LOUISIANA DEPARTMENT OF INSURANCE
JAMES J. DONELON
COMMISSIONER

ADVISORY LETTER 2015-01

TO: ALL INSURERS, INSURANCE ISSUERS, HEALTH MAINTENANCE ORGANIZATIONS AND PRODUCERS

FROM: JAMES J. DONELON, COMMISSIONER OF INSURANCE

RE: "VALUE ADDED" SERVICES & THE GIVING OF THINGS OF VALUE; COMMON MARKETING PRACTICES; RESCISSION OF BULLETIN NO. 2010-05

DATE: JUNE 3, 2015

The purpose of Advisory Letter No. 2015-01 is to inform all insurers, producers and brokers of the rescission of Bulletin No. 2010-05 and to clarify prior guidance relative to "value added" services or things of value furnished by persons engaged in the business of insurance, as well as to common and ordinary marketing practices. Advisory Letter No. 2015-01 relates directly to the enforcement of the Unfair Trade Practices Act, La. R.S. 22:1961-1973, which defines and prohibits acts, methods, and practices that constitute unfair methods of competition and unfair or deceptive acts in the business of insurance. Advisory Letter No. 2015-01 should not be regarded as containing exhaustive examples or lists of conduct that either comply with or contravene the Unfair Trade Practices Act.

All insurers and brokers are hereby given notice that Bulletin No. 2010-05 is rescinded.

All recipients of Advisory Letter No. 2015-01 are reminded that the term "insurer" under the Louisiana Insurance Code includes all persons engaged in the business of making contracts of insurance, except fraternal benefits societies. For clarity and brevity, health maintenance organizations are also included in the term "insurer." Similarly, the term "producer" is inclusive of agents and brokers, in accordance with La. R.S. 22:46.

Advisory Letter No. 2015-01 describes a number of practices that constitute "value added" services, and distinguishes between "value added" services that violate the rebating provision of the Unfair Trade Practices Act, La. R.S. 22:1964(8), and "value added" services that do not. Anti-rebating statutes were enacted beginning in the late nineteenth century to protect consumers from discriminatory pricing and to protect insurers from the risk of insolvency, thus preserving competitive markets through prohibitions on unfair or deceptive acts that distort the price mechanism and threaten the viability of insurance markets. The Louisiana Legislature largely enacted the National

Association of Insurance Commissioners Unfair Trade Practices Model Act and its rebating provision as La. R.S. 22:1964(8):

> §1964. Methods, acts, and practices which are defined as unfair or deceptive
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> The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
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> (8) Rebates. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance including life insurance, life annuity or health and accident 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 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 giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stock, bonds, or other securities of any insurer or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

A. Marketing Practices Do Not Constitute Rebating

Questions have arisen as to whether the Unfair Trade Practices Act imposes prohibitions on common and ordinary marketing practices that are routine business practices outside of the business of insurance. Persons who are engaged in the business of insurance are advised that common and ordinary marketing practices are not regarded as "consideration" or "inducement" for the purposes of La. R.S. 22:1964(8) when there is no *quid pro quo* arrangement, and thus do not violate the rebating provision of the Unfair Trade Practices Act[1]. Common and ordinary marketing practices are distinguishable from services that are clearly designed as ongoing and continuous services, which are addressed in Sections B and C of this Advisory Letter. Common and ordinary marketing practices include, but are not limited to, the giving of tangible goods (such as tee-shirts, caps, pens, calendars, etc.), the giving or purchase of consumables (such as food and beverages, etc.), the provision of continuing education course materials or instruction, and the giving of tickets to sporting, cultural or other charitable events, or the making or giving of charitable donations (including *pro bono* services) among the many common and ordinary marketing practices employed by business professionals throughout the

[1] The rationale for this guidance relative to common and ordinary marketing practices is identical to the rationale detailed and explained in Section C of this Advisory Letter.

wider economy. Provided that there is no *quid pro quo* arrangement, common and ordinary marketing practices do not constitute a rebate of premiums.

