



June 27, 2019

Honorable Bob Hackett  
Chair, Financial Services and Multi-Lines Issues Committee  
National Conference of Insurance Legislators  
2317 Route 34, Suite 2B  
Manasquan, NJ 08736

**Re: State Anti-Rebating Laws: Anti-Competitive and Anti-Consumer**

Dear Senator Hackett:

Thank you for opening a dialogue at the National Conference of Insurance Legislators (NCOIL) regarding the need for reform of state anti-rebating laws. The Council of Insurance Agents & Brokers (The Council) appreciates your review of these laws and the opportunity to present our views. This is a constant issue of concern for insurance brokers, and has been for years. At the Council, we have a working group of our members' legal counsels that has met three times a year for more than 20 years. This issue – rebating – is perhaps the only issue that has been on the agenda of every meeting, every year.

By way of background, The Council represents the largest and most successful employee benefits and property/casualty agencies and brokerage firms. Council member firms annually place more than \$300 billion in commercial insurance business in the United States and abroad, and sell and/or service the great majority of employer-sponsored health plans across the country. Council members conduct business in some 30,000 locations and employ upwards of 350,000 people worldwide. Council members specialize in a wide range of insurance products and risk management services for business, industry, government, and the public.

The purpose of this letter is to provide you with information as to why anti-rebating laws are problematic for commercial insurance brokers, why they do not make sense for commercial insurance consumers, and why we think they should be repealed in the commercial insurance space.

Laws in 48 states and the District of Columbia prohibit insurance producers from reducing premiums or providing free services or other “valuable consideration” as an inducement to policyholders or prospective policyholders to purchase insurance unless such “rebate” is specified in the insurance policy itself. These anti-rebating laws are nearly identical across the country and are based on model language from the National Association of Insurance Commissioners (NAIC).

California and Florida are the only states that permit some form of “rebating.” In Florida, the courts invalidated the state’s anti-rebating statute for failure to serve a justifiable purpose (*Department of Insurance v. Dade County Consumer Advocates Office*, 492 So. 2d 1032 (Fla. 1986)), and in California, the state’s anti-rebating rules were overturned by Proposition 103 in 1988.

State anti-rebating rules have long been problematic for insurance producers in terms of both compliance and business practice.

First, and perhaps most basic, the laws are unclear. The core statutory language, which is identical or very similar in each state, provides no guidance as to what specifically constitutes a rebate. This has left a huge opening for individual states to interpret the language differently from one another. What we see across the country is that there is little regulatory guidance in many states to help producers determine what is meant by the statutory provisions. Moreover, the guidance (rules, bulletins, opinions, etc.) that is out there – and is evolving across the country in a number of states – differs from state-to-state in many cases. And even where guidance language is similar, interpretation and enforcement is not. Indeed, it appears that many states enforce their anti-rebate laws only in response to complaints, so any resulting guidance evolves on a case-by-case basis.

This creates a very challenging compliance environment, to put it mildly.

The Council has compiled a chart for our members to assist them with compliance with state anti-rebating laws. It briefly summarizes the laws, rules, bulletins, opinions, and other guidance, and provides links to the relevant documents. It does not include all the statutory or other guidance language – just a summary and links. It is 73 pages long.

Of particular note:

1. Many states do not have any guidance explaining the statutory language, leaving brokers to wonder what is and is not permissible in relation to their commercial consumers;
2. Many states have some exceptions to the prohibitions – services that are not considered rebates. It is not always clear, however, what those exceptions include, and they can differ from state to state. For example, some states explicitly permit billing and collecting premiums for COBRA; others permit “COBRA services” more broadly; and some states permit services that are “traditional” customer services, whatever those may be in an evolving and ever-changing industry.

Indeed, most of the states that permit exceptions limit those exceptions to services provided in connection with the insurance coverage being offered. One only needs to look to one of the most dynamic elements in our industry – insurtech – to understand that this is an always-moving target. Technological solutions – and non-technological services, as well – enable brokers and other service providers to help their commercial consumers address their needs across the board. These solutions are not necessarily limited to insurance-related services: loss control services, claims services, human resources

platforms, and data analytics are all examples of services consumers want and brokers want to be able to provide. Anti-rebating rules prevent brokers from providing commercial consumers with the products and services they need and want at the prices they want. These limitations only serve to distort the market by artificially constraining brokers from competing on a level playing field and by impinging on consumers' freedom of contract and choice.

