INNOVATION AND TECHNOLOGY (EX) TASK FORCE

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Innovation and Technology (EX) Task Force
New York, New York
August 5, 2019

The Innovation and Technology (EX) Task Force met in New York, NY, Aug. 5, 2019. The following Task Force members participated: Jon Godfread, Chair (ND); Keith Schraad, Vice Chair (AZ); Lori K. Wing-Heier (AK); Jim L. Ridling represented by Steve Ostlund (AL); Allen W. Kerr represented by William Lacy (AR); Ricardo Lara represented by Lucy Jabourian (CA); Michael Conway represented by Peg Brown (CO); Andrew N. Mais and George Bradner (CT); Stephen C. Taylor (DC); Trinidad Navarro represented by Tanisha Merced and Frank Pyle (DE); Colin M. Hayashida represented by Gordon I. Ito (HI); Doug Ommen (IA); Dean L. Cameron (ID); Robert H. Muriel represented by Judy Mottar (IL); Vicki Schmidt represented by Tate Flott (KS); Nancy G. Atkins represented by John Melvin (KY); James J. Donelon represented by Rich Piazza (LA); Al Redmer Jr. represented by Robert Baron (MD); Anita G. Fox represented by Chad Arnold (MI); Steve Kelley represented by Phil Vigliaturo and Tammy Lohmann (MN); Chlora Lindley-Myers and Angela Nelson (MO); Bruce R. Ramge (NE); John Elias represented by Christie Rice (NH); Marlene Caride (NJ);  John Franchini represented by Anna Krylova (NM); Barbara D. Richardson (NV); Mike Causey represented by Kathy Schott (NC); Jillian Froment (OH); Glen Mulready represented by Cuc Nguyen (OK); Andrew Stolfi and TK Keen (OR); Jessica Altman represented by Shannen Logue and Michael McKenney (PA); Elizabeth Kelleher Dwyer and Beth Vollucci (RI); Raymond G. Farmer (SC); Larry Deiter (SD); Carter Lawrence represented by Lorrie Brouse (TN); Kent Sullivan (TX); Todd E. Kiser represented by Reed Stringham (UT); Scott A. White represented by Eric Lowe (VA); Michael S. Pieciak represented by Christina Rouleau (VT); Mike Kreidler represented by Lichiou Lee and Molly Nollette (WA); Mark Afable represented by Nathan Houdek (WI); and James A. Dodrill represented by Erin K. Hunter (WV).

1. **Adopted its June 4 Minutes**

The Task Force met June 4 and took the following action: 1) adopted its Spring National Meeting minutes; 2) heard a presentation on rebating from the California Department of Insurance (DOI); 3) heard presentations on anti-rebating language in the *Unfair Trade Practices Act* (#880) from the American Property Casualty Insurance Association (APCIA), the Center for Economic Justice (CEJ), the Council of Insurance Agents & Brokers (CIAB), the Independent Insurance Agents and Brokers of America (IIABA), Notion, Unum and Zurich North America; 4) heard a presentation on rebating from the Rhode Island Division of Insurance; 5) and discussed its next steps for the anti-rebating discussion.

Commissioner Godfread asked if there was any discussion regarding the Task Force’s June 4 interim meeting minutes. Hearing none, Mr. Ostlund made a motion, seconded by Director Schraad, to adopt the Task Force’s June 4 minutes (Attachment Four). The motion passed unanimously.

2. **Adopted the Reports of its Working Groups**

   a. **Big Data (EX) Working Group**

Commissioner Ommen said the Big Data (EX) Working Group met Aug. 3. He said after the Spring National Meeting and the referral to the Life Insurance and Annuities (A) Committee to study the use of external data and data analytics in accelerated life underwriting, the Big Data (EX) Working Group has turned its attention to the use of data for fraud detection and claim settlements. During its Aug. 3 meeting, the Working Group heard presentations from the Insurance Services Office (ISO) and the National Insurance Crime Bureau (NICB) to help inform the Working Group about current market practices in the property/casualty (P/C) industry.

He said the ISO provided an overview of three of its products the insurance industry uses for fraud detection and claim settlement. These include its ClaimSearch system, used by insurance companies to identify questionable relationships or networks within a claim record, and Verisk Weather, which provides historical weather data and loss exposure analysis for companies. He said the ISO also provided an overview of ClaimXperience, which is a policyholder collaboration portal used for processing lower value property damage claims.

Commissioner Ommen said the NICB presentation primarily focused on the NICB’s Geospatial Intelligence Center (GIC), which provides aerial imagery of pre- and post-catastrophe conditions of property to assess potential fraud and speed up the claim settlement process.

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He said the Working Group also received a brief update from the Casualty Actuarial and Statistical (C) Task Force regarding its white paper on best practices for the regulatory review of predictive analytics, stating that the Task Force will soon issue its third draft of the white paper. He said the Working Group would like to delve deeper into the specific data elements used in fraud detection and claim settlement models beyond the traditional data collected during a claim investigation.

Director Froment made a motion, seconded by Director Wing-Heier, to adopt the report of the Big Data (EX) Working Group (Attachment One). The motion passed unanimously.

b. Speed to Market (EX) Working Group

Superintendent Franchini said the Speed to Market (EX) Working Group met June 26 and June 25. During its June 25 meeting, the Working Group focused on suggestions to the P/C uniform product coding matrix (PCM) and adopted four changes that are effective Jan. 1, 2020. The four changes are to: 1) update the description for the 5.0 Commercial Multi-Peril (CMP) Liability and Non-Liability Type of Insurance (TOI) to state “various property and/or liability risk exposures” in lieu of “various property and liability risk exposures”; 2) update the description for the 5.1 Commercial Multi-Peril Non-Liability portion to read: “Coverage for non-liability commercial multiple peril contracts”; 3) update the description for the 5.2 Commercial Multi-Peril Liability portion to read: “Coverage for liability commercial peril contracts”; and 4) add a Sub-TOI under Workers’ Compensation of “Occupational Accident Worker’s Compensation.”

Superintendent Franchini during its June 26 meeting, the Working Group focused on suggestions to the Life, Accident and Health (A&H), Annuity and Credit uniform PCM. He said the suggestions discussed involved changes and additions to existing TOIs and Sub-TOIs, but the Working Group decided the suggested changes were not needed at this time due to the lack of need by most states and where needed, states can use state-specific TOIs. He said the only change adopted from the June 26th meeting was to remove the references to 2010 dates on the Medicare Supplement instructions in the PCM for all TOIs and Sub-TOIs and replace them with references to 2020 dates.

Superintendent Franchini made a motion, seconded by Ms. Lee, to adopt the changes to the P/C uniform PCM, as well as the changes to the Life, A&H, Annuity and Credit uniform PCM (Attachment Two). The motion passed unanimously.

c. Innovation and Technology State Contacts Roundtable

Commissioner Godfread asked Denise Matthews (NAIC) to provide an update regarding the meeting of the Innovation and Technology State Contacts Roundtable held on Aug. 1. Ms. Matthews said 34 states were represented at the meeting, and 48 state insurance regulators were in attendance. She said the three volunteer leaders of the group—Jerry Workman (AL), George Bradner (CT) and Chris Aufenthie (ND)—provided opening remarks, and then the meeting was opened up to attendees to discuss experiences and observations regarding taking on the role of the named Innovation and Technology state contact. She said the group also: 1) discussed the insurance regulatory sandbox, including defining it for the benefit of future discussions; 2) heard a briefing from NAIC legal staff on legislative activity around sandbox and sandbox concepts; and 3) received an update from Mr. Melvin on Kentucky’s insurance regulatory sandbox since its implementation in late June. Ms. Matthews said the group discussed on-demand products, and Travis Grassel (IA) gave the group an update regarding take-aways from the InsurTech event he attended. She said the meeting ended with a discussion about future meetings and an introduction to the Innovator/Regulator Workshop that took place right after the meeting.

3. Discussed Options for Addressing the Anti-Rebating Issues

Commissioner Godfread introduced the anti-rebating topic with a review of the background and activity to date. He said startups and incumbent insurers doing InsurTech have found that anti-rebating law interpretation and practices across states create challenges in terms of compliance due, in part, to the inconsistencies in this area. He said in short, the Model #880 was 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, and likely needs to be re-visited. He said during the Task Force meeting at the NAIC/NIPR Insurance Summit, it received presentations from stakeholders on this topic, where opinions varied from just leaving it alone, drafting model law changes and proposing to repeal it for commercial lines. He said clearly there was a sentiment expressed by all that the situation could be and probably should be improved through a more consistent interpretation and implementation of the statute related to anti-rebating. He said the APCIA proposed language to add to, as an amendment, the current model law language, and others provided thoughts on possibly developing guidance that might move states toward a more consistent set of criteria for evaluating value-added products and services in order to avoid conflicts with the language.

