

| | | | |
|---|--|--|--|
| Regulatory Analysis Form | | This space for use by IRRC | |
| (1) Agency Insurance Department | | 2002 SEP -5 PM 3:27 REVIEW COMMISSION TO KY IRRC Number: 2257 | |
| (2) I.D. Number (Governor's Office Use) 11-209 | | | |
| (3) Short Title Privacy of Consumer Health Information | | | |
| (4) PA Code Cite 31 Pa. Code, Chapter 146b, §§146b.1-146b.24 | | (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 checked="" type="checkbox"/> Final Order Adopting Regulation <input 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. The purpose of this rulemaking is to adopt Chapter 146b in order to implement the privacy requirements for nonpublic health information in the National Association of Insurance Commissioners Model Privacy of Consumer Financial and Health Information Regulation (NAIC Model). Also, certain licensees such as health insurers will be subject to the federal HIPAA privacy regulation, while other licensees such as life insurers and automobile insurance carriers will not be subject to those regulations. Therefore, this regulation is needed in order to provide consistent privacy protections to all insurance consumers of the Commonwealth. | | | |
| (9) State the statutory authority for the regulation and any relevant state or federal court decisions. The regulation is made under the general rulemaking authority of §§ 205, 506, 1501 and 1502 of the Administrative Code of 1929 (71 P.S. §§ 66, 186, 411 and 412), and under the guidance of § 648 of The Insurance Department Act of 1921 (40 P.S. §§ 288), as amended by Act 40 of 1997 (P.L. 349, No. 40). Likewise, this regulation is made pursuant to the Department's rulemaking authority under the Unfair Insurance Practices Act (40 P.S. §§ 1171.1 et seq.) (as such authority is further explained in <u>PALU v. Insurance Department</u> , 371 A.2d 564 (Pa. Cmwlth. 1977)). | | | |

Regulatory 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.

This regulation is associated with the Department's recently-promulgated financial privacy regulation located at 31 Pa. Code Chapter 146a, and those regulations were required pursuant to the Title V of the Gramm-Leach-Bliley Act (P.L. 102-106; 15 U.S.C. §§ 6801 *et seq.*). Also, the compliance date for this regulation mirrors that of the federal HIPAA privacy regulation at 45 C.F.R. Parts 160 through 164.

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

The Insurance Department seeks to amend Chapter 146b, §§146b.1-146b.24 in order to implement the privacy requirements for nonpublic health information in the National Association of Insurance Commissioners Model Privacy of Consumer Financial and Health Information Regulation (NAIC Model). Moreover, it is in the public interest to amend the Pennsylvania Code in order to ensure consumer health information privacy.

(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.)

Consumers will benefit from the regulation to the extent that it will ensure protection of the privacy of nonpublic personal health information that is available to licensees.

Regulatory Analysis Form

(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 amendment 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 licensees doing the business of insurance in the Commonwealth, with the exception of bail bondsmen, motor vehicle physical damage appraisers and governmental health programs such as CHIP and Medicaid.

(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 an initial draft of this regulation were solicited from the various trade associations representing the insurance industry. Notice of proposed rulemaking was published at 32 Pa.B. 1406 (March 23, 2002) with a 30-day comment period. During the 30-day comment period, comments were received from the Alliance of American Insurers (AAI), the American Council of Life Insurers (ACLI), the American Insurance Association (AIA), Blue Cross of Northeastern Pennsylvania (BCNPA), Capital Blue Cross (CBC), Highmark, Inc. (Highmark), Independence Blue Cross (IBC), the Insurance Federation of Pennsylvania, Inc. (IFP), the Managed Care Association of Pennsylvania (MCAP), the Pennsylvania Association of Mutual Insurance Companies (PAMIC), and the Pennsylvania Association of Non-Profit Homes for the Aging (PANPHA). During its regulatory review, the Independent Regulatory Review Commission (IRRC) submitted comments to the Department. These comments were taken into consideration in the drafting of this final form rulemaking.

(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.

This regulation will likely have some costs for licensees associated with obtaining authorization from consumers prior to releasing nonpublic personal health information. However, numerous exceptions to the authorization requirements have been included in the regulation so as not to unnecessarily interfere with licensees' daily transaction of the business of insurance.

Regulatory Analysis Form

(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.

Regulatory Analysis Form

(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. Because of the varied nature of the licensees that are covered by this regulation and because many licensees will be able to avoid the requirements of this regulation if they are compliant with the federal HIPAA privacy regulations, it is difficult, if not impossible, to accurately assess the costs associated with the promulgation of this regulation.

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.

Amending Chapter 146b, §§146b.1-146b.24 to the Pennsylvania Code is the most efficient method to achieve consistency with the NAIC Model regulation. Because the majority of other states are also promulgating the NAIC Model's health privacy provisions, a level of uniformity will be achieved by promulgating this final form rulemaking. Therefore, 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 amendment of the regulation is the most efficient method of updating the regulatory requirements.

Regulatory Analysis Form

(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?

Because a majority of other states are also promulgating the NAIC Model's privacy provisions, this rulemaking will not put Pennsylvania at a competitive disadvantage with other states. It merely provides for consistency with the NAIC model that other states are using.

(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. However, this regulation is related to the Department's Privacy of Consumer Financial Privacy Regulation located at 31 Pa.Code Chapter 146a.

(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.

Regulatory Analysis Form

(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 amendment of the regulation imposes no additional paperwork requirements on the Department. Licensees, however, will need to comply with the authorization requirements of the regulation, which include a requirement that they maintain such authorizations and any revocations thereof for a period of six years.

(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 Independent Regulatory Review Commission, the Office of the Attorney General and upon final publication in the Pennsylvania Bulletin. In order to be consistent with the federal HIPAA privacy regulation, compliance with this regulation will be required when a licensee would be expected to comply with the HIPAA privacy regulation. Under the final form regulation and as specified in the HIPAA privacy regulation, licensees with annual receipts less than \$5 million are given one additional year to comply with the regulation.

(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
BUREAU

(Pursuant to Commonwealth Documents Law)

2002 SEP -5 PM 3:28

LEGISLATIVE REFERENCE BUREAU
REVIEW COMMISSION

#2257

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to
form and legality. Attorney General

By _____
(Deputy Attorney General)

Date of Approval

→ Check if applicable.
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. 11-209

DATE OF ADOPTION: _____

BY: M. Diane Koken
M. Diane Koken
Insurance Commissioner

TITLE: _____
(EXECUTIVE OFFICER, CHAIRMAN OR
SECRETARY)

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

BY: John V. Turner

8/5/02
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 RULEMAKING

INSURANCE DEPARTMENT

31 Pa. Code, Chapter 146b
§§ 146b.1-146b.24

Privacy of Consumer Health Information

PREAMBLE

The Insurance Department (Department) hereby amends 31 Pa. Code to read as set forth in Annex A.

