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May 10, 2019

Commissioner Jon Godfread  
North Dakota Insurance Commissioner  
600 E Boulevard Ave.  
Bismarck, ND 58505



**Re: Outdated Anti-Rebating Prohibitions**

Commissioner Godfread and the NAIC Innovation and Technology (EX) Task Force,

Thank you for your time and attention to issues impacting consumers, particularly with respect to InsurTech innovations. In particular, we appreciate your focus on anti-rebating issues and the current anti-rebating language contained in the NAIC's Unfair Trade Practices Act (Model #880). Although the anti-rebating provisions may have served a purpose in the past, the current nature of the insurance industry, modern consumer expectations with respect to technology, and California's 30-year experience without anti-rebating laws have made these provisions irrelevant at best, and harmful to consumers at worst. As such, we encourage the NAIC to remove the anti-rebating provisions from the Model Act.

By way of background, our firm is deeply involved in and committed to the insurance markets and regulatory practices across the United States. We have very lengthy and deep experience with both the traditional insurer and the InsurTech communities, and the issues that commonly face new service and product offerings, competition, and establishing new working relationships in the insurance industry. One of the most common hindrances to the efficient distribution of new products, or distribution of products through new avenues, is the anti-rebating prohibitions in place (consistent with Model #880) in virtually every US jurisdiction except California. In industries other than insurance, rebates or similar benefits made available to consumers who purchase goods or services are common, and have become the normal expectation of consumers in virtually every area of their life. To single out insurance transactions and prohibit this otherwise common-place occurrence no longer seems appropriate.

The California experience is particularly informative. As you may know, in 1989 California consumers voted to adopt Proposition 103 which, among other things, repealed California's anti-rebating statute. As such, in California for the last 30 years it has been entirely permissible for producers (not insurers, who must charge their filed rates) to provide rebates to consumers. This 30-year-old experiment in the largest insurance market in the US has not resulted in consumer harm, but rather has greatly facilitated the efficient distribution of insurance products throughout California. We urge you to carefully

Commissioner Godfread

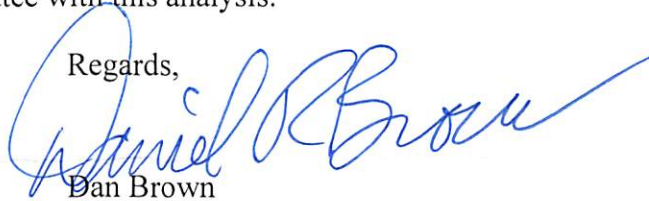
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consider this real live experiment with respect to repealing anti- rebating laws, and adopt the same position in the Model Act.

I want to once again thank the Committee for considering this important consumer protection issue. Please let me know if our firm can provide any resources or additional information to assist the committee with this analysis.

Regards,

A handwritten signature in blue ink that reads "Dan Brown". The signature is fluid and cursive, with a large initial "D" and "B".

Dan Brown



Local  
Agents  
Serving  
Main Street  
America<sup>SM</sup>

Via email to Denise Matthews at [dmatthews@naic.org](mailto:dmatthews@naic.org)

Commissioner Jon Godfread, North Dakota Insurance Commissioner  
Chair, Innovation and Technology (EX) Task Force  
National Association of Insurance Commissioners  
444 N. Capitol Street, NW, Suite 700  
Washington, DC 20001

Re: Anti-rebating and current anti-rebating language in NAIC's Unfair Trade Practices Act (Model #880)

Dear Commissioner Godfread:

On behalf of the National Association of Professional Insurance Agents (PIA National)<sup>1</sup>, thank you for the opportunity to comment on the important issue of rebating and the current anti-rebating language contained in the National Association of Insurance Commissioners' (NAIC) Unfair Trade Practices Model Act (Model #880)<sup>2</sup>.