Commissioner Godfread presented a draft North Dakota guideline based on the feedback from that meeting (Attachment Three). He said it is presented as a starting point for discussion should the Task Force agree that it would be appropriate and helpful to
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work on a guideline. Before the Task Force members discussed the draft, he asked Ms. Matthews to provide an overview of the NAIC model law process. Ms. Matthews provided an overview of the process. Commissioner Godfread also asked Ms. Matthews to provide an overview of the discussion regarding anti-rebating that took place at the National Conference of Insurance Legislators (NCOIL) in Newport, CA, prior to the NAIC Summer National Meeting. She said NCOIL is also looking at rebate reforms as part of an effort to develop model “insurance modernization” legislation aimed at helping the insurance industry move past what some view as antiquated processes. She said legislators have identified three issues as ripe for development of model legislation: 1) rebate reform initiatives; 2) optional electronic delivery and posting of insurance information; and 3) the electronic issuance of salvage titles. She said as part of the rebate reform discussions at their recent summer meeting, NCOIL legislators discussed reforms in Maine and the draft language proposed by the APCIA. She said legislators voiced the need to strike a balance with repealing old, outdated statutes while not completely repealing anti-rebating laws and that legislators will continue their work at the NCOIL annual meeting in December.

Commissioner Godfread also said the APCIA had asked to address the Task Force as well regarding the NCOIL meeting. David Kodama (APCIA) provided that update. He said there was quite a bit of support for moving forward on this issue at the NCOIL meeting. He emphasized the APCIA’s approach regarding the model language revisions it proposed during the Task Force meeting at the Insurance Summit on June 4 and noted NCOIL indicated it would like to have language ready to vote on by its meeting in December that follows the NAIC Fall National Meeting.

Commissioner Godfread asked the Task Force members for their thoughts on how best to move forward given the information presented. Director Ramge said the North Dakota draft guideline is very helpful but said considering the differing interpretations of the existing language, it might be beneficial to work on the model language. Commissioner Ommen agreed but did not think the work could be completed by the end of the year. Director Wing-Heier agreed that working on model language may be the best approach. Superintendent Franchini said defining the processes and services would be helpful, and Ms. Brouse suggested pursuing a guideline while working on model language would be a good approach. Commissioner Godfread said he would support that to keep the discussion going and provide something to states that want to act in the short term.

Mr. Kodama said Ohio has provided guidance that differs from the North Dakota draft in that it does not require the product or service to be specified in the policy contract. He said the APCIA believes having to specify it in the contract hinders innovation.

Birny Birnbaum (CEJ) said the CEJ strongly opposes opening up the model and the APCIA proposed language. He said the CEJ does not oppose providing consideration to consumers but opposes doing it on an ad hoc basis. He said if it is specifically stated in the policy, it is not a rebate.

John Fielding (CIAB) encouraged the Task Force members to amend the model but also consider repealing the anti-rebating provisions completely for commercial lines. He also said brokers differ from carriers in that they do not control the policy language, so requiring it to be specified in the policy does not work well and does not allow the brokers and commercial lines purchasers to negotiate the contract.

Commissioner Stolfi said Internet of Things (IoT) devices collect a lot of data and that should be a consideration when looking at this issue.

Director Wing-Heier said she agrees with Ms. Brouse regarding continuing work on a guideline while pursuing the model language development.

Director Wing-Heier made a motion, seconded by Director Farmer, to proceed with a Request for NAIC Model Law Development and continuing work on a draft guideline. The motion passed unanimously.

4. **Heard an Update on Cybersecurity Initiatives and the Implementation of Model #668**

Director Farmer provided an update on cybersecurity initiatives. He said the group just concluded the After-Action Report call with the U.S. Department of the Treasury (Treasury Department) regarding the cybersecurity tabletop exercise held in South Carolina on July 22, and companies have addressed a number of issues identified during that exercise.

Director Farmer said adoption of the Insurance Data Security Model Law (#668) remains a high priority. He said six states have adopted it to date, and it has cleared the legislature in two additional states. He said the Treasury Department endorsed it and recommended its prompt adoption by the states to avoid congressional action.
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Director Farmer said a kick-off call for the upcoming joint Kansas and Missouri ransomware cyber tabletop exercise was held, and 42 individuals from the state insurance and information technology (IT) departments, 12 companies, financial examiners from several states, of the Treasury Department and law enforcement are expected to participate. He said the cyber tabletop exercise will take place on Sept. 5 in Kansas City, MO, and will be the final event done in cooperation with Treasury Department. He said the NAIC will conduct two cyber tabletop exercises in 2020, tentatively planned for early second quarter and late third quarter.

Ethan Sonnichsen (NAIC) provided an update on federal activities related to cybersecurity and data privacy. He said NAIC staff have been in a number of meetings about data privacy; data security and big data; being mindful of the differences between cybersecurity and data privacy issues; data privacy being related to once you have the data, how do you use it; what consent is provided for that use; and other related issues. He said there are a lot of moving parts to this area of policy. He said there is recognition regarding the significant amounts of data available and that is creating motivation, on the part of the federal government, to understand and want to define the framework around that, and some prefer a federal solution that might preempt the state’s oversight. He said nothing has been released to date, but NAIC staff in the Washington, DC, office are watching it closely, including legislation focused on increased transparency and disclosure to consumers.

Jennifer McAdam (NAIC) provided a briefing on work the NAIC Legal staffs have done in the area of cybersecurity and data privacy. She said the NAIC has three model laws governing data privacy: 1) the Health Information Privacy Model Act (#55); 2) the NAIC Insurance Information and Privacy Protection Model Act (#670); and 3) the Privacy of Consumer Financial and Health Information Regulation (#672).

Ms. McAdam provided background and context around the drafting of these laws and talked about what they cover. She said 17 states have adopted Model #670. She said the NAIC adopted Model #672 and Model #673 following the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 and the federal Gramm-Leach-Bliley Act (GLBA) in 1999. She said the two are often conflated, but the focus of the regulations is different. One is focused on data security regulations on how the information that a business collects is protected from unauthorized access once it is in the possession of the business, and the other is focused on consumers’ rights to privacy and how companies are allowed to collect and then disclose the personal information of a consumer. She said today’s focus is only about consumer privacy and not data security. She said every state has a version of Model #55, although 19 states have only adopted the provision regarding financial information and not the one regarding health information. She said data privacy has started to get more attention with the passing of the European Union’s (EU) General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA). She reviewed the provisions of both at a high level.

Ms. McAdam said a number of states have considered introducing data privacy legislation, but only three have enacted laws. She covered those three states: Illinois, Maine and Nevada. She said a bill is pending in New York, and five states passed bills establishing task forces to study the issue of data privacy. She said others have legislation still pending that will carry over to 2020.

Commissioner Godfread said that based on the information provided, it would be appropriate for an NAIC committee to pursue further investigation into state insurance privacy protections to evaluate where there may be gaps or omissions that may require some type of additional work to ensure appropriate protections are in place in regard to data privacy related to insurance transactions. He said given this is a consumer issue, he suggests referring a charge to the NAIC’s Market Regulation and Consumer Affairs (D) Committee to take this on with a charge to: “Review state insurance privacy protections regarding the collection, use and disclosure of information gathered in connection with insurance transactions and make recommended changes, as needed, to certain NAIC models, such as the NAIC Insurance Information and Privacy Protection Model Act (#670) and the Privacy of Consumer Financial and Health Information Model Regulation (#672) by the 2020 Summer National Meeting.” Director Lindley-Myers said as the chair of the Market Regulation and Consumer Affairs (D) Committee, it accepts the referral of the charge.

