
Chair, NAIC Innovation and Technology (EX) Task Force
600 East Boulevard Avenue, 5th Floor
Bismarck, ND 58505

Re: Draft UTPA Language Addressing Rebating

Dear Commissioner Godfread:

I am writing on behalf of the National Association of Insurance and Financial Advisors (NAIFA) to provide NAIFA's comments on the draft revisions to the NAIC Model Unfair Trade Practices Act (UTPA), which address issues regarding rebating.

NAIFA commends the NAIC for undertaking a review of the UTPA provisions that deal with rebating, with an eye towards revising/modernizing the model in recognition of technological and risk/loss mitigation advances that have occurred in recent years.

In general, NAIFA supports the approach taken in the draft as well as the scope of the proposed expansion of the types of practices, products and/or services that would not be considered an impermissible rebate. We do have several specific items we would like to raise, and ask that you consider the following comments concerning the draft:

1. Section H (2) (e) (4): This section states that with respect to a product or service that shall not be considered a rebate, the cost of providing the product/service "should be reasonable in comparison to the average policy premiums…". NAIFA is concerned that the meaning of the word "reasonable"

as used here is so vague as to provide little if any guidance to the producer of where the line is between permissible and impermissible actions. This lack of clarity and clear guidelines will raise concerns among producers that their activities in this area will be viewed negatively in hindsight by regulators, which will likely cause producers to be needlessly cautious with respect to the products and/or services they would feel comfortable providing to clients. We would ask that the Task Force include more detailed, objective guidance here for producers and insurers.

2. Section H (2) (e) (5): This section sets $250 as the dollar limit for when gifts, etc., in connection with the marketing of insurance would or would not be considered *de minimus.* While NAIFA recognizes the need for an appropriate dollar limit here in order that the exception doesn't "swallow up the rule", we think that in light of the current cost of restaurants, sports tickets and the like, $500 is a more appropriate amount to use as the *de minimus* limit. This recommended amount would both more accurately reflect current costs while also being sufficiently small so as to avoid any risk of any such gift being seen as exerting an undue influence. (NAIFA is aware of the drafting note following this provision to the effect that states may wish to alter the dollar amount referenced in this provision; however, we feel that for the reason stated about $500 would be a more appropriate starting point.)
3. We are not clear as to the interplay between Section H (2) (e) (5) and Section H (2) (f) (1). If others make the same comment, some clarification would be helpful.

****

We appreciate your consideration of this letter and our comments; please contact me if you have any questions.

Sincerely,

Gary A. Sanders
Counsel and Vice President, Government Relations--NAIFA

July 15, 2020

Via email at dmatthews@naic.org to
Denise Matthews, Director, Data Coordination and Statistical Analysis

Commissioner Jon Godfread, North Dakota Insurance Department
Chair, Innovation and Technology (EX) Task Force

Superintendent Elizabeth Dwyer, Rhode Island Division of Insurance Regulation
Vice Chair, Innovation and Technology (EX) Task Force

National Association of Insurance Commissioners
444 N. Capitol Street, NW, Suite 700
Washington, DC 20001

Re: Draft Unfair Trade Practices Act: Amended Language Addressing Rebating

Dear Commissioner Godfread and Superintendent Dwyer:

On behalf of the National Association of Professional Insurance Agents (PIA National)[1], thank you again for the opportunity to continue our ongoing collaboration with you, the other regulators on the Task Force, and our fellow members of industry on the important issue of rebating.

Background

We welcome this chance to address the revised anti-rebating language contained in the June 23, 2020 draft of the National Association of Insurance Commissioners' (NAIC) Unfair Trade Practices Model Act (Model #880),[2] which was distributed electronically by Rona Bingham of the NAIC on June 23, 2020 following the conclusion of the work of the Rebating Drafting Group, on which we were pleased to serve.

In earlier comments, we provided recommendations and requests, several of which are contained in this draft. We appreciate the consideration given to the feedback of regulators and interested

[1] PIA is a national trade association founded in 1931, which represents member insurance agents in all 50 states, Puerto Rico, Guam, and the District of Columbia. PIA members are small business owners and insurance professionals who can be found across America.
[2] See https://content.naic.org/sites/default/files/inline-files/UTPA_Section_4%28H%29_Exposure_Draft_for_Comment.pdf.

parties, all of whom have provided a wide range of thoughtful suggestions on this complex issue, and we generally support the substance of this draft.

We do have some recommendations to offer, and they are explained and demonstrated with tracked changes below:

1. **Confusing Language.** Section (2)(e)(2) states:

> The Commissioner may adopt regulations when implementing the permitted practices set forth in (2)(e)(1) to ensure consumer protection. Issues include, but are not limited to, consumer data protections, especially instances where third party vendors require policyholder data as a condition of receiving the value added product or service, consumer disclosure, unfair discrimination consistent with applicable law."

We find the second sentence confusing. We agree that consumer data should be protected, especially when third-party vendors require policyholder data as a condition of receipt of a value-added product or service.

