COMMENTS

Anti-Rebating Draft NAIC Model Unfair Trade Practices Act (Model #880) Amendments
Oct. 30, 2020 Draft

American Council of Life Insurers (ACLI)
American InsurTech Council (AITC)
American Property Casualty Insurance Association (APCIA)
Council of Insurance Agents and Brokers (“The Council”)
Independent Insurance Agents and Brokers of America (IIABA)
National Association of Mutual Insurance Companies (NAMIC)
Paul Zuckerman Consulting, LLC
Dear Superintendent Dwyer:

On behalf of the American Council of Life Insurers (ACLI) thank you again for allowing the opportunity to comment on the draft Section H of the NAIC Uniform Unfair Trade Practices Act (UTPA). Our members are still viewing the latest draft, but we thank the Task Force for the positive changes that have been made to date. The recommendations below reflect the most important changes we would like to be considered.

Financial Wellness

As ACLI has previously noted, financial wellness is an important category that encompasses a number of value added services offered by life insurers. We appreciate its inclusion in the draft, but strongly urge the rewording of this subsection so as not to be so potentially limiting. Our suggestion is that the subsection read:

Enhance financial wellness through items such as education or financial planning services.

Clarifying Drafting Note

During the November 4th call of Task Force it was stated that a number of ACLI suggested changes to the draft UTPA were deemed unnecessary because the current language provides sufficient flexibility for life insurers with respect to value added services. In order to provide
some measure of reassurance that the Model will be interpreted in this spirit, we suggest a drafting note that states:

This Section is not intended to limit or curtail existing value added services in the marketplace. It is intended to promote innovation in connection with the offering of value added services while maintaining strong consumer protections.

Thank you again for all the work that has gone into this draft UTPA. ACLI supports the effort to modernize the anti-rebating section of the Model, and with these modest suggested changes we believe it will accomplish this task while appropriately balancing innovation and consumer protection.

Sincerely,

David M. Leifer
November 18, 2020

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

Commissioner Godfread:

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

The proposed changes to NAIC’s Section 4(H) of NAIC Model Unfair Trade Practices Act reflect an important step forward. Insurers and their partners continue to work on using technology to improve the health, life, and well-being of their clients. While the statement may seem to be an overstatement, it is important to understand that increasingly technology assists in aligning consumer and insurer interests. Life and health insurers are using technology to help their client’s live longer and healthier lives. Auto insurers have worked to ensure their drivers and their cars are safer. Homeowner insurers help consumers monitor their house to mitigate damage before it becomes serious.

In short, these changes reflect what has been happening in the insurance market and appreciate regulators willingness to think about these issues in new ways. But these changes are just the first step.

In some ways, we’d like to suggest a look at the past to consider the future of insurance regulation. We’d like to highlight efforts made in Wisconsin in the revision of the insurance code done in the 1970’s. The code revision included a little noted provision that allows Wisconsin’s Insurance Commissioner to waive the enforcement of any state insurance law with a public hearing, and a finding that waiving the law will not harm consumers, will not hinder competition, nor harm the insurance market.
It is hard to imagine a similar law passing today, but that level of bold action will be necessary to help bring the insurance market into the future. We strongly support a similar comprehensive review of all NAIC model laws to ensure that they are modernized with the same quick, collaborative action used in this model.

In closing, we are a newly founded InsureTech trade group with experience in life, health, and property and casualty insurance as well as experience as regulators, legislators, strategic and political advisors,, and c-suite executives. We believe it remains vitally important for regulators to be able to understand the changing insurance markets before they come to your state. We stand ready to assist, the NAIC, the members of this committee, and all states to navigate the revolutionary changes that will be coming to the insurance market in the same way the financial markets have been revolutionized.

