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Mr. Martin Swanson, Nebraska Department of Insurance, co-chair, Improper Marketing of Health Insurance (D) Working Group

Mr. Frank Pyle, Delaware Department of Insurance, co-chair, Improper Marketing of Health Insurance (D) Working Group

Via email: GWelker@naic.org; martin.swanson@nebraska.gov; frank.pyle@delaware.gov

Re: Improper Marketing of Health Insurance Working Group Proposed Amendments to Model 880 Unfair Trade Practices Act

Dear Mr. Swanson & Mr. Pyle,

The American Council of Life Insurers (ACLI) appreciates the opportunity to provide comments on the proposed amendments to NAIC Model Law 880, The Unfair Trade Practices Act. We support the utilization of the NAIC's standards for state insurance regulators to protect consumers from the improper marketing of health insurance products.

ACLI supports the Working Group holding public discussions regarding the proposed amendments to Model 880 and appreciates the opportunity to provide comments. We also encourage coordination with the Producer Licensing Task Force which has broad knowledge of the how producers will be impacted by the proposed elements of the exposure draft and may have further ideas to assure the desired regulatory authority is achieved.

We understand the Improper Marketing of Health Insurance Working Group (Working Group) was created because of concerns with activity related to the marketing of accident and sickness products. At the recent NAIC Summer National Meeting, the Working Group referenced that it was particularly focused on addressing the actions of those lead generating entities that are unlicensed from an insurance perspective and whose activities are conducted via the internet. Furthermore, we believe based on the language proposed in Model 880, your goal is to define lead generating entities, apply specific data storage and access requirements for lead generating entities, and to update Model 880 to include newer electronic communications methods not previously included.

ACLI member companies tailor their marketing and sales functions and product presentation materials to be transparent about their benefits, limitations, exclusions, and how they are not a substitute for comprehensive major medical coverage. ACLI and our member companies share the Working Group's

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The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's member companies are dedicated to protecting consumers' financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI's 280 member companies represent 94 percent of industry assets in the United States.

goal of ensuring that health insurance products, particularly health-related supplemental excepted benefits, are advertised, marketed, and sold properly. Our members are committed to ensuring agents and producers with whom they work are properly trained, managed, and vetted to prevent improper behavior. We appreciate the opportunity to work with you to find the most effective way to address the improper behavior of concern. To that end, we offer the following comments and suggestions regarding the exposure draft of Model 880 (the Unfair Trade Practices Model Act).

Definition of Lead Generator

As the consumer protection concerns of the Working Group are related to the marketing and sale of specific health insurance products, we believe that formal written guidance from the Working Group regarding applicability of existing laws and regulations can address many regulatory concerns the Working Group has expressed. We also recognize a major concern of the Working Group is a belief that there is no clear definition of the entities that perform the lead generation functions. However, we note that a definition of lead generation is currently included in the NAIC's Model 40, Advertisements of Accident and Sickness Act.

We are concerned that as the Working Group moves forward with applying a definition of lead generator, the definition of "Insurance Lead Generator" proposed in this exposure draft is overly broad and will likely lead to more confusion in the industry at large. For example, under the proposed definition, any newspaper, television station or network, internet website, or other advertising platform used by an entity to publicize insurance products would be considered an insurance lead generator, and therefore, potentially subject to standards that are only appropriate for insurers, producers, and other entities engaged in the business of insurance. We also note that a non-licensee may legally make a paid referral to an insurer or insurance producer, provided that there is no discussion of specific insurance policy terms and conditions and the compensation for the referral is not contingent on the purchase of an insurance product by the referred person. We do not believe it is the work group's intention to inappropriately sweep in media platforms or disrupt long-standing appropriately executed referrals.

We offer the following suggestions to more specifically define "Insurance Lead Generator" and to facilitate accomplishing the Working Group's goals:

1. Clearly defining the type of product that is included within the definition. This will allow for exclusion of other lines of insurance such as life insurance, disability income insurance, and long-term care insurance from the definition.
2. Clearly defining the type of entity and activities by that entity that are included within the definition. This will help avoid unintended application of the definition to all types of entities who engage in advertising.
3. Including in the definition unlicensed entities that receive compensation for referring to an insurer or insurance producer a potential consumer, regardless of whether sale of insurance coverage occurs.

