

RULES AND REGULATIONS

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 146d]

Military Sales Practices

The Insurance Department (Department), by this order, adopts Chapter 146d (relating to military sales practices) to read as set forth in Annex A.

Statutory Authority

This final-form rulemaking is adopted under the general rulemaking authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412). Likewise, the rulemaking is made under the Department's rulemaking authority under the Unfair Insurance Practices Act (UIPA) (40 P. S. §§ 1171.1—1171.14) (as is further explained in *PALU v. Insurance Department*, 371 A.2d 564 (Pa. Cmwlth. 1977)).

Comments and Response

Notice of proposed rulemaking was published at 38 Pa.B. 4101 (August 2, 2008) with a 30-day comment period. During its regulatory review, the Independent Regulatory Review Commission (IRRC) did not submit comments to the Department. During the 30-day comment period, a comment was received from Representative Fairchild (Chairperson of the Pennsylvania House Veteran's Affairs and Emergency Preparedness Committee) expressing support for the regulations. A comment was also received from the Insurance Federation of Pennsylvania, Inc. (IFP), indicating general support of the regulations to the extent that it is consistent with the NAIC's Model Regulation (the Model); but expressed concerns with various sections where the Department's proposed regulations deviated from the Model. The following is a response to the IFP's comments.

Initially, the IFP objected to the Department's deletion of the paragraph in the Model which specified that there was no private right of action under the regulation. The UIPA does not provide for a private cause of action, but permits only regulatory remedies for violations of that law. Because these regulations are promulgated under the authority set forth in the UIPA, the Department believes that inclusion of this paragraph in the regulations text is unnecessary and redundant. This approach is consistent with other regulations promulgated by the Department under its rulemaking authority under the UIPA.

The IFP made several suggestions that were incorporated into the final-form version of the regulations attached as Annex A. The IFP specifically objected to the removal of the reference to the National Guard within the Department's revisions to the definition of "active duty." To address the IFP's concern, the Department has added "National Guard or Reserve" language within the definition of "active duty." Additionally, the IFP noted that the Department eliminated the specific reference to commissioned and warrant officers within the definition of "service member." The Department has added the "commissioned and warrant" language to the definition. Likewise, the miscellaneous typographical errors noted at part 7 of the IFP letter have been corrected as set forth in Annex A.

Several of the IFP's comments expressed concern regarding changes made by the Department to conform the

Model to the standards for regulatory drafting set forth in the *Pennsylvania Code & Bulletin Style Manual (Style Manual)*. The deviations from the Model are specifically explained as follows:

The IFP indicated that the Model was not improved by changing the gender neutral "his or her" to his. This deviation from the model was made to conform the model to § 6.10 of the *Style Manual*, which provides, in pertinent part, that "words used in the masculine gender include the feminine under 1 Pa.C.S. § 1902 relating to number; gender; tense."

The IFP also objected to the Department's omission of the, "short form style of the model" and instead spell out the elements of, "Department of Defense (DoD) Personnel" when appropriate in §§ 146d.5(b)(1) and 146.d6(a)(5) and (6) (relating to practices declared false, misleading, deceptive or unfair on a military base; and practices declared false misleading, deceptive or unfair regardless of location) and (6). The Department's revisions to the Model were based upon § 6.5 (which provides that acronyms should be avoided unless absolutely necessary) and § 1.7 (which indicates that the term being defined may not be included as part of the definition; terms only should be defined in order to avoid vagueness, ambiguity or unnecessary verbosity; and substantive provisions may not be contained within a definition) of the *Style Manual*.

The IFP contended that § 146.d6(a)(7) creates a more difficult compliance standard than the Model, going further than the Model's prohibition against "knowingly" inducing service members with pay grades at or below E-4 to attend events where life applications are solicited. Specifically, within the prohibition against providing attendance inducements, the Department describes the service member as one, "whom the insurer or insurance producer knows, or in the exercise of ordinary care should have known . . ." has such a pay grade. The Department's deviation from the Model in this respect was editorial only, and made because substantive regulatory provisions are not permitted in the definition of a regulation under § 1.7 of the *Style Manual*. The IFP failed to note that the Model includes a definition of "known or knowingly" which means, depending on its use herein, the insurance producer or insurer had actual awareness, or in the exercise of ordinary care should have known, at the time of the act or practice complained of, that the person solicited: (1) is a service member; or (2) is a service member with a pay grade of E-4 or below. (Emphasis added.) The Model's definition of the terms "known or knowingly" is a substantive, regulatory requirement and is not permitted to be in a definition under § 1.7 of the *Style Manual*. For this reason, the Department incorporated the definition directly into the appropriate regulatory provision as follows:

(7) Knowingly offering or giving anything of value to a service member whom the insurer or insurance producer knows, or in the exercise ordinary care should have known has a pay grade of E-4 or below for his attendance to any event where an application for life insurance is solicited.

Accordingly, the Department's draft did not create a more difficult compliance standard than the Model as claimed by the IFP.

In part five of its comment, the IFP appeared to be objecting to the Department's failure to use the Model's "but not limited to," between "including" and "endowment"

of § 146d.6(f)(4). The, “includes but not limited to” language was deleted under § 6.16(b)(13) of the *Style Manual*, which specifically directs that the phrase “includes but not limited to” is not to be used.

Part six of the IFP’s letter objected to the “or both” language added by the Department in place of the model’s “and/or” language. This change was made as mandated by § 6.16 of the *Style Manual*, which prohibits the use of “and/or” in favor of “_____ or _____, or both.”

