April 22, 1996

The Honorable Dave Donley
Alaska State Senate
State Capitol
Juneau, AK 99801-1182

Re: Constitutionality of Insurance Anti-Rebate Law (AS 21.36.100)
A.G. file no: 661-96-0488

Dear Senator:

Your letter dated January 9, 1996, to the Department of Law has been referred to me for a response. You have requested an opinion on the constitutionality of a provision of the insurance code at AS 21.36.100 -- the anti-rebate statute applicable to sales of annuities, life insurance, and disability (health) insurance.[1] Specifically, you have asked whether the statute violates the state's constitutional due process clause; whether the statute is enforceable under our constitution; and whether the statute should be repealed. As indicated in this letter, we conclude that AS 21.36.100 is constitutional and need not be repealed, unless the legislature, as a matter of public policy, determines that there is no longer a need for the law.

I. Background for Anti-Rebate Law

In general, rebating occurs when an insurance producer (agent), acting on behalf of an insurer, gives part of the commission or some other thing of value to an applicant to induce the purchase of insurance,[2] or when an insurer makes a deduction from the stipulated premium

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[1] The Alaska insurance code (AS 21) uses the outdated term "disability insurance" to refer to what is commonly known as "health insurance." *See* AS 21.12.050. The code distinguishes "disability insurance" from "disability income insurance" and "credit disability insurance." *See* AS 21.12.040; AS 21.57.160(l). A bill currently pending in the Alaska Legislature seeks to adopt the more widely used terminology by changing the definition at AS 21.12.050 to "health insurance." *See* SB 316, HB 544, 19th Leg., 2d Sess. (1996).

[2] A life insurance agent, like a stockbroker or real estate agent, provides a service to a customer. The fee for this service is included as an expense in the premium charged to the customer. The portion of the (continued...)

to induce a purchase. Typically, rebating involves an agent discounting the initial premium. It was not uncommon in the past for a rebate to be given to some insurance consumers in the amount of 50 percent or more of the first year premium, while other buyers received no discount when purchasing the same product.

Rebating was widely practiced in the late 19th century and early 20th century. Its rise tracked the emergence of life insurance as an estate planning device at a time when agrarian-based communities were declining and urban industrial society was increasing -- resulting in an accompanying decline in dependency on families and an increase in dependency on the wage system. The life insurance industry grew tremendously between 1865 and 1905. Expansion was attributed in part to high pressure sales, deceptive policies, and very high agent commissions.[3] Rebating gradually became perceived as an evil that led to inequality and discrimination between applicants and was therefore considered a threat to the integrity of the insurance business.[4] Consequently, insurance regulators acting in the public interest sought to prohibit rebating.

The nearly universal means for prohibiting rebating is through a statutory prohibition enforced by the state insurance regulatory agency with jurisdiction. Historically, these laws were enacted at a time when antitrust measures were evolving. The laws were intended to: protect smaller insurance companies from insolvency; prevent unfair discrimination between applicants; protect consumers from exorbitant rates; prohibit misrepresentation and unfair sales practices; and avoid a concentration of business in the hands of a few.[5] It has long been recognized that the determination of what constitutes rebating and the enforcement of anti-rebate laws both involve balancing public policy considerations.[6]

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[2] (...continued)
premium paid to the agent by the insurer as compensation is called a commission.

[3] *See* Frankel, *Insurance Agent Commission Deregulation: Anti-rebate Laws and an Alternative to Repeal*, 2 J. Ins. Reg. 255, 255-56 (1983).

[4] *See generally* S. Kimball, *Insurance and Public Policy*, pp. 123-26 (1960); E. Patterson, *The Insurance Commissioner in the United States*, pp. 180, 307-17 (1927). The well-known Armstrong Commission of the 1906 New York Legislature focused attention on a variety of unfair and deceptive insurances practices, including rebating, high-pressure sales techniques, self-dealing by insurers, false representations made to applicants, and excessive commissions. *See* Jerry & Robinson, *Statutory Prohibitions on the Negotiation of Insurance Agent Commissions: Substantive Due Process Review under State Constitutions*, 51 Ohio St. L.J. 773, 776-79 (1990).

