

## Draft Pending Adoption

Draft: 7/25/19

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 Smid (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); Chlora 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 (Attachment One). The motion passed unanimously.

### 2. Heard a Presentation from the California DOI 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 insurtech or insurance 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 Two). He said even after the passage of Proposition 103, anti-rebating statutes remain in place for title, mortgage guaranty and financial guaranty insurance.

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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 (Attachment Three), Wesley Bissett (Independent Insurance Agents and Brokers of America—IIABA).

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.

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- 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. Bissett 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).

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 (Attachment Four).

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.

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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 Five).

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 (Attachment Six), David F. Snyder (American Property Casualty Insurance Association—APCIA).

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.

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Mr. Snyder introduced Joyce Mellinger (Zurich North America) 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 Godfreed 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 Godfreed introduced the next presenter (Attachment Seven), Brian Ewing (Notion).

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 Godfreed 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 Godfreed 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 Godfreed introduced the next presenter (Attachment Eight), Michelle LaFond (Unum).

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.

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- 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 (Attachment Nine), Birny Birnbaum (Center for Economic Justice).

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.

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

Superintendent Dwyer said the Rhode Island Division of Insurance's approach 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

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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 (Attachment Ten).

### 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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