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

Respectfully Submitted,

Scott Harrison (sharrison@americaninsurtech.com), Jack Friou (jfriou@americaninsurtech.com), The Hon. Thomas Mays (tmays@americaninsurtech.com), JP Wieske (jpwieske@americaninsurtech.com), Teri Hernandez (thernandez@americaninsurtech.com) Co-Founders, American InsurTech Council
Dear Commissioner Godfread and Superintendent Dwyer:

The American Property Casualty Insurance Association (APCIA) thanks the Innovation and Technology (EX) Task Force (Task Force) for its continued collaboration on amendments to section 4(H) of the Unfair Trade Practices Act. As the Task Force nears the final stages of its drafting effort, APCIA offers two important edits for your consideration.

**Subsection (H)(2)(e)(v) – Written Criteria**

APCIA continues to have practical concerns with the reference to “written” criteria. Questions remain as to where and how the written document is to be maintained. Maintenance also begs the question of what the record retention requirements might be. Further, APCIA is unaware of another context in which insurers have an affirmative duty to maintain similar written objective criteria that could serve as guidance.

We understand the regulator’s goal as requiring insurers to develop objective criteria for administering the value-added products and services and that such criteria must be available to the regulator upon request. To meet this goal and provide producers and insurers with necessary flexibility and clarity, we respectfully urge the Task Force to replace “written” with “documented” and remove the reference to maintenance. “Documented” will not change the intent and is also a more neutral term that will allow the requirement to evolve with technology and new methods for maintaining and storing information.

**Suggested Edit**

The availability of the value-added products or services must be based on fair written documented objective criteria and offered in a manner that is not unfairly discriminatory. The written documented
criteria must be maintained by the insurer or producer and produced upon request by the Department. [States may wish to consider alternative language based on their filing requirements.]

**Subsection (H)(2)(e)(vi) – Pilot Program**

The challenge presented by the pilot project requirements is finding the right legislative language to balance the regulator’s consumer protection obligations with speed to market and truly supporting insurer and producer innovation to meet consumer needs. Unfortunately, APCIA does not believe the new language achieves this balance. In a multi-state context, if an insurer or producer will have to discuss and get agreement from multiple states, the insurer’s innovation team may determine that the pilot project is not worth pursuing. Further, an “approval” requirement mandates that the insurer stick to the four corners of the agreed upon program. In a pilot program the insurer needs the freedom to quickly adapt based on what they are learning from the pilot without being required to go back to the regulator(s) to adjust the agreement.

The review and approval process will stifle and delay innovation and for this reason we respectfully urge you to limit the requirement to a notification obligation and avoid any statements related to review and approval.

*Suggested Edit*

If an insurer or producer does not have sufficient criteria, but has a good faith belief that the product or service is intended to meet the criteria in (H)(2)(e), the insurer or producer may provide the product or service in a fair manner that is not unfairly discriminatory as part of a pilot or testing program for a reasonable period. The insurer or producer must notify the department of such pilot or testing program offered to consumers in this state. The pilot must be discussed and reviewed with the department. The details of which must be agreed upon by the department.

Thank you again for the opportunity to comment and we are happy to answer any questions that you may have.

Respectfully,

Angela Gleason
November 18, 2020

VIA ELECTRONIC MAIL – dmatthews@naic.org

Commissioner Jon Godfread
Chair, Innovation and Technology (EX) Task Force
National Association of Insurance Commissioners
c/o Ms. Denise Matthews
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197


Dear Commissioner Godfread,

The Council of Insurance Agents and Brokers (“The Council”) appreciates this opportunity to comment on the Task Force’s most recent draft revisions to the Unfair Trade Practice Act (“UTPA”) rebating provisions.1 The Council strongly supports and applauds the Task Force’s efforts to modernize the rebating regime. Our comments below focus solely on changes in the October 30, 2020 exposure draft and are intended to supplement our August 28, 2020 submission on the previous draft. We look forward to continued discussion with the Task Force on these important issues.

1 To avoid confusion and uphold the purpose of paragraph (f)(ii), the added sentence at the end of the paragraph should be revised to read: “The offer must be made in a fair manner that is not unfairly discriminatory.”

