CA NAIC Rebating Presentation Notes

1) What is rebating? In general terms, rebating is the giving of valuable consideration as an inducement to insurance. There are two main types:
   a) Agent/Broker rebating: This occurs when agents and brokers earn commission on a policy and give the consumer some or all of that commission. Note that commission rebates at the direction of the insurer are attributed to the insurer.
   b) Insurer rebating: This occurs when insurers return a portion of premium to the consumer.
2) Referral fees paid to third parties (e.g.: claims handlers and doctors) are not rebates. Referral fee prohibitions may apply, even in jurisdictions where rebating is permitted; these include prohibitions against running, capping, and steering.
3) Rebating and Prop 103: Prior to Prop 103, California prohibited insurers and producers from paying any portion of premium or commission as an inducement to the purchase of insurance; legislative findings stated the prohibition was designed to safeguard solvency, prevent policyholder discrimination, and curb unethical business practices like churning or twisting.
   a) Prop 103 passed in 1988; provided for public hearings for rate approval and eliminated anti-rebating statutes, among other things. Was primarily a response to high auto insurance rates in CA at that time; repeal of anti-rebating statutes was intended to increase competition among producers.
   b) Some major insurers amended their producer agreements to prohibit commission rebating, subsequent to Prop 103. After conducting a hearing into the practice, the Department concluded that the practice did not violate the law and that Prop 103 did not require insurers to permit commission rebating.
   c) Even after the passage of Prop 103, line-specific anti-rebating statutes remain in place for title, mortgage guaranty, and financial guaranty insurance.
4) Current status of broker rebating: Broker rebating is entirely lawful under CA law, but may be restricted by terms of producer agreements.
   a) Rebating prohibitions prevalent in life insurance, where large commissions may lead to advance commission scams (i.e.: producer pays insured's initial premium, knowing that the insured intends to let the policy lapse). Advance commission scams are prosecutable as fraud.
   b) The Department does not maintain statistics on the prevalence of rebating restrictions in producer agreements.
5) Current status of insurer rebating: No statutory prohibitions exist, but other laws may indirectly prohibit rebates:
   a) Property and Casualty lines are subject to prior approval rate regulation; insurers are required to charge the entire filed and approved premium for a particular coverage, meaning that premium cannot be returned to the consumer. Rate reductions supported by loss data are permitted, so long as included in filed and approved rates.
      i) Private Passenger Auto rates may only be based on factors specified in Department regulations.
   b) Life and Disability lines are not rate-regulated, meaning that rebates may be permissible.

6) Telematics and "Smart" Devices:
   a) May be used in P&C if loss data supports their use to set premium. (e.g.: In PPA, can only collect miles driven data, which is a mandatory rating factor). The cost of the device, as well as any cost to provide services related to the device, are included in the insurer's expense efficiency standard.
   b) Life insurance "wellness programs" have been permitted which use a wearable device to track the insured's activity and reduce rates based on activity; programs have only reduced rates (not increased) so far.
7) Other considerations:
   a) Antitrust: Prop 103 removed the insurance exemption from Fed and state antitrust laws. Systems of discounts or product and service bundles may implicate discriminatory pricing, predatory pricing, or tying statutes.
   b) Discrimination prohibitions: Prevent unfair discrimination in rates charged to the insured, particularly if discriminating against a protected class.
   c) Free insurance prohibition: The insured must pay for the risk transfer portion of any bundled insurance and goods/services contract.

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Rebating in the Sale of Insurance

Rhode Island General Laws prohibit "rebating" in the sale of insurance. R.I. Gen. Laws § 27-4-6, 27-6-46, 27-8-7, 27-9-44 and 27-29-4(8) prohibit a licensee from giving something of value either as an "inducement" or "in connection with" an insurance policy. Therefore a licensee is expressly prohibited from giving a "gift" which requires the actual purchase of an insurance policy.

However, these statutes do not prohibit the use of a "gift" as a marketing tool when the "gift" is given whether or not the individual actually purchases or renews the insurance. For example, a company or agent may offer a "gift" to all persons who receive a quote. The gift must be able to be retained whether or not a policy ever becomes effective.

Therefore, "gifts" may be offered in exchange for quotes *only* if:

(1) the gift is not contingent on the purchase or renewal of a policy;

(2) the value of the gift is minimal enough that it would not serve as an inducement to choose one policy over another similar policy; and

(3) the gift is offered to the general public

Nothing prohibits an insurance company from offering or giving to an insured or a prospective insured without charge or at a discounted price, services or other offerings that relate to loss control of the risk covered under the policy. Services aligned with the insurance policy are also not considered to fall within the rebating statutes.

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American Property Casualty Insurance Association
INSURING AMERICA apci.org

Deploying Beneficial Innovation in the Context of State Anti-Rebating Laws

The American Property Casualty Insurance Association (APCIA) represents more than 1200 insurers and reinsurers that provide critically important insurance protection throughout the U.S. and world. In combination, our members write 60% of the U.S. property casualty market. As insurers seek to provide more value-added services to their customers in the form of technology to reduce risk, there is some uncertainty and even hesitation over how state anti-rebating and inducement laws may apply.

The innovative programs/services at issue often leverage the use of IoT connected devices, e.g. monitors, sensors, communication, telematics, biometric wearables to assist policyholders to mitigate risk, and in the process prevent deaths, injuries and financial loss. It is therefore critically important that we find a way forward so as not to lose this historic opportunity to better serve the public by mitigating risk and preventing loss.

Background

From the beginning of insurance, insurers have partnered with their policyholders and the general public to better understand and reduce the risk of loss. Today, insurers provide loss control services to commercial insureds, catastrophe models enabling communities to be more resilient and public information and advocacy for measures resulting in safer roads, buildings and workplaces. Now, technology offers the opportunity to dramatically increase the scope and value of this partnership through the provision of technology to policyholders as part of the service insurers provide.

Anti-rebating laws, however, originally well intended are a cause of concern, a potential hindrance to socially beneficial innovation. We therefore much appreciate the States' focus on the issue and the NAIC's review of this subject. These laws were introduced more than 100 years ago, after agents' use of rebates threatened the solvency of life insurance companies and raised questions around unfair discriminatory practices. But they are now acting as a potential hurdle to beneficial innovation through technology.

While increasing attention is devoted to new coverages for cyber risk, flooding, cannabis and other emerging exposures, new technological advances and innovation are providing significant opportunity to enhance the insured consumer experience as it relates to standard homeowner, auto and business policies.

Property casualty insurers are operating in an era of unparalleled disruption and promise. Rapidly changing technology and consumer expectations will continue to present challenges and opportunities. Customer experience is even more than before the battleground for differentiation and competitive success. Consumers expect the ease, convenience and response of an Amazon and Uber in all facets of their life – "there must be an App for that" mentality. But delivering on that experience requires a wide variety of digital capabilities that aren't found in a typical application architecture.

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IoT connected devices can benefit consumers. This developing technology holds the promise to more effectively collect and analyze data and inform consumer behavior and the ratemaking and claims process. But it may be unclear whether an insurer's offering comports with State anti-rebating laws.

The Challenge

The marketplace is demanding simpler and more innovation insurance solutions, including the combination of insurance products with non-insurance products and services in a single offering. These logical, complementary insurance/non-insurance product combinations allow insurers to better tailor products and to address emerging risks for the benefit of consumers.

