

Senate Special Committee on Aging Testimony for 5/16/07
Commissioner Kim Holland

Good morning Mister Chairman and members of the Committee. My name is Kim Holland and I am the Oklahoma State Insurance Commissioner, an elective office I have held since January 2005. The primary obligation of our agency is to protect our consuming public. I, and my staff of over 150 dedicated individuals, take this obligation very seriously. Our office fields over 60,000 calls to our consumer assistance division each and every year, plus an additional 12,000 calls to our federally funded Senior Health Insurance Counseling Program (SHIP). We license and regulate the activities of over 80,000 agents, monitor the financial solvency and market conduct of over 1,600 insurance companies and my twelve member law enforcement team responds to more than 700 insurance fraud allegations each year. We investigate all complaints thoroughly then act swiftly and aggressively against any carrier, agent or broker that has acted inappropriately in our marketplace.

This is the main reason I am here today. The Oklahoma Insurance Department is responding to an unacceptable number of complaints caused by the inappropriate and sometimes fraudulent marketing of Medicare Part C and Part D products to Medicare beneficiaries by certain insurance companies and their sales producers. Over the past year we have received hundreds of complaints from our citizens who have been misled or deceived during a sale.¹

The Medicare Modernization Act of 2003's (MMA)² preemption of states authority to oversee the licensure, market conduct and financial solvency of Medicare Part D agents and

¹ For examples see Oklahoma Insurance Department Limited Market Conduct Report of Examination of Humana Insurance Company for the period as of September 15, 2006, pages 6-15.

² Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub.L. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of 42 U.S.C.).

carriers by MMA and the marketing practices of Medicare Advantage carriers has led to virtual lawlessness in Oklahoma. Unlicensed 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. As Insurance Commissioner, I currently have greater authority to address a consumer's problem with Pet Insurance than I do ensuring the protection of the 500,000 Oklahoma senior citizens covered under a PDP or Medicare Advantage plan.

Since the roll-out of Medicare Part-D in November of 2005, we have communicated with The Centers for Medicare and Medicaid Services (CMS) on numerous occasions in an attempt to forge a partnership to educate and protect our senior citizens. Yet at the earliest stages of the program roll-out, we found ourselves challenged by the inadequacy of CMS's resources in providing the necessary support to our seniors and by further attempts to pre-empt our authority over agent licensure.

The Oklahoma Insurance Department has been aggressive in our attempts to grapple with the myriad of issues that have arisen since Part D enrollment began a year and a half ago. From requiring special licensure of enrollers³ to threatening problematic PDP providers with cease and desist orders, to field investigations by our fraud unit to target market exams of insurers, we have pushed the boundaries of our authority to respond to our citizens in need because CMS has not done so - leaving many of our aged vulnerable to those whose interests are strictly their own.

³ See Oklahoma Insurance Commissioner General Order, Case No. 05-1417-PRJ, In Re: Temporary Licensing – Medicare Prescription Drug Plan Enrollment, October 11, 2005.

Senators, I am grateful to Congress for the passage of the MMA as it has made access to affordable medications possible for twenty percent of our population, a large measure of whom depend solely on Social Security for their livelihood. Fully 70,000 of our seniors live at or below the federal poverty limit and, due to the creation of new and affordable programs under Medicare D and C, are not having to choose between a meal or their medication. But it is this reality – a pressing demand for coverage and a growing supply of available plans – that necessitates adequate regulatory oversight to ensure what Insurance Commissioners across the nation strive for: a healthy marketplace wherein robust competition and vigorous consumer protections are balanced to create choice and value.

While I can offer you many examples of how our seniors are now dangling on the short end of this teeter-totter, I would like to use my remaining few moments to focus on a recent targeted examination we conducted on one of America's largest providers of Medicare Advantage plans which will illustrate clearly the inadequacy of federal oversight.⁴

Humana Insurance Company has been licensed in Oklahoma since 1987 and is currently authorized to market some eleven different life and health products. Historically a group health insurance provider in our state, they embraced the opportunity created by MMA and began an aggressive marketing campaign for the private fee for service Advantage plans. Of note, Humana consistently priced their Medicare products the lowest in our state.