Specifically, the model defines rebating as, among other activities, "paying or allowing ... as inducement to ... [an insurance] policy, any rebate of premiums payable on the policy, or any special favor ... or any valuable consideration or inducement ... or anything of value whatsoever not specified in the policy." Independent insurance agents work hard to establish and maintain client relationships built on mutual trust and appreciation, and one way they communicate that trust and appreciation to their policyholders is by providing small tokens of gratitude when appropriate. They engage in this business practice within the confines of applicable state law, of course.

For that reason, we are concerned that the model, which currently prohibits the giving of, essentially, "anything of value whatsoever not specified in the policy" to a policyholder, is too restrictive. We recommend adding a new subpart (2)(e) to the end of Section H. on Rebates, recognizing and permitting the independent agent custom of offering, as a token of thanks, an inexpensive item, such as a product featuring the agency logo, to policyholders periodically and not necessarily concurrently with the signing or renewal of a policy. This provision would not allow the conveyance of cash or cash equivalents like money orders. Such language, with a

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<sup>1</sup> 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.

<sup>2</sup> See <https://www.naic.org/store/free/MDL-880.pdf>.

dollar-value limit of, say, \$100, would give agents the freedom to conduct their business in a competitive way without running afoul of existing state laws against rebating.

We share regulators' concerns about the risks associated with behaviors that even remotely resemble rebating; one such risk is that a client, seeing his value to the agent, could attempt to leverage that power to extract a kickback or other illegal rebate from an agent. A limit on the dollar value and nature of the token that can be provided to a policyholder from an agent or agency will help to prevent behavior that could be perceived as illegal rebating.

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

Sincerely,

A handwritten signature in cursive script that reads "Lauren G. Pachman".

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



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May 15, 2019

The Honorable Jon Godfread  
Chair, NAIC Innovation and Technology (EX) Task Force  
Commissioner, North Dakota Department of Insurance  
North Dakota Insurance Department  
600 East Boulevard Avenue, 5th Floor  
Bismarck, North Dakota 58505-0320

The Honorable Keith Schraad  
Vice Chair, NAIC Innovation and Technology (EX) Task Force  
(Interim) Director of Insurance  
Arizona Department of Insurance  
100 North 15th Avenue, Suite 102  
Phoenix, AZ 85007-2624

Re: NAIC Innovation and Technology (EX) Task Force—  
Unfair Trade Practices Model Act (No. 880): Anti-rebating  
Comments of The Risk Management Society (RIMS)

Dear Commissioner Godfread, Director Schraad and Ms. Matthews:

RIMS, The Risk Management Society, on behalf of its members in the commercial risk management sector, welcomes the opportunity to provide written comments to the NAIC Innovation and Technology (EX) Task Force on the anti-rebating and anti-inducement (collectively “anti-rebating”) language contained in Section 4 of the NAIC’s Unfair Trade Practices Act (Model #880) (the “Model Act”). As the preeminent organization dedicated to educating, engaging and advocating for the global risk community, RIMS is a not-for-profit organization representing more than 3,500 corporate, industrial, service, nonprofit, charitable and government entities throughout the world. Most of the RIMS corporate members have risk managers or chief risk officers who oversee the risk control, insurance purchasing, risk finance, and enterprise risk management of those firms, and thus would be considered sophisticated buyers of insurance. RIMS believes that its members would benefit from an update of the Model Act to allow for a broader range of risk control services and claims services that insurers and brokers might provide to sophisticated commercial insureds, for commercial property and liability insurance. These broader services now may be considered a form of rebate or inducement and thus be prohibited or of questionable legality under the present Model Act. RIMS’s position here therefore concerns commercial property casualty insurance only. Our views at this time are that (1) rebates that go to premiums and rates should perhaps remain in place, and (2) broader risk control and claims services that an insurer and broker may offer, which further the interests and efficiency of insurers and insureds to reduce and manage risks, and obtain insurance payment for losses, should become exempt from the anti-rebate statutes. We expand on these points below. Therefore, we believe the time is ripe for the NAIC and its member states to revisit the application of anti-rebating laws and make appropriate reforms to empower the commercial insurance buyer to more effectively manage its insurance programs and control its costs of insurance procurement and management.