Affected Parties

The final-form regulation will apply to life insurance companies and fraternal benefit societies doing business in this Commonwealth.

Fiscal Impact

State Government

There will be no increase in cost to the Department as a result of the adoption of Chapter 146d.

General Public

Since these final-form regulations concern the proscription of certain improper marketing practices that are now deemed to be unfair insurance practices under the UIPA, the public will benefit from this additional consumer protection and will not incur any additional costs for these protections.

Political Subdivisions

The final-form regulations will not impose additional costs on political subdivisions.

Private Sector

The final-form regulations will not impose any additional costs on insurers or insurance producers as it merely prohibits certain improper marketing strategies aimed at members of our armed forces.

Paperwork

The adoption of these final-form regulations would not impose additional paperwork for the Department or any other parties.

Effectiveness / Sunset Date

These regulations will become effective January 1, 2010. The Department continues to monitor the effectiveness of regulations on a triennial basis; therefore, no sunset date has been assigned.

Contact Person

Any questions regarding these final-form regulations should be directed to Peter J. Salvatore, Regulatory Coordinator, Bureau of Administration, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429. Questions may be e-mailed to psalvatore@state.pa.us or faxed to (717) 705-3873.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the agency submitted a copy of these final-form regulations on July 20, 2009, to IRRC and to the House Insurance Committee and the Senate Banking and Insurance Committee (Committees). In addition to the submitted regulations, the agency has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1996-1, “Regulatory Review and Promulgation.” A copy of that material is available to the public upon request.

In preparing these final-form regulations, the Department considered all comments received from IRRC, the Committees and the public. The final-form regulations were deemed approved by the Committees on August 19, 2009. Under section 5(g) of the Regulatory Review Act, the final-form regulations were deemed approved, effective August 20, 2009.

Findings

The Commissioner finds that:

(1) Public notice of intention to adopt these final-form regulations has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) The adoption of this final-form rulemaking in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code, are amended by adding §§ 146.1—146d.8, to read as set forth in Annex A.

(b) The Commissioner shall submit this order and Annex A, to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The final-form regulation adopted by this order takes effect January 1, 2010.

JOEL SCOTT ARIO,
Insurance Commissioner

(Editor’s Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5279 (September 5, 2009).)

Fiscal Note: 11-241. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 31. INSURANCE

PART VIII. MISCELLANEOUS PROVISIONS

CHAPTER 146d. MILITARY SALES PRACTICES

Sec.	
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§ 146d.1. Purpose.

This chapter establishes standards to protect active duty service members of the United States Armed Forces from dishonest and predatory insurance sales practices by deeming and declaring certain identified practices to be false, misleading, deceptive or unfair.

§ 146d.2. Applicability and scope.

This chapter applies only to the solicitation or sale of any life insurance or annuity product by an insurer or insurance producer to an active duty service member of the United States Armed Forces.

§ 146d.3. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Active duty—

- (i) Full-time duty in the United States Armed Forces.
- (ii) The term includes full-time duty or training in the National Guard or Reserve components of the United States Armed Forces if serving under published orders for a period of more than 31-calendar days.

Commissioner—The Insurance Commissioner of the Commonwealth.

Door to door—A solicitation or sales method whereby an insurance producer proceeds randomly or selectively from household to household without prior specific appointment.

General advertisement—An advertisement that promotes the concept of insurance, the insurer or the insurance producer.

Insurer—A life insurance company required to be licensed under section 202 of The Insurance Company Law of 1921 (40 P.S. § 382), or a fraternal benefit society required to be licensed under Article XXIV of The Insurance Company Law of 1921 (40 P.S. §§ 991.2401—991.2466), known as the Fraternal Benefit Societies Code, to provide life insurance products, including annuities.

Insurance producer—A person who sells, solicits or negotiates contracts of insurance as defined in section 601-A of The Insurance Department Act of 1921 (40 P.S. § 310.1).

Life insurance—

- (i) Insurance coverage on human lives including benefits of endowment and annuities, and may include benefits in the event of death or dismemberment by accident and benefits for disability income.
- (ii) The term includes individually issued annuities unless specifically excluded.

Military installation—A Federally-owned, leased, or operated base, reservation, post, camp, building, or other facility to which service members are assigned for duty, including barracks, transient housing and family quarters.

MyPay—A Defense Finance and Accounting Service web-based system that enables service members to process certain discretionary pay transactions or provide updates to personal information data elements without using paper forms.

Premium deposit fund—Amounts paid in and held for payments of future contractual obligations of policyholders or contractholders under an individual life insurance policy or an individual annuity contract.

Service member—A commissioned or warrant active duty officer or enlisted member of the United States Armed Forces.

Side fund—

- (i) A fund or reserve that is part of or otherwise attached to a life insurance policy, excluding individually

issued annuities, by rider, endorsement or other mechanism which accumulates premium or deposits with interest or by other means.

- (ii) The term does not include the following:

(A) The accumulated value, cash value or secondary guarantee provided by a universal life policy.

(B) A cash value provided by a whole life policy that is subject to standard nonforfeiture law for life insurance.

(C) A premium deposit fund that meets the following requirements:

(I) Contains only premiums paid in advance which accumulate at interest.

(II) Imposes no penalty for withdrawal.

(III) Does not permit funding beyond future required premiums.

(IV) Is not marketed or intended as an investment.

(V) Does not carry a commission, either paid or calculated.

Specific appointment—A prearranged, agreed upon appointment that is definite as to place and time.

United States Armed Forces—All components of the Army, Navy, Air Force, Marine Corps and Coast Guard.

