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Title 36. Insurance

## Oklahoma Statutes Citationized

### Title 36. Insurance

#### Chapter 1 - Insurance Code

#### Article Article 12 - Unfair Practices - Fraud - Deception

#### Section 1204 - Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined

Cite as: O.S. §. \_\_ \_\_

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

1. Misrepresentations and false advertising of policy contracts. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.
2. False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading. No insurance company shall issue, or cause to be issued, any policy of insurance of any type or description upon life, or property, real or personal, whenever such policy of insurance is to be furnished or delivered to the purchaser or bailee of any property, real or personal, as an inducement to purchase or bail said property, real or personal, and no other person shall advertise, offer or give free insurance, insurance without cost or for less than the approved or customary rate, in connection with the sale or bailment of real or personal property, except as provided in subsection B, Section 4101 of Article 41 (Group Life Insurance and Group Annuity Contracts). No person that is not an insurer shall assume or use any name which deceptively infers or suggests that it is an insurer.
3. Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.
4. Boycott, coercion and intimidation. Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.
5. False financial statements. Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

6. Stock operations and advisory board contracts. Issuing or delivering or permitting agents, officers, or employees to issue or deliver agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

7. Unfair discrimination. (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(c) As to kinds of insurance other than life and accident and health, no person shall make or permit any unfair discrimination in favor of particular persons, or between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, or expense elements, in the terms or conditions of any insurance contract, or in the rate or amount of premium charged therefor. This subsection shall not apply as to any premium rate in effect pursuant to Article 9 of the Oklahoma Insurance Code.

⑧ Rebates. (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance or agreement as to such contract other than as plainly expressed in the contract issued thereon; or paying or allowing, or giving or offering to pay, allow or give, directly or indirectly, as inducement to any contract of insurance, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; except in accordance with an applicable rate filing, rating plan or rating system filed with and approved by the Insurance Commissioner; or giving or selling or purchasing or offering to give, sell, or purchase as inducement to such insurance, or in connection therewith, any stocks, bonds or other securities of any company, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract or receiving or accepting as inducement to contracts of insurance, any rebate of premium payable on the contract, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement not specified in the contract.

(b) Nothing in subsection 7 or paragraph (a) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:

(1) In the case of any contract of life insurance or life annuity, 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 interest of the company and its policyholders;

(2) In the case of life or accident and health insurance policies issued on the industrial debit or weekly premium 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 which fairly represents the saving in collection expense;

(3) Making a readjustment of the rate of premium for a policy based on the loss or expense experience 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;

(4) In the case of life insurance companies, allowing its bona fide employees to receive a commission on the premiums paid by them on policies on their own lives;

(5) Issuing life or accident and health policies on a salary saving or payroll deduction plan at a reduced rate commensurate with the savings made by the use of such plan; and

(6) Paying commissions or other compensation to duly licensed agents or brokers, or allowing or returning to participating policyholders, members or subscribers, dividends, savings or unabsorbed premium deposits.

(c) As used in this section, the word "insurance" includes suretyship and the word "policy" includes bond.

9. Coercion prohibited. Requiring as a condition precedent to the purchase of, or the lending of money upon the security of, real or personal property, that any insurance covering such property, or liability arising from the ownership, maintenance or use thereof, be procured by or on behalf of the vendee or by the borrower in connection with such purchase or loan through any particular person or agent or in any particular insurer, or requiring the payment of a reasonable fee as a condition precedent to the replacement of insurance coverage on mortgaged property at the anniversary date of the policy; provided,

however, that this provision shall not prevent the exercise by any such vendor or lender of the right to approve or disapprove any insurer selected to underwrite the insurance; but any disapproval of any insurer shall be on reasonable grounds.

10 Inducements. No insurer, agent, broker, solicitor, or other person shall, as an inducement to insurance or in connection with any insurance transaction, provide in any policy for or offer, sell, buy, or offer or promise to buy, sell, give, promise, or allow to the insured or prospective insured or to any other person in his behalf in any manner whatsoever:

(a) Any employment.

