

		This space for use by IRRC RECEIVED 2001 JUL 18 PM 3:01 REVIEW CONTROL UNIT 5 IRRC Number: 2205
(1) Agency Insurance Department		
(2) I.D. Number (Governor's Office Use) 11-207		
(3) Short Title Mandatory Offer to Write Nonsurcharged Private Passenger Nonfleet Risks		
(4) PA Code Cite 31 Pa. Code, Chapter 67b, §§67b.1-67b.7	(5) Agency Contacts & Telephone Numbers Primary Contact: Peter J. Salvatore, Regulatory Coordinator, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429	
(6) Type of Rulemaking (check one) <input type="checkbox"/> Proposed Rulemaking <input type="checkbox"/> Final Order Adopting Regulation <input checked="" type="checkbox"/> Final Order, Proposed Rulemaking Omitted	(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and nontechnical language. Chapter 67b is being promulgated to establish the terms and conditions under which the Pennsylvania Assigned Risk Plan must give notice to insureds in the Plan that they are eligible for a mandatory offer of coverage in the voluntary market from their assigned carrier. Formerly, this notice was offered pursuant to Assigned Risk Plan Rule 12 of the current Assigned Risk Plan Manual, Rule 14A in previous Assigned Risk Plan Manuals, otherwise known as the "take-out" rule. The take out rule has been in effect for over 20 years. On May 22, 2001, the Commonwealth Court held that the take-out rule was invalid without authorizing regulations by the Pennsylvania Insurance Department. The purpose of this final/omitted rulemaking is to promulgate the take-out rule as a regulation in compliance with the Order of the Commonwealth Court.		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. The final/omitted regulation is adopted under the authority of the act of February 12, 1984, P.L. 26, No. 11, §3 (75 Pa.C.S.A. §1741); and sections 206, 506, 1501 and 1502 of the Administrative Code of 1929 (71 P.S. §§66, 186, 411 and 412), and <u>Professional Insurance Agents Association, et al. v. Koken</u> , docket number 714 M.D. 1999.		

Regulation Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes. On May 22, 2001 the Commonwealth Court held in Professional Insurance Agents Association, et al. v. Koken, docket number 714 M.D. 1999, that the take-out rule was invalid without authorizing regulations by the Pennsylvania Insurance Department.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The Insurance Department seeks to adopt Chapter 67b, §§67b.1-67b.7 to be consistent with the authorizing court order. Moreover, it is in the public interest to adopt this requirement so that there is order in this section of automobile insurance.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

There are no public health, safety, environment or general welfare risks associated with this rulemaking.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The public will benefit from the regulation to the extent that it will be consistent with the court order.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There will be no adverse effects on any party as a result of the adoption of this regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

The regulation applies to all insurers licensed to do the business of automobile insurance in the Commonwealth.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

Comments regarding the adoption of this regulation were not solicited from the various trade associations representing the insurance industry.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures, which may be required.

The adoption of the regulation will not have any impact on costs associated with insurance companies, as they were doing this for the past 20 years.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures, which may be required.

There are no costs or savings to local governments associated with this rulemaking.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures, which may be required.

There are no costs or savings associated to state government associated with this rulemaking.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. N/A

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

N/A.

Regulatory Analysis Form

(20b) Provide the past three-year expenditure history for programs affected by the regulation.

N/A.

Program	FY -3	FY -2	FY -1	Current FY

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

No costs or adverse effects are anticipated as a result of this regulation.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Adopting Chapter 67b, §§67b.1-67b.7 is the most efficient method to achieve consistency with the authorizing court order. No other alternatives were considered.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No other regulatory schemes were considered. The adoption of the regulation is the most efficient method of updating the regulatory requirements imposed by the court.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The rulemaking will not put Pennsylvania at a competitive disadvantage with other states. It merely provides for consistency with the statute.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No public hearings or informational meetings are anticipated.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports, which will be required as a result of implementation, if available.

The adoption of the regulation imposes no additional paperwork requirements on the Department, insurers, assigned risk agents, or the public.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The rulemaking will have no effect on special needs of affected parties.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The rulemaking will take effect upon approval of the final form regulation by the legislative standing committees, the Office of the Attorney General, and the Independent Regulatory Review Commission and upon final publication in the *Pennsylvania Bulletin*.

(31) Provide the schedule for continual review of the regulation.

The Department reviews each of its regulations for continued effectiveness on a triennial basis.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
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(Pursuant to Commonwealth Documents Law)

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Copy below is hereby approved as to
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By _____
(Deputy Attorney General)

Date of Approval

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Copy not approved. Objections
attached.

