Alliance
of American Insurers

REYNOLD E. BECKER
Vice President – Property/Casualty
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April 12, 2001

Peter J. Salvatore
Regulatory Coordinator
Insurance Department
1326 Strawberry Square
Harrisburg, PA 17120

Dear Mr. Salvatore:

Privacy of Consumer Financial Information
31 PA.CODE CH. 146a

The Alliance of American Insurers is a national trade association with 326 property/casualty insurance company members. Alliance member companies write both personal and commercial lines policies in Pennsylvania.

Our member companies wish to comply with the letter and spirit of the Gramm-Leach-Bliley (GLB) Act. We appreciate the opportunity to comment upon this proposed regulation. On a preliminary note, we support your effort to provide an extended compliance date of July 1, 2001, and would like to work with you to implement that directive. We also commend the Department's decision to defer consideration of health information privacy language.

The bulk of this proposed regulation is patterned after the financial portion of the Model Privacy of Consumer Financial and Health Information Regulation recently adopted by the National Association of Insurance Commissioners (NAIC). As indicated in our letter of November 13, 2000, the Alliance and its member companies, as well as much of the property/casualty insurance industry, are opposed to the NAIC model as presently written. The NAIC model goes far beyond the scope of Title V of GLB, and actually directly conflicts with several of its provisions.

Additionally, the proposed regulations deviate significantly from both GLB and the NAIC model regulations in two respects. The first is the attempt to impose "opt-out" requirements upon disclosures between and among affiliates. This was never intended by Congress. It is also pre-empted by the federal Fair Credit Reporting Act.

The second is to impose an additional or second notice requirement. The Department cites Act 40 (40 P.S. 288) to justify these burdensome and costly provisions. Please note that Section 288 addresses banks sales of insurance and annuities, not privacy. It seeks to regulate lender conduct, not insurer privacy practices.

We respectfully assert that the Department lacks the statutory authority to promulgate that model in its current form. In the absence of explicit authorization from your Legislature to contravene GLB on these points, such a regulation would be subject to legal challenge if adopted.

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Background

GLB (P.L. 106-102) was enacted on November 12, 1999. Title V created new privacy mandates for banks, insurers, and securities firms. These mandates apply only to the sharing of "financial" information about "consumers" or "customers" who obtain products or services for "personal, family or household purposes."

Both GLB and the NAIC model regulation only seek to regulate disclosures to non-affiliated third parties, by imposing notice and opt-out requirements. Congress intentionally left disclosures between and among affiliates largely unregulated, in order to foster cross-marketing opportunities.

In the property/casualty context, the "product" or "service" is clearly a personal lines insurance policy. The consumer who seeks to "obtain" that product or service is the applicant. The customer who "obtains" that product or service is the policyholder. Under Sections 502(e)(1) and 509(7), Congress explicitly excluded "processing insurance claims" from the scope of Title V. Thus, claimants are neither consumers nor customers subject to GLB.

Similarly, under these same sections, Congress also explicitly excluded a "usual, appropriate, or acceptable method for insurance underwriting" from the scope of Title V. Thus, insurance underwriting practices are not subject to GLB.

Section 504(a)(2) of GLB requires that regulations prescribed by "state insurance authorities" be "consistent and comparable with the regulations prescribed by the other agencies..." In this case, those other agencies are the federal regulators of banks and securities.

Legal Defects of Regulation

Both the NAIC model regulation and this proposed regulation go far beyond the scope of Title V of GLB. In some cases, in direct conflict. Examples include:

- The purpose section (146a.1) improperly applies the regulations to "claimants or beneficiaries." This is inappropriate for two reasons. First, it directly conflicts with Title V's exemption for "processing insurance claims." Second, claimants and beneficiaries do not "obtain" any product from an insurer, since they are not policyholders. We recommend that this reference be deleted. *Two departments have done so already: District of Columbia and Illinois. More are expected.*
- The definition of "consumer" (section 147a.2) is improperly expanded to include "claimants" and "beneficiaries in a workers compensation plan." This directly conflicts with Title V in three respects. First, the direct conflict with Title V's exemption for processing insurance claims. Second, claimants and beneficiaries do not obtain products from an insurer. Third, a workers compensation policy is clearly not a product or service for "personal, family or household purposes." We recommend that these references be deleted. *Four departments have done so already: District of Columbia, Illinois, Indiana, and Louisiana. Further, Virginia has declined to amend its existing law on this point. More are expected to avoid the pitfalls of seeking to regulate workers compensation.*
- By changing NAIC model regulation references from "*nonaffiliated* third parties" to simply "third parties", the proposed regulation effectively imposes opt-out requirements upon insurers seeking to disclose financial information to their affiliates. We recommend that the proper language be restored for two reasons. First, the approach conflicts with both Title V of GLB and the NAIC model. Second, the approach is pre-empted by the federal Fair Credit Reporting Act. In their efforts to implement Title V of GLB, *we are aware of no other state that is taking this approach.*

- Imposition of a second notice requirement (Section 146a.21) should be deleted because it conflicts with both Title V of GLB and the NAIC model. In their efforts to implement Title V of GLB, *we are aware of no other state that is taking this approach.*
- The "nondiscrimination" section (146a.42) is not authorized by GLB and directly conflicts with Title V's insurance underwriting exemption. We recommend that this section be deleted. In the alternative, the section can be amended to exclude "usual, appropriate, or acceptable methods for insurance underwriting." *This is the approach in the National Conference of Insurance Legislators (NCOIL) model bill.*
- By seeking to impose these additional mandates upon insurers, the regulation would place insurers at a competitive disadvantage with banks and securities firms, which face no similar mandates. Thus, they are not "consistent and comparable with the regulations prescribed by the other agencies" under GLB.

There is no state statutory authority for the Department to promulgate regulations containing these provisions. We respectfully request that the regulation be amended to remove the defective language or else withdrawn. We welcome the opportunity to work with the Department to redraft the regulation to implement Title V of GLB.

Sincerely,

Reynold E. Becker

Reynold E. Becker

Copies to: Neil Malady
Keith Bateman
James White
Steve Elliott – PAMIC
Sam Marshall – IFP

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April 30, 2001

Peter J. Salvatore
Regulatory Coordinator
Special Projects Office
1326 Strawberry Square
Harrisburg, Pa. 17120

Re: Comments on the Proposed *Privacy of Consumer Financial Information* Regulation

Dear Mr. Salvatore:

Capital Blue Cross is submitting the following comments on the proposed Privacy of Consumer Financial Information Regulation (#11-206), which was published in the March 31, 2001 issue of the Pennsylvania Bulletin. We appreciate the opportunity to submit these comments and look forward to working with the Pennsylvania Insurance Department to protect members' nonpublic personal financial information.

The Model Regulation and HIPAA

We agree with the Pennsylvania Insurance Department (the"Department") plan to not issue regulations to protect the privacy of nonpublic personal health information at this time, in light of the current HIPAA Privacy regulations. In fact, we believe that, with the comprehensive HIPAA Privacy provisions, it will not be necessary for the Department to address health information privacy, even at a later date.

In this proposed regulation, the Department has stated that it does not want to duplicate the HIPAA privacy regulations. Given this, we believe that the Department should amend the definition of nonpublic financial information to clarify that it was not intended to include any information which is health information. For example, all of the information on a claim is governed by the HIPAA privacy regulations. We do not believe that the Department intended for claim information, or any other health information, to be treated as financial information. Instead, it should be governed by the HIPAA privacy regulations and, if necessary, future regulations aimed at health information.

The CHIP Program

The current Pennsylvania Children's Health Insurance Program ("CHIP") provides for the sharing of nonpublic personal financial information between contractors who are insurers and various state agencies, including Medicaid. Under the proposed Regulation, the Commonwealth or its contractors arguably will have to provide notices and an ability to opt out of sharing of financial information. We do not believe that, as a matter of policy or administration, the Commonwealth intends to grant the participants the ability to opt out of the sharing of financial information with Medicaid. In addition, these activities will add administrative burdens and costs to the program. We suggest that the Department modify the Regulation to provide that it does not apply to programs such as CHIP and Medicaid. This could be done in the definition of licensee.

Definition of Consumer
Under this definition in (ii) Examples of nonconsumers (A), the following should be deleted, "...and further provided that the licensee does not disclose to a third-party nonpublic personal financial information about an individual other than as permitted under Subchapter D." This deletion should eliminate any requirement to send notices to members on group contracts. This is as it should be since this regulation is intended to govern individual products, not group products.

Definition of Licensee
In addition to the comment made in "The CHIP Program" paragraph, we believe that the reference to entities licensed, authorized or registered under the insurance laws is too vague. The definition should be revised to more specifically identify by category the entities subject to the Regulation.

Information to be Included in Privacy Notices
In Section 146a.13(a)(8), "nonpublic personal information" should be changed to "nonpublic personal financial information."

Exceptions To Limits on Disclosures of Financial Information
We suggest that Section 146a.31 be modified to mirror Sections 146a.32 and 146a.33 to provide that "the requirements for initial notice in Section146a.11, the opt out in Sections 146a.14 and 146a.21 do not apply" if the licensee meets the requirement of Section 146a.31.

Compliance/Enforcement Date
We understand the importance of retaining the July 1, 2001 effective date for this regulation and we appreciate the additional six months to come into compliance before enforcement. However, given the timing of the implementation of this regulation and the HIPAA regulation, licensees will be required to comply with this regulation while they are in the midst of preparing to comply with the HIPAA regulation. Valuable resources, dollars and time will be spent separately on both mandates, resources that could be coordinated and minimized if these two regulations had the same compliance date. Because we are quite concerned that these additional costs will ultimately be borne by the consumers and customers, we recommend that enforcement of this regulation coincide with the HIPAA Privacy April 14, 2003 compliance date.

Yours truly,

Patricia K. Wong
Corporate Counsel
Capital Blue Cross

PKW:gcw

April 30, 2001

Via E-Mail and Overnight Delivery to Follow
(psalvatore@state.pa.us)

Original: 2179

Peter Salvatore
Regulatory Coordinator
Pennsylvania Insurance Department
1326 Strawberry Square
Harrisburg, PA 17120

Re: Proposed Rulemaking – Privacy of Consumer Financial Information (31 Pa. Code Ch. 146a)

Dear Mr. Salvatore:

Independence Blue Cross and its Affiliates ("IBC") submit the following comments to the Pennsylvania Department of Insurance (the "Department") regarding the above-referenced proposed regulation published in 31 Pa. Bulletin 1858 for consideration.

GENERAL COMMENTS

1. In the background section of the proposed regulation, the Department states that "these proposed regulations are modeled from the Privacy of Consumer Financial and Health Information Regulation that was adopted by the National Association of Insurance Commissioners (NAIC) on September 26, 2000" ("2000 NAIC Model Act"). As set forth more fully below, these proposed regulations however, significantly depart from the 2000 NAIC Model Act with respect to (1) requisite notice and opt out requirements among affiliates and; (2) key definitions (i.e. nonpublic personal information and consumer)

2. We are pleased that the Department has decided to remove the opt-in requirement for health information from the proposed regulation. IBC understands that the Department will issue a proposed privacy of health information regulation at a later date to supplement the HHS final privacy regulations. This should alleviate dual compliance dates and the requisite costs incurred by insurers associated with implementation of potentially conflicting state and federal privacy of health information standards. However, as set forth more fully below, the definition of "non-public financial information" set forth in the proposed regulation does not clearly exclude "nonpublic health information" as the Department intended. As a result, insurers will be left to determine whether quasi financial information like billing records, records of copayments and other health related information is contemplated within the definition of personally identifiable financial information. We respectfully request that the definition of "nonpublic personal financial information" specifically exclude "health information" as this term is defined under the 2000 NAIC Model Act.

3. The Department proposes a July 1, 2001 effective date for this proposed regulation consistent with the July 1, 2001 effective date set forth in Title V of the Gramm-Leach Bliley Act ("GLBA"). While the Department acknowledges that "there is no requirement that state insurance regulators promulgate their regulations prior to a specific date", the Department nonetheless has proposed an effective date of July 1, 2001. To the extent the Department recognizes that implementation of the privacy regulation "may prove to be a time consuming and complex undertaking", we request that when the proposed regulation is adopted it have an effective date of July 1, 2001 with a compliance date 180 days thereafter. This approach is consistent with the Department's concern of avoiding potential loss of its authority to override Federal insurance consumer protection regulations.

SPECIFIC COMMENTS:

Definitions

- *Consumer* – The definition of "Consumer" in the proposed regulation omits "and" from subsection (d)(ii) of the definition of Consumer set forth in section 4(F)(1) of the 2000 NAIC Model Act. The 2000 NAIC Model Act includes an individual as a licensee's consumer if the individual is (i) (1) a beneficiary of a life insurance policy underwritten by the licensee; (2) a claimant under an insurance policy issued by the licensee; (3) an insured or an annuitant under an insurance policy or an annuity issued by the licensee; (4) a mortgagor of a mortgage covered under a mortgage insurance policy; **and (ii) the licensee discloses nonpublic personal financial information about the individual to a nonaffiliated third party other than as permitted under Section 14 (Service Providers and Joint Marketing), 15 (Processing and Service Transactions) and 16 (Other Exceptions), of the 2000 NAIC Model Act.**

  Exclusion of the word "and" as part of subsection (ii) highlighted above from the definition of "*Consumer*" in the proposed regulation will result in licensees having to provide privacy notices to those individuals for whom nonpublic personal information is not disclosed. This is inconsistent with proposed section 146.11(b)(1) and the Purpose and Scope (section 2) of the 2000 NAIC Model Act.

Recommendation: Conform to the definition of "Consumer" contained in section 4(F)(1) of the 2000 NAIC Model Act.

- *Nonpublic personal information* – The proposed definition of *"Nonpublic personal information"* does not conform to the 2000 NAIC Model Act definition of this term or that contained in the GLBA. Pursuant to the proposed regulation *"Non public personal information"* includes *"personally identifiable financial information"* such as (1) information a consumer provides to a licensee on an application to obtain an insurance product or service; (2) account balance information and payment history. Billing or claims records or copayment history of an individual would be considered *"health information"* as defined under section 4(O) of the 2000 NAIC Model Act and

should be specifically excluded from a definition of *"Nonpublic personal financial information"* to clarify what licensees should consider nonpublic financial information.

Moreover, although the term *"Nonpublic personal information"* is defined under the proposed regulation, the terms *"Nonpublic financial information"* and *"Nonpublic personal financial information"* are not. These terms however, are used interchangeably in the preamble and proposed subchapters B, C, D and E.

Recommendation: Conform the definition of *"Nonpublic personal information"* to the 2000 NAIC Model Act definition to specifically exclude *"Health information"* as defined in the Model Act. To the extent the revised definition of *"Nonpublic personal information"* means *"nonpublic personal financial information" as* defined in the 2000 NAIC Model Act, then this revised definition would conform to NAIC and could be consistently applied by licensees.[1]

Subchapter B – Privacy and Opt-Out Notices for Financial Information

- **Proposed Section 146a.11(a)(2)** – This proposed section would require a licensee to provide a privacy notice to a consumer before the licensee discloses nonpublic personal financial information about the consumer to a third party. First, the term *"third party"* is undefined under the proposed regulations. We assume that this term refers to a *"nonaffiliated third party"* and specifically excludes a licensee's affiliate. This interpretation is consistent with the 2000 NAIC Model Act, which regulates disclosures only to *"nonaffiliated third parties"*. Pennsylvania's proposed regulation treats disclosures of consumer information differently that the 2000 NAIC Model Act. A combined privacy notice for IBC and its Affiliates should adequately address the concerns the Department has with respect to an insurer's disclosure of its privacy notice.