## **Background of the Model Act**

We do not need to explain the Model Act here, but we believe a short history is relevant to put in context our recommendations.

Anti-rebating and anti-inducement statutes, based in many cases on the Model Act, have been on the books of state insurance codes for many decades. The Model Act and its state-adopted versions prohibit insurance buyers, producers and carriers in both the property/casualty and life/accident & health insurance markets (including employee benefits) from freely contracting for the purchase of various services that are essential to the commercial insurance purchaser. These services—which include various forms of loss control, risk assessment and risk management, insurance consulting, and legislative and regulatory updates—would normally be the subject of negotiation between commercially sophisticated parties. In most states, the present rules prevent the provision of these services at a discount or in some cases, at no additional cost, unless the service is specified in the policy itself and filed as part of rate and form filing, which in the admitted insurance market, is subject of course to review or approval by the state. But many of these desired services have the effect of helping the insurance buyer manage its exposure and control its insurance costs, even if they are not within the contours of the actual insurance coverage itself.

The historical rationale for anti-rebating laws was to prohibit undue sales pressure being applied to the purchase of insurance by an insurance buyer and to prevent alleged unfair competition, by prohibiting entities such as larger insurance brokers from competing unfairly with smaller insurance agents. One area singled out as abusive was the practice in the life insurance area by which agents paid “rebates” to customers to foster life insurance sales. A significant focus over the years has also been around the regulation of promotional items such as trinkets and gifts offered in conjunction with an insurance transaction.<sup>1</sup> States have attempted to regulate this by affixing low dollar amounts to the gift in question, or allow for nominal-value gifts. The need to protect commercial insureds in the property-casualty market is quite different than the need to protect consumers in all lines of insurance.

With the passage of time, increased complexity, and the costs of insurance coverage and resultant burden on the commercial insurance purchaser, anti-rebating laws should be refocused to permit a broader array of products and services to be provided at a price agreed to by the commercial insurance purchaser, especially where they are most needed.

### **Anti-Rebate Provisions Should Remain Applicable to Rates and Premiums**

We generally remain in favor of the Model Act, and thus opposed to rebates, where these affect the rates and premiums, because rebates distort the price of insurance, rebates interfere with the rate-setting functions of insurers, and can lead to buying decisions that confuse appropriate risk transfer and risk control against clear cost-appropriate decisions. Cash or cash-equivalent forms may also distort a cost-of-risk calculation because the costs for services may be hidden or rebates may result in recognition of revenue which is not matched against the risk transfer expense. Therefore, rebates should continue to be prohibited for monetary compensation whether as cash payments or credits against a premium or gifts (other than nominal) or emoluments that do not pertain to risk control or claims.

### **Anti-Rebate Provisions Should Exempt Broader Services to Commercial Insureds**

We favor allowing insurers and brokers to assist insureds in offering broader risk control services than the historical risk control services that have been allowed, and these broader services may include new technologies that insurers may offer, and new packages of support that further the goal of loss reduction that both insurers and insureds share. These broader risk control services should not be considered rebates, and thus the Model Act should be adjusted to expand and allow broader risk control services, which benefit both insurers and insureds.

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<sup>1</sup> Cassandra Cole and Katie McCullough, “Time to Dust Off the Anti-Rebate Laws,” *Journal of Insurance Regulation*, JIR-ZA-36-07.

We favor allowing brokers to provide claims assistance, which might also be considered a rebate under the current statute, but which is a direct service to insureds in support of the insurance policy they paid for.

An adjustment in the anti-rebating statute to allow broader risk control services, and claims assistance, also recognizes that major brokerages also act as knowledgeable and sophisticated risk consultants, and they should be able to do this work without being in potential conflict with a statute that had one salutary purpose but does not now allow for other salutary purposes as discussed here.