Copy below is hereby certified to be a true and correct
copy of a document issued, prescribed or promulgated
by:

Insurance Department

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 11-207

DATE OF ADOPTION:

BY: M. Diane Koken
M. Diane Koken

TITLE: Insurance Commissioner
(EXECUTIVE OFFICER, CHAIRMAN OR
SECRETARY)

Copy below is hereby approved as to form and
legality. Executive or Independent Agencies

BY: John V. Curran

7/10/01
DATE OF APPROVAL

(DEPUTY GENERAL COUNSEL)
(CHIEF COUNSEL, INDEPENDENT AGENCY)
(STRIKE INAPPLICABLE TITLE)

→ Check if applicable. No Attorney General
approval or objection within 30 days after
submission.

NOTICE OF FINAL-OMITTED RULEMAKING

INSURANCE DEPARTMENT

31 Pa. Code, Chapter 67b
§§ 67b.1-67b.7

Assigned Risk Plan - Mandatory Offer to Write Nonsurcharged Private
Passenger Nonfleet Risks

PREAMBLE

The Insurance Department (Department) hereby adds Chapter 67b §§67b.1 to 67b.7, Assigned Risk Plan - Mandatory Offer to Write Nonsurcharged Private Passenger Nonfleet Risks, as set forth in Annex A.

Statutory Authority

The final/omitted regulation is adopted under the authority of the act of February 12, 1984, P.L. 26, No. 11, §3 (75 Pa.C.S.A. §1741); and sections 206, 506, 1501 and 1502 of the Administrative Code of 1929 (71 P.S. §§66, 186, 411 and 412).

Purpose

Chapter 67b is being promulgated to establish the terms and conditions under which the Pennsylvania Assigned Risk Plan must give notice to insureds in the Plan that they are eligible for a mandatory offer of coverage in the voluntary market from their assigned carrier. Formerly, this notice was offered pursuant to Assigned Risk Plan Rule 12 of the current Assigned Risk Plan Manual, Rule 14A in previous Assigned Risk Plan Manuals, otherwise known as the “take-out” rule. The take out rule has been in effect for over 20 years. On May 22, 2001, the Commonwealth Court held in Professional Insurance Agents Association, et al. v. Koken, docket number 714 M.D. 1999, that the take-out rule was invalid without authorizing regulations by the Pennsylvania Insurance Department. The purpose of this final/omitted rulemaking is to promulgate the take-out rule as a regulation in compliance with the Order of the Commonwealth Court.

Notice of proposed rulemaking is omitted pursuant to Section 204(3) of the Commonwealth Documents Law, 45 P.S. §1204(3), which provides that notice of proposed rulemaking may be omitted when the Agency for good cause finds that the notice procedures found in Sections 201 and 202 of the Commonwealth Documents Law, 45 P.S. §§1201, 1202, are impracticable, unnecessary or contrary to the public interest. The Pennsylvania Insurance Department believes that the notice procedures are impracticable and contrary to the public interest because the Commonwealth Court’s Order places the status of “take-out” in the Commonwealth into doubt. Consumers who would otherwise have been eligible to exit the Plan under the take-out rule, will no longer receive notice of their options to leave the Plan and Assigned Carriers will no longer be required to offer those consumers guaranteed voluntary market coverage. The Pennsylvania Insurance Department believes that immediate emergency action is necessary to safeguard the interests of consumers eligible to exit the Plan under the take-out rule.

Affected Parties

The rulemaking applies to the Assigned Risk Plan and to all insurance companies who write motor vehicle insurance in the Commonwealth of Pennsylvania.

Fiscal Impact

State Government

There will be no increase in cost to the Department due to the adoption of Chapter 67b.

General Public

There will be no fiscal impact to the public.

Political Subdivisions

The rulemaking will not impose additional costs on political subdivisions.

Private Sector

The rulemaking will not impose additional costs of insurance companies doing the business of motor vehicle insurance in the Commonwealth.

Paperwork

The adoption of the rulemaking will not impose additional paperwork on the Department or the insurance industry.

Effectiveness/Sunset Date

This final/omitted rulemaking becomes effective upon publication in the Pennsylvania Bulletin. No sunset date has been assigned.

Contact person

Any questions regarding this regulation, should be directed to Peter J. Salvatore, Regulatory Coordinator, Special Projects Office, 1326 Strawberry Square, Harrisburg, PA 17120, phone (717) 787-4429. In addition, questions may be e-mailed to psalvatore@state.pa.us or faxed to (717) 772-1969.

Regulatory review

Under section 5(a) of the Regulatory Review Act, Act 24 of 1997, the agency submitted a copy of the regulations with the proposed rulemaking omitted on November 6, 2000 to the Independent Regulatory Review Commission (the Commission) and to the Chairpersons of the House Committee on Insurance and the Senate Committee on Banking and Insurance. On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101 - 732-506).

In accordance with section 5 (c) of the Regulatory Review Act, the regulations were (deemed) approved by the Senate Banking and Insurance Committee on _____, and (deemed) approved by the House Insurance Committee on _____. IRRC met on _____ and approved the regulation. The Attorney General approved the regulation on _____.