Director Lindley-Myers made a motion, seconded by Ms. Brouse, to refer a charge to the Market Regulation and Consumer Affairs (D) Committee to review state insurance privacy protections regarding the collection, use and disclosure of information gathered in connection with insurance transactions and make recommended changes, as needed, to certain NAIC models, such as Model #670 and Model #672, by the 2020 Summer National Meeting. Mr. Birnbaum asked if the Task Force would consider expanding the charge beyond just considering the two current models as he said the consumer protections the committee may consider may not fit within the chassis of those two models. Ms. Brouse said the charge appears to be broad enough to address that concern. The motion passed unanimously.
5. Heard a Presentation from Theta Lake on its Platform That Leverages Detections to Power a Visual and AI-Assisted Workflow to Ease the Compliance Reporting and Review Process

Commissioner Godfread asked Marc Gilman ( Theta Lake) to present to the Task Force. Mr. Gilman introduced himself and his company, including information on its executive team, financial backers and leading partners and customers. He said Theta Lake provides last mile compliance artificial intelligence (AI) using natural language processing and machine learning to detect risks in voice, visual, video, chat and documents. He said it can scan the content to find out, for example, if a suitability conversation has taken place. Mr. Gilman said the platform leverages detections to power a visual and AI-assisted workflow to ease the compliance review and reporting. He said it improves efficacy, efficiency and consistency, and it scales to meet modern compliance needs through digital compliance. He said this is very important from the perspective of there being more and more regulatory requirements, changing regulations for privacy and security require more proactivity, and personal accountability regimes reinforce proactivity.

6. Appointed a Working Group on AI

Commissioner Godfread said it is no surprise that the topic of AI is top of mind these days given the availability of “big data” and everything being written on the topic, including information and statistics that show the insurance industry is aware and extremely interested in it from a competitive and cost savings perspective. He said that the EU has been doing a lot of work in this area and that the Organisation for Economic Cooperation and Development (OECD) has published AI Principles adopted by 42 countries. Commissioner Godfread said it seems appropriate for the Task Force to consider formally taking on a charge to look at this topic and recommended the Task Force create an Artificial Intelligence (EX) Working Group to work on it. He suggested the Working Group should be formed with the charge to: “Study the development of artificial intelligence, its use in the insurance sector, and its impact on consumer protection and privacy, marketplace dynamics, and the state-based insurance regulatory framework. The Working Group will develop regulatory guidance, beginning with guiding principles, and make other recommendations to the Innovation and Technology (EX) Task Force as appropriate by the 2020 Summer National Meeting.”

Mr. Birnbaum asked if this Working Group and charge might be overlapping with the Big Data (EX) Working Group’s activities. Commissioner Godfread said the work product of the Artificial Intelligence (EX) Working Group would be broad-based and at a higher level, serving as umbrella, over-arching principles. He said it would be intended to take work already done and see what makes sense for the insurance industry. He said the Big Data (EX) Working Group is taking a much deeper dive regarding the inputs, outputs and algorithms being used and for what specific purposes.

Director Schraad made a motion, seconded by Director Wing-Heier, to appoint the Artificial Intelligence (EX) Working Group under the Innovation and Technology (EX) Task Force with the charge to study the development of AI, its use in the insurance sector, and its impact on consumer protection and privacy, marketplace dynamics, and the state-based insurance regulatory framework, as well as develop regulatory guidance and make other recommendations. The motion passed unanimously.

Commissioner Godfread offered to chair the Working Group and asked Commissioner Afable to serve as vice chair. Hearing no objections, he asked members of the Task Force wishing to serve as a member of the Working Group to send those requests to NAIC staff by Aug. 23.

7. Heard a Consumer Representative Request for an InsurTech Bulletin

Mr. Birnbaum suggested he present his request for an InsurTech bulletin on a future Task Force call due to time limitations. Commissioner Godfread agreed to move this agenda item to the Task Force’s next meeting.

Having no further business, the Innovation and Technology (EX) Task Force adjourned.
The Big Data (EX) Working Group of the Innovation and Technology (EX) Task Force met in New York, NY, Aug. 3, 2019. The following Working Group members participated: Doug Ommen, Chair (IA); Elizabeth Kelleher Dwyer, Vice Chair (RI); Lori K. Wing-Heier (AK); Jerry Workman (AL); Ken Allen (CA); Andrew N. Mais (CT); Stephen C. Taylor represented by Sharon Shipp (DC); Frank Pyle (DE); Sandra Starnes (FL); Judy Mottar (IL); Rich Piazza (LA); Al Redmer Jr. and Robert Baron (MD); Timothy Schott (ME); Karen Dennis (MI); Grace Arnold and Phil Vigliaturo (MN); Angela Nelson and Teresa Kroll (MO); John Elias represented by Christian Citarella (NH); Marlene Caride represented by Mark McGill and Justin Zimmerman (NJ); Barbara D. Richardson (NV); Jillian Froment (OH); Andrew Stolfi represented by TK Keen (OR); Michael McKenney (PA); Diane Cooper and Joe Cregan (SC); Leah Gillum (TX); Todd E. Kiser (UT); Michael S. Pieciak represented by Christina Rouleau and Kevin Gaffney (VT); and Mike Kreidler represented by Annalisa Gellermann (WA).

1. **Adopted its Spring National Meeting Minutes**

Director Froment made a motion, seconded by Commissioner Kiser, to adopt the Working Group’s April 6 minutes (see NAIC Proceedings – Spring 2019, Innovation and Technology (EX) Task Force, Attachment Two). The motion passed unanimously.

2. **Heard a Presentation from the ISO on the Use of Big Data in Fraud Detection and Claims**

Stephen Clarke (Insurance Services Office—ISO) said that the claim process has a strong bearing on the customer experience and that there is a tremendous amount of information to help accelerate the claim process to make policyholders whole. When dealing with large amounts of money, Mr. Clarke said there is a propensity for fraud. However, he said data analytics helps identify fraud, which can amount up to 10% of insurance premiums.

Kevin Rawlins (ISO) said index cards were used in 1971 to obtain claim histories for claimants. Mr. Rawlins said in 1990, information on property and auto claims were merged into one database, and in 2007, electronic reports became available. The insurance industry is now moving to visualization of an individual’s claim history to speed up claim payment.

Mr. Rawlins provided an overview of ISO’s ClaimSearch ecosystem. He explained the input process of data from a company’s claims system. There are then a suite of decision support solutions built from this data. Mr. Rawlins said ISO ClaimSearch has 1.4 billion records, and 1.1 million records were submitted on Aug. 2. A record is the initial claim submitted but may not have all necessary data, such as claimant’s date of birth. More than 100,000 claim users and 8,000 Special Investigative Units (SIU) users access ClaimSearch daily. Mr. Rawlins said fraud amounts to $80 billion annually for all lines, with $34 billion in fraud costs for U.S. property/casualty (P/C) insurers. Mr. Rawlins said insurers are focusing on “right touch” adjusting of claims and that data helps achieve this goal. Data in ClaimSearch reflects 138 million claims and 95 million relationships, such as a relationship between a claimant and body shop or a claimant and a doctor. ClaimSearch can help identify questionable networks. Mr. Rawlins said this type of insight from data provides insurers confidence in whether claims are moving through settlement appropriately. Mr. Rawlins said there are compliance benefits with ClaimSearch, with $80 million collected by the Office of Child Care and $1.3 billion collected by the Child Support Lien Network. Superintendent Dwyer asked if all states report child support delinquencies to ISO. Mr. Clarke said insurers, at their discretion, use this service in the states that have a child support check requirement.

Mr. Rawlins said aerial imagery is available in ClaimsSearch to assist companies in identifying the condition of property before and after a storm. Mr. Rawlins said this enhances the speed of claim process as issues can be addressed before claimants may have access to their property after a storm. Mr. Rawlins said Verisk Weather provides information on location and date of hail storms. This can be used before a storm occurs to help companies identify the location of future claims and potential severity. Mr. Rawlins said ClaimXperience is used for smaller claims and is a policyholder collaboration portal. This speeds up the claims settlement for smaller value claims, which can leverage data to identify coverages in place and claims experience.
Commissioner Ommen asked how aerial imagery is collected. Mr. Rawlins said Verisk has a fleet of airplanes to collect images with special cameras and then insurers can select what imagery they want.

Commissioner Ommen asked for a description of the modeling and analytics used to settle claims. Mr. Rawlins said insurers use data to identify networks of high interest. Mr. Clarke said a lot of the innovation and analytics provide the ability to identify “low touch” claims. For example, a consumer may submit a claim via his/her phone, a chatbot may request a picture of damage, and then the picture can be analyzed to assess the damage. This information, such as size and construction of a fence, can be analyzed, and the claim processing can be initiated without a claim adjuster physically inspecting the damage.

