

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
OFFICE OF CONSUMER PROTECTION SERVICES

Insurance Producer Standards of Conduct: Marketing
Unfair Trade Practices
Rebates and Inducements; Prohibited Practices

Adopted Amendment: N.J.A.C. 11:17A-2.3

Proposed: March 3, 2008 at 40 N.J.R. 1063(a).

Adopted: June 17, 2008 by Steven M. Goldman, Commissioner, Department of Banking
and Insurance.

Filed: June 18, 2008 as R. 2008 d. 195, without change.

Authority: N.J.S.A. 17:1-8.1, 17:1-15e, 17:22A-26 et seq. and 17:29A-15.

Effective Date: July 21, 2008.

Expiration Date: June 21, 2010.

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) timely received written
comments from the following:

1. MDAvantage Insurance Company of New Jersey;
2. The American Council of Life Insurers;
3. The Property Casualty Insurance Association of America;
4. The Independent Insurance Agents and Brokers of New Jersey;
5. New Jersey Land Title Association;
6. Esquire Title Services, LLC; and
7. Surety Title Corporation.

COMMENT: Several commenters supported the proposed amendment. One commenter
specifically stated that the clarification provided by the amendment should prove helpful and

enhance the environment for foundations within the State by eliminating concerns of insurers or producers that certain actions in favor of charitable organizations might be construed as rebates or inducements.

RESPONSE: The Department appreciates the support of its proposal.

COMMENT: One commenter noted that there is no dollar limit on the amount a producer may contribute to a charity on behalf of the consumer. The commenter stated that states that do permit producers to make gifts to consumers limit the dollar amount that may be given without violating the state's anti-rebating law. Limits range from \$2.00 to \$50.00, with the majority of states capping the dollar amount at \$25.00. Accordingly, the commenter recommended that the Department limit the contribution by producers to a charity to \$25.00. The commenter also stated that the \$25.00 limit will help ensure that producers are not using the charitable contribution in an attempt to distinguish one company from another.

RESPONSE: Upon review, the Department has determined that no change is required. The caps on amounts referenced by the commenter relate to a de minimis exception to prohibitions on making gifts to consumers. The amendment clarifies that contributions to a charity that satisfy the requirements in the amended rule shall not constitute an impermissible rebate or inducement. Accordingly, no cap on the amount would be appropriate and would be contrary to the intent of the amendment.

COMMENT: Several commenters requested clarification of N.J.A.C. 11:17A-2.3(f)2, which provides that no tax benefit can be passed on to the consumer, the consumer cannot receive the contribution “and has no direct or indirect interest in the recipient of the contribution.” The commenters questioned how an “indirect interest” will be determined. One example was whether a consumer who is an alumnus of a college would be considered as having an “indirect interest” where the recipient of the contribution is that college’s alumni association. Similarly, whether a consumer who has season tickets to a particular symphony and the contribution is given to the symphony would constitute the consumer having an indirect interest. In the absence of the clarification of what constitutes an indirect interest, one commenter suggested that the amendment be revised to be limited to certain situations in which there is only a direct interest involved.

Another commenter believed that there will always be some sort of interest in the recipient if a consumer is suggesting a contribution, whether as a self-motivated individual or a member of an organization that would benefit from the contribution. This commenter similarly suggested that the reference to “indirect interest” be deleted.

This commenter also questioned whether a member of an organization serving as a board member to a charitable organization would constitute having a “direct interest.” The commenter hoped that these opportunities would not be eliminated by the amendment. The commenter believed that it is important to help provide support where possible for many charitable non-profit entities, within ethical standards.

Another commenter raised questions about the circumstance where a producer sells coverage to a non-profit organization, such as a school, and wants to make a contribution to that school to support a fund-raising effort, but the actual purchaser of the insurance product (the

school) is receiving the contribution. The commenter questioned whether the consumer, in this case the school, will be considered having an interest as a recipient of the contribution and thus the contribution would be prohibited.