Findings

The Commissioner finds that:

(1) There is good cause to forego public notice of the intention to add 31 Pa. Code, Chapter 67b, because the invalidation of the take-out rule by the Commonwealth Court's Order in Professional Insurance Agents Association, et al. v. Koken, docket number 714 M.D. 1999 has placed the status of "take-out" into doubt, depriving of consumers who would otherwise be eligible to exit the Plan of notice of their options and reducing those options by no longer requiring that consumers be offered voluntary market coverage by their assigned carriers. The Department believes that immediate emergency action is necessary to safeguard the interests of consumers eligible to exit the Plan under the take-out rule.

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

Order

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

(1) The regulations of the Department, 31 Pa. Code, are amended by adding Chapter 67b, to read as set forth in Annex A.

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

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

(4) The regulation adopted by this order shall take effect upon final publication in the *Pennsylvania Bulletin*.

Diane Koken
Insurance Commissioner

Annex a

TITLE 31. INSURANCE

**PART II. AUTOMOBILE INSURANCE. Chapter 67b. Mandatory Offer to Write
Nonsurcharged Private Passenger Nonfleet Risks.**

Sec.

67b.1.	Definitions.
67b.2.	Eligibility.
67b.3.	Offer to Write.
67b.4.	Notification.
67b.5.	Company Obligations.
67b.6.	Right of Insured to Reapply to Plan.
67b.7.	Failure to Comply.

§ 67b.1. Definitions.

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

Assigned Risk Plan - As defined in section 7 of the Motor Vehicle Financial Responsibility Law (75 Pa.C.S.A. §1702).

Commissioner – The Insurance Commissioner of the Commonwealth.

Department – The Insurance Department of the Commonwealth

Governing Committee – The governing body that administers the Plan.

Nonfleet – Four or fewer motor vehicles of any type.

Plan – Assigned Risk Plan.

Producer – An agent or broker, certified or licensed, by the Department to conduct business and certified by the Assigned Risk Plan.

Producer of record - The agent or broker, certified or licensed, by the Department to conduct business, certified by the Assigned Risk Plan and whose signature appears on the application for insurance.

Risk- refers to private passenger nonfleet vehicles.

Take-out – An offer from the assigned company to write voluntary market coverage for a private passenger nonfleet automobile risk insured by the Plan.

Take-out notice – A notice from the assigned company offering voluntary market coverage to a private passenger nonfleet automobile risk insured by the Plan. The take-out

notice must inform the insured that acceptance of take-out is not mandatory, the insured may shop for coverage in the voluntary market or remain in the Plan pursuant to Section 67b.6.

§ 67b.2. Eligibility.

A private passenger nonfleet automobile risk is eligible for take-out if during the three successive years prior to the expiration of the policy, the named insured and any other person who usually operates the automobile meet the following requirements:

(1) Have been licensed to operate an automobile for at least two years.

(2) Have not been involved in accidents or convictions for which points are required to be assessed in accordance with the rules of the Plan.

§ 67b.3. Take-Out Notice.

(a) The assigned company shall mail a take-out notice to all eligible private passenger nonfleet automobile risks.

(b) The take-out notice must offer to write the same coverages afforded by the Plan policy the assigned company is offering to replace, for a period of one year.

(c) An insured accepting take-out from the assigned company is not required to select the kinds and amounts of coverage specified in the take-out notice, but may select other kinds and amounts. However, the kinds and amounts of coverage selected by the insured must be sufficient to maintain financial responsibility under 75 Pa.C.S.A. §1702.

§ 67b.4. Notification.

The assigned company must mail a take-out notice to each insured eligible for take-out and the producer of record at least 45 days, but no more than 60 days, prior to the expiration of the Plan policy to be replaced. The take-out notice shall contain a provisional premium quotation for the voluntary market coverage being offered. If the assigned company complies with this Section and the insured accepts take-out, the Plan shall give credit to the assigned company, at the expiration date of the Plan policy, for writing a voluntary market policy for a private passenger nonfleet automobile risk previously insured by the Plan.

§ 67b.5. Company Obligations.

(a) If the insured does not accept take-out and obtains replacement coverage in the voluntary market from another company, the assigned company shall have no further obligation to the insured or the producer of record, except that the assigned company shall issue any notice of termination of the Plan policy which is required by the rules of the Plan.

(b) If the insured accepts take-out, the assigned company shall be required to issue voluntary market coverage for a period of one year.

(c) Thereafter, the company issuing such policy shall be obligated to renew coverage from year to year, unless the company is permitted to non-renew the coverage under Act 68, Act of June 17, 1998, P.L. 484, No. 68, 40 P.S. §§991.2001 to 991.2013.

§ 67b.6. Right of Insured to Reapply to Plan.