It is critically important to all that state laws and regulations keep pace with these innovative and consumer friendly innovations. *In short, seldom do we have the opportunity to do so much good for so many people.*

Way Forward—Key Issues and Potential Answers

- *What is the purpose of anti-rebating and inducement laws?*
    - These laws address concerns related to the giving or offering by the insurance producer, of any rebate or other valuable consideration to the prospective insured as an inducement to purchase insurance or any renewal of coverage. As a general matter, an insurer or insurance producer may not provide or offer to provide an insured or potential insured with any special benefit or discount, including any rebate from the premium, or any service or other incentive in conjunction with the sale of insurance, that is not specified in the policy or contract for insurance.
- *What screening criteria may ensure that value-added services or products still provide consumer protections and do not violate unfair discriminatory standards?*
    - States could most effectively and efficiently address the goals of regulators and industry by adding statutory or regulatory provisions that address the emergence of value-added and risk management services, products and devices that may be offered by, through, or in relationship with the insurance carrier. Principle-based criteria can support the innovations of today with the resilience to adapt to future innovations that continue to respond to the needs of consumers (policyholders). Qualified practices would be clarified as not considered to be an improper inducement for insurance, a rebate, or other impermissible consideration for purposes of the state anti-rebate law or regulation.
- *How should the offer of a device (service or product) comport with the state anti-rebating and inducement laws?*
    - The device (service or product) is intended to prevent or mitigate loss or provide loss control;
    - The device (service or product) can monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing those risks; and

- The device (service or product) may be offered or provided to an insured for free or at a discounted price.

- *Here is an APCIA proposal for model language intended to be added to existing anti-rebating/trade practices statutes:*

> An insurer, by or through its employees, affiliates, insurance producers or third-party representatives, may offer or provide products or services in conjunction with a policy of insurance for free or at a discounted price that are intended to educate about, assess, monitor, control or prevent risk of loss to persons or property. The offer or provision of products or services in this subsection are exempt from the prohibitions set forth in [insert applicable citation.]

<u>Conclusion</u>

APCIA appreciates the work of State regulators and the focus of the NAIC on how to avoid anti-rebating laws from hindering insurers' offering innovative products and services that will assist their policyholders in reducing their risk of loss. We have suggested a way forward through a series of questions, potential answers and model language. This is a critically important safety issue for insurers, regulators and the public we serve, and we are committed to working with you deliver the best possible outcome.

Comments for the Center for Economic Justice

To the NAIC Innovation and Technology Task Force

Relevance of Anti-Rebating Provisions in Insurance

Updated June 10, 2019

The Center for Economic Justice (CEJ) submits the following comments in response to the Task Force's invitation to comment on the relevance of anti-rebating provisions in current insurance markets. These comments incorporate and supplement our comments dated June 4, 2019. Our main points are:

- Insurance is different from other consumer products. Consequently, references to innovation in other consumer product markets have limited relevance for assessing anti-rebating provisions in insurance.

- The historical reasons for anti-rebating laws – preventing unfair discrimination and unfair competition – continue to justify anti-rebating laws.

- The existence and enforcement of anti-rebating laws has greater relevance today as insurance markets have become more concentrated and insurers' use of Big Data for marketing, pricing and claims settlement segmentation has exploded.

- CEJ has not seen evidence of impeded innovation due to anti-rebating laws. During the June 4, 2019 Task Force meeting, we heard no specific instance of anti-rebating laws impeding innovation. In fact, we've heard from Notion about their thriving partnerships with insurers. The complaints by CIAB and Locke Lord are essentially complaints about the lack of uniformity resulting from state-based regulation.

- Changes to the NAIC UTPA are not necessary. Recent laws, regulations and bulletins appear to address interpretation of core anti-rebating prohibitions or simply restate existing law.

- Rather than reviewing the language of model 880, NAIC efforts are better spent developing consistent interpretations of existing law by reviewing specific practices for which the states have taken non-uniform approaches.

- When you think about producers, please keep in mind that producers include small independent agents, larger brokers, and managing general agents. Issues that may not be significant for small independent agents would have profound implications for large brokers and managing general agents. This is particularly relevant in commercial markets such as, for example, force—placed insurance markets.

- Innovation in loss prevention can be easily accommodated within existing laws. There is no impediment to and many reasons for incorporating loss prevention devices and services into the policy contract instead of opening the door to all forms of unfair discrimination and unfair competition by opening up the anti-rebate laws. We suggest some in the industry are using alleged impediments to innovation as a Trojan horse to use a small problem or non-problem to insert massive changes in the state regulatory structure. Consider that long term care insurance insurers complain about a lack of uniformity in rate review – yet the proposed solution is for states to develop more consistent approaches, not to eliminate rate review or carve out gaping exceptions. Please don't legislate or regulate on the basis of anecdotes or exceptions that undermine the purpose and impact of the model that impact the vast majority of consumers.

<u>Insurance is different from other consumer products.</u>

References to innovation and disruption in other consumer product markets have limited, if any, relevance for an assessment of the role of anti-rebating laws in insurance because insurance is significantly different from other consumer products, including:

- Cost-based pricing is required by law and actuarial principles. Price optimization and dynamic pricing found in other consumer markets are prohibited in insurance.

- Insurance is a promise for future benefits instead of a product or service received upon purchase.

- Insurance is a contract of adhesion in which the consumer – personal lines and small business consumers – have no bargaining power to modify the contract.

- There is little or no information available to consumers about the performance of the product. Insurers and producers have significant information advantages about the insurance product and pricing over consumers.

- There are broad public policy concerns over availability and affordability of insurance, as some major lines of insurance are required by law or by loan contract.

- There is a history of abuse in insurance markets associated with rebates and referral fees. In recent years, we can point to the Attorney General investigation into and settlements with large brokers in 2005[1], the collapse of private mortgage and bond insurance markets and carriers in the recent financial crisis due to kickback arrangements and the spate of lawsuits against mortgage servicers and force-placed insurance insurers for rebate kickbacks.

<u>The historical reasons for anti-rebating laws – unfair discrimination and unfair competition – remain relevant.</u>

Insurance laws require cost-based pricing and prohibit certain practices as unfair discrimination. Cost-based pricing means that consumers of similar risk and expense associated with the transfer of risk are treated similarly. Discrimination against certain groups of consumers – typically groups who have experience racial, religious or ethnic discrimination in the past – is prohibited in both sales and claims settlement. In the vast majority of states, there is some form of rate regulation and unfair claims settlement laws which the commissioner utilizes to ensure that unfair discrimination does not occur.

The anti-rebating prohibition is an essential component of the authority needed by the commissioner to enforce unfair discrimination laws. Arbitrary rebates would undermine other efforts by the commissioner to enforce cost-based pricing and unfair discrimination requirements.

Market structure – the degree of market concentration in the hands of a small number of insurers – remains a relevant rationale for anti-rebating laws. Insurers or producers with larger market share have greater capability to utilize rebates to maintain or increase market share. The scandals and market failures mentioned above are examples.

The existence and enforcement of anti-rebating laws has greater relevance today as insurance markets have become more concentrated and insurers' use of Big Data for marketing, pricing and claims settlement segmentation has exploded.

