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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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October 14, 2008

DENNIS B. FITZGIBBONS, CHIEF OF STAFF
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AND CHIEF COUNSEL

The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Daniel R. Levinson
Inspector General
U.S. Department of Health and Human Services
330 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Leavitt and Inspector Levinson:

The Committee on Energy and Commerce continues to be concerned about predatory and fraudulent marketing of Medicare Advantage (MA) plans, particularly those plans marketed to low-income Medicare beneficiaries whose financial status qualifies them for assistance from the Medicaid program, or "dual eligibles," a particularly vulnerable subgroup of Medicare beneficiaries who tend to be poor and suffer from chronic conditions and lower health status than other Medicare beneficiaries.

At a June 26, 2007, hearing on "Predatory Sales Practices in Medicare Advantage," the Subcommittee on Oversight and Investigations received testimony from low-income Medicare beneficiaries about insurance agents fraudulently enrolling them in MA plans that were inappropriate for their health care conditions and financial circumstances. One witness who fell prey to a fraudulent sale discovered, only when she became seriously ill, that she had lost her prescription drug coverage as a result of enrolling in the plan. State Insurance Commissioners reported that exorbitant sales commissions, volume bonuses, and other financial incentives, combined with Congress's removal, in 2003, of State regulators' authority over insurance companies selling private Medicare plans has led to a frenzy of exploitive sales to unwitting victims. Kim Holland, the elected Insurance Commissioner for the State of Oklahoma, described the situation in her State as "virtual lawlessness." She testified that:

“[u]nlicensed agents are setting up shop in pharmacies, Wal-Marts, and nursing home lobbies to prey upon seniors’ confusion and concern over their medical care coverage. Certain insurers are exploiting their exemption from regulatory oversight with aggressive and frequently misleading advertising; agent financial incentives that encourage high-pressure sales tactics; and a lack of responsiveness, if not outright neglect, of a vulnerable population caught in the middle of an unbridled free market.”

To protect vulnerable Medicare beneficiaries from this type of exploitation, Congress enacted strict controls over MA plan marketing as part of the Medicare Improvements for Patients and Providers Act of 2008, Public Law 110–275 (MIPPA). Among other things, Section 103(a)(1) of MIPPA, which was enacted July 15, 2008, notwithstanding the objections of the President, expressly prohibits MA plans from engaging in outbound telemarketing, or from “any unsolicited means of direct contact of prospective enrollees ... without the prospective enrollee initiating contact” (emphasis added). CMS also responded by issuing new Medicare Marketing Guidelines, effective October 1, 2008, that prohibit plans from enrolling beneficiaries in plans during an outbound sales call, but then delayed implementation of new requirements regulating commissions payable to plans’ sales agents.

We were therefore exceedingly troubled to receive a report that Health Net, Inc., an insurance company that offers private Medicare health care and prescription drug plans, appears to have engaged in egregious marketing abuses in connection with its Medicare Special Needs Plan. Attached is a copy of a complaint describing these troubling tactics, submitted to CMS by the National Senior Citizens Law Center (NSCLC), a non-profit legal services organization that assists low-income Medicare beneficiaries. Under Rules X and XI of the Rules of the United States House of Representatives, the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations are investigating the allegations in this complaint.

The complaint describes apparently widespread “robo-calls” (auto-dialed telemarketing calls) made to homes, which connect the recipient of the call directly to a sales agent or the agent’s answering machine. The complaint alleges that employees of the NSCLC themselves received random robo-calls at their homes. When they were connected to Health Net’s sales agents, they encountered agents providing misleading information regarding the nature of the private plans they were selling, including misleading information about network restrictions, enrollment deadlines, and whether they would lose Medicare drug benefits or Medicaid benefits if they enrolled.

Based on NSCLC’s report, it would appear that Health Net’s sales agents not only attempted to induce beneficiaries to enroll by providing false and misleading information, they also implied that they could enroll their targets immediately during the outbound call. All such activity is expressly prohibited by Federal law.

In addition to the troubling reports of aggressive and fraudulent sales tactics on the part of Health Net, NSCLC reports that sales agents for the company have enrolled low-income, non-English speaking beneficiaries in plans with potentially devastating financial and health consequences for these individuals. In one case, a blind, dually-eligible Spanish speaking beneficiary was enrolled by a sales agent at a park. The individual continued to see his regular doctor because reportedly that was one of two places to which he could travel on his own. He learned belatedly that his physician was not part of Health Net's network of physicians, and has received over \$1,000 in medical bills that he cannot afford to pay. We are concerned that more victims, yet to be identified, may have encountered similar problems or are about to encounter such problems when they attempt to use plan benefits.