(b) Any shares of stock or other securities issued or at any time to be issued or any interest therein or rights thereto.

(c) Any advisory board contract, or any similar contract, agreement or understanding, offering, providing for, or promising any special profits.

(d) Any prizes, goods, wares, merchandise, or tangible property of an aggregate value in excess of Twenty-five Dollars (\$25.00).

(e) Any special favor, advantage or other benefit in the payment, method of payment or credit for payment of the premium through the use of credit cards, credit card facilities, credit card lists, or wholesale or retail credit accounts of another person. The provisions of this paragraph shall not apply to individual policies insuring against loss resulting from bodily injury or death by accident as defined by Article 44 of the Oklahoma Insurance Code.

11. Premature disposal of premium notes prohibited. No insurer or agent thereof shall hypothecate, sell, or dispose of a promissory note received in payment of any part of a premium on a policy of insurance applied for prior to the delivery of the policy.

12. Fraudulent statement in application; penalty. Any insurance agent, examining physician, or other person who knowingly or willfully makes a false or fraudulent statement or representation in or relative to an application for insurance, or who makes any such statement to obtain a fee, commission, money, or benefit shall be guilty of a misdemeanor.

13. Deceptive use of financial institution's name in notification or solicitation. Verbally or by any other means notifying or soliciting any person in a manner that:

(a) mentions the name of an unrelated and unaffiliated financial institution,

(b) mentions an insurance product or the possible lack of insurance coverage,

(c) does not mention the actual or trade name of the insurance agency or company on whose behalf the notification or solicitation is provided, and

(d) thereby creates an impression or implication, including by omission, that the financial institution or a financial-institution-authorized entity is or may be the one making the notification or solicitation.

Nothing in this paragraph shall be interpreted to prohibit the reference to or use of the name of a financial institution made pursuant to a contractual agreement between the insurer and the financial institution.

**Historical Data**

Added by Laws 1987, SB 340, c. 210, § 34, emerg. eff. July 1, 1987; Amended by Laws 2005, HB 1535, c. 129, § 10, eff. November 1, 2005 (superseded document available); Amended by Laws 2006, HB 2905, c. 264, § 43, emerg. eff. July 1, 2006 (repealed by Laws 2007, HB 2195, c. 1, § 21, emerg. eff. February 22, 2007) (superseded document available); Amended by Laws 2006, SB 1095, c. 180, § 1, eff. November 1, 2006 (superseded document available); Amended by Laws 2007, HB 2195, c. 1, § 20, emerg. eff. February 22, 2007 (superseded document available).

**Citationizer® Summary of Documents Citing This Document**

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	

Cite	Name	Level
<u>1976 OK CIV APP 12, 561 P 2d 142,</u>	<u>MAHONE v. HARTFORD LIFE AND ACC., ETC.</u>	Discussed at Length
<b>Oklahoma Supreme Court Cases</b>		
Cite	Name	Level
<u>1963 OK 112, 381 P 2d 844,</u>	<u>HUNT v. WASHINGTON FIRE AND MARINE INSURANCE CO.</u>	Discussed at Length

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Title 36. Insurance

## Oklahoma Statutes Citationized

### Title 36. Insurance

#### Chapter 1 - Insurance Code

#### Article Article 14A - Oklahoma Producer Licensing Act

#### Section 1435.30 - Insurance Consultants - License

Cite as: O.S. §. \_\_\_

A. No person shall act as, or hold himself or herself out to be, an insurance consultant until a license as an insurance consultant has been issued to the person by the Insurance Commissioner. However, no insurance consultant's license shall be required of the following:

1. Attorneys licensed to practice law in this state acting in their professional capacity;
2. A duly licensed insurance producer or surplus lines insurance broker;
3. A trust officer of a bank acting in the normal course of employment; or
4. An actuary or a certified public accountant who provides information, recommendations, advice, or services in a professional capacity.