We reiterate our support for the current construct of the revised draft, which appropriately distinguishes between individual insureds and commercial/institution clients with respect to the giving of gifts and services. Commercial insureds are sophisticated purchasers and insurance sales are arm’s length, business-to-business transactions. There is therefore no material concern that gifts or services will improperly or unfairly induce these clients to purchase insurance.

While we recognize that the full sentence added to (f)(ii) mirrors language in (f)(i) and (f)(iii), it is confusing in (f)(ii) (given the rest of the paragraph) and threatens to undermine the purpose of the entire commercial/institutional provision. The Council does, however, support retaining the first half of the added sentence – “The offer must be made in a fair manner that is not unfairly

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discriminatory.” – as an important clarification and guardrail that is consistent with the rest of subsection (f).

The second half of the added sentence is problematic. The opening sentence of (f)(ii) explicitly allows gifts and services to be offered “in connection with the marketing for the sale or retention of contracts of insurance. . . .” The added sentence, though, would prohibit such offerings that are “contingent on the purchase, continued purchase or renewal of a policy.” This effectively eliminates contractual offers of services to these sophisticated insureds, even if the offered services would comply with the guardrails already built into (f)(ii) (reasonable compared to the premium/proposed premium, not charged to other persons or entities, and not unfairly discrimination). This internal inconsistency and confusion are unique to paragraph (f)(ii), which is intentionally structured differently than (f)(i) and (f)(iii) because of its focus on commercial/institutional insureds.

For these reasons, we request that the Task Force remove the following language from the last sentence of (f)(ii): “and may not be contingent on the purchase, continued purchase or renewal of a policy.”

2. The drafting note on a suggested $250 dollar limit for meals, charitable donations, and non-cash promotional items should appear directly below paragraph (f)(i) to avoid confusion as to its applicability, and the drafting note should not include the added language pertaining to commercial and institutional clients.

Commercial and institutional insureds vary considerably in size and amount of insurance purchased, which may factor into the overall reasonableness of a gift. Consequently, a one-size-fits-all approach – i.e., specifying a uniform dollar limit for gifts to commercial insureds – does not make sense in the commercial space. We therefore urge the Task Force to return to its earlier approach and avoid any reference to a set dollar limit for these insureds, including the suggestion in the current drafting note that such a limit be considered by the states.

As drafted, the note would lead to a patchwork of state approaches to gift limits for commercial and institutional insureds, contrary to the policy objectives of this effort to reform the Model Act. A better way to assess the reasonableness of gifts and services is already contemplated in paragraphs (e)(v) and (e)(vii) of the exposure draft – and, for commercial/institutional insureds, reiterated in paragraph (f)(ii) – i.e., based on nondiscriminatory, objective criteria and proportionality to a client’s coverage.

Accordingly, we encourage the Task Force to remove the last sentence from the section (f) drafting note and move the drafting note directly below paragraph (f)(i) to clarify its applicability to non-commercial/institutional insureds.

* * *

2 For example, a $250 meal for a Fortune 500 company executive likely would not have any impact on a purchasing decision. But a trip to Hawaii for a small business owner could have quite an impact.
Again, we appreciate the Task Force’s continued efforts on rebating reform and your consideration of our comments. Please do not hesitate to contact us if we can provide additional information or answer any questions.

Respectfully submitted,

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November 18, 2020

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

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

Dear Commissioner Godfread:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), I write to comment on the draft revisions to the Unfair Trade Practices Act. IIABA is the largest association of insurance producers in the United States and represents hundreds of thousands of insurance professionals, and our members continue to have great interest in the work of your task force.

The task force has made considerable progress in recent months, but IIABA believes a handful of provisions require further consideration and revision. The outstanding issues are in some cases critically important, although certainly not insurmountable, and we look forward to working with the task force as the development of this model continues. IIABA also recognizes the group’s desire to conclude its work on this project in the near future, but we encourage regulators to permit oral comments on the proposal before taking final action. Stakeholders have not had the opportunity to comment in this way to date, and the process and final work product would likely benefit from such an exchange.

IIABA’s comments on the most recent draft – which focus most notably on the Section 4(H)(2)(f) safe harbors – follow below.

