

Comments of the Center for Economic Justice

On the May 23, 2008 draft

Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities to Seniors

The Center for Economic Justice offers the following comments on the above-captioned draft model regulation. Our comments include the following:

- Suggestion for a regulatory framework which includes a list of approved designations
- Application of protections to all consumers, not just to seniors
- Eliminate exemptions for credit life and other types of insurance
- Clarification of Section 6A(2)d
- Add provision to explicitly authorize restitution to harmed consumers
- Eliminate inappropriate delegation of regulatory authority in Section 6B
- Authorize private causes of action
- Provide reasonable time for public comment and consideration of public comments.

1. General Approach

We suggest the general approach should be to set out the criteria for a legitimate designation and certifying organizations and provide a list of designations and certifying organizations accepted by insurance regulators as opposed to simply providing the criteria. The benefits of the approach of providing a list of pre-approved designations include:

- a. Transparency to the producers. The draft proposal includes criteria that are clearly subject to interpretation. For example, Section 6A(2)c prohibits the use of a designation that *implies* a level of qualification that the person using the designation does not have. What a designation implies will certainly be subject to disagreement. Section 6A(2)d prohibits designations from organizations if *primarily* engaged in sales or marketing or if reasonable standards for designee competency and discipline are not met. Again, this standard is subject to interpretation. Section 6C provides a *list of words to be considered* and the *order of the words* shall also be *considered*. This standard is certainly open to interpretation.

The regulator will have to review various designations used in the marketplace and go through the process of evaluating such designations. But the proposed draft sets up a system of after-the-fact review based on market conduct exams instead of an up-front review. If the regulator performed the review up-front and published a list of acceptable designations, there would be far greater transparency for producers in terms of acceptable designation. Again, the question is not *if* the regulator will review the legitimacy of designation, but *when* – up-front or after-the-fact.

- b. Efficiency of regulation. By publishing a list of accepted designations, the enforcement of the regulation is more efficient. Enforcement becomes simply an examination of whether a non-approved designation was used as opposed to an ad hoc review of designations on a producer by producer basis.
- c. Consistency of regulation. By using a list of accepted designations, the regulator could establish a consistent process for reviewing applications for designation acceptance and could more easily work with other states' regulators. Such a process would provide much greater consistency of review than an ad hoc after-the-fact review on a producer by producer basis.
- d. Greater consumer protection. By publishing a list of accepted designations, the regulation would stop abuses in the market place *before* consumers were harmed by the misleading designations.
- e. Greater consumer information. By publishing a list of accepted designations, consumers who are alerted to the problem of misleading designations could easily check a regulatory web site to see if the producer's designation has been accepted. This is not a panacea to unfair sales, but another important tool for consumers.

2. No exemption for credit insurance or other types of insurance

Credit insurance is exempted from certain life insurance market regulations because of the unique nature of credit insurance sales – credit insurance is sold by a lender or dealer only in connection with a consumer loan. Consequently, certain types of life insurance or annuity market problems are not present in the credit insurance market – improper replacements is one such example.

However, consumer credit insurance may be sold to older consumers and there is nothing that would prevent an auto dealer or finance company from using a deceptive designation to sell credit insurance to that older consumer. In fact, many of the abuses with financed single premium credit insurance sold in connection with real estate secured loans were targeted at older consumers. Unlike other types of life insurance and annuity market problems which could not occur with life insurance, the use of deceptive designations could appear in the consumer credit insurance market. Consequently, there should be no exemption for credit insurance in the proposed regulation.

The credit insurance industry will likely claim that this issue is not relevant for them and that credit insurance producers should be exempt. We suggest that if such designations are not used by credit insurance producers, then credit insurance producers are not affected by being covered by the regulation. Stated differently, if credit insurance producers do not use such designations, then there is no harm to being included in the regulation. If credit insurance producers do use such designations – or could use such designations in the future – then coverage by the regulation is appropriate.

The same logic used to eliminate the exemption for credit insurance is valid for eliminating the other exemptions in Section 4B.

3. Application to All Consumers

Section 6A(1) states that it is a dishonest and unethical practice to mislead a senior purchaser or prospective senior purchaser that the producer has a special certification in advising seniors. The previous drafting note defines a senior to be an individual 62 years or older. We suggest that the use of a misleading designation should be a prohibited act when used with any purchaser regardless of age. The fact is that many life insurance and annuity products are sold as retirement investments and sold to consumers younger than 62 years of age. Consumers younger than 62 should get the same protection from misleading designations as consumers older than 62. We see no downside to making the protections under this regulation applicable to all purchasers of prospective purchasers. We suggest deleting the following:

- “to Seniors” in the title of the model regulation
- Section 5C – definition of senior
- The drafting note after Section 5C
- The word “senior” in Section 6A(1) twice.

4. Clarification of Section 6A(2)d

Section 6A(2)d lists four standards for disqualifying a designation related to qualifications of the certifying organization. The section should be amended to make clear that failure to meet any of the four qualifications disqualifies the certifying organization and designation. This could be accomplished by adding the word “or” at the end of 6A(2)d (i) and 6A(2)d (ii) along with the “or” currently listed after 6A(2)d (iii).

5. Restitution for Consumers

Given that the proposed model provides for after-the-fact enforcement, consumers will likely be harmed by violations of the regulation before regulators can stop the wrongful practice. Consumers harmed by such violations should receive restitution. Consequently, the model should contain a specific provision to authorize the regulator to order restitution to the consumer by the regulator.

6. Section 6B, Certifying Organizations, Should Be Deleted

Section 6B provides that certification by generic accrediting organizations will be presumed legitimate. It is unclear how the activities of these certifying organizations relate to insurance or financial services. The broader question is why should regulators delegate to these organizations for effective approval of designations instead of regulators doing the work themselves. This does not seem like a proper delegation of regulatory authority. We believe regulators should do the critical evaluation of whether a designation is legitimate or not and recommend elimination of Section 6B.

7. Private Cause of Action

We believe a private cause of action is helpful for consumers because of limited regulatory resources. Insurance regulators are unable to police every aspect of insurance markets and regulators and consumers benefit from the assistance of private litigation to identify and stop marketplace abuses. The need for a private cause of action is particularly great with the proposed regulatory framework of criteria and after-the-fact enforcement. The need for a private cause of action would be less with our proposed structure of criteria and a published list of accepted designations.

8. Process for Consideration and Adoption of Model

We received the proposed model on May 23, 2008. The Life Insurance (A) Committee will discuss the model – and presumably any comments received – at its meeting on June 1, 2008. We suggest that if the A Committee takes action on the proposed model at the June 1, 2008 meeting, that such action be limited to exposing the draft or an amended version of the draft for at least two weeks for additional comment. We do not believe that A Committee action to adopt the model or an amended version at the June 1, 2008 meeting would be appropriate because interested parties and regulators would not have had sufficient time to review, comment and consider comments.