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

David A. Paterson Eric R. Dinallo
Governor 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.[1] 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.[2] 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[3]; 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[4] 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;[5]

• 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 or (212) 480-2125.

Very truly yours,

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Paul A. Zuckerman
Assistant Deputy Superintendent and Counsel

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[1] Section 2324 applies to most kinds of insurance that ï¿½ 4224 does not, including most property/casualty insurance; ï¿½ 4224 applies to life insurance, accident and health insurance, and annuities; ï¿½ 6409 applies to title insurance; ï¿½ 6504 applies to mortgage guaranty insurance; and ï¿½ 6904 applies to financial guaranty insurance. Under Insurance Law ï¿½ï¿½ 2324 and 6409, the recipient of the rebate or inducement also stands in violation of the law.

[2] 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 insurerï¿½s 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 insurerï¿½s insurance business. See Insurance Law ï¿½ 1113(a); see also Insurance Law ï¿½ï¿½ 1106, 1610, 1714 and 4205.

[3] OGC opinions have stated that the service must be a service that the producer ï¿½normally performs or arranges.ï¿½ 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 Departmentï¿½s intent.

[4] 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).

[5] 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.