Section 4(H)(2)(e)

The aspect of the model that has received the most consideration so far is Section 4(H)(2)(e), which creates a safe harbor that would enable insurers and producers to offer certain insurance-related products or services (including those related to risk mitigation) without running afoul of the anti-rebating laws. Our comments on this subparagraph follow below:

- We wonder what the addition of the phrase “value-added” is intended to mean and what effect it has on the types of products or services that may be offered, and we have not heard a meaningful explanation for the inclusion of the phrase. Unless the addition of the phrase has a purpose and achieves a particular public policy objective, we recommend its removal.
Section 4(H)(2)(e)(iv) makes reference to promulgating regulations to implement the “permitted practices set forth in this regulation” (emphasis added). Since the proposal takes the form of model law and not a rule, we recommend revising this provision to refer to regulations that implement the “permitted practices set forth in this subparagraph” (emphasis added).

Section 4(H)(2)(e)(vi) addresses the offering of products or services when a licensee cannot demonstrate with certainty that a particular product or service satisfies one or more of the requirements set forth in Section 4(H)(2)(e)(ii). The included reference, however, is too broad and should be narrowed to Section 4(H)(2)(e)(ii). IIABA also believes any pilot or testing program should be limited in duration (e.g. to one year), and we will urge any state ultimately considering this proposal to incorporate such a restriction.

Section 4(H)(2)(e)(vii) is intended to require that the cost of any product or service offered pursuant to the safe harbor is reasonable in comparison to that client’s premiums or coverage, but the provision only states that the cost should meet that standard. Such aspirational wording is not appropriate for a statute setting forth an affirmative requirement, and the clause should be revised to make clear that this is an obligation for any licensee offering or providing something pursuant to Section 4(H)(2)(e). We also believe that moving this provision so that it immediately follows the requirements set forth in Section 4(H)(2)(e)(i) and (ii) would be helpful.

The first appearance of the word “client” is in Section 4(H)(2)(e)(ii)(VIII), and the term is used throughout the proposal. IIABA opposes the use of the word “client” in the model and does not believe it is appropriate in this context. The term is used elsewhere in the Unfair Trade Practices Act to describe a fiduciary relationship between a consumer and a financial planner or investment adviser, and the model proposes using it in a way that is no consistent with those other provisions. We suggest using an alternative term (such as “customer”) and largely retaining the definition currently in place. We also recommend a modest revision that makes clear the definition exists for purposes of this subsection or paragraph only.

Section 4(H)(2)(f)

IIABA is most confused by and potentially concerned with the Section 4(H)(2)(f) safe harbors and with clauses (i) and (ii) in particular. Section 4(H)(2)(f)(i) appears intended to provide that gifts, items, or services with a value below a certain monetary threshold do not violate the anti-rebating statute, and Section 4(H)(2)(f)(ii) is designed to permit the offering of such things to commercial or institutional insureds when their cost is reasonable in light of the premium paid. The intent seems relatively clear, but the provisions do not achieve their objectives as currently crafted. The existing text is frustratingly confusing and inconsistent, and we urge the task force to craft these clauses in a clear and straightforward manner that can be easily understood by industry. We have highlighted some of the areas of confusion and concern below:

- Section 4(H)(2)(f)(i) and Section 4(H)(2)(f)(ii) are similar safe harbors, but they inconsistently and unnecessarily refer to universe of things that a licensee might offer to a customer in different ways. The former allows the offering of “meals”, “charitable donations”, and “non-cash promotional or advertising items”, but the latter refers to a different universe of things (“gifts or services”). The former also makes clear that only “non-cash” items may be provided, but there is no such restriction in the latter. This formulation will create confusion about why distinct and different terms are used and what the differences are intended to mean. To address these problems, we urge the task force to clarify the text and use more consistent terminology in these two clauses.
Both Section 4(H)(2)(f)(i) and Section 4(H)(2)(f)(ii) would require the offer of anything permitted by the safe harbors to be made to both customers and non-customers (i.e. prospective clients), and we wonder why such a condition is included. Section 4(H)(2)(f)(i), for example, seems to say, among other things, that an agent can have lunch with a customer but must offer the same lunch opportunity to even non-customers. In order to alleviate this confusion and potentially odd outcome, we recommend that the task force simply provide for a state-specific monetary threshold and allow anything below that amount to be offered without violating the statute.