Ms. Gellernmann asked what data is used to identify when a claim is potentially fraudulent. Mr. Gellermann questioned if data is tied to who is purchasing insurance, where they live and if there could be potential bias. Mr. Rawlins said there are 12 data points required to be submitted to ClaimSearch but that ClaimSearch does not take into account any data beyond what a company submits. Mr. Clarke said a very small number of claims are identified, with 90% of claims moving through the process very rapidly.

3. Heard a Presentation from the NICB on the Use of Big Data in Fraud Detection and Claims

Alan Haskins (National Insurance Crime Bureau—NICB) said the NICB is a 107-year-old organization with 400 employees across the country and a budget of $5.7 million. He said the NICB’s core disciplines are data analytics, investigations, learning and development, government affairs, and public awareness. Mr. Haskins said the NICB is headquartered in Chicago.

Mr. Haskins said the Federal Bureau of Investigation (FBI) assesses there is $120 billion annually in insurance fraud, with $40 billion in P/C insurance. He said insurance companies are mandated to identify claim fraud and report this information to states. Mr. Haskins said companies that are members of the NICB identify approximately 130,000 claims involving suspected fraud each year. He said the NICB does not look at single claims for fraud but rather looks at data from multiple insurance companies to identify fraud networks affecting the industry. Mr. Haskins provided a few examples of how the NICB worked with law enforcement to identify organized fraud networks in the U.S. He said organized crime networks use insurance fraud to fund other organized crimes, such as drug and human trafficking.

Mr. Haskins said the NICB has a Geospatial Intelligence Center that takes aerial imagery of the entire U.S. He said the imagery has “blue sky” imagery of property prior to a catastrophe and “gray sky” imagery of property after a catastrophe. Mr. Haskins said the NICB uses this imagery and advanced analytics to enhance fraud detection, catastrophe responses and claims handling. Mr. Haskins said the imagery can measure rooftops and windows to identify damage for specific property.

Commissioner Ommen asked for a description of the analytics used. Mr. Haskins said the NICB uses Esri, which has claims software but that the NICB does not have proprietary analytics products. Mr. Haskins said any claims processing is done at member companies. Mr. Clarke said any machine learning at the ISO is supervised through the setting of parameters and the assessment of results. Mr. Clarke said the ISO’s goals are to speed up the claim process and provide a better consumer experience. Commissioner Ommen said this discussion would be followed up with a conference call.

4. Received a Report from the Casualty Actuarial and Statistical (C) Task Force

Mr. Piazza said the Casualty Actuarial and Statistical (C) Task Force exposed a revised draft of its draft white paper on best practices for the regulatory review of predictive analytics. Mr. Piazza recognized state insurance regulators from Maine, Minnesota, Nevada, New Jersey and Texas as key contributors. The Task Force is reviewing comments on the latest draft and will issue its third draft of the white paper. Mr. Piazza said the Task Force may ask the Big Data (EX) Working Group to review the issues of causality versus statistical correlation and the confidentiality of predictive models.

Having no further business, the Big Data (EX) Working Group adjourned.
The Speed to Market (EX) Working Group of the Innovation and Technology (EX) Task Force met via conference call June 26, 2019. The following Working Group members participated: Maureen Motter, Vice Chair (OH); Yada Horace (AL); Wally Thomas and Joanne Bennett (AK); William Lacy (AR); Shirley Taylor (CO); Tammy Lohmann (MN); Shirley Taylor (CO); Timothy Johnson (NC); Crystal Bartuska (ND); Lien Skaggs (OK); Taylor Bowden and Sharalyn Taylor (TX); Gail Jones and Lichiou Lee (WA); Mary Kay Rodriguez and Sue Ezalarab (WI).

1. **Discussed and Reviewed Suggestions for 2019 Changes to the Life, Accident/Health, Annuity and Credit Uniform PCM Effective Jan. 1, 2020**

Ms. Motter said there were nine suggestions to the Life, Accident/Health, Annuity and Credit Uniform Product Coding Matrix (PCM) to be reviewed and discussed.

   a. **PCM Request #1: Needing a Pediatric Dental Option for HMO Individual Health Plans**

      The first suggestion was to add a pediatric dental option in the form of a new sub Type of Insurance (TOI) for Health Maintenance Organization (HMO) Individual Plans. Due to a lack of need by most states, the Working Group decided that rather than adding a sub-TOI, a state TOI will be utilized for the states needing this option.

   b. **PCM Request #2: Adding a Sub-TOI under Medicare Supplement for Innovative Benefits**

      The second suggestion was to add a sub-TOI under Medicare Supplement for Innovative Benefits. Due to the lack of need by most states, the Working Group decided that rather than adding a sub-TOI, a state TOI will be utilized for the states needing this option.

   c. **PCM Request #3: Splitting the TOI-Health—Other (H21) into Group (H21G) and Individual (H21I) Variants, with their Respective Sub-TOIs (H21G.000 and H21I.000)**

      The third suggestion was to split the TOI “Health—Other” (H21) into Group (H21G) and Individual (H21I) variants with respective sub-TOIs. Due to the lack of need by most states, the Working Group decided that rather than adding a sub-TOI, a state TOI will be utilized for the states needing this option. Ms. Motter said it may be helpful to remind state insurance regulators that market type would help distinguish between group and individual since there will be no change at this time.

   d. **PCM Request #4: Adding a New TOI for Mental Health Parity with a Sub-TOI of Mental Health Parity-Required Annual Reporting**

      The fourth suggestion was to add a new TOI for “Mental Health Parity” with a sub-TOI of Mental Health Parity-Required Annual Reporting. After discussion with the Working Group, Ms. Motter confirmed that the states will continue to utilize current TOIs in the PCM and/or state TOIs and/or states could add a filing type for annual reporting for the states that need to capture those specific submissions. Ms. Motter advised Ohio would not utilize new sub TOIs and explained OH created a filing type unique to their state for Refund Calculations.

   e. **PCM Request #5: Adding New Sub-TOIs for Tracking Uniform or Reasonable Modifications**

      The fifth suggestion was to add new sub-TOIs for tracking Uniform or Reasonable Modifications. Ms. Taylor said it would be helpful for Colorado to have specific sub-TOIs. Ms. Motter asked if a filing type would work. Ms. Taylor asked if the filing type could be changed once submitted. Brandy Woltkamp (NAIC) said the filing type, TOI and sub-TOI are locked in at submission and cannot be changed. Ms. Lee said she has not experienced carriers being confused about how to submit information with the current TOIs for Uniform and Reasonable Modifications, and she does not think additional sub-TOIs are necessary.
The Working Group decided to continue with utilizing a state TOI at the present time due to lack of need for additional sub-TOIs by most states.

f. PCM Request #6: Including a Sub-TOI for Group Medicare Part D Supplement under H17G Group Health Prescription Drug

The sixth suggestion was to include a sub-TOI for Group Medicare Part D Supplement under H17G Group Health – Prescription Drug, to be used for plans sold to retiree groups to supplement the benefits provided by Medicare Part D. The Working Group decided that this was not a necessary change at this time due to the lack of need by the states. The states can use existing sub-TOIs or a state TOI when needed.

g. PCM Request #7: Including a New TOI and a Sub-TOI for Group Retiree Health

The seventh suggestion was to include a new TOI and sub-TOI for Group Retiree Health to provide health insurance coverage to retirees of an employer. The Working Group decided that this was not a necessary change at this time due to the lack of need by the states. The states can use the existing TOIs or a state TOI when needed.

h. PCM Request #8: Including a New TOI for Combined Dental and Vision Products, a New Sub-TOI for Dental/Vision with Hearing Benefits, and a New Sub-TOI for Dental/Vision Without Hearing Benefits

The eighth suggestion was to add a new TOI for Combined Dental and Vision Products with a sub-TOI for dental/vision with hearing benefits and a sub-TOI for dental/vision without hearing benefits.

After discussion about how the states are handling this, the Working Group decided that this was not a necessary change at this time due to the lack of need by the states. The suggesting party will be advised of this and told to consider utilizing H23 or H21 to accept these types of combination policies or adding a state TOI or use additional benefits flag.

i. PCM Request #9: Including a New TOI for H# Multi-Line-Other

The ninth suggestion was to add a new TOI for H# Multi-Line – Other to be used for forms with multiple products that are all health coverages. The Working Group decided that this was not a necessary change at this time due to the lack of need by other states. The suggesting party will be advised to review the existing TOIs such as H21 to see if they will suit their needs or do a state TOI if necessary.