Licensed title insurance producers are advised to consult Bulletin No. 2015-05, issued on June 3, 2015, regarding the specific prohibitions placed upon title producers and other persons engaged in the business of real estate settlements. Such persons are subject to specific requirements and prohibitions under the Real Estate Settlement Procedures Act of 1974 (RESPA), Public Law 93-533, 12 U.S.C. 2601 et seq., as well as other federal regulations and jurisprudence. In addition, title insurance producers are subject to all applicable provisions of the Louisiana Insurance Code for which title insurance producers are not exempt, including but not limited to the Unfair Trade Practices Act.

B. Services Offered Only to Insureds

Any person engaging in the business of insurance may offer certain services to insureds without charge and that do not constitute rebating if the services fall within the scope of services that an insurance producer may lawfully provide in connection with insurance when the services are incidental to the policy of insurance and are offered to all insureds. Although the following list is not exhaustive, the following services are incidental to and closely related to the administration of an insured's policy, and thus, would not constitute rebating:

- 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 or other insurance-related advice.
- Insurance-related regulatory and legislative updates.
- Claims form preparation, but excluding claims adjustment.
- 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, as well as forms needed for plan administration, enrollment forms, enrollment, including electronic enrollment services or software when those services or software pertain to insurance products but do not go beyond enrollment services or management of the insurance product, insurer-provided information or website links, and answers to frequently asked questions related to the insurance (including, for example, access through a

website created by the producer to an employee benefit portal that contains such information.)

- Certain services performed pursuant to COBRA such as billing former employees, collecting insurance premiums and forwarding aggregate premiums to the employer or contract holder or to the insurer when offered in connection with the provision of health and accident insurance.
- Certain services provided in accordance with the Health Insurance Portability and Accountability Act of 1996 such as those pertaining to health care access, portability, and renewability of insurance.
- The negotiation on behalf of insureds by health insurance issuers with non-participating providers in an effort to reduce or otherwise ameliorate billed charges by non-participating providers, commonly referred to as "balance billing".

Conversely, services that are not truly incidental to the contract of insurance, when offered *only* to insureds, may constitute rebating under La. R.S. 22:1964 if the costs of those services are not passed on to the insured or are not specified in the contract of insurance. Such services include, but are not limited to:

- COBRA administration that goes beyond billing and collecting the insurance premiums for former employees that are to be forwarded to the group contract holder or insurer.
- Payroll processing and/or services such as providing employers with check creation and distribution services for their employees.
- Development of employee handbooks and training materials that are unrelated to the insurance.
- Human resource software or any services related to employee compensation, discipline, job functionality, employee leave, organizational development, business policies or practices, safety, staffing, and recruiting that is unrelated to the insurance.
- Risk management or loss control services that are not routinely available to all agency clients, or that exceed the insurance related risk evaluation and underwriting of an account, or that are typically provided on a fee for service basis.
- Advice regarding compliance with federal and state laws concerning human resource issues that are not related to the insurance.
- Legal services.

C. Services Offered to the Public at Large, Rather Than Only to Insureds

The term "value added" services necessarily implies that the services offered to a party do in fact add value to a prior, ongoing, future, or continual purchase or other agreement between a buyer and seller of goods or services. Where there is no purchase or agreement, there can be no addition of value, and therefore, no "value added" services. La. R.S. 22:1964(8), among other things, prohibits any person engaged in the business of insurance from rebating premiums or giving a thing of value ("value added" services or "valuable *consideration*") to another person as the *inducement* to the purchase or placement of a contract of insurance. The Unfair Trade Practices Act does not specifically define consideration or inducement, but both terms can be easily understood from other sources of law.