Section 4(H)(2)(f)(i) would address the offering of items that are “promotional or advertising” in nature – but not items that cannot be categorized as such – and this structure seems certain to lead to questions about whether a particular item is “promotional” or “advertising.” We question whether the phrase and the distinction it creates are beneficial or necessary and what public policy goal its inclusion serves.

We urge the task force to focus in particular on Section 4(H)(2)(f) and to revise the provision in order to eliminate this ambiguity and confusion and so that its clauses are clearer and more consistent. We have outlined one possible alternative approach to crafting Section 4(H)(2)(f)(i) and Section 4(H)(2)(f)(ii) below:

\[(f)\] An insurer or producer may:

\[(i)\] offer or give non-cash gifts, items, or services, including meals to or charitable donations on behalf of a client, in connection with the marketing, sale, purchase, or retention of contracts of insurance, as long as the cost does not exceed an amount determined to be reasonable by the commissioner per policy year per client. The offer must be made in a manner that is not unfairly discriminatory.

\[(ii)\] offer or give non-cash gifts, items, or services, including meals to or charitable donations on behalf of a client, to commercial or institutional clients in connection with the marketing, sale, purchase, or retention of contracts of insurance, as long as the cost is reasonable in comparison to the premium or proposed premium and the cost of the gift or service is not included in any amounts charged to another person or entity. The offer must be made in a manner that is not unfairly discriminatory.

Conclusion

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

Very truly yours,

Wesley Bissett
Senior Counsel, Government Affairs
November 18, 2020

Commissioner Jon Godfread, Chair
NAIC Innovation and Technology (EX) Task Force
c/o Denise Matthews – dmatthews@naic.org
1100 Walnut Street, Suite 1500
Kansas City, MO 64106-2197

Re: NAMIC comments - Amended model language addressing rebating – October 30, 2020 exposure

Dear Commissioner Godfread and Members of the EX Task Force,

Please find included herein comments on behalf of the National Association of Mutual Insurance Companies (hereinafter “NAMIC”) regarding the amendatory language addressing anti-rebating modernization in the NAIC model law #880 - Unfair Trade Practices Act. These comments are intended to address the October 30, 2020 exposure. NAMIC wants to thank the task force for the ability to provide comments on this important modernization effort as it progresses. NAMIC continues to applaud the work of the task force for moving to fruition the removal of regulatory barriers that prevent reasonable measures concerning consumer interaction in this regard by industry.

In looking at the latest draft and being mindful of the Chair’s admonition to only provide new comments, NAMIC would suggest the following matters could be clarified with possibly more revision while understanding that they were well intended.

- The numbering in 4(H)(2)(f) appears to be incorrect.
- Section 4(H)(2)(f)(i) states “per policy year per client” which is confusing in light of the prior qualification of “for all named or additional insureds in the policy in total.” For one, if there is a six-month auto policy, for instance, is this limited to only one time per year? Further, what is a “client” and what limitations are there for a household for instance or other business entity in light of the previously mentioned qualification. Is this limited to only one or several persons? The use of client in two instances and then the insureds usage creates confusion. Focus is suggested on scope of the intended parameters which should be broad and on the policy term or period such as “per policy per term.”

1The National Association of Mutual Insurance Companies is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner’s insurance market and 53 percent of the auto market. Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.
Further, in both (f)(i) and (f)(ii) (second paragraph numbered i) and in other sections, the “fair manner” usage is potentially creating a different standard from the unfairly discriminatory standard. Without defining “fair manner,” it may be interpreted separately from unfair discrimination causing an unworkable standard of compliance. “Fair manner” is highly subjective. Attempts at clarification in regulations may cause a regulatory patchwork of compliance demands which these reforms were intended to remove to some extent.

