THE COUNCIL
The Council of Insurance Agents & Brokers

August 28, 2020

VIA ELECTRONIC MAIL – dmatthews@naic.org

Commissioner Jon Godfread
Chair, Innovation and Technology (EX) Task Force
National Association of Insurance Commissioners
c/o Ms. Denise Matthews
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

RE: Comments on Revised Exposure Draft of UTPA Rebating Provisions

Dear Commissioner Godfread,

The Council of Insurance Agents and Brokers ("The Council") appreciates this opportunity to comment on the Task Force's most recent draft revisions to the Unfair Trade Practice Act ("UTPA") rebating provisions.[1] The Council strongly supports and applauds the Task Force's efforts to modernize the rebating regime, which has become cumbersome for regulators and industry participants alike, and – in its current prescriptive form – is stifling innovation and client services in the commercial insurance space without a counterbalancing policy justification.

Below are our detailed comments on changes made in the latest exposure draft. We look forward to continued discussion with the Task Force on these important issues.

1. *The Task Force should retain commonly used "value-added" language in section (e)(1).*

The Council urges the Task Force to retain language from previous exposure drafts referring to "value-added" products or services in section H(e)(1), rather than "non-cash" products or services. "Value-added" is a term of art in the industry and the terminology used in rebating guidance issued by most states. Use of "non-cash" products/services also could confuse this section (e) – focused on valuable services and products related to insurance coverage – with section (f), which deals with gifts, raffles, drawings, and the like. **We therefore recommend keeping the "value-added" language to avoid creating any unnecessary confusion in the marketplace or within the model's own structure**.

[1] Draft Revised UTPA Amended Language Addressing Rebating (Aug. 10, 2020), available at https://content.naic.org/sites/default/files/inline-files/August_7_UTPA_Section_4%28H%29_Exposure_Draft_%28clean_with_post_mtg_changes%29.pdf.

2. *To provide the greatest value to both prospective and current insureds and to help reduce the cost of insurance coverage, the Task Force should not include "underlying" in section (e)(1)(b)(8)*.

The Council agrees with the suggested addition of "or with compliance with a state or [*sic*] federal law or regulatory requirement." We do not, however, support the addition of "underlying" in this provision.

First, we believe inclusion of "underlying" is unnecessary. The overarching "relates to the insurance coverage" requirement in section H(e)(1)(b) for value-added products and services is sufficient to ensure a nexus between those products/services and the insurance.

Second, commercial insurance brokers provide valuable services to clients before, during, and after placement of an insurance policy. Clients may, for instance, seek consultation on what type of health benefit arrangement – e.g., a high-deductible health plan, a PPO plan, a fully insured or self-insured plan, etc. – would be best for their business and their employees. Indeed, much of the value provided by brokers is in the pre-placement planning and advising phase to help ensure that clients get the best possible insurance products to fit their unique risk profiles and needs. These pre-placement services also are important to help manage and minimize the cost of insurance coverage (e.g., helping clients determine which group benefits coverage is the most cost-effective for employers and their employees). Including "underlying" would effectively limit value-added services to the post-placement context, which is less advantageous for clients and decreases the cost-saving potential of value-added services.

Third, the "underlying" policy language does not appear to contemplate ongoing client relationships that may involve the purchase of multiple insurance policies. The same client may use a broker to place a health benefit policy and then, months or years later, use that broker to purchase a group life insurance product. Reference to an "underlying" policy suggests that value-added services could not be provided to the client on a consistent basis between those placements (one being in a post-placement posture and the other being in a pre-placement context). This is unnecessarily disruptive to the broker-client relationship and stifles brokers' ability to satisfy clients' evolving needs and demands over the course of a long-term business relationship.

For all of these reasons, **The Council urges the Task Force to remove "underlying" from paragraph (e)(1)(b)(8)**.

3. *Proposed (e)(2) from the latest exposure draft is unnecessary and should not be included*.

The Council does not support inclusion of section (e)(2) in the most recent exposure draft. Insurance policies clearly set forth coverages and exclusions, so a separate statement regarding what is not included in the policy is unnecessary. Moreover, as drafted, the paragraph suggests that brokers would have to coordinate with insurers about the services brokers are providing. Brokers are not able to bind insurers to provide any service, and brokers render value-added services independent of their carrier partners.