§ 146d.4. Exemptions.

(a) This chapter does not apply to solicitations or sales involving:

- (1) Credit insurance.
- (2) Group life insurance or group annuities when there is no in-person, face-to-face solicitation of individuals by an insurance producer or when the contract or certificate does not include a side fund.

(3) An application to the existing insurer that issued the existing policy or contract when one of the following applies:

- (i) A contractual change or a conversion privilege is being exercised.
- (ii) The existing policy or contract is being replaced by the same insurer under a program filed with and approved by the Commissioner.
- (iii) A term conversion privilege is exercised among corporate affiliates.

(4) Individual stand-alone health policies, including disability income policies.

(5) Contracts offered by Servicemembers' Group Life Insurance or Veterans' Group Life Insurance, as authorized under 38 U.S.C. §§ 1965—1980A (relating to servicemembers' group life insurance).

(6) Life insurance contracts offered through or by a nonprofit military association, qualifying under section 501(c)(23) of the Internal Revenue Code of 1986 (26 U.S.C.A. § 501(c)(23)), and which are not underwritten by an insurer.

(7) Contracts used to fund:

(i) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA) (29 U.S.C.A. §§ 1001—1461).

(ii) A plan described by sections 401(a) or (k), 403(b) or 408(k) or (p) of the Internal Revenue Code of 1986 (26 U.S.C.A. §§ 401(a) or (k), 403(b) or 408(k) or (p)), if established or maintained by an employer.

(iii) A government or church plan defined in section 414 of the Internal Revenue Code of 1986 (26 U.S.C.A. § 414) or a deferred compensation plan of a state or local government or tax exempt organization under section 457 of the Internal Revenue Code of 1986 (26 U.S.C.A. § 457).

(iv) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor.

(v) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process.

(vi) Prearranged funeral contracts.

(b) Nothing in this chapter abrogates the ability of nonprofit organizations or other organizations, or both, to educate members of the United States Armed Forces in accordance with Department of Defense Instruction 1344.07—PERSONAL COMMERCIAL SOLICITATION ON DOD INSTALLATIONS or successor directive.

(c) For purposes of this chapter, general advertisements, direct mail and internet marketing do not constitute “solicitation.” Telephone marketing does not constitute “solicitation,” when the caller explicitly and conspicuously discloses that the product concerned is life insurance and makes no statements that evade a clear and unequivocal statement that life insurance is the subject matter of the solicitation. Nothing in this section exempts an insurer or insurance producer from this chapter in any in-person, face-to-face meeting established as a result of the “solicitation” exemptions identified in this section.

§ 146d.5. Practices declared false, misleading, deceptive or unfair on a military installation.

(a) The following acts or practices when committed on a military installation by an insurer or insurance producer with respect to the in-person, face-to-face solicitation of life insurance are deemed and declared to be false, misleading, deceptive or unfair:

(1) Knowingly soliciting the purchase of any life insurance product door to door or without first establishing a specific appointment for each meeting with the prospective purchaser.

(2) Soliciting service members in a group or mass audience or in a captive audience where attendance is not voluntary.

(3) Knowingly making appointments with or soliciting service members during their normally scheduled duty hours.

(4) Making appointments with or soliciting service members in barracks, day rooms, unit areas, transient personnel housing or other areas where the installation commander has prohibited solicitation.

(5) Soliciting the sale of life insurance without first obtaining permission from the installation commander or the commander’s designee.

(6) Posting unauthorized bulletins, notices or advertisements.

(7) Failing to present DD Form 2885, *Personal Commercial Solicitation Evaluation*, to service members solicited or encouraging service members solicited not to complete or submit a DD Form 2885.

(8) Knowingly accepting an application for life insurance or issuing a policy of life insurance on the life of an enlisted member of the United States Armed Forces without first obtaining for the insurer’s files a completed

copy of any required form confirming that the applicant has received counseling or fulfilled any other similar requirement for the sale of life insurance established by regulations, directives or rules of the Department of Defense or any branch of the Armed Forces.

(b) The following acts or practices when committed on a military installation by an insurer or insurance producer constitute corrupt practices, improper influences or inducements and are deemed and declared to be false, misleading, deceptive or unfair:

(1) Directly or indirectly using an active duty service member or a civilian, nonappropriated fund, or special government employee of the Department of Defense as a representative or agent in any official or business capacity, with or without compensation, with respect to the solicitation or sale of life insurance to service members.

(2) Using an insurance producer to participate in any United States Armed Forces sponsored education or orientation program.

§ 146d.6. Practices declared false, misleading, deceptive or unfair regardless of location.

(a) The following acts or practices by an insurer or insurance producer constitute corrupt practices, improper influences or inducements and are deemed and declared to be false, misleading, deceptive or unfair:

(1) Submitting, processing or assisting in the submission or processing of any allotment form or similar device used by the United States Armed Forces to direct a service member’s pay to a third party for the purchase of life insurance, including using or assisting in using a service member’s “MyPay” account or other similar internet or electronic medium for this purpose. This paragraph does not prohibit assisting a service member by providing insurer or premium information necessary to complete any allotment form.

(2) Knowingly receiving funds from a service member for the payment of premium from a depository institution with which the service member has no formal banking relationship. For purposes of this paragraph, a formal banking relationship is established when the depository institution does all of the following:

(i) Provides the service member a deposit agreement and periodic statements and makes the disclosures required by the Truth in Savings Act (12 U.S.C.A. §§ 4301—4313) and the regulations promulgated thereunder.

