



OCT 17 2001

State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott McCallum, Governor
Connie L. O'Connell, Commissioner

October 15, 2001

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Wisconsin.gov

HONORABLE JUDITH ROBSON
SENATE CO-CHAIRPERSON
JOINT COMM FOR REVIEW OF ADM RULES
SOUTH STATE CAPITOL RM 15
MADISON WI 53702

Re: Section Ins 6.60, Wis. Adm. Code, relating to agent transactions with customers
Clearinghouse Rule No. 01-072

Dear Senator Robson:

I am enclosing a copy of this proposed rule which has been submitted to the presiding officers of the legislative houses under s. 227.19 (2), Wis. Stat. A copy of the report required under s. 227.19 (3), Wis. Stat., is also enclosed.

Sincerely,

Connie L. O'Connell
Commissioner

CLO:SM
Attachment: 1 copy rule & legislative report

**PROPOSED ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE CREATING A
RULE**

To create Ins 6.60, Wis. Adm. Code, relating to regulations concerning agent transactions with customers.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE

Statutory authority: ss. 227.11 (2) (a) & (c), 600.01 (2), 601.41 (3), 628.34 (12), Stats.

Statutes interpreted: ss. 600.01, 618.39 (1), 628.04 (1), 628.10 (2) (b), 628.34 (12), Stats.

In general insurance agents occupy a position of trust and credibility with their customers. Customers permit these agents to enter their homes and to acquire financial and other personal information. Most agents merit this trust and respect the responsibility it engenders. Unfortunately a few agents abuse this confidence and engage in non-insurance transactions with customers that are not in the customer's best interest.

There are recent examples of this type of abuse:

Out of state promoters of illegal "corporate promissory note" programs have specifically recruited insurance agents (most not licensed as securities agents) to illegally market millions of dollars in illiquid unregistered securities to their customers in Wisconsin. These programs resulted in devastating financial loss to Wisconsin citizens who placed their trust in the agents relying in part on their status as licensed insurance agents.

Several insurance agents have sold investments in viatical settlements to their customers for commissions without exploring or understanding the risks and securities law implications of these sales.

Several agents borrowed money from customers or encouraged customers to invest in businesses controlled by the agents. Often the funds loaned or invested are derived from life insurance settlements or liquidated annuities.

Wisconsin and federal securities law prohibits certain personal financial transactions with customers by securities agents as "dishonest or unethical business practices" or

“taking unfair advantage of a customer.” This conduct includes borrowing from a customer and acting as custodian for money or securities of a customer. Securities agents are required to disclose all securities transactions to their employing broker-dealers and obtain the broker-dealer’s written authorization for any “off the books” transactions. Some insurers also prohibit their listed insurance agents from borrowing from customers. The proposed rule incorporates normal standards of ethical behavior that prudent agents practice and their customers deserve and expect. This rule does not place an unnecessary burden on the legitimate business of insurance.

S. 628.10 (2) (b) Stats., allows the commissioner to “...revoke, suspend,...the license of any intermediary if the commissioner finds that the licensee is unqualified as an intermediary, is not of good character or has repeatedly or knowingly violated an insurance statute or rule... of the commissioner... , or if the intermediary’s methods and practices in the conduct of business endanger, or financial resources are inadequate to safeguard, the legitimate interests of customers and the public...” The proposed rule will specifically prohibit conduct that falls within the proscriptions of this statute without limiting the types of conduct that constitute grounds for license sanction. The rule will assist agents and others to determine when conduct with customers is prohibited and places an agent’s insurance license at risk.

The rule defines personal financial transactions and prohibits agents from engaging in such transactions with persons with whom they have conducted insurance business within 3 years prior to the transaction. Transactions with relatives and bona fide business transactions with customers are allowed as long as there are sufficient safeguards to protect the customer’s interests. The rule incorporates violations of state and federal securities and other related laws and prohibits misleading statements regarding an agent’s training and qualifications.