Ms. Motter advised the group that NAIC staff will update outdated descriptions in the PCM Medicare Supplement section. The decisions agreed upon by the Working Group will be summarized in an email vote by NAIC staff on behalf of Ms. Motter to confirm that no changes to the Life, Accident/Health, Annuity and Credit Uniform PCM will be implemented at this time.

Having no further business, the Speed to Market (EX) Working Group adjourned.
The Speed to Market (EX) Working Group of the Innovation and Technology (EX) Task Force met via conference call June 25, 2019. The following Working Group members participated: Maureen Motter, Vice Chair (OH); Joanne Bennett and Wally Thomas (AK); William Lacy (AR); David Martinez (CO); Frank Pyle (DE); Tony Venturella (KS); Tammy Lohmann (MN); Angela Nelson (MO); Chris Auffentie (ND); Cuc Nguyen (OK); Mark Worman and Sharalyn Taylor-Hargrove (TX); Lichiou Lee and Gail Jones (WA); and Sue Ezalarab and Mary Kay Rodriguez (WI).

1. Discussed and Reviewed Suggestions for 2019 Changes to the Property and Casualty Uniform PCM Effective Jan. 1, 2020

Ms. Motter said there were five suggestions to the Property and Casualty Uniform Product Coding Matrix (PCM) to be reviewed and discussed.

a. PCM Request #1: Modifying the Definition of Commercial Package Policy (5.0003)

The first suggestion was to change the definition of Commercial Package Policy 5.0003 to the following (an “and/or” has been added in place of “and” in the below sentence):

“The Commercial Package Policy (CPP) provides a broad package of property and/or liability coverages for commercial ventures other than those provided insurance through a businessowners policy.”

Ms. Motter provided a background of the description. Ms. Lohmann and Mr. Thomas agreed that a change to read “property and/or liability coverages” was appropriate. In conjunction with this change, there will also be an asterisk added to the 5.1 and 5.2 annual statement portion of the column with a footnote indicating that depending on the nature of the product, it may need to be reported elsewhere. The Working Group agreed to make the changes.

Ms. Motter later amended her suggestion regarding the footnote, and she suggested adding all annual statement lines where the products’ experience might be stated.

b. PCM Request #2: Eliminating the TOIs for Commercial Multi-Peril Non-Liability Portion Only (5.1) and Commercial Multi-Peril Liability Portion Only (5.2)

The second suggestion was to eliminate Types of Insurance (TOIs) 5.1 and 5.2 for Commercial Multi-Peril. Ms. Motter discussed the concerns with eliminating a TOI that was historically used to submit filings, and she suggested that the description be updated to match the annual statement. The non-liability premium and loss experience of a package policy is reported on line 5.1, and the liability premium and loss experience is reported on line 5.2. Ms. Motter explained that the states have the option to turn off TOIs or sub-TOIs for electronic filing submissions; and by doing so, they would still have access to historical filings. Ms. Motter suggested that: 1) the description for 5.1 Commercial Multi-Peril Non-Liability Portion be changed from “Absence of a responsibility to fulfill a contract or obligation,” to “Commercial Multi-Peril Non-Liability portion only”; and 2) the description for 5.2 Commercial Multi-Peril Liability portion be changed from “Responsibility to fulfill a contract or obligation,” to “Commercial Multi-Peril Liability portion only.” The Working Group agreed to make the changes.

Theresa Boyce (Chubb Insurance) asked for clarification about the definition changes to 5.1 and 5.2 if 5.0 is being changed to “and/or.” Ms. Motter explained that the current 5.0 language suggests that the Commercial Multi-Peril must have property and liability components to be considered a package policy, but by clarifying that 5.1 is liability and 5.2 is non-liability, the states have a choice. For a state that does not want to use the 5.1 and 5.2 sub-TOIs, 5.0 would still allow for a property-only or liability-only package since the language will change to “and/or.” Ms. Motter explained that the states could turn off 5.1 and 5.2 and have everything filed as a 5.0 if they prefer, since the 5.0 language will change to “and/or.” She explained that it is up to each state to decide what works best for them and whether they want to use these sub-TOIs.
c. **PCM Request #3: Separating Animal Mortality (9.0001) and Pet Insurance Plans (9.0004) Sub-TOIs from Inland Marine 9.0**

The third suggestion was to separate the Animal Mortality (9.0001) and Pet Insurance Plans (9.0004) sub-TOIs from 9.0 Inland Marine, because not all the states feel that the pet insurance and animal mortality plans are true inland marine products. Ms. Motter explained that the annual statement could change to carve out these products and, changing the PCM might be premature, as there may be different instructions regarding pet insurance plans and animal mortality in the future. The Working Group decided that this was not a necessary change at this time.

d. **PCM Request #4: Adding New Sub-TOIs under Workers’ Compensation (16.0)**

The fourth change was to add additional sub-TOIs under 16.0 Workers’ Compensation. Ms. Motter asked if additional TOIs are necessary given the current options, such as the “other than standard” option. Ms. Lohmann advised that she could see occupational accident being a special case that presents issues at times, and it could be helpful to separate these types of filing submissions. Ms. Nguyen said Oklahoma has a new type of workers’ compensation, but she felt that the current TOIs suffice. Mr. Martinez said he agreed with the addition of sub-TOIs; however, two sub-TOIs, one for comparable workers’ compensation and one for occupational accident, would be preferable. Ms. Motter reviewed the current PCM descriptions again with the Working Group. After further discussion, the consensus was reached that one new sub-TOI, 16.0005, will be added for “Occupational Accident” with the description: “Insurance that covers occupational accident to include comparable workers’ compensation.” The Working Group agreed to make the changes.

e. **PCM Request #5: Adding Examples in the Description for Commercial Auto (20.0003)**

The current description for 20.0003 is “A catchall code for other than the previously presented automobile coding used for Commercial Auto.” Ms. Motter asked what kind of filing submissions the Working Group members see regulated entities reporting in 20.0003. Ms. Jones said her actuarial staff sees filing submissions in 20.0003 regarding recreational vehicle rental programs, garage dealer programs, public transportation programs, and other rental programs. The Working Group agreed that no changes were needed regarding this suggestion at this time.

Brandy Woltkamp (NAIC) asked if new sub-TOI descriptions should include “as prescribed by state and federal workers’ compensation laws”. Following a discussion, Ms. Motter advised that the additional words were not necessary.

Ms. Motter summarized the changes agreed upon by the Working Group during the conference call, and she suggested that an email vote be conducted to adopt the changes to the Property and Casualty Uniform PCM discussed during the call. NAIC staff will send an email vote on behalf of Ms. Motter to the Working Group members to request adoption of the changes agreed to during the call.

Having no further business, the Speed to Market (EX) Working Group adjourned.

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North Dakota Guidance on Rebating

Technological innovations along with innovative services and programs are having a significant impact on the insurance industry to the benefit of policyholders and insurers. Insurers wanting to provide innovative products, services and/or programs that prevent or mitigate risk have questioned whether providing these types of benefits are considered rebating in North Dakota. This bulletin sets forth the Department’s general position for insurers that choose to offer value added services and programs for loss control, loss mitigation, and rate reduction to policyholders. Value-added products, services and programs may be offered or provided at no additional charge or at a discounted price and may allow for a rate reduction of the premium.

North Dakota law generally prohibits offering or providing anything of value not specified in the policy of insurance as an inducement to purchase insurance or rebate of premium. See N.D.C.C. §§ 26.1-04-03 (8) and 26.1-25-16.

Value-added products, services or programs may be offered so long as these products, services or programs:

a. are specified in the insurance policy, and
b. align with the type of insurance offered, and either
c. mitigate loss or provide loss control that aligns with the risks of the policy,
   -OR--
d. assess risk, identify sources of risk, or develop strategies for eliminating or reducing those risks that aligns with the risks of the policy

Value-added products, services or programs must comply with all other provisions of North Dakota law. For example, value added products, services or programs must not translate to excessive or inadequate policy rates or result in unfair discrimination and must be proportional to the premium.