[5] *See* Frankel, *supra* note 3, at 255; Saks, "California Supreme Court Upholds Constitutionality of Insurance Changes," 16 *Estate Planning*, 248 (July/Aug. 1989).

[6] *See* Patterson, *supra* note 4, at 317.

Initially, it is useful to recognize that regulation of the insurance industry -- unlike regulation of other financial services industries such as banking and securities -- is nearly an exclusive state function and does not have corresponding federal regulatory activity. Because insurance activities impact interstate commerce, they are subject to congressional oversight through the Commerce Clause.[7] However, Congress has never occupied this regulatory field. In 1945, Congress formally recognized the long-standing existence of state as opposed to federal insurance regulation through a broad delegation of regulatory authority to the states via the McCarran-Ferguson Act.[8] Alaska, like nearly all states, has exercised its authority in this area through adopting an insurance code (AS 21). In addressing the purpose of insurance regulation, the Alaska Supreme Court has held that the insurance code was enacted to "protect the Alaskan insurance consumer.[9]

Insurance regulation constitutes a classic exercise of a state's police power.[10] Over the years, regulation has evolved to the point where the business of insurance is one of the more highly regulated industries in the country. In addition to the police power objective, it is also well recognized that insurance regulation contributes significantly to the state coffer.[11]

As previously stated, anti-rebate laws have been around for over 100 years. The first anti-rebate law was enacted by Massachusetts in 1887. Three years later, ten states had

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[7] *See United States v. South-Eastern Underwriters Ass'n*, U.S. 533 (1944); U.S. Const. art. 1, § 8, cl. 3.

[8] *See* 15 U.S.C. § 1011. This congressional action was actually a direct response to the Supreme Court's South-Eastern Underwriters decision. Prior to that 1944 decision, the business of insurance had not been considered "commerce" subject to congressional regulatory authority. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868) (issuance of insurance policy "is not a transaction of commerce").

[9] *See Northern Adjusters, Inc. v. Department of Revenue*, P.2d 2051 207 (Alaska 1981), 627 P.2d 205, 207 (Alaska 1981).

[10] *See e.g., California State Automobile Ass'n v. Maloney*, 341 U.S. 105, 109 (1951) (Police power "is peculiarly apt when the business of insurance is involved -- a business to which the government has long had a 'special relation.'"); *20th Century Insurance Co. v. Garamendi*, 878 P.2d 566, 580 (Cal. 1994)("It scarcely needs mention that the regulation of the insurance industry is squarely within the state's police power.").

[11] In FY 1994, taxes alone paid by insurers to the Alaska Division of Insurance exceeded $27,000,000. California, in contrast, collected over $1.2 billion in taxes in FY 94. Authority for collecting these revenues derives from the McCarran-Ferguson Act, which expressly gives states the power to tax the business of insurance. *See* 15 U.S.C. § 1011 (1992). It is therefore obvious why insurance regulatory authority is jealously guarded by the states.

adopted similar laws.[12] By 1945 when the McCarran-Ferguson Act was enacted, all then existing states had a prohibition against rebating.[13] And, notably, in 1937 the Territorial Legislature enacted Alaska's first anti-rebate law.[14] Today, with the exception of Florida and California, all states continue to prohibit rebating.[15]

II. AS 21.36.100

The anti-rebate law at issue provides as follows:

