



American Insurance Association

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September 23, 2002

BY E-MAIL

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

Original: 2257

RE: AIA Comments on Revised Pennsylvania Draft Regulation (September 2002): Chapter 146b, "Privacy of Consumer Health Information"

Dear Mr. Salvatore:

The American Insurance Association ("AIA") is writing this letter in response to the most recent draft of the Pennsylvania Insurance Department ("Department") regulation Chapter 146b, "Privacy of Consumer Health Information" ("Revised Health Privacy Regulation" or "Revised Regulation"). AIA previously submitted comments on September 12, 2001 and April 15, 2002 with respect to this Regulation. At this stage in the process, our comments are confined to two major concerns: (1) the "necessary" limitation on application of the business function exceptions; and (2) new language that allows the Department to "hold a licensee responsible for disclosures made by a third party that violate the requirements of this Chapter." See §§ 146b.11(b), (d). We urge the Department to carefully consider the recommendations offered by AIA in this letter.

§ 146b.11 (b) ("Necessary" Limitation)

Subsection 146b.11(b) states, "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." (Emphasis added, highlighting the deviation from §17B of the NAIC Model Privacy Regulation.) The Revised Regulation defines "necessary" as a disclosure "required or... usual, appropriate or acceptable for the purpose of performing an insurance function identified in" § 146b.11(b). This language generates a number of issues. First, as the Department acknowledges, the "necessary" limitation has its origins in federal medical privacy

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regulations adopted by the U.S. Department of Health and Human Services (“HHS”). Yet, the HHS rules do not apply to the property/casualty industry. As a result, the Revised Regulation attempts to thrust federal standards on insurers not covered by those standards. The Department should avoid language in state privacy regulations that has the effect of bringing property/casualty insurers into a federal privacy environment from which they have been intentionally excluded.

Second, the inclusion of this new standard separates the Revised Health Privacy Regulation from those of every other insurance regulatory jurisdiction that has adopted the NAIC Model Regulation’s health information privacy article. As a result, property/casualty insurers will need to evaluate whether their existing privacy compliance programs – largely developed based on compliance with the NAIC Model Privacy Regulation – have to be altered to account for this additional standard. This in turn will require the devotion of unforeseen resources, and insurers doing business in Pennsylvania will incur increased costs. As AIA has stated repeatedly, uniformity and consistency of privacy regulation in the 51 insurance regulatory jurisdictions are crucial to implementing privacy standards in an efficient and effective manner.

Third, it is unclear who will determine what is “necessary,” applying the new definitional standard, and how that standard will be applied. Insurance licensees may be unable to predict how the Department applies the necessary limitation and whether perfectly acceptable information disclosure practices will be curtailed in Pennsylvania. Further, if non-licensees from whom our members collect nonpublic personal health information start interpreting the term “necessary” in a restrictive way, our members’ ability to evaluate, administer, and settle claims may be compromised.

Moreover, while the Department purportedly looked to the HHS rules in drafting the “necessary” standard, it is clear from reviewing those rules that the Department has not adopted the flexibility envisioned by HHS. On page 53197 of the Federal Register detailing the final rules (67 Fed. Reg. 53182, 53197), HHS states:

“It is the Department’s policy that the minimum necessary standard is intended to be consistent with, and not override, professional judgment and standards, and that covered entities must implement policies and procedures based on their own assessment of what protected health information is reasonably necessary for a particular purpose, given the characteristics of their business and their work force.” (Emphasis added).

While we continue to urge the Department not to apply the “necessary” standard to those licensees not covered by the HHS rule, at minimum, all licensees should be afforded the flexibility that accompanies the “necessary” standard to determine the scope of nonpublic personal health information to be disclosed to carry out their business purposes.

Fourth, it is unclear what purpose the additional language in §§ 146b.11 (b), (c) serves. Disclosures without authorization are already limited by the business function exceptions. Pennsylvania consumers will not be further protected by a quantity limitation on the amount of health information shared for an excepted business function.

For each of these reasons, as well as those contained in our September 12, 2001 and April 15, 2002 submissions, AIA respectfully urges the Department to remove the "necessary" limitation from § 146b.11 (b) of the Regulation or, alternatively, incorporate the flexibility to conduct business operations into that limitation, as intended by HHS.

