



Wednesday, June 3, 2009

Ms. Cindy Ehnes  
Director  
Department of Managed Health Care  
980 9th St., Suite 500  
Sacramento, CA 95814

**RE: Rulemaking Action Titled Post-Claims Underwriting, Control No. 2006-0633**

Dear Ms. Ehnes,

It has been over two years since the Department of Managed Health Care ("Department") granted Consumer Watchdog's rulemaking petition and initiated the above-referenced proceeding to address illegal post-claims underwriting and retroactive policy cancellations (known as "rescission"). However, the Department has yet to issue a final rule and since this proceeding is no longer listed as pending on the Department's website, it appears that the Department has ceased the rulemaking proceeding altogether.

Rescission continues to be the most pernicious of the health plan industry's practices, leaving innocent patients uninsured after they get sick and need coverage the most. Accordingly, pursuant to Government Code section 11346.4(b), the Department should reissue a notice of proposed action and move forward with the rulemaking proceeding to adopt final regulations to end this practice. It is very important that the Department revive this rulemaking now as the Department of Insurance announces its own rulemaking today. Ideally, both agencies will work together to establish a coherent regulatory approach that is protective of patients. Should the Department fail to promulgate these regulations, health insurers will be able to discriminate against patients on the basis of which agency regulates their insurer.

Though various administrative settlements entered into between the Department and health plans have provided new coverage for past rescission victims, the Department has yet to clarify the legal standards on which future rescissions will be judged. This clarification is the essence of the rulemaking petition filed by Consumer Watchdog and granted by the Department. One of the elements of Consumer Watchdog's petition called on the Department to issue regulations clarifying that Health & Safety Code section 1389.3 bars post-claims underwriting in all instances and requires health plans to show a patient willfully misrepresented her health history during the application process before a health plan contract may be rescinded. As a result of the Department's failure to complete the regulations, innocent patients continue to face illegal contract rescissions at the hands of health plans. The timeline below contains a summary of actions by the Department regarding this rulemaking:

- On November 13, 2006, Consumer Watchdog (then known as the Foundation for Taxpayer and Consumer Rights) petitioned the Department pursuant to Government

Code section 11340.6 to initiate a rulemaking proceeding on the issue of post-claim underwriting and rescission. See attached "Exhibit 1."

- On December 13, 2006, the Department granted our petition. At that time, the Department wrote that though "informal rulemaking activity to address post-claims underwriting was commenced in March 2006 . . . please consider the Petition granted [as to the rulemaking request]." See attached "Exhibit 2."
- Shortly after granting the petition, the Department published a Notice of Public Hearing "Regarding Rulemaking Action Titled Post-Claims Underwriting, Control No. 2006-0633." See attached "Exhibit 3."
- On January 29, 2007, the Department held the public hearing on the rulemaking action. See attached "Exhibit 4."
- On October 23, 2007, the Department issued draft post-claim underwriting regulations. See attached "Exhibit 5."
- On November 8, 2007, Consumer Watchdog provided the Department with requested comments on the draft regulations. See attached "Exhibit 6."
- On March 27, 2008, Department Director Cindy Ehnes told the California Senate Health Committee, at a hearing convened to discuss several topics concerning the "adequacy" of the Department's "implementation and enforcement" activities, that the Department was pursuing the post-claims underwriting regulations. See attached "Exhibit 7."

If the Department has ceased this rulemaking action, the Department must explain its reason for doing so. If the Department in fact made a determination to not proceed with this rulemaking proceeding within one year from the date that the proposed action was originally noticed, then the Department should have provided notice of its decision to the Office of Administrative Law for publication in the California Regulatory Notice Registry pursuant to Government Code section 11347(a).

Rescission of a health plan contract is extremely detrimental to the patient. Not only is the rescinded patient left uninsured and often hundreds of thousands of dollars in medical debt, but he or she also becomes virtually uninsurable in the individual market. Particularly harmful is the fact that a patient rescinded under an *allegation* of fraud, whether proven or unproven, is barred from enrolling in high-risk coverage provided by a public program, the Major Risk Medical Insurance Program (MRMIP). As a result, patients who have been wrongly rescinded are forced to rely on charity care and the state's underfunded health care safety net. Accordingly, pursuant to Government Code section 11346.4(b), the Department should reissue a notice of proposed action and move forward with the rulemaking proceeding to adopt final regulations to end this practice. We look forward to a prompt response to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Flanagan", with a stylized flourish at the end.

Jerry Flanagan