We recognize that there has been some progress in this area, notably in states like New Hampshire, which has amended its anti-rebating statutes,<sup>2</sup> and New York, through adoption of Circular Letter No. 9 (2009), which includes a list of permissible practices that otherwise could constitute rebating.<sup>3</sup> However, the results to date nationwide have been slow in coming, sporadic and uneven. New York, for example, while recognizing services such as loss control and risk assessment, permits only certain claims administration functions, does not permit referral to third party administrators for discounted services, and does not permit certain services involving flexible spending accounts. California has also modified its rebate laws, specifically as to commissions as a result of Proposition 103, in California Insurance Code § 750, though anti-rebate provisions remain elsewhere enforceable on other lines of insurance.<sup>4</sup>

### **Other Forces Driving the Need for Reform**

There are other forces at work. There have been other developments in the industry and the NAIC that make a re-examination timely. The NAIC is in the midst of a three-year “State Ahead” reform project, which is intended to ensure that regulation keeps up with the pace of development and innovation, and that state insurance regulation in particular remains viable in an increasingly global insurance market. The NAIC has defined the State Ahead project as “a three-year blueprint for the NAIC’s future, showing the way toward building on existing strengths as a nexus for innovation and a hub of resources for insurance departments to draw upon.” The NAIC has made the case for modernization: “The long-standing goals of solvency monitoring and consumer protection have not changed, but the landscape has. In response, the NAIC must develop and harness new tools, talents and technologies.”

Your Task Force has held numerous hearings to date and received input from various startups and innovative firms. In particular, we have seen the emergence of InsurTech/RegTech companies and adoption or consideration by state legislatures regarding so-called “regulatory sandboxes”; this has caused a fundamental reexamination of changes in the insurance industry, new ways of doing business and the benefits of technological innovation. Another development has been the onset of the shared economy with entities like Uber and Airbnb entering the marketplace.

Requiring insurance placement services to be governed by the policy and by subject to the rate and form filing process, on a piecemeal basis, no longer makes sense in the commercial context. These issues can be addressed by new statutory or regulatory principles, and revisions to the Model Act, the adoption of a new model law or regulation, or issuance bulletin may be appropriate. This would help ensure that such rules are transparent, readily apparent to the insurance community and broad-based.

We urge the Task Force to reform the anti-rebating section in the Unfair Trade and Practices Model Act so States have a good framework to update their anti-rebating laws, especially in the commercial context, both to better take account of present realities in the marketplace and to enable insurance buyers, brokers and carriers to freely contract for services. Doing so would have RIMS’ members and other commercial purchasers of insurance to better manage their risk and insurance exposures and control their insurance costs.

RIMS and its members are well situated to assist in this modernization effort, which would be quite consistent with the objectives of the State Ahead project. From a public policy point of view, perhaps, this

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<sup>2</sup> NH § 402:41(1)(d)(1)-(2)

<sup>3</sup> Available at: [https://dfs.ny.gov/insurance/circltr/2009/cl09\\_09.htm](https://dfs.ny.gov/insurance/circltr/2009/cl09_09.htm)

<sup>4</sup> See John K. diMugno and Paul E.B. Glad, California Insurance Law Handbook § 73:5.

effort should start by focusing on commercial accounts and commercially sophisticated buyers. We acknowledge that some of the issues may be different in personal lines.

We believe the upcoming hearing in Kansas City on June 4 will be the beginning of a constructive conversation, and we look forward to being a resource and working with you on this important endeavor.

Thank you for raising this very vital issue and providing us an opportunity to comment. If you have any further questions please contact RIMS Director of Government Relations, Whitney Craig at [wrcraig@rims.org](mailto:wrcraig@rims.org).

Sincerely,

A handwritten signature in black ink that reads "Gloria Brosius". The signature is written in a cursive, flowing style.

Gloria Brosius, RIMS CRMP  
RIMS President