  Treating affiliated companies different than contemplated under the 2000 NAIC Model Act does not add any significant privacy protections to consumers and creates additional administrative burdens for health insurers.

Recommendation: Adopt the 2000 NAIC Model Act approach, which regulates only disclosures to "nonaffiliated third parties".

- **Proposed Section 146a.11(b)**- This proposed provision is in direct conflict with proposed section 146a.13(d). Proposed section 146a.11 does not require a licensee to provide an initial privacy notice to a consumer if the licensee (1) does not disclose any nonpublic personal financial information about the consumer to a third party except as authorized by sections 146a.32 and 146a.33 **and** the licensee does not have a customer relationship with the customer. By default then proposed section

[1] This recommendation should be consistently applied with respect to the remaining comments to the extent the terms *"nonpublic personal financial information"* or *"nonpublic financial information"* are used.

146a.13(d) would not apply as this proposed section only applied to customers that are nonconsumers.

Recommendation: Delete proposed section 146a.13(d).

- **Proposed section 146a.21(c)(3)** – Inconsistent with the 2000 NAIC Model Act, the Pennsylvania proposed regulation requires that licensees provide a second opt out notice within 30 days of the first opt out notice. To the extent the first opt out notice was delivered in accordance with proposed section146a.16, a second notice should not be required. Requiring a second opt-out notice imposes an administrative burden and additional cost on insurers not contemplated by the GLBA or the 2000 NAIC Model Act.

Recommendation: Consistent with the GLBA and the 2000 NAIC Model Act, delete proposed section 146a.21(c)(3).

IBC respectfully requests the Department to consider these comments before the final adoption of regulations governing the Privacy of Consumer Financial Information. Please feel free to contact me directly at (215) 241-9548 to discuss any of the above comments.

Respectfully submitted,

Julie E. Haywood
Senior Counsel

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Original: 2179

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April 30, 2001

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Mr. Peter J. Salvatore
Regulatory Coordinator
Commonwealth of Pennsylvania
Department of Insurance
1326 Strawberry Square
Harrisburg, PA 17120

Re: Privacy Rulemaking (31 PA Code Ch. 146a)

Dear Mr. Salvatore:

On behalf of Harleysville Insurance, I appreciate the opportunity to comment upon the proposed adoption of Chapter 146a of Title 31, Part VIII, entitled "Privacy of Consumer Financial Information," as published in the Pennsylvania Bulletin, Volume 31, Nos. 13 and 14 (Proposed Regulations). Harleysville Insurance has five companies with 1,210 employees actively servicing the needs of approximately 77,000 policyholders in the Commonwealth of Pennsylvania.

In a letter to the Pennsylvania Department of Insurance (Department) dated January 26, 2001, we advanced our concerns regarding the NAIC model privacy regulation upon which the subject Proposed Regulations are based. We are pleased that the Department, now, has decided not to include the opt in requirements for health information as part of this rulemaking, thereby, deferring the implementation of health privacy regulations to a later date. However, we still have some remaining concerns as to the manner in which the Proposed Regulations address the implementation of the privacy requirements under the Gramm-Leach-Bliley Act (GLBA).

Addressed below are our concerns in regard to certain threshold issues, workers' compensation coverage, and miscellaneous requirements.

Threshold Issues

The cross-marketing activities that could be triggered by the new financial services interrelationships permitted under GLBA prompted Congressional concern in regard to the confidentiality of non-public personal financial information. As a result, Title V of GLBA mandated new federal and state privacy regulations. It is important to note, however, that this federal enactment specifically limited its coverage to "financial information." Therefore, assuming for the moment that GLBA is sufficient authority for a state to embark upon its rulemaking, then, simple logic would dictate that the Proposed Regulations not exceed the scope of GLBA.

Further, reliance upon Pennsylvania's Act 40, to any extent, as authority for this rulemaking is problematic not only in regard to the originally proposed health information provisions, but also in regard to the opt out regimes of the Proposed Regulations. This Pennsylvania enactment, which focuses upon the use of loan information as to the marketing of insurance products, has mandatory notice provisions that are at variance with the provisions of GLBA. Therefore, lacking any clear state statutory guidance and because GLBA is the impetus for the privacy rulemaking in Pennsylvania and all other states, every effort should be extended, as part of this rulemaking, not to go beyond the parameters set forth in GLBA. On a similar note, the NAIC model is not the appropriate "authority" for provisions in the Proposed Regulation. If the NAIC model is at odds with clear Congressional intent, as provided in GLBA, then, the provisions of GLBA should prevail.

Workers' Compensation Coverage

The Proposed Regulations' inclusion of workers' compensation claimants within the subject rulemaking is justified by the Department based on the need for "uniformity" as provided by the NAIC model. This concern for uniformity, however, should not overshadow the need to base regulation upon statutory authority and guidance, such as that provided in the GLBA.

In general, the revised Section 146a.2. definition of "Consumer," as published in the *Pennsylvania Bulletin* on April 7, 2001, has some inconsistencies and seems structurally convoluted. Although we were not totally in agreement with the earlier definition of "Consumer," as set forth in the *Pennsylvania Bulletin* of March 31, 2001, the structure thereof permitted the reader to more easily ascertain its meaning.

Our specific concerns, in regard to the substance of the present version or definition of "Consumer," under Section 146a.2., are:

- We take issue with the inclusion of the phrase "a claimant under an insurance policy" within the definition of consumer. This inclusion, in most instances, will trigger the application of the Proposed Regulations' notice and opt out provisions to third party claimants. Compounding the situation is the specific inclusion of a "...beneficiary in a workers' compensation plan." The privacy protections afforded by the GLBA were meant to be afforded to those in, or seeking to be in, a contractual relationship with an insurer, *i.e.*, someone whose interests are aligned with those of the insurer. Extending the rulemaking's privacy coverage to sometimes hostile third party interests is not only beyond the statutory intent, but also needlessly and greatly increases the coverage costs ultimately borne by the policyholder.

- In the workers' compensation context, Section 146a.2. provides that a privacy notice can be avoided when sharing non-public personal financial information, if "the licensee provides the initial annual and revised notices...to the workers' compensation plan participant." Not only does this notice provision add an extra layer of compliance that does not apply to other claimant situations, but also the Proposed Regulations do not provide a definition as to the term "plan participant." We assume this undefined term refers to the employer to which the workers'

compensation policy is issued. Clarification is sought as to the "plan participant" in the event workers' compensation claimants are to be covered by the final regulations.

- We respectfully submit that the examples of Consumers, as provided under Section 146a.2., exceed both the intent of the GLBA and the actual definition of Consumer as set forth in this Section. The definition specifically provides that a Consumer is "An individual who seeks to obtain, obtains or has obtained an insurance product or service from a licensee that is to be used primarily for personal, family or household purposes..." In the context of workers' compensation insurance, the employer is the party who "obtained" the "product or service," for business purposes and, therefore, a claimant should not qualify as the Consumer.

- There is an additional concern in regard to the actual definition of Consumer and the examples, thereunder. There are inconsistencies and resultant uncertainties created by references at times to "non-public personal information" and at other times to "non-public personal financial information." We submit that the proper phrase should be "non-public personal *financial* information"; otherwise, the Proposed Regulations would go beyond the intent of Congress as specifically provided in GLBA.

In summary, the definition of "Consumer" and the examples thereunder should be redrafted to clearly exclude all claimants, including workers' compensation claimants, and to provide a clearer and more practical path for the exchange of non-public personal financial information.

Additional Issues

Our additional concerns regarding the Proposed Regulations are:

- The Section 146a.31. exceptions to the opt out requirements should be clarified either in subparagraph (a)(1)(ii), thereof, or as an "Example," thereunder, to include claims processing and fraud investigation service providers as "third party" exceptions. As now drafted, the examples provided in subparagraphs (a)(2) and (b) appear restrictive when contrasted to the "General rule" exception language of subparagraph (a)(1) of Section 146a.31.

- Similar to the above comment, the Section 146a.33. exceptions should be expanded under subparagraph (a)(7), thereof, to include claims processing and fraud investigation service providers.

- Under Section 146a.44., "Effective date," the licensee must provide the "initial notice" to all of its "consumers who are the licensee's customers on July 1, 2001." This mandate creates practical problems because the generation of thousands of mail notices within a compressed time period will be costly and needlessly overwhelm a licensee's systems. As an alternative, a licensee should have the option of mailing the initial notice at the time of the policy renewal, during the period of July 1, 2001 to June 30, 2002.

- The commentary in the March 31, 2001 *Pennsylvania Bulletin* rationalizes the Department's adherence to the NAIC model based upon the need for uniformity among states. Curiously, however, Section 146a.21. abandons the uniformity approach when it requires opt out notices in the context of "affiliate" information sharing. To our knowledge, no other state has steered this course. Section 146a.21. should be redrafted to address "non-affiliate" disclosures of non-public personal financial information, only.

- Also, in regard to Section 146a.21.(c)(3), there is an overlay of a second opt out notice requirement. This requirement not only is onerous, but also it is outside the dictates of GLBA and at odds with the path being followed in other states. The genesis of this requirement appears to be Act 40, which is applicable only to lending situations and, therefore, the second notice requirement should be removed in its entirety.

Thank you for considering our comments and concerns in regard to the Proposed Regulations. We strongly urge the incorporation of the foregoing suggested changes into the final rulemaking process. Recognizing that consumer privacy is a very complex matter, the Department's efforts, to date, to meet this challenge are very much appreciated.

Very truly yours,

John F. Weaber

JFW:nd
cc: Roger Brown

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Original: 2179

May 15, 2001

Mr. Peter J. Salvatore
Regulatory Coordinator
Insurance Department
1326 Strawberry Square
Harrisburg, PA 17120

VIA e-mail & Fax

Dear Mr. Salvatore:

On behalf of the more than 1,200 Pennsylvania member agencies (independent business owners) of the Professional Insurance Agents of Pennsylvania, Maryland and Delaware, we hereby submit these comments relating to the Final Form Draft of 11-206 (05/10/01) Privacy of Consumer Financial Information.

In our comments dated April 26, 2001, we point out in Section 146a.1(b) questions regarding the applicability of these regulations when commercial policies have more than one purpose, such as personal umbrella coverage's added by endorsement to commercial umbrella policies, private passenger type vehicles covered under commercial auto policies and farm policies that cover both the commercial and personal lines exposures of the insured. We understand Title V of the Gramm-Leach-Bliley Act, the NAIC Model and these regulations apply only to personal lines. Nevertheless, questions as to the applicability of the notice requirements surface when situations of the kind illustrated above arise. The regulations should be made clear when commercial and personal lines exposures intermingle.

In the definitional section, Section 146a.2, the term licensee includes "...insurer...a producer and other persons...required to be licensed..." under the laws of the Commonwealth. The term "producer" is not defined in current Pennsylvania statute. Again, PIA suggests the term "producer" be defined separately as "a person required to be licensed to sell, solicit or negotiate insurance." The term "producer" is used throughout the regulations. For example, it appears as an exception in Section 146a.23(b)(2), yet, it has absolutely no meaning in current Pennsylvania law. Since it has no statutory meaning, the exemption annotated is left open to interpretation. If it is the Department's intent to infer that the term "producer" means "agent", then why does the term "agent" appear in Section 146a.2(iii)? Further, the terms "insurance producer" and "insurance broker" are used in Section 146.a.11(c)(2)(i) adding additional, unnecessary confusion to the meaning of the term. We believe any confusion is easily remedied by defining the term "producer" and addressing the appropriateness of its use throughout.

In the definition of licensee there is a general exemption for notice requirements when the licensee is an agent of the licensee and the licensee fulfills the notice requirements in Section 146a.2(iii)(A). Although PIA strongly supports this provision, principals should be required to provide confirmation to their agents.

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Should the Department elect not to address the notification provision, agents will be left in limbo as to whenever the notice requirements have been met exposing them to potential enforcement action. At a bare minimum, when an agent relies in good faith on a principal's representations that it is in compliance with these regulations, the Department should take such reliance into account should any enforcement action be taken. Absent a notification provision, we would like to know the Department's enforcement position, in writing, for handling enforcement actions like these that will inevitably arise.

In Section 146a.2 a "Company" includes in its definition "... similar organization". To be consistent, we suggest the term "entity" be used in lieu of "organization".

Section 146a.11(f) uses the nondefined term "noncustomers". This Section causes some confusion and we believe it is in need of illumination. We do not know whether a noncustomer is a "consumer" or whether it is some other separate category?

Traditionally in insurance law, an offer is made in request by an individual applicant for coverage. Here in Section 146a.16(b)(iv) notice is required to be given to each consumer when a "quote" is provided. PIA would like to know the elements the Department considers to be part of a "quote" because of the apparent conflicting exempting language that appears regarding a transaction instituted at the request of a customer, and a quote traditionally is regarded as a reply to that offer to do business. The Department's response to this particular question will have a dramatic impact on the advice and counsel we offer our members. Does the use of the term "quote" include providing premium indications, which is commonly known to the general public as a "quote"?

We remain open to discussing our comments further with the Department, IRRC and the legislative committees.

Respectfully submitted,

Joseph T. Leighton, Esq.
VP Government and Industry Affairs

C: Rick Russell, PIA Executive VP
Sen. Edwin Holl
Sen. Jack Wagner
Rep. Nick Micozzie
Rep. Tony DeLuca
Robert Nyce, IRRC

FARMERS

Legislative & Regulatory Affairs
4680 Wilshire Blvd
Los Angeles, CA 90010

Peter J. Salvatore
Regulatory Coordinator
Pennsylvania Insurance Department
1326 Strawberry Square
Harrisburg, PA. 17120

Original: 2179

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May 1, 2001

Peter J. Salvatore
Regulatory Coordinator
Insurance Department
1326 Strawberry Square
Harrisburg, PA. 17120

RE: Proposed Rulemaking – Privacy of Consumer Financial Information

Dear Mr. Salvatore:

On behalf of Farmers Insurance Group of Companies, the fifth-largest Property & Casualty insurance group in the United States and the third-largest auto and home insurer, we would like to thank you for the opportunity to comment on the proposed Privacy of Consumer Financial Information regulations. We support the NAIC consumer privacy model regulation and look forward to working with you in this regard.

Specifically, Farmers would like to comment on Chapter 146a.2. Definitions. We respectfully request that Subsection (iv)(B) "A claimant under an insurance policy issued by the licensee" be removed from the definition of "consumer". Other states have removed this provision from their GLB regulations. We respectfully request you do the same.

Additionally, the definition of "Control" is used as defined in section 1401 of the Insurance Company Law (40 P.S. § 991.1401). This definition is necessary because Section 146a.2 defines "affiliates" as a company that controls, is controlled by or is under common control with another company, and uses the word "control". Under section 991.1401, control is defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote or holds proxies representing ten per centum (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact. The Insurance Department may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect. This is critical to an organization such as Farmers, wherein the insuring entities, known as Exchanges, contract with an attorney-in-fact to perform administrative functions. These administrative functions include underwriting, policy processing, actuarial services and accounting. The attorney-in-fact/management company has no ownership control, or even a seat on the Board of Directors.

