

**DEPARTMENT OF INSURANCE**

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**NOTICE**

**DATE:** November 18, 2005  
**TO:** Life Insurers and Life Agents  
**FROM:** California Insurance Commissioner John Garamendi  
**SUBJECT:** Unlawful Sales Practices Pertaining to Medicare Part D and Annuities for Seniors

The purpose of this notice is to make life insurers and life agents aware of specific communications with the Center for Medicare & Medicaid Services (CMS) and the National Association of Insurance Commissioners (NAIC) with regard to:

- (A) allegations of unfair sales practices regarding the sale of Medicare Part D, and reinforce the application of state laws to marketing and sales practices involving Part D benefits;
- (B) address the provisions of the Insurance Information and Privacy Protection Act of the California Insurance Code, as they relate to the use of pretext interviews by insurers, producers and insurance-support organizations and;
- (C) inform insurers and agents regarding the use of marketing practices that are in violation of the Insurance Code and to address the responsibilities of both insurers and producers in assuring that the described or similar marketing practices are not used in the solicitation and sale of insurance in California.

**Medicare Part D Sales**

Since October 1, 2005, marketing activity for the new Medicare prescription drug benefit, Medicare Part D, has been permissible. Several questions have arisen in regard to the sale of Part D. The Department wishes to provide the following clarification and guidelines to insurers and agents:

**Q. Is an insurance license required to market Medicare Part D?**

- A. Only state-licensed insurance producers may engage in marketing activity.

**Q. Does the State retain jurisdiction over the conduct of agents and brokers selling Part D?**

A. The Medicare Modernization Act does not pre-empt producer licensing laws. Thus, state law and regulatory provisions regarding producer activity apply to the marketing of Medicare Part D. CMS has already received complaints about alleged misconduct by licensed producers with regard to Medicare Part D marketing. CMS will refer complaints it receives about producers licensed in this state to the California Department of Insurance. This bulletin reminds licensed producers that they are subject to all the laws and regulations of this state, including those relating to the duty of good faith and fair dealing, the suitability of sale, and the prohibitions against misrepresentation, churning, and high pressure sales tactics when marketing, soliciting, or selling Medicare Part D. (See below).

**Q. May agents cross-sell Part D or use Medicare Part D information to generate leads?**

A. CMS marketing guidelines permit the sale of multiple lines with Part D subject to restrictions outlined in Marketing Materials Guidelines.

<http://www.cms.hhs.gov/pdps/marketingguidelinesupdate11-1-05.pdf>

Although the sale of multiple lines is not prohibited by state law, the manner in which products are represented or promoted is subject to all of the laws of this state regarding the sale of insurance products. We view with a high degree of skepticism the use of a lead relating to Part D marketing activity to cross-sell other insurance products of any type and will continue to apply state laws prohibiting inappropriate marketing and sales practices in this context.

The new Part D benefit is extremely confusing for the Medicare beneficiary and most seniors are looking for guidance on this decision. It would be unwise for the producer to take advantage of the Part D lead to sell other insurance products to a Medicare beneficiary.

Allegations of misconduct related to Part D marketing or sales will be thoroughly investigated by this office. Any proven misconduct will be prosecuted under the laws of this state relating to producer licensing.

**Sales of Annuities**

The Department of Insurance is aware of a number of unlawful marketing schemes designed to accomplish the sale of annuities principally to senior citizens through the use of misrepresentation of identity and/or purpose. The initial approach to clients may be to solicit senior citizens at “seminars,” purportedly to educate participants about the benefits of living trusts, retirement planning, long term nursing care and explanations of Medicare Part D. The approach may be through mass mailing, telemarketing, door-to-door solicitation, or even while providing entertainment at senior related functions. Sometimes high CD rates or reverse mortgages are offered in newspaper ads or in banks in a classic bait and switch. Regardless of

the initial area of interest to the senior, the senior is eventually sold an annuity. Seniors characteristically perceive the agent as a legal advisor or estate planner and not as an insurance agent because the representatives misrepresent themselves as experts in the initial subject area. They gain the trust and confidence of the senior, and then misuse that trust to sell an annuity that is oftentimes unsuitable for the senior.