Statutory Authority

This final form regulation is adopted pursuant to the Insurance Department's ("Department") rulemaking authority as set forth in §§ 205, 506, 1501 and 1502 of the Administrative Code of 1929 (71 P.S. §§ 66, 186, 411 and 412), and under the guidance of § 648 of The Insurance Department Act of 1921 (40 P.S. §§ 288), as amended by Act 40 of 1997 (P.L. 349, No. 40). Likewise, this final form regulation is promulgated pursuant to the Department's rulemaking authority under the Unfair Insurance Practices Act (40 P.S. §§ 1171.1 *et seq.*) (as such authority is further explained in PALU v. Insurance Department, 371 A.2d 564 (Pa. Cmwlth. 1977)), because the Insurance Commissioner of the Commonwealth of Pennsylvania has determined that the improper disclosure and/or marketing of nonpublic personal health information by members of the insurance industry constitutes an unfair method of competition and an unfair or deceptive act or practice.

Comments and Response

Notice of proposed rulemaking was published at 32 Pa.B. 1406 (March 23, 2002) with a 30-day comment period. During the 30-day comment period, comments were received from the Alliance of American Insurers (AAI), the American Council of Life Insurers (ACLI), the American Insurance Association (AIA), Blue Cross of Northeastern Pennsylvania (BCNPA), Capital Blue Cross (CBC), Highmark, Inc. (Highmark), Independence Blue Cross (IBC), the Insurance Federation of Pennsylvania, Inc. (IFP), the Managed Care Association of Pennsylvania (MCAP), the Pennsylvania Association of Mutual Insurance Companies (PAMIC), and the Pennsylvania Association of Non-Profit Homes for the Aging (PANPHA). During its regulatory review, the Independent Regulatory Review Commission (IRRC) submitted comments to the Department. The following is a response to those comments.

General comments

Inconsistent with the Gramm-Leach-Bliley Act:

AAI commented that the proposed health privacy regulation is neither required by federal law nor consistent with the act of November 12, 1999 (Pub. L. No. 106-102, 113 Stat. 1338), known as the Gramm-Leach-Bliley Act ("GLBA") and the federal privacy regulations that apply to depository institutions and securities entities. See e.g. 12 CFR 40.1 *et seq.* (Office of the Comptroller of Currency privacy regulations) and 12 CFR 216.1 *et seq.* (Federal Board of Governors of the Federal Reserve System privacy regulations).

Although it is true that the federal banking and securities regulations treat nonpublic personal health information in the same manner as nonpublic financial information by requiring only that consumers be provided with an opportunity to opt-out of a disclosure of their health information, Section 507 of the GLBA (15 U.S.C. § 6807) explicitly allows states to afford “any person” greater protection than that provided in the GLBA or in the federal privacy regulations promulgated pursuant to Title V of the GLBA. Therefore, the GLBA not only allows, but envisions, states providing broader insurance privacy protection to consumers, as well as affording privacy protection to classes of persons not addressed in the GLBA or the federal privacy regulations. For this reason, this final form regulation is not inconsistent with the GLBA.

Section Specific Comments

Purpose (§ 146b.1):

With regard to its stated purpose, the proposed regulation used the term “affirmative consent” rather than “authorization,” which is used throughout the regulation. IBC and IFP both commented that the Department should change the reference in § 146b.1(a)(3) from “affirmative consent” to “authorization.”

The Department agrees with these comments and has made the requested change in this final form regulation.

Definitions (§ 146b.2):

“Consumer”

With regard to the definition of “consumer,” IFP suggested that either workers compensation claimants be excluded in the definition, or the regulation be clarified to state that it is not intended to modify the “existing information sharing practices” in the workers compensation industry. No explanation or description was provided as to what constitutes such “existing information sharing practices.”

The Department has retained its inclusion of workers’ compensation insurance in this final form privacy regulation’s definition of “consumer.” As mentioned above, Section 507 GLBA (15 U.S.C. § 6807) explicitly allows states to afford “any person” greater protection than that provided in the GLBA or in the federal privacy regulations promulgated pursuant to Title V of the GLBA. Therefore, the Department asserts that workers’ compensation claimants are properly within the scope of the privacy regulation.

In addition, it is important to note that claimants under a workers’ compensation insurance plan generally are unable to choose the licensees with whom they transact business. Rather, that choice is made by their employer, who is the policyholder in the

workers' compensation insurance plan. Unlike other types of consumers who are able to choose the licensees with whom they transact business, workers' compensation insurance claimants are unable to "shop around" for a licensee that has a privacy policy that suits their needs. Therefore, it is critical that these persons be afforded the privacy protections instituted by this regulation.

"Licensee"

With regard to the definition of "licensee," IBC commented that the definition should be modified so that licensees that administer a governmental health insurance program are exempt from the regulation. IRRC also commented on this aspect of the definition, stating that the definition of "licensee" should be clarified as to whether a licensee that administers a governmental health insurance program is bound by the regulation. Also, IFP seeks a clarification to the definition wherein the Department explains what entities beyond insurers it considers to be a "licensee."

Although the Department believes that because the programs do not meet the definition of "licensee," CHIP, Medicaid, Medicare+Choice and other governmental health insurance programs would not be subject to the privacy regulation even without a specific exception, this regulation nonetheless includes specific exceptions for these programs, as requested by the interested parties. However, this exception does not extend to entities that enroll participants through these programs, hence the clarification in paragraph (iv). In addition, the language in paragraphs (iii) and (iv) is identical to the language that is included in the definition of "licensee" in the Department's Privacy of Consumer Financial Information Regulation (31 Pa.Code § 146b.1 et seq.).

The Department does not agree with IBC's comment that licensees who enroll participants through a governmental health insurance program should be exempt from the regulation. Governmental health insurance program enrollees are entitled to the same privacy protection as any other persons who obtain health insurance in the private marketplace or through their employers. Therefore, contrary to the request of IBC, licensees that enroll participants through governmental health insurance programs will not be excluded from the definition of "licensee."

