



**STATE OF TENNESSEE  
DEPARTMENT OF COMMERCE AND INSURANCE**

Insurance Division  
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Nashville, Tennessee 37243  
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July 1, 2005

Mike Pickens, Esq.  
Friday Eldredge & Clark  
2000 Regions Center  
400 West Capitol  
Little Rock, Arkansas 72201-3493

**RE: Interpretive Opinion No. 01-05  
Rebating of Commissions**

Dear Mr. Pickens,

This letter is written in response to your letter dated May 31, 2005, to Commissioner Paula Flowers whereby you ask for guidance from this Department. Your letter is being treated as a request for an interpretive opinion from the Insurance Division of the Tennessee Department of Commerce and Insurance (hereinafter referred to as the "Division") pursuant to Tenn. Comp. R. & Regs. Tit. Dept of Commerce and Ins., ch. 0780-1-77-.01(1).

The facts understood by the Division are as follows:

You represent an insurance agency (hereinafter referred to as "Agency"), licensed in this State as a producer, that employs people in this state. Agency wishes to offer its employees property and casualty insurance as an employee benefit. (Such employees will be hereinafter referred to collectively as "Employee"). The insurance would be purchased by Agency through an insurance company licensed in this state to offer such coverages (hereinafter referred to as "Carrier"). As represented, an Employee wishing to participate in Agency's employee benefit plan would purchase the insurance through Agency just as any other policyholder would. The Employee would be responsible for the payment of the premiums quoted by Agency.

Through one (1) of three (3) different scenarios, Agency wishes to be able to either return premium to the Employee or pay on Employee's behalf part of the premium. Under Scenario # 1, Agency would remit to the Employee the Agency's commission received from the Carrier earned by the Agency for selling the insurance to the Employee, thus, reimbursing Employee for at least a portion of the premium paid by Employee. Under Scenario # 2, Agency would bill the

Employee for the premium less the amount of Agency's commission. Agency would pay the balance of the premium and then be reimbursed when Carrier paid Agency its earned commission. Scenario # 3 would have Agency, with the permission of the Carrier, bill the Employee for the premium less the amount of Agency's commission, which would, in turn, be sent to Carrier in full payment of the Employee's premium. Scenario # 3 is known to be characterized in the industry as charging for a policy net of commission.

You opine that such an arrangement would not be violative of law as such arrangement would neither constitute rebating nor impermissible commission splitting, especially in light of the fact that the purpose of the arrangement is to allow an employer to pay a legitimate benefit to its employees. You base this opinion on the fact that, in your words, "[i]t is the premium that is in fact being returned, not the commission that is 'shared.'"

Be advised that it is the opinion of the Division that such arrangement, under any of the three (3) separate scenarios would constitute an impermissible rebate, and would be in violation of Tennessee's law which prohibits unfair methods of competition and unfair or deceptive acts or practices in the business of insurance.

#### **RESPONSE:**

Tenn. Code Ann. § 56-8-104(7)(A) provides that:

**Rebates.** Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, 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 whatsoever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract;

It is the opinion of the Division that the arrangements described above would violate Tenn. Code Ann. § 56-8-104(7). In the arrangement, the insurance producer/agency sells insurance to the employee with the promise that if they purchase the policy the producer/agency will refund the employee's premium through the producer/agency's commission received from the insurance company. Such would constitute paying as inducement to such insurance a rebate of premiums payable on the contract not specified in the contract.

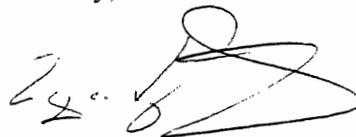
Note that the difference in facts between the three (3) scenarios, above, do not change the arrangement in such a way as to change the conclusion made in this opinion. Each scenario still has the producer/agency returning premium as an inducement to contract that is not specified in the contract of insurance. In Scenario # 2, the producer/agency is still paying a portion of the employee's premium only to have it returned by the insurer. As to Scenario # 3, it should be noted that this Department has consistently held that the sale of insurance "net of commission" is an unlawful rebate and is prohibited by Tenn. Code Ann. § 56-8-104(7). In sum, the Division does not currently envision any situation where the agency/producer can return premium for insurance purchased by their employee through the agency that would be lawful.

You argue that public policy should encourage approval by this Department of such arrangements. However, the law does not allow this Department to permit a statutorily impermissible activity on the grounds that public policy would be encouraged. It is recognized by the Division that this opinion places the agency in a peculiar situation as many employers pay for portions of their employees' insurance coverage. However, most other employer/employee arrangements do not implicate Tenn. Code Ann. § 56-8-104(7), which does not provide for any such exception to its prohibitions against rebating.

Therefore, it is the opinion of this Division that should your client engage in the above activity, it will be in violation of Tenn. Code Ann. § 56-8-104(7) and, thus, subject to sanctions pursuant to Tenn. Code Ann. §§ 56-6-112 and 56-8-109, as well as all other applicable law. Note that because it has been determined that the arrangement described above is in violation of Tenn. Code Ann. § 56-8-104(7), no opinion is expressed herein by the Division concerning the applicability of Tenn. Code Ann. § 56-6-113, the statute governing the sharing of commissions by an insurance producer, to the arrangement, and no opinion should be inferred herefrom.

This response by the Insurance Division to a specific fact situation relating to the interpretation of the Tennessee Insurance Law should not be construed as a legal position or opinion of the Commissioner of Commerce and Insurance or any other official in the Department of Commerce and Insurance. As each inquiry is reviewed on the specific facts presented, this response is based only on such facts and may not be used as precedent. Any variation in the facts presented to the Insurance Division could result in a different conclusion as asserted herein.

Sincerely,



Larry C. Knight, Jr.  
Assistant Commissioner for Insurance

LCK/jfm

cc: Paula A. Flowers, Commissioner  
John F. Morris, Chief Counsel for Insurance  
Brenda Sechler, Director, Agent Licensing Section  
Stephani Ryan, Director, Consumer Insurance Services Section