In monitoring calls through our Senior Health Insurance Counseling Program (SHIP) office we were alerted to a number of complaints from seniors indicating they were confused and/or misled by assertions made by agents representing Humana. We learned that the

⁴ See Oklahoma Insurance Department Limited Market Conduct Report of Examination of Humana Insurance Company for the period as of September 15, 2006.

company had set up kiosks staffed by insurance agents at local Wal-Marts to sell Medicare prescription drug plans. Their location within Wal-Mart pharmacies caused us concern that consumers could be given the misleading impression that they had to be insured with that particular company in order to purchase their medicines from Wal-Mart. In many small communities throughout Oklahoma, the nearest Wal-Mart may have the only conveniently located pharmacy operation. And, indeed, seniors seeking information from these kiosks stated that they felt pressured to buy and were not made fully aware of all of the options available. We asked Humana corporate representatives to come to our offices to explain their marketing strategies and allow us to share our concerns. We were particularly concerned over complaints from seniors who stopped by the kiosk to obtain information on Part D and were pressured to change from their current program and enroll in one of the carrier's Advantage plans, not understanding the consequences of their decision – either in terms of benefits or physician choice. During this meeting, Humana assured me that they had an extensive agent training program. Their senior executives asserted that sales associates (both company employees and independent brokers) were required to go through a lengthy forty-five minute presentation with each senior that explained fully all available options. However, when I questioned them about their ability to enforce this requirement or even monitor their agent performance within Wal-Mart, they confessed their inability to do so indicating that they had underestimated the volume created by their marketing campaign and were not adequately staffed – but, while continuing to run full-page advertisements for their products in our local newspapers. I asked the company to discontinue the arrangement with Wal-Mart and challenged them to act more responsibly in accounting for the activities of their independent agent population. Subsequently, we proposed

an agreement with Wal-Mart to allow our SHIP volunteers to co-locate in their larger stores to ensure seniors received objective program information.

In June of 2006, we initiated a targeted market examination of Humana due to the escalation in the number and nature of unresolved complaints involving the sales tactics of agents selling their products.⁵ The examination report submitted with our written testimony provides numerous examples that illustrate the scope and gravity of the types of complaints made against the company.

Let me provide you one such example, the story of Malcolm who lives in the small Oklahoma town of Claremore. He was solicited by a salesman representing Humana while visiting his local Wal-Mart Pharmacy. The salesman aggressively encouraged Malcolm to purchase the Humana Gold Choice plan, a Private Fee for Service Advantage product. Malcolm told him that he merely wanted the stand-alone drug plan and submitted paperwork for what he believed to be that plan. However, when his card and information arrived in the mail he discovered he was in fact enrolled in the Advantage product.

Malcolm had been enrolled in a private insurance plan with rich benefits to which he was entitled as a result of his retirement from a major corporation. This plan served as his Medicare supplement plan. By law, an individual can have only one Medicare supplement plan. Therefore, the enrollment in Humana Gold Plan caused him to be automatically disenrolled from his more comprehensive plan. He and his family spent weeks restoring his original insurance and disenrolling from the Humana plan. After restoration of his original insurance coverage, Humana continued billing Malcolm for months. His circumstance is unfortunately typical of the complaints we heard and which prompted our targeted exam.

⁵ *Id.*

I sent an independent examiner to Humana to review the files of their Oklahoma agents who had been paid for the sale of the company's Advantage products.⁶ Throughout the examination, the company attempted to hinder the examiner's access to information, claiming federal preemption.

When finally completed, the examination exposed chronic and blatant disregard for state regulation and for senior policyholders. Advantage plan products were sold throughout our state by untrained, unlicensed individuals in violation of Oklahoma law and similar laws in force in every state in the US. Our appointment process was consistently circumvented by guidelines promulgated by CMS, prohibiting states from enforcing this important consumer protection.^{7 8} An appointment creates a critical link between an insurer and the agent, ensuring that regulators can hold insurers accountable for the conduct of an agent. The examination illustrated the company's indifference to complaints and concerns registered by senior consumers, leaving many Medicare beneficiaries waiting months in some instances for any kind of response.