In response to the IRRC's comment that the definition should be clarified as to whether a licensee that administers a governmental health insurance program is bound by the regulation, the Department believes that the regulation is sufficiently clear. Also, the language of the definition is identical to that used in the Department's Privacy of Consumer Financial Information. See 31 Pa.Code § 146a.2 (definition of "licensee"). Therefore, in the interest of uniformity between these two closely related regulations, the Department has not changed the definition of "licensee."

The Department also does not agree with the IFP's comment that the definition should explicitly identify the entities beyond insurers that the Department considers to be

“licensees.” The definition is abundantly clear that any person or entity licensed or required to be licensed by the Department is required to comply with this regulation unless the entity is specifically excluded from the definition of “licensee.” The only license holders that are specifically excluded are bail bondsmen as defined in 42 Pa.C.S. § 5741, motor vehicle physical damage appraisers as defined in 63 P.S. § 852, and the governmental health insurance programs discussed above.

“Nonpublic personal health information”

IFP commented that the exception for “nonpublic personal financial information” should be removed from the definition of “nonpublic personal health information” because it believes that health information is always an exception to financial information, but not vice versa. Also, IRRC and AIA commented that the wording in paragraph (i)(B) of the definition of “nonpublic personal health information” is not parallel to paragraph (i)(A).

The Department disagrees with the IFP. By including an exception for nonpublic personal financial information within the definition of nonpublic personal health information, the Department has clarified that the opt-in requirements of this final form regulation apply only to nonpublic personal health information and not to nonpublic personal financial information. Also, because there is an exception for nonpublic personal health information within in the definition of nonpublic personal financial information in the Privacy of Consumer Financial Information regulation (31 Pa.Code §§ 146a.1 et seq.), the Department believes that the corresponding exception in this regulation is both necessary and appropriate.

The Department concurs in the suggestion proposed by the IRRC and AIA regarding the wording used in subparagraphs (i)(A) and (i)(B). The Department has made an appropriate change in order to make the wording in these two subparagraphs parallel.

Authorization required (§ 146b.11):

General

The IFP has suggested that the regulations need clarification to establish that Chapter 146b’s requirements are directed at the sharing of non-public personal health information for marketing purposes, and not information sharing for the purposes of first and third party claims administration and processing among and between carriers. The IFP made a similar suggestion in their comments to Chapter 146a - Privacy of Consumer Financial Information.

The Department asserts that, as with Chapter 146a, this final form regulation is abundantly clear that claims processing functions, including the administration and processing of first and third party claims, are included under the insurance function exemptions found at Section 146b.11 (b). Therefore, similar to the exception for first and third party claims administration and processing in the Department’s Privacy of Consumer

Financial Information Regulation, the authorization requirement of this final form regulation does not attach to information sharing associated with first and third party claims administration and processing.

“Minimum necessary” requirement (§ 146b.11(b))

The Department’s proposed regulation included a provision requiring that when nonpublic personal health information is disclosed by licensees or non-licensed third parties for the purpose of carrying out certain listed insurance functions, such disclosure could be made only to the extent that the disclosure is necessary for the performance of the insurance function by the licensee or non-licensed third party. AAI commented that this “minimum necessary” requirement is inconsistent with the NAIC Privacy of Consumer Financial and Health Information Model Regulation (“NAIC Model”) and that the requirement is unworkable because it injects subjective preconditions into the “safe harbors” provided by the exceptions. In addition, PAMIC stated that the new requirement would introduce an element of uncertainty into the regulation exceptions. Likewise, AIA commented that the additional requirement should be deleted because it prohibits uniformity among the states, and because the standard is too vague.

The Department respectfully disagrees with the comments provided by AAI, PAMIC and AIA. Although the “minimum necessary” requirement is not found in the NAIC Model, the requirement is not inconsistent with the intent of the regulation, nor is it unworkable. A similar requirement is found in the Federal Health Insurance Portability and Accountability Act (“HIPAA”) privacy regulation promulgated by the United States Department of Health and Human Services at 45 CFR Parts 160-164, to which many of the Department’s licensees are already subject. Furthermore, this additional requirement provides an additional layer of privacy protection to consumer’s nonpublic personal health information in that only the minimum amount of nonpublic personal health information that is necessary to perform an insurance function listed in subparagraphs 146b.11(b)(1)-(33) will be disclosed without an authorization from the consumer. This requirement is not unworkable, but instead is an appropriate balance between the protection of consumer health information and the uninterrupted performance of common insurance functions.

Although IFP also commented that the “minimum necessary” requirement be should deleted from the regulation, it also suggested in the alternative that a definition of “necessary” should be included stating that it means disclosures that are “required” or are a “usual, appropriate or acceptable” method of performing the underlying function. Likewise, IRRC commented that the language at issue should either be deleted or the criteria used to determine when disclosure is “necessary” should be included in the regulation. IRRC also commented that it would like an explanation of when, and by whom, the “necessary” disclosure determination is made.

The Department agrees and has added new subsection (c) to clarify that disclosure of nonpublic personal health information is necessary only when the disclosure is “required or when disclosure is usual, appropriate or acceptable for the purpose of performing an insurance function identified and subsection (b).” This additional explanation and

guidance as to what the Department considers “necessary” in terms of the performance of the insurance function exceptions to the authorization requirement should be sufficient to alleviate the concerns raised by the interested parties.

To address the IRRC’s comment, a determination of what is considered “necessary” will be made by the Department in the context of an investigation, consumer complaint, market conduct examination or other analysis of a licensee’s compliance with this regulation.

Insurance function exceptions (§§ 146b.11(b)(1) – (33))

This regulation includes an enumerated list of specific “insurance functions” that do not require an authorization to the extent that disclosure of nonpublic personal health information is necessary for the performance of the insurance functions. Several commentators raised concerns that several legitimate insurance functions were not included in the exception to the regulation’s general rule that an authorization is required for the disclosure of nonpublic personal health information. For example, IFP suggested that the Department clarify in either the regulation or the preamble that the exceptions for “claims administration, adjustment and management” in exceptions (1) and (2) also cover claims investigation, negotiation and settlement. IFP also commented that the wording in exception (31) should be changed back to the language in the NAIC Model (*i.e.*, to state “complying with legal process”). In addition, IBC recommended that exception (11) should be changed from “disease management” to “disease management and wellness programs” and that exception (15) be changed from “provider credentialing verification” to “provider training, accreditation, certification, licensure and credentialing.” IBC also suggested that an exception be added for “lawful reporting of disease, injury, vital statistics, child abuse, adult abuse, neglect or domestic violence.” Finally, both IFP and IRRC requested that exception (23) be clarified by incorporating types of “reporting” that are included in the scope of the exception, including reporting to various index and consumer reporting bureaus.