However, the clause after that comma, "consumer disclosure, unfair discrimination consistent with applicable law," appears to be out of place. To achieve the result we believe was intended, we recommend that paragraph be revised as follows:

> When implementing the permitted practices set forth in (2)(e)(1), t~~T~~he Commissioner may adopt regulations ~~when implementing the permitted practices set forth in (2)(e)(1) to~~ for the purpose of ensuring~~e~~ consumer protection. Issues include, but are not limited to, consumer data protection~~s~~, especially in instances ~~where~~ in which third party vendors require policyholder data as a condition of receiving the value added product or service. ~~, consumer disclosure,~~ The receipt of a value added product or service must not result in unfair discrimination, consistent with applicable law."

2. **Reasonableness Standard.** Section (2)(e)(4) states that the cost of providing the product or service "to any given policyholder should be reasonable in comparison to the average policy premiums or the insurance coverage." We find more specificity warranted here. The cost of providing the product or service to a particular policyholder should be reasonable in comparison to average policy premiums or insurance coverage for *that* policyholder, not "average policy premiums or the insurance coverage."

To address this issue, we recommend that paragraph be revised as follows:

> The cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to ~~the average~~ that policyholder's premiums or ~~the~~ insurance coverage without the provided product or service.

3. **Drafting Note on Financial Limitations.** The Drafting Note following Section (2)(e) notes, "States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment." Many states already have financial

limitations in place regarding insurance rebates. States with existing limitations should be encouraged to use them, rather than encouraging them to duplicate work by considering anew "each state's economic environment." To that end, we recommend the following change:

> Drafting Note: States may wish ~~to alter the financial limitations set forth in~~ this section to reflect existing statutory limitations on the allowable value of insurance rebates. If no such limitation exists, a state may wish to alter the financial limitations set forth in this section, depending upon ~~each~~ that state's economic environment.

For the same reasons, we also suggest making this change to the Drafting Note located after Section (2)(f), which contains the same language as the Drafting Note that follows Section (2)(e).

4. **Confusing Language.** That same section, (2)(f), concludes with the word "or," which could be interpreted to limit insurers or producers to engaging in only one of the three activities listed (offer or give items to a policyholder, OR give a gift to a commercial lines customer, OR conduct a drawing). We do not believe that was the intent of the Drafting Group, so we recommend adding language at the beginning of this section to make clear that insurers or producers may do any of the activities listed, subject to applicable state law, without punishment.

Additionally, we find the wording of Section (2)(f)(1) confusing and possibly internally inconsistent. We recommend the changes below to provide context for the mention of charitable donations and to make the list of permissible items ("promotional or advertising items or meals or charitable donations") consistent throughout this section.

For these reasons, we recommend the following changes to this section:

> (f) Notwithstanding any other provision, an insurer or a producer may do any combination of the following:
>
> > (1) offer or give promotional or advertising items or meals or charitable donations on behalf of or to a personal lines policyholder or potential policyholder, as long as the total fair market value of the promotional or advertising items ~~and/~~or meals or charitable donations does not exceed an amount set in regulation by the Commissioner per calendar year per person, and no purchase or renewal of an insurance policy is either expressly or impliedly required;

5. **Acknowledgement of Drafting Note.** In Section (2)(f)(3), we recommend putting the "five hundred dollars" in brackets to denote that it can be adjusted, in accordance with the Drafting Note that appears beneath it (edits to which are suggested under item 3 above). This change is reflected below:

(3) conduct raffles or drawings, to the extent permitted by state law, as long as there is no participation cost to entrants, the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance, and the prizes are not valued in excess of [five hundred dollars].

PIA National recognizes and appreciates the consideration that the Task Force is giving to this issue, and, as always, we are grateful for the opportunity to provide the independent agent perspective. Please contact me at laurenpa@pianet.org or (703) 518-1344 with any questions or concerns. Thank you for your time and consideration.

Sincerely,

Lauren G. Pachman
Counsel and Director of Regulatory Affairs
National Association of Professional Insurance Agents

PAUL ZUCKERMAN CONSULTING, LLC
44 SANDBURG DRIVE
MORGANVILLE NJ 07751
Paul.zuckerman09@gmail.com

July 13, 2020

Honorable Jon Godfread
Commissioner, North Dakota Department of Insurance
Chair, NAIC Innovation and Technology (EX) Task Force
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

RE: Draft UPTA Amended Language Addressing Rebating

Dear Commissioner Godfread:

As a former regulator, I appreciate the opportunity to offer comments on the NAIC's Innovation and Technology (EX) Task Force (Innovation TF) proposed revisions of the NAIC Unfair Trade Practice Act. In an October 14, 2019 letter I previously offered comments on the North Dakota draft bulletin.

I was Assistant Deputy Superintendent and Counsel for the New York Insurance Department and its successor, the Department of Financial Services, in the Department's Office of General Counsel before my retirement in 2019. In my nearly four decades at the New York Department, rebating and inducements were among the most frequent type of inquiries or investigations. While I will refer several times to New York's practices, it's because I know them the best but I do not speak for the New York department nor are these comments made on behalf of any client.