Important insurance markets have become more concentrated over the past few decade, including residential property, The top ten insurers had 59.78% cumulative market share of the private passenger auto insurance market in 2000. In 2017, the top ten had 72.10% market share. The top six private passenger auto insurers had a cumulative market share of 50.86% in 2004. In 2017, the top six market share was 60.65%. In several lines of business, there are ten or fewer insurers who control the entire market, including title insurance, private mortgage insurance, financial guaranty and force-placed insurance. . The commercial broker market is highly concentrated with four brokers commanding a huge share of the commercial market. Relaxing or eliminating anti-rebating laws would further increase the disproportionate market power of these dominant players.

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[1] "Marsh & McLennan Companies, the largest insurance broker in the world, agreed yesterday to pay $850 million to settle a lawsuit accusing it of cheating customers by rigging prices and steering business to insurers in exchange for incentive payments." *Insurance Broker Settles Spitzer Suit for $850 Million,* New York Times, February 1, 2005 at https://www.nytimes.com/2005/02/01/business/insurance-broker-settles-spitzer-suit-for-850-million.html

Perhaps the most important reason to reaffirm the importance of anti-rebating laws is insurers' use of Big Data to finely segment the customer population for marketing, pricing and claims settlement. Regulators are already aware of Big Data practices that challenge or violate statutory requirements for cost-based pricing (e.g., price optimization) and to prohibit unfair discrimination (disparate impact of certain risk classifications, claims optimization). Insurers now have the ability to create micro customer segments for which unique rebate amounts and types are easily created – with the result that cost-based pricing requirements and unfair discrimination prohibitions are undermined and thwarted.

Insurers have long sought to market and price insurance based on factors other than expected claim costs. Consider the presentation by Ed Liddy, then CEO of Allstate, to investment analysts in 2005, in which he discussed Allstate's use of credit scoring to create customer segments:

> *Tiered pricing helps us attract higher lifetime value customers who buy more products and stay with us for a longer period of time. That's Nirvana for an insurance company. That drives growth on both the top and bottom line.*
>
> *This year, we've expanded from 7 basic price levels to 384 potential price levels in our auto business.*
>
> *Tiered pricing has several very good, very positive effects on our business. It enables us to attract really high quality customers to our book of business.*
>
> *Make no mistake about it, the economics of insurance are driven largely by retention levels. It is a huge advantage. And our retentions are as high as they have ever been.*
>
> *The key, of course, is if 23% or 20% of the American public shops, some will shop every six months in order to save a buck on a six-month auto policy. That's not exactly the kind of customer that we want. So, the key is to use our drawing mechanisms and our tiered pricing to find out of that 20% or 23%, to find those that are unhappy with their current carrier, are likely to stay with us longer, likely to buy multiple products and that's where tiered pricing and a good advertising campaign comes in.*[2]

Mr. Liddy made those statements when insurers' use of third party data for customer segmentation was in its infancy. Allstate and other insurers now employ thousands of rating tiers and employ far more sophisticated marketing analytics. Here is what the CEO of Progressive told investment analysts in 2018:

[2] Partial Transcript of Presentation to Edward M. Liddy, Chairman and CEO, The Allstate Corporation Twenty-First Annual Strategic Decisions Conference, Sanford C. Bernstein & Co., June 2, 2005 at https://www.nclc.org/images/pdf/credit_discrimination/InsuranceScoringWhitePaper.pdf

> *So in summary, as we increase media spend to drive new business growth by diversifying message and launching more relevant creative, we will drive up demand and shift the customer mix to higher retaining customers, which, in turn, will help increase our customer retention, allowing for a more efficient growth in our book of business, which, in turn increases our efficiency so we can invest more in media. It's something we like to call the virtuous cycle, and something we're very proud of and will continue to nurture over time.*[3]

It is clear that insurers now have far greater ability to utilize rebates to reward the most-favored customers and penalize the least-favored customers. Insurance regulators should be focusing efforts on improving your ability to enforce anti-rebating laws instead of considering relaxation of these laws.

<u>CEJ has not seen evidence of impeded innovation due to anti-rebating laws.</u>

In preparation for today's meeting, CEJ has sought examples of innovative approaches to insurance products or sales that have been thwarted or impeded by anti-rebating laws. We have not found any examples. Preventing a vendor from giving a kickback to certain applicants for insurance in the form of cash or services as an inducement is not thwarting innovation – it is enforcing unfair discrimination prohibitions and ensuring fair competition.

<u>Changes to the NAIC UTPA are not necessary. Recent laws, regulations and bulletins appear to address interpretation of core anti-rebating prohibitions or simply restate existing law.</u>

In the absence of evidence that anti-rebating laws have impeded innovation and given the critical role of anti-rebating laws as a tool to enforce cost-based pricing and unfair discrimination requirements, we see no case for amending the NAIC UTPA model 880. Recent laws, regulation and bulletins appear to restate existing law. For example, recent Maine legislation has introduced the concept of a "value-added" service as exempt from anti-rebating laws.[4]

> **2. Permissible value-added service or activity.** An insurer, an employee of an insurer or a producer may offer to provide a value-added service or activity, offered or provided without fee or at a reduced fee, that is related to the coverage provided by an insurance contract if the provision of the value-added service or activity does not violate any other applicable statute or rule and is:
> **A.** Clearly identified and included within the insurance contract; or
> **B.** Directly related to the servicing of the insurance contract or offered or undertaken to provide risk control for the benefit of a client.

[3] Progressive CEO Tricia Griffith in March 1, 2018 Q42017 earnings results call at https://seekingalpha.com/article/4155724-progressive-corporations-pgr-ceo-tricia-griffith-q4-2017-results-earnings-call-transcript?part=single
[4] Maine Revised Statutes, Title 24-A

In CEJ's view, this new "value added service" activity restates existing law. It is unclear how a value-added service could be offered without being included in the policy contract. If an insurer wants to offer a monitoring device to an insured – whether telematics for the vehicle or home or a wearable device for the insured – it is unclear how a service associated with the device can be utilized by insurer without specification in the policy.

It is also important to distinguish between a device and a service based on that device. If an insurer gives a consumer a sensor for, say, detecting leaks in the water heater, that device by itself is not a thing of value. It is the service of monitoring that device and providing information to the consumer that creates the value from the device.

We note that the Maine Bureau of Insurance issued a bulletin to producers after the Maine Legislature modified the anti-rebating statute and offered the following guidance:[5]

> A determination whether a given arrangement violates Maine's rebating statutes is fact-specific and will depend upon the circumstances of the interaction between the parties.
>
> In evaluating whether a value-added service is directly related to the servicing of the insurance contract, licensees should look at the type of insurance involved and the nature of the services to be offered. The Bureau appreciates that the marketplace has become more complicated, especially for employers in the group health insurance market, and producers want to be able to use their expertise to provide customer assistance in a number of new areas.
>
> The following examples are not intended as a complete list of acceptable services, but are offered to illustrate the range of services that would **generally** not be considered prohibited rebates:
>
> - Risk management assistance provided by the producer;
> - Regulatory and/or legislative updates;
> - Enhancements that operate to make the producer's own services and office operations more efficient and convenient for the insured;
> - System improvements, which could include software provided to employers, which make information about group benefits provided through the producer more accessible to employers and employees;
> - Services provided for COBRA or HIPAA administration for group health insurance customers;
> - Administration of employer-sponsored Section 125 plans, flexible spending accounts (FSAs), and health reimbursement accounts (HRAs) for group health insurance customers.