The Department has no objection to these changes and has made appropriate revisions to the insurance function exceptions listed in this final form regulation.

MCAP suggested deleting that the phrase “that do not require disclosure of nonpublic personal information that a consumer has not previously disclosed directly to the recipient of the information” from exception (33) because there is a possibility that the new physician would receive protected or identifiable information prior to the member’s initial visit with the new doctor.

The Department has not adopted the recommendation made by MCAP because deleting the phrase at issue would significantly expand exception (33) in a manner that is directly contrary to the intent and spirit of this regulation.

Third party confidentiality agreements (§ 146b.11(c)) (now §146b.11(d))

The Department's proposed regulation included a requirement in § 146b.11(c) (now §146b.11(d)) that when a licensee disclosed nonpublic personal health information to a non-licensed third party for the purpose of having the third party perform one of the insurance functions described above on its behalf, the licensee must enter into an agreement with the non-licensed third party wherein that third party cannot disclose the nonpublic personal health information other than for the purpose of performing the insurance function. Several comments were raised on this provision. First, AAI commented that the requirement that licensees enter into third party confidentiality agreements is inconsistent with the NAIC Model and is unnecessary because there is a requirement that the authorization indicate the third parties who will receive the information and how the information will be used by those third parties. Second, IFP recommended deleting this requirement from the regulation because it is not needed, or in the alternative, the Department should use a requirement that insurers send a "notice" of confidentiality requirements to third parties instead of having a written agreement. Third, AIA suggested that the confidentiality agreement requirement be deleted because it is overly burdensome. Finally, IRRC has requested clarification of how the Department intends to enforce this provision and a specification of a licensee's responsibilities with regard to the agreements if a third party breaches the same.

In order to address the several concerns raised with regard to the third party confidentiality agreement, the Department has deleted the requirement that an actual agreement be entered into and inserted a blanket prohibition against the disclosure of nonpublic personal health information by a non-licensed third party other than for the purpose of performing an insurance function exception to the authorization requirement. Although the requirement for a confidentiality agreement has been deleted, licensees must still be cognizant of the disclosure practices of non-licensed third parties performing insurance functions on their behalf. For example, the Department would consider a licensee's continued use of the services a non-licensed third party that the licensee knows or reasonably should have known has improperly disclosed nonpublic personal health information to be a violation of this regulation. However, where a licensee did not know or reasonably could not have known that a third party has not maintained the confidentiality of nonpublic personal health information, the Department would likely not find a violation by the licensee. The Department has also added, at the IRRC's request, new language to paragraph (d) (formerly (c)). The following language is now found at §146b.11(d)

(eD) Insurance functions performed by third parties on behalf of the licensee. A licensee may disclose nonpublic personal health information to a third party not licensed by the Department provided that ~~the licensee enters into an agreement with the third party that prohibits the third party from disclosing or using the nonpublic personal health information IS DISCLOSED ONLY for a purpose~~ THE PURPOSES ~~other than to carry~~ OF CARRYING OUT one or more of the insurance functions identified in subsection (b). THE DEPARTMENT MAY HOLD A LICENSEE RESPONSIBLE FOR DISCLOSURES MADE BY A THIRD PARTY THAT VIOLATE THE REQUIREMENTS OF THIS CHAPTER.

Additional insurance function exceptions (§ 146b.11(d)) (now §146b.11(e))

The Department's proposed regulation included a provision wherein additional insurance function exceptions could be added by publishing a notice in the *Pennsylvania Bulletin*. IRRC commented that additional insurance function exceptions must follow the rulemaking process because the addition of insurance function exceptions constitutes a change to the substantial requirements of the regulation.

The Department agrees with IRRC's comment. Accordingly, the last sentence in paragraph (e) (formerly (d)) of § 146b.11 has been deleted.

Authorization Requirements (§ 146b.12):

Duration of authorization (§ 146b.12(b))

Several comments addressed the regulation's requirement that authorizations remain valid for no more than 2 years. IFP and ACLI commented that the maximum length of time for authorizations should be extended from 24 months to 30 months because life insurers have a 24 month contestability period and if a problem arises at the end of the 24 month period, they may need 6 more months to resolve the problem. BCNP suggested that the two-year limitation for authorizations be eliminated in order to be more consistent with the federal rule. PANPHA recommended that the authorizations be permitted to remain valid until the consumer is discharged from the facility.

The Department has considered these comments, but is unwilling to deviate from the NAIC Model with regard to the requirement that authorizations remain valid for no more than two years. Two years is a reasonable time period for the duration of the authorizations required by this regulation. After two years, consumers should be given an opportunity to reassess whether they want to grant authorization for the disclosure of their nonpublic personal health information for purposes other than performing the insurance functions identified in the regulation, especially since a consumer's health status and health information can change dramatically in a two year period. Therefore, in order to be consistent with the NAIC Model, the Department has retained the requirement that authorizations remain valid for no more than 2 years.

In order to specifically address the comments made by IFP and ACLI, although the Department understands that life insurers have a 2 year contestability period in its policies, and that problems such as a fraud investigation may arise in the last month of the contestability period that would require additional time to resolve the issue, the Department does not believe that an extension of the 2 year limitation on the duration of the authorization is necessary. If a fraud investigation were to be initiated in the final month of the contestability period, it is important to recall that no authorization is required for disclosures that are made pursuant to the insurance function exceptions in § 146b.11(b),

which include an exception for the “detection, prevention, investigation or reporting of action or potential fraud, misrepresentation or criminal activity.” The Department believes that this exception and the other exceptions in § 146b.11(b) obviate the need for life insurers to obtain an authorization to resolve contestability issues, so no extension of the 2 year limitation on the duration of authorizations is needed.

Record of authorization (§ 146b.12(d))

IFP recommended that the record retention requirement be reduced from 6 years, but did not provide other alternative number of years that retention would be acceptable. Also, IRRC questioned why it is necessary for authorizations to be maintained for 6 years when they last only for 2 years.

The Department did not change any language in §146b.12(d), relating to the record-keeping requirement for executed authorizations. The Department requires that licensees maintain the authorization for 6 years because the maximum duration of the authorization is 2 years and the standard statute of limitations for a contract claim is 4 years. See 42 Pa.C.S. § 5525. Therefore, the Department believes that it is entirely reasonable that licensees be required to maintain the authorizations in their records for 6 years.