Exchanges are owned by their policyholders. However, Exchanges do not have traditional "back office" insurance administration. Thus, they generally contract with a management company for these services. The management company, in turn, then "controls" certain administrative aspects of the insuring enterprise.

While permitting the Commissioner to determine what constitutes control under section 1401 possibly provides the opportunity to import the concept of control adopted in the Insurance Holding Company Act, we believe clarification is necessary to make certain that contractual control is included in the proposed regulations.

Current practices in the insurance industry and language in existing insurance laws provide support that Exchanges and management companies are affiliates. To minimize our risks while developing a structure that permits non-personal public information to be disclosed between an Exchange and its administrative manager, we would like to see the regulation confirm that through management contracts, control can be established.

Thank you for the opportunity to comment on the Department's proposed regulations. We look forward to working with you on these proposed regulations, especially with regard to the definition consumer, control and other provisions concerning the standards for determining which parties are affiliates. Please feel free to call on us at any time should you have any questions, or if we can provide you with additional information.

Sincerely,

Bennett L. Katz

Bennett L. Katz
Assistant Vice-President
Regulatory Affairs and Compliance
Chief Compliance Officer

American Insurance Association

April 30, 2001

Original: 2179

BY E-MAIL

Peter J. Salvatore
Regulatory Coordinator
Insurance Department
Commonwealth of Pennsylvania
1326 Strawberry Square
Harrisburg, PA 17120

Re: AIA Comments on Pennsylvania Proposed Insurance Regulation Chapter 146a: "Privacy of Consumer Financial Information"

Dear Mr. Salvatore:

The American Insurance Association ("AIA") is a national trade association representing more than 370 property and casualty insurers that write insurance in every jurisdiction in the United States. Their U.S. premiums exceed $60 billion each year. AIA member companies offer all types of property and casualty insurance including personal and commercial automobile insurance, commercial property and liability coverage, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. AIA represents companies writing both personal and commercial lines of business in Pennsylvania. In 1999, AIA member companies wrote almost $2.8 billion of premiums in Pennsylvania, representing over 1/4 of the market. AIA welcomes the opportunity to comment on proposed Insurance Chapter 146a ("proposed regulation") issued by the Pennsylvania Insurance Department ("Department"). For your convenience, the memorandum is organized in sections showing the degree of importance of the recommendation. The most critical items deal with the disclosure of nonpublic personal financial information to third parties (both affiliated and non-affiliated), which is a significant component of Title V of the federal Gramm-Leach-Bliley Act ("GLBA").

AIA supports state efforts to protect consumer information pursuant to Title V of GLBA while preserving critical business use of such information. It is essential that state regulatory efforts in this area be uniform and consistent in order to avoid the disparate treatment and confusion among consumers and the regulated community that will inevitably result should different states adopt differing regulatory standards. The sheer potential variety and volume of dissonant laws and regulations among the 51 insurance regulatory jurisdictions would frustrate consumer realization of meaningful protections, impede compliance with privacy standards, prevent consumers from

accessing the full range of insurance products and services enjoyed by consumers elsewhere, place carriers doing business in particular states at a competitive disadvantage vis-à-vis those operating in other states, and potentially invite federal preemption of state law in the privacy area.

For AIA member companies, many of which operate regionally and nationally, uniformity and consistency are necessary for three overriding reasons: (1) compliance implementation; (2) reduction in cost burden; and (3) leveling the competitive playing field. Generally, the effective date for implementing GLBA privacy standards is July 1, 2001. With only two months remaining before that date, companies need rules and regulations that are consistent and operationally uniform in order to achieve any reasonable measure of compliance. The delays inherent in the regulatory process only shorten an already-abbreviated implementation period. Further, the costs of ensuring compliance increase with differing regulation. Those costs will inevitably increase where a company guesses incorrectly about a legislative or regulatory outcome and must re-tool its privacy compliance program. Finally, an uneven insurance regulatory playing field in the area of privacy may tip the competitive balance in favor of federally regulated financial institutions (which are regulated by one standard instead of by 51 standards).

PENNSYLVANIA CHAPTER 146A REVIEW – HIGHEST PRIORITY RECOMMENDATIONS

Notice and Information Sharing

AIA recommends inserting "nonaffiliated" where it has been omitted. In numerous places throughout the proposed regulation, the term "nonaffiliated" is a missing modifier to "third party" and should be added. The list that follows provides examples of the sections at issue:

- §146a.2 "consumer" (i)(D).
- §146a.2 "financial institution" (iii).
- §146a.2 "licensee" (iii)(D)(I).
- §146a.11(a)(2).
- §146a.11(b)(a).
- §146a.13(a)(5).
- §146a.13(a)(6).
- §146a.13(c)(4).
- §146a.14(a)(1)(i).
- §146a.14(a)(2)(i).
- §146a.14(a)(2)(i)(A).
- §146a.15(a).
- §146a.15(a)(3).
- §146a.15(b)(1)(i).
- §146a.15(b)(1)(ii).
- §146a.15(b)(1)(iii).
- §146a.15(b)(2).
- §146a.21(a).
- §146a.21(a)(3).
- §146a.21(b).
- §146a.21(e).
- §146a.22(a) – *Also missing additional related language*.
- §146a.22(b).
- §146a.22(c) – *Also missing additional related language*.

- §146a.22(d).
- §146a.22(d)(2).
- §146a.22(e) – *Also missing additional related language.*
- §146a.22(f) – *Also missing additional related language.*
- §146a.23(a).
- §146a.31(a)(1).

Making these changes will make it clear that the Pennsylvania proposal is consistent with the provisions of GLBA and applies only to nonpublic personal financial information disclosures to nonaffiliated third parties. The structure for disclosure of nonpublic personal financial information contemplated by the Pennsylvania proposed regulation creates confusion and departs significantly from GLBA. A summary of the apparent differences between the Pennsylvania proposed regulation and GLBA (and the NAIC Model Privacy Regulation unanimously adopted in September 2000) are highlighted in the chart below.

SHARING NONPUBLIC PERSONAL FINANCIAL INFORMATION

Parties	Type of sharing	Pennsylvania	GLBA/NAIC [No opt-in involved]
Affiliate sharing	Not joint marketing	Opt out	No opt out
	Joint marketing context	Opt out	No opt out
Non-affiliate sharing	Joint marketing context	Opt out	No opt out
	Outside exceptions	Opt-out	Opt out

If Pennsylvania were to include affiliate disclosures of nonpublic personal financial information within the scope of the proposed rule, Pennsylvania's insurance privacy rules would differ from every other insurance regulatory jurisdiction. Adopting different privacy rules for Pennsylvania will isolate Pennsylvania consumers from insurance consumers in other jurisdictions. As a result, Pennsylvania consumers may not be able to take advantage of enhancements in product development (which rely in part on available demographic information) or "one-stop" shopping benefits that GLBA was designed to promote. Equally compelling, Pennsylvania may be the only jurisdiction that functionally departs from GLBA standards. As a result, Pennsylvania may thwart the goal of operational uniformity and consistency of privacy regulation.

Second notice

AIA recommends deleting §146a.14(i) and §146a.21(b)(3) that require a second opt out notice.

This requirement is inconsistent with and contrary to the intent of GLBA and to the goals of financial services modernization. While AIA has no issue with an "opt-out" requirement where personal information is shared outside applicable exceptions, in this context, multiple opt-out obligations unnecessarily prolong delays in marketing products or service and distort GLBA requirements. Licensees that intend to share nonpublic personal information for marketing purposes would be paralyzed by a "double opt out" notice – unable to know exactly when the licensee can market products or services to Pennsylvania consumers.

Corrected definition of "consumer"

The Department recently issued a bulletin, noting that the definition of "consumer" was incorrect in the proposed regulation published for comment. The bulletin attached the corrected version as Annex A. As "corrected," subsection (iv) of the definition does not track with the parallel construction of NAIC Model § 4F(2)(d), on which it is based. That section only makes an individual a "consumer" under the Model where two distinct requirements are met: (1) the individual falls within one of the categories identified in Subsection 4F(2)(d)(i)(I)-(IV) (i.e., the individual is a beneficiary of a life insurance policy issued by the licensee or is a claimant under an insurance policy issued by the licensee, etc.) **and** (2) "the licensee discloses nonpublic personal financial information about the individual to a nonaffiliated third party other than as permitted" under the exceptions in the NAIC Model. NAIC Model §§ 4F(2)(d)(i) & (ii).

As presently drafted, the parallel provision of the proposed regulation would appear only to require an individual to meet one of the five separate requirements for that individual to qualify as a licensee's consumer (e.g., the individual would have to be a life insurance beneficiary, claimant, insured or annuitant, or mortgagor, or the licensee would need to share nonpublic personal financial information outside the exceptions to qualify as a licensee's consumer).

Automatically treating any of the above categories of individuals as a "consumer" (without adding the requirement of financial information disclosures outside the exceptions) runs counter to the provisions of the NAIC Model Regulation. Likewise, providing blanket protection to any individual whose nonpublic personal information is shared outside of the exceptions, without regard to their connection as a defined "consumer" to a licensee, obviates the intended scope of the proposed rules – to provide applicable privacy protections to those individuals "who seek[] to obtain[], or [have] obtained an insurance product or service from a licensee that is to be used primarily for personal, family, or household purposes, and about whom the licensee has nonpublic personal information." Proposed 31 Pa. Code Ch. 146a, § 146a.2 (Definition of "consumer"). In effect, Pennsylvania's proposed consumer example language would read the consumer definition out of the regulation. Such an expansion of the privacy rules would place Pennsylvania squarely out of step with other insurance regulatory jurisdictions.

To fix this anomaly, AIA recommends the following revision to subsection (iv) of the consumer definition:

"(iv) An individual is a licensee's consumer if the individual is:

(A) ***(1)*** A beneficiary of a life insurance policy underwritten by the licensee~~,~~
~~(B)~~ ***(2)*** A claimant under an insurance policy issued by the licensee~~,~~
~~(C)~~ ***(3)*** An insured or an annuitant under an insurance policy or an annuity~~,~~ respectively, issued by the licensee~~,~~; ***or***
~~(D)~~ ***(4)*** A mortgagor of a mortgage covered under a mortgage insurance policy~~,~~ ***and***

~~(E)~~***(B)*** Licensee discloses nonpublic personal financial information about the individual to a ***nonaffiliated*** third party other than as permitted under §§ 146a.31-146a.33."

PENNSYLVANIA CHAPTER 146A REVIEW – HIGH PRIORITY RECOMMENDATIONS

Scope

The proposed regulation scope provision in §146a.1(b) currently reads: "This chapter applies to nonpublic personal financial information about individuals who obtain or **are claimants or beneficiaries** of products or services primarily for personal, family or household purposes from licensees. Unless otherwise specified, this chapter generally does not apply to information about companies or about individuals who obtain products or services for business, commercial or agricultural purposes." (Emphasis added)

AIA recommends revising §146a.1(b) relating to scope to delete the reference to "claimants or beneficiaries."

While Title V of GLBA was intended to afford privacy protections to a financial institution's customers, the application of GLBA to individuals without a customer relationship is open to question. Claimants and beneficiaries fall into this latter category. Even the NAIC Model Regulation treats claimants only as "consumers" and only where a licensee discloses the claimant's nonpublic personal financial information outside all permitted exceptions. By specifically including claimants and beneficiaries as protected parties under the Scope section of the proposed regulation, the proposed regulation gives the misleading impression that those categories of

individuals enjoy a special status.

Violations and Penalties

AIA recommends revising §146a.43 as follows: "Violations of this chapter ~~are~~ **may be** deemed and defined by the Commissioner to be an unfair method of competition and an unfair or deceptive act or practice and ~~shall be~~ **may be** subject to ~~all penalties~~ **a cease and desist order or to fines** contained in sections 9—11 of the Unfair Insurance Practices Act (40 P.S. §§1171.9—1171.11)"

Suspending or revoking a license for noncompliance with this proposed rule is a drastic measure and should not be included. It appears to go beyond what was contemplated in the NAIC Model Regulation. In addition, the penalties section should not be mandatory, but the authority to issue fines should be discretionary. This would allow minor mistakes to be addressed in an appropriate manner, not through the issuance of mandatory penalties.

PENNSYLVANIA CHAPTER 146A REVIEW – PRIORITY RECOMMENDATIONS

Status of Claimants and Definition of "Customer"

AIA recommends adding a sentence to the definition of "customer" under §146a.2, which confirms that a consumer's mere status as a beneficiary or claimant does not make that consumer a licensee's "customer" under the proposed rule. The new sentence added to the definition would read: "In no event, however, shall a beneficiary or a claimant under a policy of insurance, solely by virtue of their status as a beneficiary or claimant, be deemed to be a customer for purposes of this regulation."

The additional sentence is consistent with the NAIC Model Regulation (see §§ 4F(2)(d) & 4J(2)(b)(iv), (v)) and the FAQs recently released by the NAIC. Furthermore, it is identical to the confirming sentence added to the final version of the NCOIL Privacy Model.

Policyholder Service

AIA recommends adding a new section, 146a.32(a)(5), containing the following text: "Informing a policyholder or the policyholder's producer or broker with respect to a claim asserted by, or paid to, a consumer under the policy and servicing or processing such claim."

In §17B of the NAIC Model, the exceptions center on "insurance functions", including policyholder service functions. Some of the exceptions in sections 14, 15, and 16 also seek to allow disclosure in these circumstances, but are phrased differently. The NAIC Model Regulation

intended for exceptions to be functionally consistent with each other, not based on whether a licensee is sharing nonpublic personal financial or health information. At their core, the exceptions were meant to preserve business operational disclosures. The recommendation here simply clarifies the regulatory intent to preserve the ability to service policyholder accounts.

Workers' compensation

AIA recommends that certain references to workers' compensation "plan participant" under the definition of "consumer" either be deleted or changed to workers' compensation "policyholder" and that certain references to a "beneficiary in a workers' compensation plan" under the definition of "consumer" be deleted or changed to a "claimant under a workers' compensation policy."

The relevant terminology is found in §146a.2(ii)(A) and §146a.2 (ii)(A)(III). The terms "workers' compensation plan participant" and "beneficiary" appear under the definition of "consumer," referring to a "safe harbor" afforded licensees from having workers' compensation "beneficiaries" considered to be "consumers" when the licensee provides workers' compensation "plan participants" notice and does not share nonpublic personal financial information with nonaffiliated third parties outside listed exceptions. There has been a tremendous amount of confusion surrounding the use of these two terms in this context, as they are not terms of art used in the workers' compensation industry. The NAIC FAQ document (company issue 10) lends guidance. It indicates that the "plan participant" is an employer; the employer in the workers' compensation arena is the policyholder. AIA's recommendations would bring clarity in this area.

Examples

AIA recommends revising §146a.1(d) relating to examples to more closely follow the NAIC Model's Rule of Construction. The text of the new section would be as follows: "The examples in this regulation and the sample clauses in Appendix A of this regulation are not exclusive. Compliance with an example or use of a sample clause, to the extent applicable, constitutes compliance with this regulation."

The proposed regulation stops short of affording safe harbor protection to those seeking to comply with the requirement by following the examples. Section 3 of the NAIC Model Regulation offers rules of construction that lend security to a company electing to use a sample clause with the intent of complying with the regulation.