This proposed rule incorporates specific guidelines concerning insurance agents who engage in sales of illegal multiple employer welfare trusts and other forms of group health insurance by unauthorized insurers. Typically conducted under the false guise of being “ERISA” or federally-governed and thus exempt from state regulation these plans frequently are self-funded and fail, leaving unpaid claims and lost premiums. OCI has held agents who participate in these programs to strict standards of accountability. This rule codifies the position of OCI that agents may not escape responsibility by citing their reliance on the pronouncements of the promoters that the program is “exempt from state regulation” under ERISA. This strict standard is in

keeping with the professional standards that everyone expects from their insurance professionals. This rule makes it clear that an agent who participates in sales of these illegal plans commits an unfair trade practice in violation of s. 628.34 (12) Stats., and violates s. 618.39 Stats. by assisting an unauthorized insurer.

Section 628.34 Stats., defines and prohibits unfair marketing (trade) practices. Sub. (11) prohibits "other unfair trade practices" including "any other unfair or deceptive act or practice in the business of insurance, as defined in sub. (12)." Sub. (12) allows the commissioner to define additional "specific unfair trade practices by rule, after a finding that they are misleading, deceptive, unfairly discriminatory, provide an unfair inducement, or restrain competition unreasonably." This is the statutory authority for the proposed rule. While the conduct proscribed by this rule may involve misrepresentation or unfair inducement as described in sections 628.34 (1) & (2) Stats., it also constitutes unfair trade practices and unfair or deceptive acts or practices in the business of insurance within the meaning of s. 628.34 (11) Stats.

The Commissioner finds that the conduct prohibited by this rule is misleading, deceptive, unfairly discriminatory, provides an unfair inducement and restrains competition unreasonably within the meaning of s. 628.34 (12) Stats., and finds further that sales of unauthorized insurance as ERISA-exempt in violation of s. 618.39 Stats., are harmful to the public and that agents who become involved in the marketing or placement of these plans must be held strictly accountable for their actions.

SECTION 1. Section Ins 6.60 is created to read:

Ins 6.60 Prohibited business practices. (1) In this section:

(a) "Affiliate" means any person who is under the control of or acts at the direction of the agent.

(b) "Agent" means an intermediary as defined in s. 628.02, Stats.

(c) "Customer" means a natural person with whom the agent or affiliate is doing or has, within 3 years from the act or transaction regulated by this section, done an insurance business as that term is defined in s. 618.02 (2) and (3), Stats.

(d) "Personal financial transaction" includes a transaction in which the agent or an affiliate of the agent borrows money, property or securities from a customer; loans money, property or securities to a customer; acts as custodian for money, property or securities of a customer; obtains power of attorney over money, property or securities of a customer; obtains a guarantee of any loan from a customer; shares directly or indirectly in profits or losses with a customer; or without furnishing equal consideration obtains title to or ownership of any property of a customer. In this section "personal financial transaction" does not include transactions conducted by an agent or affiliate in the normal course of doing an insurance business such as holding an insurance policy for analysis or servicing, or receiving an insurance premium from a customer provided the transaction is properly recorded on the records of the agent or affiliate as required by s. Ins 6.61, including the name of the insurer for whom the premium was received, and the agent or affiliate immediately issues a written receipt to the customer for the policy or premium.

(2) The following are deemed to be unfair trade practices by an agent or affiliate pursuant to s. 628.34 (12), Stats., without limiting those terms to the practices specified in this section:

(a) Effecting or attempting to effect a personal financial transaction with a customer unless any of the following apply :

1. The customer is a relative of the agent or affiliate as defined in s. 13.62 (12g), Stats.

2. The customer is a person residing in the household of the agent or affiliate at the

time of the transaction.

3. The transaction is a bona fide arm's length business transaction where the customer is either qualified to understand and assess the transaction or has been advised or represented in the transaction by a qualified individual who is not the agent or affiliate.

4. The agent or affiliate is acting lawfully pursuant to authority given under federal or state law governing the securities or investment advisory business.

(b) Knowingly being listed as a beneficiary of any proceeds of a life insurance policy or annuity issued to a customer unless the agent or affiliate has an insurable interest in the life of the customer.