B. An application for a license to act as an insurance consultant shall be made to the Commissioner on forms prescribed by the Commissioner. Within a reasonable time after receipt of a properly completed application form, the Commissioner shall hold a written examination for the applicant, and may conduct investigations and propound interrogatories concerning the qualifications of the applicant, the residence, business affiliations, and any other matter which the Commissioner deems necessary or advisable to determine compliance with the provisions of the Oklahoma Producer Licensing Act or for the protection of the public.

C. In advance of rendering any service as an insurance consultant as defined in the provisions of Section 2 of this act, a written agreement on a form approved by the Commissioner shall be prepared by the consultant, and shall be signed by both the consultant and the client. The agreement shall outline the nature of the work to be performed by the consultant and shall state the fee for the work. The consultant shall retain a copy of the agreement for not less than three (3) years after completion of the services and shall make said copy available to the Insurance Commissioner upon request by the Insurance Commissioner.

D. No individual may concurrently hold a consultant's license and a license as an insurance producer, surplus lines insurance broker, or limited lines producer.

E. No licensed consultant in the performance of activities as a consultant may employ, be employed by, be in partnership with, or receive any remuneration whatsoever from, any licensed insurance producer, surplus lines insurance broker, limited producer, or insurer.

F. A license to act as an insurance consultant shall be valid for not longer than twenty-four (24) months and may be renewed biennially.

G. All requirements and standards relating to the denial, revocation, or suspension of an insurance producer's license, including penalties, shall apply to the denial, revocation, and suspension of an insurance consultant's license to the extent practicable.

H. A consultant is obligated by the terms of this license, to serve with objectivity and complete loyalty the interests of a client alone; and render to a client such information, counsel, and service as, within the knowledge, understanding, and opinion, in





DEPARTMENT OF INSURANCE, FINANCIAL  
INSTITUTIONS AND PROFESSIONAL REGISTRATION

P.O. Box 690, Jefferson City, Mo. 65102-0690

## INSURANCE BULLETIN 10-07

**Rebating, value-added services, charitable contributions, consumer gifts**  
**Issued** Nov. 5, 2010

**To:** All licensed insurers, all licensed producers, agencies, third-party administrators, trade associations, and the public

**From:** John M. Huff, Director 

**Re:** Rebating, value-added services, charitable contributions and consumer gifts

Earlier this year, the Missouri Department of Insurance, Financial Institutions and Professional Registration (DIFP) issued [Bulletin 10-01](#) to provide guidance to individual insurance producers (producers) and business entity insurance producers (agencies) regarding the provision of wellness programs under the anti-rebating statutes. Since the release of that bulletin, the DIFP has received many additional inquiries about compliance with the anti-rebating statutes. The DIFP recognizes that the nature of services that an insurance producer may provide in connection with the sale or service of insurance continues to evolve and recognizes the importance of value-added services that producers and agencies provide. This bulletin is being issued in an effort to provide further guidance to producers and agencies concerning the application of the anti-rebating statutes to producers or agencies providing value-added services, making charitable contributions, or providing gifts to consumers.

### Rebating

While separate statutes prohibiting rebating exist for life and health insurance (§376.500) and property and casualty insurance (§379.356), the general statute regarding rebating for all lines of insurance is found in §375.936(9) of Missouri's version of the NAIC Model *Unfair Trade Practices Act*. Paragraph (a) of subdivision (9) defines what constitutes a "rebate." Since the paragraph is very long and complicated, it may be helpful to break it into its three primary clauses in order to better understand the meaning. Under §375.936(9)(a), a "rebate" is:

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

For the purposes of this bulletin, the criteria set forth in the above statutory provisions might be best summarized by answering the following two questions:

1. Is the item being provided to an insured or prospective insured outside the provisions of the insurance contract?
2. Is the item being provided to an insured or prospective insured intended to induce the purchase of an insurance contract?

