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July 31, 2001

**VIA HAND DELIVERY**

John R. McGinley, Jr.  
Chairman  
Independent Regulatory Review Commission  
14<sup>th</sup> Floor, Harristown 2  
333 Market Street  
Harrisburg, PA 17101

**RE: TITLE 31 INSURANCE: FINAL OMITTED REGULATIONS**  
**PROMULGATING CHAPTER 67b. Mandatory Offer to Write Nonsurcharged**  
**Private Passenger Nonfleet Risks.**

Dear Chairman McGinley:

Our law firm represents The Professional Insurance Agents Association of PA, MD, and DE, Inc. ("PIA"), a trade association which represents the interests of independent property and casualty insurance agents and brokers, and which is dedicated to maintaining the education and professionalism of the independent agent. Since the inception of the Motor Vehicle Financial Responsibility Law ("MVFR") and throughout the tenure of No-Fault, PIA has actively solicited the Pennsylvania Insurance Commissioner to engage in dialogue relative to the legislative directive set forth in Section 1741 of the MVFR (75 Pa.C.S. 1741) which requires the Department to promulgate regulations for TAKE-OUT.<sup>1</sup>

TAKE-OUT is a process unique to the Assigned Risk Plan ("Plan"), the place Pennsylvanians obtain private passenger auto insurance when they are unable to purchase it in the voluntary market. Producers of record are those licensed agents and brokers certified by the Plan, who place consumers into the Plan to ensure mandatory auto coverage in Pennsylvania and maintain financial responsibility for consumers. Plan Rules govern the method by which Producers of record place consumers into the Plan for coverage. TAKE-OUT is the process by which those consumers in the Assigned Risk Plan

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<sup>1</sup> The last sentence of Section 1741 of the MVFR states that "[t]he Plan may provide reasonable means for the transfer of individuals 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). Section 105(a) of the No-Fault Act contained almost identical language on TAKE-OUT.

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are "taken out" of the Plan and placed back into the voluntary insurance marketplace after enjoying a period of driving with a "clean" record. TAKE-OUT has been operating under Assigned Risk Plan Rule 14A by way of an approval process; the terms of which have been agreed upon between the Insurance Department and the Assigned Risk Plan, and totally contrary to Section 1741 of the MVFRL, which requires TAKE-OUT to be done by way of regulations.

On May 22, 2001, approximately ten (10) years after PIA had first filed a Formal Complaint at the Insurance Department on this issue, the Commonwealth Court of Pennsylvania ruled in favor of PIA and its interpretation of Section 1741 requiring regulations on TAKE-OUT.<sup>2</sup> The Commonwealth Court's Opinion and Order reversed the Declaratory Order of the Insurance Commissioner which held that TAKE-OUT was valid in the absence of regulations. The Court specifically held that:

***"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." Commonwealth Court Opinion p.11. (APPENDIX)***

While both the Commissioner and PIA agree that consumer choice is the basic premise upon which the regulation for TAKE-OUT should be written, the parties do not agree that Plan Rule 14A fully protects consumer choice. In fact, the Commonwealth Court's Order and specifically addressed the unequal relationship between the Plan and the consumer in the Plan as follows:

***"...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. Com. Ct. Opinion p. 10. (APPENDIX)***

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<sup>2</sup>PIA was forced to file an action in mandamus against the Insurance Commissioner in order to have an adjudication issue on whether TAKE-OUT had to occur by way of regulation. The mandamus resulted in an agreement by the Department to file an adjudication and on November 19, 1999, a Declaratory Opinion and Order was issued by the Commissioner finding TAKE-OUT valid without regulation. An appeal to the Commonwealth Court by PIA followed.

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PIA believes that consumer choice should determine how TAKE-OUT operates, and the Commissioner's Declaratory Order and Opinion clearly recognizes, "**...the importance of consumer choice, universal automobile insurance, availability of the best coverages at the lowest rates, and the stability of the insurance marketplace.**" Com. Ct. Opinion p.9. Footnote 8 (APPENDIX).

With the acknowledgment of consumer choice is a recognition of the services provided by a consumer's Producer of record. The Producer of record is mandated by law to direct its insured into the Plan, however, the transfer out of the Plan is a journey that the consumer makes without its Producer of record. The transfer lands the consumer in the voluntary market with an assigned insurance carrier which may or may not recognize the agent distribution system. PIA seeks to have the consumer's choice honored when TAKE-OUT occurs, by permitting the consumer the opportunity to have their Producer of record maintain their account and be paid commission for services rendered. To the extent that the Plan presently does not provide for commissions to be paid to agents who are not licensed with an assigned carrier, PIA believes that the Plan has historically accommodated the operating needs of its assigned insurance carriers and that the concerns of the agent maintaining its business and promoting consumer choice and control, can be accomplished through this regulation.<sup>3</sup> Of course, the parties must work together to accomplish a final resolution to this long standing problem.