(c) Engaging in transactions with a customer in violation of ch. 551, Stats., the Wisconsin uniform securities law, ch. 553, Stats., the Wisconsin franchise investment law, the U.S. securities act of 1933 (15 USCS 77a et seq), the U. S. securities exchange act of 1934 (15 USCS 78a-78kk), the U. S. investment company act of 1940 (15 USCS 80 a-1 – 80a-52), or any rules or regulations promulgated under any of such laws.

(d) Making misleading statements to a customer regarding or otherwise misrepresenting one's qualifications or services. This includes using terms such as "financial", "investment" or "retirement" in conjunction with terms such as "planner", "planning" or "consulting" when, under the circumstances, the statements, representations or use of these terms do not accurately describe the nature of the services offered or the qualifications of the person offering the services.

(e) Selling, soliciting the sale, or assisting the sale, of health coverage that is:

1. Provided by a person who is not licensed as an insurer in this state; and
2. Represented to be authorized under, or exempt from state insurance regulation under, the federal employee retirement income security act (29 USCS 1001 et seq).

(3) (a) For the purpose of s. 618.39 (1), Stats., an agent should know that placement of insurance is illegal if the agent:

1. Sells, solicits the sale, or assists in the sale, of health coverage offered by a person not licensed as an insurer in this state; and
2. Knows that the health coverage is represented to be authorized, or exempt from state insurance regulation, under the federal employee retirement income security

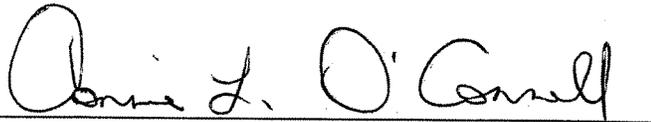
act (29 USCS 1001 et seq).

(b) An agent's lack of knowledge of any of the following is not a defense to a violation of s. 618.39 (1), Stats.:

1. That the person providing the coverage is not licensed in this state.
 2. That the person is an insurer as defined under s. 600.03 (27), Stats.
 3. That the represented authorization or exemption under the federal employee retirement income security act is false (29 USCS 1001 et seq).
- (4) The commissioner shall order, for any agent who violates s. 618.39, Stats., not less than revocation of the agent's license and that the agent pay any claims not paid within 60 days by the unauthorized insurer. An agent may establish the basis for a lesser penalty for a violation of s. 618.39, Stats, only if the agent shows all of the following:
- (a) Substantial mitigating factors.
 - (b) The agent made, and solicited to make, only a few sales of the coverage.
 - (c) The agent did not serve as a general agent, was not eligible for override commissions, and was not responsible for recruiting, and did not recruit, other agents to sell the coverage.
- (5) A violation of sub. (2) is a cause for denial of an agent license application under s. 628.04 (1), Stats., and a cause for agent license suspension, revocation or limitation under s. 628.10 (2) (b), Stats.

SECTION 2. This rule shall take effect on the first day of the first month after publication, as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin, this 15 day of October, 2001.



Connie L. O'Connell
Commissioner of Insurance



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott McCallum, Governor
Connie L. O'Connell, Commissioner

Wisconsin.gov

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September 17, 2001

REPORT ON Section Ins 6.60, Wis. Adm. Code,
relating to agent transactions with customers

Clearinghouse Rule No 01-072
Submitted Under s. 227.19 (3), Stats.
The proposed rule-making order is attached.
Hearing was held August 3, 2001

(a) Statement of need for the proposed rule

see analysis in proposed rule

(b) Modifications made in proposed rule based on testimony at public hearing:

none, testimony at the hearing was in favor of the rule as proposed, see description of letters received for changes made as a result of written comments

(c) Persons who appeared or registered regarding the proposed rule:

Appearances For:

Kenneth Hojnacki, Director, Licensing & Compliance Bureau,
Division of Securities, Wisconsin Department of Financial Institutions

William P Donaldson, Counsel to the Board on Aging & Long-Term
Care, State of Wisconsin, suggested change from 3 to 5 year duration for
definition of "customer", OCI decided to retain 3 year limitation because
that period was included in notice of hearing and previous versions sent
out to interested parties

Appearances Against:

none

Appearances For Information:

Lee Fanshaw, American Family Insurance

Atty. John Slein, Hale & Wagner S.C.