It is important to note that throughout the past year and a half Oklahoma, individually and collaboratively through the NAIC, has made numerous requests of CMS to act to address company sales and marketing issues. We have made beneficiary complaint referrals as required, provided information, negotiated and entered into a Memorandum of Understanding⁹ for information sharing and whatever we could do to encourage a swift and appropriate response to

⁶ *Id.*

⁷"Because CMS, through its Medicare Marketing Guidelines, explicitly addresses the use of marketing representatives, state marketing agent appointment laws will not apply to organizations." Centers for Medicare and Medicaid Services Medicare Marketing Guidelines for Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, Prescription Drug Plans and 1876 Cost Plans, page 130.

⁸36 Okla.Stat. tit § 1435.15.

⁹ Memorandum of Understanding and Agreement Concerning Regulatory Cooperation and Information Sharing Between The Centers For Medicare and Medicaid Services and the Oklahoma Insurance Department, signed by CMS on February 5, 2007.

these unnecessary and unlawful activities. The senior citizens of my state are still waiting for that response from CMS.

Even in instances where we believe CMS could take action to address a clear problem, we have been frustrated by their inaction. For example, we had a foreign company selling Medicare Part D products that had an identical name to an Oklahoma domestic health carrier selling Part C and D products. This situation created widespread confusion among consumers, causing many to be disenrolled in their local Medicare Part C plan when they enrolled in the other company's (with the identical name) Part D plan by mistake. CMS provided no assistance in resolving this problem which was ultimately corrected by our domestic's legal action and our efforts to mediate the dispute for the benefit of consumers.

Another challenge for states was the granting of three year waivers by CMS from state licensure and financial solvency requirements. The MMA provides for waivers if a company had filed a "substantially complete" application each in which the applicant seeks licensure. However, CMS proceeded to grant waivers to companies who had not fulfilled the most basic requirements of licensure in their home states, as required by state law and NAIC guidelines. In fact, CMS would grant waivers if a company simply showed that it had applied for state licensing and been turned down.

These unlicensed upstarts are not subject to the preclicensing scrutiny or triennial examinations that are performed on licensed insurers, nor are they covered by state guaranty funds in the event of insolvency. If such a company were to fail, consumers and medical providers would be left holding the bag.

In August of last year we acted upon our concerns over one particular company doing business in Oklahoma under such a waiver by initiating a Freedom of Information Act request to CMS.¹⁰ We are still waiting for that information from CMS.

Due to the gravity of the findings from the Humana exam, I traveled to Washington, D.C. to meet with CMS officials in February of this year. I provided a copy of the examiner's draft report and voiced my concerns and frustration over our ongoing and unresolved issues. I left with no assurances and feeling that CMS had no sympathy for the victims. I am still waiting for a response from CMS.

I now appeal to you – allow me to do the job I do every day to assure the financial solvency of companies selling health plans in my state. Allow me to fully deploy the substantial and immediate resources of my office to protect the interests of all policyholders in my state regardless of their age and regardless of the private health plan they purchase. For the safety and security of all Oklahomans, I have not failed to act; I have not failed to respond. Yet I am encumbered by unproductive, unnecessary, and dangerous preemptions that expose my citizens to the neglect and abuse I have described. Senators, allow me to do my job. Thank you.

¹⁰ See Freedom Of Information Request by the Oklahoma Insurance Department dated August 9, 2006; also see letter from CMS with CMS reference number C06FOI2682 (VEH) received by the Oklahoma Insurance Department on September 15, 2007.

EXHIBITS

- A Oklahoma Insurance Department Limited Market Conduct Report of Examination of Humana Insurance Company for the period as of September 15, 2006, pages 6-15.
- B "Because CMS, through its Medicare Marketing Guidelines, explicitly addresses the use of marketing representatives, state marketing agent appointment laws will not apply to organizations." Centers For Medicare and Medicaid Services Medicare Marketing Guidelines For Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, Prescription Drug Plans and 1876 Cost Plans, page 130.
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- F Oklahoma Insurance Commissioner General Order, Case No. 05-1417-PRJ, In Re: Temporary Licensing – Medicare Prescription Drug Plan Enrollment, October 11, 2005.