(ii) Permits the service member to make deposits and withdrawals unrelated to the payment or processing of insurance premiums.

(3) Employing a device or method or entering into an agreement whereby funds received from a service member by allotment for the payment of insurance premiums are identified on the service member’s Leave and Earnings Statement or equivalent or successor form as “Savings” or “Checking” and when the service member has no formal banking relationship as defined in paragraph (2).

(4) Entering into an agreement with a depository institution for the purpose of receiving funds from a service member whereby the depository institution, with or without compensation, agrees to accept direct deposits from a service member with whom it has no formal banking relationship.

(5) Directly or indirectly using an active duty service member or a civilian, nonappropriated fund, or special government employee of the Department of Defense, as a

representative or agent in an official or unofficial capacity with or without compensation with respect to the solicitation or sale of life insurance to service members who are junior in rank or grade, or to the family members of the personnel.

(6) Offering or giving anything of value, directly or indirectly, to an active duty service member or a civilian, nonappropriated fund, or special government employee of the Department of Defense to procure assistance in encouraging, assisting or facilitating the solicitation or sale of life insurance to another service member.

(7) Knowingly offering or giving anything of value to a service member whom the insurer or insurance producer knows, or in the exercise of ordinary care should have known, has a pay grade of E-4 or below for a service member's attendance to an event where an application for life insurance is solicited.

(8) Advising a service member with a pay grade of E-4 or below to change his income tax withholding or state of legal residence for the sole purpose of increasing disposable income to purchase life insurance.

(b) The following acts or practices by an insurer or insurance producer lead to confusion regarding source, sponsorship, approval or affiliation and are declared to be false, misleading, deceptive or unfair:

(1) Making any representation, or using any device, title, descriptive name or identifier that has the tendency or capacity to confuse or mislead a service member into believing that the insurer, insurance producer or product offered is affiliated, connected or associated with, endorsed, sponsored, sanctioned or recommended by the United States Government, the United States Armed Forces, or any State or Federal agency or government entity.

(i) Examples of titles prohibited include "Battalion Insurance Counselor," "Unit Insurance Advisor," "Service-member's Group Life Insurance Conversion Consultant" or "Veteran's Benefits Counselor."

(ii) Notwithstanding the prohibitions of this paragraph, a person may use a professional designation awarded after the successful completion of a course of instruction in the business of insurance by an accredited institution of higher learning. Examples include "Chartered Life Underwriter," "Chartered Financial Consultant," "Certified Financial Planner," "Master of Science In Financial Services" or "Master of Science In Financial Planning."

(2) Soliciting the purchase of a life insurance product through the use of or in conjunction with, a third-party, organization that promotes the welfare of or assists members of the United States Armed Forces in a manner that has the tendency or capacity to confuse or mislead a service member into believing that either the insurer, insurance producer or insurance product is affiliated, connected or associated with, endorsed, sponsored, sanctioned or recommended by the United States Government, the United States Armed Forces or any State or Federal agency or governmental entity.

(c) The following acts or practices by an insurer or insurance producer lead to confusion regarding premiums, costs or investment returns and are declared to be false, misleading, deceptive or unfair:

(1) Using or describing the credited interest rate on a life insurance policy in a manner that implies that the credited interest rate is a net return on premium paid.

(2) Excluding individually issued annuities, misrepresenting the mortality costs of a life insurance product, including stating or implying that the product "costs nothing" or is "free."

(d) The following acts or practices by an insurer or insurance producer regarding Servicemembers Group Life Insurance or Veterans' Group Life Insurance are declared to be false, misleading, deceptive or unfair:

(1) Making a representation regarding the availability, suitability, amount, cost, exclusions or limitations to coverage provided to a service member or dependents by service members' group life insurance or veterans' group life insurance, which is false, misleading or deceptive.

(2) Making any representation regarding conversion requirements, including the costs of coverage, or exclusions or limitations to coverage of Servicemembers' Group Life Insurance or Veterans' Group Life Insurance to private insurers which is false, misleading or deceptive.

(3) Suggesting, recommending or encouraging a service member to cancel or terminate a Servicemembers' Group Life Insurance policy or issuing a life insurance policy which replaces an existing Servicemembers' Group Life Insurance policy unless the replacement takes effect upon or after the service member's separation from the United States Armed Forces.

(e) The following acts or practices by an insurer or insurance producer, or both, regarding disclosure are deemed and declared to be false, misleading, deceptive or unfair:

(1) Deploying, using or contracting for any lead generating materials designed exclusively for use with service members that do not clearly and conspicuously disclose that the recipient will be contacted by an insurance producer, if that is the case, for the purpose of soliciting the purchase of life insurance.

(2) Failing to disclose that a solicitation for the sale of life insurance will be made when establishing a specific appointment for an in-person, face-to-face meeting with a prospective purchaser.

(3) Excluding individually issued annuities, failing to clearly and conspicuously disclose the fact that the product being sold is life insurance.

(4) Failing to make the written disclosures required under section 10 of the Military Personnel Financial Services Protection Act (10 U.S.C. § 992 nt), at the time of sale or offer to an individual who the insurer or insurance producer knows, or in the exercise of ordinary care should have known, is a service member.

(5) Excluding individually issued annuities, when the sale is conducted in-person face-to-face with an individual whom the insurer or insurance producer knows, or in the exercise of ordinary care should have known, to be a service member, failing to provide the applicant at the time the application is taken with the following:

(i) An explanation of any free look period with instructions on how to cancel if a policy is issued.