Nothing in this chapter shall render the insured ineligible for coverage in the Plan. The insured may, at his option, continue his policy with the assigned company as a Plan risk or, if the three year assignment period has expired, he may reapply to the Plan for assignment to another company.

§ 67b.7. Failure to Comply.

If the Governing Committee finds that any company, without good cause, is not complying with this chapter, it shall notify the Commissioner.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Professional Insurance Agents :
Association of Pennsylvania, Maryland :
and Delaware, Inc., and Roger A. :
Weber, A Licensed Pennsylvania Agent, :
Petitioners :
v. :
M. Diane Koken, Insurance :
Commissioner of the Commonwealth of :
Pennsylvania, and Pennsylvania :
Assigned Risk Plan, : No. 714 M.D. 1999
Respondents : Argued: April 2, 2001

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JESS S. JULIANTE, Senior Judge

OPINION BY JUDGE McGINLEY

FILED: May 22, 2001

The Professional Insurance Agents Association of Pennsylvania, Maryland, and Delaware, Inc. and Roger A. Weber, a licensed Pennsylvania insurance agent (PIA) appeal from a declaratory order of Insurance Commissioner M. Diane Koken (Commissioner) that validated Pennsylvania Assigned Risk Plan Rule 14A (Plan Rule 14A) in the absence of regulations by the Insurance Department (Department).

The extensive history of this case, as recounted in the Commissioner's declaratory opinion, is as follows:

On January 22, 1990, PIA filed a formal complaint naming the Plan [Pennsylvania Assigned Risk Plan] and then-Insurance Commissioner Constance B. Foster as respondents. PIA claimed that Plan Rules 14A.1 and

14A.2, which provide a mechanism for transfer from the Plan to the ordinary market, are invalid. These rules, otherwise known as 'takeout' provisions of the Plan, were alleged to be invalid for several reasons.

. . . .
The Department and the Plan responded to PIA's complaint, and the Plan filed a motion to dismiss the complaint. . . . Commissioner Foster on February 27, 1992 issued an opinion and order dismissing all but one of the complaint's allegations. She held that the Commonwealth Documents Law did not require Plan rules to be promulgated as regulations and declined to exercise jurisdiction over the constitutional challenge. She also dismissed the excessive rates claim, since the insurance producers had no standing to challenge rates paid by policyholders. However, since a possible violation of the Motor Vehicle Financial Responsibility law was alleged,^[1] the Commissioner set that particular matter for hearing.

A hearing date was set, but prior to the scheduled date PIA filed a petition for review of the Commissioner's order to the Commonwealth Court. By order and opinion dated May 25, 1993, the Commonwealth Court affirmed the Commissioner's order. The Professional Ins. Agents Ass'n of PA., MD., and DE., Inc. v. Chronister, 625 A.2d 1314 (Pa. Cmwlth. 1993).^[2] A hearing was again scheduled, but PIA on June 24, 1993 petitioned the Pennsylvania Supreme Court for allowance of appeal from the Commonwealth Court decision. On December 30, 1994, the Supreme Court affirmed the order of the

¹ "PIA alleged that the rules violated Section 1741 of the Pennsylvania Motor Vehicle Financial Responsibility Law because the take-out provisions were not created pursuant to regulations of the Pennsylvania Insurance Department ('Department')." Declaratory Opinion, November 19, 1999, at 2.

² In Professional Insurance Agents Association of Pa., Md., and De., Inc. v. Chronister, 625 A.2d 1314 (Pa. Cmwlth. 1993), *aff'd sub nom.*, Professional Insurance Agents Association of Pa., Md., and De., Inc. v. Maleski, 539 Pa. 269, 652 A.2d 293 (1994), this Court determined that the take-out provision was constitutional. This Court reasoned that the Assigned Risk Plan was an independent entity and there was no state action involved. Professional Insurance Agents, 625 A.2d at 1320.

Commonwealth Court. *The Professional Ins. Agents Ass'n of Pennsylvania, Maryland, and Delaware, Inc. v. Maleski*, 652 A.2d 293 (Pa. 1994) [sic].

The appellate courts then remanded the record to the hearings office on March 1, 1995 A prehearing conference was held on July 9, 1996 but the parties did not reach a settlement. The parties appeared at a scheduled hearing on September 12, 1996, at which time they articulated a joint stipulation [JS1] for the record and also submitted a written joint stipulation of facts [JS2] (footnote omitted).

Declaratory Opinion, November 19, 1999, at 1-3.

The parties stipulated to the following facts:

9. Section 14A of the Plan Rules is entitled 'Offers to Remove Private Passenger Non-Fleet Automobile Insured from the Assigned Risk Plan', which is commonly referred to in the insurance industry as the 'take-out' provision.

10. The take-out provisions of the Plan, Section 14A ('14A'), were filed by the Pennsylvania Assigned Risk Plan and approved by the Department. As set forth in Plan Exhibit 'B' the take-out provisions of the Plan have existed since at least 1978.