Advocate for repealing or substantially limiting the existing anti-rebating/anti inducement laws argue that the laws are obsolete and out-of-date. Most laws should be reviewed periodically to ascertain whether they are still relevant and appropriate and should be revised if necessary. Certainly, the anti-rebating/anti-inducement laws are not always the clearest written but they continue to be a necessary tool in ensuring that consumers can purchase the critical insurance protection that they need unencumbered by unnecessary and often redundant tie-in products and services. The insurance industry has limited exemptions from federal anti-trust requirements and oversight and it thus is incumbent upon the states to provide necessary protection to all insurance consumers.

At first blush, why would anyone object to anti-rebating or anti-inducement laws? After all, isn't the consumer getting something extra in the bargain? Isn't providing discounts or freebies a common practice in most other commercial endeavors? When I was employed at the New York department, it was constantly bombarded with all sorts of programs designed to attract attention to a company's insurance products, from providing a "free" golf club membership with a policy to frequent flyer mileage; from charitable contributions to shopping rewards. The marketing word typically was "free"— added products or services that allegedly cost the insured nothing. But, as my Contracts law professor emphatically noted to my class in my first week in law school, "nobody gets nothing for nothing..." Actually, his full statement was a lot more colorful! Indeed, this principle was recognized by the New York Court of Appeals in Ollendorff Watch Co., Inc. vs. Pink, 279 N.Y. 32 (1938): Products and services that may be obtained only through the purchase of some other product or service are not "free"; there is always a cost, hidden often, but a cost nonetheless.[1]

While one of the immediate concerns of the anti-rebating/anti inducement insurance laws was solvency, another significant concern is that bigger customers will receive a lower total price for insurance than smaller customers. This concern remains viable as demonstrated by the settlements that the New York Attorney General had with several title insurance companies in 2006, where large commercial insureds received rebates, and non-commercial consumers ended up subsidizing the insurance of the large commercial insureds.

Fairness must be at the heart of any revision of the anti-rebating/anti inducement insurance laws, either by amendment or interpretation. But, in addition, the insurance consumer's primary concerns are whether the coverage is adequate for the customer's needs; whether the price for the coverage is competitive and affordable; and whether legitimate claims will be made quickly and fairly. Ancillary products or services that the consumer may already have or may not need should not be forced upon the insured. Insurance should not become a commodity for the sale of other products; nor should consumers be lured into buying insurance to get "free" things. An insurer or producer should sell its insurance on the value of that insurance and the related services that it provides, not add-on items.

Unlike the earlier draft guidance, it appears that the intent now is that states amend their existing laws and/or regulations to implement these proposed changes. Given the scope of the proposed changes, legislation would be needed to implement the full array of revisions. The model act is based on the laws of many of the states, including New York's; though differences do abound from state to state or even from line of insurance to line.

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[1] Ollendorf provided a "free warranty" when a customer purchased one of its watches. After concluding that the warranty was in fact insurance, the court noted that "[t]he fact that the insurance comes out of the proceeds of all the income of the watch company cannot hide the reality of the transaction. The price which the purchaser of the watch pays is not only for the watch but for everything which the seller gives him. The seller would not give him the insurance if he did not buy the watch. The price he pays for the watch is the inducement for the insurance the same as the certificate of insurance is an inducement for the purchase." The same rationale applies to these transactions and is what the anti-rebating and anti-inducement statutes are intended to guard against.

The draft amendment to Section 4H of the Model Act exempts a laundry list of items from the definition of discrimination or rebates without having to specify such in the policy. In doing so, the draft significantly undercuts the protections afforded by the existing model act.

Addressing each of the proposed changes in order:

New subsection (e)(1) would provide:

> (e)(1)The offer or provision by insurers or producers, by or through employees, affiliates or third party representatives, of value-added products or services at no or reduced costs when such products or services are not specified in the policy of insurance if the product or service:(a) Relates to the insurance coverage and (b) Is primarily intended to satisfy one or more of the following:(1) Provide loss control; (2) Reduce claims costs or claim settlement costs; (3) Educate about risk of loss to persons or property; (4) Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;

The draft does not define "value-added products or services" though it attempts to circumscribe when they would be permitted; but does so in an exceedingly broad manner. The earlier draft had vague language establishing the criteria but now all the insurer or producer has to show is that the "value-added products or services" is "primarily intended to satisfy" one of the specified criteria; not that the product or service in fact does that. How does one demonstrate whether it is "primarily intended?" That is an exceedingly subjective standard. *Paragraph (3), which seems to require an insurer to have sufficient evidence that the product* or service is cost-effective or has a material correlation to risk does not overcome this concern. In fact, the primary intent of add-on products is usually to induce the consumer to buy or retain the insurance. The proposed draft would allow an insurer or some entity purportedly acting on its behalf to provide an array of products or services that may only tangentially have to do with the policy coverage or its servicing.