Isolated transaction

AIA recommends deleting the word "airline" in §146a.2 under the examples showing what does not constitute a "customer relationship" (see (ii)(B)), so the provision would read as follows: "The licensee sells the consumer travel insurance in an isolated transaction."

The term "airline" appears in §4J(2) where it is specified that a "consumer does not have a continuing relationship with a licensee if "[(b)] the "licensee sells the consumer airline travel insurance in an isolated transaction." As it exists, this provision does not contemplate other forms of travel insurance that are equally isolated transactions. Moreover, by making this change, the isolated transaction example will parallel the provision found in § 146a.16(b)(1)(iv) (§10B(1)(d) of the NAIC Model), which simply refers to "travel insurance."

PENNSYLVANIA CHAPTER 146A REVIEW – SUGGESTIONS

Notice format

AIA prefers that the specific "16-point type" requirement not be included in the proposed regulation under the definition of "licensee" (see (iii)(D)(II)). In addition, with regard to the quoted privacy notice text, AIA suggests that the text not be provided in all capitalized letters (also in (iii)(D)(II)).

In this regard, please note that identical language in the NAIC Model Regulation is not printed in all caps. If this notice language remains in caps, it may be inconsistent with other jurisdictions following the NAIC Model Regulation precisely, and surplus lines companies or brokers may be required to provide a separate Pennsylvania notice (despite the fact that the actual text is identical).

Ministerial changes

AIA recommends making the following ministerial changes, as indicated below:

(A) The proposed regulation does not provide direction as to whether the items in lists are cumulative. This can be remedied easily be replacing the some periods with semi-colons and by adding the proper connecting term.

The connector "and" should be added to the following provisions:

- §146a.2 "clear and conspicuous" (i)(E).
- §146a.2 "clear and conspicuous" (ii)(D).
- §146a.2 "licensee" (iii)(A).
- §146a.2 "licensee" (iii)(D)(I).

- §146a.2 "nonpublic personal information" (i)(A).
- §146a.2 "personally identifiable financial information" (ii)(A)(VI).
- §146a.2 "personally identifiable financial information" (ii)(B)(I).
- §146a.2 "publicly available information" (ii).
- §146a.2 "reasonable basis" (i)(A).
- §146a.11(a)(1).
- §146a.13(c)(4)(i).
- §146a.13(c)(6)(i).
- §146a.13(d)(2)(ii).
- §146a.13(e)(1).
- §146a.14(a)(1)(ii).
- §146a.14(a)(2)(i)(A).
- §146a.14(d)(5)(iii)(B).
- §146a.15(a)(3).
- §146a.21(a)(3).
- §146a.31(a)(1)(i).

The connector "or" should be added to the following provisions:

- §146a.2 "clear and conspicuous" (iii)(A).
- §146a.2 "consumer" (i)(D)(III).
- §146a.2 "consumer" (ii)(A)(II).
- §146a.2 "customer relationship" (i)(A).
- §146a.2 "customer relationship" (ii)(G).
- §146a.2 "financial institution" (ii).
- §146a.2 "personally identifiable financial information" (i)(B).
- §146a.11(b)(1).
- §146a.11(c)(2)(i).
- §146a.11(d)(1).
- §146a.11(e)(1)(i).
- §146a.13(a)(8).
- §146a.13(c)(iii).
- §146a.13(c)(2)(i)(B).
- §146a.13(c)(4)(ii)(A).
- §146a.13(d)(4)(i).
- §146a.14(a)(2)(ii)(C).
- §146a.14(a)(2)(iii)(A).
- §146a.14(d)(2)(i).
- §146a.16(b)(1)(iii).
- §146a.16(b)(2)(i).
- §146a.16(c)(1).
- §146a.16(e)(2)(iii).
- §146a.23(b)(2).
- §146a.32(a)(3).
- §146a.32(b)(1).
- §146a.32(b)(2)(v).
- §146a.32(b)(2)(vi)(B).
- §146a.33(5) [once renumbered].
- §146a.33(a)(12).
- §146a.33(a)(13).

(B) The referenced section numbers and numbering should be reviewed in the following provisions:

- §146a.2 "consumer" (ii)(B) and (C) which refer to "subparagraph (v)".
- §146a.2 "licensee" (iii)(C) which refers to "subparagraph (ii)".
- §146a.31(a)(2) which refers to "paragraph (1)(i)".
- §146a.33(a)(2-6).
- §146a.33(a)(9) to accommodate "or" as it appears in the NAIC model.

CONCLUSION

On behalf of our member companies, AIA respectfully asks that the above comments be taken into consideration when assessing the proposed regulation. We reserve the right to supplement our comments as the process moves forward. Thank you for your attention. If you have any questions or comments, please contact Taylor Cosby, Vice President, at 410-267-9581 or Stef Zielezienski, Assistant General Counsel, at 202-828-7175.

Respectfully submitted,

/s/ /s/

Taylor Cosby J. Stephen Zielezienski

Original: 2179

PAMIC
Pennsylvania Association of
Mutual Insurance Companies

FAX

To: Pete Salvatore

Company: PA Ins Dept

Fax #: 772-1969

From: Steve Elliott

Date: 4-30-01

# of pages: 6 (including cover sheet)

Notes: Original to follow in mail

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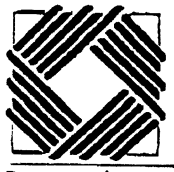

PAMIC
Pennsylvania Association of
Mutual Insurance Companies

Steven C. Elliott
President

April 30, 2001

Peter J. Salvatore
Regulatory Coordinator
Commonwealth of Pennsylvania
Department of Insurance
1326 Strawberry Square
Harrisburg, PA 17120

Re: Consumer Privacy Regulation, 31 Pa. Code Chapter 146a

Dear Mr. Salvatore:

I am President of the Pennsylvania Association of Mutual Insurance Companies (PAMIC). PAMIC's membership includes over seventy Pennsylvania domiciled mutual property/casualty insurance companies, as well as several nondomestic mutuals writing property/casualty business in Pennsylvania. Thank you in advance for your consideration of the concerns and suggestions of PAMIC and its membership about the proposed privacy regulation.

Gramm-Leach- Bliley The regulation is the Pennsylvania version of the NAIC Model Privacy Regulation, which was the subject of a prior comment letter addressed to Deputy Commissioner Timothy Knapp on November 13, 2000. The regulation is needed for the Pennsylvania Commissioner to fulfill her role as "functional regulator" of insurance companies and insurance products under the provisions of the Federal Financial Services Modernization Act of 1999, "Gramm-Leach-Bliley." The purpose of Gramm-Leach-Bliley is to permit cross marketing of financial products previously required to be separately sold by banks, insurance companies, and securities firms. The consolidation of these hitherto separate classes of financial institutions and their new ability to market products to the public across old institutional barriers has led to concerns about the privacy of nonpublic personal financial information. The Act requires the functional regulators to promulgate regulations implementing the privacy protections of Gramm-Leach-Bliley, and this is what the Pennsylvania regulation and the NAIC model upon which it is based attempt to do.

Act 40 While the federal requirement is clear, the state statutory authority that permits the Department to proceed with this regulation is stated to be Act 40, governing use of loan information in marketing insurance products. Use of this

Act as legislative authority remains problematic since that act purports to only regulate sales of insurance products by financial, i.e. lending, institutions. Where the licensee is not a lending institution, the strictures of Act 40 should not apply. There appears to be at least an implicit recognition of this in the proposed regulation itself. Section 146a.21 (c) (3) requires a second opt out notice only "if required by section 648 of the act." The same section again makes reference to section 648, stating that section of Act 40 permits disclosure "if applicable." Act 40 is clearly not applicable to licensees who are not financial institutions.

"Unaffiliated" Third Parties On this analysis, it is not necessary to depart from the rest of the United States as radically as the Department proposal does on unaffiliated third parties. The NAIC model permits sharing of personal financial information to affiliated third parties. The Department has deleted this word in, e.g. and especially, Section 146a.11, governing the initial privacy notice to consumers. Subsection (b) (1) states that such initial notice is not required where licensee does not disclose any nonpublic personal financial information "about the consumer to any ('nonaffiliated' omitted) third party, other than as authorized by Sections 146a.32 and 146a.33, and the licensee does not have a customer relationship with the consumer." Many insurance companies are part of group of affiliated companies as to which it is not certain which company will be issuing the policy until after the underwriting of the submission. This can occur in auto companies, for example, where applications for insurance exhibiting different risk profiles can be assigned to different companies within an affiliated group. Now this can happen only if the transaction can be reasonably defined as within one of the two exceptions sections enumerated. It seems that such transactions should be authorized without delivery of privacy notice under Section 146a.32, as "necessary to effect, administer, or enforce a transaction" (emphasis supplied) authorized by the consumer, but PAMIC maintains this is such a common, longstanding and regulatorily permitted practice as to justify explicit recognition, as the section does with reinsurance transactions. If this cannot be done the "unaffiliated" language should be restored and the definition of "control" in Section 146a.2 should be modified to restore the NAIC model language "control in any manner over the election of a majority of the directors...of the company." This definitional language is helpful in the case certain mutual companies with common directorships.

Workers Compensation The provisions requiring compliance for workers compensation coverages should be removed. By definition, workers compensation cannot be an insurance product purchased by an "individual" primarily for personal, family and household purposes. Section 146a.2 defines "consumer" in such a way that a workers compensation "beneficiary" can be a consumer. A beneficiary need not receive a privacy notice if the licensee does not share nonpublic personal financial information outside of the exceptions contained in Sections 146a.31—146a.33 and the "workers compensation plan participant" has been given initial, annual and revised privacy notices.

"Plan participant" is an undefined term in the regulation. Most observers rightly believe it is synonymous with "workers compensation policyholder." It is clear from the rest of the definition that it cannot mean "covered employee of a workers compensation policyholder." There are several reasons for this. First, the proviso of the definition says that initial notice under Section 146a.11 shall be given the "workers compensation plan participant." But 146a.11 requires initial notice to be given only to "customers," that is purchasers of insurance, when they become customers. "Consumers" must be notified only when it is proposed to share personal financial information outside the permitted exceptions. A workers compensation beneficiary is not the purchaser of the policy. When a beneficiary is a consumer is what the definition is all about. Second, the definition provides that the "individuals" described shall in no event be deemed to be customers because of the status described in this section. "Individuals" is undefined but must refer to natural persons. The other members of the series in which reference to a "plan participant" occurs, "plan sponsor", "group policyholder", etc., almost certainly are never natural persons. By logical parity, neither would a "plan participant" be an individual. Third, "plan participant" cannot be other than the policyholder because, at the inception of the policy, the insurance company would not know the identity of any of the beneficiaries of the policy. Initial underwriting would deal only with factors such a headcount, payroll, SIC classification, and other nonpersonal information. Therefore the insurance company would not possess information sufficient to enable it to give any notice to anyone other than the policyholder.

The question remains, then, what consumer interest is served by requiring initial and annual notices on a commercial policy where the notice, if retained at all, will be filed in the policyholder risk manager's office?
It is a costly and futile exercise with no discernable benefit to a beneficiary. A beneficiary should be treated as any other consumer. Better still, adhere to the intention of Gramm-Leach-Bliley and remove workers compensation entirely.

Third-Party Claimants The Pennsylvania regulation, like its NAIC prototype, makes a "claimant under an insurance policy" a consumer in Section 146a.2, defining "Consumer." This language is broad enough to cover third-party claimants under liability policies. PAMIC thinks this is an unwarranted extension of the mandate of Gramm-Leach-Bliley. As we noted in our November 13 comments to Deputy Commissioner Knapp: "The protections of the regulation should be afforded to those who are in a contractual relationship with an insurer or are otherwise aligned in interest with a customer of an insurer. A third party claimant's interest is hostile to the insurer's customer and initiated by the claimant. This seems a needless extension of privacy protections beyond the federal act's intent, and should be removed."

Effective Date The effective date for the Pennsylvania regulation is stated to be July 1, 2001. The effective date section, at Section 146a.44(b), also provides that initial notice required by the regulation shall be given by that date to all existing customers of the licensee and a system be in place on that date for initial notice to all new customers. While PAMIC understands that the

Department desires to adhere to the July 1, 2001, effective date to preserve state prerogatives that may be lost otherwise and to maintain interstate uniformity, there is a significant cost incurred in sending separate initial notices. While noting in the regulation forbids sending initial notices now, ahead of the July 1 deadline, with policyholder renewals, the lateness of promulgation of the regulation prevents this from being readily useable in all cases. PAMIC suggests that meaningful implementation cost savings to insurers can be achieved, customer privacy interests protected, and interstate uniformity and congressional compliance maintained by a slight modification of the section. It should be provided that, for existing customers on July 1 as well as new customers on and after that date, companies may (not shall) send required initial privacy notices, etc., at the next renewal date or next customer contact after July 1, provided that the company disclose no nonpublic personal financial information in the interim other than that permitted in Sections 146.a 32 and 33. An absolute cutoff of July 1, 2002, should be provided, by which date all initial notices will have been provided. This method has been recently recommended by the Michigan Insurance Department to the Michigan legislature as part of the enacting legislation for this measure . Since at least one other jurisdiction is apparently going to adopt this approach, concerns about interstate uniformity should not be too significant, especially where the other Pennsylvania specific nonuniform changes are far more radical.

Annual Notices This concern can be best addressed by quoting my November 13, 2000, comment letter to Deputy Commissioner Knapp. "Gramm-Leach-Bliley was crafted with large, integrated financial services institutions in mind. But since the regulations rightfully cover all licensees, burdens are inevitably placed on smaller companies that are disproportionately larger in their operational impact. Sometimes the disclosure mandated does not further the main statutory and regulatory purpose. An example of this kind of needless burden is the annual notice requirement in chase when no disclosure of information is to be made to affiliates and no other disclosure to third parties except as permitted in ..[Sections 146a.32 and 33]. If a company does not make such disclosure, there is no opt-out question. It seems that this would be an appropriate instance where initial notice (and any revise notice, when and if needed) would be appropriate. This would significantly lessen he burdens on many PAMIC members that are quite small, while still furthering the regulatory purpose. We are aware that annual notices for all customers are apparently required by the congressional legislation. We would not be surprised if that is an oversight, reflecting the drafter's lack of knowledge of just how small an enterprise they were regulating in many cases. The Pennsylvania Department knows better, and should make an appropriate exception. If the Department does not feel it has authority to do this, the special circumstances of smaller insurers should be brought to the attention of Congress via the Treasury report due in 2002. The legislation calls for NAIC input in this study, and the Department could protect the interests of Pennsylvania's smaller, rural carriers by recommending such a change."

Once again, thank you for facilitating meaningful industry input in this regulatory process. We recognize the hard work the Department has put into

very complex regulation, and hope that the suggestions made in these comments will make licensee compliance no more difficult than the development of the draft regulation itself.