Compliance Dates (§ 146b.24):

Annual receipts

In order to be consistent with the HIPAA privacy regulation, the compliance date for this regulation varies depending upon whether a licensee has more than \$5 million in “annual receipts.” IFP commented that the reference to “annual receipts” is confusing and suggests, along with IRRC, that the term “premium” should be used instead.

The Department has not adopted the recommendation that the term “premium” be used in lieu of the term annual receipts because certain licensees such as insurance agents and third party administrators do not base their annual income on premium volume. However, the Department has added a definition of *annual receipts* to §146b.2, relating to definitions, in order to alleviate the concerns of the IFP and IRRC.

Compliance date

In order to be consistent with the HIPAA privacy regulation’s compliance date, the Department’s proposed regulation indicated that the compliance date for this rulemaking would be April 14, 2002 or 2003 (depending upon the amount of the licensee’s annual receipts). However, since the publication of this regulation in proposed form, several amendments have been proposed to the HIPAA privacy regulation. Because of these proposed amendments and because it is possible that the compliance date for the HIPAA privacy regulation might be extended or delayed, CBC,

PAHPHA, Highmark and IRRC suggested that the regulation should only generally reference the federal rule compliance dates rather than imposing a date certain.

The Department agrees and has changed the compliance date so that the compliance date for this regulation is the same as “the corresponding compliance date applicable to the Federal regulation.”

\$5 million in annual receipts

As explained above, the compliance date for this regulation varies depending upon whether a licensee has more than \$5 million in annual receipts. With regard to this provision, Highmark and IRRC recommended that the regulation be clarified to address which compliance date is to be followed where licensees have exactly \$5 million in annual receipts.

The Department agrees with the suggestion made by Highmark and IRRC. To that end, the Department has clarified § 146b.24 so that licensees with \$5 million or more in annual receipts must comply with the regulation by the corresponding date in the HIPAA privacy regulation and licensees with less than \$5 million in annual receipts must comply one year later as specified in the HIPAA privacy regulation.

Affected Parties

The rulemaking applies to all entities that are, or are required to be, licensed by the Department. The only exceptions are bail bondsmen as defined in 42 Pa.C.S. § 5741, motor vehicle physical damage appraisers as defined in 63 P.S. § 852, and governmental health insurance programs.

Fiscal Impact

State Government

The adoption of Chapter 146b will not cause an increase in costs to the Department.

General Public

There will be no fiscal impact to the public arising from the adoption of Chapter 146b.

Political Subdivisions

Because they are generally not licensed by the Department, this rulemaking will not impose additional costs on political subdivisions.

Private Sector

The rulemaking may result in additional costs to licensees of the Department that are subject to this regulation. These costs will relate to the development, printing, retention and compliance with the authorizations required by this regulation. These costs, however, are substantially outweighed by the privacy protections that are afforded to consumers by this regulation.

Paperwork

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

Effectiveness/Sunset Date

This 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, Office of Special Projects, 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, (71 P.S. §745.5(a)), the agency submitted a copy of this regulation on September 5, 2002 to the Independent Regulatory Review Commission and to the Chairmen of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the submitted regulation, the agency has provided the Commission and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of that material is available to the public upon request.

In preparing this final form regulation, the Department considered all comments received from IRRC, the Committees and the public. This final form regulation was (deemed) approved by the House and Senate Committees on _____. In accordance with section 5a(d) of the Regulatory Review Act (71 P.S. §745.5a(d)), IRRC met on _____ and (deemed) approved the regulation in accordance with section 5a(e) of the Regulatory Review Act (71 P.S. §745.5a(e)).

Findings

The Commissioner finds that:

(1) Public notice of intention to adopt this rulemaking as amended by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No240) (45 P.S. §§1201 and 1202) and the regulations there under, 1 Pa. Code §§7.1 and 7.2.

(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:

(a) The regulations of the Department, 31 Pa. Code, are amended by adopting §§146b.1-146b.24, to read as set forth in Annex A.

(b) 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.

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

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

M. Diane Koken
Insurance Commissioner

Annex A

TITLE 31. INSURANCE. PART VIII. MISCELLANEOUS PROVISIONS CHAPTER
146b. PRIVACY OF CONSUMER HEALTH INFORMATION

Subch.

A. GENERAL PROVISIONS

B. RULES FOR DISCLOSURE OF NONPUBLIC PERSONAL HEALTH
INFORMATION

C. ADDITIONAL PROVISIONS

Subchapter A. GENERAL PROVISIONS

Sec.

146b.1. Purpose.

146b.2. Definitions.

§ 146b.1. Purpose.

(a) Purpose. This chapter:

(1) Governs the treatment of all nonpublic personal health information about individuals
by various licensees of the Department.

(2) Describes the conditions under which a licensee may disclose nonpublic personal
health information about consumers to a third party.

(3) Requires licensees to obtain ~~the affirmative consent of~~ AN AUTHORIZATION
FROM consumers prior to disclosing nonpublic personal health information, UNLESS
OTHERWISE PERMITTED HEREIN.

(b) Compliance. A licensee domiciled in this Commonwealth that is in compliance with this
chapter and Chapter 146a (relating to privacy of consumer financial information) in a state that
has not enacted laws or regulations that meet the requirements of Title V of the act of November
12, 1999 (Pub. L. No. 106-102, 113 Stat. 1338) known as the Gramm-Leach-Bliley Act

(Financial Services Modernization Act of 1999) (15 U.S.C.A. §§ 6801--827) may nonetheless be deemed to be in compliance with Title V of the Gramm-Leach-Bliley Act in the other state.

(c) Examples. The examples provided in this chapter are for illustrative purposes only and do not otherwise limit or restrict the scope of this chapter.

§ 146b.2. Definitions.

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

Act--The Insurance Department Act of 1921 (40 P. S. §§ 1--321).

ANNUAL RECEIPTS--PREMIUM, COMMISSIONS, FEES OR OPERATING REVENUE RECEIVED IN A 12-MONTH PERIOD.

Commissioner--The Insurance Commissioner of the Commonwealth.

Company--A corporation, limited liability company, business trust, general or limited partnership, association, sole proprietorship or similar organization.