The proposal would not require that the product or service be specified in the policy, a major departure from existing law. There are already certain activities that directly relate to the sale or servicing of the policy or provides general information about insurance or risk reduction that do not fall within the statutory bar because they are inherently part of the insurance business provided. New York provided guidance about services that were limited and tailored to fit into the scope of appropriate insurer and producer activities. See https://www.dfs.ny.gov/insurance/circltr/2009/cl09_09.htm. Not so here. The proposal would allow the marketing of ancillary products or services, including those by or of third parties, in connection with the insurance. Insurers and producers will compete to provide these products or services to induce the purchase or retention of insurance.

However, to the extent that the product or service meets one of the criteria, the goals may be laudable. If those products or services are truly relevant to the insurance, then they should be contained within the policy terms and conditions and reviewed by the department to ascertain whether they have a sufficient nexus to the policy, which is the approach New York took. See https://www.dfs.ny.gov/insurance/ogco2007/rg070603.htm.

Including the add-on benefits in the policy further protects the insured, and not only when a third-party provider is involved. The insurance laws generally apply only to what is in the policy; providing services or products outside the scope of the policy will likely take them outside the scope of the agency's regulatory protections. If products are provided outside the scope of the policy and are defective or otherwise deficient, where does the consumer go for protection?

In addition, without the products or services specified in the policy, they can be removed at any time without adequate notice to consumers or protection of any kind. Many states have strong non-renewal and cancellation protections; all of those would not be available since the benefits were not part of the policy. Insurers and producers would be able to offer the benefits for limited time; and then withdraw the offer, thus resulting in insureds have differing benefits or none at all.

In addition, the term "value-added products or services" should be replaces with a more neutral term that better describes the services and products that the draft is intended to be addressing.

Paragraph (3) also says that if the product or service is not made available to all policyholders or applicants, its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner. Can that criteria include requiring the insured to purchase unrelated products or to use particular vendors? Does that mean that different criteria can apply to people otherwise in the same class? Does the insured have the option to reject the product or service and, if so, will there be a price differential?

Paragraph (4) states that the cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to the average policy premiums or the insurance coverage. The draft says that the insurer or producer may provide the product or service at no or reduced costs; but, as noted above, there is always a cost; nothing is free Who determines what is reasonable and what matrix would be used to determine that? The product or service is not in the policy but will the costs for them somehow work themselves directly into the rates and, if not, will they nonetheless end up there indirectly?

In paragraph (5), the draft permits "gifts or offers of gifts" so long as the cost does not exceed $250 per person each year and characterizes that as being "*de minimus*". A gift of $250 is by no means *de minimus* for most people but rather is substantial and clearly intended to induce the consumer to purchase or retain the insurance particularly since the amount is *per person*. Where there are multiple insureds, that amount is similarly multiplied. And the cost to pay for the gift must come from some place. Again, this raises the same questions as with respect the product and services. Will insurers be able to load the premium to pay for those gifts? Moreover, the draft says nothing about the gifts being offered on a fair or nondiscriminatory basis since paragraph (3)'s requirement does not appear to apply to the exception in paragraph (5). Insurers and producers will be able to provide the so-called gifts to preferred customers, or even vary the size and type of gift, but, in the end, the cost will eventually fall on all insureds but in an unfair manner.

Some may remember when banks began offering gifts to consumers for opening accounts, and people were constantly moving their money around to get free toasters and the like. The deposits were generally insured and there was little difference to the consumer if his or her money were maintained in Bank A or Bank B. Will insureds similarly be motivated to change insurers to get the latest gifts being offered? Unlike the case with deposits in a bank, insureds run the risk of having coverage gaps and exclusions if they repeatedly move their insurance coverage around chasing gifts.

And how is the value of the gift to be determined? Insurers often can cut better deals than consumers and obtain products or services at costs below market. For example, one insurer wanted to provide "free" frequent flyer mileage; but the cost to the insurer was significantly below the cost that a consumer would have had to pay from the airline to get the same mileage. The draft is silent on this issue.

Nor does the draft preclude cash gifts. A cash gift is effectively a rebate, which undermines the insurer's rating plans. If insurers don't treat like customers alike, different insureds will end up paying different amounts for the same insurance and thereby undercut the rating process.

Subsection (f)(1) goes even further in undermining the statutory protection by permitting a number of other exceptions, including promotional or advertising items, meals or charitable donations for personal lines policyholders or potential policyholders, with the only cost limitation being whatever the commissioner may establish in a regulation provided that no purchase or renewal of a policy is either expressly or impliedly required. But the consumer is nonetheless forced to submit to a sales pitch to get those items; and more often than not, consumers would be likely to be lured into buying the insurance. And what about promotional or other items that are obtained through loyalty programs—the longer you stay in, the higher the benefits? Would those be prohibited as being impliedly required to renew the policy? Moreover, how does promotional or advertising items or meals or charitable donations differ from "gifts" under subsection (e)(5)? Under (f)(1), the commissioner must set an amount in a regulation for the total fair market value of the listed things, but it is not clear how that relates to the $250 maximum for gifts in (e)(5).