Very truly yours,

Steven C. Elliott
President

Independent Insurance Agents of Pennsylvania
Independent Finance Company, LLC
Original: 2179

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COVER SHEET

Date: 4/30/01

Deliver to: Peter Salvatore

Pages *(inclusive of cover)*: 4

From: Yvonne

Comments: Privacy Reg. - I'll bring in hard copy tomorrow

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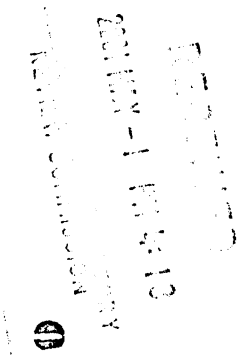
April 30, 2001



TO: Peter J. Salvatore
Regulatory Coordinator
PA Insurance Department

Honorable Timothy Knapp, Esquire
Deputy Commissioner
PA Insurance Department

FROM: Tim Wonder, Executive Vice President
IIAP

Scott Jackson, CAE, CEO
PAIFA

RE: **Privacy of Consumer Financial Information [31 Pa.B. 1748]**

These comments are being submitted to you pursuant to the Insurance Department's proposed Regulation on Consumer Privacy and represent the thinking of the Independent Insurance Agents of PA (IIAP) and PA Association of Insurance and Financial Advisors (PAIFA).

General Comment

Generally, IIAP and PAIFA support the core of the proposed regulation as necessary to avoid imposition of a Federal Trade Commission regulation on to Pennsylvania. With the extension, PA must adopt its own privacy regulation by July 2001 in order to stave off the Federal intrusion into state-regulation of insurance. This mandate comes from the Financial Services Modernization Act (Gramm-Leach-Bliley Act, or GLBA).

Specific Concerns

Worker Compensation Component Creates Impediment for Adoption

The Department has expanded the purview of its regulation to cover Worker Compensation. Unfortunately, the inference could be made that the Worker Compensation component is also necessary because of GLBA. Nothing can be further from the truth. GLBA affects disclosure of financial information, but not other information. It is a stretch to aver that Worker Compensation data is financial information.

The Insurance Department and the NAIC have ADDED Worker Compensation as something they want, not something GLBA requires.

By putting the two together, the Department creates the risk of derailing something it needs (compliance with GLBA) by adding a volatile issue, which would best be handled in a separate proposal. When the Department raised the Worker Compensation issue, it was greeted with a firestorm of opposition from insurance groups. Irrespective of the merit of the issue, why create an impediment against adoption of the rest of the regulation by the GLBA deadline? IIAP and PAIFA recommend that the Department remove Worker Compensation from the regulation so as to allow the rest of it to have speedy approval. The Department could then choose to resubmit it as a separate regulation, which could be judged on its own merits.

Problems With Worker Compensation Inclusion

Evaluating a commercial client for Worker Compensation coverage mandates insurer access to important information: job classification (since WC rates are by classification), payroll, and experience. Experience is critical to the transaction because the agent/insurer must know how safe the worksite is. From this history, projections can be made estimating future losses. Types of previous WC claims are important too. Ultimately, Worker Compensation, like other kinds of insurance, is predicated upon risk. What this regulation would appear to do would be to require the affirmative approval of each employee for release of any WC claim history. This added burden impedes the ability for the agent or insurer to see the complete picture of a commercial client.

Another impact lies in the area of collecting WC benefits after a petition has been filed. How can investigators determine if the back injury was caused by a workplace injury versus a previous or long-standing back problem if they cannot see medical information? Someone wishing to commit insurance fraud would certainly not want to permit access. Unwittingly, this regulation would hurt the campaign to stop Worker Compensation insurance fraud. Hopefully, the Insurance Department has sought or will seek out the views of the PA Insurance Fraud Prevention Authority, the Attorney General's Insurance Fraud Unit, and other law enforcement officers as stakeholders at some stage of the regulatory preparation process.

A third difficulty with including Worker Compensation is jurisdiction. Currently, the Insurance Department's role of approving rate and form filing, overseeing company solvency, and producer marketing are clearly segmented from the PA Department of Labor & Industry (L&I), which actually runs the system. This regulation appears to significantly expand the Insurance Department role into the actual workings of the system. It certainly opens up a new litigious door in WC appeals based on alleged violation of worker privacy.

The rationale for the regulation says that L&I supports the regulation. Although impossible to dispute this argument, it does not match the conversations with high-ranking L&I officials who have not expressed support for this approach.

In order to justify including Worker Compensation, the Department has yet to offer definitive documentation where abuses have already occurred. Where is the volume of case law that should justify such a regulation? Absent a smoking gun, the argument that PA should do it because it is contained within the NAIC Model does not hold much water. The question should be whether or not there is a critical need that must be addressed by this regulation. So far, none has been shown.

Federal Action

Last session of Congress, Rep. Jim Leach (R-IA) proposed HR 4585 to achieve many of the same goals in the Insurance Department regulation. HR 4585 is problematic in that the scope of the bill was too extensive. Insurance interests from both the companies and agents' sides raised problems with Worker Compensation similar to those raised above. The solution came in the form of compromise language adopted by the House Banking Committee last summer. Subsection (a)(4)(E) exempted information used

For any purpose related to the administration or replacement of a group health plan as defined in section 733 of the Employee Retirement Security Act of 1974 or workers compensation policy.

The bill passed the House Banking Committee but did not become law. This is relevant to adoption of this proposed regulation because it recognized that Worker Compensation should not be included in an affirmative election system. The amendment was seen as essential.

Other Issues: Agent Liability

The regulation does not appear to include a limit on an agent's liability if an insurance company violates terms of GLBA or of this regulation. For example, an agent may be required to obtain a person" Social Security number by an insurer. The carrier uses that information to obtain MVRs, credit scores, etc. as part of underwriting. But one company employee takes the number and uses it fraudulently. From the consumer's point of view, both the agent and the company should be sued. The agents would be forced to incur significant legal expense just to separate themselves from the case. This regulation should include a statement of limited liability for agents in this situation.

Second, an agency should be able to satisfy this regulation by communicating its own privacy policy or by simply having a policy of supporting a particular insurer's privacy policy (where companies contact consumers directly). The agency should not be required to transmit duplicative notifications to customers.

Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware Inc.

Original: 2179 - Duplicate, original received 5/1/01.

April 26, 2001

Mr. Peter J. Salvatore
Regulatory Coordinator
Insurance Department
1326 Strawberry Square
Harrisburg, PA 17120

VIA e-mail, USPS, & Fax

Dear Mr. Salvatore:

On behalf of the more than 1,200 Pennsylvania member agencies (independent business owners) of the Professional Insurance Agents of Pennsylvania, Maryland and Delaware, we hereby submit these formal comments relating to the proposed regulations "Privacy of Consumer Financial Information" as published in *The Pennsylvania Bulletin* March 31, 2001, and corrections thereto published April 7, 2001.

In Section 146a.1(b) the regulations limit the applicability to personal lines, pursuant to the NAIC Model Act and the Gramm-Leach-Bliley Act. Questions arise when commercial policies have more than one purpose, such as personal umbrella coverages added by endorsement to commercial umbrella policies, private passenger type vehicles covered under commercial auto policies and farm policies that cover both the commercial and personal lines exposures of the insured. The regulations should be made clear for circumstances whenever situations of the kind arise.

DEFINITIONS

In the definitional section, Section 146a.2, the term licensee includes "...insurer...a producer and other persons...required to be licensed..." under the

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laws of the Commonwealth. Although agents and brokers are among those required to be licensed, the term "producer" is not defined in current Pennsylvania statute. PIA suggests the term "producer" be defined separately as "a person required to be licensed to sell, solicit or negotiate insurance."

In the definition of licensee there is a general exemption for notice requirements when the licensee is an agent of the licensee and the licensee fulfills the notice requirements.(Section 146a.2(iii)(A)). Although PIA strongly supports this provision, principals (as used in this section) should be required to inform agents of the notification procedures to the policyholders. Should insurers not be required to provide notice, agents are left in limbo as to whenever the notice requirements have been met leaving them exposed to potential enforcement actions.

Section 146a.2(iii)(D) uses the term "surplus lines broker". Because "surplus lines broker" is not defined anywhere in Pennsylvania law, we are unsure as to the precise meaning of the term.

Both the NAIC Model Regulations and the GLBA use the term "nonaffiliated third party" whereas the proposed rulemaking uses the term "third party" throughout. Although the term "nonaffiliated third party is defined using the NAIC language, the term "third party" is not defined. This leaves the impression that affiliated third parties clearly invoke the notice requirements. First, the term, "third party" raises serious questions as to the scope of the regulations and we are left to speculate as to its meaning as it is an undefined term. Second, the GLBA uses "nonaffiliated third party" as its operative language. We believe these regulations go far beyond the intent of the GLBA and the NAIC Model Regulations to include affiliated third parties within the scope of the regulations. By including affiliated third parties the regulations jeopardize uniformity among the states – a primary goal of the NAIC Model.

The Regulation's explanatory comments in the preface do not relay the concerns and questions we raised on this matter in our preliminary comments submitted during the Department's outreach comment phase. These comments, submitted November 13, 2000, were neither acknowledged nor addressed formally or informally by the Department.

GLBA AND PENNSYLVANIA ACT 40

In addition to the privacy requirements set forth in GLBA, the GLBA does not preempt more protective state privacy requirements. Accordingly, Act 40 of 1997

imposes additional customer privacy protections that must be met. Specifically, "financial institutions"[1], as defined in Act 40, are required to meet certain requirements. It is important to note that Act 40's requirements are in addition to any requirements imposed by GLBA, and that it also applies only to "customer information"[2] as defined in Act 40. Further, these proposed regulations do not and can not supplant these requirements.

The proposed regulations apply to "licensee" as defined. Under law, a financial institution, as defined under both Act 40 and the proposed regulations, may also be a licensee. However, under analysis, the purpose and scope of Act 40 does not seem to coincide with the Insurance Department's reasoning.

Act 40 was enacted by the legislature to protect specific customer information that is secured during or related to the financial institutions lending activities, specifically insurance information that is provided by agents, brokers or insurers as proof of insurance to secure the lender's interest. This information is an asset of the agent, broker or insurer and could be used unfairly by a financial institution in any insurance agency activities of functions. This is also why the requirements of Act 40 apply to all third parties.

In that vein, Act 40 applies to financial institutions only—and in their capacity as financial institutions and related to their lending activities. Act 40 does not deal with financial institutions in their capacity as a "licensee". Act 40 sets forth a specific scheme that must be followed, including statutorily prescribed notices and delivery methods. The proposed regulations are not consistent with Act 40 and are, in fact, a misapplication.

It is PIA's conclusion that the requirements of Act 40 and the privacy requirements under GLBA be separated in the proposed regulation to properly reflect the prescribed statutory schemes.

Section 146a.11(e)(ii) allows for a customer to receive notice at a later time provided that customer agrees to the delay. PIA believes clarification is needed in this section, specifically, what constitutes that customer's agreement as well as what is satisfactory evidence of meeting the consent delay requirements.

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[1] The term "financial institution,":as used in this article, means any federal or state-chartered bank, bank and trust company, savings bank, savings and loan association, trust company or credit union.

[2] The term "customer information," as used in this article means individually identifiable insurance –related information regarding a person that has been derived from a record of a financial institution related to its lending activities. Such information shall be limited to information concerning the terms or conditions of insurance coverage, insurance expirations, insurance claims, or insurance history of an individual.

We remain open to discussing our comments with the Department, IRRC and the legislative Committees.

Respectfully submitted,

Joseph T. Leighton, Esq.
VP Government & Industry Affairs

Cc: Sen. Edwin Holl
Sen. Jack Wagner
Rep. Nick Micozzie
Rep. Tony DeLuca
Robert Nyce, IRRC

Kimberly S. Gray
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April 30, 2001 Original: 2179

Peter J. Salvatore, Regulatory Coordinator
Pennsylvania Insurance Department
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Harrisburg, PA 17120

FAX: 717-772-1969
Email: psalvatore@state.pa.us

RE: Proposed Rulemaking, 31 Pa. Code Chapter 146a
Privacy of Consumer Financial Information
(31 Pa. B. 1748)

Dear Mr. Salvatore:

I am writing on behalf of Highmark Inc. (Highmark) to provide comments on the proposed rulemaking published pursuant to the Gramm-Leach-Bliley Act ("GLBA") regarding privacy of consumer financial information (Pub. L. 106-102).

In its role as a major health care insurer and Medicare claims processor, Highmark provides health, dental, Medigap, life, casualty and vision coverage to 23 million members nationwide. Highmark has a vested interest in protecting the confidential information with which it is entrusted, while working to reduce administrative expenses so as to maintain the availability and affordability of its products and services.

Highmark values the attention demonstrated by the Pennsylvania Insurance Department in its promulgation of the Proposed Regulation. Further, Highmark appreciates the Department's willingness to work with the health insurance industry to promulgate regulations that fulfill the intent of GLBA.

Highmark, therefore, submits the following comments for consideration by the Insurance Department.

- **Definition of "Nonpublic personal information" – § 146a.2**

Issue: The use of the definition "nonpublic personal information" is inconsistent with the drafting of the Proposed Regulation.

Recommendation: The definition "nonpublic personal information" should be changed to reference "nonpublic personal financial information".

Discussion: The definition of "nonpublic personal information" is a hold-over from the language used in the NAIC Model GLBA Regulation ("Model"). In the Model, the definition is used to define information that is considered both "nonpublic personal financial information" and "nonpublic health information." Since the Department has removed coverage of "nonpublic health information" from its version of the rule, the use of this definition is no longer needed.

It is Highmark's belief that the Department intended to instead define "nonpublic personal financial information" in this definition. This would be consistent with the current draft of the rule and the Model language. Areas of the rule that currently use "nonpublic personal information" should be changed to more appropriately reference "nonpublic personal financial information."

- **Definition of "Personally Identifiable Financial Information" – § 146a.2**

Issue: The definition of "personally identifiable financial information" contained in the rule is overly broad and potentially causes dual regulation issues for health insurers.

Recommendation: The definition of "personally identifiable financial information" should be changed to reflect the full Model definition, which excludes health information from coverage under the rule.

Discussion: In adapting the Model for use in Pennsylvania, the Department correctly recognized the problems inherent in the model's regulation of health information. In addition to exceeding the scope of the GLBA's requirements, the health information provisions would have caused tremendous confusion and compliance difficulties for those entities covered by the privacy rule published in the Federal Register on December 28, 2000 by the Department of Health and Human Services ("HHS") pursuant to the Health Insurance Portability and Accountability Act of 1996 ("Privacy Rule"). We agree with, and appreciate, the Department's decision to not include the health privacy sections of the Model in this final rule, and to limit the scope of the Proposed Regulation to financial information as required by the GLBA legislation.

With these considerations in mind, we further expected to find that health information would be included in the list of exclusions contained in the definition of "personally identifiable financial information." Without this clear exclusion, plans are left with an interpretative difficulty. Therefore, Highmark suggests that health information be specifically excluded from the definition of personally identifiable financial information.

- **Affiliated Third Parties – §146a.31 – 146a.33**

Issue: Treating affiliated companies in a way that differs from the Model adds no significant privacy protection for consumers, while creating administrative burdens for health insurers.

Recommendation: Conform to the Model, which regulates disclosures only to "nonaffiliated third parties."

Discussion: The Proposed Regulation treats disclosures of customer information between affiliated companies differently than the Model. While the Model would permit free disclosure among affiliates, Pennsylvania would treat affiliates as if they were true third parties: i.e., any disclosure for purposes other than the exceptions of Sections 146a.32 and 146a.33 requires notice and an opportunity to opt out. Moreover, instead of the one-step notice requirement of the Model, Pennsylvania would, in certain cases, impose a more elaborate two-step notice process.