11. Refer to stipulation of record. (JS1)^[3]

.....

13. Take-out under the Pennsylvania Assigned Risk Plan Rules is presently being offered *and effectuated* pursuant to Plan Rule 14A.

³ Reciting a verbal stipulation, counsel stated that "[t]he parties have agreed . . . that the take-out provisions in Section 14A-1 and 14A-2 . . . were never promulgated as a regulation." Petition for Review, December 20, 1999, Exhibit I; Reproduced Record (R.R.) at 439a.

Petition for Review, December 20, 1999, Exhibit B: Joint Stipulation of Facts, September 12, 1996, Nos. 9-11 & 13; R.R. at 435a-436a (emphasis added).

On November 19, 1999, the Commissioner issued a declaratory order, which established that “Plan Rule 14A facilitates, but does not transfer, insureds into the ordinary market and may remain in effect *without Department regulations.*” Declaratory Order, November 19, 1999, No. 5 (emphasis added).

The Commissioner made the following pertinent findings of fact and conclusions of law:

1. The Professional Insurance Agents Association of PA., MD., & DE., Inc. (‘the association’) is a non-profit corporation operating as a trade association representing the interests of its members, insurance agents who are qualified to transact property and casualty business in Pennsylvania.
2. Roger Weber is an insurance agent qualified to transact business in Pennsylvania, and is a member of the association.
3. Roger Weber in the course of his profession submits applications to the Pennsylvania Assigned Risk Plan (‘Plan’).
4. The association and Roger Weber (collectively ‘PIA’) initiated the present action by filing a formal complaint with the Insurance Commissioner of Pennsylvania (‘Commissioner’).
5. The Plan was named as a respondent to the complaint.
6. The Plan is an unincorporated association of insurance carriers created pursuant to 75 Pa.C.S. §1741.

7. All insurance companies that are licensed to write motor vehicle liability insurance in Pennsylvania are required to be members of the Plan.

8. Consumers who are unable to secure insurance in the voluntary insurance market are able to secure an automobile insurance policy through the Plan. The Plan files rules, rates and forms on behalf of its member insurers. The purpose of the Plan is to equitably apportion among insurers those applicants for automobile insurance unable to procure insurance through ordinary methods.

9. The purposes of the Plan are effectuated through Plan Rules filed by the Plan and approved by the Insurance Department ('Department').

10. The Plan Rules include, inter alia, provisions detailing: Plan purposes, producer eligibility, definitions, applicant eligibility, Plan administration,

11. Pursuant to Plan Rules, the Plan assigns policy applications submitted by qualified agents to its member insurance companies who issue an insurance policy to the applicant.

12. Section 14A of the Plan Rules is titled 'Offers to Remove Private Passenger Non-Fleet Automobile Insured from the Assigned Risk Plan' and is commonly known in the insurance industry as the 'takeout' provision.

13. Plan Rule 14A acts as a mechanism to depopulate the Plan.

14. Plan Rule 14A has been approved by the Department.

15. Plan Rule 14A was never promulgated as a regulation by the Department.

16. Plan Rule 14A was not filed with the Legislative Reference Bureau.

17. The takeout provision of Plan Rule 14A has existed since at least 1978.

18. The Insurance Department has not promulgated regulations prescribing criteria, rules or mechanisms to depopulate the Plan by transferring consumers from the Plan to the voluntary market.

19. Takeout under the Pennsylvania Assigned Risk Plan Rules is presently being offered pursuant to Plan Rule 14A.

20. Plan Rule 14A.1 requires an assigned risk carrier to offer its policyholder a policy if the policyholder and usual drivers have a clean driving record for three policy years.

21. A typical offer pursuant to Plan Rule 14A.1 advises the consumer of options which include accepting the company's offer, staying in the Plan or obtaining coverage from another company.

22. Plan Rule 14A.2 provides guidelines for the voluntary offer by the assigned risk carrier to write a policy.

23. Plan Rule 14A does not mandate that an assigned risk insured be transferred to the regular market, only that certain consumers be given an offer.

24. The means by which an assigned risk insured is placed in the regular market, if at all, is when the insured accepts his assigned risk carrier's offer or that of another carrier.

....

CONCLUSIONS OF LAW

....

4. Provisions of the Pennsylvania Assigned Risk Plan which are a means to transfer individuals into the ordinary market must be issued pursuant to Insurance Department regulations.

5. The plain definition of ‘means’ is ‘that by which something is done or obtained.’

6. Pennsylvania Assigned Risk Plan Rule 14A is not a ‘means’ to transfer individuals into the ordinary market as contemplated by the General Assembly.

7. Even if ‘means’ as used by the General Assembly in 75 Pa.C.S. §1741 is ambiguous, all applicable statutory rules of construction favor the definition: ‘that by which something is done or obtained.’

