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After 170 opinion letters, the New York Department of Insurance issues a circular that negates them all and finally makes sense of anti-rebating laws.

MAYA ANGELOU ONCE WROTE, “AMONG ITS OTHER BENEFITS, GIVING LIBERATES THE soul of the giver.” That may well be true, but until last month, in our more parochial world of insurance agency and brokerage services, Ralph Waldo Emerson’s view was more apt. He said: “We do not

quite forgive a giver; the hand that feeds us is in some danger of being bitten.” And so it has been with brokers providing value-added services. Over the years such practices had come under increasing scrutiny as a prohibited “rebate” under state anti-rebating laws.

Laws in 48 states and the District of Columbia generally prohibit insurance producers from reducing premiums or providing free services or other “valuable consideration” as an inducement to purchase insurance unless the “rebate” is specified in the policy itself. These laws are nearly identical across the country and are based on National Association of Insurance Commissioners (NAIC) language. The provisions can be read as prohibiting brokers from offering any services whatsoever unless a separate fee is paid.

The vast majority of states have issued no guidance on the laws. The notable exception is New York, which over the last several decades has issued more than 170 letters—most in response to brokers complaining that a competitor was offering a prohibited service giving them an unfair advantage. In these non-binding letters, the Insurance Department repeatedly opined that an agency can offer services only if they are “normally provided by an insurance” agent or broker. In almost every instance, the letters then went on to conclude that the challenged value-added service du jour was not “normally provided” and thus constituted an impermissible rebate.

On March 3, in response to a request from The Council, the New York Insurance Department issued Circular Letter No. 9 purportedly “clarifying” anti-rebating rules. The letter, in contrast to the 170 previ-

ously issued staff opinion letters, is considered binding authority. It essentially vacates all prior guidance and establishes a more viable regulatory framework consistent with current firm practices.

Specifically, it clarifies that producers may provide a service to a client that is not specified in the insurance policy without receiving additional (i.e., fee) compensation if two conditions are met:

- The service directly relates to the sale or servicing of the policy or provides general information about insurance risk reduction; and
  - The producer provides the service in a “fair and non-discriminatory manner to like” customers.
- The circular then provides a non-exhaustive list of examples of services that would be considered permissible. These include:
- Risk assessments
  - Insurance consulting services/ insurance-related advice
  - Certain claims assistance services, including preparation of claims forms
  - Preparation of Schedule A of IRS Form 5500 for employee benefit plans, and
  - COBRA administration services.

The circular contrasts these services with flexible spending account or payroll administration services, which the letter says generally are probably not related to the sale or servicing of a policy. They thus would constitute a “rebate” if no separate fees were charged.

This is a watershed event that should help to ensure the value-added services you want to provide clients are permissible.

But there is a caveat and an opportunity embedded in this development.

Providing services in a “fair and

non-discriminatory manner to like” customers is a very important point to the New York Insurance Department. This type of anti-discrimination policy, in the Department’s view, animated the enactment of the anti-rebating requirements in the first place. Although we will argue this type of protectionist perspective has no place in the modern commercial context, we may be stuck with it as long as these statutes remain on the books.

In practice, this means your firm should be very deliberate about what suite of value-added services you provide to whom without receiving fee compensation. Seriously consider formally documenting those policies so that you are in a position to demonstrate the services are provided in a “fair and non-discriminatory manner.”

The New York Insurance Department’s guidance appears to be the best available in the country for evaluating value-added services under state anti-rebating rules. Because those rules essentially are identical in 48 states and the District of Columbia, and because the vast majority of those jurisdictions have issued no regulatory guidance, it appears that good faith reliance on the circular should be justified.

What does all of this add up to? The Hall of Fame baseball manager and underappreciated philosopher Sparky Anderson may have said it best: “The trick is to realize that after giving your best, there’s nothing more to give.”

It’s nice to know that the New York Insurance Department has finally and officially given its blessing for you to play ball.