Consumer--

(i) An individual, or that individual's legal representative, 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, and about whom the licensee has nonpublic personal health information. Examples include:

(A) An individual who provides nonpublic personal health information to a licensee in connection with obtaining or seeking to obtain financial, investment or economic advisory services relating to an insurance product or service, regardless of whether the licensee establishes an ongoing advisory relationship.

(B) An applicant for insurance prior to the inception of insurance coverage.

(C) A beneficiary of a life insurance policy underwritten by the licensee.

(D) A claimant under an insurance policy issued by the licensee.

(E) An insured under an insurance policy or an annuitant under an annuity issued by the licensee.

(F) A mortgagor of a mortgage covered under a mortgage insurance policy.

(G) A participant or a beneficiary of an employee benefit plan that the licensee administers or sponsors or for which the licensee acts as a trustee, insurer or fiduciary.

(H) An individual covered under a group or blanket insurance policy or group annuity contract issued by the licensee.

(I) A claimant in a workers' compensation plan.

(ii) Examples of persons who are not consumers are as follows:

(A) An individual is not a consumer solely because the individual is a beneficiary of a trust for which the licensee is a trustee.

(B) An individual is not a consumer solely because the individual has designated the licensee as trustee for a trust.

(C) An individual who is a consumer of another financial institution is not a licensee's consumer solely because the licensee is acting as agent for, or provides processing or other services to, that financial institution.

Department--The Insurance Department of the Commonwealth.

Federal regulation--The Federal Health Insurance Portability and Accountability Act (HIPAA) privacy regulation as promulgated by the United States Department of Health and Human Services at 45 CFR Parts 160--164.

Financial institution--

(i) An institution the business of which is engaging in activities that are financial in nature or incidental to the financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C.A. § 1843(k)).

(ii) The term does not include the following:

(A) A person or entity with respect to a financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C.A. §§ 1--25).

(B) The Federal Agricultural Mortgage Corporation or an entity charged and operating under the Farm Credit Act of 1971 (12 U.S.C.A. §§ 2001--2279cc).

(C) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights) or similar transactions related to a transaction of a consumer, as long as the institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

Health care--

(i) Preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, procedures, tests or counseling that either:

(A) Relates to the physical, mental or behavioral condition of an individual.

(B) Affects the structure or function of the human body or a part of the human body, including the banking of blood, sperm, organs or other tissue.

(ii) Prescribing, dispensing or furnishing to an individual drugs or biologicals, or medical devices or health care equipment and supplies.

Health care provider--A physician or other health care practitioner licensed, accredited or certified to perform specified health services consistent with the laws of the Commonwealth, or a health care facility.

Health information--Information or data except age, gender or nonpublic personal financial information, whether oral or recorded in a form or medium, created by or derived from a health care provider or the consumer that relates to one or more of the following:

(i) The past, present or future physical, mental or behavioral health or condition of an individual.

(ii) The provision of health care to an individual.

(iii) Payment for the provision of health care to an individual.

Insurance product or service--A product or service that is offered by a licensee under the insurance laws of the Commonwealth. Insurance service includes a licensee's evaluation, brokerage or distribution of information that the licensee collects in connection with a request or an application from a consumer for an insurance product or service.

Licensee--

(i) A licensed insurer, as defined in section 201-A of the act (40 P. S. § 65.1-A), a producer and other persons or entities licensed or required to be licensed, or authorized or required to be authorized, or registered or required to be registered under the act or The Insurance Company Law of 1921 (40 P. S. §§ 361--991.2361), including health maintenance organizations holding a certificate of authority under section 201 of the Health Care Facilities Act (35 P. S. § 448.201).

(ii) The term does not include:

(A) Bail bondsmen as defined in 42 Pa.C.S. § 5741 (relating to definitions).

(B) Motor vehicle physical damage appraisers as defined in section 2 of the Motor Vehicle Physical Damage Appraiser Act (63 P. S. § 852) and § 62.1 (relating to definitions).

(iii) Subject to subparagraph (iv), the term does not include governmental health insurance programs such as the following:

(A) The Children's Health Insurance Program as provided for in the Children's Health Care Act (40 P. S. §§ 991.2301--991.2361).

(B) The Medicaid program as provided for in sections 441.1--453 of the Public Welfare Code (62 P. S. §§ 441.1--453).

(C) The Medicare+Choice program as provided for in the Balanced Budget Act of 1997, sections 1851--1859, Medicare Part C under Title XVIII of the Social Security Act (42 U.S.C.A. §§ 1395w-21--1395w-29).

(D) The Adult Basic Care program as provided for in Act 77 of 2001 (June 26, 2001). See section 1303 of the Tobacco Settlement Act (35 P. S. § 5701.1303).

(iv) The term includes a licensee that enrolls, insures or otherwise provides an insurance related service to participants that procure health insurance through a governmental health insurance program exempted under subparagraph (iii).

(v) Subject to subparagraph (ii), the term "licensee" shall also include a nonadmitted insurer that accepts business placed through a surplus lines licensee (as defined in section 1602 of The Insurance Company Law of 1921 (40 P. S. § 991.1602) (relating to definition of surplus lines licensee)) in this Commonwealth, but only in regard to the surplus lines placements placed under Article XVI of The Insurance Company Law (40 P. S. §§ 991.1601--991.1625).

Nonpublic personal financial information--As defined in § 146a.2 (relating to definitions).

Nonpublic personal health information--

(i) The term means ~~health information that~~ either OF THE FOLLOWING:

(A) HEALTH INFORMATION THAT IDENTIFIES ~~Identifies an individual~~ who is the subject of the information.

(B) HEALTH INFORMATION THAT THERE ~~There is~~ a reasonable basis to believe could be used to identify an individual.

(ii) The term does not include nonpublic personal financial information.

Producer--An insurance agent or broker licensed or required to be licensed by the Department under the act.

Subchapter B. RULES FOR DISCLOSURE OF NONPUBLIC PERSONAL HEALTH INFORMATION

Sec.

146b.11. Authorization required for disclosure of nonpublic personal health information.

146b.12. Authorizations.

146b.13. Authorization request delivery.

§ 146b.11. Authorization required for disclosure of nonpublic personal health information.

(a) *Authorization required.* A licensee may not disclose nonpublic personal health information about a consumer unless an authorization is obtained from the consumer whose nonpublic personal health information is sought to be disclosed.