On or about July 11, 2001, the Pennsylvania Insurance Department forwarded to the Standing Committees on Insurance for both the House and Senate, as well as to the Independent Regulatory Review Commission ("IRRC"), the above-referenced final omitted regulations on TAKE-OUT. The final omitted regulations for Chapter 67b of Title 31 are the submission made by the Commissioner to purportedly comply with the Commonwealth Court's May 22, 2001 ruling. These final-omitted regulations at Chapter 67b. of Title 31, neither address the issues that the PIA had sought to be addressed through its ten years of litigation, nor do they comply with the specific language of the statute.

The PIA challenges this regulation both procedurally and substantively as follows:

1. Procedurally, the final omitted regulation was sent to IRRC and to the Standing

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<sup>3</sup>The Plan provides for a Limited Assignment Distribution Procedure ("LAD")(Plan Rule 6 E), which permits auto carriers required to participate in the PA Assigned Risk Plan, to buy-out their private passenger auto quotes and to find a servicing auto carrier to service their assignments. The Plan, with the Department's approval, has facilitated the operational needs of the insurance companies by the use of creative solutions, which PIA contends, can also resolve the present issue on TAKE-OUT.

Committees without any notification to PIA, who was the Petitioner in the Commonwealth Court in the recent decision which forced the promulgation of the above-referenced regulations. PIA was the main challenger to the Department's invalid TAKE-OUT operation. The reason for the requested promulgation of regulation by PIA was to permit PIA to advance its position relative to regulations and public comment. The use of final omitted regulations, PIA believes to have been a conscious attempt to avoid any public notification on TAKE-OUT and to preclude PIA the opportunity to be heard. Resolution of this matter will not be accomplished without dialogue.

2. That notwithstanding, PIA challenges the final omitted regulation on the basis that there is no present emergency which should by-pass the public rule making process. While TAKE-OUT had been ordered to be done by way of regulation pursuant to Judge McGinley's ruling of May 22, 2001, the Department did not act immediately to create a regulation for TAKE-OUT, but instead, sought reargument and now claims there is an emergency situation which requires the lack of public rule making to occur. The PIA challenges that there is any emergency situation at this point, since a Petition for Allowance of Appeal has been filed with the PA Supreme Court which acts as an automatic supersedeas of the Court's May 22, 2001 Order. See Pa.R.A.P. 1736(b).<sup>4</sup> The Department has no basis upon which to force the regulation through on a lack of public notice.
3. Furthermore, the final omitted regulation is not in keeping with the specific language of the statute. For example, in *Section 67b.4 Notification*, the regulation, as written, assures that assigned carriers will be given credit for TAKE-OUT assignments, but gives no heed to requiring that the insurance rates are the same or lower than those paid in the Plan. Specifically, the statute requires that the premium rates that an insured pays when they come out of the Plan into the ordinary market be at the same or lower rates than they were at while they were in the Plan. (Section 1741 of MVFRL). The particular final omitted regulation which is being submitted by the Insurance Department states

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<sup>4</sup>The Commissioner and The Assigned Risk Plan both sought reargument en banc from the Commonwealth Court, which was denied on June 20, 2001. Seemingly convinced that the Commonwealth Court is in error and that TAKE-OUT is not required to be governed by regulations, on July 20, 2001, the Plan and the Commissioner both filed separate Petitions for Allowance of Appeal to the Pennsylvania Supreme Court in an effort to overturn the Commonwealth Court and defy the clear directive of the legislature.

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that, "The TAKE-OUT notice shall contain *a provisional premium quotation* for the voluntary market coverage being offered." (*SEE* Section 67b.4 Notification) This is not in following the language of the statute. There is nothing in the final omitted regulation which addresses or which requires the Plan to provide those premiums at the same or lower rates as those in the Plan. For this reason alone the regulation should be disapproved.

4. Section 67b.7. Failure to Comply, reads as follows: "**If the Governing Committee finds that any company, without good cause, is not complying with this chapter, it shall notify the Commissioner.**" The majority of the members of the Governing Committee of the Plan are made up of representatives from the insurance companies which write private passenger auto insurance in Pennsylvania. The Governing Committee is given discretion to determine whether company representatives, the ranks from which it came, are complying with the TAKE-OUT provisions and can determine whether an good cause reason exists, in order to excuse the company from complying with the LAW. If they decide the company can ignore the law, the Committee doesn't notify the Commissioner. The Governing Committee should not be given this type of discretion, or authority, but must be subject to public scrutiny and oversight.

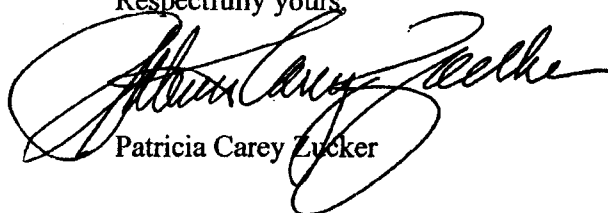
PIA seeks to have the final omitted regulation revised to include a recognition by the Plan of the Producer of record, if the consumer so chooses. PIA's present efforts are consistent with its past efforts to require the Plan to recognize the Producer of record, through consumer choice. PIA has submitted a myriad of unilateral proposals to the Insurance Department to resolve this matter and has also joined in a proposal with the Plan to support a compromise resolution on this issue. There has been no substantive response by the Department to any of the proposals submitted.