Further, patient advocates helping Medicare beneficiaries in Kern County, California, have received reports from the local Medicaid office that Health Net agents have posed as beneficiaries in efforts to obtain their Medicaid identification numbers. One of the principal means by which Medicare and Medicaid fraud is perpetrated is through the theft and use of a patient's Medicaid and Medicare identification numbers to submit fraudulent claims or fraudulently enroll beneficiaries in private plans. This type of activity, as well as all fraudulent marketing and enrollment activity, should cease immediately.

The Committee requests that CMS immediately launch investigations into these reported activities, through a coordinated effort involving the Center for Health and Drug Plan Choice, the Medicare Program Integrity Group, and the Medicaid Integrity Program. To the extent that any of these deceptive sales tactics are substantiated, we request that CMS require Health Net to suspend immediately any further marketing activities, impose monetary sanctions at a level sufficient to serve as a real deterrent, and consider prohibiting Health Net from participating in the MA program.

We note that CMS imposed a temporary marketing suspension on Health Net earlier this year after reports of harmful delays in enrolling beneficiaries in its prescription drug plans, and that the company has recently been fined by the California Insurance Department for egregious customer abuses, including unlawful policy rescissions, with respect to its individual health insurance products.

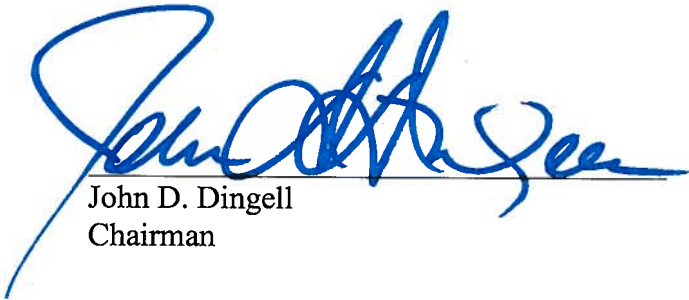
We also request that CMS provide every dual-eligible Medicare beneficiary enrolled by Health Net within the past year with information regarding the network and prescription formulary limitations imposed by their plans and ensure that each enrollee be given the option of retroactively disenrolling from the plan. In addition, CMS should ensure that Health Net is effectively coordinating plan benefits with State Medicaid programs for all dual-eligible plan members so that no plan member is liable for medical bills that would otherwise be covered by Medicaid.

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We further request that the Office of Inspector General investigate whether Health Net or its agents have engaged in Medicare fraud in connection with Health Net's MA plans.

Please contact us immediately to schedule a briefing as soon as possible on your response to these issues. If you have any questions relating to this request, please contact Kristine Blackwood with the Committee staff at (202) 226-2424.

Sincerely,



John D. Dingell
Chairman



Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable John Shimkus, Ranking Member
Subcommittee on Oversight and Investigations

National Senior Citizens Law Center



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Cynthia Tudor
Director, Medicare Drug Benefit Group
VIA EMAIL: cynthia.tudor@cms.hhs.gov

Teresa Decaro
Director, Medicare Drug and Health Plan Contract Administration Group
VIA EMAIL: teresa.decaro@cms.hhs.gov

October 1, 2008

Re: Health Net Marketing in California

Dear Ms. Tudor and Ms. Decaro,

We are writing to alert you of recent marketing efforts to dual eligibles in California by brokers for Health Net. The brokers are using a variety of unscrupulous, misleading and illegal practices to enroll beneficiaries into Health Net's Special Needs Plan, Health Net Seniority Plus Amber II.

The activities do not appear to be confined to one particular broker or even one area of the state. Different brokers in different areas are using different tactics. The only consistency is the misrepresentation and inaccuracy used to induce enrollment.

Robo-Calls in the Bay Area

A number of advocates in the San Francisco Bay Area have reported receiving "robo-calls"—automated telemarketing calls with a prerecorded message – that include inaccurate and/or grossly misleading information about a Special Needs Plan (SNP), Health Net Seniority Plus Amber II.

We have reports of automated computers dialing homes in San Francisco and Alameda counties between September 2nd and September 15th. The calls appear to be taking a scattershot approach – three of the four attorneys in our office have received calls in their homes. When the recipient of the call picks up the phone, a pre-recorded message promises a special program, with "no premiums," for those who have both Medicare and Medi-Cal. When the listener follows the instructions to press a button for more information, he or she is either connected with a sales agent or told to leave a message to receive more information.