(ii) Either a copy of the application or a written disclosure that clearly and concisely sets out the type of life insurance, the death benefit applied for and its expected first year cost. A basic illustration that meets the requirements of sections 407-A and 408-A, of The Insurance Company Law of 1921 (40 P.S. §§ 625-7 and 625-8), regarding illustrations and life insurance illustrations, shall be deemed sufficient to meet this requirement for a written disclosure.

(f) The following acts or practices by an insurer or insurance producer with respect to the sale of life insurance products, excluding individually issued annuities, are deemed and declared to be false, misleading, deceptive or unfair:

(1) Recommending the purchase of a life insurance product which includes a side fund to a service member in pay grades E-4 and below unless the insurer has reasonable grounds for believing that the life insurance death benefit, standing alone, is suitable.

(2) Offering for sale or selling any life insurance contract which includes a side fund unless all the following conditions are met:

(i) Interest credited accrues from the date of deposit to the date of withdrawal and permits withdrawals without limit or penalty.

(ii) The applicant has been provided with a schedule of effective rates of return based upon cash flows of the combined product. For this disclosure, the effective rate of return will consider all premiums and cash contributions made by the policyholder and all cash accumulations and cash surrender values available to the policyholder in addition to life insurance coverage. This schedule will be provided for at least each policy year from 1 to 10 and for every fifth policy year thereafter ending at age 100, policy maturity or final expiration.

(iii) The contract does not, by default, divert or transfer funds accumulated in the side fund to pay, reduce or offset any premiums due.

(3) Offering for sale or selling any life insurance contract which after considering all policy benefits, including endowment, return of premium or persistency, does not comply with standard nonforfeiture law for life insurance.

(g) The following acts or practices by an insurer or insurance producer with respect to the sale of life insurance products are deemed and declared to be false, misleading, deceptive or unfair:

(1) Offering for sale or selling a life insurance product that includes a side fund to a service member in pay grades E-4 and below who is currently enrolled in Service Members' Group Life Insurance. This practice is presumed unfair unless the following conditions are met:

(i) The insurer conducts a needs assessment which includes consideration of the risks associated with premature death, the financial obligations and immediate and future cash needs of the applicant's estate, or survivors or dependents, or both.

(ii) The insurer demonstrates that the applicant's service members group life insurance death benefit, together with other military survivor benefits, savings and investments, survivor income, and other life insurance are insufficient to meet the applicant's insurable needs for life insurance. For purposes of this subparagraph, "other military survivor benefits" include the Death Gratuity, Funeral Reimbursement, Transition Assistance, Survivor and Dependents' Educational Assistance, Dependency and Indemnity Compensation, TRICARE Healthcare Benefits, Survivor Housing Benefits and Allowances, Federal Income Tax Forgiveness and Social Security Survivor Benefits.

(2) Selling a life insurance product to an individual whom the insurer or insurance producer knows, or in the exercise of ordinary care should have known, to be a service member that excludes coverage if the insured's death is related to war, declared or undeclared, or an act

related to military service except for an accidental death coverage, for example, double indemnity, which may be excluded.

§ 146d.7. Violation.

Violations of this chapter are deemed and defined by the Commissioner to be an unfair method of competition and an unfair or deceptive act or practice and shall be subject to applicable penalties or remedies contained in the Unfair Insurance Practices Act (40 P. S. §§ 1171.1—1171.15).

§ 146d.8. Effective date.

This chapter will become effective January 1, 2010, and apply to acts or practices committed on or after January 1, 2010.

[Pa.B. Doc. No. 09-1777. Filed for public inspection September 25, 2009, 9:00 a.m.]

Title 58—RECREATION

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CH. 437a]

Vendor Permission to Conduct Business Prior to Certification or Registration

The Pennsylvania Gaming Control Board (Board), under its general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. § 1321 (relating to additional licenses and permits and approval of agreements), amends Chapter 437a (relating to vendor certification and registration) to read as set forth in Annex A.

Purpose of the Final-Form Rulemaking

This final-form rulemaking amends § 437a.9 (relating to permission to conduct business prior to certification or registration) which allows the Bureau of Licensing to (Bureau) authorize a vendor to provide goods or services to a slot machine applicant or licensee while the vendor's application for certification or registration is being reviewed. Under this amendment, the Bureau could rescind that permission if the Office of Enforcement Counsel has issued a Notice of Recommendation for Denial to an applicant for certification or registration.

Explanation of Amendments to Chapter 437a

Currently, vendors may request permission to provide goods or services to a slot machine applicant or licensee while their application is being reviewed. The Board feels this practice is reasonable and necessary due to the demands of slot machine licensees to conduct business with hundreds of vendors on a day-to-day basis. Due to the volume of vendor applicants and the limited resources of the Board and its staff, it may take as long as 6 months to complete the review of an application from a business and render a decision on its suitability to be a part of the gaming industry in this Commonwealth.

Under this rulemaking, if the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to a vendor applicant that has received this interim permission, the Bureau could rescind that permission, and the applicant would have to cease providing goods or services to the slot machine applicant or licensee. The Bureau would also notify the affected slot machine applicants or licensees that they may no longer do business with the vendor applicant.

Comment and Response Summary

Notice of proposed rulemaking was published at 39 Pa.B. 1003 (February 21, 2009).

The Board received comments from HSP Gaming, LP (HSP), Chester Downs and Marina, LLC (Chester), Greenwood Gaming and Entertainment, Inc. (Greenwood) and Downs Racing, LP (Downs). On April 22, 2009, The Independent Regulatory Review Commission (IRRC) also filed comments. These comments were considered by the Board and are discussed as follows.