For the reasons considered above, we recommend refining the definition of "Insurance Lead Generator" as follows:

"Insurance Lead Generator" means an entity that is: a) not licensed to engage in the business of insurance or sell insurance under the laws of this state; b) that engages in health insurance-related advertising activity (excluding disability income and long term care insurance), or publicizes the availability of a health insurance product or what purports to be a health insurance product or service; and c) that is paid to recommend, endorse, and/or promote a health insurance product or service,

producer, and/or insurer and, in so doing, discusses specific health insurance policy terms and conditions, and (d) any part of whose compensation is contingent on the purchase of a health insurance product by a referred person.

We would also like the opportunity to discuss sections B and new Section C with the Working Group to ensure we understand what the specific expectations would be for records and availability of data related to internet advertising. Since Model 880 is broadly applicable to all entities engaged in the business of insurance, this might be a more appropriate discussion to have in the context of Model 40, as discussed below in our comments related to guidance and best practices.

Rhode Island Proposal

ACLI strongly recommends that the Rhode Island proposal to insert Third Party Marketing Organizations (TPMO) definitions and provisions be rejected. The federal TPMO rule upon which this recommendation is based was promulgated by the federal Centers for Medicare & Medicaid Services (CMS) specifically to address concerns related to how Medicare Advantage (MA) plans are being marketed and sold by third parties representing MA insurers. It imposes TPMO requirements on all agents and brokers representing Medicare Advantage business and sets forth requirements for which it will be very difficult for some types of insurance producers to comply. Imposing the requirements in this proposal on all insurers and producers subject to the Unfair Trade Practices Act [as adopted in their state] will have a wide variety of impacts depending on the type of insurance or entity and would be cost prohibitive for many of the independent and smaller organizations, agents, and brokers. It would be extremely disruptive to existing distribution channels that function well and provide consumers with legitimate and helpful information and assistance in selecting financial protection products that are highly valued.

Similar to our concerns with inserting a broad definition of “insurance lead generators” into Model 880, we worry that by adopting the TPMO regulations (which were originally developed by the federal government to address a specific type of marketing behavior for a specific product type) into the broadly applicable Unfair Trade Practices Act, regulators would be inundated with data and information at a level that will make it very difficult to identify bad actors and violations. Further, since regulators’ authority is limited to regulated entities who are engaged in the business of insurance, there would be broad disruption with very little impact on solving the problem at hand.

A Simpler and More Comprehensive Way

We suggest a simpler method to assure consistent and clear state insurance regulatory authority for preventing inappropriate advertising and solicitation of health insurance products is for the Working Group to issue written guidance regarding the application of Model 40 and Model 880. We are concerned that merely adding a definition of “lead generator” to Model 880 is insufficient to assure state regulatory authority since such lead generation entities are not required to be licensed as an insurance entity and are not directly within state insurance regulatory authority. This is because lead generation entities are not licensed as any type of insurance entity, such as insurer, producer, solicitor. Therefore, for state insurance regulators to effectively have additional authority to regulate lead generation entities, it is probable that in many changes to state laws and/or regulations would be necessary.

Since re-opening Model 880 has broad implications, requires state-by-state legislative updates, and may not give states the strong tools they need to solve this difficult problem, we recommend the Working Group develop a guidance document to clarify how existing standards found in Model 880 (Unfair Trade Practices) and Model 40 (Advertisements of Accident and Sickness Insurance) apply to lead generating entities and the insurers that interact with them. The guidance should include clarification on how regulators can address violations as well as updated and more detailed guidelines for the proper use of lead generators.

We believe guidance issued from the Working Group to clarify how existing standards apply to the lead generating entities that are causing concern in the health insurance space, and the insurers that work with them would allow for a more robust discussion of the roles and responsibilities of insurers, producers, and lead generators. It would also give states clear parameters around their ability to apply the full force of both models to prevent improper or deceptive marketing of health insurance products.

We also believe issuing guidance will allow for consideration of best practices for insurers, who are clearly under the regulatory authority of the states, to exercise their role in controlling how their products are presented and how customers are appropriately brought to their products through lead generation. Additionally, guidance could allow for a fulsome discussion with federal authorities that have clear regulatory authority over the media through which lead generators work, to lay out how states, insurers, and producers can work together to assure effective identification and enforcement of standards.

Thank you again for the opportunity to offer our comments. We look forward to further discussion on this important topic and stand ready to answer any questions you may have.

Sincerely,

A handwritten signature in black ink that reads "Cindy Goff". The signature is written in a cursive, flowing style.

Cindy Goff
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American Council of Life Insurers

Cc: Martin Swanson, Nebraska Department of Insurance
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