The application of North Dakota’s laws to each situation is fact specific. When analyzing a value-added product, service or program, the Insurance Department will evaluate the product/service/program using the following parameters:

1. Does the provision of the value-added product, service or program, taken as a whole, protect the solvency of the applicable insurers and protect consumers?
2. Does the provision of the value-added product, service or program, taken as a whole, protect consumers against unfair discrimination?
3. Is the value-added product, service or program, taken as a whole, related to the insurance coverage being provided?
4. Does the product or service mitigate loss or provide loss control that aligns with the risks of the policy, or assess risk, identify sources of risk, or develop strategies for eliminating or reducing those risks?

If the answers to all of the above questions are “yes”, then the product/service/program would not be considered detrimental and could be allowed under North Dakota law. However, this is not an exhaustive list and the Department retains its authority to request additional information regarding any value-added product, service or program as it deems necessary.

Please note that the purpose of this bulletin is to provide guidance to insurers desiring to provide products, services or programs that add value related to the insurance policy and also prevent or mitigate risk. This bulletin does not modify or expand the exception permitting a $100 aggregate retail value gift, prize, promotional article, logo merchandise, meal or entertainment activity an insurance producer may provide to a person in connection with marketing, promotion, or advertising business under N.D.C.C. §§ 26.1-04-03 (8) and 26.1-25-16.
Innovation and Technology (EX) Task Force
Kansas City, Missouri
June 4, 2019

The Innovation and Technology (EX) Task Force met in Kansas City, MO, June 4, 2019. The following Task Force members participated: Jon Godfread, Chair (ND); Keith Schraad, Vice Chair (AZ); Lori K. Wing-Heier (AK); Jim L. Ridling represented by Jerry Workman (AL); Allen W. Kerr represented by Letty Hardee (AR); Ricardo Lara represented by Damon Diederich and Lucy Jabourian (CA); Michael Conway represented by Peg Brown (CO); Andrew N. Mais (CT); Stephen C. Taylor (DC); David Altmaier represented by Rebecca Smed (FL); Doug Ommen, Travis Grassel and Andria Seip (IA); Robert H. Muriel represented by CJ Metcalf (IL); Vicki Schmidt (KS); Nancy G. Atkins represented by Patrick O’Connor (KY); James J. Donelon represented by Rich Piazza (LA); Gary Anderson represented by Matthew Veno (MA); Al Redmer Jr. represented by Robert Baron (MD); Steve Kelley represented by Tammy Lohmann and Phil Vigliaturo (MN); Chlorla Lindley-Myers represented by Angela Nelson (MO); Mike Causey represented by Kathy Shortt (NC); Bruce R. Ramge represented by Lindsay Crawford (NE); John Elias (NH); Marlene Caride represented by Mark McGill (NJ); John G. Franchini (NM); Jillian Froment represented by Amanda Baird, Rodney Beetch and Angela Dingus (OH); Glen Mulready represented by Cuc Nguyen (OK); Jessica Altman (PA); Elizabeth Kelleher Dwyer (RI); Raymond G. Farmer represented by Kendall Buchanan and Daniel Morris (SC); Larry Deiter (SD); Julie Mix McPeak represented by Lorrie Brouse (TN); Kent Sullivan represented by Rachel Cloyd (TX); Todd E. Kiser represented by Tanji Northrup (UT); Scott A. White (VA); Mike Kreidler represented by Darryl Colman, Lichiou Lee and Molly Nollette (WA); and Mark Afable represented by Nathan Houdek (WI).

1. **Adopted its Spring National Meeting Minutes**

Commissioner Godfread asked if there was any discussion regarding the Task Force’s Spring National Meeting minutes. Director Deiter made a motion, seconded by Commissioner Taylor, to adopt the Task Force’s April 8, 2019, minutes (see NAIC Proceedings – Spring 2019, Innovation and Technology (EX) Task Force). The motion passed unanimously.

2. **Heard a Presentation from the California Department of Insurance Regarding Rebating**

Commissioner Godfread provided a brief history regarding this topic. He said during the 2018 Summer National Meetings, the Task Force led a small group of state insurance regulators to discuss, among other things, potential regulatory obstacles to insurer-related innovative products and services. He said one of the areas specifically identified as a potential regulatory obstacle to innovation by both start-ups and incumbent insurers doing insurtech was the anti-rebating law interpretation and practices across the states that can make it difficult to understand and manage in terms of compliance due, in part, to the inconsistencies in this area. He said the small group took on the task of reviewing current state laws and comparing how the *Unfair Trade Practices Act* (#880) was being applied, and the small group found that the states’ interpretation and application of the anti-rebating laws varies. In addition, he said the small group reviewed the history of Model #880, along with the history and the intent of the anti-rebating portion. He said that led to an invitation to stakeholders to participate in the discussion by sending written comments to the NAIC and presenting on the topic during this meeting.

Commissioner Godfread said before getting to those presentations, California, one of the two states that no longer has an anti-rebating statute, or at least one that is substantially similar to the model, will provide the background and California’s perspective on the subject. He invited Mr. Diederich to provide that perspective.

Mr. Diederich said the conversation needs to start with a clear definition of what rebating is. He said it means the giving of something of value as an inducement to insurance. He said there are two main flavors or rebating—agents/brokers getting a commission, kicking it back to the consumer; and the insurer rebating a premium directly back to the consumer. Referral fees paid to third parties are not considered rebates in the technical sense. Mr. Diederich said some jurisdictions may prohibit referral fees even where rebating is permitted, including prohibitions against running, capping and steering.

Mr. Diederich reviewed rebating after the passage of Proposition 103 in California (Attachment Four-A). He said even after the passage of Proposition 103, anti-rebating statutes remain in place for title, mortgage guaranty and financial guaranty insurance. Mr. Diederich said broker rebating is entirely lawful under California law, but it may be restricted in terms of producer agreements, and advance commission scams are prosecutable as fraud.
Mr. Diederich said telematics and other “smart” devices may be used if loss data supports their use. To set premium and life insurance, “wellness programs” have been permitted, which use a wearable device to track the insured’s activity and reduce rates based on that activity. Mr. Diederich also covered a few other considerations.

Commissioner Godfread asked Mr. Diederich how often the department gets involved in an agent-to-agent discussion where agents are complaining about other agents. He also asked if Proposition 103 has eliminated all these concerns. Mr. Diederich said those types of things tend to be an enforcement unit question, but by and large, there is not an agent rebating issue in California outside of the advance commissions context, and they do not see a lot of that.

Commissioner Godfread asked if Internet of things (IoT) devices are allowed if they show risk mitigation. If so, he asked how California handles the issue related to newer products not having any data to support the risk mitigation contention, given that this is a new product. Mr. Diederich said it is a rate filing issue, and they would investigate that, but he would have to get back to the Task Force with an answer to that question.

Superintendent Dwyer asked if Proposition 103 completely removed the anti-rebating language from the statute. Mr. Diederich said yes.

Commissioner Godfread asked if California was good with providing the device if contained in the policy. Mr. Diederich said yes, but it has to be supported by loss data and all of the costs associated with any device or service must be part of the expense efficiency standard; although, it is not exactly the same for life and health because those lines are not regulated the same way.

3. Heard Presentations Regarding Anti-Rebating Language in Model #880

Commissioner Godfread said interested state insurance regulators and interested parties who wished to present a perspective on the anti-rebating topic, either generally or representing their constituency, were asked to submit those comments and their request to present to members of the Task Force. He said the response was good, and 10 presenters from most if not all the stakeholders in this area, including state insurance regulators, producers, consumers, insurance companies, and the startup community. He reviewed the topic and questions that each stakeholder who requested to present was asked to cover, and he introduced the first presenter, Wesley Bissett (Independent Insurance Agents and Brokers of America—IIABA) (Attachment Four-B).