The commentators asserted that the regulation should allow for a period of time after receiving a notice under this section during which a vendor applicant could continue to conduct business with a slot machine facility. The purpose of such a period would be to permit the vendor applicant to wind up its work with the slot machine licensee, and provide the slot machine licensee a reasonable time to secure a replacement vendor.

It is not the intent of this rulemaking to impose additional costs on slot machine licensees. The Board acknowledges that abrupt work stoppages or the interruption of supplies or services could increase the costs for slot machine licensees that have contracted with vendors in good faith. To avoid this result, the Board has changed the proposed amendment to permit the Bureau to include a prospective date in its notice by which the vendor applicant must cease conducting business with the slot machine licensee. This will give the Bureau the ability to establish a winding-up period based on the type of work or services being provided by the vendor applicant, and the reason for the Office of Enforcement Counsel's Notice of Recommendation for Denial.

HSP and Downs expressed concern that under the proposed amendment, the vendor applicant has no opportunity to cure the concerns identified in the Office of Enforcement Counsel's Notice of Recommendation for Denial. The Board disagrees with this assessment of the vendor applicant's remedies under the regulation.

A vendor applicant that receives a Notice of Recommendation for Denial would have the right to request an administrative hearing to contest the issues outlined in the notice. This hearing would be held in accordance with 2 Pa.C.S. (relating to administrative law and procedure), 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) and 58 Pa. Code Part VII, Subpart H (relating to practice and procedure).

At this hearing, the vendor applicant would have the opportunity to present evidence and examine witnesses before a hearing officer. The recommendation of the hearing officer made under the record established during this administrative hearing would then be reviewed by the Board. The Board has the option of accepting some or all of the hearing officer's recommendations, conducting a de novo hearing, or making an adjudication based on the record. See § 494a.5 (relating to review). A final order of the Board denying the applicant's certification or registration is appealable to the Commonwealth Court. See § 494a.11 (relating to appeals).

Greenwood, Downs and IRRC expressed concern that rescission of permission granted under § 437a.9 deprives the vendor applicant of its right to due process. The industry commentators suggested that the vendor applicant must be given an opportunity for a hearing prior to the rescission of that permission. In its comments, IRRC asked the Board to clarify how the proposed amendment affected the vendor applicant's due process rights.

The Board disagrees that a vendor applicant is due a hearing prior to the permission granted under § 437a.9 being rescinded. The grant of permission to a vendor applicant to do business with a slot machine licensee prior to certification or registration is completely within the discretion of the Board. A vendor provisionally conducting business with a slot machine licensee pursuant to the permission has merely an expectation of a favorable decision by the Board on its application. Since this expectation is not equivalent to the protected interest that attaches when a vendor attains certification or registration, rescinding permission granted under § 437a.9 without a prior hearing does not offend the vendor applicant's due process rights.

Greenwood and Downs also questioned whether the proposed rulemaking represented an impermissible commingling of the prosecutorial and adjudicative functions of the Board. These commentators felt that requiring the vendor applicant to cease doing business with the slot machine facility upon action of the Office of Enforcement Counsel was counter to the standards set by the Pennsylvania Supreme Court in *Lyness v. State Board of Medicine*, 605 A.2d 1204 (1992). In that case, the Court held that if an administrative agency has both prosecutorial and adjudicative authority over a regulated community, then due process demands that walls of division be constructed between the two arms of that agency so that the threat or appearance of bias in the administration of its authority is eliminated. IRRC also asked the Board to address this issue.

The Board agrees that the proposed rulemaking could have been construed in a manner that would render it inconsistent with the rule established by *Lyness*. For this reason, the final-form rulemaking clarifies that the permission granted by the Bureau under § 437a.9 can only be rescinded by the Bureau.

Finally, both Greenwood and IRRC recommended that the rulemaking expressly require that notice to the vendor applicant and the slot machine licensee regarding the rescission of permission be made in writing and posted. The Board agrees with this suggestion and the final-form rulemaking requires notice by the Bureau be made to both the vendor applicant and the slot machine licensees by registered mail.

Affected Parties

This rulemaking will affect applicants for vendor certification or registration that have been granted permission to provide goods or services to a slot machine applicant or licensee while its application is being reviewed. It may also affect slot machine applicants and licensees.

*Fiscal Impact**Commonwealth*

The final-form rulemaking will have no fiscal impact on the Board or other agencies of the Commonwealth.

Political Subdivisions

This final-form rulemaking will have no fiscal impact on political subdivisions of this Commonwealth.

Private Sector

Vendors who have been granted permission to provide goods or services while their application is being reviewed could lose that privilege. If the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to a vendor applicant, the Bureau may require that the applicant cease providing goods or services to an applicant for or holder of a slot machine license.

Similarly, the slot machine applicant or licensee will have to find a different vendor to provide the goods or services that the vendor applicant had been providing.

General Public

This final-form rulemaking will have no fiscal impact on the general public.

Paperwork requirements

The Bureau may need to issue additional notices to a vendor applicant and the slot machine licensee or applicant with which it is conducting business. The issuance of a Notice of Recommendation for Denial to an applicant by the Office of Enforcement Counsel is part of the current application process.

Effective Date

The final-form rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Contact Person

The contact person for questions about this rulemaking is Richard Sandusky, Director of Regulatory Review, at (717) 214-8111.

Regulatory Review

In accordance with section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 11, 2009, the Board submitted a copy of the proposed rulemaking, published at 39 Pa.B. 1003, and a copy of the Regulatory Analysis Form, to IRRC and to the Chairpersons of the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee (Committees).