3. Third, states are all over the map in terms of providing "gifts" – goods, merchandise, meals, entertainment, etc. – illustrating the underlying irrationality of these rules, particularly in the commercial insured space. Dollar limits range from \$5 for a gift to a life insurance applicant (\$10 for P&C) in one state, to a couple hundred dollars for a raffle winner in another. And there are dozens of dollar limits in between depending on the state, the line of business, and the type of gift. It strains credulity to think that taking a client to dinner or a football game as a "thank you" for purchasing a \$10 million D&O policy could be responsible for convincing that client to purchase that policy.

These legal and regulatory uncertainties and complexities are compounded by the evolution of the marketplace and commercial consumers. We are in a different world from that of the 19<sup>th</sup> century, when the first anti-rebating statutes were enacted to protect the solvency of life insurance companies and prevent unfair discrimination. Indeed, the marketplace and commercial consumers are much different today from 1947 when the NAIC's model Unfair Trade Practices Act was first adopted. As noted above, the insurance world has – and is – constantly changing. Commercial consumers demand more, and technology is enabling commercial brokers, among many other market players, to compete to address those demands. Moreover, the regulatory system has evolved and grown more robust and sophisticated in the last century-plus, as well. Regulators have numerous tools available to them to protect insurer solvency (which is the ultimate consumer protection), and protect consumers from unfair discrimination and other bad acts, without the need to rely on anti-rebating laws and rules, with all their problematic side-effects.

Today's knowledgeable commercial consumers not only want to know what their producers are earning from a deal, they may want to negotiate to get the best deal for themselves. Allowing the marketplace to work in this manner, as it does in most other industries, would likely serve the producer well, too. Unfortunately, under state anti-rebating statutes, producers are largely prohibited from negotiating compensation and services in connection with an insurance placement. As a result, producers are required (in many cases) to disclose compensation information to commercial clients but are prohibited from doing anything about it. They operate largely on a "take it or leave it" basis, with no ability to tailor or negotiate compensation and services with their clients. Commercial clients must either accept the level of commission or find another producer.

Thus, under the current anti-rebating regime, insurance producers are left in the dark as to what truly constitutes a rebate, and operate in a climate of increased scrutiny from both regulators and consumers, under opaque, constantly shifting rules. The lack of statutory clarity and limited, non-uniform regulatory guidance, combined with the incomplete enforcement "guidance," leaves producers wondering what they can and cannot do for their commercial clients with respect to

negotiating compensation, or providing added-value services, discounts, marketing materials, and so forth.

Moreover, most, if not all, anti-rebating complaints are made by producers. It would not be a stretch to surmise that the motives behind such complaints have less to do with consumer protection than with turf protection, and that complaints are made selectively based on competition factors. This further skews the little precedential value that might be gleaned from regulators' anti-rebating enforcement decisions. Further, it begs the question as to what the purposes of the anti-rebating prohibition are and if the prohibition achieves those purposes.

The Council does not think turf protection is a legitimate purpose for the anti-rebating laws. The commercial insurance broker space is highly competitive, with players of all sizes competing for business according to their business models. Moreover, the industry is highly regulated, with important consumer protections embedded in requirements at both the front end – licensing, appointments, education, etc. – and the backend – enforcement of unfair trade practices laws, disclosures, to name just a couple.

What purpose do anti-rebating laws play in today's commercial insurance environment? They certainly do not help commercial policyholders, which would love to be able to negotiate the ultimate cost of their insurance and the services they wish to purchase from their broker, just as they do with their other service providers and business partners. They do not help brokers who lose opportunities to provide their commercial clients with the best products and services at the best prices. They add compliance-related costs to brokers on transactions that span states with differing rebating laws – and they even add costs on single-state transactions – costs that are ultimately borne by consumers. Ultimately, they simply do not make sense in today's commercial insurance marketplace because they are not needed to protect sophisticated business consumers that want to get the best product and services for the best price but are unable to under today's regulatory structure.

For these reasons, The Council urges you to take steps to repeal anti-rebating laws as they apply to commercial insurance. We look forward to working with you and other interested parties to achieve lasting and meaningful reform.

Thank you for your consideration of The Council's views.

Sincerely,



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John P. Fielding  
General Counsel