> SEC. 21.36.100. Rebates. Except as otherwise expressly provided by law, a person may not knowingly permit or offer to make or make a contract of life insurance, life annuity or disability insurance, or agreement under the contract other than as plainly expressed in the contract issued thereon, or pay, allow, give or offer to pay, allow, or give, directly or indirectly, as inducement to the insurance, or annuity, a rebate of premiums payable on the contract, or a special favor or advantage in the dividends or other benefits, or paid employment or contract for services of any kind, or any valuable consideration or inducement whatever not specified in the contract; or directly or indirectly give, sell, purchase or offer to agree to give, sell, purchase, or allow as inducement to the insurance or annuity or in connection therewith, whether or not to be specified in the policy or contract, an agreement of any form or nature promising returns, profits, stocks, bonds, or other securities, or interest present or contingent therein or as measured thereby, of an insurance company or other corporation, association, or partnership, or dividends or profits accrued or to accrue thereon; or offer, promise, or give anything of value that is not specified in the contract. (§ 1 ch 120 SLA 1996)

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[12] *See* Douds, "Preserving the Anti-Rebating Laws: Sisyphus at Work?", p. 5, paper presented to the Association of Life Insurance Counsel, May 4, 1987 (on file with author of this letter).

[13] *See* 1946 *Proceedings of the NAIC*, at 148-49.

[14] *See* Act of Mar. 4, 1937, ch. 22, 1937 Alaska Sess. Laws 73 (rebating included in list of forbidden practices and acts for which an agent's license may be suspended or revoked).

[15] Florida is the only state with a court decision invalidating an anti-rebate statute. *See Department of Insurance v. Dade County Consumer Advocate's Office,* 492 So. 2d 1032 (Fla. 1986)(4-3 decision). The California anti-rebate law was repealed by voter initiative in 1988 through Proposition 103.

The legislative history for AS 21.36.100 is scant. The statute has remained unchanged since it was enacted in 1966. At that time, the insurance code (AS 21) underwent major revisions for the first time since statehood.[16] Alaska's law, like most state anti-rebate laws, is based upon the NAIC model.[17] There is no commentary on AS 21.36.100 in the legislative history, and the provision is not even included in the list of sections addressed in the bill analysis.[18] A partial repeal of the statute was attempted in 1987 without success.[19]

Finally, the broad prohibition of AS 21.36.100 has always been subject to a few statutory exceptions.[20] And, as in most states, Alaska has a corresponding anti-rebate law addressing property and casualty insurance.[21] Consideration of these statutes is beyond the scope of this opinion.

III. Analysis

Your inquiries address the validity of AS 21.36.100 as measured by Alaska law. State constitutional rights sometimes afford broader protection than their federal counterparts.[22] For this reason, our analysis will focus primarily on state constitutional law, particularly as to due process and equal protection rights.

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[16] The statement waiving engrossment and enrollment of the bill indicates it "is a complete revision of Title 21 (Insurance)."

[17] *See* IV *NAIC Model Laws, Regulations and Guidelines*, Unfair Trade Practices Act, sec. 4(H), pp. 880-5, 880-15 to 880-18 (1993). The National Association of Insurance Commissioners (NAIC), organized in 1871, is the oldest organization of state regulatory officials in the country. Reflecting the longevity and predominance of state insurance regulation, it has developed more than 200 model laws to meet the needs of state insurance regulators. Since its inception, it has had a primary goal of creating uniformity in state insurance regulatory laws.

Alaska's insurance code, containing over 600 pages and 41 chapters, has many NAIC models within it. In addition, 33 sections of the code expressly reference the NAIC. The 1966 code revision was in large part an adoption of existing NAIC standards. *See generally* H.J. Supp., pp. 19, 25-27, 34, 38 (March 3, 1966).

[18] *See* H.J. Supp. No. 12, p. 33, March 3, 1966.

[19] *See* Section 32 of CSHB 46, 15th Leg., 1st Sess. (1987).

[20] *See* AS 21.27.560 (appointment of insurance producers as brokers); AS 21.36.110 (exceptions to discrimination and rebates).

See AS 21.36.120. Some states have combined the two prohibitions in one statute.

[22] *See Maeckle v. State*, 792 P.2d 686, 688 (Alaska App. 1990).