Under paragraph (2), for commercial or institutional insureds, any dollar limit is eliminated; it just must be "reasonable in light of the relationship between the parties", which can mean virtually anything. As a practical matter, an insurer or producer would be unlikely to enter into an arrangement that would not be reasonable and profitable for it and thus, the restriction of being reasonable is effectively meaningless. And, since the costs of those gifts or value added services are outside of the rates, will the costs be amortized over all policies, with personal lines insureds having to bear the cost, as was the case in New York's title insurance investigations?

In paragraph (3), the insurer or producer may conduct a raffle or drawing provided the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance and the prizes are not valued in excess of $500. However, the consumer should not be forced into submitting to a sales pitch to participate in the raffle. And, in such a case where the raffle is open to the general public without precondition, there should be no need for a dollar limitation

since there is no inducement involved. In this sense, the draft is more restrictive than the law would currently require. In New York, for example, there is no limitation on raffle prizes so long as the raffle is open to the general public and the consumer is not obligated to listen to a sales pitch, let alone have or buy insurance. Nor is there any limitation on charitable gifts so long as again it is not tied to any insurance transaction. Moreover, how is "fair market value" to be determined—is it the amount that the insured would have paid or the value that the insurer or producer paid?

The draft applies to producers as well as insurers. This means that Producer A may provide certain inducements to consumers that Producer B does not, or Producer C provides different inducements, even though they are all selling the same insurance plans. This exacerbates the discrimination issue for insurance offered by an insurer for insureds of the same class where the only difference is the producer used, and disfavors smaller producers who may not be able to compete with the lavish gifts and meals being proffered by their larger competitors.

Nor does the draft exclude other insurance from being the gift or product. Will a producer, for example, be allowed to throw in another policy of insurance?

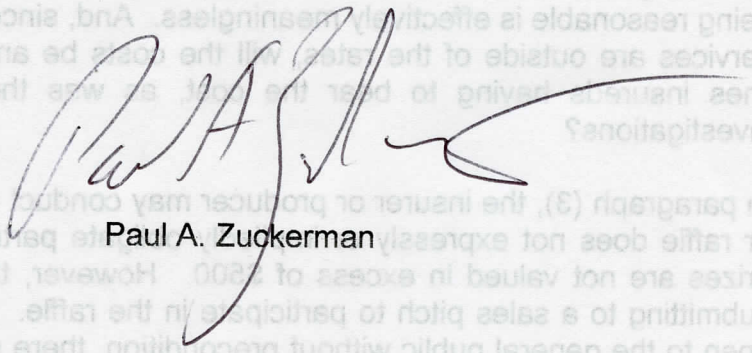
Another issue not addressed in the draft is the role of an unlicensed third party in marketing the product or service. The draft permits third parties to offer their products or services to insureds of particular insurers at different costs than they would to the general public. Affiliated companies often market the relationship with the insurer or producer. In New York, this often meant that the unlicensed entity was deemed to be acting as an agent or broker without a license. The draft also does not address marketing arrangements with surplus lines insurers.

Clear examples of the products and services that may be permissible and those that may not should be included, as New York did in its 2009 circular letter. It is never possible to think of all possible scenarios, but illustrations are useful in understanding the department's intent.

While clarification of anti-inducement laws may be needed, the proposed draft goes to far in eliminating necessary consumer protections and essentially gut the anti-inducement laws.

Thank you again for your attention. I would be glad to address any questions that the Task Force may have.

Yours truly



Paul A. Zuckerman

pennsylvania
INSURANCE DEPARTMENT

Innovation and Technology (Ex) Task Force

Section 4(H) of NAIC Model Unfair Trade Practices Act

The Pennsylvania Insurance Department shares the following comments that consider our recent experience with premium rate relief filings as well as our experience with recently enacted anti-rebating laws that provide flexibilities not found in the current model act.

Terminology:

- We have found the term "specified" in the policy causes confusion and leaves too much room for interpretation. How specific is "specified?"
- Rather than saying "discrimination" or "nondiscriminatory" the term we found best works is "unfair" discrimination or not unfairly discriminatory. *(Unless everyone is eligible and everyone pays the same rate, a product discriminates. It is unfair discrimination that is unlawful.)*

Substantive Edits:

- Section H(2)(e)(3) – We recommend ending the sentence after "protects consumers."
- We recommend deleting sections H(2)(e)(4,5) and (f) and instead addressing non-value add rebates (gifts) in general terms rather than a delineated list. Pennsylvania, for example, has an annual aggregate limit of $100 for valuable considerations to consumers. The Commissioner is permitted to increase that cap.
- Section H(2)(e)(3): Rather than establishing a threshold amount, we recommend leaving it to states to determine the appropriate allowable value(s) of a value-added product or service. The section could, in text or through a drafting note, suggest that the amount could vary by line of business (including commercial vs. personal risk), duration of the policy, or total size of the risk.
- In recent premium relief filings we have seen, Pennsylvania has objected to filings that sought to subject the relief to the purchase, continued purchase, or renewal of a policy. We would suggest adding a provision that makes clear that a rebate may not be contingent on the purchase, continued purchase, or renewal of a policy.

