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Before the United States Senate Finance Committee

Selling to Seniors: The Need for Accountability and Oversight of Marketing and Sales by Medicare Private Plans

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Good morning Chairman Baucus, Ranking Member Grassley, and members of the United States Senate Finance Committee. My name is Michael McRaith and I am Director of the Illinois Division of Insurance.

Thank you for holding this important hearing today and for inviting me to testify about Illinois' experience and views on the need for accountability and oversight of marketing and sales by Medicare private plans. As a member of the NAIC Senior Issues Task Force and chairman of the NAIC Health Innovations Working Group, I also intend to share some of the views of the National Association of Insurance Commissioners (NAIC).

State insurance regulators are well-versed in the marketing and sales practices used by companies that offer Medicare private plans (*i.e.*, Medicare Advantage and Medicare Part D Prescription Drug Plans). This testimony will summarize problems with the Medicare private plan marketplace, describe the benefits of state-based consumer protection, and endorse the grant of additional state authority found in the Accountability and Transparency in Medicare Marketing Act of 2007.

Problems in the Marketplace

The problems occurring in the marketing and sales of Medicare private plans have been well publicized. Countless media reports have described the overly-aggressive, inappropriate, and sometimes deceptive practices used to market, sell, and enroll seniors into Medicare private plans. Federal and state legislators across the United States, perhaps including your offices, have received innumerable complaints from Medicare-eligible constituents about these problems.

During several Congressional hearings on these topics during 2007, state insurance regulators reported that their respective departments and State Health Insurance Assistance Programs (SHIPs) received a consistent pattern of complaints, most of which related to the marketing and sale of Medicare private plans. While the media often focused on Medicare Advantage private-fee-for-service plans, state insurance regulators did and do recognize that many complaints also involve other types of Medicare Advantage and Prescription Drug Plans.

Regulators receive frequent reports of a variety of problems, including: marketing and sales practices that pressure beneficiaries to enroll into inappropriate or unsuitable plans; marketing and sales practices leading beneficiaries to enroll into Medicare Advantage plans without fully understanding that enrollment would lead to the loss of traditional Medicare and Medigap plans; beneficiaries being misled about a Medicare Advantage plan's provider network or provider reimbursement policies; mishandling of enrollment applications; beneficiaries being misled or not informed about a plan's cost-sharing; tying (*i.e.*, cross-selling) tactics where agents use Medicare Part D as a pre-text to develop a relationship with a senior and then sell the senior an unrelated and often unsuitable product (*e.g.*, a Medicare Advantage plan or life insurance policy); and, finally, outright common law fraud.

As a result of the frequent and severe misconduct and resulting bad publicity, CMS has recently announced a number of new requirements for Medicare Advantage Private Fee-for-Service plans. State insurance regulators generally support the new CMS requirements, including the

call-back system, the secret shopper program, and the requirement that plans administer agent training. The NAIC has informally surveyed the states to assess whether the CMS changes noticeably improved the quality or quantity of consumer complaints. The survey results received thus far are mixed: some states report clear improvement for consumers during the past year, while other states, such as Illinois, report neither a clear improvement nor a clear worsening of the situation.

For insurance commissioners, these marketplace problems are startlingly reminiscent of the early days of Medigap. Just like Medicare private plans today, federal Medigap regulation in the late 1980's created confusion and financial distress for seniors. Prudently, Congress developed and passed important legislation in 1990 that gave the NAIC authority to develop national, state-enforced standards for Medigap plans. This model for cooperative federal-state oversight can be adapted to create in the Medicare private plan marketplace greater protection and clarity for Medicare beneficiaries, while preserving viable options.

The Oversight Role of State Regulators

The program to provide Medicare beneficiaries the option of private plan coverage, once referred to as Medicare+Choice, operated successfully for almost 10 years with state oversight. The Medicare Modernization Act (MMA) not only created the new "Medicare Advantage" plan, but stripped state regulatory oversight of insurance company activities. Not surprisingly, reported marketing and sales abuses began to proliferate shortly thereafter.