A. Contract Clause

The United States Constitution and the Alaska Constitution both prohibit state government from passing laws that impair the obligation of contracts.[23] However, because the business of insurance is a highly regulated industry and one to which a state's police power is particularly applicable, laws regulating the business of insurance usually do not violate the contract clauses.[24] For example, in 1940, the Supreme Court upheld a Virginia statute prohibiting the writing of insurance on risks within the state except through resident agents, and for which the resident agents were required to retain not less than one-half the customary commission. The court stated:

> Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, . . . it may regulate the compensation of agents, . . . it may curtail drastically the area of free contract.[25]

There are no published Alaska cases addressing the validity under Alaska's contract clause of a provision of the insurance code. However, in *Wien Air Alaska v. Arant*, the court held that a workers' compensation rate table did not impair obligations under an insurance contract.[26] We believe the Alaska Supreme Court will reach the same result regarding the validity of AS 21.36.100.

AS 21 contains provisions regulating insurance contracts that provide further support for the validity of AS 21.36.100. Insurance policy (contract) language must be filed with

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[23] *See* U.S. Const. art. I, § 10, cl. 1; Alaska Const. art. I, § 15.

[24] *See, e.g., California State Auto Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. at 110 (Justice Douglas wrote the opinion of the court stating: "Here [insurance], as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise."); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934) (Police power extends to "prevent injurious practices in business subject to legislative regulation, despite interference with existing contracts."); *Blue Cross and Blue Shield of Kansas City v. Bell*, 596 F. Supp. 1053, 1058 (D. Kan, 1984) ("contract clause does not obliterate the police power of the state.").

[25] *Osborn v. Ozlin*, 310 U.S. 53, 65-66 (1940) (citations omitted). *See also National Union Fire Insurance Co. v. Wanberg*, 260 U.S. 71, 73-77 (1922) (upholding the validity of a state law setting time requirement for commencement of coverage).

[26] *See Wien Air Alaska v. Arant*, 592 P.2d 352, 363 (Alaska 1979).

and approved by the Division of Insurance.[27] In particular, insurance contracts must state the premium to be charged. Producers may only share commissions with persons who are licensed with the division.[28] And, the insurance code contains numerous sections mandating offers of coverage and other contractual provisions.[29] Each of these provisions involves the state exercising its police power in contravention to some degree with the freedom to contract. It is our opinion that AS 21.36.100 is an appropriate exercise of the state's police power. The statute does not violate either federal or state prohibitions against impairment of contractual obligations.

B. Due Process

Your letter specifically asks whether AS 21.36.100 is unconstitutional as a violation of due process.[30] For the following reasons, we conclude that the statute does not violate due process.

Due process analysis begins with the proposition that the state constitution requires legislation to be at least minimally rational. The test enunciated by the Alaska Supreme Court is that if any conceivable legitimate public policy for the enactment is either apparent or offered, the enactment will survive due process scrutiny so long as the factual basis for the justification is not disproved.[31]

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[27] *See* AS 21.42.120.

[28] *See* AS 21.27.370.

[29] *See, e.g.*, AS 21.42.345 (health coverage for newly born or adopted children); AS 21.42.353 (coverage for acupuncture treatment); AS 21.42.355 (coverage for nurse midwife services); AS 21.42.375 (coverage for mammograms); AS 21.42.380 (coverage for phenylketonuria); AS 21.89.020 (auto coverage); AS 21.89.035 (mandatory appraisal clause in motor vehicle policy); AS 21.89.040 (eye care coverage). The current legislature has bills pending which will mandate additional coverage provisions. *See* CSSB 253 (Fin) (mandated coverage for prostate and cervical cancer detection); CSSB 193 (L&C) (mandated coverage for certain costs of birth), 19th Leg., 2d Sess. (1996).

[30] The Alaska Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." Alaska Const. art. 1, § 7.

[31] *See, e.g., Chokwak v. Worley*, ___ P.2d ___, No. 4323, slip op. at 14 (Alaska Mar. 8, 1996); *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 397 (Alaska 1994); *Keyes v. Humana Hospital Alaska, Inc.*, 750 P.2d 343, 351-52 (Alaska 1988).