Registrations Neither for nor against:

Atty. John Slein

Dan Morrissey, Morrissey Insurance Agency

Letters received:

August 17, 2001, Atty. Michael McNerney, Viatical & Life Settlement Association of America, opposed to proposed rule

August 13, 2001, Donna Blazek, Benefit Specialist, Ashland County Aging Unit, for, with suggested changes

August 6, 2001, Steven Radke, Legislative Representative, Northwestern Mutual Life Insurance Company, for, with suggested changes

May 4 & April 27, 2001, Atty. Timothy Fenner, Axley Byrnelson, LLP, Independent Insurance Agents of Wisconsin, for, with suggested changes

December 6, 2000, Steven Radke, Northwestern Mutual, Chair, Life Committee, Wisconsin Association of Life & Health Insurers, for, with suggested changes

Richard Carney, Legal Assistant & Manager, Broker-Dealer & Investment Advisor Services, Quarles & Brady, LLP, for, with suggested changes

Suggestions from Blazek, Radke, Fenner and Carney were all considered and many were incorporated into the proposed rule. The OCI file contains letter responses to Radke and Fenner explaining why some of their suggested modifications were not incorporated. OCI has maintained an extensive dialogue with interested parties and presented the proposed rule for comment to the Commissioner's Life & Health and Property & Casualty Advisory Councils at each of their 3 most recent meetings. Both Advisory Councils voiced their comments and their support for the rule.

(d) Response to Legislative Council staff recommendations

All comments were complied with and corrected except for paragraphs 2.i., 2.j. and 2.l.

(e) Regulatory flexibility analysis

1. None of the methods specified under s. 227.114 (2), Stats., for reducing the rule's impact on small businesses were included because all must be treated equally and thus it is not possible to have different rules for one segment of the population.
2. No issues were raised by small businesses during the hearing on the proposed rule.
3. The proposed rule does not impose any additional reporting requirements on small businesses.
4. The proposed rule does not require any additional measures or investments by small businesses. This rule is directed to individual insurance agents. To the extent that some agents may be employed by or associated with an independent insurance agency that may be a small business, this rule may have a minimal impact on some small businesses. However the impact of the rule is to require ethical behavior towards customers and is applied uniformly to all agents regardless of affiliation or employer.

(f) Fiscal Effect

See fiscal estimate attached to proposed rule.

Enclosure: Legislative Council Staff Recommendations
660 Rule Legislative Report 1.Doc



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-072

AN ORDER to create Ins 6.60, relating to regulations concerning agent transactions with customers.

Submitted by **OFFICE OF THE COMMISSIONER OF INSURANCE**

06-21-01 RECEIVED BY LEGISLATIVE COUNCIL.
07-20-01 REPORT SENT TO AGENCY.

RNS:JLK:jal;tlu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached

YES

NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached

YES

NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached

YES

NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached

YES

NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached

YES

NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]^h

Comment Attached

YES

NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached

YES

NO



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CLEARINGHOUSE RULE 01-072

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

- a. A title should be inserted for s. Ins 6.60. [See s. 1.05 (1), Manual.]
- b. In s. Ins 6.60 (1) (intro.), the title should be deleted unless titles are created for all of the other subsections of this section. [See s. 1.05 (1), Manual.]
- c. In s. Ins 6.60 (1) (intro.), "In this chapter:" should be changed to "In this section:".
- d. In s. Ins 6.60 (1) (a) and (b), the underlining under the paragraph numbers should be eliminated. [See s. 1.06, Manual.]
- e. As a general comment on form, there are many lengthy sentences, including items that contain a series within a series. Several of these provisions could be clarified by using semicolons to separate items in a series when the items in the series themselves contain items in a series. Another approach that may be useful in making some of the provisions more understandable is the use of a colon followed by a list. For example, s. Ins 6.60 (2) (a) could be rewritten as follows:

(a) Effecting or attempting to effect a personal financial transaction with a customer unless any of the following apply:

1. The customer is a relative of the agent as defined in s. 13.62 (12g), Stats.

2. The customer is a person residing in the agent's household at the time of the transaction.

3. The transaction is a bona fide arm's length business transaction where the customer is either qualified to understand and assess the transaction or has been advised or represented by a qualified individual regarding the transaction.