(b) *Insurance function exception.* Nothing in this section prohibits, restricts or requires an authorization for the disclosure of nonpublic personal health information by a licensee to the extent that the disclosure of nonpublic personal health information is necessary for the performance of one or more of the following insurance functions by or on behalf of the licensee:

- (1) Claims administration, including coordination of benefits and subrogation.
- (2) Claims adjustment, INVESTIGATION, NEGOTIATION, SETTLEMENT and management.
- (3) Detection, prevention, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity.
- (4) Underwriting.
- (5) Policy placement or issuance.
- (6) Loss control.
- (7) Ratemaking and guaranty fund functions.
- (8) Reinsurance and excess loss insurance.
- (9) Risk management.
- (10) Case management.
- (11) Disease management AND WELLNESS PROGRAMS.
- (12) Quality assurance.
- (13) Quality improvement.
- (14) Performance evaluation.
- (15) Provider TRAINING, ACCREDITATION OR CERTIFICATION BY A RECOGNIZED ACCREDITING OR CERTIFYING BODY, LICENSE AND CREDENTIAL ~~credentialing~~ verification.
- (16) Utilization review.
- (17) Peer review activities.
- (18) Actuarial, scientific, medical or public policy research.
- (19) Grievance and complaint procedures.

(20) Internal administration of compliance, managerial and information systems.

(21) Policyholder service functions.

(22) Auditing.

(23) Reporting (EXAMPLES INCLUDE REPORTING TO MEDICAL INDEX OR CONSUMER REPORTING BUREAUS AND LEGALLY REQUIRED REPORTING OF DISEASE, INJURY, VITAL STATISTICS, CHILD OR ADULT ABUSE, NEGLECT OR DOMESTIC VIOLENCE).

(24) Database security.

(25) Administration of consumer disputes and inquiries.

(26) External accreditation standards.

(27) The replacement of a group benefit plan or workers compensation policy or program.

(28) Activities in connection with a sale, merger, transfer or exchange of all or part of a business or operating unit.

(29) An activity that permits disclosure without authorization under the Federal regulation.

(30) Disclosure that is required, or is one of the lawful or appropriate methods, to enforce the licensee's rights or the rights of other persons engaged in carrying out a transaction or providing a product or service that a consumer requests or authorizes.

(31) An activity otherwise permitted by law, required under governmental regulatory or reporting authority, or to comply with LEGAL PROCESS ~~a court ordered warrant, a subpoena or summons issued by a judicial officer, administrative judge, referee, hearing officer or a grand jury subpoena.~~

(32) Compliance with qualified medical child support Orders.

(33) Preventive service reminders that do not require disclosure of nonpublic personal health information that a consumer has not previously disclosed directly to the recipient of the information.

(C) DISCLOSURE OF NONPUBLIC PERSONAL HEALTH INFORMATION IS NECESSARY WHEN THE DISCLOSURE IS REQUIRED OR WHEN DISCLOSURE IS USUAL, APPROPRIATE OR ACCEPTABLE FOR THE PURPOSE OF PERFORMING AN INSURANCE FUNCTION IDENTIFIED IN SUBSECTION (B).

(eD) Insurance functions performed by third parties on behalf of the licensee. A licensee may disclose nonpublic personal health information to a third party not licensed by the Department provided that the licensee enters into an agreement with the third party that prohibits the third party from disclosing or using the nonpublic personal health information IS DISCLOSED ONLY for a purpose THE PURPOSES other than to carry OF CARRYING out one or more of the insurance functions identified in subsection (b). THE DEPARTMENT MAY HOLD A LICENSEE RESPONSIBLE FOR DISCLOSURES MADE BY A THIRD PARTY THAT VIOLATE THE REQUIREMENTS OF THIS CHAPTER.

(eE) Additional insurance functions. Additional insurance functions may be added with the approval of the Commissioner to the extent they are necessary for appropriate performance of insurance functions and are fair and reasonable to the interest of consumers. The addition of insurance functions may be done by publication of a notice identifying the additional insurance functions in the Pennsylvania Bulletin.

§ 146b.12. Authorizations.

(a) *Valid authorization contents.* A valid authorization to disclose nonpublic personal health information under § 146b.11(a) (relating to authorization required for disclosure of the nonpublic personal health information) shall be in written or electronic form and shall contain all of the following:

(1) The identity of the consumer who is the subject of the nonpublic personal health information.

(2) A general description of the types of nonpublic personal health information to be disclosed.

(3) General descriptions of the parties to whom the licensee discloses nonpublic personal health information, the purpose of the disclosure and how the information will be used.

(4) The signature of the consumer who is the subject of the nonpublic personal health information or the individual who is legally empowered to grant authority and the date signed.

(5) Notice of the length of time for which the authorization is valid and that the consumer may revoke the authorization at any time and the procedure for making a revocation.

(b) *Duration of authorization.* An authorization for the purposes of § 146b.11(a) shall specify a length of time for which the authorization shall remain valid, which may not be for more than 24 months.

(c) *Revocation of authorization.* A consumer who is the subject of nonpublic personal health information may revoke an authorization provided under this subchapter at any time, subject to the rights of an individual or licensee who acted in reliance on the authorization prior to notice of the revocation.

(d) Record of authorization. A licensee shall retain the authorization and a revocation of the authorization, or copies thereof, for 6 years in the record of the individual who is the subject of nonpublic personal health information.

§ 146b.13. Authorization request delivery.

A request for authorization and an authorization form may be delivered to a consumer as part of a privacy notice delivered under Chapter 146a (relating to privacy of consumer financial information), provided that the request and the authorization form are clear and conspicuous. An authorization form is not required to be delivered to the consumer or included in other notices unless the licensee intends to disclose nonpublic personal health information under § 146b.11(a) (relating to authorization required for disclosure of nonpublic personal health information).

Subchapter C. ADDITIONAL PROVISIONS

Sec.

146b.21. Relationship with other laws.

146b.22. Nondiscrimination.

146b.23. Violation.

146b.24. Compliance dates.

§ 146b.21. Relationship with other laws.

(a) Relationship with the Federal regulation. Irrespective of whether a licensee is subject to the Federal regulation, if a licensee complies with the requirements of the Federal regulation, the licensee will not be subject to this chapter.

(b) Relationship with other state law or regulation. Nothing in this chapter preempts or supersedes existing laws or regulations of the Commonwealth that relate to medical records, health or insurance information privacy.

(c) Relationship with the Fair Credit Reporting Act. This chapter will not be construed to modify, limit or supersede the operation of the Federal Fair Credit Reporting Act (15 U.S.C.A. §§ 1681--1681u), and no inference may be drawn on the basis of the provisions of this chapter regarding whether information is transaction or experience information under section 603 of that act (15 U.S.C.A. § 1681a).