The U.S. Supreme Court stated in a case in which it deferred to the legislative prerogative to regulate business activity: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise,

(continued...)

AS 21.36.100 survives the above test. While it is true that the need for and appropriateness of anti-rebate laws have been subject to increasing criticism in recent years,[32] legitimate public policy reasons exist to support these laws. The reasons which have been expressed -- many of which were valid a century ago with the emergence of anti-rebate laws and which remain valid today -- include:

1. The desire for rebates may lead consumers to buy new or replacement policies year after year, resulting in an adverse impact to the solvency of insurance companies.

2. Rebates may result in consumers going to other states to make large insurance purchases, resulting in regulatory oversight and enforcement problems.

3. Unrestricted rebating keeps prices hidden and unavailable to government monitoring for discrimination.

4. Rebating will jeopardize the livelihood of a small town producer, opening the door to concentration of business by the big players and monopolistic practices.

5. Rebating will result in a de-emphasis on producer advice and service, to the detriment of consumers.

6. Insurers will experience adverse selection and increased costs, when unhealthy insureds cannot switch companies to get rebates.

7. Rebates will result in an increased number of policy lapses with attendant increased costs for everyone.

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[31] (...continued)
improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955) (Douglas, J.). The preceding quotation was cited to change by the Alaska Supreme Court in *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1262 (Alaska 1980).

[32] *See, e.g.*, Conniff, *Anti-Rebate Statutes after the Florida Litigation: Alternative Controls for Pricing Abuses*, 5 J. Ins. Reg. 109, 128-41 (1986); Frankel, *supra* note 3, at 258-64; Hallett, *Life Insurance Agent Fraud in California: Rebating and Related Misconduct*, 17 Loy. L.A.L. Rev. 809, 838-40 (1984); Jerry & Robinson, *supra* note 4, at 783-90; Kimball & Jackson, *The Regulation of Insurance Marketing*, 61 Colum. L. Rev. 141, 186-92 (1961); Comment, *Insurance Anti-Rebate Statutes and "Dade County Consumer Advocates v. Department of Insurance": Can a 19th Century Idea Protect Modern Consumers?*, 9 U. Puget Sound L. Rev. 499, 521- 29 (1986); Slater, "Big Insurers Taking Aim at 'Rebating,'" Wall Street Journal, January 15, 1992. *See also* Greider, Crawford & Beadles, *Law and the Life Insurance Contract*, 104 (5th ed. 1984) ("There is currently a widespread debate over whether or not rebating should be allowed.").

8. Rebates will result in increased unfair discrimination among policyholders, particularly those with little or no economic leverage.

9. Rebates will render ineffective some cost disclosure requirements which are considered a fundamental life insurer consumer protection device.

10. Rebates will result in a diminishment of the life insurance business as a source of investment capital for the nation, because consumers will replace policies to obtain rebates rather than allow them to stay on the books to accumulate cash values.

11. Rebates will result in new contestable periods for insureds replacing their coverage, thereby resulting in lack of coverage to many.

12. Rebates will result in undue consumer emphasis on price over quality of product.

13. Even well-intentioned deregulation in this area will result in unanticipated negative consequences for the general public, including, at minimum, a torrent of sharp business practices by producers.

The preceding list is not exhaustive. Additional factors supporting the validity of anti-rebate laws include the following. AS 21.36.100, like nearly every other state's law in this area, is based upon the NAIC model. And, in almost every state, the anti-rebate provision is part of a broader statutory scheme -- the Unfair Trade Practices Act. As of 1990, the unfair trade practices laws in 47 states were modeled on or similar to the NAIC model act language.[33] In addition, state regulators and the insurance industry generally have supported anti-rebate laws since their emergence at the turn of the century.[34] We also note the significance that public utilities -- another highly regulated industry -- are also subject to a prohibition against rebating the rates charged to consumers.[35]

Finally, case law supports a conclusion that AS 21.36.100 does not violate due process. Although a lone Florida decision invalidated an anti-rebate law on due process grounds, more recently a Michigan court upheld a similar statute as not violative of due process. The

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[33] *See* Jerry & Robinson, *supra* note 4, at 775.

