COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
STRAWBERRY SQUARE
HARRISBURG, PA. 17120

EXECUTIVE OFFICES

Re: House Bill 2420 (Printer's No. 3537) on the use of senior-specific designations by insurance producers in the sale of life insurance and annuities.

Dear Chairman DeLuca, Chairman Micozzie, and members of the House Insurance Committee:

The Pennsylvania Insurance Department ("Department") appreciates the opportunity to provide comments on House Bill 2420, PN 3537.

We support the intended consumer protections contained in the proposed legislation. However, we believe that broad authority already exists under existing insurance statutes to protect not only senior citizens, but also all insurance consumers considering the purchase of a life insurance or annuity product. Further, the Department believes that the goals of HB 2420 for both consumers and the regulated community would be better achieved through the promulgation of a regulation by the Department, under the authority of existing statutes, establishing a "prohibited list" of impermissible designations or certifications.

Specifically, the Unfair Insurance Practices Act ("UIPA"), 40 P.S. §§1171.1 – 1171.15, prohibits unfair or deceptive acts or practices in the business of insurance and gives the Insurance Commissioner authority to determine certain practices to be unfair or deceptive. Further, Act 154 of 1996 directly addresses unfair financial planning practices and restricts the use of professional designations by an insurance producer if the designation is not a formally recognized financial planning or consulting designation and would lead the consumer to believe the producer is a "specialist" engaged in the business of giving financial planning advice related to estate planning or tax advice when in fact that person is engaged only in the sale of life insurance or annuity products. See 40 P.S. §625-3.

Act 154 also places additional requirements for disclosure on the insurance producer when using designations and imposes penalties for violations of the act, including but not limited to a civil monetary penalty of $5000.00 for each violation of the act. The Department believes that these two statutes provide the Department with sufficient authority to establish a "prohibited list" of impermissible designations, including senior-specific designations, by regulation and that this route would protect consumers more effectively than HB 2420 The regulatory approach would also put producers on prior notice of what designations are not permissible.

The Department agrees that the goals of HB 2420 are laudable, but we also believe that the bill, as written, would not achieve those goals in the most effective and efficient manner. Specifically, the bill essentially envisions a "mini-hearing" on the acceptability of any particular designation on a case-by-case basis as part of a larger enforcement action brought against an individual producer. Section 4(b)(4) of the bill then uses a variety of standards based on "reasonableness" to determine whether a designation is acceptable. This approach is likely to result in some unintended consequences. First, it

requires the Department to take enforcement actions and hold hearings against each individual producer with penalties imposed after the fact. In addition to creating a singular, ad hoc procedure that only addresses conduct after the fact, this hearing approach is also slow, litigious (requiring hearings and possible appeals), time consuming and not as efficient as a front-end regulatory process. Further, this approach provides no guidance to the producer community as to what is permissible on the "front end" while subjecting them to potential penalties after the fact. Producers therefore may argue that due process requires the law to apprise persons of what acts are prohibited before they may be punished for engaging in them, which may give rise to a constitutional challenge to the bill as drafted.

Further, the various "reasonable" standards contained in Section 4(b)(4) of the bill for determining whether a designation is acceptable are not typically found in administrative statutes because, unlike civil tort cases, administrative hearings do not employ juries as fact-finders. Moreover, an individual hearing officer or agency head's opinion as to what is "reasonable" may differ from that of a reviewing court on appeal. In short, "reasonableness" in this area is not a well–defined standard to employ in attempting to prohibit something, and will introduce potential avenues to attack such decisions on appeal, likely to result in some unintended consequences.

As an additional concern, the Department resolves the vast majority of enforcement actions without a hearing through execution of a Consent Order with the producer. Professional certifications, while used by producers, are not issued or created by them. As such, it is doubtful whether a producer could agree that a particular designation is misleading or inappropriate and, even if they could, it would have no binding effect on the entity issuing the designation or on the use of this designation by other producers.

As a final matter, the bill appears to "piggy back" on the UIPA by declaring certain practices to be an unfair or deceptive act for purposes of the UIPA. The bill then has its own "stand alone" enforcement and penalty section for violations of the bill, which does not appear to be consistent with the penalty provisions of the UIPA in that the UIPA does not authorize the Commissioner to impose civil penalties directly but requires the Department to request the imposition of civil penalties by a court. While the Department prefers the "stand-alone" penalty approach taken by the bill (giving the Commissioner authority to impose civil fines as he does in other laws), to be consistent with this approach, Section 4 of the bill should then be amended to clearly prohibit certain conduct, rather than tying that conduct to a violation of the UIPA.

For all of the above reasons, the Department respectfully suggests that the goals of HB 2420 could be more effectively achieved through a regulation promulgated under existing law. The Department notes that the model from the National Association of Insurance Commissioners on which HB 2420 is based was similarly a model regulation intended to be issued under a states "Unfair Trade Practices Act."

In the event that this Committee decides to move forward with the bill, at a minimum the Department requests that the bill be amended to add the following language at page 7, line 10:

Section 8. Prohibited List.

The Department may, by regulation, establish a list of prohibited senior-specific certifications and professional designations, the use of which by an insurance producer shall constitute a violation of this act.

The Department again thanks you for the opportunity to provide comments on HB 2420 and wishes to extend to you and your staff our resources to promulgate regulations that will better define the use of designations and certain prohibitions to enhance the protection of all insurance consumers. We are prepared to move forward promptly with proposed regulations.

Respectfully,

Ronald Gallagher
Deputy Commissioner, Market Regulation
September 24, 2010

cc: Honorable Joseph F. Markosek