

211 CMR 40.00:        MARKETING OF INSURED HEALTH PLANS

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40.01: Purpose

(1) In accordance with M.G.L. c. 176D, § 11 and c. 175, § 110E it is the intent of 211 CMR 40.00 to assure truthful and adequate disclosure of all material and relevant information and to identify certain misleading or misrepresentative practices in the marketing of health plans under M.G.L. c. 176D, § 3. This purpose is intended to be accomplished by the establishment of, and adherence to, certain minimum standards and guidelines of conduct in the advertising and marketing of insured health plans in a manner which prevents unfair competition among carriers and is conducive to the accurate presentation and description to the insurance-buying public of such plans offered through marketing methods.

(2) In general, it shall be deemed misleading to solicit an offer to contract for health plans without a clear and conspicuous disclosure of the following:

- (a) The extent and nature of the coverage offered.
- (b) The extent to which the coverage meets the potential risk.
- (c) The cost of the coverage.

It is, therefore, a misrepresentation to solicit an offer to contract for an insured health plan without disclosing the above data.

40.02: Applicability

(1) 211 CMR 40.00 shall apply to any marketing method for any insured health plan that is intended for presentation, distribution or dissemination in Massachusetts when made or on behalf of any person as defined herein. A marketing method originating outside Massachusetts, but which may reasonably be expected to be seen or heard in this state, must comply with 211 CMR 40.00 or prominently set forth the following disclaimer: "This solicitation is not available to residents of Massachusetts."

(2) Every carrier, as herein defined, shall establish and at all times maintain a system of control over the content, form and method of dissemination of all marketing methods of its insured health plans. All marketing methods shall be the responsibility of the carrier whose insured health plans are so marketed.

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40.03: Definitions

As used in 211 CMR 40.00 the following mean:

Carrier, shall include, but not be limited to, an insurer licensed or otherwise authorized to transact accident and health insurance under M.G.L. c. 175, a fraternal benefit society licensed under M.G.L. c. 176, a hospital service corporation organized under M.G.L. c. 176A, a medical service corporation organized under M.G.L. c. 176B, a dental service corporation organized

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under M.G.L. c. 176E, an optometric service corporation organized under M.G.L. c. 176F, and a health maintenance organization licensed under M.G.L. c. 176G.

Exception shall mean any provision in a policy whereby coverage for a specified hazard is entirely eliminated; it is a statement of a risk not assumed under the policy.

Insured health plan shall include any individual, blanket, association, or group policy of health, accident or sickness insurance offered by a carrier.

Limitation shall mean any provision which restricts coverage under the policy other than an exception or a reduction.

Marketing or marketing methods shall include any of the following including, but not limited to advertisements, when they are used by any person with the intent of soliciting an offer to contract for an insured health plan:

- (a) Printed and published material, audio-visual material and descriptive literature used in direct mail, newspapers, magazines, radio or TV scripts, billboards, computer or electronic transmissions and similar displays;
- (b) Descriptive literature and sales aids of all kinds issued for presentation to members of the insurance-buying public, including but not limited to circulars, leaflets, booklets, depictions, illustrations and form letters;
- (c) Prepared sales talks, presentations and material; and
- (d) All oral and written solicitations and presentations.

Medicare shall mean Title XVIII of the Social Security Act, "Health Insurance for the Aged Act," 42 USCS §1396 *et seq.*, as amended.

Person shall mean any individual, carrier, or any other legal entity engaged in the marketing or advertising of a policy, including agents, brokers, and advisors.

Policy shall include any policy, plan, certificate, contract, agreement, statement of coverage, rider, or endorsement which provides insured health benefits, including surgical or hospital expense benefits and disability or loss of time benefits, whether such are issued individually or on a general or blanket basis, whether such are issued on an indemnity, reimbursement, service or prepaid basis, except when issued in connection with another kind of insurance other than life and except disability, waiver of premium and double indemnity benefits included in life insurance and annuity contracts.

Reduction shall mean any provision which reduces the amount of the benefit; a risk of loss is assumed but payment upon the occurrence of such loss is limited to some amount or period less than would be otherwise payable had such reduction not been used.

40.04: Identity of Insurer

(1) Failure to clearly identify the name of the carrier and, where practicable, the form number on all marketing materials will be considered misleading and is therefore prohibited. A marketing method shall not use a trade name, or insurance group designation, name of the parent company or the insurer, name of a particular division of the insurer, service mark, slogan, symbol or other device which without disclosing the name of the actual insurer would have the capacity and tendency to mislead or deceive as to the true identity of the insurer and therefore be prohibited.