If the answer to **both** of these questions is “yes,” the item being provided is likely a rebate.

### **Value-added services**

Following the release of Bulletin 10-01 regarding wellness programs, the DIFP received numerous questions as to what types of value-added services may be provided by producers and agencies. The discussion of value-added services in this bulletin is not intended to supersede Bulletin 10-01, but is to be considered a supplement to that bulletin.

The following non-exclusive list of services, if appropriate in scope, are directly related to the insurance product being sold, intended to reduce claims, and provided in a fair and nondiscriminatory way, would generally not be prohibited by Missouri’s rebating statutes:

- Risk assessments, including identifying sources of risk and developing strategies for eliminating or limiting those risks
- Insurance consulting services such as examining, appraising, reviewing or evaluating the insurance provided
- Claim filing assistance, including the preparation of claim forms
- Certain services related to HIPAA, such as assistance in obtaining a certificate of creditable coverage from a prior carrier for an insured or applicant
- Certain services performed pursuant to COBRA such as billing former employees, collecting insurance premiums and forwarding the aggregate premiums to the employer policy or contract holder or to the insurer when offered in connection with the provision of accident and health insurance to all clients
- Insurance-related regulatory and legislative updates
- Providing information to group policy or contract holders and members under group insurance policies currently in place, as well as the forms needed for group insurance plan administration, enrollment in a group insurance plan, insurer Web links (including, for example, access through a website created by the insurance producer to an employee benefit portal that contains such information) and answers to frequently asked questions relating to insurance.

The following non-exclusive list of services, if provided for free or at a reduced cost and not specified in the insurance contract being sold, could be viewed by the DIFP as violations of Missouri's anti-rebating statutes:

- Services related to employee compensation, discipline, job descriptions, leaves of absence, organizational development, business policies and practices, safety, staffing and recruiting that are used as an inducement to the purchase of insurance and are unrelated to risk management.
- Risk management or loss control services (1) that are not routinely available to all agency clients or (2) that exceed the insurance-related risk evaluation and underwriting of an account or (3) that are frequently provided on a fee for service basis
- Payroll services, such as providing employers with check creation and distribution services for their employees
- Referrals to third-party service providers through which an insured or prospective insured may receive a discounted rate contingent upon the purchase or renewal of insurance
- COBRA administration that goes beyond billing and collecting the insurance premiums for former employees that are to be forwarded to the contract holder or insurer
- Establishment and administration of employer-sponsored cafeteria plans, flexible spending accounts, and health reimbursement accounts
- General tax preparation or accounting services
- Legal services.

Please be advised that the preceding lists are not exclusive and are instead intended for illustrative purposes. Complaints regarding inducements and rebates are extremely fact-sensitive, and the DIFP will consider each situation on a case-by-case basis.

### **Charitable contributions**

Insurance producers or agencies may contribute to charities, as long as such contribution is not made as an inducement to the purchase of insurance. The DIFP will investigate any questions or complaints that arise concerning charitable contributions on a case-by-case basis. Some of the factors that the DIFP will review in determining the acceptability of a charitable contribution are:

- The timing of the contribution
- The amount of contribution
- The producer/agency's history of giving
- The relationship between the producer/agency and the contribution recipient.

### **Consumer gifts**

Gifts to a consumer of any value are prohibited if the gift is an inducement to, or conditioned upon, the purchase or renewal of an insurance policy. If it is unrelated to the purchase of insurance, a small item with a low fair market value may generally be given. Again, the DIFP will consider each complaint regarding gifts on a case-by-case basis.

**Chapters 374, 375, 376 and 379 are available in their entirety at:**

<http://www.moga.mo.gov/STATUTES/C374.HTM>,

<http://www.moga.mo.gov/STATUTES/C375.HTM>,

<http://www.moga.mo.gov/STATUTES/C376.HTM>, and

<http://www.moga.mo.gov/STATUTES/C379.HTM>.