Because of this perception that the salesperson has their best interests in mind, seniors may conclude that they need not totally understand what the pros and cons of an annuity are for their specific situation. They may not be told, or if told, they may not understand, the impact of surrender penalties on their net worth, or far-off annuitization dates on their liquidity, or the sale of an annuity or other investment to buy the annuity offered on the taxes they will owe.

## **Summary of Prohibitions**

Pretext interviews and unfair marketing and sales tactics are in violation of, and may be sanctioned under various California law as outlined more completely below. These include criminal elder abuse, prohibitions against churning, twisting, material omissions or misrepresentations of fact, violations of the heightened duties of honesty and fair deal in relations with seniors, and unfair business practices.

These prohibitions may apply to insurers as well as agents. Insurers and agents are therefore advised to review all marketing programs they are involved in to assure compliance with all of the provisions of law cited below. Such review is particularly important with regard to new programs, such as those that may involve Medicare Part D marketing or sale.

## **Legal Authority**

Unfair marketing and sales tactics in certain circumstances may be criminal elder abuse under Welfare and Institutions Code section 115610.30(a)(2). The Insurance Code prohibits: (1) churning and twisting—misleading claims or material omissions leading to the replacement of insurance products (Ins. Code sections 781 and 10509.8); and (2) lead-generating gambits or advertisements that are misleading (Ins. Code section 787). Moreover, under Insurance Code section 785, dealings with seniors require a heightened duty of honesty, integrity and fair dealing. The Commissioner, along with other state and local officials, is determined to stop these fraudulent practices by pursuing all appropriate administrative, civil and criminal enforcement remedies necessary to the task. (For instance, Insurance Code sections 780 et. seq. and 790 et. seq.).

These sections may apply to insurers as well as agents, and certainly insurers may be parties in any enforcement action if an agent participates in any activities set forth in Insurance Code sections 790.03. Insurers should clearly define the high standard of fair dealing expected of agents when working with seniors. Insurers should review and approve solicitation materials and

techniques. Insurers may be subject to suspension of a certificate of authority under Insurance Code section 704 or fine under section 704.7 if an insurer permits its life agents to engage in deceptive marketing schemes.

The activities described in this Notice are also actionable under Business and Professions Code sections 17200 and 17500, and may be actionable under Civil Code section 1761, which may allow punitive damages under Civil Code section 3294 or the trebling of a damage award under Civil Code section 3345. As indicated above, established violations can result in injunctive relief, restitution and both civil and criminal penalties. As well, such violations are administratively actionable under the provisions of the Insurance Information and Privacy Protection Act,<sup>1</sup> and may result in orders to cease and desist, subsequent monetary penalties and the suspension or revocation of certificates of authority and production agent licenses.

Insurance Code section 791.03 provides that “[no insurance institution, agent or insurance support-organization <sup>2</sup> shall use or authorize the use of pretext interviews to obtain information in connection with an insurance transaction.” Insurance Code section 790.02(u) defines “Pretext interview” as “an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following acts: (1) Pretends to be someone he or she is not; (2) Pretends to represent a person he or she is not in fact representing; (3) Misrepresents the true purpose of the interview; and/or (4) Refuses to identify himself or herself upon request.”

While neither the Business and Professions Code’s Unfair Competition Law nor the Insurance Information and Privacy Protection Act are limited in their application to solicitations for Medicare Part D coverage, the potential for pretext interviews while marketing Medicare Part D is cause for the Insurance Commissioner to request agents and insurers to conduct a focused identification and review of each marketing program in which they are involved, for the purpose of assessing their compliance with the above cited statutes. Particular attention should be given to any program for annuity sales in which the insurer or agent states or infers that they possess particular expertise in the areas of law, finance, health or financial planning. Offending programs should be corrected immediately, and remedial action should be taken. Remediation should include allowing purchasers that were unlawfully solicited to rescind their contracts.

Thank you for your consideration of this matter.

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1 Insurance Code section 791 et seq.

2 Insurance-support organizations are persons engaged in the business of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution or agent for insurance transactions. Insurance institutions include insurers holding certificates of authority, and agents include production agents’ licenses pursuant to the provision of the California Insurance Code.