[5] Bulletin 426, Rebates – Guidance for Producers

While some of the items on this list of generally acceptable “value-added services” are fact-specific, some are quite general and open to interpretation, including “risk management assistance provided by the producer” and “enhancements that operate to make the producer’s own services and office operations more efficient and convenient for the insured.” CEJ can imagine activities that fall into either general category, but which are inconsistent with the intent of the anti-rebating law. Specific examples of permitted and prohibited practices would, in our view, be helpful to insurers, producers and consumers.

Rather than reviewing the language of model 880, NAIC efforts are better spent developing consistent interpretations of existing law by reviewing specific practices for which the states have taken non-uniform approaches.

There is a difference between states’ interpreting the same anti-rebating provisions in different manners for emerging technologies versus a need to revise the anti-rebating statutory language.

CEJ believes the anti-rebating provisions of model 880 remains as relevant or more today than ever before. The different interpretations for specific business practices across the states does not suggest repealing or revising the statutory language but does suggest that a mechanism is needed for states to review new business models to, hopefully, come up with common understanding and interpretations of how the emerging technologies and business models relate to anti-rebating prohibitions. In our view, consumers would be better served and NAIC members’ time would be better spent reviewing and discussing specific business models or practices for which the states have taken or might take different interpretations of the applicability of anti-rebating provisions and thereby attempt to develop a recommendation for consistent treatment across the states. Such a review could be housed in a working group of the Market Regulation (D) Committee, for example, where the interests of consumer protection and promoting innovation would be balanced.

THE COUNCIL
The Council of Insurance Agents & Brokers

NAIC INNOVATION AND TECHNOLOGY (EX) TASK FORCE
NAIC Insurance Summit Meeting, June 4, 2019

STATEMENT OF THE COUNCIL OF INSURANCE AGENTS & BROKERS ON STATE ANTI-REBATING LAWS

John P. Fielding, General Counsel

Good morning. I represent The Council of Insurance Agents & Brokers, where I serve as General Counsel, and Steptoe & Johnson. Thank you for the opportunity to speak today to provide our thoughts on state anti-rebating laws. We appreciate your review of these laws and opening a dialogue regarding the need for change. This is a constant issue of concern for insurance brokers, and has been for years. At the Council, we have a working group of our members' legal counsels that has met three times a year for more than 20 years. This issue – rebating – is perhaps the only issue that has been on the agenda for every meeting, every year.

By way of background, The Council represents the largest and most successful employee benefits and property/casualty agencies and brokerage firms. Council member firms annually place more than $300 billion in commercial insurance business in the United States and abroad, and sell and/or service the great majority of employer-sponsored health plans across the country. Council members conduct business in some 30,000 locations and employ upwards of 350,000 people worldwide. Council members specialize in a wide range of insurance products and risk management services for business, industry, government, and the public.

I'm going to take the next few minutes to talk about why anti-rebating laws are problematic for commercial insurance brokers, why they don't make sense for commercial insurance consumers, and why we think they should be repealed in the commercial insurance space.

Laws in 48 states and the District of Columbia prohibit insurance producers from reducing premiums or providing free services or other "valuable consideration" as an inducement to policyholders or prospective policyholders to purchase insurance unless such "rebate" is specified in the insurance policy itself. These anti-rebating laws are nearly identical across the country and are based on model language from the National Association of Insurance Commissioners (NAIC). California and Florida are the only states that permit some form of "rebating." In Florida, the courts invalidated the state's anti-rebating statute for failure to serve a justifiable purpose (*Department of Insurance v. Dade County Consumer Advocates Office*, 492 So. 2d 1032 (Fla. 1986)), and in California, the state's anti-rebating rules were overturned by Proposition 103 in 1988.

State anti-rebating rules have long been problematic for insurance producers in terms of both compliance and business practice.

First, and perhaps most basic, the laws are unclear. The core statutory language, which is identical or very similar in each state, provides no guidance as to what specifically constitutes a rebate. This has left a huge opening for individual states to interpret the language differently from one another. What we see across the country is that there is little regulatory guidance in many states to help producers determine what is meant by the statutory provisions. Moreover, the guidance (rules, bulletins, opinions, etc.) that is out there – and is evolving across the country in a number of states – differs from state-to-state in many cases. And even where guidance language is similar, interpretation and enforcement is not. Indeed, it appears that many states enforce their anti-rebate laws only in response to complaints, so any resulting guidance evolves on a case-by-case basis.

This creates a very challenging compliance environment, to put it mildly.

We have compiled a chart for our members to assist them with compliance with state anti-rebating laws. It briefly summarizes the laws, rules, bulletins, opinions, and other guidance, and provides links to the relevant documents. It does not include the statutory or other guidance language – just a summary and links. It is 73 pages long.

Of particular note:

1. Many states do not have any guidance explaining the statutory language, leaving brokers to wonder what is and is not permissible in relation to their commercial consumers;

2. Many states have some exceptions to the prohibitions – services that are not considered rebates. But it is not always clear what those exceptions include, and they can differ from state to state. For example, some states explicitly permit billing and collecting premiums for COBRA; others permit "COBRA services" more broadly; and some states permit services that are "traditional" customer services, whatever those may be in an evolving and ever-changing industry.

Indeed, most of the states that permit exceptions limit those exceptions to services provided in connection with the insurance coverage being offered. One only needs to look to the core subject of your task force – insurtech – to understand that this is an always-moving target. Technological solutions – and non-tech services, as well – enable brokers and other service providers to help their commercial consumers address their needs across the board. And these solutions are not necessarily limited to insurance-related services: loss control services, claims services, human resources platforms, and data analytics are all examples of services consumers want and brokers want to be able to provide. Anti-rebating rules do not make sense in today's commercial insurance marketplace. These limitations only serve to distort the market by artificially constraining brokers from competing on a level playing field in providing commercial consumers with the products and services they need and want – and impinging on consumers' freedom of contract and choice.

3. Third, states are all over the map in terms of providing "gifts" – goods, merchandise, meals, entertainment, etc. – illustrating the underlying irrationality of these rules, particularly in the commercial insured space. Dollar limits range from $5 for a gift to a life insurance applicant ($10 for P&C) in one state, to a couple hundred dollars for a raffle winner in another. And there are dozens of dollar limits in between depending on

the state, the line of business, and the type of gift. It strains credulity to think that taking a client to dinner or a football game as a “thank you” for purchasing a $10 million D&O policy could be responsible for convincing that client to purchase that policy.