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), the final-form rulemaking was deemed approved by the Committees on August 19, 2009. Under section 5.1(e) of the Regulatory Review Act IRRC met on August 20, 2009, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of intention to adopt the amendment was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The final-form rulemaking is necessary and appropriate for the administration and enforcement of 4 Pa.C.S. Part II (relating to gaming).

Order

The Board, acting under 4 Pa.C.S. Part II, orders that:

(1) The regulations of the Board, 58 Pa. Code Chapter 437a, are amended by amending § 437a.9 to read as set forth in Annex A.

(2) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative reference Bureau as required by law.

(3) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

GREGORY C. FAJT,
Chairperson

(Editor's Note: For the text of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5279 (September 5, 2009).)

Fiscal Note: Fiscal Note 125-97 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart B. LICENSING, PERMITTING, CERTIFICATION AND REGISTRATION

CHAPTER 437a. VENDOR CERTIFICATION AND REGISTRATION

§ 437a.9. Permission to conduct business prior to certification or registration.

(a) Notwithstanding § 437.1 (relating to general vendor requirements), the Board may allow an applicant for a vendor certification or registration to conduct business with a slot machine applicant in the following criteria met:

(1) A completed Vendor Registration Form—Un-sponsored has been filed by the vendor, a completed Vendor Registration Form—Sponsored has been filed by the slot machine applicant or licensee or a completed Vendor Certification Application and Disclosure Information Form has been filed by the slot machine applicant or licensee in accordance with § 437a.2 or § 437a.3 (relating to vendor registration applications; and vendor certification applications).

(2) The slot machine applicant or licensee certifies that it has performed due diligence on the vendor.

(b) If the Office of Enforcement Counsel issues a Notice of Recommendation for Denial to an applicant for certification or registration, the Bureau of Licensing may rescind the permission granted to the applicant for certification or registration to conduct business with a slot machine applicant or licensee under subsection (a). If the permission is rescinded, the applicant for certification or registration shall cease conducting business with the slot machine applicant or licensee by the date specified in the notice of the rescission by the Bureau of Licensing under subsection (c).

(c) The Bureau of Licensing will notify the applicant for certification or registration and the slot machine applicant or licensee by registered mail that permission for the applicant for certification or registration to conduct business with the slot machine applicant or licensee under subsection (a) has been rescinded and that the slot machine applicant or licensee shall cease conducting business with the applicant for certification or registration by the date specified in the notice.

(d) Permission to conduct business under this section will be for 6 months.

(e) The Board may extend the relief for additional 6-month periods upon a showing of good cause by the slot machine applicant or licensees.

[Pa.B. Doc. No. 09-1778. Filed for public inspection September 25, 2009, 9:00 a.m.]

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CHS. 439a, 461a, 463a, 465a AND 499a]

Junkets; Slot Machines; and Practice and Procedures; Omnibus Amendments

The Pennsylvania Gaming Control Board (Board), under its general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. §§ 1205, 1207 and 1322 (relating to license or permit application hearing process; public input hearings; regulatory authority of board; and slot machine accounting controls and audits), amends Chapters 439a, 461a, 463a, 465a and 499a to read as set forth at 39 Pa.B. 1662 (April 4, 2009).

Purpose of the Final-Form Rulemaking

The final-form rulemaking contains numerous editorial changes to improve the clarity of existing provisions, brings the Board's regulations in line with current practices, and eliminates or streamlines existing requirements and procedures to improve the effectiveness of the Board's regulatory programs.

Explanation of Amendments to Chapters 439a, 461a, 463a, 465a and 499a

Throughout this final-form rulemaking, the Board replaced references to the "Office of Gaming Operations" with the new name, "Bureau of Gaming Operations." Additionally, the Board deleted the definition of "Slots Lab" and references to this term and to "Gaming Lab," replacing them with the "Bureau of Gaming Laboratory Operations (BGLO)," the name used for this Bureau in other chapters.

In § 461a.12 (relating to progressive slot machines), a new subsection (g) was added to require that the BGLO test and certify progressive slot machines prior to the progressive slot machines' availability to the public for play. This reflects the current practice of the BGLO, but it will now also be a regulatory requirement.

In § 463a.1(c) (relating to possession of slot machines generally), the Board limited the requirement to file a petition requesting permission to possess slot machines to educational institutions; unlicensed manufacturers, manufacturer designees or suppliers who want to exhibit or demonstrate slot machines; and the general category of "other persons." There is no need for the other entities previously listed in subsection (b) to file a petition because they are either licensed by the Board or are law enforcement agencies. The Board will be able to monitor slot machines in the possession of these entities through the periodic reports they are required to file. The Board also believes that requiring common carriers to file a petition is impracticable and unnecessary because of the short duration of time common carriers will have the slot machines in their possession, and because information related to all shipments is filed with the Board under § 463a.2 (relating to transportation of slot machines into, within and out of this Commonwealth).

In § 463a.7 (relating to off premises storage of slot machines), the Board simplified the process for reviewing requests from slot machine licensees to store slot machines off the premises of a licensed facility. These amendments replace the requirement that these requests be filed as a petition and approved by the Board with the requirement that these requests be filed as a written request with the Bureau of Gaming Operations which will be approved by the Board's Executive Director. This should reduce the amount of time required to process these requests.

In § 465a.9(c) (relating to surveillance system; surveillance department control; surveillance department restrictions), the Board deleted the requirement that slot machine licensees have audio surveillance capability in the count room. Because of changes in count room equipment technology and the capabilities of the central control computer system to track gaming revenues, there is no need to have audio recordings of count room activities.