Finally, paragraph (e)(3) in the latest exposure draft authorizes regulators to address consumer disclosures and other consumer protections in implementing regulations. This, we believe, renders (e)(2) superfluous. **We therefore urge the Task Force to refrain from adding paragraph (e)(2)**.

4. *Paragraph (e)(4) should be amended to allow for more flexibility and innovation in the offering of value-added products/services, to account for different types of client relationships, and to maximize the cost savings benefit of value-added services.*

Limiting offerings of value-added products/services to a static set of written criteria is overly prescriptive, particularly for commercial and institutional client relationships. Often, those sophisticated clients wish to negotiate for such services as part of an arm's length, business-to-business negotiations; they should not be unnecessarily hampered in getting the best deal and most value possible.

As noted above, there also is an important cost-saving benefit to value-added services in the group plan context. Allowing arm's length negotiations for value-added products/services for commercial or institutional clients helps reduce the overall cost to these clients of their insurance policies and programs. For example, in the employee benefits area, pre-placement value-added services help reduce overall cost of employers' benefit plans, thus making them more affordable for their employees.

For these reasons, **we urge the Task Force to amend the language in paragraph (e)(4) to remove the requirement that objective criteria be written (i.e., static) and to add language allowing value-added services/products that result from an arm's length negotiation between an insurer/producer and a commercial or institutional client**.

5. *Council members question the efficacy of pilot or test programs for value-added services covered by the regulation.*

Section (e)(5) of the exposure draft contemplates pilot or test programs for value-added products and services that meet certain criteria. Some Council members have raised concerns that this type of short-term offering could overwhelm state insurance authorities and create inconsistencies and confusion in the market regarding what may or may not be offered to clients as a value-added service/product. We therefore recommend that the Task Force consider removing this paragraph.

If the Task Force retains paragraph (e)(5), we recommend – for clarity – adding "or producer" at the beginning of the paragraph to match the rest of the regulation and the second clause of the paragraph. Additionally, to help alleviate the potential burden on Departments of Insurance and reduce some "patchwork" concerns related to permitted short-term offerings, the Task Force could consider removing the affirmative requirement of Commissioner approval and instead, consider an approach that would allow a pilot/test program to become permanent unless disapproved by the Commissioner after a certain period of time.

6. *Paragraph (e)(6) provides an example of fair and objective criteria on which to base availability of value-added services, and is therefore already encompassed in paragraph (e)(4).*

Paragraph (e)(4) stipulates that value-added services and products must be made available based on fair objective criteria and may not be offered in a manner that is unfairly discriminatory (e.g., based on the risk characteristics of a client). Paragraph (e)(6) then states that the cost of offering such value-added services/products should be "reasonable in comparison to that client's premiums or insurance coverage without the provided product or service" – precisely the type of metric we believe is contemplated under paragraph (e)(4) (e.g., the size of the client and the amount of compensation derived from the client). We therefore do not think (e)(6) is necessary as a standalone provision.

Further, as drafted, (e)(6) references premiums, but does not contemplate fee compensation arrangements that are permitted for producers in many states. Ultimately, **if the Task Force retains the contents of (e)(6), we recommend moving the information to (e)(4) as an example and generalizing the language to refer to reasonable offerings "based on size of the client and compensation derived from the client."**

7. *If the final model law references a dollar limit on non-cash items given to or on behalf of clients, such dollar limit should be specified in the text of the regulation and permitted non-cash items should include entertainment.*

The most recent exposure draft provides a "soft" recommended limit of $250 or 5% of the current or projected policyholder premium for non-cash items given to clients in a drafting note after paragraph (f)(1). Differing limits across 50-plus jurisdictions would generate tremendous compliance challenges and costs for industry participants. **The Council therefore recommends that the Task Force stipulate its recommended limit in the text of the regulation to promote the greatest possible uniformity across states**.

Additionally, paragraph (f)(1) should be amended to include entertainment, along with meals, charitable donations, etc. We perceive no practical difference between taking a client to a restaurant versus to a baseball game or other event with the same dollar value, so **we encourage the Task Force to expand this provision to encompass "entertainment" generally**.