**Applicable statutes:** Sections 374.046 -374.049, 375.932, 375.934, 375.936, 376.940, 375.942, 376.500, and 379.356, RSMo.

If you have any questions regarding this bulletin, please [contact DIFP](#) or call toll free at 800-726-7390.



STATE OF NEW YORK  
INSURANCE DEPARTMENT  
25 BEAVER STREET  
NEW YORK, NEW YORK 10004

David A. Paterson  
Governor

Eric R. Dinallo  
Superintendent

Circular Letter No. 9 (2009)

March 3, 2009

**TO: All licensed insurance agents and brokers**

**RE: Permissible services of insurance agents and brokers; rebating and inducements**

**STATUTORY REFERENCE: Sections 2324, 2502, 4224, 6409, 6504, and 6904 of the Insurance Law**

The purpose of this Circular Letter is to provide guidance and clarification to licensed insurance agents and brokers (collectively, "insurance producers") as to what kinds of services (often referred to as "value-added" services) may be provided to insureds or potential insureds without running afoul of the rebating and inducement provisions set forth in the New York Insurance Law. In response to numerous inquiries regarding these services, the Insurance Department's Office of General Counsel ("OGC") has in recent years issued a number of opinions on the subject. The Department recognizes that the nature of services that an insurance producer may provide in connection with sale or service of insurance continue to evolve, but even in changing conditions, certain underlying principles can guide licensees in their conduct.

There are a number of sections of the Insurance Law that pertain to rebating and inducements, and each has specific applicability to different kinds of insurance or, in the case of Insurance Law § 2502, a specific kind of relationship. Although the language and scope of Insurance Law §§ 2324, 4224, 6409, 6504, and 6904 differ in some respects, collectively those provisions prohibit an authorized insurer, licensed insurance producer, or any person acting on behalf of any such insurer or insurance producer from directly or indirectly paying or offering to pay an insured any rebate from the insurance premium specified in the insurance policy or contract, or giving or offering to give any valuable consideration or inducement, not specified in the insurance policy or contract.<sup>1</sup> Insurance Law § 2502 imposes similar prohibitions against inducements on banks and other specified financial entities, including persons engaged in the business of financing the purchase of real or personal property.

As a general matter, an insurer or insurance producer may not provide or offer to provide an insured or potential insured with any special benefit or discount, including any rebate from the premium, or any service or other incentive in conjunction with the sale of insurance, that is not specified in the policy or contract, or vice versa.<sup>2</sup> For example, an insurer or insurance producer may not provide "free" insurance or offer to pay part of the insurance premium for an insured or potential insured as an incentive to purchase goods, services or even other insurance. The purpose of New York's rebating and inducement provisions is to require an insurer or licensed insurance producer to provide insurance in a nondiscriminatory manner to like insureds or potential insureds, and to prohibit such an insurer or insurance producer from providing an insured or potential insured with any special benefit not afforded to other insureds or potential insureds. See, e.g., *McGee v. Felter*, 75 Misc. 349 (Co. Ct. Kings Co. 1912) ("The vice is not in the giving of a rebate, inducement, or consideration, but the giving of any rebate, inducement, or consideration not specified in the policy."). Indeed, the legislative history of Insurance Law §§ 2324 and 4224 shows that the two statutes are intended to reach discrimination, through rebating of any special favor or advantage, between insureds who are equal risks, without specifying the favor or advantage in the policy or contract.

Of course, under the Insurance Law, an insurance broker, but not an insurance agent, may charge an insured a service fee for providing insurance-related services, provided that the broker obtains a written service fee agreement in accordance with Insurance Law § 2119(c). Further, both an insurance broker and an insurance agent may, in accordance with Insurance Law § 2119(a) and (b), charge a fee for insurance consulting services pursuant to a written consulting agreement. However, the fees charged should be reasonable, and like insureds (or potential insureds) should be charged

the same amounts for the same services. See Circular Letter No. 9 (2006) (discussing service fee agreements).