The agents appear to be independent brokers soliciting enrollments on behalf of Health Net. In one case, the agent identified himself as a representative of “Insurance Services,” a “research company” in Sacramento that was doing “pre-screening” for Medicare Advantage plans. We have not been able to find any Sacramento company doing business under that name.

Once the potential consumer is connected to a sales agent, much of the information provided was false or misleading. For instance:

- Agents gave inaccurate and misleading information about the effect that joining a SNP would have on a dual eligible’s existing Medicare coverage. One agent stressed repeatedly that taking advantage of the new benefits offered would have no effect on existing coverage. When asked whether the program being marketed would result in the loss of traditional Medicare or changes in Part D coverage, the agent assured the listener that the new benefits were in addition to and would have no impact on existing benefits. When asked whether joining the SNP would be “in addition to or instead of enrollment in regular Medicare,” another agent replied that the SNP enrollment was “on top of Medicare—the doctor bills Health Net as primary” with “Medicare and Medi-Cal picking up the balance.”
- Agents made incomplete statements about network restrictions. One agent suggested that SNP membership would allow an enrollee to go to “private sector doctors who do not take Medi-Cal,” but failed to explain that this was so only if the doctor was part of the Health Net network. Another agent indicated that the beneficiary should check to make sure that his primary care physician was a Health Net provider (while assuring the caller that 95% of doctors in the area were), but said nothing about the impact enrolling in the plan would have on access to specialists, local hospitals, etc.
- Agents made misleading statements regarding the coverage dual eligibles currently receive from Medi-Cal. Agents emphasized that the product being marketed charges “no monthly fee, no deductible,” without acknowledging that dual eligibles already receive many of the same services and pay no monthly premiums or deductibles. This same agent asserted that “lots of people with Medi-Cal do not have any dental [coverage],” even though this is not generally true of dual eligibles in California.
- One agent was extremely vague about the product he was marketing. When asked whether the beneficiary had to sign up for something to get the extra benefits described, the agent assured the listener that there was no need to sign up for something. If the beneficiary wanted the benefits, the agent would get him enrolled on the phone and would send out a card he could start using. This agent was asked three separate times whether the product he was marketing was a Medicare Advantage plan. Each time, the agent responded by providing the plan name instead of answering the question.
- One agent pretended to be a neutral broker interested in finding the “right” option for a particular dual eligible, but then needed only information about the county of residence in order to recommend Health Net’s Seniority Plus Amber II SNP.

- One agent provided inaccurate information about enrollment periods, telling the listener that beneficiaries would have to sign up by November 1, 2008. When asked about a dual eligible's right to make a plan election at anytime during the year, the agent explained that while someone may sign up for Medicare or Medi-Cal at anytime during the year, the special benefit programs like the one he was marketing are only available at certain times of the year. Beneficiaries would have to sign up by November 1st to get the extra benefits he was offering.
- Agents refused to provide important follow up information. One agent refused to provide a phone number and hung up after a request for a last name. Another agent refused to mail information, instead directing the listener to a Health Net website, but emphasized that he could enroll someone over the phone using a website he had access to.

These robo-calls violate CMS' marketing regulations and guidance in effect at the time of the calls as well as new prohibitions on outbound telemarketing.

Regulations and Guidance in Effect for Plan Year 2008. The regulations in effect at the time of these calls prohibit activities that could mislead or confuse or that misrepresent the MA organization. 42 CFR 422.2268(e). As detailed above, many of the statements made by agents during the calls were misleading and confusing and misrepresented the benefits offered by the SNP.

The Medicare Marketing Guidelines in effect in early September allow outbound telemarketing "solely to solicit requests for pre-enrollment information, describe benefits, and to alert existing beneficiaries to new benefits or health related offers." Yet at least one agent emphasized that his role was to sign potential beneficiaries up for the SNP over the phone. If Health Net believes that simply asking a beneficiary to press a button for more information converts a call from an outbound marketing call to an inbound call on which enrollment is allowed, we believe that is a gross misinterpretation of the marketing guidelines, and CMS should clarify that intrusive robo-calling cannot be used to circumvent marketing rules.

The Guidelines also require organizations to comply with the Nation-Do-Not-Call Registry. The robo-calls appear to violate this prohibition because a number of the recipients of calls were registered with the Do-Not-Call registry and had no prior business relationship with Health Net or the broker.