8. Plan Rule 14A is not the type of provision contemplated by 75 Pa.C.S. §1741 which must be issued pursuant to Department regulations.

Declaratory Opinion, Findings of Fact (F.F.) Nos. 1-24 at 5-8 and Conclusions of Law Nos. 4-8 at 26-27.⁴

On December 20, 1999, PIA petitioned for review in this Court and set forth two counts. Count I in the nature of an appeal requests:

[T]his Honorable Court to reverse and vacate the Declaratory Opinion and Order of November 19, 1999 and enter judgment in favor of Petitioners which finds that Pennsylvania Assigned Risk Plan Rule 14A (Take-Out) violates Section 1741 of the Pennsylvania Motor Vehicle Financial Responsibility Law (75 Pa.C.S. §1741, ‘MVFRL’) and that Plan Rule 14A must be promulgated pursuant to regulations established by the Insurance Department. . . .

Petition for Review, December 20, 1999, at 10.

Count II in the nature of a complaint in mandamus, under our original jurisdiction, requests an order directing that “Respondent Commissioner shall

⁴ PIA filed a petition for reconsideration, however, the Commissioner denied its request.

vacate her November 19, 1999 Declaratory Opinion and Order and immediately issue an Adjudication on the matter. . . .” Petition for Review at 25. On January 25, 2000, this Court entered an order granting the Commissioner’s application for summary relief and dismissing as moot count II of the petition for review.⁵

The issues presented for our review are: 1) whether the Commissioner improperly validated Plan Rule 14A in the absence of Department regulations, and 2) whether the Commissioner erred by refusing to be bound by the joint stipulation of facts.⁶

First, PIA challenges the Commissioner’s interpretation of Section 1741 of the Motor Vehicle Financial Responsibility Law (MVFRL),⁷ 75 Pa.C.S. §1741, to validate Plan Rule 14A in the absence of Department regulations. PIA contends that the Commissioner’s interpretation is contrary to the statute’s plain, unambiguous meaning. We agree.

Pursuant to Section 1921(b) of the Statutory Construction Act of 1972, (Act), “[w]hen the words of a statute are clear and free from all ambiguity,

⁵ This Court determined that “[t]he Commissioner’s declaratory decision and order constitutes an adjudication within the meaning of 2 Pa.C.S. §101.” Memorandum and Order, January 25, 2000, at 2.

⁶ Our review with respect to an Insurance Department order is limited to a determination of whether constitutional rights were violated, legal error was committed, or findings of fact were supported by substantial evidence. Pennsylvania Life and Health Insurance Guaranty Association v. Insurance Department, 625 A.2d 1286 (Pa. Cmwlth. 1993).

⁷ Section 1741 of the MVFRL states that “[t]he plan may provide reasonable means for the transfer of individuals insured thereunder into the ordinary market, at the same or lower rates, pursuant to regulations established by the department.” 75 Pa.C.S. §1741 (emphasis added).

the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. §1921(b). In the present controversy, the Commissioner’s declaratory opinion and order ignore the letter of the law. According to the Commissioner, Plan Rule 14A provides consumers with the choice to stay in the Plan or explore other opportunities to reduce insurance costs. Plan Rule 14A does not require the insured to transfer from the Plan to the voluntary market but provides a path whereby the insured may choose “takeout” or transfer to the voluntary market.⁸

Interpreting the phrase “means for the transfer,” as reflected in Section 1741 of the MVFRL, is critical to the outcome of this controversy.⁹ The

⁸ The Commissioner explained:

The Department has thus recognized the importance of consumer choice, universal automobile insurance coverage, availability of the best coverages at the lowest rates, and the stability of the insurance marketplace. . . . Plan Rule 14A as written comports with the legislative intent and public policy, and does not require promulgation of regulations to be effective.

Declaratory Opinion at 25.

⁹ Using the definition of “means,” the Commissioner distinguished a transfer by the consumer from the Plan accomplishing a transfer.

Statutory rules of construction require that ‘[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage.’ 1 Pa.C.S. §1903. Words in a statute are to be given their plain meaning. *Treaster v. Township of Union*, 242 A.2d 252 (Pa. 1968) [sic]. The word ‘means’ is defined as ‘that by which something is done or obtained.’ *Webster’s New World Dictionary* 839 (3d College ed. 1994). The parties have not suggested, nor does research disclose, a judicial definition of this term.

As discussed above, transfer into the ordinary market pursuant to 75 Pa.C.S. §1741 is done or obtained by the consumer’s actions. If

(Footnote continued on next page...)

Commissioner focused upon the insured, who creates the “means for the transfer” by accepting the offer in Plan Rule 14A. “Since consumer action accomplishes the transfer if one occurs, consumer action and not the rule is the means which accomplishes takeout.” Declaratory Opinion at 16.