Note that no quotation marks should be used around "relative." Also, should ", who is not the agent or affiliate," be inserted after "qualified individual"?

f. In s. Ins 6.60 (2) (c), there are references to several federal acts. When citing a federal law, the U.S. Code reference should be used. [See s. 1.07 (3) (a), Manual.] If the agency wishes to include a reference to a public law or named federal act, this could be done in a note.

This comment also applies to s. Ins 6.60 (3), which includes several references to "the Federal Employee Retirement Income Security Act ("ERISA")." In addition, it is not necessary to name the act on numerous occasions and include the acronym following each reference. The agency might consider including a definition of "ERISA" in the definitions subsection by referencing the U.S. Code and then just using the acronym in the text of the rule.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. Ins 6.60 (3) (b), the reference to "s. 601.03 (27), Stats.," should be changed to "s. 600.03 (27), Stats."

b. In the analysis, the statutory authority provision includes a citation to s. 601.42, Stats. This statute does not appear to be relevant to the proposed rule.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section Ins 6.60 (1) (b) indicates that "agent" has the meaning given in s. 628.02, Stats. However, "agent" is not defined in that statute. Should this be changed to: "'Agent" means an intermediary as defined in s. 628.02 (1).'"?

b. In s. Ins 6.60 (1) (c), was the limitation of "customer" to a "natural person" intended? For example, could the "customer" be a trust or small business?

c. In the next-to-last line of s. Ins 6.60 (1) (d), "s." should be inserted preceding "Ins 6.61." Also, a comma should be inserted following "Ins 6.61."

d. Section Ins 6.60 (2) (intro.) would be easier to read if the penalty for the unfair trade practice (i.e., making it cause for denial of the license application or license suspension, revocation, or limitation) were included in a separate subsection. This was done in s. Ins 6.60 (4) for the violations listed in s. Ins 6.60 (3).

e. In s. Ins 6.60 (2) (intro.) and (a), "Stats." should be set off by commas unless it is used at the end of a sentence.

f. In s. Ins 6.60 (2) (a) and (b), should the references to "agent" be amended to refer to "agent or affiliate" since the prohibitions are unfair trade practices by an "agent or affiliate"?

g. In s. Ins 6.60 (2) (c), the references to "Ch." should be changed to "ch."

h. In s. Ins 6.60 (2) (d), use of the term "representing" on the first line is confusing. It appears that this paragraph would be more readable if it were changed as follows:

Making misleading statements to a customer regarding or otherwise misrepresenting one's qualifications or services. This includes using terms such as financial, investment, or retirement in conjunction with terms such as planner, planning, or consulting when, under the circumstances, the statements, representations, or use of these terms do not accurately describe the nature of the services offered or the qualifications of the person offering the services.

i. Section Ins 6.60 (2) (e) and (3) (intro.) refer to health coverage that is offered by an unauthorized insurer or insurer not licensed in this state and that is "purported" to be authorized under, or exempt from state regulation under, ERISA. "Purported" to be authorized under ERISA implies, but does not in fact require, that the information be false. It appears that these penalties should apply only if the health coverage is not in fact authorized or exempt from state regulation under ERISA. This should be clarified. For example, should these provisions be changed to "falsely purported" or "inaccurately purported"?

j. In s. Ins 6.60 (3) (intro.), should the phrase "the agent knows that" be changed to "the agent knows or should know that"? This question arises since s. 618.39 (1), Stats., includes a prohibition if the person "knows or should know."

k. In s. Ins 6.60 (3) (intro.), in the first line, "solicits the sale" should be changed to "solicits the sale of."

l. In s. Ins 6.60 (4) (b), should "or" replace "and"?



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RNS:JLK:jal;tlu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



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This comment also applies to s. Ins 6.60 (3), which includes several references to "the Federal Employee Retirement Income Security Act ("ERISA")." In addition, it is not necessary to name the act on numerous occasions and include the acronym following each reference. The agency might consider including a definition of "ERISA" in the definitions subsection by referencing the U.S. Code and then just using the acronym in the text of the rule.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. Ins 6.60 (3) (b), the reference to "s. 601.03 (27), Stats.," should be changed to "s. 600.03 (27), Stats."

b. In the analysis, the statutory authority provision includes a citation to s. 601.42, Stats. This statute does not appear to be relevant to the proposed rule.