(d) Relationship with section 648 of the act (40 P. S. § 288) (relating to customer privacy). This chapter will not be construed to modify, limit or supersede the operation of section 648 of the act (40 P. S. § 288) (relating to customer privacy).

§ 146b.22. Nondiscrimination.

A licensee may not unfairly discriminate against a consumer because that consumer has not granted authorization for the disclosure of nonpublic personal health information under this chapter.

§ 146b.23. Violation.

Violations of this chapter are deemed and defined by the Commissioner to be an unfair method of competition and an unfair or deceptive act or practice and shall be subject to applicable penalties or remedies contained in the Unfair Insurance Practices Act (40 P. S. §§ 1171.1--1171.15).

§ 146b.24. Compliance dates.

(a) Licensees with \$5 million or more in annual receipts shall comply with the applicable requirements of this chapter by ~~April 14, 2003~~ THE CORRESPONDING COMPLIANCE DATE APPLICABLE TO THE FEDERAL REGULATION.

(b) Licensees with LESS THAN \$5 million or less in annual receipts shall comply with the applicable requirements of this chapter by April 14, 2004 THE CORRESPONDING COMPLIANCE DATE APPLICABLE TO THE FEDERAL REGULATION.



**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

September 5, 2002

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

Re: Insurance Department Final
Form Regulation No. 11-209,
Privacy of Consumer Health
Information

Dear Mr. Nyce:

The Insurance Department is hereby-withdrawing regulation number 11-209, Privacy of Consumer Health Information, from your consideration at this time in order to make further clarifications.

The Department is simultaneously submitting the revised regulation for your review.

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

The Final Form Regulation listed below has been sent to the following:

| Reg # | Regulation Title | Date Sent | 09/05/2002 |
|---|---|-------------------------|-------------------------------------|
| 11-209 | Privacy of Consumer Health Information | | |
| <hr/> | | | |
| Mr. Reynolds E. Becker | | | |
| Vice President - Property/Casualty | | | |
| Alliance of American Insurers | | | |
| 3025 Highland Parkway | | | |
| Downers Grove, IL 60515-1289 | | | |
| | | Letter Co-Author | |
| Phone | (630) 724-2109 X00000 | Email | rbecker@allianceai.org |
| <hr/> | | | |
| Mr. Michael J. Bartholomew | | | |
| Senior Counsel, State Relations | | | |
| American Council of Life Insurers | | | |
| 101 Constitution Ave N.W. | | | |
| Washington, DC 20001 | | | |
| | | Letter Co-Author | |
| Phone | (202) 624-2178 X00000 | Email | michaelbartholomew@acli.com |
| <hr/> | | | |
| Mr. J. Stephen Zielezienski | | | |
| Assistant General Counsel | | | |
| American Insurance Association | | | |
| 1130 Connecticut Ave. NW | | | |
| Washington, DC 20036 | | | |
| | | Letter Co-Author | Taylor Cosby |
| Phone | (202) 828-7175 X00000 | Email | |
| <hr/> | | | |
| Ms. Kimberly J. Kochler | | | |
| Director, Policy Management | | | |
| BlueCross of Northeastern Pennsylvania | | | |
| NA, PA | | | |
| | | Letter Co-Author | |
| Phone | (717) 671-8204 X00000 | Email | kimberly.kockler@bcnepa.com |
| <hr/> | | | |
| Ms. Kathleen P. Kelly | | | |
| Privacy Officer | | | |
| Capital Blue Cross | | | |
| Harrisburg, PA 17177 | | | |
| | | Letter Co-Author | |
| Phone | (717) 541-6063 X00000 | Email | Kathy.Kelly!capbluecross.com |
| <hr/> | | | |

Reg # **Regulation Title**
11-209 **Privacy of Consumer Health Information**

Date Sent **09/05/2002**

Ms. Kimberly S. Gray

Chief Privacy Officer

Highmark, Inc.

1800 Center St.

Camp Hill, PA 17011

Phone (717) 730-1598 X00000

Letter Co-Author

Email kimberly.gray@highmark.com

Ms. Julie E. Haywood

Senior Counsel

Independence Blue Cross

1901 Market Street

Philadelphia, PA 19103-1480

Phone (215) 241-9548 X00000

Letter Co-Author

Email julie.haywood@ibx.com

Mr. Samuel R. Marshall

President

Insurance Federation of Pennsylvania, Inc.

1600 Market St.

Philadelphia, PA 19103

Phone (215) 665-0505 X00000

Letter Co-Author

Email sammy1@ifpenn.org

Ms. Dolores M. Hodgkiss

Executive Director

Managed Care Association of Pennsylvania

240 North Third Street, Suite 501

Harrisburg, PA 17108-2108

Phone (717) 238-2600 X00000

Letter Co-Author

Email info@managedcarepa.org

Ms. Christine F. Klejbuk

Vice President & Chief Public Policy Officer

PANPHA

1100 Bent Creek Blvd

Mechanicsburg, PA 17050

Phone (717) 763-5724 X00000

Letter Co-Author

Email beth@panpha.org

Reg # Regulation Title

Date Sent

09/05/2002

11-209 Privacy of Consumer Health Information

Mr. Steve C. Elliott

President

Pennsylvania Association of Mutual Insurance Companies

320 W Market Street

Harrisburg, PA 17101

Letter Co-Author

Phone (717) 233-1599 X00000

Email selliottpamic.org

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

I.D. NUMBER: 11-209
 SUBJECT: Privacy of Consumer Health Information
 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
 REGULATORY COMMISSION
 SEP 5 11 31 28

FILING OF REGULATION

| DATE | SIGNATURE | DESIGNATION |
|--------|----------------------|--|
| 9/5/02 | <u>M. E. Hatcher</u> | HOUSE COMMITTEE ON INSURANCE |
| 9/5/02 | <u>Spillo Eubank</u> | |
| 9/5/02 | <u>Lucy Mitchell</u> | SENATE COMMITTEE ON BANKING & INSURANCE |
| 9/5/02 | <u>P. McDermott</u> | |
| 9/5/02 | <u>S. Pagan</u> | INDEPENDENT REGULATORY REVIEW COMMISSION |
| _____ | _____ | ATTORNEY GENERAL |
| _____ | _____ | LEGISLATIVE REFERENCE BUREAU |

September 4, 2002