RESPONSE: Generally, the Department considers an “indirect interest” as one in which the consumer could receive the pecuniary benefit of a contribution indirectly, through ownership or other means. The cited examples of a consumer who was an alumnus and season ticket holder would not constitute an indirect interest that would prohibit the contribution. The same would be true for the board member. However, if a school is the consumer, a contribution to the school that was linked to the sale of insurance to the school or marketed as such would be prohibited in that the purchaser (the school) would be receiving a pecuniary benefit.

COMMENT: Several commenters expressed concern with the application of the amendment as it applies to title insurance. The commenters generally maintained that the amendment is inconsistent with applicable State and Federal law. The commenters cited N.J.S.A. 17:46B-35, which prohibits title insurance companies and title insurance agents from paying, allowing or giving, or offering to pay, allow or give, directly or indirectly, as an inducement to insure, or after insurance has been affected, any rebate, discount, abatement, credit, or reduction of premium or special favor, advantage or other benefit to accrue thereon or any valuable consideration or inducement whatever, not specified or provided for in the policy, except to the extent provided for in an applicable filing with the Commissioner as provided in the statute. In addition, the commenter cited the Real Estate Settlement Procedures Act (RESPA) at 12 U.S.C. §2607, which provides: “No person shall give and no person shall accept a fee, kickback, or

thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.” The commenters also stated that regulations adopted by the United States Department of Housing and Urban Development to enforce RESPA provide at 24 CFR 3500.14 define “thing of value” broadly as including, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or part on the amount of business referred, trips and payments of another person’s expenses, or reduction in credit against an existing obligation.

Several commenters also stated that the amendment may allow larger competitors to drop prices through large donation incentives in an effort to gain market share to the detriment of small business agents, especially in the title insurance market. The commenters additionally stated that there is no apparent control over the type of charity to which a contribution may be made and that it could be made to a charitable foundation controlled by an insurance producer or a client, where little if any money actually ends up with the charity because of “administrative fees.” The commenters believed that this could make a donation illusory or a kickback. The commenters also stated that nothing prohibits an insurance producer from supporting a charity and advertising that they do so.

Accordingly, the commenters suggested that the proposed amendment not be adopted or at the very least not apply to insurance producers under the line of title insurance.

RESPONSE: Upon review, the Department has determined that no change is required. The Department does not believe that the proposed amendment is inconsistent with N.J.S.A. 17:46B-35. The amendment specifically provides that contributions to a charity shall not constitute an impermissible rebate or inducement, provided the specified provisions are satisfied. Similarly, the Department does not believe that the amendment is inconsistent with applicable Federal law. The prohibition against providing “things of value,” appears to relate to items that provide a direct or indirect pecuniary benefit to the consumer. The amendment specifically provides that no income tax benefits may be passed through to the consumer and the consumer may not receive the contribution and may have no direct or indirect interest in the recipient of the contribution. Accordingly, the recipient is receiving nothing of value other than possible “good will” of having a charity that he or she supports receive a contribution.

The Department also disagrees that competitors may temporarily drop prices and thereby hurt small businesses. The amount of premium or commission charged may not be altered as a result of the contribution pursuant to N.J.A.C. 11:17A-2.3(f)3. Further, the Department disagrees that there is no control over the type of charity to which a contribution may be made. Charities that may receive these contributions must be a qualified organization under the guidelines of the Internal Revenue Service, a non-profit corporation, or the State of New Jersey or a political subdivision thereof, or another state government or political subdivision thereof. The Department disagrees that the donation could constitute a hidden kickback in that the rule

provides that no pecuniary benefit may be obtained by the insurer or producer other than the income tax benefit of such a contribution.

Finally, while it is correct that there is currently no prohibition upon a producer supporting a charity, the adopted amendment eliminates potential prohibitions against the utilization of offers to make contributions to worthy causes, which insurers and producers may support as a part of a legitimate marketing mechanism. The Department also notes that records of all such offers and contributions made must be maintained for at least five years and be available to the Department for review and inspection upon request.

Federal Standards Statement

A Federal standards analysis is not required because the adopted amendment is not subject to any Federal requirements or standards.

Full text of the adopted amendment follows:

JC08-09/INOREGS