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(2) It shall be considered misleading and therefore prohibited for a marketing method to use any combination of words, symbols, or physical materials which by their content, phraseology, shape, color or other characteristics are so similar to combination of words, symbols, or physical materials used by agencies of Massachusetts or of the Federal Government, or otherwise appear to be of such a nature that it tends to confuse or mislead prospective insureds into believing that the solicitation is in some manner connected with an agency of the municipal, state, or Federal Government.

40.05: Method of Disclosure or Required Information

All information required to be disclosed by 211 CMR 40.00 shall be presented conspicuously and in close conjunction with the statements to which such information relates or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion or disclosed in any manner so as to be confusing or misleading.

40.06: Form and Content of Marketing Method

(1) A marketing method for an insured health plan shall be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. Whether a marketing method has a capacity or tendency to mislead or deceive shall be determined by the Commissioner of Insurance from the overall impression that the marketing method may be reasonably expected to create upon a person of average education or intelligence, within the segment of the public to which it is directed.

(2) Marketing methods shall be truthful and not misleading in fact or in implication. Persons using words or phrases, whose meanings are only understood by implication or by familiarity with insurance terminology, shall be considered misleading. In determining whether a marketing method has the capacity or tendency to mislead, the Commissioner of Insurance may consider as misleading the failure to disclose to a purchaser or a prospective purchaser any fact, the disclosure of which may have influenced the purchaser or prospective purchaser not to enter into the transaction.

40.07: Benefits Payable, Losses Covered or Premiums Payable

(1) Deceptive Words, Phrases or Illustrations Prohibited.

(a) It shall be considered misleading, and therefore prohibited to omit information or use words, phrases, statements, references or illustrations if such omission has the capacity, tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy benefit payable, loss covered or premium payable. The fact that the policy offered is made available to a prospective insured for inspection prior to consummation of the sale or an offer is made to refund the premium if the purchaser is not satisfied, does not remedy misleading statements.

(b) It shall be considered misleading, and therefore prohibited, to solicit an offer to contract for a health insurance policy without a clear and conspicuous disclosure of the premium rate for such policy.

(c) It shall be considered misleading, and therefore prohibited, for a marketing method of a policy whose benefits are conditional upon confinement in a hospital or similar facility, to refer to the benefits or costs of the policy, or the risks against which the policy is intended to provide protection unless it shall also disclose both clearly and conspicuously in accordance with 211 CMR 40.05 as well as on the application for such policy whether benefits are based on actual costs incurred and/or the length of confinement.

(d) It shall be considered misleading, and therefore prohibited, for a marketing method to contain or use words or phrases such as "all"; "full"; "complete"; "comprehensive"; "unlimited"; "up to," "as high as"; "this policy will help pay your hospital and surgical bills"; "this policy will help fill some of the gaps that Medicare and your present insurance leaves out"; "this policy will help to replace your income" (when used to express loss-of-time benefits); or similar words and phrases, in a manner which exaggerates any benefits beyond the terms of the policy.

(e) It shall be considered misleading, and therefore prohibited, for a marketing method to present descriptions of a policy limitation, exception, or reduction, worded in a positive

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manner to imply that it is a benefit, such as, describing a waiting period as a "benefit builder," or stating "even pre-existing conditions are covered after two years." Words and phrases used in a marketing method to describe such policy limitations, exceptions and reductions shall fairly and accurately describe the negative features of such limitations, exceptions and reductions of the policy offered.

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(f) It shall be considered misleading, and therefore prohibited, for the marketing of a hospital or other similar facility confinement benefit to state that the amount of the benefit is payable on a monthly or weekly basis, when, in fact, the amount of the benefit payable is based on a daily pro rata basis relating to the number of days of confinement. When the policy contains a limit on the number of days of coverage provided, such limit must be stated in the marketing method.

(g) It shall be considered misleading, and therefore prohibited, for a marketing method of a policy covering a list of specified diseases to imply coverage beyond the terms of the policy. Synonymous terms shall not be used to refer to any disease so as to imply broader coverage than is the fact.

(h) A marketing method for a policy providing benefits for specified illnesses only, or for specified accidents only, such as automobile accidents, shall be considered misleading and therefore prohibited unless it shall clearly and conspicuously state the limited nature of the policy. The statement shall be worded in language identical to, or substantially similar to the following: "THIS IS A LIMITED POLICY"; "THIS IS A SPECIFIED DISEASE ONLY POLICY"; "THIS IS AN AUTOMOBILE ACCIDENT ONLY POLICY."