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b. In s. Ins 6.60 (1) (c), was the limitation of "customer" to a "natural person" intended? For example, could the "customer" be a trust or small business?

c. In the next-to-last line of s. Ins 6.60 (1) (d), "s." should be inserted preceding "Ins 6.61." Also, a comma should be inserted following "Ins 6.61."

d. Section Ins 6.60 (2) (intro.) would be easier to read if the penalty for the unfair trade practice (i.e., making it cause for denial of the license application or license suspension, revocation, or limitation) were included in a separate subsection. This was done in s. Ins 6.60 (4) for the violations listed in s. Ins 6.60 (3).

e. In s. Ins 6.60 (2) (intro.) and (a), "Stats." should be set off by commas unless it is used at the end of a sentence.

f. In s. Ins 6.60 (2) (a) and (b), should the references to "agent" be amended to refer to "agent or affiliate" since the prohibitions are unfair trade practices by an "agent or affiliate"?

g. In s. Ins 6.60 (2) (c), the references to "Ch." should be changed to "ch."

h. In s. Ins 6.60 (2) (d), use of the term "representing" on the first line is confusing. It appears that this paragraph would be more readable if it were changed as follows:

Making misleading statements to a customer regarding or otherwise misrepresenting one's qualifications or services. This includes using terms such as financial, investment, or retirement in conjunction with terms such as planner, planning, or consulting when, under the circumstances, the statements, representations, or use of these terms do not accurately describe the nature of the services offered or the qualifications of the person offering the services.

i. Section Ins 6.60 (2) (e) and (3) (intro.) refer to health coverage that is offered by an unauthorized insurer or insurer not licensed in this state and that is "purported" to be authorized under, or exempt from state regulation under, ERISA. "Purported" to be authorized under ERISA implies, but does not in fact require, that the information be false. It appears that these penalties should apply only if the health coverage is not in fact authorized or exempt from state regulation under ERISA. This should be clarified. For example, should these provisions be changed to "falsely purported" or "inaccurately purported"?

j. In s. Ins 6.60 (3) (intro.), should the phrase "the agent knows that" be changed to "the agent knows or should know that"? This question arises since s. 618.39 (1), Stats., includes a prohibition if the person "knows or should know."

k. In s. Ins 6.60 (3) (intro.), in the first line, "solicits the sale" should be changed to "solicits the sale of."

l. In s. Ins 6.60 (4) (b), should "or" replace "and"?

**PROPOSED ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE CREATING A
RULE**

To create Ins 6.60, Wis. Adm. Code, relating to regulations concerning agent transactions with customers.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE

Statutory authority: ss. 227.11 (2) (a) & (c), 600.01 (2), 601.41 (3), 601.42, 628.34 (12), Stats.

Statutes interpreted: ss. 600.01, 618.39 (1), 628.04 (1), 628.10 (2) (b), 628.34 (12), Stats.

In general, insurance agents occupy a position of trust and credibility with their customers. Customers permit these agents to enter their homes and to acquire financial and other personal information. Most agents merit this trust and respect the responsibility it engenders. Unfortunately a few agents abuse this confidence and engage in non-insurance transactions with customers that are not in the customer's best interest.

There are recent examples of this type of abuse:

1. Out of state promoters of illegal "corporate promissory note" programs have specifically recruited insurance agents (most not licensed as securities agents) to illegally market millions of dollars in illiquid unregistered securities to their customers in Wisconsin. These programs resulted in devastating financial loss to Wisconsin citizens who placed their trust in the agents partly due to their credibility as licensed insurance agents.
2. Several insurance agents have sold investments in viatical settlements to their customers for commissions without exploring or understanding the risks and securities law implications of these sales.
3. Several agents borrowed money from customers or encouraged customers to invest in businesses controlled by the agents. Often the funds loaned or invested are derived from life insurance settlements or liquidated annuities.