In subsection 4(H)(3), the ban on the word “free” appears to be absolute and unqualified. This could cause many unintended consequences in areas well beyond the concern on tying if that is the intention. It would conceivably prohibit an insurer from accurately promoting one of the many programs that the preceding sections purport to enable. We do not think this achieves its intended goal and quite possibly eradicates the reforms as enunciated. False advertising and misrepresentations are handled in other sections in the UTPA or other regulations. If the intent is anti-tying language that might have to be specified further.

We look forward to continuing to engage with the task force on this important workstream and thank you for your consideration of our suggestions.

Sincerely,

Andrew Pauley, CPCU
Government Affairs Counsel
National Association of Mutual Insurance Companies (NAMIC)
November 17, 2020

Honorable Jon Godfread
Commissioner, North Dakota Department of Insurance
Chair, NAIC Innovation and Technology (EX) Task Force
National Association of Insurance Commissioners
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RE: Draft UPTA Amended Language Addressing Rebating

Dear Commissioner Godfread:

As a former regulator, I appreciate the opportunity to again offer comments on the NAIC’s Innovation and Technology (EX) Task Force (Innovation TF) proposed revisions of the NAIC Unfair Trade Practice Act. I have previously offered comments on the earlier drafts.

I was Assistant Deputy Superintendent and Counsel for the New York Insurance Department and its successor the Department of Financial Services in the Department’s Office of General Counsel before my retirement in 2019. In my nearly four decades at the New York Department, it frequently addressed rebating and inducement questions. I preface my remarks to note that I do not speak for the New York department nor are these comments made on behalf of any clients.

While the anti-rebating laws could probably stand some dusting off, I remain concerned that the draft provides exceptions that are too broad and will result in unfair discrimination and may add significant additional costs to insureds. However, I also recognize that the NAIC seems committed to moving forward with this proposal, which is notably better than the recent NCOIL model. So, I am attaching a suggested mark-up of the draft that I believe would add some necessary added protections for insureds. I do have a few general observations to raise.

The draft allows producers to provide services and products without any regard to what is offered to other insureds with a particular company. The variance of significant services and products from producer to producer within a single insurer’s insurance products can be seen in of itself to be unfairly discriminatory. Producer A will offer products and services for insureds that will not be available elsewhere. One result may be a lot of shifting to Producer A, which
itself is a market concern, especially for smaller producers who may not be able to compete, but many insureds also may not have that option to change producers and thus will not be afforded the same benefits that other insureds from the same insurer may have. And, even as the NAIC is looking at issues regarding race and insurance, there does not seem to have been any real analysis of whether or how the proposed rules will impact existing economic inequality that may already be present, particularly when producers offer their own incentives that will not be available to all insureds. I would urge that the NAIC fully explore how the proposal’s potential negative impact can be lessened.

The draft still does not address the role of an unlicensed third party in marketing the product or service. The draft permits third parties to offer their products or services to insureds of particular insurers at different costs than they would to the general public. Affiliated companies often market the relationship with the insurer or producer. In New York, this often meant that the unlicensed entity was deemed to be acting as an agent or broker without a license. Nor does the draft address marketing arrangements with surplus lines insurers.

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

Yours truly,

Paul A. Zuckerman
Section 4(H) of NAIC Model Unfair Trade Practices Act

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

H. Rebates.

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

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

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

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

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


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

There is always a cost for any service or product -the only question is who will pay for it and how will it be paid for. It is misleading to say that there is no cost when the cost is built into the overall price.