(i) It shall be considered misleading, and therefore prohibited, for the marketing method of a direct response insurance product to imply that because "no insurance agent will call and no commissions will be paid to agents" that it is "a low cost plan" or use other similar words or phrases because the cost of advertising and servicing such policies is a substantial cost in the marketing of a direct response insurance product, unless such is the fact, and is clearly substantiated in such marketing method.

(j) It shall be considered misleading, and therefore prohibited, for a marketing method to use photographs, illustrations, depictions or fictionalized accounts of illness or illness-related subjects, or overemphasis of exceptional or catastrophic risk, or exaggeration of potential out-of-pocket costs of health care, or any other marketing method in such a way as to invite the purchase of an insured health plan for emotional rather than functional reasons.

(2) Exceptions, Reductions and Limitations.

(a) When a marketing method refers to either a dollar amount or a period of time for which any benefit is payable, or the cost of the policy, or specific policy benefit, or the loss for which such benefit is payable, it shall be considered misleading, and therefore prohibited, unless it also discloses those exceptions, reductions and limitations affecting the basic provisions of the policy without which the marketing method would have the capacity or tendency to mislead or deceive.

(b) When a policy contains a waiting, elimination, probationary or similar time period between the effective date of the policy and the effective date of coverage under the policy or a time period between the date benefits begin to accrue for such loss, a marketing method which is subject to the requirements of the preceding paragraph shall disclose the existence of such periods or be considered misleading and therefore prohibited.

(c) A marketing method shall not use the words "only"; "just"; "merely"; "minimum"; or similar words or phrases to describe the applicability to any exceptions and reductions such as: "This policy is subject to the following minimum exceptions and reductions" or it shall be considered to be misleading, and therefore prohibited.

(3) Pre-Existing Conditions.

(a) A marketing method shall, in negative terms, disclose the extent to which any loss is not covered if the cause of such loss is traceable to a condition existing prior to the effective date of the policy or it shall be considered misleading and therefore prohibited. The use of the term "pre-existing condition" without an appropriate definition or description shall not be used or it shall be considered misleading, and therefore prohibited.

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(b) When a policy does not cover losses resulting from pre-existing conditions, no marketing of the policy shall state or imply that the applicant's physical condition or medical history will not affect the issuance of the policy or payment of a claim thereunder or it shall be considered misleading and therefore prohibited. 211 CMR 40.07(3)(b) prohibits the use of the phrase "no medical examination required" and phrases of similar import, but does not prohibit explaining "guaranteed issue." If a carrier requires a medical examination for a specified policy, the marketing material shall disclose that a medical examination is required or it shall be considered misleading, and therefore prohibited.

40.08: Renewability, Cancelability and Termination

When a marketing method refers to either a dollar amount or a period of time for which any benefit is payable, or the cost of the policy, or specific policy benefit, or the loss for which such benefit is payable, it shall disclose the provisions relating to renewability, cancelability and termination and any modification of reasons, in a manner which shall not minimize or render obscure the qualifying conditions or it shall be considered misleading, and therefore prohibited.

In this regard where there is a guarantee of renewability or premium which is conditional either on renewal of all such policies or premium adjustment on all such policies it will be considered misleading unless the marketing method clearly and conspicuously discloses that the insurer has the right to non-renew or to change premium levels at its choice and without specific approval of any state authority.

40.09: Testimonials or Endorsements by Third Parties

(1) Testimonials used in marketing methods must be genuine, represent the current opinion of the author, be applicable to the policy marketed and be accurately reproduced or it shall be considered misleading, and therefore prohibited. The carrier, in using a testimonial, makes as its own all of the statements contained therein, and the marketing method, including such statement, is subject to all the provisions of 211 CMR 40.00.

(2) If the person making a testimonial, an endorsement or an appraisal has a financial interest in the carrier or a related entity as a stockholder, director, officer, employee, or otherwise, such fact shall be disclosed in the marketing method or it shall be considered misleading, and therefore prohibited. If a person is compensated for making a testimonial, endorsement or appraisal, such fact shall be disclosed in the marketing method by language substantially as follows: "Paid endorsement." 211 CMR 40.09(2) does not require disclosure of union "scale" wages required by union rules if the payment is actually for such "scale" for TV or radio performances. The payment of substantial amounts, directly or indirectly for "travel and entertainment" for filming or recording of TV or radio advertisements removes the filming or recording from the category of an unsolicited testimonial and requires disclosure of such compensation.