[34] *See* Chartrand, "Anti-Rebate Update," Report to Agent Licensing Study (EX3) Task Force of NAIC, p. 3 (June 23, 1987); Brief of Amicus Curiae American Council of Life Insurance, in *Dept. Of Insurance v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032 (Jan. 15, 1985) (on file with author of this letter).

[35] *See* AS 42.05.391(c).

Michigan court held that: "[A]ntirebate [sic] provisions are reasonably related to achieving the proper legislative purposes of nondiscrimination, solvency of insurance companies, and public convenience. These provisions, being rationally related to a legitimate legislative objective, are, therefore, constitutional.[36] It is also worth mentioning that the Florida case was weakened by the fact that it was a 4-3 decision with a strong dissenting opinion arguing that the majority decision was "an aggrandizement of judicial power that is antithetical to the basic constitutional doctrine of separation of powers."[37] Lastly, in the federal context, the Supreme Court has on numerous occasions upheld due process challenges to state laws regulating insurance."[38]

In contrast to the many seemingly valid reasons offered for keeping anti-rebate laws, there are nonetheless some reasons which appear to justify no prohibition in this area. Often-cited arguments include:

1. Many policyholders see no objection to rebating and prefer the operation of free market forces with its resulting price competition.

2. Although anti-rebate laws were originally enacted in part to prevent monopolization, they are generally acknowledged to be anticompetitive today.

3. Rebating is difficult to detect and impossible to prove. Many anti-rebate laws, Alaska's included, apply to "a person" who knowingly permits or offers to make a rebate -- thereby extending the prohibition to activity by the consumer. This adds to the enforcement problem.

4. Anti-rebate laws should no longer be used to justify the outdated goal of preserving the insurance industry agency system by keeping up the compensation level.

5. Concern for the solvency of an insurer is no longer an adequate basis for anti-rebate laws due to a number of regulatory tools that have evolved addressing solvency.

Actions of the federal government also reflect the increasing disfavor of anti-rebate laws. A 1977 study by the Department of Justice concluded that it would be in the best interests

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[36] *Katt v. Insurance Bureau*, 505 N.W. 2d 37, 40 (Mich. App. 1993).

[37] *See Department of Insurance v. Dade County Consumer Advocate's Office*, 492 So. 2d at 1035.

[38] *See California State Automobile Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. at 109, n.2.

of the public to allow customers to bargain with agents over the commission or agent's fee.[39] And, there was even an unsuccessful attempt in Congress to prohibit anti-rebate statutes. In 1981, Representative John LaFalce (N.Y.) introduced an amendment to the McCarran-Ferguson Act to repeal anti-rebate laws, based upon the perceived anticompetitive and price-fixing aspect of the laws.[40]

To summarize, a court reviewing AS 12.36.100 will likely acknowledge that there are persuasive arguments both for maintaining and for repealing anti-rebate laws. Nevertheless, in answering the due process inquiry, we believe the court will conclude that the statute is constitutionally valid.

C. Equal Protection

Your general question whether AS 21.36.100 is enforceable under our state constitution requires application of the equal protection[41] clause. As with due process analysis, an individual's right to equal protection under Alaska law is broader than the federal counterpart.[42] Consequently, only the state test need be applied.

The Alaska Supreme Court has identified a sliding scale test to be used in interpreting the validity of laws under the equal protection clause.[43] The test involves a three-part analysis. The court first establishes the weight to be afforded the interest impaired by the challenged law. Depending on the importance of the interest, the state will have a greater or lesser burden in justifying its legislation. Second, the court looks at the purpose served by the challenged statute. Depending on the level of review determined, the state must justify the legislation on a continuum extending from a low-end where it is established merely that the objectives of law were legitimate, to a high end where it is shown that the law was motivated by a compelling state interest. Third, the court evaluates the means employed by the state to further its goals. At the low end of the sliding scale, merely a substantial relationship between the means and ends is constitutionally adequate. At the high end of the scale, the nexus between means and

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[39] *See* Task Group on Antitrust Immunities, U.S. Dept. of Justice, *The Pricing and Marketing of Insurance*, pp. 293-301 (1977).