Mr. Bissett made the following points in his presentation:

- The IIABA’s membership is large and diverse, and there is no unanimous perspective within the entire producer universe on this issue.
- The IIABA does not believe that there is anything occurring that requires or justifies a significant paradigm change and radical revisions to the statutory framework governing rebates, and inducements are not warranted or appropriate.
- Anti-rebating laws still serve numerous public policy interests.
- Statutes prohibit certain types of anti-competitive and anti-consumer behavior.
- Interpretations of these statutes are very inconsistent across the U.S.
- Some states have interpreted the statute to allow:
  1. Anything to a consumer or potential consumer that is specified in the actual policy.
  2. The provision of items or services that have a value below a certain monetary threshold.
  3. Insurance-connected items or services (including those related to risk mitigation) to be provided without running afoul of the anti-rebating laws.
- Examples of several states that can serve as interpretative examples for other jurisdictions.
- Observations and suggestions:
  1. The repeal of anti-rebating statutes is a bad idea.
  2. Consider whether the state’s interpretation of the existing law is consistent with the actual legislative text.
  3. Opening the door to items and services with no insurance nexus is not warranted, and it is likely to result in a lack of interstate consistency.
  4. Comments focused on individual insurance buyers and small commercial insurance purchasers might be different for more sophisticated commercial clients.
- The IIABA feels that there is a need to modernize prohibitions on fees for services.
Commissioner Godfread asked Mr. Bisset what the IIABA’s position is on the monetary threshold that some states have implemented. Mr. Bissett said it would be good to look at it in terms of putting things in different baskets, such as contests and raffles, social courtesies, and risk control related items. He said the benefit of having a monetary threshold is that it provides a way to stay away from getting into the minutiae. He said having the same monetary threshold for everything is not a good idea.

Director Wing-Heier asked if the IIABA thought there should be a different standard for commercial lines. Mr. Bissett said this should be looked at through the lens of individual versus commercial buyers.

Superintendent Dwyer asked about the point Mr. Bissett made about fees. He said the IIABA thinks the issue of agents not being allowed to charge a fee for services should be addressed.

Commissioner Ommen said if the item is in the contract (e.g., devices) the amount is irrelevant. He asked Mr. Bissett if the IIABA has any concern about that. Mr. Bissett said if it is in the policy, it is not a violation of the anti-rebating laws. Commissioner Ommen asked Mr. Bissett if anything the IIABA has seen cannot just be put in the contract. Mr. Bissett said he did not know why these items are not just put in the policies more often, but producers do not file policy forms, so that would not apply to them.

Commissioner Godfread introduced the next presenter, John Fielding (Council of Insurance Agents & Brokers—CIAB) (Attachment Four-C).

Mr. Fielding made the following points in his presentation:

- The CIAB advocates for repealing anti-rebating laws for commercial insurance.
- Anti-rebating laws are problematic because they are unclear; therefore, they are open for individual states to interpret differently.
  1. Many states do not have any guidance explaining the language.
  2. Many states have some exceptions to the prohibitions.
  3. The states are all over the map in terms of providing “gifts.”
- Anti-rebating laws are not needed for the original stated purpose because state insurance regulators have numerous tools available to protect insurer solvency and consumers from unfair discrimination and other bad acts.
- The current situation results in producers wondering what they can and cannot do.
- In the interim, before complete repeal, the CIAB would be happy to provide some suggested steps in written materials.

Commissioner Godfread asked Mr. Fielding how he would respond to eliminating the anti-rebating laws for commercial, potentially distorting the market, with everyone moving to one or a limited number of big insurers that can afford to offer incentives and pick up the loss on the back side. Mr. Fielding said there is a big difference between commercial and personal lines. He said commercial lines are very competitive, business-to-business transactions are generally between sophisticated buyers and sellers, and the transaction will result in different outcomes.

Director Wing-Heier asked about the netting of commissions. She also asked if that is considered rebating in some cases and if it creates an unlevel playing field. Mr. Fielding said the CIAB thinks it should be permissible, and it is part of the relationship between the broker and the commercial client to negotiate that.

Commissioner Ommen asked about devices and technology that allow consumers to interact (e.g., data to be collected on health behavior) and if the CIAB is seeing anything on the commercial side that producers want to put on the market for their customers that is not something that could be put in the policy. Mr. Fielding said it might be on the employee benefit side where data collection and analytics are important, and they can help the brokers work with their clients to get the best policy for them. He said brokers do not have control over what is filed in the policy, and some of these things can be very difficult to get in the policy and approved for every plan being worked. He said it can be difficult to include everything the customer may want to be provided in the policy, and it changes quickly. He said he would get the Task Force members more specific examples from CIAB members.
Commissioner Godfread introduced the next presenter, Benjamin Sykes (Locke Lord) (Attachment Four-D).

Mr. Sykes made the following points in his presentation:

- State insurance regulators should consider revisions to current laws to allow for value-added services and products, without the requirement that they be explicitly in insurance carriers’ filed rates and insurance policy forms.
- It is costly and time-consuming, and it stifles customer-friendly insurance innovation.
- An appropriate test for reviewing value-added services for rebating purposes should include asking:
  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, taken as a whole, unrelated to the insurance coverage being provided?
- If the answer to all three of the questions above is “no,” then it should not be considered harmful.
- Devices are not being given away for inducement purposes, they are doing it because the producer or carrier wants the data. They want to be sure that nothing is being done in a discriminatory manner.
- This is not the first time the industry has seen innovation. Software as a service (SaaS), provided to everyone, sounds like a rebate, but the industry and state insurance regulators have evolved to believing that there is a lot of consumer good with that type of model. There are a lot of bulletins and circulars on how to do this, but they are very inconsistent.
- In general, it is recognized that where the value-added service is directly related to the policy and distributed on a non-discriminatory basis, it is not a rebate.
- The three-part test should be:
  1. Does it impact solvency?
  2. Is it being offered on a non-discriminatory basis?
  3. Is it related to the policy?
- Locke Lord fully supports what the Ohio Insurance Department did regarding rebating. A bulletin that mirrors that approach should be proposed.

Commissioner Godfread said he appreciated the comment related to the three-point test.

Commissioner Godfread introduced the next presenter, David F. Snyder (American Property Casualty Insurance Association—APCIA) (Attachment Four-E).

Mr. Snyder made the following points in his presentation:

- Background regarding this issue.
- The purpose of anti-rebating and inducement laws, noting that the law addresses any rebate or other valuable consideration to the prospective insured as an inducement to purchase insurance or any renewal coverage. An insurer or insurance producer may not provide or offer to provide a special benefit or discount that is not specified in the contract.
- In order to provide clarity and ensure that important risk mitigation offerings can be made, the APCIA offered model language intended to be added to existing anti-rebating/trade practices statutes. It provides that products or services intended to “educate about, assess, monitor, control or prevent risk of loss to persons or property” be exempt.
- The APCIA is not proposing to repeal existing language.

Mr. Snyder introduced Joyce Mellinger (Zurich North America) (Attachment Four-F) to make some additional points that included:

- It is time to dust off anti-rebate laws.
- Anti-rebating laws started in the life insurance area to protect solvency and then moved into the property & casualty world.
- Zurich supports the proposed language from the APCIA.
- Examples of real-life products and services that the Zurich team have reviewed, indicating that exceptions should be made to the anti-rebating laws that recognize the value of improving customers’ risk profiles by providing products and services that mitigate risk.
Commissioner Godfread asked Mr. Snyder if this proposed language would be in addition to the existing language or if it replaces any language. Mr. Snyder confirmed that it is in addition to the existing language.

Commissioner Godfread introduced the next presenter, Brian Ewing (Notion) (Attachment Four-G).

Mr. Ewing made the following points in his presentation:

- The Notion business model and insurance products and services it offers.
- The anti-rebating laws still have merit, and they should not be thrown away.
- Notion’s comments are mostly focused on IoT devices, namely those that provide sensors to monitor issues in a home that may lead to a problem that may lead to a claim.
- Balance or pro-active and reactive offering.
- Sensors give peace of mind, but they also provide a lot of valuable data that can lead to insights not available before that will lead to major changes and innovation.
- A change to the current way the law is interpreted and implemented needs to be made to enable technology to benefit consumers, in terms of home protection.

Commissioner Godfread asked Mr. Ewing what the scope of Notion’s activity is at this time. Mr. Ewing said Notion works with the top 10 insurers based on three factors, including customer acquisition, customer retention and claims reduction. Notion also works on having early success with small commercial policies covering things like places of worship where there might be an older building that is not staffed a lot of the time and may experience issues during those times.

Commissioner Godfread asked if the activity was more on customer acquisition or retention. He also asked if Notion had run into any regulatory obstacles with either of those. Mr. Ewing said going state by state is time consuming, and deployment can take anywhere from six to nine months, so there are some issues with the ability to move quickly. He said the acquisition model has fewer issues, and they are seeing some good success there.