(3) A marketing method shall not state or imply that a carrier or a policy has been approved or endorsed by any individual, group of individuals, society, association or other organizations, unless such is the fact, and unless any proprietary or other financial relationship between an organization and the carrier is disclosed, or it shall be considered misleading, and therefore prohibited. If the entity making the endorsement or testimonial has been formed by the carrier or is owned or controlled by the carrier or the person or persons who own or control the carrier, such fact shall be disclosed in the marketing method or it shall be considered misleading, and therefore prohibited.



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(4) In order to assure compliance when a testimonial refers to benefits received under a policy, the specific claim data, including claim number, data of loss, and other pertinent information shall be retained by the carrier for inspection for a period of four years or until the filing of the next regular report on examination of the carrier, whichever is the longer period of time.

40.10: Use of Statistics in Marketing

(1) A marketing method using statistics of any type relating to a carrier, including the dollar amounts of claims paid, the time within which claims are paid, or the number of persons insured, shall be considered misleading, and therefore prohibited, unless it identifies the sources of all statistics and accurately reflects all of the relevant facts. A marketing method shall not imply that statistics are derived from the policy advertised or marketed unless such is the fact, and when applicable to other policies shall specifically so state the policies to which it refers.

(2) A marketing method shall not represent or imply that claim settlements by the insurer are "liberal" or "generous" or use words of similar import, that claims settlements are or will be beyond the actual terms of the contract, or shall not portray an unusual amount paid for a unique claim for the policy marketed.

(3) The source of any statistics used in a marketing method shall be identified in such advertisement or marketing method or it shall be considered misleading, and therefore prohibited.

40.11: Identification of Plan or Comparison Among Plans

(1) When a marketing method refers to a choice of benefit amounts, it shall be considered misleading, and therefore prohibited, if it does not disclose that the amount of benefits provided to the consumer depends upon the plan selected by the consumer and that the premium will vary with the amount of the benefits selected.

(2) When a marketing method refers to various benefits which may be contained in two or more policies (other than group master policies), it shall be considered misleading, and therefore prohibited, unless it discloses that such benefits are provided only through a combination of such policies.

(3) When a marketing method makes comparisons between insured health plans, it shall be considered to be misleading, and therefore prohibited, if it makes unfair or incomplete comparisons of policy benefits, compares noncomparable aspects of policies of other carriers, or disparages competitors, their policies, their services, or their business methods of marketing insured health plans.

(4) A marketing method for a particular policy shall not state or imply that prospective insureds become group or quasi-group members covered under a group policy and as such enjoy special rates or underwriting privileges, unless such is the fact or it shall be considered misleading, and therefore prohibited.

40.12: Introductory, Initial or Special Offers

(1) A marketing method for any individual insured health plan shall not directly, or by implication, represent that a contract or combination of contracts is an introductory, initial or special offer, or that applicants will receive substantial advantages not available at a later date, or that the offer is available only to a specified group of individuals, unless such is the fact or it shall be considered misleading, and therefore prohibited. A marketing method shall not contain phrases describing an enrollment period as "special," "limited," or similar words or phrases when the insurer used such enrollment periods as the usual method of advertising or marketing accident and sickness insurance or it shall be considered misleading, and therefore prohibited.

(2) 211 CMR 40.00 prohibits any statement or implication to the effect that only a specific

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number of policies will be sold, or that a time is fixed for the discontinuance of the sale of the particular policy marketed because of special advantages available in the policy unless such is fact.

(3) A marketing method shall not utilize an initial premium rate which is less than that premium rate which would be charged by making a uniform prorating of the annual premium or it shall be considered misleading, and therefore prohibited.

40.13: Form and Content of Policy Applications

When a person uses an application form to be completed by the applicant as an offer to contract for an insured health plan, such application form shall contain statements disclosing to the applicant the nature of the policy offered for sale. In complying with 211 CMR 40.13 the following guidelines as to the contents and applicability of disclosure requirements shall be used.