These legal and regulatory uncertainties and complexities are compounded by the evolution of the marketplace and commercial consumers. We are in a different world from that of the 19th century, when the first anti-rebating statutes were enacted to protect the solvency of life insurance companies and prevent unfair discrimination. And, indeed, the marketplace and commercial consumers are much different today from 1947 when the NAIC’s model Unfair Trade Practices Act was first adopted. As I noted a moment ago, the very existence of this Task Force is testament to the fact that the world has – and is – constantly changing. Commercial consumers demand more, and technology is enabling commercial brokers, among many other market players, to compete to address those demands. Moreover, the regulatory system has evolved and grown more robust and sophisticated in the last century-plus, as well. Regulators have numerous tools available to them to protect insurer solvency (which is the ultimate consumer protection), and protect consumers from unfair discrimination and other bad acts, without the need to rely on anti-rebating laws, with all their problematic side-effects.

Today’s knowledgeable commercial consumers not only want to know what their producers are earning from a deal, they may want to negotiate to get the best deal for themselves. Allowing the marketplace to work in this manner, as it does in most other industries, would likely serve the producer well, too. Unfortunately, under state anti-rebating statutes, producers are largely prohibited from negotiating compensation and services in connection with an insurance placement. As a result, producers are required (in many cases) to disclose compensation information to commercial clients but are prohibited from doing anything about it. They operate largely on a “take it or leave it” basis, with no ability to tailor or negotiate compensation and services with their clients. Commercial clients must either accept the level of commission or find another producer.

Thus, under the current anti-rebating regime, insurance producers are left in the dark as to what truly constitutes a rebate, and operate in a climate of increased scrutiny from both regulators and consumers, under opaque, constantly shifting rules. The lack of statutory clarity and limited, non-uniform regulatory guidance, combined with the incomplete enforcement "guidance," leaves producers wondering what they can and cannot do for their commercial clients with respect to negotiating compensation, or providing added-value services, discounts, marketing materials, and so forth.

Moreover, most, if not all, anti-rebating complaints are made by producers. It would not be a stretch to surmise that the motives behind such complaints have less to do with consumer protection than with turf protection, and that complaints are made selectively based on competition factors. This further skews the little precedential value that might be gleaned from the regulators' anti-rebating enforcement decisions. And it begs the question as to what is the purpose of the anti-rebating prohibition and if the prohibition achieves that purpose.

We do not think turf protection is a legitimate purpose for the anti-rebating laws. The commercial insurance broker space is highly competitive, with players of all sizes competing for business according to their business models. Moreover, the industry is highly regulated, with important consumer protections embedded in requirements at both the front end – licensing, appointments, education, etc. – and the backend – enforcement of unfair trade practices laws, disclosures, to name just a couple.

What purpose do anti-rebating laws play in today's commercial insurance environment? They certainly do not help commercial policyholders, which would love to be able to negotiate the ultimate cost of their insurance and the services they wish to purchase from their broker, just as they do with their other service providers and business partners. They do not help brokers who lose opportunities to provide their commercial clients with the best products and services at the best prices. They add compliance-related costs to brokers on transactions that span states with differing rebating laws – and they even add costs on single-state transactions – costs that are ultimately borne by consumers. Ultimately, they simply do not make sense in today's commercial insurance marketplace because they are not needed to protect sophisticated business consumers that want to get the best product and services for the best price but are unable to under today's regulatory structure.

For these reasons, we urge you, along with your fellow regulators, to support – and work for – the repeal of anti-rebating laws and rules as they apply to commercial insurance. Meantime, there are some steps you can take in the short-term to address some of the challenges and confusion in connection with compliance with anti-rebating rules more generally. First, uniformity is essential, and we urge you to:

1. Establish a uniform of limit for all states for promotional/advertising items that can be provided to prospects and existing customers without being deemed a rebate or inducement;

2. Establish a uniform list for all states of items/services that can be provided without being deemed a rebate/inducement (e.g., goods, wares, meals, etc.);

3. Issue uniform guidance for all states acknowledging that client seminars/educational events held in a reasonable location and where no selling takes place would not be considered a rebate or inducement under state insurance law (or include these events in the limit/list of permissive items/services in #1&2).

Second, flexibility is critical. As noted above, things are moving fast – technology, the marketplace generally, and consumer expectations. Regulation needs to be able to evolve to enable brokers to provide their customers with the services they need at the prices they want.

Thank you, again, for your time today and for considering reforms to the anti-rebating laws. For the reasons outlined above, The Council believes that these laws should be repealed as they apply to commercial insurance, and that uniform, flexible approach to the issue is needed going forward. We look forward to working with you and other interested parties to achieve lasting and meaningful reform.

Written Testimony Submitted to The NAIC Innovation and Technology Task Force by the Independent Insurance Agents and Brokers of America Concerning Anti-Rebating Laws

June 4, 2018

Introduction

Good morning, Chairman Godfread and members of the task force. My name is Wesley Bissett, and I am Senior Counsel of Government Affairs for the Independent Insurance Agents & Brokers of America, the largest producer organization in the country. We represent 300,000 insurance professionals who work at more than 25,000 physical locations, and our members offer all types of insurance products and services in large cities and small towns across the United States.

I am here to offer some of IIABA's views concerning anti-rebating laws. At the outset, I should note that – since the agent and broker community is so large and diverse – there is no unanimous perspective within the entire producer universe about these issues. There are areas where there is greater consensus, and I will attempt to identify those elements and offer additional thoughts and observations that could perhaps assist your review of this aspect of the regulatory framework.

We appreciate the work of this task force and especially appreciate the chair's thoughtful approach to the examination of such regulatory issues. Discussion of innovation and technology issues is often hyperbolic, and we are grateful for the reasoned manner in which this review is being conducted.

Although the NAIC's review of anti-rebating laws is being viewed through a technology-specific lens, the examination you are engaging in now is really a continuation of a longer conversation that has been occurring at the state level for more than ten years. The insurance world is certainly seeing significant change and innovation occur, but the reality is that the industry has not been standing still in the decades before now. There have always been marketplace advances that resulted in new products, services, and ways of doing things, and questions concerning whether and how anti-rebating laws applied to those developments have arisen as they were introduced. We may now be seeing a new wave of progress, but there is nothing occurring that requires or justifies a significant paradigm change.

Discussion of Anti-Rebating Laws

The task force has asked whether anti-rebating laws are still relevant today or whether they have outlived their purpose, and our view is that radical revisions to the statutory framework governing rebates and inducements are not warranted or appropriate. There may be some who argue for the outright repeal of these laws, but most observers and certainly most policymakers have taken the position that these statutes remain relevant to at least some extent and continue to advance valuable purposes. Anti-rebating laws serve numerous public policy interests, and one prominent treatise on insurance law and regulation (*Couch on Insurance)*, describes them this way:

> *The purposes of such statutes is to protect the solvency of the insurance company, prevent unfair discrimination among insureds of the same class, protect the quality of service, avoid concentration of the market in a few insurance companies, and avoid unethical sales practices.*

Although insurer solvency is arguably not advanced by anti-rebating laws any longer and is instead assured by more effective means, the other purposes identified in the treatise are relevant today. These statutes remain meaningful and important because they prohibit certain types of anti-competitive and anti-consumer behavior. If these laws did not exist, industry players willing to absorb short-term losses could offer “loss leader” inducements to consumers in an effort to quickly grab market share. This might offer some short-term benefit to select consumers, but the long-term effects could be anti-competitive in nature.

We urge you, however, not to frame this discussion as a binary choice between jettisoning anti-rebating laws altogether and preserving the status quo. We recognize that implementation and interpretations of these statutes are very inconsistent across the United States (which is perhaps not unexpected in a state regulatory system), and there are some jurisdictions that interpret the laws in exasperating and frustrating ways.