The Medicare Advantage program provides an important option for seniors in Illinois. However, as currently structured, the Medicare Advantage program provides insufficient oversight and thereby invites abuses by companies and agents, both of which receive great financial rewards for steering seniors to private, limited-network products that often do not meet a senior's basic needs. For instance, many seniors have been enrolled in Medicare Advantage plans without being told or without understanding that the private plan's provider network does not include that senior's long-known primary care physician.

Greater state authority is needed to both properly oversee the marketing activities of Medicare private plans and to quickly assist seniors who have been harmed. For reasons described below, state insurance regulators urge passage of the Accountability and Transparency in Medicare Marketing Act of 2007 (S. 1883), pending legislation that would supplement federal oversight with a limited grant of authority to states to monitor insurance company marketing abuses. Uniformity of state laws is guaranteed – the grant of authority is explicitly tied to national standards developed by a diverse working group.

The top priority of insurance regulators is consumer protection. Insurance regulators not only license private insurance companies, but also possess broad authority to act against a state-licensed entity on behalf of consumers.

Every day insurance regulators receive and respond to consumer inquiries or complaints for non-Medicare private health plans. When the Illinois Division of Insurance receives a consumer complaint, professional staff immediately reports the complaint to the company. State law

requires that the company then review the complaint and provide a specific written response, which may include corrective action. If necessary, state law requires the company to provide additional information. We evaluate all information and determine whether the company violated Illinois' insurance consumer protection laws. Every complaint receives this thorough attention.

If the Division finds a violation of state law, or if the Division receives more than one complaint about a company, then the Division initiates an investigation under general regulatory authority granted to the Director of Insurance. State insurance regulators can issue a subpoena, examine witnesses, and conduct a hearing. If the investigation reveals that a company has violated the Insurance Code, then several remedies are available: order the company to take corrective action; impose a fine on the company; and/or issue a cease and desist order to immediately stop the company from harming consumers. Ultimately, I can also revoke or place limits on a company's certificate of authority. State regulators also conduct regular and cyclical market conduct examinations that comprehensively evaluate a company's compliance with consumer protection laws.

State regulators, familiar with local companies, agents, and providers, are engaged and vigilant in ensuring proper behavior of all marketplace participants. Necessary state laws authorize regulators to investigate, fine, penalize, and even shut down companies that employ practices harmful to the public interest. State regulators not only foster competitive insurance markets but also actively demand consumer protection.

The Problem of Preemption

A principal reason for the proliferation of problems in the Medicare private plan marketplace is the absence of rigorous oversight to protect and assist consumers. State insurance regulators, including my Illinois department, have uncovered practices that would appear to violate state consumer protection laws. Unfortunately, we are precluded from taking action because, with the exception of licensing and solvency, the MMA specifically preempts states from regulating Medicare Advantage and Prescription Drug Plans.

The Illinois Division of Insurance regularly receives complaints and inquiries from seniors who were sold unsuitable Medicare private plans, but is without authority to call the company and clarify or correct the problem. The only recourse for the senior is to call Medicare, wait for a live person to answer the phone (a process that can take 20 to 30 minutes), report the violation to CMS, and sometimes wait weeks or months for CMS to respond. Seniors deserve better.

State regulators continue to exercise appropriate authority over licensed agents. Nevertheless, the method by which state regulators tackle widespread marketing and sales abuses is by addressing the financial incentives that drive the behavior – the marketing plans and agent compensation practices developed by the companies. Since regulators lack authority over the companies, reaction is often limited to case-by-case investigations of abuses and prosecutions of agents.

Despite the jurisdictional limitations, the Illinois Division of Insurance noted a pattern of complaints against persons selling Humana Medicare Advantage and Prescription Drug plans. In

response to this pattern, the Division examined Humana and its relationships with sellers. Upon finding that Humana engaged and received Medicare Advantage and Prescription Drug plan applications from at least 67 unlicensed sellers, the Division, on January 11, 2008, entered an order against Humana requiring appropriate corrective action and imposing a $500,000 fine.

While the Division has taken action against Humana for using unlicensed sellers, we can not hold Medicare private plans responsible for the acts of their licensed agents, unlike other types of private health insurance. State insurance regulators require additional authority over the marketing and sales strategies of the plans in order to protect vulnerable seniors from unscrupulous agents.