[40] *See* H.R. 4497, 97th Cong., 1st Sess. (1981).

[41] *See* Alaska Const. Art. I, § 1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law").

[42] *See* Gilmore v. Alaska Workers' Compensation Board, 882 P.2d 922, 926 (Alaska 1994).

[43] *See Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984); *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).

ends must be much closer, and the classification will be invalidated if the purpose can be accomplished by a less restrictive alternative.[44]

For AS 21.36.100, the interest impaired by the classification is an economic interest -- freedom of contract. The Alaska Supreme Court has held that economic interests are only entitled to review at the low end of the sliding scale.[45] Consequently, AS 21.36.100 will comply with the equal protection clause if the classification it creates bears a fair and substantial relationship to the purpose of the insurance code (AS 21) and, more specifically, the purpose of the Unfair Trade Practices Act (AS 21.36).

As previously stated in this opinion, the business of insurance is one of the most highly regulated industries in the country. Alaska, like all other states, exercises broad police power in this area to protect insurance consumers. There are many provisions in the insurance code affecting freedom of contract.[46] It is also significant that there is a similar provision (prohibiting rebates) applicable to public utilities -- another highly regulated industry.[47] Taken together, these factors allow the conclusion that AS 21.36.100 bears a fair and reasonable relation to the regulatory scheme of the insurance code and AS 21.36 in particular.

Regarding the purpose of the statute at issue, AS 21.36.100 is specifically designed to protect insurance consumers. The purpose section of the Unfair Trade Practices Act (AS 21.36.010) expressly states that the purpose of AS 21.36 is to define or provide for determination of all practices in the state that constitute unfair methods of competition or unfair or deceptive acts or practices and prohibit them. And, as previously referenced, the Alaska Supreme Court has stated that the purpose of the insurance code is to protect Alaskan insurance consumers.[48] Finally, although legislative history for AS 21.36.100 is of little assistance in determining the purpose of the statute -- in the national dialogue addressing anti-rebate laws, consumer protection is the primary goal of both supporters and opponents
of these laws.[49] Based on all of these factors, the objective of AS 21.36.100 is legitimate as required by the second part of the equal protection test.

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[44] *See Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d at 926 (quoting *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d at 269-70).

[45] *See Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d at 927.

[46] *See* text accompanying notes 27-29, *supra*.

[47] *See* AS 42.05.391(c).

[48] *See Northern Adjusters, Inc. v. Dept. of Revenue*, 627 P.2d at 207.

[49] *See generally* citations, *supra* note 32.

The third component of the test is also met. The lower end of the sliding scale only requires that the means adopted through AS 21.36.100 be substantially related to the ends sought to be achieved. "A perfect fit between the legislative classification and the governmental objective is not required."[50] While some activities are excepted from the reach of AS 21.36.100 and therefore the statute does not apply equally to all,[51] the means chosen to regulate in this area are substantially related to the state's objective (protecting insurance consumers). In summary, upon application of the three-part test, AS 21.36.110 does not violate the right of equal protection.

CONCLUSION

AS 21.36.100 is not unconstitutional and is not otherwise invalid. While some of the reasons supporting the enactment of this law may no longer be as persuasive as they once were, the law continues to have a sufficient basis. It is our opinion that the Alaska Supreme Court, if faced with a challenge to the validity of this law, will defer to the legislative prerogative -- particularly given the broad authority of state regulators over this highly regulated industry.

Let us know if you have any additional concerns in this matter.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
David G. Stebing
Assistant Attorney General

DGS:jem
cc: Bruce Botelho

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[50] *See Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d at 928.

[51] *See* AS 21.27.560; AS 21.36.110.