However, the Commissioner’s approach assumes that consumers are on equal footing with the Plan insofar as they decide the terms under which they will leave the Plan and obtain coverage elsewhere. Reality leaves the consumer in a more precarious situation because the consumer will undoubtedly encounter numerous difficulties shopping for coverage. Unlike the Commissioner, we must focus on Plan Rule 14A as the “means for the transfer” into the ordinary market.

Qualifying language that the Plan provides “reasonable” means for transfer “at the same or lower rates” supports the need for administrative regulations to protect consumers.¹⁰ Under Section 1921(a) of the Act, “[e]very

(continued...)

the Plan itself accomplished the transfer, such as by requiring exodus from the Plan under certain conditions, the Plan would be the means by which the transfer were done or obtained. It does not. Thus, this plain and common usage of ‘means’ mandates an interpretation that regulations are not necessary.

Declaratory Opinion at 17.

¹⁰ This Court has addressed the difference between a regulation and a policy statement:

It is well settled that agency ‘regulations’ must be promulgated pursuant to the notice and comment procedures contained in the Commonwealth Documents Law in order to have the force and effect of law. *Hillcrest Home, Inc. v. Department of Public Welfare*, 123 Pa.Cmwlt. 289, 553 A.2d 1037 (1989). ‘Statements

(Footnote continued on next page...)

statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa.C.S. §1921(a). One cannot overlook the reference to regulations at the end of Section 1741 of the MVFRL. We are constrained to conclude that the Commissioner’s declaratory order validating Plan Rule 14A does not comply with the requirement for regulations in Section 1741 of the MVFRL.

PIA also asserts that the Commissioner’s interpretation of Section 1741 of the MVFRL is not entitled to deference because it departs from explicit statutory language. Again, we agree.

The Commissioner highlighted that Plan Rule 14A has been in operation since 1978 without Department regulations. See Declaratory Opinion at 25. Nevertheless, a period of usage does not empower an administrative entity beyond its legislative parameters. Federal Deposit Ins. Corp. v. Board of Finance

(continued...)

of policy,’ on the other hand, need not comply with these procedures. Id.

The Supreme Court in Pennsylvania Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671, 679 (1977), has explained that the critical distinction between a substantive rule or regulation and a statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. A properly adopted regulation establishes a standard of conduct which has the force of law, whereas a general statement of policy does not establish a ‘binding norm.’ Id.

R.M. v. Pennsylvania Housing Finance Agency, 740 A.2d 302, 306 (Pa. Cmwlth. 1999) (footnote omitted).

and Revenue, 368 Pa. 463, 84 A.2d 495 (1951). Adherence to the statute is of paramount importance.

“[T]he rule that courts defer to an agency’s interpretation of a statute which the agency administers does not apply where the statute is clear.” Department of Environmental Resources v. Washington County, 629 A.2d 172, 175 (Pa. Cmwlth. 1993). Here, Section 1741 of the MVFRL mandates the promulgation of regulations, and there is no need to defer to the Department’s expertise.

Second, PIA maintains that the Commissioner erred by refusing to accept as conclusive evidence the joint stipulation of facts entered into between the parties. In particular, PIA submits the Commissioner found that takeout is “offered” without mentioning the stipulated fact that takeout is also “effectuated” by Plan Rule 14A.¹¹ PIA’s argument is compelling.

Effectuation is defined as “the action of putting into effect: accomplishment.” Webster’s Third New International Dictionary 725 (1993). In the present controversy, the parties stipulated that Plan Rule 14A offers and effectuates the take-out provision. See Petition for Review, Exhibit B: Joint Stipulation of Facts, No. 13; R.R. at 436a.

It is widely accepted that:

¹¹ See Declaratory Opinion, F.F. No. 19 at 7.

‘The stipulation of facts is binding on both the parties and on this court, and facts effectively stipulated are controlling and conclusive.’ *Tyson v. Commonwealth*, 684 A.2d 246, 251 n.11 (Pa. Cmwlth. 1996), citing *Beasley Industries, Inc. v. Commonwealth*, 116 Pa. Cmwlth. 505, 542 A.2d 210 (1988). ‘Where the stipulation [is] clear and unambiguous on its face, we are prohibited from examining evidence, as to the intent of the parties which is not within the four corners of the stipulation.’ *Cobbs v. Allied Chemical Corp.* 443 Pa.Super. 386, 661 A.2d 1375, 1378 n.5 (1995).

Kennedy Blvd. Associates, I, L.P. v. Tax Review Board of the City of Philadelphia, 751 A.2d 719, 724 (Pa. Cmwlth. 2000).

When factoring the definition of effectuation into the statutory interpretation, Plan Rule 14A acts as the “means for the transfer.” We agree with PIA that the Commissioner’s deletion of the term “effectuated” from her finding of fact resulted in an erroneous statutory analysis.