- (1) If the advertised or marketed policy contains a provision which allows the carrier to deny claims for any loss, where the cause of such loss is in some manner traceable to a condition existing prior to the effective date of the policy, the application shall state clearly and unambiguously in negative terms the nature and extent of that exclusion in accordance with guidelines spelled out in 211 CMR 40.07(3)(a).
- (2) If the application is for a policy whose benefits are subject to a waiting period either of the deductible kind, e.g. "fifth day for sickness" or of the one-time exclusionary kind, "30 day" or "six months for certain conditions," the application must disclose in negative terms the nature of such exclusion.
- (3) The application must disclose for all health policies whether or not and to what extent benefits are or are not contingent upon hospital confinement.
- (4) The application must disclose the premium rate for the policy being solicited.
- (5) The application must disclose clearly and unambiguously the terms of renewability and premium guarantee, if any.
- (6) At the completion of the above required statements of disclosure space shall be made for the applicant's signature acknowledging understanding of such disclosures.

40.14: File of All Marketing Methods

In order to assure compliance under 211 CMR 40.00, each carrier shall maintain at its home or principal office a complete file containing every printed, published or prepared marketing method of its individual policies and typical printed, published or prepared marketing methods of its blanket, franchise and group policies hereafter disseminated in this or any other state whether or not licensed in such other state, with a notation attached to each such marketing method that shall indicate the manner and extent of distribution and the form number of any policy advertised or marketed. Such file shall be subject to regular and periodic inspection by the Division of Insurance. All such marketing methods shall be maintained in said file for a period of either four years or until the filing of the next regular report on examination of the carrier, whichever is the longer period of time.

40.15: Required Disclosure for Medicare-eligible Policyholders and Certificateholders

- (1) Guide to Health Insurance for People with Medicare. Insurers of accident and sickness policies or certificates which provide hospital or medical expense coverage on an expense incurred or indemnity basis to a person(s) eligible for Medicare shall provide to those applicants a Guide to Health Insurance for People with Medicare in the form developed jointly by the National Association of Insurance Commissioners and the Centers for Medicare & Medicaid Services and in a type size no smaller than 12 point type. The Guide shall also include an attachment concerning the Massachusetts Medicare Supplement Insurance Program in a form prescribed by the Commissioner in a type size no smaller than 12 point type. Delivery of the Guide shall be made whether or not such policies or certificates are advertised, solicited or issued

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as Medicare Supplement policies or certificates as defined in 211 CMR 71.00: *Medicare Supplement Insurance to Facilitate the Implementation of M.G.L. c. 176K and Section 1882 of the Federal Social Security Act*. Except in the case of direct response carriers, delivery of the Guide shall be made to the applicant at the time of application and acknowledgment of receipt of the Guide shall be obtained by the insurer. Direct response carriers shall deliver the Guide to the applicant upon request but not later than at the time the Policy is delivered.

For the purposes of 211 CMR 40.15(1), "form" means the language, format, type size, type proportional spacing, bold character and line spacing.

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(2) Required Notice for Non-Medicare Supplement Policies. Any accident and sickness insurance or long-term care insurance policy or certificate, other than a Medicare Supplement policy, a policy issued pursuant to a contract under Section 1876 of the federal Social Security Act (42 U.S.C. § 1395, *et seq.*); disability income policy or other policy identified in 211 CMR 71.02(2), issued for delivery to persons eligible for Medicare shall notify insureds under the policy that the policy is not a Medicare Supplement policy or certificate. The notice shall either be printed or attached to the first page of the outline of coverage delivered to insureds under the policy, or if no outline of coverage is delivered, to the first page of the policy, or certificate delivered to insureds. The notice shall be in no less than 12 point type and shall contain the following language:

"THIS [POLICY OR CERTIFICATE] IS NOT A MEDICARE SUPPLEMENT [POLICY OR CONTRACT]. If you are eligible for Medicare, review the Guide to Health Insurance for People with Medicare available from the company."

(3) Applications provided to persons eligible for Medicare for the health insurance or long-term care insurance policies or certificates described in 211 CMR 71.13(2)(d)5.a. shall disclose, using the applicable statement in 211 CMR 71.100: *Appendix H*, the extent to which the policy duplicates Medicare. The disclosure statement shall be provided as a part of, or together with, the application for the policy or certificate.

40.16: Severability Provision

If any section or portion of a section of 211 CMR 40.00, or the applicability thereof, to any person or circumstance is held invalid by a court, the remainder of 211 CMR 40.00, or the applicability of such provision, to other persons or circumstances, shall not be affected thereby.

REGULATORY AUTHORITY

211 CMR 40.00: M.G.L. c. 176D, § 11; c. 175, § 110E.

(PAGES 201 THROUGH 204 ARE RESERVED FOR FUTURE USE.)