Innovation and Pilots:

- Pennsylvania supports the pilot program concept but would suggest that the provision clearly state that such programs that will be made available to fewer than all policyholders must be administered in a fair and not unfairly discriminatory manner and should have a limited duration.

Office of the Commissioner
1326 Strawberry Square | Harrisburg, Pennsylvania 17120 | Phone: 717.783.0442 | Fax: 717.772-1969 | www.insurance.pa.gov

Commissioner Jon Godfread
Chair, NAIC Innovation & Technology Task Force
1100 Walnut St
Suite #1500
Kansas City, MO 64106

Re: Task Force Request for Comments on UTPA
(Model #880) Amended Language Addressing Rebating

Dear Commissioner Godfread:

RIMS, the Risk Management Society ("RIMS"), provides these comments to the Innovation & Technology Task Force on proposed revisions to the NAIC's Model Unfair Trade Practices Act (No. 880) (the "Model Act"). The proposed revisions would permit insurers and producers to offer insureds certain value-added services that otherwise might constitute illegal rebates.

RIMS, the preeminent organization dedicated to promoting the profession of risk management, is a global not-for-profit organization representing more than 3,500 industrial, service, nonprofit, charitable and government entities throughout the world. Its members are directly affected by restrictions on the ability of insurers and producers to provide value-added services in connection with large insurance purchases. RIMS supports the addition of the eight permitted value-added services listed in new Subsection H.(2)(e) of the draft revisions to the Model Act, but we ask the Task Force to consider adding a ninth item that would apply only to value-added services provided to a commercial or institutional insured and that are designed to enhance the relationship between the producer or the insurer and the insured.

The present draft permits value-added services, and products, to be offered for free or at a discount, but generally limited to those relevant to loss control and risk assessment/mitigation. Specifically, new Subsection H.(2)(e)(1)(b) would permit an insurer or producer to provide value-added products or services that both relate to the insurance coverage and, generally speaking, that address various aspects of loss control, claims costs, risk, health and wellness, or administration of employee or retiree benefit policies.

This language would go a long way toward recognizing the importance of insureds benefiting economically from those value-added services. It would certainly be a significant improvement over the status quo; however, we believe the language should be expanded to include value-added services offered by a broker to a commercial insured. Commercial insureds, weighed under by the burden of so many challenges these days and from rising insurance costs, expect "one-stop" shopping when dealing with their broker. Restricting the offering of value-added services primarily to loss control and risk assessment does not recognize present realities, demands in the marketplace and the scope of the broker-insured relationship.

The proposed list of value-added services should not be so limited when it comes to a commercial or institutional insured. Therefore, we urge the Task Force to add the following language as Subsection H.(2)(e)(1)(b)(9), so as to permit additional value-added services that:

"(9) Arise out of the relationship between the producer and/or insurer and a commercial or institutional insured where the nature of the relationship and the compensation arrangement are memorialized in writing."

Examples of value-added services that would fit within this category are insurance consulting services or other related insurance advice, updates on insurance-related federal or state legislation or regulations, or litigation, and in the employee benefits area, where health insurance coverage is being placed, preparation and assistance in compliance and filing matters with federal agencies such as the Internal Revenue Service, U.S. Department of Labor or U.S. Department of Health and Human Services.

It is common for producers and insurers to enter into a written agreement that defines a sophisticated insurance relationship with a commercial or institutional insured to include value-added services that go beyond what would be permitted by the proposed additions. When considering changes to the Model Act, we urge the Task Force not to confine what is permissible to a list of value-added services that, while it may be appropriate for personal lines insurance, does not reflect that sophisticated insureds may benefit from other value-added services. Those are services that can be more efficiently provided by the insurer or producer due to the expertise about an insured developed from a more sophisticated, often long-term insurance relationship. Such an approach would be consistent with the NAIC's "State Ahead" reform project, which is designed to ensure that regulation keeps up with the pace of development and innovation, and that state insurance regulation remains viable in an increasingly global insurance market.

We thank the members of the Task Force for considering these comments. We stand ready to work with the Task Force as it moves ahead in its consideration of these issues.

Very truly yours,

Whitney B. Craig, J.D.
Director, Government Relations

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

Phone: 360-725-7000
www.insurance.wa.gov

OFFICE OF
INSURANCE COMMISSIONER

July 16, 2020

Denise Matthews, Director
Data Coordination and Statistical Analysis
National Association of Insurance Commissioners (NAIC)
dmatthews@naic.org

Re: Unfair Trade Practices Act, Model #880

Dear Ms. Matthews:

Thank you for the opportunity to provide comments on the proposed amendments to the Unfair Trade Practices Act (Model #880). Our comments are provided below. Please see attached our suggested edits to the draft language.

Section 4(H)(2)(e)(1)(b). We recommend that the selections within this subsection be limited to the insurance products that address the risk being mitigated. Otherwise, the value-added product or service could address any risk and thus be acceptable. We do not agree with this expansion and think it will lead to consumer confusion and to increased rates for insurance products due to non-related risk mitigation. Although Section H(2)(e)(1)(a) requires that value-add products or services "relate" to the insurance coverage, this is an amorphous standard and should be supported by this secondary requirement.