Wisconsin and federal securities law prohibits certain personal financial transactions with customers by securities agents as "dishonest or unethical business practices" or "taking unfair advantage of a customer". This conduct includes borrowing from a

customer and acting as custodian for money or securities of a customer. Securities agents are required to disclose all securities transactions to their employing broker-dealers and obtain the broker-dealer's written authorization for any "off the books" transactions. Some insurers also prohibit their listed insurance agents from borrowing from customers. The proposed rule incorporates normal standards of ethical behavior that prudent agents practice and their customers deserve and expect. This rule does not place an unnecessary burden on the legitimate business of insurance.

S. 628.10 (2) (b) Stats. allows the commissioner to "...revoke, suspend,...the license of any intermediary if the commissioner finds that the licensee is unqualified as an intermediary, is not of good character or has repeatedly or knowingly violated an insurance statute or rule... of the commissioner... , or if the intermediary's methods and practices in the conduct of business endanger, or financial resources are inadequate to safeguard, the legitimate interests of customers and the public...". The proposed rule will specifically prohibit conduct that falls within the proscriptions of this statute without limiting the types of conduct that constitute grounds for license sanction. The rule will assist agents and others to determine when conduct with customers is prohibited and places an agent's insurance license at risk.

The rule defines personal financial transactions and prohibits agents from engaging in such transactions with persons with whom they have conducted insurance business within 3 years prior to the transaction. Transactions with relatives and bona fide business transactions with customers are allowed as long as there are sufficient safeguards to protect the customer's interests. The rule incorporates violations of state and federal securities and other related laws and prohibits misleading statements regarding an agent's training and qualifications.

This proposed rule incorporates specific guidelines concerning insurance agents who engage in sales of illegal multiple employer welfare trusts and other forms of group health insurance by unauthorized insurers. Typically conducted under the false guise of being "ERISA" or federally-governed and thus exempt from state regulation these plans frequently are self-funded and fail, leaving unpaid claims and lost premiums. OCI has held agents who participate in these programs to strict standards of accountability. This rule codifies the position of OCI that agents may not escape responsibility by citing their reliance on the pronouncements of the promoters that the program is "exempt from state regulation" under ERISA. This strict standard is in keeping with the professional standards that everyone expects from their insurance

professionals. This rule makes it clear that an agent who participates in sales of these illegal plans commits an unfair trade practice in violation of s. 628.34 (12) Stats. and violates s. 618.39 Stats. by assisting an unauthorized insurer.

S. 628.34 Stats. defines and prohibits unfair marketing (trade) practices. Sub. (11) prohibits "other unfair trade practices" including "any other unfair or deceptive act or practice in the business of insurance, as defined in sub. (12)." Sub. (12) allows the commissioner to define additional "specific unfair trade practices by rule, after a finding that they are misleading, deceptive, unfairly discriminatory, provide an unfair inducement, or restrain competition unreasonably." This is the statutory authority for the proposed rule. While the conduct proscribed by this rule may involve misrepresentation or unfair inducement as described in sections 628.34 (1) & (2) Stats. it also constitutes unfair trade practices and unfair or deceptive acts or practices in the business of insurance within the meaning of s. 628.34 (11) Stats. The Commissioner finds that the conduct prohibited by this rule is misleading, deceptive, unfairly discriminatory, provides an unfair inducement and restrains competition unreasonably within the meaning of s. 628.34 (12) Stats. and finds further that sales of unauthorized insurance as ERISA-exempt in violation of s. 618.39 Stats. are harmful to the public and that agents who become involved in the marketing or placement of these plans must be held strictly accountable for their actions.

SECTION 1. Section Ins 6.60 is created to read:

INS 6.60 (1) Definitions and applicability. In this chapter:

(a) "Affiliate" has the meaning given in s. 600.03 (1), Stats.

(b) "Agent" has the meaning given in s. 628.02, Stats.

(c) "Customer" means a natural person with whom the agent or affiliate is doing or has, within 3 years from the act or transaction regulated by this section, done an insurance business as defined in s. 618.02 (2) and (3), Stats.