Apart from an arrangement pursuant to Insurance Law § 2119, an insurer or insurance producer may provide a service not specified in the insurance policy or contract to an insured or potential insured without violating the anti-rebating and inducement provisions of the Insurance Law if:

1. the service directly relates to the sale or servicing of the policy or provides general information about insurance or risk reduction<sup>3</sup>; and
2. the insurer or insurance producer provides the service in a fair and nondiscriminatory manner to like insureds or potential insureds.

The following services generally will fall within the scope of services that an insurance producer may lawfully provide in connection with insurance sold by the producer if provided incidental to the insurance and in a fair and nondiscriminatory manner:

- Risk assessments, including identifying sources of risk and developing strategies for eliminating or limiting those risks;
- Insurance consulting services<sup>4</sup> or other insurance-related advice;
- Insurance-related regulatory and legislative updates;
- Certain claims assistance services (including the preparation of claims forms), but excluding claims adjustment, unless the exceptions set forth in Insurance Law § 2101(g) are satisfied;<sup>5</sup>
- Tax preparation on behalf of an employer of Schedule A of the Internal Revenue Service Form 5500 Annual Return/Report of Employee Benefit Plan, which requests information regarding insurance contract coverage, fees, and commissions, investment and annuity contracts, and welfare benefit contracts;
- Information to group policy or contract holders and members under group insurance policies currently in place, as well as forms needed for plan administration, enrollment in a plan, insurer website links, and answers to frequently asked questions related to the insurance (including, for example, access through a website, created by the insurance producer, to an employee benefit portal that contains such information);
- Certain services performed pursuant to the federal Consolidated Omnibus Budget Reconciliation Act ("COBRA"), such as billing former employees, collecting the insurance premiums, and forwarding the aggregate premiums to the employer policy or contract holder or to the insurer, when offered in connection with the provision of accident and health insurance; and
- Certain services provided in accordance with the federal Health Insurance Portability and Accountability Act, such as those pertaining to health care access, portability, and renewability, when offered in connection with the provision of accident and health insurance.

However, because they are too attenuated to the provision of insurance, or would otherwise violate the law because the services are not specified in the policy, the following services, if provided by an insurance producer to an insured or prospective insured for "free" or at a reduced fee, or otherwise offered in conjunction with insurance services, could, in the Department's estimation, run afoul of the rebating and inducement provisions set forth in the Insurance Law. Thus, careful consideration should be given to:

- Flexible spending administration services;
- Legal services;
- Payroll services, such as providing employers with check creation and distribution services for their employees;
- Referrals to third-party service providers through which an insured or prospective insured may receive a discounted rate while the producer is the producer of record;
- Advice regarding compliance with federal and state laws concerning human resource issues not relating to the insurance provided;
- Management of employee benefit programs, such as retirement programs and time-off/leave of absence programs, other than the insurance sold by the producer;
- Preparation of employee benefit statements listing all of the benefits provided to employees by the employer that are unrelated to the insurance purchased;

- Development of employee handbooks and training, which are unrelated to the insurance purchased; and
- Services related to employee compensation, discipline, job descriptions, leaves of absence, organizational development, business policies and practices, safety, staffing, and recruiting that are unrelated to the insurance purchased.

Special mention of so-called "wellness programs," too, is warranted. Generally speaking, a wellness program is one designed to promote health and prevent disease, and which provides rewards or incentives for participation. On September 25, 2008, Governor David A. Paterson signed Chapter 592 of the Laws of 2008 into law. Chapter 592 adds a new section to the Insurance Law, § 3239, which is styled "Wellness programs." The statute authorizes an insurer to offer a wellness program in conjunction with a group accident and health insurance policy or group subscriber contract, provided that the program is specified in the policy or contract. The legislation also amends Insurance Law § 4224(c) to expressly exclude a wellness program, as described in Insurance Law § 3239, from the rebating and inducement prohibitions set forth in the Insurance Law, provided that the program is specified in the policy or contract. Chapter 592 confirms the Department's practice of requiring an insurer to specify in an accident and health or life insurance policy or contract any wellness program offered in conjunction with the policy or contract in order to comply with the rebating and inducement provisions of Insurance Law § 4224(c).