The preamble to the Proposed Regulation states that this departure from the Model is required by Act 40 of 1997, 40 P.S. §§ 286-289.1 ("Act 40"). The Department apparently believes that, since Act 40 includes no exception for affiliates and a two-step notice requirement, regulations adopted under GLBA must also have these features. Highmark believes this reasoning is misplaced for several reasons:

- Act 40 is a pre-GLBA state regulation of traditional "financial institutions" (i.e., banks). The intent of the act was to regulate the entry of banks into the business of insurance. As such, Act 40 may be preempted by Section 104 of GLBA, 15 U.S.C. § 6701. Whether such preemption will actually occur cannot be determined without invoking the complex process required by Section 507 of GLBA, but Act 40's attachment of opt-out rights to information sharing among affiliates appears to conflict with Section 104(d)(2) of GLBA:

  . . .[N]o State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

- Even if Act 40 is not formally preempted as suggested above, Section 146a.31 of the Proposed Regulation appears to negate Act 40 by authorizing licensees to share information for joint marketing purposes, without opt-out, subject only to adopting contracts among themselves that prohibit further disclosure.

Highmark submits that retaining the "no affiliates" concept of Act 40 will not extend opt-out rights to the sharing of information between financial institutions for marketing purposes—Section 146a.31 specifically permits it, subject only to executing the prescribed

contracts. However, the "no affiliates" concept will impose significant administrative burden on health insurers such as Highmark. Unlike life, property, casualty, or other types of insurers, Highmark will be subject to the Privacy Rule, which prohibits the sharing of customer information for marketing purposes in most circumstances. While it doesn't disclose customer information for marketing purposes, Highmark finds it necessary to disclose such information to its affiliates for many other proper purposes. Under the Proposed Regulation, Highmark could be required to execute a complex series of Section 146a.31 "service provider" agreements among all of its affiliates, simply to avoid opt out procedures that will be inapplicable under HIPAA in any event.
The result of including affiliate relationships in the Proposed Regulation will be:

- Other financial institutions will still be able to share customer information for marketing purposes, because of the "joint marketing" exception of GLBA.

- Health insurers won't be able to use the "joint marketing" exception because of the more stringent requirements of HIPAA, but they will face the complex analytical task of determining which of their affiliate relationships must be documented by GLBA "service provider" contracts.

- No consumer would be assured of any more opt-out rights than the Model provides. Health insurers already face huge costs in analyzing all of their affiliate relationships for compliance with HIPAA. They shouldn't be saddled with the additional burden of analyzing all of their affiliate relationships for compliance with GLBA, if no material personal privacy protection will be gained.

- **Relationship to Federal Rules – §146a.45 (proposed)**

Issue: Given the application of this proposed rulemaking to licensees offering health insurance products, there may be some overlap with the Privacy Rule.

Recommendation: A provision should be added to the Proposed Regulation indicating that compliance with the Privacy Rule shall be deemed to be compliance with the Proposed Regulation for information covered by both.

Discussion: Given the possible overlap of information covered by both the Privacy Rule and the Proposed Regulation, it seems likely that issues of dual regulation could occur. To avoid confusion and potential compliance issues, Highmark recommends that the Department add a "deemer" provision as a new section in this rulemaking. This would clarify the duties of covered entities under both this Proposed Regulation and the Privacy Rule and would ultimately benefit consumers.

Suggested language for such a "deemer" is as follows:

§146a.45 – Relationship to Federal Rules

If a licensee is subject to the privacy rule promulgated on December 28, 2000 by the U.S. Department of Health and Human Services (HHS) pursuant to the Health Insurance Portability and Accountability Act of 1996 (the "Privacy Rule") (See 65 Fed. Reg. 250, 82461-82510), and if said licensee complies with all requirements of the Privacy Rule (excepting its effective date provision), the licensee shall not be subject to the provisions of 30 Pa. Code § 146a.1 - §146a.45 with respect to information covered by both the federal rule and 30 Pa. Code § 146a.1 - §146a.45.

- **Enforcement**

Issue: Highmark shares its fellow commentors' earlier concerns regarding the ability to comply with privacy regulations by July 1, 2001, especially if such regulations are still not finalized at that time.

Recommendation. Highmark suggests that the Department be appreciative of the difficulties inherent in complying with the Proposed Regulation by July 1, 2001, while operating in the absence of final regulations and while undergoing significant operational changes in order to so comply.

Discussion: Recognizing the Department's call for Pennsylvania's Proposed GLBA Regulation (the "Proposed Regulation") to take effect on July 1, 2001 in order to achieve a sense of parity between the insurance industry and other members of the financial services industry and to avoid a potential loss of its authority to override the Federal insurance consumer protection regulations, Highmark welcomes the Department's willingness and stated intention to remain flexible with regard to initial enforcement.

On behalf of Highmark and its majority-owned subsidiaries, I thank you for this opportunity to provide comments on the Proposed Regulation. If you have any questions regarding this communication, please direct questions to me by phone at (717) 730-1598 or by e-mail at kimberly.gray@highmark.com.

Sincerely,

Kimberly S. Gray, Esq.
Chief Privacy Officer

cc: Candy M. Gallaher

Original: 2179

FAX

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Date: _____

Number of pages including cover sheet: ____

To: Pete Selvaggio	From: Sean Morkal

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REMARKS

Just en fuel

The Insurance Federation of Pennsylvania, Inc.

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April 30, 2001

Peter J. Salvatore
Regulatory Coordinator
Pennsylvania Insurance Department
Strawberry Square
Harrisburg, PA 17120

Re: Privacy of Consumer Financial Information - Insurance Department's proposed regulation

Dear Mr. Salvatore:

On behalf of our member companies and our national trade association counterparts, this is to outline our concerns and recommendations regarding the Insurance Department's proposed privacy regulation.

At the outset, let me offer a few general comments. First, we appreciate the Department's efforts on this, not just in terms of bringing Pennsylvania into compliance with the Gramm-Leach-Bliley Act, but in terms of promoting uniformity among the states and assuring effective privacy protections for consumers.

Second, we appreciate the urgency in getting this done. The July 1 national deadline is rapidly approaching, and we share your goal of having Pennsylvania "up and running" by that time.

Third, we understand that the Department has struggled with the seemingly-conflicting provisions of the GLBA and Pennsylvania's Act 40. As will be detailed below, we believe that, for the most part, there is no conflict.

To the extent there is a conflict, however, we believe it is appropriate for the Department to reconcile its regulatory provisions - essentially its interpretation of the insurance laws it enforces - in a way that best effectuates the GLBA. Such reconciliation is not only the best reading of the relevant federal and state laws; it is best for a well-regulated Pennsylvania marketplace.

As to our concerns and recommendations:

Affiliated and non-affiliated third parties

Our major concern with the proposed regulation is that it does not incorporate the NAIC's distinction and limiting of much of its provisions to non-affiliated third parties dealing with insurers or producers ("licensees").

We understand that the Department has not included this distinction because it felt bound by Act 40. Act 40 imposes privacy requirements on financial institutions, and it does not include the distinction between affiliated and non-affiliated third parties that is a cornerstone of both the GLBA and the NAIC privacy model.

Nothing in Act 40, however, requires or even suggests that the Department is bound to extend the privacy requirements the act established for financial institutions to insurers and producers ("licensees" under the proposed regulation). The General Assembly was obviously aware of insurers and producers at the time it enacted Act 40, and it was obviously aware that insurers and producers have the type of nonpublic personal information covered in this regulation.

Nonetheless, the General Assembly chose to limit the privacy requirements of Act 40 only to financial institutions using or sharing with third parties their own customer information for selling or soliciting insurance. It could have extended this requirement to insurers and producers, but it elected not to do so - going so far as to limit Act 40's definition of "customer information" to that derived from the records of a financial institution related to its lending activities.

The Department should not, through this regulation, try to construct rules it believes the General Assembly would have constructed if it had established privacy rules for insurers and producers. There is no reason to believe that the General Assembly meant to establish any rules in this area, much less rules that would mirror those of Act 40 for financial institutions. In fact, it is just the opposite: The General Assembly presumably intended not to deal with insurers and producers at all, as it was aware of them when it enacted Act 40 and chose not to include them in its privacy provisions.

In truth, the Department's power comes not from Act 40, but from the Unfair Insurance Practices Act and the GLBA. The Department should stay within the confines of the GLBA as it implements privacy requirements based on it pursuant to the Unfair Insurance Practices Act.

Even if Act 40 was intended to apply to insurers and producers, it would be superceded by the GLBA and in conflict with the Fair Credit Reporting Act. Enclosed is a memorandum on this prepared by a law firm for the American Council of Life Insurance. It notes at the outset that Section 507 of the GLBA "does not authorize a state to enact a law which restricts the ability of a company (not just an insurer) to share information with its affiliates." Equally important is the analysis and conclusion at page six, namely that "Section 506 of the GLBA, and its legislative history, clearly indicate clear Congressional intent and direction that the language of the FCRA which permits sharing among affiliates without interference by state law remain unaffected by Section 507."

Accordingly, we recommend the Department revise the regulation to adopt the distinction between affiliated and non-affiliated third parties found in the NAIC model. We will set forth the particular sections that should therefore be revised in the section-by-section analysis that follows.

Financial institutions and the second opt out

Section 146a.21(c)(3) requires that a licensee - namely an insurer or producer - who is also a financial institution provide a second opt out notice pursuant to Act 40.

We recommend deletion of this subsection. As noted above and in the enclosed legal opinion, the GLBA supercedes state laws, at least where those laws are inconsistent with its requirements. Act 40 is clearly inconsistent with the GLBA to the extent that it applies different standards with respect to financial institutions that are also licensees.

We also recommend the Department no longer require the double opt out for financial institutions who are not licensees. While that issue is not touched in this regulation, it should be. That portion of Act 40 is superceded by the GLBA, and the Department should use this regulation as the forum in which to state the change in its regulatory posture.

Some may question the propriety of a regulator making a decision on supercision or preemption by regulation, as opposed to doing so only through legal challenge. The Department, however, has done this in the past when confronted with federal laws or cases that it believes override its own laws or regulations. Notably, a recent example was with the issue of banks selling insurance. Just before Act 40, the Department had decided not to enforce certain provisions of its laws in response to federal case law. The same can and should hold true here: The Department can take the positions we have recommended and allow, as it has in the past, those that disagree to institute their own legal actions against it.

The inclusion of workers compensation "plans" and "beneficiaries"

A number of insurers and trade associations have recommended the deletion of workers compensation within the scope of this regulation, noting that it is not a product or service for "personal, family or household purposes" as envisioned in the GLBA. We agree with the recommended deletion.

Beyond the value of fitting within, not beyond, the GLBA, this area raises a number of concerns. We need to clarify, with both the Department and the Department of Labor and Industry, that this regulation does not interfere with the proper processing and examination of workers compensation claims and settlements. We do not believe it does, at least if the

distinction between affiliated and non-affiliated parties is made, and provided the exceptions are not altered. Still, that needs to be examined in conjunction with the Department of Labor and Industry, too.

Further, if workers compensation is to be included, it should refer to "policyholders" and "claimants," not "plans" and "beneficiaries," consistent with usage of those terms under the Workers Compensation Act.

Those are our general concerns. The following is a section-by-section review.

Chapter A - General Provisions

Section 146a.1 - Purpose

Subsection (a)(2) should refer to "non-affiliated" third parties.

Section 146a.2 - Definitions

"Consumer:" The categories in subsections (iv) and (v) need the insertion of "or" and "and" as found in the corresponding section of the NAIC model. Further, subsection (vii) should be revised to refer to the subcategories of subsection (v), again consistent with the NAIC model.

"Customer:" We recommend adding the sentence from the NCOIL model, "In no event, however, shall a beneficiary or claimant under a policy of insurance, solely by virtue of their status as a beneficiary or claimant, be deemed to be a customer for purposes of this regulation." This is also consistent with the NAIC model and FAQ responses.

"Customer relationship:" We recommend the exception in (ii)(B) apply to all travel insurance, not just airline travel.

"Financial institution:" Subsection (iii) should refer to "non-affiliated" third parties.

"Licensee:" Subsection (iii)(D) should refer to "non-affiliated" third parties. Further, the privacy notice should not require that only capital letters be used.

"Personally identifiable financial information:" We recommend the NAIC model definition be used. The Department's reference to the definition in Section 601 is flawed, as that applies only to information of financial institutions.

Chapter B - Privacy and opt out notices for financial information

Section 146a.11 - Initial privacy notice to consumers

Subsections (a)(2) and (b)(1) should refer to "non-affiliated" third parties.

Section 146a.13 - Information in privacy notices

Subsections (a)(5) (first time), (a)(6) (both times) and (c)(4) should refer to "non-affiliated" third parties.

Section 146a.14 - Form of opt out notice and opt out methods

Subsections (a)(1)(i), (a)(2)(ii) and (a)(2)(i)(A) should refer to "non-affiliated" third parties. Subsection (i) should be deleted or otherwise redrafted to clarify that licensees that are financial institutions (or any other licensees) need not provide an "opt in" option.

Section 146a.15 - Revised privacy notices

Subsections (a), (a)(3), (b)(1)(i-iii) and (b)(2) should refer to "non-affiliated" third parties.

Chapter C - Limits on disclosure of financial information

Section 146a.21 - Limits on disclosure to third parties

Subsections (a), (a)(3), (b) and (e) should refer to "non-affiliated" third parties.

As noted in our general comments, we also recommend the deletion of subsection (c)(3). That deletion should not, however, along with any other supercision or preemption determinations the Department makes, should not result in financial institutions who are not licensees (i.e., not producers) having less restrictive privacy requisites than apply to insurers and producers.

We believe Act 40 is best construed and implemented as being superceded by the GLBA to the extent it is inconsistent - but that its purpose of regulating non-licensee financial institutions should still be enforced. Our recommendation is that, in light of the GLBA, this enforcement be equal to, not less or more than, the enforcement standards applicable to licensee financial institutions.

Section 146a.22 - Limits on redisclosure and reuse

Subsections (a), (b), (c) and (d) should refer to "non-affiliated" financial institutions. Subsections (d)(2) and (f) should refer to "non-affiliated" third parties.

We also recommend that subsections (a), (c), (e) and (f) be revised to include all three of the exceptions listed in the corresponding subsections in section 12 of the NAIC model (the proposed regulation includes only the third exception). This revision is consistent with our recommendation to make the distinction between affiliated and non-affiliated financial institutions and third parties.

Section 146a.23 - Limits on sharing account number information for marketing purposes

Subsection (a) should refer to "non-affiliated" third parties.

Chapter D - Exceptions to limits on disclosures

Section 146a.31 - Exception to opt out requirements for service providers and joint marketing

Subsections (a)(1) (both times) and (b) should refer to "non-affiliated" third parties.

Section 146a.32 - Exceptions to notice and opt out requirements for processing and service transactions

The concern here is with instances where an insurer or agent may disclose to a customer information about a third party claimant. The exceptions in subsection (b) seem to cover this, but this may merit further examination.

Section 146a.33 - Other exceptions to notice and opt out requirements

Subsection (a)(9) needs the clean-up addition of "or."

Section 146a.43 - Violation

We recommend deletion of this section as unnecessary. The regulation is being promulgated pursuant to the Unfair Insurance Practices Act, so violations of it could only be prosecuted under that act.