Additionally, the current regulatory bifurcation (*i.e.*, CMS has exclusive regulatory jurisdiction over the companies and states have jurisdiction over agents) creates a wide regulatory gap that invites exploitation by both companies and agents. When state regulators attempt to protect consumers, the companies cite preemption and advise regulators that CMS limits jurisdiction. This gap harms consumers.

In Illinois, as with other states, seniors have reported abusive sales practices resulting from the cross-branding or tying of private insurance products. While in other commercial transactions the practices of cross-branding and tying may be appropriate, such practices can be wholly improper when directed at seniors frequently overwhelmed by the level of detail associated with products like Medicare Part D coverage. For example, under current CMS guidelines an agent selling a Medicare Part D plan to a senior may also sell that senior an annuity, a life insurance policy, or a Medicare Advantage plan. Without access to a discerning family member or SHIP volunteer, a senior on a fixed income can easily be steered into purchasing the wrong product(s).

Seniors are also harmed by company behavior not directly connected with plan marketing. For example, a company may encourage agent abuses by paying volume-based bonuses to agents, *e.g.*, the agent receives additional compensation by increasing the volume of his or her submitted applications. Also, evidence demonstrates that the short 45-day enrollment period may drive companies to work with agents of a quality that the company would not normally allow.

Improved State Oversight and Enhanced Consumer Protection

With nearly fifteen percent (15%) of a state population enrolled in Medicare – a number likely to increase in the near future – federal preemption of state consumer protection laws generates significant challenges for too many of our residents. The lack of an effective federal safeguard against abusive sales and marketing practices heightens the need for improved oversight.

The problems identified in this brief summary can be resolved with measured reforms that do not interfere with the fundamental objectives of the MMA. Fortunately, the federal and state experience with Medigap reform provides an instructive precedent.

In the late 1980's, Senator Ron Wyden and others on this Committee collaborated with the NAIC and led the effort to address problems in the Medigap marketplace. This pro-consumer

collaboration culminated in 1990 with the passage of landmark legislation that established the current regime of Medigap insurance regulation.

The 1990 Medigap legislation established joint federal-state regulation, with state regulation tied to state adoption of NAIC-developed model regulations. After adopting the standards, states were authorized to enforce the rules. Given that the Medigap problems of the late 1980's strongly resemble the company and agent abuses in today's marketplace for Medicare private plans, the Medigap solution provides an appropriate template for reform.

As proposed by Senators Kohl, Wyden and Dorgan, the "Accountability and Transparency in Medicare Marketing Act of 2007" (S. 1883) would encourage the NAIC to develop a set of standardized marketing requirements for Medicare Advantage and Prescription Drug Plans. Under this bill, the NAIC would develop these standards in consultation with a balanced working group comprised of state insurance regulators, CMS, industry representatives, consumer groups, and other experts. The Secretary of Health and Human Services would promulgate these national standards and, thereafter, states would be permitted to enforce the rules.

The S. 1883 federal-state partnership approach ensures that Medicare Advantage and Prescription Drug Plans would not be subject to state-specific rules but, rather, would allow state regulators to protect and assist seniors. States would not interfere in the contracting process and would not have approval authority over company marketing materials. States would, though, have the legal capacity to require accountability if a company's marketing practices, or the practices of a company agent, failed to satisfy the essential consumer protections developed by the S. 1883 working group.

Summary

Expansion of state oversight authority over Medicare Advantage and Prescription Drug Plans will allow insurance regulators to better protect seniors from agents engaged in unscrupulous or abusive sales practices. With measured delegation of responsibility, state insurance regulators cannot only continue to foster competitive insurance markets but also ensure that fewer seniors are mistakenly sold unnecessary Medicare Advantage or Prescription Drug Plans.

The Illinois Division of Insurance, like all NAIC members, works every day to protect consumers, especially those seniors who are among the most vulnerable members of our communities. State insurance regulators have long-standing institutional knowledge, expertise, and resources upon which to construct appropriate marketplace safeguards.

Grateful for the opportunity to participate in this important discussion, the Illinois Division of Insurance and the NAIC remain committed to working with the United States Senate, CMS, and other essential policymakers to draft and implement those practices that serve the best interests of the growing Medicare-eligible population. We remain certain that consumer-focused collaboration will benefit all interested parties.