The Producer of record has a business and financial motivation to see that TAKE-OUT operates in accordance with the legislative directive and that the consumer is brought back into the ordinary market as soon as possible, and at the lowest rates possible. The Producer of record protects consumers by educating them as to the procedure and their legal rights under TAKE-OUT pursuant to properly promulgated regulations. Better rates at the best coverage and stability of the marketplace are all in the best interests of consumers, Producers of record and the Commissioner. The Producer of record aids the consumer in obtaining these goals. The Commissioner's reluctance to permit the consumer access to their Producer of record is puzzling.

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PIA will be in attendance at the public meeting scheduled for August 9, 2001, at IRRC, and at that time would request the opportunity both to make a short presentation and to answer any questions the Commission may have on this issue.

Respectfully yours,



Patricia Carey Zucker

**VIA HAND DELIVERY**

cc: Independent Regulatory Review Commission  
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**VIA U. S. MAIL**

Professional Insurance Agents Association of PA, MD & DE, Inc.  
F.E. "Rick" Russell, II, Executive Vice President  
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# *Independent Insurance Agents of Pennsylvania, Inc.*

August 3, 2001

Original: 2205

Richard Sandusky  
Senior Regulatory Analyst  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

RECEIVED  
2001 AUG -6 AM 11:07  
INDEPENDENT REGULATORY  
REVIEW COMMISSION

Dear Richard:

RE: Title 31 Insurance: Final Omitted Regulations Promulgating Chapter 67b. Mandatory Offer to Write Nonsurcharged Private Passenger Nonfleet Risks.

Please consider the following as formal comment from the Independent Insurance Agents of Pennsylvania (IIAP), a 113-year old association representing property casualty insurance agencies in the Commonwealth. Most of our members offer automobile insurance and, as such, they and their customers are affected by regulations regarding the so-called Assigned Risk Take-Out issue.

As you know, the Professional Insurance Agents of PA, MD, and DE (PIA) filed and won a Commonwealth Court decision on Section 1741, which provided the impetus for the Insurance Department to submit for IRRC's consideration a Final-Form Omitted Regulation. Submitting a regulation on this basis, per the Department rationale, was necessary to protect consumers from a gap in notices under Assigned Risk, yet still comply with the Court's ruling that the Department's declaratory ruling did not comply with a legal requirement to promulgate regulations.

IIAP would like to present the argument that compliance with the Court's decision means that the Insurance Department submit regulations per the normal procedure giving stakeholders such as IIAP, PIA, consumers, and the insurer associations their right to present views on what the regulation should contain. Having an expedited process such as the Final Form Omitted Regulation deprives the public and stakeholders of their right to provide this commentary. The Department's concern about consumers being in a void with no formal regulation in place would be valid if the process would be long and protracted. The rebuttal to this is found in the recently approved privacy regulation as mandated by the Gramm-Leach-Bliley Act. It did not take long for the entire approval process to run its course. Stakeholders had their say. The Department had theirs. IRRC had theirs and the Department responded quickly in preparing the final regulation which IRRC approved July 12, 2001. If there is a sense of urgency, all parties can move quickly.

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Comment on Title 31 Insurance: Final Omitted Regulations Promulgating Chapter 67b.  
Mandatory Offer to Write Nonsurcharged Private Passenger Nonfleet Risks.

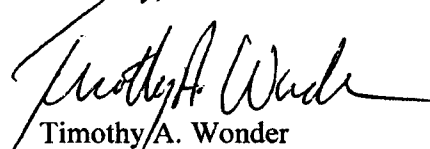
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One problem with regulations in the summertime is an absence of legislative oversight. With the General Assembly on recess, the usual scrutiny from the relevant committees is lessened. Chairmen are less inclined to convene formal meetings of their committees.

IIAP feels that another advantage of having the Insurance Department resubmit its regulation through the normal process is allow additional input from the legislators themselves. After all, they wrote the law. They should have more say in its interpretation.

The issue itself is of long-standing interest to IIAP members. Association members have testified on Assigned Risk Take-Out in the past and would probably do so again should it be warranted. Although not a part of the PIA lawsuit, the Association has followed proceedings with a great deal of interest. We would respectfully ask the Independent Regulatory Review Commission to direct the Insurance Department to resubmit the regulation through the public rule-making process.

Sincerely,



Timothy A. Wonder  
Executive Vice President

CC: F. E. "Rick Russell", PIA  
Peter Salvatore, PA Insurance Department  
Honorable Edwin Holl  
Honorable Nicholas Micozzie  
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