(i) Relates to the insurance coverage; [and]
(ii) Is primarily intended designed to satisfy one or more of the following:
(I.) Provide loss mitigation or loss control;
(II.) Reduce claim costs or claim settlement costs;
(III.) Provide education about liability risks or risk of loss to persons or property;
(IV.) Monitor or assess risk, identify sources of risk, or develop strategies for eliminating or reducing risk;
(V.) Enhance health;
(VI.) Enhance financial wellness through education or financial planning services;
(VII.) Provide post-loss services;
(VIII.) Incent behavioral changes to improve the health or reduce the risk of death or disability of a client (defined as policyholder, potential policyholder, certificate holder, potential certificate holder, insured, potential insured or applicant); or
(IX.) Assist in the administration of the employee or retiree benefit insurance coverage.

(iii) If the insurer or producer [is providing] provides the product or service offered, the insurer or producer must ensure that the client is provided with contact information to assist the client with questions regarding the product or service.

{Does (iii) mean that if the insurer or producer directly provides the service, it will be considered to be within the jurisdiction of the Insurance Dept to adjudicate issues regarding the product or service? If the insurer or producer does not provide the product or service, the client appears to have no protection under this proposal. What is the client supposed to do and who can the consumer go to if not within the Department’s jurisdiction, regardless of who provides the services? It is a serious deficiency in the draft to allow the insurer or producer to provide third-party services without giving the client a mechanism for addressing abuses with the product or service, particularly if the client has not choice to accept the service or product.}

(iv) The commissioner may adopt regulations when implementing the permitted practices set forth in this regulation to ensure consumer protection. Such regulations, consistent with applicable law, may address, among other issues, consumer data protections and privacy, consumer disclosure and unfair discrimination.

{As in other cases where the insurer or producer is given discretion previously regulate, a safety valve should be included to allow the commissioner authority to reimpose requirements if necessary. I would also urge that, rather than make it mandatory that no filing be required, that a note be added to permit states the option of requiring filings. This subparagraph (iv) should also apply to the provisions of section (f). It is not clear why the highlighted word “regulation” is used; won’t most states be doing this by statute?}

(v) The availability of the value-added product or services must be based on [fair] written objective criteria and offered in a manner that is fair and not unfairly discriminatory. The written criteria must be maintained by the insurer or producer and produced upon request by the Department. [States may wish to consider alternative language based on their filing requirements.]

{Should track the new language in (vi) and (vii). However, “fair” does not seem to add much and it is not clear how much fairer something can be if it is not already “unfairly discriminatory.” Perhaps “reasonable” is an alternative, though the word “reasonable” itself is problematic as used in the draft elsewhere with respect to the insurer’s or producer’s actions since, except in extreme cases, it is unlikely that something will be found to be “unreasonable”. Another alternative is giving the commissioner discretion where the activity is found to be harmful to insureds or the general public—see language in new proposed (g).}

In any case, overriding all these provisions, presumably, would be other state or federal laws that prevent various types of discrimination in all cases, regardless of whether it meets the insurance definition of being unfair. Should this be explicitly stated?

(vi) If an insurer or producer does not have sufficient criteria, but has a good-faith belief that the product or service meets the criteria in (H)(2)(e)(h), the insurer or producer may provide the product or service in a fair manner that is not unfairly discriminatory as part of a pilot or testing program for a
reasonable period of time. The pilot must be discussed and reviewed with the department. The details of which must be agreed upon by the department upon approval of the commissioner.

(vii) The cost to the insurer or producer offering the product or service to any given client should be reasonable in comparison to that client's premiums or insurance coverage for the policy class. Unless the product or service is included within the insurance policy, the insurer or producer providing the product or service shall provide the client with a notice that identifies the separate cost of the product or service and shall permit the client to reject the product or service.

Transparency is important. Ideally, the product or service should be offered as an opt-in not an opt-out. Clients should not be forced to pay for products or services that they may not need or want. In many cases, a client may already have the product or service separately. Not providing options to the client will add costs to clients and should be considered to be an unfair trade practice.