The task force has also asked whether the text found in anti-rebating laws is producing adverse effects, but IIABA is not convinced that the statutory language itself is a problem or that sweeping legislative changes are necessary. The statutory text found in most anti-rebating laws across the country is fairly consistent. The typical anti-rebating law – and the text found in the NAIC’s Unfair Trade Practices Act – prohibits an insurer or producer from offering or providing anything of value to a customer or potential customer if (1) the item or service is not included in the policy itself and (2) it is offered or provided as an inducement to the policy.

Many states interpret this legislative text in ways that do not inhibit competition or create heartburn for marketplace actors, but other jurisdictions construe the same language in ways that seem inconsistent with the laws themselves. The latter is a source of frustration for many within the industry.

There are some states that take a strict view and essentially do not allow an insurer or producer to offer or provide anything not specified in the policy. Regulators in some of these states rigidly interpret these laws to prohibit agents from taking longtime clients to lunch to discuss their insurance plans, from making financial contributions in their communities, from engaging in innocuous forms of marketing, etc. There is even one state that has issued guidance that restricts when and how an agent can provide a floral arrangement for the funeral services of a deceased client. In addition, one of the issues that has led to this hearing today is that there are states that do not allow items or services to be provided even when they are tied to the actual sale and servicing of insurance or are related to risk mitigation.

The text of the statutes may not be the problem, and not every state takes the view that these laws prohibit the offering of items or services identified above. There are various ways in which jurisdictions have reached that conclusion:

- First, it is important to remember that an insurer can provide anything to a customer or potential customer that is specified in the actual policy. It is sometimes unclear why companies do not avail themselves of this option, but it nevertheless exists.

- Second, some states interpret their laws to say that items or services that have a value below a certain monetary threshold do not violate the anti-rebating statute. States have adopted this view using a number of rationales, and one of those is that items and services below a certain monetary value do not practically act as an inducement to insurance and therefore do not trigger the laws. States employ a range of different monetary thresholds, including one state that has a $200 per customer per year framework, but recent state activity has generally resulted in $100 levels.

- Third, some states recognize that insurers and producers provide certain services in connection with the sale and servicing of insurance, and these jurisdictions allow insurance-connected items or services (including those related to risk mitigation) to be provided without running afoul of the anti-rebating laws. Numerous states have issued bulletins in recent years that address the regulator's view of the statute and identify certain types of items or services that may be provided.

Although a large number of states have adopted regulations or interpretive bulletins over the last decade to make clear that certain services may be offered and/or to identify a monetary threshold, there are jurisdictions that have opted for legislative action. This action is typically narrow in nature, and Arizona, New Hampshire, New Mexico, and Pennsylvania are states that have enacted or are about to enact legislation over the last two years that could serve as examples for other jurisdictions. Pennsylvania law, for example, ensures that insurers and producers are not prohibited from offering or giving services or other offerings that "relate to loss control of the risks covered by the policy." Similarly, a recently enacted Arizona law allows producers to "offer or provide products or services that are ancillary or related to any insurance coverage and that are intended to minimize or prevent claims-related losses or expenses or harm to the public."

Observations and Suggestions

As the NAIC and individual states examine these issues, we offer the following observations and recommendations:

- As you consider how to move forward, we urge you not to go overboard or to take a chainsaw to the anti-rebating laws in your states. An outright repeal of anti-rebating statutes is a bad idea, and we note that no legislature has ever voted to do this.

- States that are considering whether to "modernize" their approaches should first consider whether their interpretation of the existing law is consistent with the actual legislative text. As I have noted, there are very different regulatory interpretations of the same text among the states.

- States that are considering action of some kind are urged to focus on eliminating some of the peculiar prohibitions referenced earlier and to perhaps address items and services that are tied to risk mitigation and the actual insurance transaction. Opening the door to items and services with no insurance nexus, however, is not warranted at this time and is likely to result in a lack of interstate consistency. States considering action are also encouraged to engage and work with their local producer community.

- Discussions of these issues often involve a balancing of public policy considerations, and it can be challenging to draw clear distinctions and bright lines.

- I have focused much of my testimony with individual insurance buyers and small commercial insurance purchasers in mind, and some have suggested greater liberalization with regard to larger and more sophisticated commercial clients.

- Any action by states should not result in outcomes that favor certain business models, distribution channels, or particular ways of doing business over others.

- There are states that continue to prohibit agents from charging fees in nearly any scenario. Although the hearing today is focusing on situations in which insurance professionals may be able to offer certain items for free or for a reduced cost, there is also a need to modernize prohibitions on fees for services.

Conclusion

IIABA appreciates having the opportunity to participate in this morning's hearing, and we look forward to being part of future discussions of this issue with individual state officials and the NAIC.

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NAIC'S INNOVATION AND TECHNOLOGY (EX) TASK FORCE

Anti-Inducement/Anti-Rebate Statutes Comments

April 30, 2019

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.

While we are fully in support of a robust regulatory regime designed to protect the solvency of insurance carriers, we believe the NAIC and state insurance regulators should consider revisions to current laws to allow for value-added services and products without the requirement that such value-added products and services be explicitly included in insurance carriers' filed rates and insurance policy forms, which despite recent advances made through the Interstate Insurance Product Regulation Commission, is often a costly and time-consuming endeavor that oftentimes casts a chilling effect on customer-friendly insurance innovation.

While there are numerous ways in which the laws can be revised to encourage such innovations, we propose the three central questions that should be considered in evaluating this issue are:

1. Does the provision of the value-added services and products, taken as a whole, harm the solvency of applicable insurance carriers?

2. Does the provision of the value-added services and products, taken as a whole, result in intentional or unintentional discrimination?

3. Is the value-added service or product wholly unrelated to the insurance coverage being provided?

We believe that, in general, if the answer to all of these questions is "No" that the weight of any public harm is far outweighed by the public benefit of encouraging innovative customer driven solutions in the insurance marketplace. To assist the NAIC's Innovation and Technology (EX) Task Force in applying the concept described above, we provide an analysis of five representative examples utilizing the three part test highlighted above:

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<u>Example 1</u>: ***Internet of Things Integration***

An insurance carrier provides free or discounted third party online loss mitigation software services and Internet of Things devices (such as a water meter that detects and shuts off leaks that would otherwise damage property) to property or casualty insurance policyholders.

In nearly every state, unless such discounts were included in the form of the policy, such discount would be likely considered an illegal inducement to the purchase of the underlying insurance product, as it is something of value not specified by contract.

However, when viewed in the context of the three questions above, there is no public policy rationale for restricting such behavior, as: (i) the utilization of the products by the policyholders should reduce the cost and occurrence of claims (thereby supporting the solvency of the carrier), (ii) all policyholders receive the same discount and therefore are not discriminated against and (iii) the products are directly related to the insurance policy at issue, as they directly reduce the likelihood of the cost and occurrence of claims. As such, the innovation should be allowed.