Lastly, PIA contends that the Department is estopped by its admission from asserting that Plan Rule 14A does not provide a means for transfer of individuals into the ordinary market. We agree.

In *Professional Insurance Agents Association of Pa., Md., and De., Inc. v. Chronister*, 625 A.2d 1314 (Pa. Cmwlth. 1993), *aff’d sub nom.*, *Professional Insurance Agents Association of Pa., Md., and De., Inc. v. Maleski*, 539 Pa. 269, 652 A.2d 293 (1994), this Court stated that “[e]stoppel by record is defined as ‘the preclusion to deny the truth of a matter set forth in a record, . . . also to deny the facts adjudicated by a court of competent jurisdiction.’ ” *Professional Insurance Agents*, 625 A.2d at 1319 *quoting* Black’s Law Dictionary 1146 (5th Ed. 1979).

Here, the Department alleged that “[t]he Department admits that Sections 14A.1. and 14A.2. provide the means for the transfer of individuals insured under the Plan into the ordinary market.” Answer and New Matter of the Insurance Department of the Commonwealth of Pennsylvania to the Formal Complaint of the Professional Insurance Agents Association and Roger Weber, April 23, 1990, Paragraph 46, at 9; R.R. at 105a. In light of such an admission, the Department is now precluded from asserting that Plan Rule 14A does not provide a “means for the transfer.”

In sum, the Commissioner erred as a matter of law by misapplying the statute together with the joint stipulation of facts.

Accordingly, we reverse.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Professional Insurance Agents	:	
Association of Pennsylvania, Maryland	:	
and Delaware, Inc., and Roger A.	:	
Weber, A Licensed Pennsylvania Agent,	:	
Petitioners	:	
	:	
v.	:	
	:	
M. Diane Koken, Insurance	:	
Commissioner of the Commonwealth of	:	
Pennsylvania, and Pennsylvania	:	
Assigned Risk Plan,	:	No. 714 M.D. 1999
Respondents	:	

ORDER

AND NOW, this 22nd day of May, 2001, the declaratory order of the Insurance Commissioner of the Commonwealth of Pennsylvania in the above-captioned matter is reversed.

BERNARD L. MCGINLEY, Judge



**COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT**

SPECIAL PROJECTS OFFICE
1326 Strawberry Square
Harrisburg, PA 17120

Phone: (717) 787-4429
Fax: (717) 772-1969
E-Mail: psalvatore@state.pa.us

July 18, 2001

Mr. Robert Nyce
Executive Director
Independent Regulatory Review Comm.
333 Market Street
Harrisburg, PA 17101

Re: Insurance Department Final- Omitted
Regulation No. 11-207, Assigned Risk
Plan – Mandatory Offer to Write
Nonsurcharged Private Passenger
Nonfleet Risks

Dear Mr. Nyce:

Pursuant to Section 5a(c) of the Regulatory Review Act, enclosed for your information and review is final-omitted regulation 31 Pa. Code, Chapter 67b, Assigned Risk Plan – Mandatory Offer to Write Nonsurcharged Private Passenger Nonfleet Risks.

Chapter 67b is being promulgated to establish the terms and conditions under which the Pennsylvania Assigned Risk Plan must give notice to insureds in the Plan that they are eligible for a mandatory offer of coverage in the voluntary market from their assigned carrier. Formerly, this notice was offered pursuant to Assigned Risk Plan Rule 12 of the current Assigned Risk Plan Manual, Rule 14A in previous Assigned Risk Plan Manuals, otherwise known as the “take-out” rule. The take out rule has been in effect for over 20 years. On May 22, 2001, the Commonwealth Court held in Professional Insurance Agents Association, et al. v. Koken, docket number 714 M.D. 1999, that the take-out rule was invalid without authorizing regulations by the Pennsylvania Insurance Department. The purpose of this final/omitted rulemaking is to promulgate the take-out rule as a regulation in compliance with the Order of the Commonwealth Court.

If you have any questions regarding this matter, please contact me at (717) 787-4429.

Sincerely yours,

A handwritten signature in cursive script that reads "Peter J. Salvatore".

Peter J. Salvatore
Regulatory Coordinator

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 11-207

SUBJECT: Assigned Risk Plan - Mandatory Offer to Write Nonsurcharged Private Passenger
Nonfleet Risks

AGENCY: DEPARTMENT OF INSURANCE

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

RECEIVED
 2001 JUL 18 PM 3:01
 REGULATORY REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
7/18/01	<i>Sheila Cabant</i>	HOUSE COMMITTEE ON INSURANCE
	<i>M.E. Mitchell</i>	
7/18/01	<i>Senise Patton</i>	SENATE COMMITTEE ON BANKING & INSURANCE
7/18/01	<i>Ruby McDowell</i>	
7/18/01	<i>Elena Pagan</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
7-18-01	<i>Mary Mummert</i>	ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU

July 10, 2001