Please be advised that the above lists are not exclusive, and are instead intended for illustrative purposes. To be sure, the Department intends, from time to time, to revisit the instant Circular Letter to update the list of services that, based on the Department's interpretation of the governing legal framework, insurance producers may lawfully offer to insureds and prospective insureds.

Please direct any questions regarding this circular letter to Joana Lucashuk, Senior Attorney, at [jlucashu@ins.state.ny.us](mailto:jlucashu@ins.state.ny.us) or (212) 480-2125.

Very truly yours,

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Paul A. Zuckerman  
Assistant Deputy Superintendent and Counsel

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<sup>1</sup> Section 2324 applies to most kinds of insurance that § 4224 does not, including most property/casualty insurance; § 4224 applies to life insurance, accident and health insurance, and annuities; § 6409 applies to title insurance; § 6504 applies to mortgage guaranty insurance; and § 6904 applies to financial guaranty insurance. Under Insurance Law §§ 2324 and 6409, the recipient of the rebate or inducement also stands in violation of the law.

<sup>2</sup> Even if the policy or contract specifies a particular good or service and makes it available to all persons of the same class, the Department still may find the endorsement unacceptable, if the policy or contract and/or the insurer's activities run afoul of any other relevant provisions of the Insurance Law, separate and apart from the rebating and inducement provisions. Thus, in reviewing policy or contract forms, the Department looks to see that the goods or services offered in the policy or contract have a legitimate nexus to the insurance coverage provided under the policy or contract, and are necessarily or properly incidental to the insurer's insurance business. See Insurance Law § 1113(a); see also Insurance Law §§ 1106, 1610, 1714 and 4205.

<sup>3</sup> OGC opinions have stated that the service must be a service that the producer "normally performs or arranges." See, e.g., OGC Opinion 07-10-13 (Oct. 31, 2007); OGC Opinion 07-07-17 (July 23, 2007); and OGC Opinion 06-09-14 (Sept. 21, 2006). However, on reflection, this standard implies an inelastic and unadaptable approach to producer activities, which was not the Department's intent.

<sup>4</sup> Insurance consulting services include "examining, appraising, reviewing or evaluating any insurance policy, bond, annuity or pension or profit-sharing contract, plan or program," as well as "making recommendations or giving advice" with regard to the foregoing. Ins. Law § 2119(a)(1).

<sup>5</sup> This is one instance where the distinction between an insurance agent and broker is meaningful. Whereas an insurance agent may, under certain circumstances, adjust claims only on behalf of the insurer, a broker may do so only on behalf of the insured.

April 16, 2010

Bulletin 177

### REBATING AND REFERRAL FEES

This Bulletin is directed to all insurance producers, insurance companies, health maintenance organizations and other persons as defined by IC 27-4-1-2(a). This Bulletin is intended to clarify Indiana's insurance laws on rebating, commission splitting, and referral fees, which are found at IC 27-1-15.6-13, IC 27-1-20-30, IC 27-1-22-18 and IC 27-4-1-4(a)(8).

Title insurance producers, while subject to Indiana law, are also subject to the provisions of the federal Real Estate Settlement Procedures Act (RESPA). In cases where RESPA is more restrictive, the more restrictive law applies. Title insurance producers should also refer to IDOI Bulletin 158.