The Restatement of the Law of Contracts, Second, states the fundamental and generally accepted definition of "consideration" used by courts today. In the Restatement, Second, "consideration" in a bargain is the exchange or price by a promisor for his promise.[2,3] Consideration in a bargained for exchange is generally necessary for the creation of a contract. Where there is no contract between a promisor and promisee, it is specious to discuss "consideration," valuable or otherwise. In the context of Advisory Letter No. 2015-01, where there is no contractual relationship in which a regulated entity gives a thing of value to another person or entity, there is no "valuable consideration or inducement" furnished by the regulated person or entity.[4] Although the word "inducement" can have a broader meaning, it cannot be easily maintained that the word "inducement" means *any* and therefore *every* motivation that a person may have. Otherwise, the statute would be so broad as to encompass any motive not recounted in the contract of insurance as a rebate. In construing the statute in conformity with its general purpose as far as the words fairly permit, we therefore advise that the word "inducement" is synonymous with the word "consideration" and is the reason why the word "or" is interposed between the two, meaning that the consideration *is* the inducement in a bargained for exchange. It is not out of the ordinary in construing a statute to give a word a more precise meaning based on the neighboring words in the statute.[5] Equating "consideration" with

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[2] 3 Williston on Contracts § 7:2 (4th ed.)

[3] There are two requirements in order to find consideration for a contract: (1) the promisee must confer, or agree to confer, a benefit, or must suffer, or agree to suffer, prejudice, and (2) the benefit or prejudice must actually be bargained for as the exchange for the promise. West's Ann.Cal.Civ.Code 1605. Steiner v. Thexton, 48 Cal. 4th 411, 106 Cal. Rptr. 3d 252, 226 P.3d 359 (2010).

"Consideration" is a bargained for exchange whereby the promisor receives some benefit or the promisee suffers a detriment. Young v. Allstate Ins. Co., 119 Haw. 403, 198 P.3d 666 (2008).

[4] An inducement is the "benefit or advantage which the promisor is to receive from a contract[.]" Black's Law Dictionary (2nd ed.).

[5] For a more detailed discussion of the commonsense canon of statutory interpretation known as *noscitur a sociis,* see United States v. Williams, 553 U.S. 285 (2008). The same result would follow if the canon of *ejusdem generis* were employed, which restricts a broader or more general term's meaning to that meaning encompassed by more specific or restricted terms that precede the general term. In this instance,

"inducement" is not undermined by the general reluctance to interpret statutes in a way that leads to surplus terminology. Surplus terminology sometimes results from "a perhaps regrettable but not uncommon sort of lawyerly iteration ("give, grant, bargain, sell, and convey"). But the canon against surplusage merely favors that interpretation which avoids surplusage.[6] It is not intended to require that a statute pursue its purposes at all costs. Therefore, La. R.S. 22:1964(8) should not be interpreted as prohibiting a person engaging in the business of insurance from giving things of value outside of a contractual arrangement when there is no insurance contract or relationship. Such a broad interpretation would result in prohibiting common and ordinary business activities where such prohibition bears no reasonable relation to the evils sought to be cured by the Unfair Trade Practices Act.

The same result necessarily follows in situations where a person engaged in the business of insurance gives a thing of value to a person with whom he has a contractual relationship, provided that the thing of value is offered on equal terms to the general public. In such situations it cannot be reasonably asserted that the thing of value served as valuable consideration or inducement to the contract because its recipient could obtain the thing of value irrespective of any contractual relationship regarding insurance. Where the thing of value is available to the general public, the recipient of the thing of value has received no special favor or advantage through the contract of insurance. On the contrary, to construe the statute literally in this context would similarly result in an application so broad as to prohibit any person engaged in the business of insurance from employing marketing practices that are routine, ordinary, and acceptable throughout the broader economy and that do not inhibit or undermine the statutory goals of protecting consumers from discriminatory pricing or insurers from the risk of insolvency. Statutes should be neither construed nor enforced in a manner that results in absurd consequences. In this instance, an uncritical and broad interpretation could have the substantially likely effect of fostering a less competitive marketplace for insurance that deprives policyholders of choice and value for their dollars, which is incompatible with and antithetical to the broad policy goals of the statute.

Baton Rouge, Louisiana, this 3rd day of June 2015.

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Commissioner of Insurance

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consideration is a specific term that precedes the sometimes broader and more general term *inducement*. 2A N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* § 47:17 (7th ed.2007)

[6] Microsoft Corp. v. i4i Ltd. Partnership, 131 S.Ct. 2238, 2248-49 (2011).