<u>Example 2</u>: ***Bundling***

An insurance carrier develops a portable electronic device insurance policy bundled with a wireless mobile device service contract (a/k/a extended warranty) with a discounted price of the service contract for the voluntarily purchased bundled product election which is marketed, sold and delivered uniformly to all potential customers on a mobile device through an application programming interface. The bundled product allows the purchaser to add newly covered devices using the application programming interface. Because the insurance premium rate for the portable electronic device insurance coverage would be approved by the applicable insurance departments and the financial security requirements for a licensed service contract provider offering extended warranties would be satisfied, the bundled product does not present a product provider solvency concern. Likewise, because the bundled product would be offered to all potential customers, it would not result in any actual customer discrimination. Moreover, the bundled product provides a more comprehensive device protection solution that wireless device customers want and need, combining the features of an extended warranty with insurance protection against a stolen or lost device. Here, the bundling of the extended warranty is directly related to the portable electronic device insurance coverage.

However, despite these benefits, New York has explicitly opined that similar bundling violates its anti-inducement law because it would constitute an inducement to prospective wireless customers to purchase the service contact or extended warranty. *See* N.Y. OGC Op. No. 08-05-15 (May 30, 2008).

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Example 3: ***Health Monitors***

An insurance carrier wants to experiment with real-time health monitoring providing fully adjustable term life insurance premiums based on the daily behavior of their insureds. However, in order to have a more diversified pool of insureds they decide to provide the health monitor, such as an Apple Watch or Fitbit, to every policyholder for free during the time the individual remains a policyholder.

While there are some very public examples of life and health carriers providing such products to their policyholders, it is our understanding that such benefit is explicitly included in the policy form, which, again, requires substantial time and cost on behalf of the carrier. Such effort often makes limited run pilot projects difficult to implement, thus stifling innovation.

Again, however, when viewed through our proposed lens, the value of innovation shines through. Specifically: (i) the goal of the pilot is to provide the carrier with more accurate underwriting, resulting in a greater solvency position; (ii) it is not discriminatory as every policyholder would receive a health monitor and (iii) the benefit is directly related to the carrier's core function of underwriting the policies at issue. As with the examples above, the correct public policy answer is that such value-added benefits should be allowed by the law.

Example 4: ***Insurance Commission Rebate***

A life insurance agent wants to provide a $1,000 rebate on every $1 million face value policy.

Unlike the examples above, there is no value-added to the consumer (other than receiving the additional money) in a classic commission rebating scenario. Furthermore, while such actions do not harm any carrier's solvency position (as the funds are coming directly from the agent in our scenario), this example does discriminate based on income (only those individuals who can afford a $1M policy receive the rebate) and is not related to the insurance coverage being provided in anyway. The failure of such a blatant rebating scheme to meet the three-part criteria described in this letter, shows the validity and promise of such approach.

Example 5: ***Electronic Signature and Product Delivery and Digital Customer Relationship***

An insurance company offers a discounted premium rate (filed with and approved by state insurance departments) to customers who will agree to sign insurance applications electronically and receive all notices and other written communications from the insurance company solely in electronic form, in compliance with the stated adopted Uniform Electronic Transactions Act or the federal Electronic Signatures in Global and National Commerce Act, as applicable. The discounted premium rate reflects the cost savings that the insurance company expects to achieve by eliminating the costs of paper record preparation and U.S. Postal Service mailings to its customers. Eventually, the insurance company will migrate its digital customer relationships to a private blockchain environment.

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In this scenario, the insurance company's cost-savings based premium reduction for customers who voluntarily subscribe to a digital transaction and ongoing customer relationship would not increase the insurance company's solvency risk. The digital insurance product offering would be offered uniformly to all potential customers based on their digital transaction preference and its perceived value, and those customers who prefer a paper based transaction and customer relationship, while not receiving the digital customer premium credit, would not pay a higher premium amount that is not actuarially supported.

Conclusion

We appreciate that the work of crafting statutory and regulatory language to capture a more permissive approach to these issues is not something that will happen overnight; however, we want to applaud the NAIC and the states' efforts in recognizing the issue and reaching out to the industry to have a collective dialogue in order to ensure that the consumer is ultimately able to benefit from the innovative and connected world we live in today.

Should the NAIC's Innovation and Technology (EX) Task Force have any follow up questions, please do not hesitate to reach out to either one us. In addition, we would appreciate the opportunity to provide additional testimony on this important issue during the NAIC's Innovation and Technology (EX) Task Force's meeting during the Insurance Summit in June.

Thank you-

Brian Casey	Ben Sykes
Partner	Partner
Locke Lord LLP	Locke Lord LLP

notion®

Innovation and Technology (EX) Task Force
Tuesday, June 4, 2019

It has been over 100 years since the insurance industry put some of the currently-used anti-rebating laws in place. Originally, those laws were primarily meant to protect insurance carriers and consumers from unfair and discriminatory practices by stifling them from offering consumers "bribes" for purchasing or maintaining a policy. Today's modern advances have surpassed anything the lawmakers of the early 20th century could have imagined, changing needs and wants of policyholders. While there are some advantages to the laws, like market stability, they often hinder the ability for innovation, barring insurers from providing consumers with smart, cost-effective products and services.

As the dependency and effectiveness of the internet-of-things continues to grow stronger, so does the consumer demand and comfort with smart home products and services. It should be part of the insurer's right to offer things that promote policyholders being proactive in home protection and maintenance. The idea of homeowners being equipped by their carriers with cost-conscious tools that enable them to be the best homeowner they can be is the future Notion is working toward.

A homeowner can set up Notion's multifunction sensors in less than 15 minutes to monitor for water leaks, sounding alarms, temperature spikes, opened and closed doors, and more. If a monitored event takes place, Notion sends an alert to the homeowner's smartphone, giving them the opportunity to take necessary action to solve the problem as soon as (or even before) it starts. Out of thousands of water leaks detected by Notion so far, not a single one has resulted in a claim -- this is a great example of Notion's proactive impact, and it backs up industry data that shows having a system like Notion in place results in large reductions in claims.

This is the kind of proactive innovation consumers AND the insurance industry are demanding, and exactly what current anti-rebating laws are preventing.

Brian Ewing, Vice President, Sales

Innovation and Technology (EX) Task Force
Tuesday, June 4, 2019

Good morning. I am Michelle LaFond, VP & Chief Regulatory Counsel for Unum Group. We are an employee benefit provider offering life, disability, dental/vision and supplemental benefits at the worksite. We applaud the work of this Task Force to support innovation in insurance and to examine areas of the law that might impede innovation. We appreciate the opportunity to provide comments and observations about whether anti-rebating laws should be modernized.

These laws were designed to serve an important purpose: to protect consumers and to maintain a fair and level playing field among all providers of insurance products and services. We support these objectives. However, trying to apply the existing Model Law and related guidance to modern practices has led to uncertainty and unpredictability. The industry, consumers and regulators would all benefit from clarification and consistent application.

As we heard all day yesterday, consumer expectations and market demands are changing.

Consumers expect a seamless and immediate purchasing experience. They want to benefit with lower costs whenever they can improve the underlying risk.

Millennials – an underinsured population - have lived most of their lives with gadgets, incentivization and using and sharing personal data. They are driven by purpose and are more likely to buy products or patronize companies that contribute to their charities and causes.

These changes in consumer behavior carry over to the insurance market, which in turn implicates insurance laws and regulations governing inducements/rebates.