Commissioner Ommen asked if companies were using some of the language in policies like the proposed APCIA model language. Mr. Ewing said that sounded like a really good framework to start working with, but putting it in the policy does take time. The result is that it may only be available to customers in 16 or 17 states where the company has been able to move quickly but not so in others because of legislation.

Commissioner Godfread introduced the next presenter, Michelle LaFond (Unum) (Attachment Four-H).

Ms. LaFond made the following points in her presentation:

- Existing laws were designed to serve an important purpose, but trying to apply the existing model law and guidelines to modern practices has led to uncertainty and unpredictability.
- To provide clarity, the states have issued additional rules and guidance, but that has led to more issues.
- There are two ways that offerings can be allowed: if filed in the contract; or if “directly related” to the insurance product.
- The benefits of providing more clarity include making it easier and less risky to innovate; ensuring an even playing field in the marketplace; and minimizing unexpected enforcement challenges.
- Given the current situation, Unum encourages working together to get clear and consistent guidance that can serve well now and into the future.

Commissioner Godfread asked Ms. LaFond if Unum believes a model law amendment is the way to go. Ms. LaFond said yes, but she has not yet had an opportunity to review the APCIA language. She said the language sounds intriguing, and she looks forward to looking into it more deeply.
Commissioner Godfread introduced the next presenter, Birny Birnbaum (Center for Economic Justice) (Attachment Four-I).

Mr. Birnbaum made the following points in his presentation:

- Insurance products are different from other consumer product offerings; therefore, it is not relevant to look at it the same way in terms of innovation and assessing anti-rebating provisions in insurance.
- Anti-rebating laws continue to be justified and changes to Model #880 are unnecessary.
- The CEJ has not seen evidence of impeded innovation due to anti-rebating laws.
- Time should be spent reviewing specific instances where the states have lacked uniformity regarding Model #880.
- The CEJ advocates for incorporating loss prevention devices and services into the policy contract.
- The historical reasons for anti-rebating laws—unfair discrimination and unfair competition—remain relevant.
- The CEJ proposes that a group, perhaps under the Market Regulation and Consumer Affairs (D) Committee, should look at this issue, as opposed to getting rid of anti-rebating laws or carving out an exception.

Commissioner Godfread said he took issue with the suggestion these issues are not backed by more than anecdotal evidence, and he said this language had not been reviewed in a very long time; therefore, it makes sense to look at them now in a more comprehensive way and in light of the innovation happening today. He asked Mr. Birnbaum if the CEJ is opposed to the use of IoT devices. If the CEJ does not believe a model law change is in order, Commissioner Godfread asked Mr. Birnbaum if the CEJ suggests that a white or best practices paper is needed.

Mr. Birnbaum said the CEJ has always promoted loss mitigation and using big data tools and opportunities to partner with consumers. He said there is no evidence to support the need to modify the anti-rebating model law, and he asked why these risk mitigation products or services cannot just be included in the policy form; there is fair treatment of insurers and no unfair discrimination. He said a white paper is not necessary, and entities who have had difficulty in any state should present that to the NAIC and have state insurance regulators discuss why that happened.

Mr. Diederich said Mr. Birnbaum mentioned market segmentation, and he asked if Mr. Birnbaum would elaborate on the use of big data to develop an individual risk profile that might run contrary to the risk spreading function of insurance and if anti-rebating laws need to exist to avoid that.

Mr. Birnbaum said the issue of rebates deals with payments that are not related to the cost of the transfer of risk. He said the risk segmentation presumption should be based on some assessment of the consumers’ risk, as opposed to their profitability (price optimization) or likelihood to accept a low-ball claims settlement offering. He said the CEJ is all for risk assessment that empowers consumers to change behaviors to reduce risk, but the CEJ is against opening anti-rebating laws to use big data technology to attract the more favorable risk and leaving the more vulnerable in a worse situation.

In addition to the above presentations on anti-rebating language in Model #880, comment letters were received from the following: Drinker Biddle & Reath, National Association of Professional Insurance Agents—PIA, and RIMS, The Risk Management Society (Attachment Four-J).

4. **Heard a Presentation from the Rhode Island Division of Insurance Regarding Rebating**

Superintendent Dwyer said the Rhode Island Division of Insurance’s approach (Attachment Four-K) was to take the narrowest interpretation of the language that still protects consumers. She said they issued a bulletin in 2009 that talks about what an inducement, gift and consideration mean, separate from what this statute is talking about. Offering $500 or a television if the consumer buys the policy is absolutely prohibited. She said all the other stuff does not fall under the rebating statute. It actually harms consumers by taking away products and services they would enjoy, and it only increases costs that are passed on to consumers. Superintendent Dwyer said if it is offered to entire categories of people; they do not consider that a gift or consideration in the form of an inducement. She said the original bulletin was based on agents turning each other in, which was what was going on in 2009. She said the discussion then turned to Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) services. She said she is in favor of agents offering as many services as possible, and that is why they are there. The Rhode Island Division of Insurance looked at what they were offering and if it was effective and not causing consumer harm. She said the third and current area is in the insurtech arena, and it related to items being offered regarding risk mitigation. She said Rhode Island does not consider those to be a rebate if they are designed to mitigate loss or gather information from which loss mitigation can be determined in the future. She said it is very difficult to get that data without allowing these devices to be used so insurers can test if there will be an effect on rates.
Superintendent Dwyer said she has been asked to update the bulletin, but from what she is hearing, the biggest issue is lack of uniformity across the states; therefore, she said she does not plan to go forward with a change and will wait to see what can be done to get a more consistent interpretation that can bring down frictional costs for insurers and consumers. She said Maine has done a lot in this area that the Task Force can pull from as well.

5. **Discussed Next Steps for the Anti-Rebating Discussion**

Commissioner Godfread asked the Task Force members how they would like to proceed, reviewing the options. Superintendent Franchini said New Mexico just passed an anti-rebating change increasing limits to $250, but that may have been a waste of time based on this discussion. He said he is in favor making the necessary changes to help our constituents and get technology permitted.

Superintendent Dwyer said she tried a couple years ago to amend the statutes, and agents objected. She said getting a change through would be difficult, and she agreed that there are cases where it is necessary but might be best as a bulletin or regulation based on the language that most of the states already have. Superintendent Franchini said it would be important do this uniformly and developing a bulletin may not get a consistent implementation.

A member of the Task Force said it seems that there are different needs depending on the type of entity. He said it seemed that there are differences depending on whether, for example, the entity is an agents/producer/broker or an insurer. He asked if there is a way to consider looking at and identifying issues for those specific levels and considering how the language applies to those entities, possibly separating out those areas in any type of change that comes about.

Commissioner Godfread said that could be considered in the work ahead.

Having no further business, the Innovation and Technology (EX) Task Force adjourned.

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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.
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.
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.
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:
**Example 1: 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.

**Example 2: 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 contract or extended warranty. *See N.Y. OGC Op. No. 08-05-15 (May 30, 2008).*
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.
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
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.

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.]

**Conclusion**

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.
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.
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 educate, 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.
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 marketplace:** 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 and 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**
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 have 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.

Insurance is different from other consumer products.

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 20051, 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.

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

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.*

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:

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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.

CEJ has not seen evidence of impeded innovation due to anti-rebating laws.

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.

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.

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.

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.
Insurance Bulletin Number 2009-9

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.

Issued: November 20, 2009
Amended:
May 10, 2019

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

Re: Outdated Anti- Rebating Prohibitions

Commissioner Godfrey 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
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,

Dan Brown
Via email to Denise Matthews at dmatthews@naic.org

Commissioner Jon Godfrey, 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 Godfrey:

On behalf of the National Association of Professional Insurance Agents (PIA National), 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).

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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1 PIA is a national trade association founded in 1931, which represents member insurance agents in all 50 states, Puerto Rico, Guam, and the District of Columbia. PIA members are small business owners and insurance professionals who can be found across America.
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 or (703) 518-1344 with any questions or concerns. Thank you for your time and consideration.

Sincerely,

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

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, and New York, through adoption of Circular Letter No. 9 (2009), which includes a list of permissible practices that otherwise could constitute rebating. 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.

**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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2 NH § 402:41(1)(d)(1)-(2)
3 Available at: [https://dfs.ny.gov/insurance/circltr/2009/cl09_09.htm](https://dfs.ny.gov/insurance/circltr/2009/cl09_09.htm)
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 wcraig@rims.org.

Sincerely,

Gloria Brosius, RIMS CRMP
RIMS President