(d) "Personal financial transaction" means a transaction where the agent or an affiliate of the agent borrows money, property or securities from, loans money, property or securities to, acts as custodian for money, property or securities of, obtains power of attorney over money, property or securities of, obtains a guarantee of any loan from, shares directly or indirectly in profits or losses with, or without furnishing equal consideration obtains title to or ownership of any property of, a customer. In this section "personal financial transaction" does not include a licensed agent's obtaining and briefly holding an insurance policy for analysis or servicing or receiving an insurance premium from a customer provided the transaction is properly recorded on the agent's records as required by Ins 6.61 including the name of the insurer for whom the premium was received.

title
(2) The following are deemed to be unfair trade practices by an agent or affiliate pursuant to s. 628.34 (12), Stats. without limiting those terms to the practices specified in this section and a cause for denial of an agent license application under s. 628.04 (1), Stats. and a cause for agent license suspension, revocation or limitation under s. 628.10 (2) (b), Stats.:

(a) Effecting or attempting to effect a personal financial transaction with a customer unless the customer is a ^{relative} of the agent as defined in s. 13.62 (12g), Stats. or a person residing in the agent's household at the time of the transaction or the transaction is a bona fide arm's length business transaction where the customer is either qualified to understand and assess the transaction or has been advised or represented by a qualified individual regarding the transaction. *beck*

(b) Knowingly being listed as a beneficiary of any proceeds of a life insurance policy or annuity issued to a customer unless the agent has an insurable interest in the life of the customer. *not the insurance agent*

- (c) Engaging in transactions with a customer in violation of Ch. 551, Stats., the Wisconsin uniform securities law, Ch. 553, Stats., the Wisconsin franchise investment law, the U.S. securities act of 1933, the U. S. securities exchange act of 1934, the U. S. investment company act of 1940, or any rule under any of such statutes. u.j.c.
rtr
- (d) Making misleading statements to a customer regarding or otherwise representing one's qualifications or services including the use of terms such as financial, investment or retirement planner, planning or consulting, when under the circumstances the statements, representations or use of such terms do not accurately describe the nature of the services offered or the qualifications of the person offering the services.
- (e) Selling, soliciting the sale, or assisting the sale, of a health coverage that is offered by an unauthorized insurer and that is purported to be authorized under, or exempt from state insurance regulation under, the federal Employee Retirement Income Security Act. u.j.c.

def. (3) An agent violates s. 618.39 (1), Stats., if the agent sells, solicits the sale, or assists in the sale of health coverage offered by an insurer not licensed in this state and the agent knows that the health coverage is purported to be authorized under, or exempt from state insurance regulation under, the federal Employee Retirement Income Security Act ("ERISA"). No other knowledge need be shown to establish a violation of s. 618.39, Stats. Nothing in this section requires a showing that an agent knows that health coverage is offered by an unauthorized insurer, or is purported to be authorized under, or exempt from state insurance regulation under, the federal Employee Retirement Income Security Act ("ERISA") in order to establish a violation of s. 618.39, Stats. The agent's lack of knowledge of any of the following is not a defense to a violation of s. 618.39, Stats.:

- (a) That the entity is not licensed in this state.
- (b) That the entity is an insurer as defined under s. 601.03 (27), Stats.
- (c) That purported authorization or exemption under the federal Employee Retirement Income Security Act is false.
- (d) That assurances or representations that the coverage is authorized or exempt under the federal Employee Retirement Income Security Act ("ERISA") were false.

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(4) The commissioner shall order, for any agent who violates s. 618.39, Stats., not less than revocation of the agent's license and that the agent pay any claims not paid within 60 days by the unauthorized insurer. An agent may establish the basis for a lesser penalty for a violation of s. 618.39, Stats, only if the agent shows all of the following:

(a) Substantial mitigating factors.

(b) The agent made, ^{or} and solicited to make, only a few sales of the coverage.

(c) The agent did not serve as a general agent, was not eligible for override commissions, and was not responsible for recruiting, and did not recruit, other agents to sell the coverage.

SECTION 2. This rule shall take effect on the first day of the first month after publication, as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin, this _____ day of _____, 2001.

Connie L. O'Connell
Commissioner of Insurance