This is not just a matter of semantics. The Department wants to "deem and define" any violation of this regulation as a violation of the Unfair Insurance Practices Act. The bulk of the UIPA, however, penalizes patterns of conduct, not single acts, as done here. While the Commissioner is given some discretion to expand the specific conduct listed in the UIPA, it is generally limited to conduct uncovered in an investigation, and its penalties come only after hearings.

Here, however, the Department wants a preemptive strike: It wants to define single violations, which may well be technical in nature and with little real consumer impact, as "deemed"

violations of the UIPA. At the least, the Department should limit these deemed violations to instances involving patterns of conduct. Much of this regulation focuses on conduct similar to the types of conduct set forth in Section 5 of the UIPA - the "pattern of conduct" section - as it goes into proper marketing practices. Violations of the rules established here should, accordingly, match those of similar provisions specifically listed in the UIPA - where patterns of conduct are required.

Additional concerns

Assigned Risk Plan producers: We recommend that these producers, although not normally agents of the insurer who takes on the customer, are considered as such for purposes of this regulation. Otherwise, these producers would not be affiliates with the insurers.

Claims administration: The GLBA and therefore this regulation are directed at marketing, not claims administration. We recommend clarification in the preamble that this regulation is not intended to interfere with or alter claims administration beyond anything done under the GLBA.

Effective date: The July 1 effective date is ambitious and obviously depends on timing through the IRRC process. We ask only that whatever the effective date, it be reasonable in light of when this regulation is approved by the IRRC (and in what form).

Thank you for the chance to comment on this. We welcome the chance to work with you in getting these issues resolved and this regulation enacted.

Sincerely,

Samuel R. Marshall

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MEMORANDUM

December 8, 1999

To: Roberta Meyer
American Council of Life Insurers

From: Gilbert T. Schwartz

Re: The Effect of the Gramm-Leach-Bliley Act on the Affiliate Sharing Provisions of the Fair Credit Reporting Act

CONCLUSION

You have asked whether section 507 of the Gramm-Leach-Bliley Act ("G-L-B Act"),[1] which permits states to adopt provisions that provide protections which are greater than the protections contained in the G-L-B Act, affects section 624(b)(2) of the Fair Credit Reporting Act ("FCRA"),[2] which prohibits states from enacting laws affecting the exchange of information among affiliated persons. After reviewing the language of the G-L-B Act and its legislative history, as well as the language and purposes of the FCRA, it is our conclusion that the G-L-B Act does not affect section 624(b)(2) of the FCRA. Accordingly, it is our view that a court would hold that section 507 of the G-L-B Act does not authorize a state to enact a law which restricts the ability of a company to share information with its affiliates.

DISCUSSION

The FCRA

The FCRA generally relates to the exchange and use of consumer information for certain purposes, including decisions relating to the granting of credit or

[1] Pub. L. 106-102.
[2] 15 U.S.C. §§ 1681 et seq.

insurance.[3] In 1996 Congress enacted amendments to the FCRA to facilitate the sharing of information among affiliated persons.[4] At that time, Congress amended the definition of the term "consumer report" in section 603(d) of the FCRA to exclude from that term (1) any communication of information among persons related by common ownership or affiliated by corporate control "if the information relates to transactions or experiences between the consumer and the person making the report," and (2) any communication between affiliated persons which relates to other types of information if it is clearly and conspicuously disclosed to the consumer that such information may be communicated among affiliates, and before the information is initially communicated, the consumer is given an opportunity to direct that such information not be shared.[5]

The legislative history of the 1996 amendment to the definition of "consumer report" states that the provision "facilitates the sharing of information among entities related by common ownership or affiliated by corporate control by excluding certain information from the definition of 'consumer report.' "[6] In furtherance of this objective, Congress prohibited states from enacting laws that would affect the ability of companies to share information with affiliates by adding section 624(b)(2) to the FCRA, which provides as follows:

> *General exceptions.* No requirement or prohibition may be imposed under the laws of any state–
>
> * * *
>
> (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control
>
> * * *[7]

The legislative history of the FCRA amendment indicates that it "pre-empts any state or local law with respect to the exchange of information among affiliated persons . . ."[8] Congress's intent with regard to the provision was "to provide for national uniformity in many of the disclosures and procedures required by the

---

[3] 15 U.S.C. § 1681.

[4] Economic Growth and Regulatory Paperwork Reduction Act of 1996. Pub. L. 104-208, §§ 2401 et seq.

[5] Pub. L. 104-208, § 2402(e)(4).

[6] S. Rep. 104-185, 104th Cong., 1st Sess. 33.

[7] 15 U.S.C. § 1681t. Although not relevant here, section 624(b)(2) of the FCRA provides that the exception does not apply to title 9, section 2480e(a) and (c)(1) of Vermont Statutes Annotated, in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996.

[8] S. Rep. 104-185, 104th Cong., 1st Sess. 55. It should be noted that pre-emption language of § 624(b) of the FCRA will not apply to a state law that is (1) enacted after January 1, 2004; (2) states explicitly that the provision is intended to supplement the FCRA; and (3) gives greater protection to consumers than is provided under the FCRA. 15 U.S.C. § 624(d).

FCRA."[9] It is widely acknowledged that as a result of the 1996 amendments to the FCRA, companies may share all types of information with affiliates without regard to state law.[10]

The G-L-B Act

Subtitle A of title V of the G-L-B Act establishes several requirements on financial institutions with regard to disclosures and sharing of nonpublic personal information ("Subtitle A").[11] Generally, a financial institution may not share nonpublic personal information concerning a consumer with a nonaffiliated third party unless the financial institution provides a notice to the consumer that complies with section 503 of the G-L-B Act. Section 503 of the G-L-B Act requires a financial institution to disclose to its customers at the time the relationship is established, and at least annually, the institution's policies and practices with respect to (1) disclosing nonpublic personal information to affiliates and nonaffiliates, (2) disclosing information relating to persons who are no longer customers, and (3) protecting nonpublic personal information. In addition, a financial institution may not disclose nonpublic personal information of a consumer to a nonaffiliated third party unless it has disclosed to the consumer that the information may be disclosed to a third party and it provides the consumer with the opportunity to direct that such information not be disclosed, as well as an explanation as to how the consumer can exercise that option.[12]

The G-L-B Act addresses the issue of what law should apply in the event the provisions of Subtitle A conflict with the provisions of state law. Section 507 of the G-L-B Act provides as follows:

> (a) IN GENERAL.–This subtitle and the amendments made by this subtitle shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.
>
> (b) GREATER PROTECTION UNDER STATE LAW.–For purposes of this section, a State statute, regulation, order

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[9] *Id.*

[10] See Comptroller of the Currency Advisory Letter No. 99-3 (March 29, 1999) and Statement of the Federal Trade Commission before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Banking and Financial Services, United States House of Representatives, "Financial Privacy, the Fair Credit Reporting Act, and H.R. 10," July 21, 1999.

[11] Sections 501 to 510 of the G-L-B Act.

[12] G-L-B Act § 502

> or interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subtitle and the amendments made by this subtitle, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 505(a) of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

Section 507 of the G-L-B Act was added in conference. The Conference Report simply reiterates the language of section 507 and states the following:

> The Conferees inserted language stating that the privacy provisions in the subtitle do not supersede any State statutes, regulations, orders, or interpretation, except to the extent that such State provisions are inconsistent with the provision of the subtitle, and then only to the extent of the inconsistency. The amendment provides that a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this subtitle, as determined by the FTC in consultation with the agency or authority with jurisdiction under 505(a) over either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.[13]

Effect of the G-L-B Act on the FCRA Affiliate Sharing Provisions

There are several reasons why section 507 of the G-L-B Act does not authorize a state to adopt laws that supersede section 624(b)(2) of the FCRA, which relates to the sharing of information among affiliated companies.

[13] H. Rep. 106-434, 106th Cong., 1st Sess. 172.

A. The Language of Section 507 Itself Does Not Affect the FCRA

The language of section 507 of the G-L-B Act does not in any way suggest that a state may override the affiliate sharing provisions of the FCRA. Section 507 provides that the provisions of Subtitle A do not supersede or affect any state law except to the extent that the state law is inconsistent with the provisions of Subtitle A, and only to the extent of the inconsistency.[1] Section 507 further states that for purposes of that section, a state law is not inconsistent with Subtitle A if the protection provided under state law is greater than the protection provided, and the amendments made, by Subtitle A.[2]

The purpose of section 507 of the G-L-B Act is to establish when the protections afforded by Subtitle A will pre-empt state law. That is, state law will be pre-empted by Subtitle A when the state provision is "inconsistent" with those of Subtitle A. Section 507(b) indicates that state law is not "inconsistent" with the provisions of Subtitle A if it provides protection which is greater than the protections provided under Subtitle A. Nothing in section 507 indicates that state law may address anything other than the "protections provided under this Subtitle [A]."

The FCRA provisions relating to sharing of information among affiliates are not dealt with under the G-L-B Act. They are addressed exclusively by the FCRA. Indeed, Subtitle A does not even deal with when and under what circumstances information may be shared with affiliates.[3] The only requirements with respect to sharing of information with affiliates mentioned in Subtitle A are found in section 503(a) of the G-L-B Act, which requires financial institutions periodically to disclose to customers their policies and practices with respect to sharing nonpublic personal information with affiliates, and in section 503(b)(4) of the G-L-B Act, which requires financial institutions to include in their periodic disclosure statements to customers any disclosure required under the affiliate-sharing provisions of section 603(d)(2(A)(iii) the FCRA..[4] Accordingly, nothing in the G-L-B Act provides any "protections" with regard to the sharing of information with affiliates because the act

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[1] G-L-B Act § 507(a).

[2] G-L-B Act § 507(b).

[3] During the Senate debate on the conference report, Senator Bryan (D-NV), a critic of the legislation, confirmed that nothing in the legislation dealt with the sharing of information among affiliated companies:

> Now, there is absolutely no provision - none, zippo, nada, zero, nothing – that prevents the sharing of information from affiliate to affiliate. No privacy at all. That is freely exchanged; it is freely exchanged.

145 *Cong. Rec.* S 13892 (November 4, 1999 daily ed.)

[4] Section 603(d)(2)(A)(iii) of the FCRA provides that a company must provide a consumer with the opportunity to "opt-out" if the company intends to share with affiliates information about the customer other than experience and transaction information.

does not address affiliate sharing of information.[5] Consequently, the language of section 507 itself cannot be read to authorize the states to override the FCRA provisions on affiliate sharing.

B. The Language of Section 506 Precludes State Action Affecting the FCRA

Section 506 of the G-L-B Act, entitled "Protection of Fair Credit Reporting Act," amends the FCRA to permit the Federal banking agencies and the Federal Trade Commission ("FTC") to adopt rules under the FCRA. Previously, those agencies were precluded from promulgating any rules under the FCRA. In addition to conferring rulemaking authority on the agencies, section 506(c) of the G-L-B Act provides the following:

> (c) RELATION TO OTHER PROVISIONS.– Except for the amendments made by sections (a) [rulemaking authority for the Federal banking agencies] and (b) [rulemaking authority for the FTC], nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act, and no inference shall be drawn on the basis of the provisions of this title regarding whether information is transaction or experience information under section 603 of such Act.

This provision was the subject of the following colloquy between Senator Mack (R-FL) and Senate Banking Committee Chairman Gramm (R-TX), the Senate's major sponsor and floor manager for the legislation:

> Mr. MACK. I want to confirm that section 507 is intended to apply only to the amendments made by subtitle A of title V of the bill, and that section 507 is not to be construed, under any circumstances, to apply to any provision of law other than the provisions of subtitle A. For instance, subtitle A of title V relates only to disclosure of nonpublic personal information to nonaffiliated third parties. This means that section 507 of the bill does not supersede, alter, or affect laws on the disclosure of information among affiliated entities. In particular, section 507 does not supersede, alter, or affect the provisions of the Fair Credit Reporting Act (or FCRA) regarding the communication of information among persons related by common ownership or affiliated by corporate control, not does section 507 supersede, alter, or affect the

[5] In this regard, section 508 of the G-L-B Act requires the Secretary of Treasury, in conjunction with the Federal functional regulators and the FTC and in consultation with state insurance authorities, to conduct a study of information sharing practices among financial institutions and their affiliates, and report its findings, conclusions, and recommendations to Congress by January 1, 2002.

> existing FCRA preemption of state laws with respect to the exchange of information among affiliated entities. . . .
> Mr. GRAMM. Mr. President, the understanding of the Senator from Florida is correct. Section 507 in intended to apply only to subtitle A of title V of the bill, and is not to be construed to apply to any other provision of law other than the provisions of the subtitle. Thus, section 507 does not affect the existing FCRA provisions on that statute's relationship to state laws.[6]

Accordingly, section 506 of the G-L-B Act, and its legislative history, clearly indicate clear Congressional intent and direction that the language of the FCRA which permits sharing of information among affiliates without interference by state law remain unaffected by section 507.

C. Rules of Statutory Construction Support the Position that the Affiliate Sharing Provisions of the FCRA Are Unaffected by Section 507

There is nothing in title V of the G-L-B Act which expressly amends or repeals section 624(b)(2) of the FCRA. Accordingly, any amendment or repeal of the pre-emption provision of section 624(b)(2) by section 507 of the G-L-B Act could only occur by implication. However, amendments and repeal by implication are not favored.[7] Applicable principles of statutory construction suggest that statutes are to be interpreted so that they are not in conflict.[8] In the absence of an affirmative showing of an intention to amend or repeal, the only permissible justification for amendment or repeal by implication is when the two laws are irreconcilable, or if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.[9] This suggests that a court would hold that the G-L-B Act did not change the FCRA unless the terms of the G-L-B Act are so inconsistent with the provisions of the FCRA that they cannot stand together.[10]

There is nothing in section 507 of the G-L-B Act which establishes an irreconcilable conflict with section 624(b)(2) of the FCRA, nor is there anything which suggests that Subtitle A was intended to replace section 624(b)(2) of the FCRA. Section 507 is intended to permit states to adopt protections that are greater than the protections established by Subtitle A. Subtitle A does not deal with the

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[6] 145 *Cong. Rec.* S 13901 (November 4, 1999 daily ed.)

[7] Sutherland Stat. Const. §§ 22.13, 23.10 (5th Ed.); U.S. v. Welden, 377 U.S. 95 (1964); Morton v. Mancari, 414 U.S. 1142 (1974); NRDC v. Hodel, 865 F2d 288 (DC Cir. 1988)

[8] U.S. v. Barrett, 837 F.2d 933 (10th Cir. 1988); Commonwealth of Pennsylvania v. Department of Health and Human Services, 723 F.2d 1114 (3d Cir. 1983)

[9] Polos v. U.S., 621 F2d 385 (Ct. Cl. 1980).

[10] Sutherland § 22.13; Eveco Leasing Corp v. Ace Trucking Co., 828 F2d 188 (3d Cir. 1987).

authority of a financial institution to share information with its affiliates. It relates to what requirements apply with respect to the sharing of information with nonaffiliated third parties, and disclosure of the financial institution's policies and practices regarding the handling and sharing of nonpublic personal information of customers. As indicated by the language of the statute and its legislative history, there is nothing in Subtitle A that establishes an irreconcilable conflict between section 507 of the G-L-B Act and section 624(b)(2) of the FCRA. Accordingly, it is likely that a court would conclude that the FCRA continues to pre-empt state laws that attempt to limit the exchange of information among affiliates.