MIPPA and the new regulations. The Medicare Improvements for Patients and Providers Act explicitly prohibits outbound telemarketing. Recently issued regulations reflect this prohibition. 42 CFR 422.2268(d). As stated above, robo-calls are clearly outbound calls. To the extent that these calls are continuing, they clearly violate the new regulations.

These calls raise concerns about recent CMS guidance which, despite the clear prohibition on outbound calls in MIPPA and the text of the interim final regulation, permits plans to continue conducting outbound calls in some situations. As the Health Net calls demonstrate, outbound calls provide a ripe opportunity for misrepresentation and are difficult to monitor or regulate.

We note that none of CMS' proposed new surveillance of Medicare Advantage marketing (increasing "secret shopper" activities, reviewing plans' print and broadcast advertisements, reviewing recordings of enrollment calls, and asking plans to self-policy agent/broker misrepresentations) will adequately monitor these robo-calls or other outbound calls.

Targeting Monolingual Spanish Speakers in Kern County

Throughout the year, advocates in Kern County have been dealing with problems created by brokers marketing Health Net products to low-income Spanish speaking beneficiaries. Health Net brokers have been using misleading and inaccurate statements to enroll beneficiaries in a plan (Health Net Seniority Plus Amber II) that is not accepted by their providers. As a result, a number of beneficiaries have received bills from their providers and have been saddled with significant medical debt.

The stories in Kern County all follow a similar pattern. A Spanish speaking senior or individual with a disability is approached in a public place (park, grocery store, etc.) or in their home by an agent who speaks limited Spanish. The agent tells the beneficiary about a program which provides extra benefits (respite care, free toiletries, a \$5 gift card) at no cost and assures them that their current benefits will not be changed ("I'm sure your provider will be covered"). The beneficiary signs up for the plan without fully understanding it (the agent's Spanish is not very good and no written materials are provided in Spanish or any other language) and continues to see their providers believing that their benefits have not changed. Unable to bill the plan, the provider bills the beneficiary for services rendered and the beneficiary is stuck with bills they cannot afford. Unable to pay the bills, the beneficiary loses access to their provider and medically necessary healthcare.

For example, a blind, dually eligible, Spanish speaking beneficiary was approached in a park by a Health Net representative. The beneficiary became interested in the plan after being told that he would receive \$5 each month to use at the local pharmacy and being assured that his doctor was a Health Net provider. Despite the fact that the beneficiary cannot read or write and, therefore, signs his name with a mark, the conversation between the broker and the beneficiary ended with an enrollment form with his full name signed at the bottom. Only later did the beneficiary discover that he had been enrolled in the plan, that his doctor was not a Health Net provider and that the \$5 coupon could only be applied to over the counter medications that he did not take. The beneficiary had been continuing to see his provider even after learning of the Health Net enrollment because the provider's office was one of only two places he knew how to get to on his own (the other being the local pharmacy). He eventually contacted a local advocate after receiving over \$1,000 in bills from his provider.

Advocates in Kern County have also heard reports from the local Medi-Cal office that agents are posing as Medi-Cal beneficiaries to obtain Medi-Cal identification numbers.

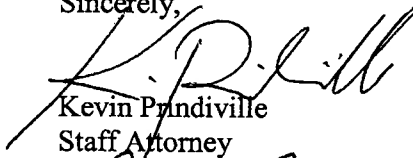
These contacts violate the prohibition on misleading and confusing statements and misrepresentations. They also violate the prohibition on direct to beneficiary solicitation.

National Senior Citizens Law Center

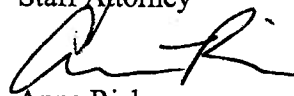
We request that CMS investigate the marketing activities of Health Net and its agents. If violations of marketing regulations and guidance are discovered, we ask that CMS act quickly to stop ongoing violations and reprimand Health Net for any prior violation. Press reports, congressional hearings and the new regulations have alerted plans that unscrupulous marketing practices will not be tolerated. Plans that fail to follow the regulations in the face of the attention paid to the issue must be held accountable. If plans that violate the marketing regulations and guidance are not held accountable, there will be no incentive for plans to follow the law.

We look forward to hearing about CMS plans to follow up on this complaint. Thank you for your attention to this matter.

Sincerely,



Kevin Pyndiville
Staff Attorney



Anna Rich
Staff Attorney

Cc: David Sayen, Regional Administrator, CMS Region IX
Alejandra Clyde, Health Net
Kristine Blackwood, House Energy & Commerce Committee, Subcommittee on Oversight and Investigations
Christina Hinkle, Senate Special Committee on Aging
David Lipschutz, California Health Advocates