The Unfair Trade Practices Model Law is a bit dated, confusing and lacks clarity, leaving it ill-equipped to respond to the questions posed by the changing market.

In an effort to provide clarity, states have issued additional rules and guidance that while well meaning, are often contradictory and unclear. Companies – both legacy and startups – need to navigate this complex matrix to meet consumer expectations in a compliant and fair manner.

There are two ways under the laws & regulations to offer non insurance services and offerings.

First: Offerings that are otherwise impermissible inducements may be allowed if filed in the contract - otherwise they are disallowed. But often no statute or anti-rebating law provides a clear basis for the disapproval, so no prior “notice” is given to the insurer. That makes innovating and meeting consumer expectations challenging to determine in advance.

Second: Offerings may be a permissible inducement or an exception. Usually this is because they are “directly related” to the insurance product.

In an effort to clarify, many states issued bulletins allowing the offer of some services outside the contract even when they induce, so long as the services are “directly related” to the insurance and offered in a nondiscriminatory manner.

Some have tried to be clear and list what is allowed, and others have disallowed the very same offerings.

Enumerating some services leaves open whether others not listed are prohibited.

To summarize, the Model law is confusing because it lays out the principles of inducement, things of value, and expression in the policy in repetitive and overlapping ways, while leaving open the question whether (and on what terms) a *non*-inducing thing of value may be offered. It also gives no notice why some policy filings may be rejected.

Considering these challenges, additional guidance, clarification and consistency is important for carriers to continue to meet consumer needs and expectations and remain compliant. Clarification and consistency in regulation would provide three benefits:

1. **Make it easier and less risky to innovate:** Companies – start-ups and legacy -- trying to innovate face uncertainty in designing national roll outs because of the range of approaches. This can lead to companies abandoning ideas b/c navigating complex laws pose too much risk and added cost. We heard these same words of caution in the AM Best session yesterday -- companies can’t afford to develop different offerings in different states.

2. **Ensure an even playing field in market place**: Companies in good faith may land on different interpretations of law and that can lead to an uneven playing field. For example, one company may determine an offering is an inducement and put in contract and get a disapproval; another company may interpret the same offering not to be a rebate because it is directly related to the offering and not put it in the contract. This leads to one company with the offering and one being affirmatively told it is impermissible – uneven playing field.

3. **Minimize unexpected enforcement challenges:** When states evolve interpretation of the Model Law without explicit transparent guidance, concern about enforcement is heightened. As carriers, we want to get it right on our own!! We don't want regulators to have to tell us! If carriers get it wrong, we have two problems:

   a. Reputational. With consumers and regulators.
   b. Unwinding embedded business.

As I said at the outset, anti-rebating laws exist to protect consumers and to maintain a fair and level playing field among all providers of insurance products and services. These purposes align with the tenets of insurance regulation generally – to protect consumers & to ensure stable markets and solvent companies. All stakeholders are aligned on these basic tenets of insurance regulation.

But in recent years, rebating laws have focused on concepts like "inducement," "directly related," "specification in contract."

We now have to examine – is this the right focus for these laws/regulations or should guidance be more aligned with the principles of consumer protection and a stable and fair marketplace?

Stakeholders should seize the opportunity to work together to fashion clear and consistent guidance that can also serve us into the future, for we know that innovation will continue to bring new ideas, products and offerings that we can't yet imagine… and consumer expectations will also no doubt continue to grow.

We look forward to working with our trades, industry, the NAIC and consumer groups to provide clarity and parity.

Thank you for your time.

Michelle LaFond, VP & Chief Regulatory Counsel

Joyce Hall Mellinger
Senior Vice President and
Associate General Counsel

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TESTIMONY OF JOYCE HALL MELLINGER, ZURICH NORTH AMERICA INNOVATION AND TECHNOLOGY TASK FORCE MEETING, 6/4/19

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I am Joyce Hall Mellinger, Senior Vice President and Associate General Counsel at Zurich North America. We are one of the largest providers of insurance solutions to businesses and individuals. Our customers represent industries ranging from agriculture and construction and include more than 90 percent of the Fortune 500. In my role, I am responsible for providing insurance regulatory counsel to our commercial businesses, directly and through my team of attorneys. I've provided legal advice in this area of law for over 30 years but, I must say, that in the past two years, I've received more interest in evaluating business propositions involving state anti-rebating laws than ever before. So, this is not theoretical or academic to me or to the customers we serve. It is quite real.

I don't believe I'm overstating the issue when I tell you that it's become extremely challenging to provide solutions-oriented, customer-centric legal advice in this area. The laws and regulations, while well-intended, simply have not kept up with the loss-control innovations in the marketplace. Ironically, the same laws designed to protect consumers, in some instances, are inhibiting the adoption of loss-control solutions intended to protect consumers and their property.

Although I won't take the time to go through the history of anti-rebating laws in great depth, I recommend looking at the 2017 Journal of Insurance Regulation's article – "Time to dust off the anti-rebate laws". In short, over 100 years ago, the regulatory guardrails started on the life insurance side to protect insurer solvency at a time of widespread abuses, and then they subsequently moved over to the P&C world. Ultimately what has evolved is a patchwork quilt of laws and regulations. And that is confounding when I'm trying to provide legal advice on a proposed loss-control product or service that we at Zurich want to offer on a national basis. I do appreciate that some states have issued or may be thinking of issuing bulletins on the topic that would permit some of the loss control solutions we are looking for. But my ask is for the NAIC to address this by model as I believe this would be ideal to enhance the potential for national adoption. And this would bring with it the regulatory clarity we are seeking.

Joyce Hall Mellinger
Senior Vice President and
Associate General Counsel

Please note that I'm not suggesting we abandon regulatory guardrails. I think that is important for consumers and to ensure a level playing field.

Let me go back to those examples on my desk. Most business propositions I review with my team involve products or services that we wish to offer to our current customers. A couple of examples: an offer to current property policy customers to purchase and use water leakage detectors at a discounted price. We wanted our hospital customers to consider using water leakage detectors because a burst pipe from a floor above can impact, for example, an MRI machine and that can quickly become an expensive loss. Another example would be to offer cyber monitoring through a vendor at a discounted rate for current customers who have purchased our security and privacy policy. It's not at all about inducing a prospective customer to choose Zurich; our goal is to improve the risk profile of our current customers for their safety and to reduce their potential for loss.

With that additional context, here's my next ask: I'd like to see an exception to the anti-rebating laws that recognizes the value of improving customers' risk profiles by providing them with opportunities to receive at no additional charge, or to purchase at discounted prices, products and services that are designed to educated, assess, monitor, control or prevent risk of loss to themselves, their businesses or their property. This broad yet tailored exception truly would address the current demand from customers seeking loss-control products and services from or arranged through their insurers while, at the same time, providing a flexible, evergreen exception that could be utilized far into the future for products and services we haven't yet even contemplated.

In closing, I thank you for your consideration and time on this important topic – important to both us and our customers. Please make it easier for us to meet the demands of our customers and the marketplace to offer innovative loss-control products and services to educate and prevent loss to persons and property. And please make it easier for me to counsel our businesses on the legally compliant path forward. I'd like to see that patchwork quilt replaced. Thank you.