Section 4(H)(2)(e)(1)(b). We do not find "primarily intended to" to be an implementable standard. Intent is a mental state. As insurance regulators, we do not know how to determine the mental state of an insurer. Therefore, we suggest a standard that insurers can demonstrably meet, such as that value-added products or services actually do satisfy one of the list of criteria that follows in H(2)(e)(1)(b)(1)(8).

Section 4(H)(2)(e)(1)(b)(5). We recommend limiting "financial wellness" to Life and Annuity insurance products. By definition, a value-added product or service increases the financial wellness of a policyholder or prospective policyholder. Without such a limitation, this subsection would become the default for any value-added product or service related to the insurance coverage, and thus make the other subsections of Section H(2)(e)(1)(b) irrelevant. We are also concerned that the broadness of "financial wellness" may be an invitation to a financial kick-back unrelated to the insurance product and would invite restrictive language to prevent this misapplication.

Section 4(H)(2)(e)(1)(b)(7). We recommend limiting this subsection to Life, Annuity, and Health insurance products as there is an obvious direct link between insurance benefits offered under these products and improvement in health and lifespan. While this is obviously a beneficial goal in any context,

we believe that value-added benefits incenting such efforts as part of an insurance product should be limited to those products directly linked to health and lifespan.

Section 4(H)(2)(e)(1)(b)(8). We recommend modifying this subsection so as to read "Assists in the administration of underlying employee or retiree benefit policies." This change will help clarify that the value-added benefit must assist in the administration of the underlying group plan with which it is associated, and not to all such policies in general.

Section 4(H)(2)(e)(2). This section provides insurance commissioners with the authority to ensure important consumer protections, such as data protection. We urge the NAIC to retain these consumer protections through the ability of an insurance commissioner to adopt state-specific regulations directing how insurers demonstrate compliance. Arrangements between insurance companies and third parties to provide insurance consumers with products and services not specified in the policy and at no or reduced cost creates an opportunity for third party "bad actors" to collect and misuse personal information. State-specific regulations can define expectations and level the playing field across the industry. We note that the language is permissive and does not require insurance commissioners to enact regulations, but allows them to do so.

Section 4(H)(2)(e)(3). We do not find "a good faith belief" to be an implementable standard. A belief suggests trust, faith, or confidence in something. For an insurer, we would expect documentable evidence to support why it believes "that the product or service may mitigate, assess, or identify sources of risk of loss or claims". A standard of a "good faith belief" only muddies the regulatory waters. We support pilots and testing programs, and therefore suggest replacing "a good faith belief" with "evidence", which is a demonstrable standard.

Section 4(H)(2)(e)(3). We strongly support limits on how long a pilot or testing program can run. Without limits, pilot or testing programs could run in perpetuity without oversight. We have concerns that there will be disagreement over what constitutes "a reasonable period of time", but support this language as it includes "upon approval of the Commissioner."

Section 4(H)(2)(e)(3). We strongly support the ability of an insurance commissioner to approve, and therefore not approve, pilot or testing programs. Against the minimum standards of this draft model, with the edits suggested in comments above, an insurance commissioner should have the authority for approving pilot or testing programs.

Section 4(H)(2)(e)(4). A determination of what is "reasonable in comparison to the average policy premiums or the insurance coverage" is problematic. Using the *average policy premiums* as the standard for comparison in determining reasonableness provides little guidance for an insurer or producer and insurance commissioner to agree upon. We also have concerns about determining reasonableness in comparison to the insurance coverage itself. Average policy premiums could be converted to a dollar figure; the insurance coverage as a standard for a comparison of reasonableness of cost is ripe for confusion and disagreement. This subsection would appear to relate to the desire to protect the policyholder from hidden costs, unrelated to the insurance product, which would be included in the policy

premium. But what if the insurer is being paid by the third party to provide the value-added good or service in exchange for access to the personal data of the policyholder? How is that reasonableness to be measured?

Section 4 (H)(2)(f)(1). Offering or giving promotional or advertising items or meals to a personal lines policyholder or potential policyholder reflects a relationship between an insurer or producer and the policyholder or potential policyholder. The policyholder or potential policyholder has an opportunity to accept or reject the offer. However, a charitable donation does not require the policyholder or potential policyholder to accept, approve of, or even be aware of a donation made in their name or the charity that is chosen. We have concerns about the privacy rights of policyholders and potential policyholders in these situations, particularly when insurers and producers are allowed to make charitable donations in their *own* names separate from the relationship with a policyholder and potential policyholder. We are also concerned about potential fraud where the person on whose behalf the charitable donation is made is completely unaware of the insurer or producer. While we recognize positive intent, we also recognize the existence of "bad actors". We recommend striking this language.

