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NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

June 19, 2007

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The Honorable Herb Kohl, Chair  
Special Committee on Aging  
United States Senate  
Washington, DC 20510

The Honorable Gordon H. Smith, Ranking Member  
Special Committee on Aging  
United States Senate  
Washington, DC 20510

Dear Chairman Kohl and Ranking Member Smith:

Thank you for your Committee's interest in widespread abuses in the marketing and sales of Medicare Advantage and Medicare prescription drug plans. As you hold hearings and consider the possibility of legislative solutions, we urge you to restore state insurance regulatory authority over the plans participating in these programs, and that you consider the current regulation of Medicare Supplement (Medigap) insurance as a potential regulatory model.

The National Association of Insurance Commissioners (NAIC) represents the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories, whose primary objective is to protect consumers and promote healthy insurance markets. Insurance Commissioners have extensive institutional and personal experience in the regulation of private health insurance, including insurance products for senior citizens and, therefore we write to offer our suggestions and assistance.

As you know, deplorable practices have been reported in the marketing and sales of some Medicare Advantage and Medicare Part D prescription drug plans. State insurance departments and the State Health Insurance Assistance Program (SHIP) offices within our departments have reported patterns of overly aggressive and deceptive or abusive marketing and sales practices. We have received troublesome reports of tactics leading beneficiaries to enroll in a Medicare Advantage plan without full knowledge or understanding of the consequences of their decision. In many instances, unscrupulous agents and marketers misled beneficiaries into believing they were signing up for a stand-alone prescription drug plan or a Medigap plan, rather than a Medicare Advantage plan. Frequently, the beneficiaries did not know they were giving up traditional Medicare, potentially restricting or altering their access to providers, or were not fully aware of the new plan's benefits or cost-sharing. Some were even told that traditional Medicare was being eliminated, or that they were talking to a representative of the Medicare program.

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June 19, 2007  
Page Two

As state insurance regulators, we are also concerned that the current federal marketing guidelines permit high-pressure sales tactics that states consider inappropriate for senior citizens, such as cold calls and cross-selling.<sup>1</sup> Insurance agents have used Medicare Part D as a pre-text to enter the home of a senior, and once inside sell the senior an unrelated and sometimes unsuitable insurance product -- including Medicare Advantage plans, annuities, life insurance policies, funeral policies, and other types of products, which often pay higher commissions. In addition, state regulators have also reported that companies are working with unlicensed agents and brokers in violation of federal marketing guidelines and high rates of other abusive practices, including outright fraud.

Under other circumstances, these practices would be prohibited by state law, monitored and questioned by watchful state insurance regulators, and controlled by the state-based insurance regulatory structure. However, since these cases involve Medicare Advantage or Medicare Part D, the hands of state insurance regulators are often tied, as states are largely pre-empted from regulating these plans. The Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 rolled back and pre-empted state insurance regulation of Medicare Advantage plans, except for licensing and solvency.<sup>2</sup> The MMA also established the same limited boundaries of state insurance regulation for Medicare Part D prescription drug plans.<sup>3</sup>

Unlike Medigap insurance or other types of state-regulated health insurance, the state insurance commissioner has very limited authority over the insurance company, and cannot ensure that marketing strategies or practices are appropriate for this vulnerable population. State insurance regulators are restricted in their ability to monitor companies in the marketplace. We are hindered in our authority to take corrective action against a company for misconduct or to have problems rectified in a timely manner. Often, consumers must wait months for a resolution, if one is provided at all.

State insurance regulators do have authority over insurance agents and brokers. However, without any real authority over the plans themselves, a wide regulatory gap exists that allows abusive marketing and sales practices to flourish. Without authority over the plans, state insurance regulators cannot prevent the abusive marketing and sales practices. Instead state insurance regulators simply receive the extraordinarily high number of complaints that result from these abuses. In addition, state insurance regulators' already limited ability to hold companies responsible for the acts of their agents has been eroded even further by CMS' interpretation that state insurance agent appointment laws, which help create an agency relationship between plans and their agents/brokers, are pre-empted and unenforceable.<sup>4</sup>

We urge you to restore state insurance regulatory authority over the Medicare Advantage and Medicare prescription drug plans so that states can fulfill their traditional role of consumer

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<sup>1</sup> CMS Medicare Marketing Guidelines, pages 112-113.

<sup>2</sup> Social Security Act, Sec. 1856(b)(3) states "The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part."

<sup>3</sup> Social Security Act, Sec. 1860D-12(g) states " The provisions of ...1856(b)(3) shall apply with respect to PDP sponsors and prescription drug plans under this part in the same manner as such sections apply to MA organizations and MA plans under part C."

<sup>4</sup> Medicare Marketing Guidelines, page 130, states "Because CMS...explicitly addresses the use of marketing representatives, state marketing agent appointment laws will not apply to organizations".

protection in this area. In doing so, we encourage you to consider Medigap insurance as a good regulatory model. As you know, standardization of Medigap insurance came about with the passage of the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) in response to rampant abuses targeting seniors in the Medigap insurance marketplace that bear a striking similarity to the problems we are seeing today with Medicare Advantage and Medicare Part D prescription drug plans.

The regulation of Medigap insurance provides a good model for enforcement, as states have the ability to take action against both the agents and the companies themselves. However, states should not simply be enforcing unworkable guidelines set by CMS. OBRA-90 included a unique delegation of regulation development authority to the NAIC for Medigap insurance, providing the NAIC with a specified period of time to develop and establish the federal minimum standards.<sup>5</sup> In developing these standards, the legislation also prescribed that the NAIC consult a balanced working group composed of industry representatives, Medicare beneficiaries, and other qualified interested individuals, thus ensuring that the final proposal is balanced and enforceable.<sup>6</sup> These NAIC-established standards were then adopted by the federal government as the federal minimum, and are enforced by the states. We believe a similar process could be utilized to establish marketing guidelines for Medicare Advantage and Medicare prescription drug plans, as well as to allow effective state regulation of these plans.

We look forward to continuing to work with you as you endeavor to protect consumers in Medicare Advantage and Medicare prescription drug plans. We offer the services of this organization as a resource for you as you consider these issues.

Sincerely,



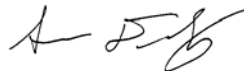
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<sup>5</sup> Social Security Act, Section 1882 (p)(1)(A).

<sup>6</sup> Social Security Act, Sec. 1882(p)(1)(D) states "In promulgating standards under this paragraph, the Association or Secretary shall consult with a working group composed of representatives of issuers of medicare supplemental policies, consumer groups, medicare beneficiaries, and other qualified individuals. Such representatives shall be selected in a manner so as to assure balanced representation among the interested groups."