In subsections (c) and (e), "automated teller machines" (ATMs) have been added to the lists of items that require camera coverage and video recording. Slot machine licensees' surveillance systems already cover ATMs, but they were not previously included in the Board's regulations. Gaming conducted at slot machines has also been added to the list in subsection (e) for the same reason. Additionally in subsection (e), the reference to "satellite cage" has been moved from paragraph (2), which covers the main bank and vault, to paragraph (1), which covers the cashier cage.

In § 465a.9(j), the Board reduced the time period for retention of surveillance recordings from 30 days to 7 days for the main bank and vault, the drop, the count and gaming conducted at slot machines. Following the internal control requirements associated with the activities conducted in these areas, any problems for which these recordings would be needed will have occurred within the 7-day time frame.

In § 465a.25 (relating to counting and recording of slot cash storage boxes), the Board deleted, "at least 48 hours" from the advance notice requirement for changes to the time the slot cash storage boxes are to be counted. Video surveillance utilized during the count process and the continuing presence of the Board's casino compliance representatives at the licensed facilities makes the 2 days advanced notice on changes to this schedule unnecessary.

In § 465a.26 (relating to jackpot payouts), the requirement in subsection (b)(3) and (7)(viii)(A) that the witness of a jackpot between \$1,200 and \$9,999.99 be "a lead slot attendant or higher" has been replaced with "a security department member or a slot operations department member other than the preparer." This will make it easier for slot machine licensees to verify jackpots and allow more efficient use of personnel.

In § 499a.1 (relating to appearance in person), a new subsection (b) has been added, clarifying who may represent a party in nonadversarial proceedings before the Board. It is modeled on the provisions in 1 Pa. Code § 31.21 (relating to appearance in person) and will reduce the need for some parties to hire legal counsel to represent them.

Comment and Response Summary

Notice of proposed rulemaking was published at 39 Pa.B. 1662 (April 4, 2009).

During the public comment period, the Board received a letter from International Gaming Technology thanking

the Board for the opportunity to comment, but not offering any comments on the substance of the rule-making. By letter dated June 3, 2009, the Independent Regulatory Review Commission (IRRC) notified the Board that it had no comments on the proposed rulemaking.

No changes have been made to the proposed rulemaking in the final-form version of this rulemaking.

Affected Parties

Slot machine licensees will benefit from the simplified process for reviewing requests for off premise storage of slot machines and for verifying jackpots, the elimination of the requirement for audio surveillance capability in the count room, the reduction in the time periods for retention of some video recordings and the elimination of the 48 hours minimum notice on changes to the count schedule. Slot machine licensees will also be required to have progressive slot machines certified by the BGLO prior to their use by the gaming public. Licensed and governmental entities and common carriers will no longer have to file petitions to possess slot machines. Parties in some Board proceedings will not be required to be represented by legal counsel.

Fiscal Impact

Commonwealth

To the extent that this final-form rulemaking simplifies some administrative processes, there may be some slight savings to the Board. The Department of Revenue and the State Police may also experience small savings because filing a petition to possess slot machines is no longer required.

Political Subdivisions

This final-form rulemaking will have no fiscal impact on political subdivisions of this Commonwealth.

Private Sector

Slot machine licensees will experience some cost savings due to revisions and elimination of unnecessary regulatory requirements. There should be little to no costs associated with the new requirement that progressive slot machines be certified prior to the use because this represents the current practice of the BGLO.

General Public

This final-form rulemaking will have no fiscal impact on the general public.

Paperwork requirements

This final-form rulemaking may reduce the paperwork associated with filing requests for off premise storage of slot machines. Licensed and governmental entities and common carriers will no longer have to file petitions to possess slot machines.

Effective Date

The final-form rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Contact Person

The contact person for questions about this final-form rulemaking is Richard Sandusky, Director of Regulatory Review at (717) 214-8111.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 24, 2009, the Board submitted a copy of the proposed rulemaking, published at 39 Pa.B. 1662 and a copy of the Regulatory Analysis Form to IRRC and to the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee (Committees).

Under section 5(c) of the Regulatory Review Act IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), the final-form rulemaking was deemed approved by the Committees on August 19, 2009. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC effective August 19, 2009.

Findings

The Board finds that:

(1) Public notice of intention to adopt these amendments was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) The final-form rulemaking is necessary and appropriate for the administration and enforcement of 4 Pa.C.S. Part II (relating to gaming).

Order

The Board, acting under 4 Pa.C.S. Part II, orders that:

(a) The regulations of the Board, 58 Pa. Code Chapters 439a, 461a, 463a, 465a and 499a are amended by amending §§ 439a.7, 439a.8, 439a.10, 439a.11, 461a.1, 461a.4, 461a.5, 461a.7, 461a.8, 461a.10, 461a.12, 461a.18, 461a.22, 461a.26, 463a.1, 463a.2, 463a.7, 465a.2, 465a.4, 465a.5, 465a.8, 465a.9, 465a.18, 465a.25, 465a.26 and 499a.1 to read as set forth at 39 Pa.B. 1662.

(b) The Chairperson of the Board shall certify this order, 39 Pa.B. 1662 and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

GREGORY C. FAJT,
Chairperson

Fiscal Note: 125-99 remains valid for the final adoption of the subject regulations.

Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5279 (September 5, 2009.)

[Pa.B. Doc. No. 09-1779. Filed for public inspection September 25, 2009, 9:00 a.m.]