



March 13, 2023

Sent via email: GWelker@naic.org

Martin Swanson, Chair
Improper Marketing of Health Insurance (D) Working Group
c/o Greg Welker
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RE: Improper Marketing of Health Insurance (D) Working Group
Exposure Draft Model 880

Thank you for the opportunity to provide feedback regarding the edits being proposed by the Improper Marketing of Health Plans Working Group to NAIC Model #880.

We understand the working group is charged with reviewing and identifying existing NAIC models and guidelines that need updating to address the use of lead generators related to the sale of health insurance products. We appreciate the working group's efforts to address this very important issue. However, we do not think amending Model #880 in isolation is the most appropriate approach to address the current marketplace problems. We instead recommend the working group explore existing language related to lead generators in other models and potential revisions to those models and guidelines, including but not limited to:

- Model 40 – Advertisements of Accident And Sickness Insurance Model Regulation
- Model 660 – NAIC Model Rules Governing Advertisements of Medicare Supplemental Insurance with Interpretive Guidelines
- Model 218 – The Producer Licensing Model Act

Nevertheless, we wish to provide the following comments about the currently proposed changes as it may inform future conversations regarding proposed amendments to Model #880.

As currently drafted, we believe the proposed changes do not grant our department any additional authority to regulate "health insurance lead generators" than is already afforded under the existing model. Model #880, as written, defines "person" as "a natural or artificial entity, including but not limited to individuals, partnerships, associations, trusts, or corporations." "Person" has long been



understood to have a broad meaning under the Unfair Trade Practices Act. An article written by David R. Anderson in the Journal of Insurance Regulation¹ titled *State Unfair Insurance Trade Practices and Claim Laws: The NAIC Model*, states, in regard to persons:

'Person(s)' covered under the Act is very broad and includes virtually every individual or entity engaged in the business of insurance, including insurers, reciprocals, agents, brokers, and adjusters. State case law has interpreted the act to also include sureties, self-insurers, and defense attorneys (pg. 69).

The article further explains that,

The commissioner of insurance is authorized to examine and investigate the affairs of any person engaged in the business of insurance who has been or is engaged in anything prohibited by the Model Act whenever there is reason to believe that a person has or is engaged in prohibited conduct, whether defined or undefined (pg. 79).

This aligns with Section 6 of the existing model law. Furthermore, the Proceeding Citations of the circulated draft of the model also note: "Section 6 was substantially revised in 2001 by the addition of the last two sentences. **To broaden its scope, references to persons were added wherever insurers were noted**" (emphasis added). Given the broad applicability of the term "persons", it seems unnecessary to add an additional definition for one such type of "person" when all other such persons remain undefined. Furthermore, the proposal to add "or health insurance lead generators" to Section 3 is inappropriate since other defined terms such as "person" and "producer" are not also in the existing model language.

Section 2. Definitions

If the current definition of 'Health Insurance Lead Generator' remains in the proposal, we recommend the word "consumers" or "consumer," as used in E.1, E.2, and E.3 of Section 2. be changed to "customers" or "customer", as that is the term defined in the model.

The definition also remains very broad and may continue to inadvertently include routine activities of licensed or regulated entities, creating potential confusion. For example, under the proposed definition, it appears that an insurer who collects information about potential customers and then transmits that data to one or more of its producers for a follow-up activity would be deemed to be a "health insurance lead generator."

¹ Anderson, David R. "State Unfair Insurance Trade Practices and Claim Laws: the NAIC Model." *Journal of Insurance Regulation*, September 1998, pp. 64-109

Section 4 – Unfair Trade Practices Defined

Many provisions contained in Section 4 refer only to “insurers”. With the proposed extension of the application of this model to health insurance lead generators, does the language within Section 4 of the model need to be updated accordingly?

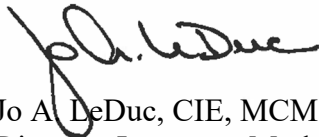
The draft includes a new provision in section 4 related to the maintenance of marketing and performance records. This new provision appears substantially similar to an existing provision (Section 4.J.). Was the duplicative paragraph intentional or would it be cleaner to simply extend the existing provision to apply to both insurers and health insurance lead generators? If the new section remains, additional re-numbering will be continued through to the end of Section 4, as it currently stops after Rebates.

Sections 6 - 11

These sections give state departments the authority to take action. If “person” encompasses a “health insurance lead generator,” then these sections are appropriate as currently drafted. However, if “health insurance lead generator” is specifically called out as a separately defined term, statutory interpretation instructs us that the specific definition is there for a reason – so if “person” does not encompass “health insurance lead generator,” then “health insurance lead generator” also is not included in the references to “person” in sections 6-11. Should “health insurance lead generator” be specifically included in these sections?

Again, thank you for the opportunity to provide comments on this topic. We look forward to future opportunities to continue this important dialogue once the request to review the model law has reached its final approval.

Sincerely,



Jo A. LeDuc, CIE, MCM, CPCU, FLMI, AIDA
Director, Insurance Market Regulation Division

cc: Director Chlora Lindley-Myers