

No Summer Break for the Rebating Drafting Group

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The rebating drafting group of the NAIC's Innovation and Technology (EX) Task Force ("Innovation TF") has been busy all summer working on proposed changes to section 4(H) of the NAIC's Unfair Trade Practices Act (UTPA). On June 23, the Innovation TF released for comment proposed revisions to the UTPA's rebating section. These comments were discussed during the July 23 meeting of the Innovation TF. During the Innovation TF's August 7 meeting, Commissioner Dwyer reviewed the changes made to the draft rebating section in response to the 21 comment letters received.

In general, if certain conditions are met, the draft rebating section allows insurers, producers, and their representatives to offer:

- Products and services related to the insurance coverage that are primarily intended to help the recipient when such products or services are not provided in the insurance contract.
- Promotional items, within specified limits.

The more notable changes and discussions from the August 7 meeting are below.

1. Recipients of the Products and Services or Promotional Items

The August 7 version of the rebating provision includes a new defined term "client," which includes "policyholders, potential policyholders, certificate holders, potential certificate holders, insureds, potential insureds or applicants." This change was made in recognition of the range of persons who may receive products, services, or promotional items.

2. Nature of Products and Services

In response to the various comments seeking to clarify or broaden the scope of the products and services permitted under the revised rebating provision, the August 7 version added loss mitigation and assistance with compliance with a state or federal law or regulatory requirement as permissible products and services.

Some of the more notable suggested products or services the rebating drafting group declined to add as permissible include those that:

- Incent consumer referrals of insurance products that they already obtained and for which they are current insureds.
- Enhance the value of the insurance benefits to the policyholder.

Commissioner Dwyer explained that the Innovation TF also declined suggestions to:

- Limit the available products and services to particular lines of business due to states' differing definitions for various lines of business and the possibility that the limitations might be too restrictive.
- Include products and services that would be available in connection with the administration of group insurance out of a concern that this would allow for products and services to be offered in connection with force-placed insurance and title insurance, areas in which regulators had previous concerns over rebating practices.

The revisions to the rebating language also allow for a pilot program or testing of products and services where the insurer does not yet have evidence that the products or services meet the conditions of permissible products or services. To test, the insurer must have:

- A good faith belief that the product or service relates to the insurance coverage and primarily satisfies one of the eight enumerated types of products and services listed in the revised rebating language.
- Commissioner approval for the test.

3. Availability of the Product and Services

The revisions to the rebating language require that the products or services be offered to all clients unless the limited availability is based on fair, written objective criteria that are not unfairly discriminatory. In response to comments, the drafting group acknowledged that the objective criteria may include risk characteristics of a client.

4. Required Disclosure

To make clear that an insurer remains responsible when offering products or services, especially when there is no relationship between a third party providing the product or service and the insurer, a new section (e)(2) was added to the August 7 version requiring disclosure to the consumer that the product or service “is not part of the insurance policy” and what “assistance, if any, ... the insurer will provide should the consumer have an issue with the product or service.”

5. Prohibition on “Free Insurance” and Use of “Free” in Any Offer

Apparently in response to the New York Department of Financial Services’ (NYDFS) comment, the August 7 version also added a new section (g) explicitly prohibiting “free” insurance and the use of the word “free.” The NYDFS asserted that someone is paying for the product or service even if it is not the consumer. The NYDFS’ comments referenced OGC Opinion No. 08-05-15, in which a proposed insurance coverage to consumers “free-of-charge” with the purchase of an extended service contract was found to violate New York insurance law and regulations.

The Innovation TF continued to accept comments on the revised draft rebating section until August 28.

**With assistance from Facundo Scialpi, a student at the University of Miami School of Law.*