8. *Paragraph (f)(2) should be amended to refer more generally to the size of, and compensation derived from, the client as reasonable bases for the cost of gifts and services given to commercial or institutional clients, and the reference to amounts charged to other persons should be deleted.*

We reiterate our support for the current construct of the revised draft, which appropriately distinguishes between individual insureds and commercial/institution clients with respect to the giving of gifts and services. Commercial insureds are sophisticated purchasers and insurance sales are arm's length, business-to-business transactions. There is therefore no material concern that gifts or services will improperly or unfairly induce these clients to purchase insurance.

Of course, commercial and institutional insureds vary considerably in size and amount of insurance purchased, which may factor into the overall reasonableness of a gift. For example, a $250 meal for a Fortune 500 company executive likely would not have any impact on a purchasing decision. But a trip to Hawaii for a small business owner could have quite an impact.

Ultimately, therefore, a one-size-fits-all approach – i.e., specifying a uniform dollar limit for gifts to commercial insureds – does not make sense in the commercial space and we support the Task Force's avoidance of such a model in the exposure draft. As contemplated in the framework of the draft, a better way to assess the reasonableness of gifts and services is based on objective criteria. Such criteria, as discussed above under paragraph (e)(6), should include size of the client and the compensation derived from the client by the broker providing the gift. Because some brokers are paid on a fee basis (not commission), the language in paragraph **(f)(2) should be generalized to contemplate these different compensation methods**.

Finally, we recommend deleting "and the cost of the gift or service is not included in any amounts charged to another person or entity" from the end of the paragraph. We assume that this language is aimed at preventing shifting the cost of gifts and services for some clients to other clients, but we welcome clarification from the Task Force on the intent of this language. We are concerned that this clause, as drafted, is confusing and overly broad. We recommend removing it from the revised draft or, at a minimum, revising the language to make some important clarifications.

If our assumption about the clause's purpose is correct and it is aimed at prohibiting direct charges of gift costs for one client to another client, **we encourage the Task Force to make that clarification and substitute the following language:**

"and the cost of the gift or service ***will not be charged directly to another client****."*

Without this amendment, the current language would appear to prohibit firms from having aggregate marketing budgets – a budget item common across all types of businesses – even if there is no intent to shift a particular client's marketing costs to another particular client. So, for instance, a brokerage firm that purchases firm-branded pens would have to charge a particular client file for the pens distributed to that client. This model would be virtually impossible to implement and track for compliance purposes.

Further, by using "another client" instead of "another person or entity," vendors would still be permitted to offer their products and services on a promotional basis through brokers (e.g., providing a sample of a product/service as an introductory demonstration). In this scenario, the vendor bears the cost of the promotion/gift. Under the current language, the broker would have to pay the vendor (i.e., not charge the vendor) for the gift. Notably, the largest brokers may be able to pay vendors for these gifts, but it would appear to disadvantage smaller brokers who could not.

Again, paragraph (f)(2) is specific to sophisticated commercial and institutional insureds, so the likelihood of broker- or vendor-provided gifts resulting in an improper inducement to purchase

insurance is minimal. **We therefore urge the Task Force, to the extent it retains some version of this clause in (f)(2), to narrow the language as suggested above**.

9. *If the final regulation references a dollar limit on raffles or drawings, the text of the regulation should stipulate such dollar limit.*

For the reasons stated above in the discussion of paragraph (f)(1), **we recommend that – if it chooses to reference a dollar limit in paragraph (f)(3) with respect to raffles and drawings – the Task Force specify a dollar limit in regulation text**.

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Again, we appreciate the Task Force's continued efforts on rebating reform and your consideration of our comments. Please do not hesitate to contact us if we can provide additional information or answer any questions.

Respectfully submitted,

Ken A. Crerar
President/CEO
The Council of Insurance Agents & Brokers
701 Pennsylvania Avenue, NW
Suite 750
Washington, DC 20004-2608
(202) 783-4400
ken.a.crerar@ciab.com

Kate Jensen
NAIC/State Legislative and Regulatory Chief Counsel
The Council of Insurance Agents & Brokers
701 Pennsylvania Avenue, NW
Suite 750
Washington, DC 20004-2608
(202) 429-6259
kjensen@steptoe.com