Section 4(H)(2)(f)(2). Implementation of this subsection would require a determination of the relationship between the parties and then determination of a reasonableness limit to apply to the cost of gifts or value-added services to be offered or given based upon that relationship. This is not a simple undertaking and would reasonably vary significantly across jurisdictions. Regulating this amorphous standard would take time and attention to develop the actual standards to be applied. We recommend either striking the entire section and incorporating commercial or institutional insureds in Section 4(H)(2)(f)(1), or setting an amount not linked to distinctions of relationship, to be set in regulation by the insurance commissioner per calendar year per commercial or institutional insured.

Section 4(H)(2)(f)(3). We seek clarification that the five-hundred-dollar limit is one of the financial limitations that a state could choose to alter.

Thank you,

Molly Nollette

Molly Nollette, Deputy Insurance Commissioner
Rates, Forms, and Provider Network

Enclosure: Suggested Edits to Section 4(H) NAIC Model Unfair Trade Practices – WA State

SENT ELECTRONICALLY

Washington State Insurance Commissioner's Office
Suggested edits to Section 4(H) of the NAIC Model Unfair Trade Practices Act
July 16, 2020

Section 4(H) of NAIC Model Unfair Trade Practices

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

…

H. Rebates.

(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any ~~insurance~~ company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

(2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;

(c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year; or

(d) Engaging in an arrangement that would not violate Section 106 of the Bank Holding Company Act Amendments of 1972 (12 U.S.C. 1972), as interpreted by the Board of Governors

of the Federal Reserve System, or Section 5(q) of the Home Owners' Loan Act, 12 U.S.C. 1464(q).

(e) (1) The offer or provision by insurers or producers, by or through employees, affiliates or third party representatives, of value-added products or services at no or reduced costs when such products or services are not specified in the policy of insurance if the product or service:

(a)Relates to the insurance coverage and

(b) ~~Is primarily intended to satisfy~~ Satisfies one or more of the following:

(1) Provides loss control;

(2) Reduces claims costs or claim settlement costs;

(3) Educates about risk of loss to persons or property;

(4) Monitors or assesses risk, identifies~~y~~ sources of risk, or develop strategies for eliminating or reducing risk;

(5) For life and annuity products, ~~E~~enhances health or financial wellness;

(6) Provides post-loss services.

(7) For health, life, and annuity products, ~~I~~incents behavioral changes that improve the health or reduce the risk of death of the insured; or

(8) For employee or retiree benefit insurance products, ~~A~~assists in the administration of the underlying employee or retiree benefit policies.

(2) The Commissioner may ~~-~~adopt regulations when implementing the permitted practices set forth in (2)(e)(1) to ensure consumer protection. Issues include, but are not limited to, consumer data protections, especially instances where third party vendors require policyholder data as a condition of receiving the value added product or service, consumer disclosure, unfair discrimination consistent with applicable law.

(3) If the product or service is not made available to all policyholders or applicants its availability must be based on written objective criteria and offered in a fair and nondiscriminatory manner. If an insurer does not have sufficient evidence that the product or service is cost effective or has a material correlation to risk, but has ~~a good-faith belief~~evidence that the product or service may mitigate, assess or identify sources of risk of loss or claims, the insurer or producer may provide the product or service as part of a pilot or testing program for a reasonable period of time upon approval of the Commissioner.

(4) The cost to the insurer or producer of providing the product or service to any given policyholder should be reasonable in comparison to the average policy premiums ~~or the insurance coverage~~.

(5) Gifts or offers of gifts in connection with marketing for the sale or retention of contracts of insurance is considered *de minimus* and not in violation of this statute as long as the cost does not exceed [two hundred and fifty dollars] per person per year;

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

(f) Notwithstanding any other provision, an insurer or a producer may:

(1) offer or give promotional or advertising items or meals ~~or charitable donations on behalf of~~ to a personal lines policyholder or potential policyholder, as long as the total fair market value of the promotion or advertising items and/or meals does not exceed an amount set in regulation by the Commissioner per calendar year per person and no purchase or renewal of an insurance policy is either expressly or impliedly required;

(2) offer or give gifts or value added services to commercial or institutional insureds in connection with marketing for the sale or retention of contracts of insurance, as long as the cost is reasonable in light of the relationship between the parties; or

(3) conduct raffles or drawings to the extent permitted by state law, as long as there is no participation cost to entrants, the drawing or raffle does not expressly or impliedly obligate participants to purchase insurance and the prizes are not valued in excess of [five hundred dollars].

Drafting Note: States may wish to alter the financial limitations set forth in this section depending upon each state's economic environment.

Drafting Note: Section 104 (d)(2)(B)(viii) of the Gramm-Leach-Bliley Act provides that any state restrictions on anti-tying may not prevent a depository institution or affiliate from engaging in any activity that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System. The Board of Governors of the Federal Reserve System has stated that nothing in its interpretation on combined-balance discount arrangements is intended to override any other applicable state and federal law. FRB SR 95-32 (SUP). Section 5(q) of the Home Owners' Loan Act is the analogous provision to Section 106 for thrift institutions. The Office of Thrift Supervision has a regulation 12 C.F.R. 563.36 that allows combined-balance discounts if certain requirements are met.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.