#### Rebating

IC 27-1-20-30, IC 27-1-22-18, and IC 27-4-1-4(a)(8) prohibit any person engaged in the business of insurance from paying, allowing, or giving any rebate, credit, reduction, discount, or abatement of any premium or commission to a consumer that is not specifically stated in the insurance policy or to the extent provided for in applicable filings. Gifts to a consumer of any value are prohibited if the gift is an inducement to, or conditioned upon, the purchase or renewal of insurance. If it is unrelated to the purchase or renewal of insurance, a small item with a fair market value of \$25 or less – such as a promotional handout, advertising product, or meal – may be given. For purposes of this Bulletin, the Department considers a small item provided with every quote to be unrelated to the purchase or renewal of insurance.

Contests or raffles in which a consumer receives a free chance to win a prize are acceptable as long as they are open to the public and there is no obligation for the consumer to purchase or renew insurance to enter, win, or claim the prize. Prizes are not limited to a value of twenty-five dollars (\$25); however, the value of the prize divided by the reasonably expected number of entrants must not exceed \$25 per entrant.

Insurance producers may donate earned commissions to charities as long as clients or prospective clients have no influence over which charity receives the donation, the donation is not in the client's name, and no client or prospective client becomes eligible for a tax benefit from the donation.

Reduced loan interest rates or fees, higher deposit interest rates, or other inducements offered to consumers by a financial institution to purchase insurance from an agency or company owned by or affiliated with the financial institution are prohibited.

Questions concerning the provision of certain services by producers, agencies, and insurance companies have arisen. The following non-exclusive list of services, if appropriate in scope, directly related to the insurance product being sold, or intended to reduce claims, and provided in

a fair and nondiscriminatory way, would generally not be prohibited by Indiana's anti-rebating statutes:

- Loss control; including wellness programs
- Claim filing assistance
- COBRA administration
- HIPAA compliance
- Risk management or analysis
- Regulatory and legislative updates
- Group policy administration
- Establishment and administration of employer-sponsored 125 plans, flexible spending accounts (FSAs), and health reimbursement accounts (HRAs)

The following non-exclusive list of services, if provided free or at a reduced cost, could be viewed by the Department as violations of Indiana's anti-rebating statutes provided the service is not specifically stated in the insurance policy or provided for in applicable filings:

- Human resource (personnel)
- Legal
- Payroll
- Referrals to third-party service providers that offer discounted rates contingent upon the purchase or renewal of insurance
- Tax preparation
- Accounting

Complaints concerning inducements and rebates are fact sensitive, and the Department will consider such cases on an individual basis. Furthermore, the Department reserves the right to disapprove policy filings containing services that are unrelated to the insurance product or are not intended to reduce claims.

Any producer, agency, company, or other person engaging in the aforementioned prohibited activities is subject to enforcement action under IC 27-1-15.6-12 and/or IC 27-4-1-6.

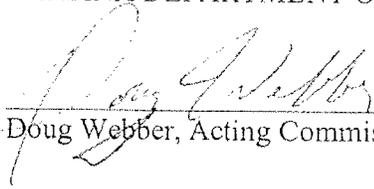
### **Referral Fees**

Under IC 27-1-15.6-13, a licensed producer may share commissions with another licensed producer for selling, soliciting, or negotiating insurance. In the event only one of the producers has the proper qualification, a commission or referral fee can still be shared as long as the non-qualified producer did not sell, solicit, or negotiate the insurance being sold. In addition, a producer may pay a referral fee to a non-licensed person as long as that person does not sell,

solicit, or negotiate insurance. The terms “sell”, “solicit”, and “negotiate” are defined by IC 27-1-15.6-2. If a producer chooses to pay a referral fee to a non-licensed person, the payment may not be conditioned on the purchase of insurance nor may the purchase of insurance be a factor used in determining the amount of the referral fee.

Questions concerning this Bulletin should be directed to attorney Robert Hummel at (317) 232-5063 or [rhummel@idoi.IN.gov](mailto:rhummel@idoi.IN.gov).

INDIANA DEPARTMENT OF INSURANCE

  
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Doug Webber, Acting Commissioner