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Original: 2179

To:	Peter J. Salvatore	**From:**	Louise A. Rynd, Esq
Fax:	717-772-1969	**Date:**	April 30, 2001
Phone:		**Pages:**	06
Re:		**CC:**	Arthur McNulty, Esq., Christopher Doane, Esq., Brad Marker, Esq.

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•Comments:

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April 30, 2001

Peter J Salvatore, Regulatory Coordinator
Pennsylvania Insurance Department
1326 Strawberry Square
Harrisburg PA 17120
(via fax to 717-772-1969)

RE: PA Privacy of Consumer Financial Information – 31 Pa. Code Ch. 146a

Dear Mr Salvatore:

The Pennsylvania Bankers Association deeply appreciates the opportunity to comment on the Department's proposed privacy regulation [1]

PBA's comments follow the outline the Department used in its preamble accompanying its proposed regulations

Health information privacy

PBA supports the Department's decision to defer its development of health information privacy regulations until a later date when it will issue a proposal that supplements, rather than duplicates, the Federal Health and Human Services health information privacy regulations that were issued in final form on December 28, 2000

It appears that several necessary references to health information were inadvertently deleted during the drafting of the Department's proposed insurance privacy rules The health information references within the National Association of Insurance Commissioners (NAIC) regulations' [2] definitions of "Nonpublic Personal Information" and "Personally Identifiable Financial Information" should be restored to the Department's proposal's definitions of these terms Otherwise it may be implied that health information IS included within these terms That does not appear to be the Department's intent

[1] http://www.pabulletin.com/secure/data/vol31/31-13/550.html (1st section), http://www.pabulletin.com/secure/data/vol31/31-13/550a.html (2nd section))
A subsequent correction to the definition of "consumer" was also published: http://www.pabulletin.com/secure/data/vol31/31-14/550.html

[2] http://www.naic.org

Definition of "Consumer"

Under the NAIC model regulations, an individual is a consumer of the licensee if the individual is a beneficiary of a policy, claimant under a policy, insured or annuitant under a policy, or mortgagor under a mortgage covered by a policy AND the licensee discloses nonpublic personal financial information to unaffiliated third parties.

The Department's proposed regulation's definition of "consumer" at Section 146a.2 lists all five of these factors in the alternative, meaning if any one of these five factors is true, the individual is a consumer. Under the Department's proposed definition, many more individuals will be considered to be consumers. The PBA suggests that the Department instead utilize the definition of "consumer" provided in the NAIC's insurance privacy model regulation. During our meeting on April 12, 2001, representatives of the Department indicated that this difference was inadvertent, and would be corrected in the final regulation.

Compliance Date

The PBA appreciates the Department's stated intent to make its proposed rulemaking effective (we hope as amended to reflect the comments we have made) subject to its plan to remain flexible with regard to its initial enforcement - at least for the first 6 months. This is particularly important for those entities that must also comply with the Federal Gramm-Leach-Bliley Financial Modernization Act[1] and its implementing regulations that take effective July 1, 2001.

Uniformity/ Parallel of PA regulation to Gramm-Leach-Bliley re financial information sharing

The financial institutions in Pennsylvania are pleased that NAIC made an effort to parallel the federal financial institution regulatory agencies' privacy regulations issued under the Gramm-Leach-Bliley Act. Uniformity of regulation in customer financial information disclosure is absolutely essential. Gramm-Leach-Bliley's framework of financial information sharing regulation is now the national standard and should be followed as closely as possible to avoid the "50-state crazy quilt" of varying customer information sharing standards that could otherwise result.

The Gramm-Leach-Bliley Act prohibits disclosure of personal information by a financial institution to any nonaffiliated third party, unless the financial institution has provided a disclosure of its privacy policy to the consumer and also gives the consumer the chance to "opt out" or to direct that such information not be disclosed to such third parties. Only disclosures to non-affiliates are covered by the prohibition; Subtitle A of Title V does not prohibit disclosure by a financial institution to its affiliates.

The GLBA restriction against disclosure also does not prevent a financial institution from providing nonpublic personal information to a nonaffiliated third party in order for that party to perform services for or to function on behalf of the financial institution, including marketing of the financial institution's own products or services, or financial products or services offered pursuant to joint agreements between two or more financial institutions (subject to regulatory restrictions to be developed), so long as the financial institution fully discloses to the consumer that the information is being provided and the third party agrees to maintain the confidentiality of such information.

The Department's *Background* to its proposed regulation indicates that PA's Act 40 of 1997 requires substantive variations by the Department from the NAIC Privacy of Consumer Financial and Health Information Regulation adopted by NAIC on September 26, 2000. PBA sees this issue differently. Instead, PBA views subsection 146a.21 (c)(3) of the proposed regulation as directly contradicting Act 40 in several

[1] Public Law 106-102 may be accessed at http://thomas.loc.gov/cgi-bin/query/C?c106:./temp/~c106IbDWmI[

respects and adopting provisions which the Pennsylvania Legislature considered and discarded when addressing information sharing in the context of banks' selling insurance as agent.

For example, the "customer information" protected by the Legislature in Section 601 of Act 40 of 1997 which the Department apparently would reflect in its proposed regulation at Section 146a.21 (c)(3) was that "individually identifiable insurance-related information regarding a person that has been derived from a record of a financial institution related to its lending activities," which information was then further "limited to information concerning the terms and conditions of insurance coverage, insurance expirations, insurance claims or insurance history of an individual."

A preliminary draft of Senate Bill 23 circulated in March 1997 (copy attached) and commented upon by the Pennsylvania Bankers Association defined "nonpublic customer information" broadly to include all information related to all banking services , and in a manner almost identical to the way the US Congress defined it in Gramm-Leach-Bliley. Instead of protecting a wide range of information, the Pennsylvania Legislature focused on specific insurance information which might be used by a lender in soliciting insurance sales from a borrower and banned its use, for that sole purpose, without a double-opt out notice to the customer.

The Department cannot hope to reconcile two different legislative initiatives - Act 40 of 1997 and Gramm-Leach-Bliley of 1999 - adopted years apart by different bodies addressing different concerns and utilizing different means For the Department to select from Act 40 only the double opt-out standard without also limiting the circumstances to when it is to be applied, and the information it is to restrict, is to go farther than the Pennsylvania Legislature ever intended to go

Therefore, PBA urges the Department to exercise its regulatory authority by following the NAIC's lead in applying the Gramm-Leach-Bliley opt-out process as the uniform general standard for customer financial information sharing. Of course if a financial institution wishes to share information clearly covered by Act 40's "double opt out or opt in" requirement, it will have to comply with Act 40, at least until the Legislature takes appropriate action to conform this provision to Gramm-Leach-Bliley or the federal regulators decide that it is pre-empted by Gramm-Leach-Bliley. However, we think the most the Department needs to do in its regulation is to include a brief footnote or parenthetical to the effect that, until this issue is sorted out, compliance with either Act 40 or Gramm-Leach-Bliley will not lead to enforcement action by the Department.

Specifically, we propose that subsection 146a.21(c)(3), captioned "Second opt out notice required", be deleted. If the Department feels it necessary to include a reference to section 648 of Act 40, the following language in a footnote should suffice. "Section 648 of the act (40 P S § 288) requires a financial institution to either obtain the written consent of the customer or send a total of two opt out notices to the customer before sharing insurance coverage information obtained as part of the loan process. This provision may be pre-empted by section 104 of the federal Gramm-Leach-Bliley Act. Until this is determined, compliance with either section 648 of the act or this regulation will not lead to enforcement action by the Department."

Section 146a.22 (limits on redisclosure and reuse of nonpublic personal financial information) also varies from the NAIC proposal. The basic concept of the NAIC model regulations on this point seems to be that if a licensee obtains information from a non-affiliated financial institution, it may share that information with the licensee's affiliates and the affiliates of the financial institution, but the affiliates can only use or share the information to the extent the licensee or the financial institution could do so.

The PA Ins Dept 's proposed regulations at Section 146a 22 seem to say that the licensee can only share the information with affiliates to the extent the affiliate is permitted to use or share the information.

PBA recommends that the final PA regulations mirror the NAIC model on the issue of sharing information with affiliates.

***

In summary, PBA believes that customer information sharing on a fully-disclosed basis is beneficial to insurance consumers who can thus be offered a wider array of insurance products, from a variety of providers, at competitive rates. PBA stands ready to provide any additional information which the Department believes would be helpful

Sincerely,

Louise A. Rynd

Louise A Rynd
General Counsel

Attachment

cc Arthur McNulty, Esq., Christopher Doune, Esq., Brad Harker, Esq

[redacted] 1841 et seq.),
savings bank, savings and loan association, savings and loan
holding company, trust company or credit union that:

(1) accepts deposits and makes loans from an office located in this Commonwealth; or

(2) accepts deposits and makes loans from an out-of-state location and provides insurance services that would require the institution to obtain a license under the laws of this Commonwealth. The term does not include an insurer as defined in this article.

The term "insurance," as used in this article, means annuities, credit life, health and accident insurance, credit unemployment insurance, title insurance, property and casualty insurance and life insurance.

The term "insurers," as used in this article, means insurance companies, associations, exchanges, health maintenance organizations, preferred provider organizations and professional health plan corporations.

The term "nonpublic customer information," as used in this article, means individually identifiable information regarding a natural person that has been derived from a record of a financial institution related to a banking service, including information concerning the terms and conditions of insurance coverage, insurance expirations, insurance claims or insurance history of an individual. The term does not include customer names, addresses or telephone numbers.

* * *

The term "person," as used in this article, means any individual, corporation, association, partnership, reciprocal

Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware Inc.

COPY

April 26, 2001

Original: 2179

Mr. Peter J. Salvatore
Regulatory Coordinator
Insurance Department
1326 Strawberry Square
Harrisburg, PA 17120

VIA e-mail, USPS, & Fax

Dear Mr. Salvatore:

On behalf of the more than 1,200 Pennsylvania member agencies (independent business owners) of the Professional Insurance Agents of Pennsylvania, Maryland and Delaware, we hereby submit these formal comments relating to the proposed regulations "Privacy of Consumer Financial Information" as published in *The Pennsylvania Bulletin* March 31, 2001, and corrections thereto published April 7, 2001.

In Section 146a.1(b) the regulations limit the applicability to personal lines, pursuant to the NAIC Model Act and the Gramm-Leach-Bliley Act. Questions arise when commercial policies have more than one purpose, such as personal umbrella coverages added by endorsement to commercial umbrella policies, private passenger type vehicles covered under commercial auto policies and farm policies that cover both the commercial and personal lines exposures of the insured. The regulations should be made clear for circumstances whenever situations of the kind arise.

DEFINITIONS

In the definitional section, Section 146a.2, the term licensee includes "...insurer...a producer and other persons...required to be licensed..." under the

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laws of the Commonwealth. Although agents and brokers are among those required to be licensed, the term "producer" is not defined in current Pennsylvania statute. PIA suggests the term "producer" be defined separately as "a person required to be licensed to sell, solicit or negotiate insurance."

In the definition of licensee there is a general exemption for notice requirements when the licensee is an agent of the licensee and the licensee fulfills the notice requirements.(Section 146a.2(iii)(A)). Although PIA strongly supports this provision, principals (as used in this section) should be required to inform agents of the notification procedures to the policyholders. Should insurers not be required to provide notice, agents are left in limbo as to whenever the notice requirements have been met leaving them exposed to potential enforcement actions.

Section 146a.2(iii)(D) uses the term "surplus lines broker". Because "surplus lines broker" is not defined anywhere in Pennsylvania law, we are unsure as to the precise meaning of the term.

Both the NAIC Model Regulations and the GLBA use the term "nonaffiliated third party" whereas the proposed rulemaking uses the term "third party" throughout. Although the term "nonaffiliated third party is defined using the NAIC language, the term "third party" is not defined. This leaves the impression that affiliated third parties clearly invoke the notice requirements. First, the term, "third party" raises serious questions as to the scope of the regulations and we are left to speculate as to its meaning as it is an undefined term. Second, the GLBA uses "nonaffiliated third party" as its operative language. We believe these regulations go far beyond the intent of the GLBA and the NAIC Model Regulations to include affiliated third parties within the scope of the regulations. By including affiliated third parties the regulations jeopardize uniformity among the states – a primary goal of the NAIC Model.

The Regulation's explanatory comments in the preface do not relay the concerns and questions we raised on this matter in our preliminary comments submitted during the Department's outreach comment phase. These comments, submitted November 13, 2000, were neither acknowledged nor addressed formally or informally by the Department.

GLBA AND PENNSYLVANIA ACT 40

In addition to the privacy requirements set forth in GLBA, the GLBA does not preempt more protective state privacy requirements. Accordingly, Act 40 of 1997

imposes additional customer privacy protections that must be met. Specifically, "financial institutions"[1], as defined in Act 40, are required to meet certain requirements. It is important to note that Act 40's requirements are in addition to any requirements imposed by GLBA, and that it also applies only to "customer information"[2] as defined in Act 40. Further, these proposed regulations do not and can not supplant these requirements.

The proposed regulations apply to "licensee" as defined. Under law, a financial institution, as defined under both Act 40 and the proposed regulations, may also be a licensee. However, under analysis, the purpose and scope of Act 40 does not seem to coincide with the Insurance Department's reasoning.

Act 40 was enacted by the legislature to protect specific customer information that is secured during or related to the financial institutions lending activities, specifically insurance information that is provided by agents, brokers or insurers as proof of insurance to secure the lender's interest. This information is an asset of the agent, broker or insurer and could be used unfairly by a financial institution in any insurance agency activities of functions. This is also why the requirements of Act 40 apply to all third parties.

In that vein, Act 40 applies to financial institutions only—and in their capacity as financial institutions and related to their lending activities. Act 40 does not deal with financial institutions in their capacity as a "licensee". Act 40 sets forth a specific scheme that must be followed, including statutorily prescribed notices and delivery methods. The proposed regulations are not consistent with Act 40 and are, in fact, a misapplication.

It is PIA's conclusion that the requirements of Act 40 and the privacy requirements under GLBA be separated in the proposed regulation to properly reflect the prescribed statutory schemes.

Section 146a.11(e)(ii) allows for a customer to receive notice at a later time provided that customer agrees to the delay. PIA believes clarification is needed in this section, specifically, what constitutes that customer's agreement as well as what is satisfactory evidence of meeting the consent delay requirements.

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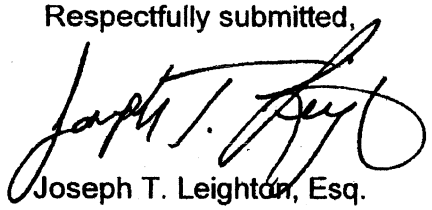
[1] The term "financial institution,":as used in this article, means any federal or state-chartered bank, bank and trust company, savings bank, savings and loan association, trust company or credit union.

[2] The term "customer information," as used in this article means individually identifiable insurance –related information regarding a person that has been derived from a record of a financial institution related to its lending activities. Such information shall be limited to information concerning the terms or conditions of insurance coverage, insurance expirations, insurance claims, or insurance history of an individual.

We remain open to discussing our comments with the Department, IRRC and the legislative Committees.

Respectfully submitted,



Joseph T. Leighton, Esq.
VP Government & Industry Affairs

Cc: Sen. Edwin Holl
Sen. Jack Wagner
Rep. Nick Micozzie
Rep. Tony DeLuca
Robert Nyce, IRRC