(f) An insurer or a producer may:

(i) offer or give non-cash promotional or advertising items or meals to, or charitable donations on behalf of a client, or as long as the actual cost of the non-cash promotional or advertising items or meals, or charitable donations, or non-cash promotion or advertising items for all named or additional insureds in the policy in total, does not exceed an amount reasonably determined to be reasonable by the commissioner per policy year per person client; does not exceed x percent of the premium; and purchase or renewal of an insurance policy is not required. The offer must be made in a fair manner that is not unfairly discriminatory and may not be contingent on the purchase, continued purchase or renewal of a policy;

Drafting note — The committee would suggest that, at the time of the drafting of this model, the lesser of 5% of the current or projected policyholder premium or $250 would be an appropriate limit, however specific prohibitions may exist related to transactions governed by the Real Estate Settlement Procedures Act of 1974 and the laws and regulations governing the Federal Crop Insurance Corporation Risk Management Agency.

(ii) offer or give gifts or services to commercial or institutional clients in connection with marketing for the sale or retention of contracts of insurance, as long as the cost is reasonable in comparison to the premium or proposed premium and the cost of the gift or service is not included in any amounts charged to another person or entity. The offer must be made in a fair manner that is not unfairly discriminatory and may not be contingent on the purchase, continued purchase or renewal of a policy; and/or

(iii) conduct raffles or drawings to the extent permitted by state law, as long as there is no financial cost to entrants to participate, the drawing or raffle does not obligate participants to purchase or have insurance from any specific insurer or producer, the prizes are not valued in excess of a reasonable amount determined by the commissioner and the drawing or raffle is open to the public. The raffle or drawing must be offered in a fair manner that is not unfairly discriminatory and may not be contingent on the purchase, continued purchase or renewal of a policy.

As drafted, it is unclear whether the insurer or producer could limit entry into the raffle to only existing insureds; the rest of the language implies not, but it doesn't actually say so.

It is not clear why there should be any cost limitation on the price under the circumstances where the raffle is open to the general public and not conditioned on the sale or purchase or renewal of insurance so long as the offering of the prize itself is not something that would put the insurer into financial straits, but that usually would be addressed by other provisions of the Insurance Law. The proposal as drafted would actually be limiting in some states such as New York, where raffles open to the general public have long been permitted without limitation on the price, subject, of course, to any solvency requirements.

Drafting note — The committee would suggest that, at the time of the drafting of this model, the lesser of 5% of the current or projected policyholder premium or $250 would be an appropriate limit, however specific prohibitions may exist related to transactions governed by the Real Estate Settlement Procedures Act of 1974 and the laws and
The broad definition of client means and a per client allowance of a gift or meal can result in incredibly large exceptions from the general rule as well as significant potential for unfair discrimination. A family with five children would be entitled to gifts and freebies far exceeding that of a single person. And, with a high enough amount determined to be “reasonable” per person, could pay for a family trip to Disneyworld. There is tremendous room for abuse in these provisions. The potential for unfair discrimination is only aggravated by permitting producers to provide their own incentives. Moreover, a one size fit all amount does not take into account the huge difference in costs of insurance for different kinds of insurance.

(3) An insurer, producer or representative of either or any other person may not offer or provide insurance as an inducement to the purchase of another product or policy or otherwise use the word “free” in an advertisement or in any way imply or assert that the cost of the insurance has been discounted or reduced unless in accordance with the rates on file with the commissioner. In no event shall an insurer or producer charge a client for products, services or other incentives provided to a third party.

(This is modeled after NY Ins Law 2308 to allow the Supt authority to impose restrictions where necessary. This should be tied to the language of (a)(iv), which should be moved here so that it would apply generally and not just to (e).

Drafting Note: Section 104 (d)(2)(B)(viii) of the Gramm-Leach-Bliley Act provides that any state restrictions on anti-tying may not prevent a depository institution or affiliate from engaging in any activity that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System.

The Board of Governors of the Federal Reserve System has stated that nothing in its interpretation on combined-balance discount arrangements is intended to override any other applicable state and federal law. FRB SR 95-32 (SUP). Section 5(q) of the Home Owners’ Loan Act is the analogous provision to Section 106 for thrift institutions. The Office of Thrift Supervision has a regulation 12 C.F.R. 563.36 that allows combined-balance discounts if certain requirements are met.

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