CARLTON FIELDS

The Gift of Giving: States Move to Amend Their Anti-Rebating Laws

May 05, 2021

On December 9, 2020, the NAIC Executive Committee adopted provisions to section 4(H) of the NAIC Unfair Trade Practices Act (Model 880) allowing insurers and producers to provide consumers with value-added products and services that are not specified in the policy. Massachusetts, New Mexico, New York, and North Dakota are proposing changes to their respective rebating laws, based on the changes to Model 880.

This article will examine the differences between the changes to Model 880 and the state initiatives. (Our previous article "NAIC Task Force Gives Insurers a Holiday Rebating Gift," Expect Focus – Life, Annuity, and Retirement Solutions (December 2020) discusses the NAIC framework.) In addition, this article will discuss Washington state's new regulation that, while not amending its unfair practices and frauds act, imposes advertising requirements for products offering noninsurance benefits that incentivize healthy behavioral changes.

Section 4(H) enumerates the types of value-added products or services that may be provided. The states differ from the NAIC as follows:

- Massachusetts includes administrative services as an additional permissible benefit.
- New Mexico requires that the benefits provided be approved by the insurance department before a product or service is offered.
- New York's list of permissible benefits only applies to wellness programs.

- North Dakota requires only that the product or service be designed to provide one of the permissible benefits, instead of primarily designed as required by the NAIC. Commissioner Doug Ommen described the "primarily designed" standard as "a basic test [that the product or service] is related to the value being added." Whether North Dakota seeks to impose a more stringent requirement with its variation is unclear.

Section 4(H) requires that a value-added product or service be offered (i) to all insureds or (ii) if not to all, (a) based on documented objective criteria and (b) in a manner that is not unfairly discriminatory. The states differ from the NAIC as follows:

- Massachusetts does not include this requirement.
- In New York, value-added services are presumptively permissible if they are offered in a nondiscriminatory manner to all similarly situated insureds, unless "the Superintendent determines, after a notice and hearing, that … but for the offer or delivery of such service, the purchase of such policy or contract would not have taken place."

Section 4(H) allows each state to establish monetary caps on the value of items, services, meals, or charitable donations that are provided. The state limits are:

For products and services with non-enumerated benefits.	MA – capped at $25 ND – capped at $100
For wellness programs that are supported by "data and research that such incentives, in the aggregate, are directed to sharing the benefit of improving mortality risk experience."	NY – no cap

New Mexico does not address monetary limits.

Washington adopted a new regulation to ensure that incentives intended to influence consumer behavior protect policyholders' privacy rights and protect consumers in the administration of life insurance products. Advertisements for individual insurance policies that provide noninsurance benefits that "incent behavioral changes that improve the health and reduce the risk of death of the insured" must contain specific disclaimers that:

1. Provide contact information for the insurer.
2. Inform the insured if the noninsurance benefit includes additional costs or participation requirements.

3. Inform the insured if the noninsurance benefit has additional requirements associated with participation in the program.

4. Inform the insured if the noninsurance benefit has a penalty for terminating participation for the products or services.

While the amendments to section 4(H) were intended to promote uniformity across the states, the states' actions thus far reflect deviations from Model 880. Thus, insurers hoping to make value-added products and services available need to carefully consider the implications of the different regulatory requirements, as more states are expected to take action in 2021.

Authored By

Ann Young Black

Related Practices

Financial Services Regulatory
Life, Annuity, and Retirement Solutions

Related Industries

Life, Annuity, and Retirement Solutions
Securities & Investment Companies
Life, Annuity, and Retirement Solutions