CARLTON FIELDS

Is It Time to Come Out and Play? New Rules Proposed on What Constitutes Rebating

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While everyone was working from home, the NAIC's Innovation and Technology (EX) Task Force (Innovation TF) was busy creating proposed new game rules on rebating. On June 23, 2020, the Innovation TF released for comment proposed revisions to the Unfair Trade Practices Act. The proposed revisions follow the Innovation TF's decision during the NAIC Fall 2019 National Meeting to amend the Unfair Trade Practices Act to address state regulators' concerns that their laws did not allow them to permit benefits not stated in the policy and to facilitate uniformity on practices that are not considered prohibited rebating.

Under the proposed revisions, insurers and producers could hop over the anti-rebating laws by providing "value-added" products or services at no cost (or reduced cost) if the products or services:

- Are related to the insurance coverage.
- Are primarily intended to provide loss control, reduce claims costs, educate about the risk of loss, monitor or assess risk, enhance health or financial wellness, provide post-loss services, incentivize behavioral changes, or assist in the administration of employee or retiree benefit policies.

The proposed revisions include a sandbox to play in if the insurer or producer lacks evidence that the product or service is "cost effective or has a material correlation to risk." Under the sandbox, a pilot or testing program for a reasonable time would be permitted upon approval of the state regulator.

- Are available to all policyholders or prospective policyholders unless the restricted availability is based on written objective criteria that are fair and nondiscriminatory.
- Have a cost to the insurer that is reasonable compared to the average policy premiums or insurance coverage.

The proposed revisions include additional consumer protection measures that allow state regulators to adopt new game rules to address consumer data, consumer disclosure, and unfair discrimination. Of note, the proposed revisions called out the need for new rules if third-party vendors require "policyholder data as a condition of receiving the value added product or service."

The proposed revisions also seek to revise the rules on marketing-related activities by allowing more gifts and promotional items, as follows:

- Marketing gifts to individual consumers of up to $250 per person per year, so long as the gift is not contingent on the purchase or renewal of a policy. The limit may be modified on an individual state basis, depending on each state's "economic environment."
- Marketing gifts to institutional buyers provided in connection with "marketing for the sale or retention of contracts," so long as the cost is reasonable "in light of the relationship between the parties."
- Raffles or drawings as long as there is no participation cost, the raffle or drawing does not "expressly or impliedly obligate participants to purchase insurance," and the prize value does not exceed $500.

Based on the proposed revisions, the Innovation TF is inviting innovators to consider ways in which to enhance the experience and engagement of insurance owners and purchasers so that they will come out and play.

Comments on the proposed revisions are due by July 15. The Innovation TF will discuss the comments on July 23, 2020.

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