§ 146b.11(c) (Third-Party Responsibility Requirement)

While the Department has removed the "agreement" requirement in § 146b.11(d), it has added troubling language at the end of that subsection, which effectively allows the Department to hold insurance licensees responsible for violations by third-party non-licensees and makes this draft of the Revised Regulation as burdensome as the last draft. That language reads: "The Department may hold a licensee responsible for disclosures made by a third party that violate the requirements of this Chapter." This appears to constitute "backdoor" regulation of non-licensees. AIA can find nothing in Pennsylvania insurance law that permits the Department to regulate the actions of non-licensees either directly or indirectly.

More importantly, this language flatly assumes that every "third party" to whom a licensee discloses nonpublic personal health information stands in an agency relationship with the licensee. AIA respectfully submits that the degree of licensee responsibility for third party actions is a mixed question of fact and law to be determined by the courts, not a matter to be decided by regulatory fiat. AIA believes that the Department is exceeding its authority in dictating the nature of licensee relationships with third parties and respectfully requests that the Department withdraw this new language from § 146b.11(d).¹

In conclusion, on behalf of our member companies, AIA respectfully asks that the above comments, in tandem with comments submitted on September 12, 2001 and April 15, 2002, be strongly considered when assessing additional revisions to the Pennsylvania Health Privacy Regulation. The recommendations submitted here are needed to make licensee compliance with the Revised Regulation a manageable task. We reserve the right to supplement our comments as the process moves forward. Thank you for your attention. If you have questions or comments, please contact Taylor Cosby, Vice President, at 410-267-9581 or Stef Zielezienski, Assistant General Counsel, at 202-828-7175.

Respectfully submitted,

/s/

Taylor Cosby

/s/

J. Stephen Zielezienski

cc: Loudon Campbell, Esq.

¹ AIA remains willing to work with the Department on a bulletin or circular letter to resolve concerns with third-party handling of nonpublic personal health information. There are a variety of options short of the current draft language that can help ease those concerns.

IRRC

From: Wilmarth, Fiona E.
Sent: Tuesday, September 24, 2002 9:18 AM
To: IRRC
Cc: Miller, Sarah E.; Sandusky, Richard M.; Wyatte, Mary S.
Subject: FW: AIA Comments - Regulation Number 11-209, Privacy of Consumer Health Information (As Revised, September 2002)
comments on #2257

-----Original Message-----

From: Salvatore, Peter [mailto:psalvatore@state.pa.us]
Sent: Tuesday, September 24, 2002 9:06 AM
To: Wilmarth, Fiona E.
Subject: FW: AIA Comments - Regulation Number 11-209, Privacy of Consumer Health Information (As Revised, September 2002)

Fiona,

More comments... I think the IRRC needs to invite the members of the insurance industry to the next Reg Review Seminar. These guys continue to send in comments and suggestions when we are not requesting them. I am also faxing one from NAI.

Pete

-----Original Message-----

From: Zielezienski, Stephen [mailto:szielezienski@aiaadc.org]
Sent: Monday, September 23, 2002 11:21 AM
To: 'psalvatore@state.pa.us'
Cc: Cosby, Taylor; 'llc@escm.com'
Subject: AIA Comments - Regulation Number 11-209, Privacy of Consumer Health Information (As Revised, September 2002)

Dear Mr. Salvatore:

Attached please find AIA's supplemental comments with respect to the September 5, 2002 revisions to the Pennsylvania Insurance Department's health information privacy regulation. Please let me know if you cannot open the attachment.

Regards,

Stef Zielezienski
Assistant General Counsel
American Insurance Association
202-828-7175

<<PA - Proposed Health Privacy Regs - AIA Final Comment - Sept 23, 2002.doc>>



**National Association
of Independent Insurers**

2600 River Road, Des Plaines, IL 60018-3286

**ANN M. WEBER
COUNSEL**

September 23, 2002

Original: 2257

VIA FACSIMILE & REGULAR MAIL

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

RE: Comments on Health Privacy Regulation

Dear Chairman McGinley:

The National Association of Independent Insurers (NAII) would like to reiterate concerns raised by the property and casualty industry regarding health privacy regulations submitted to the IRRC by the Pennsylvania Department of Insurance. The NAII represents 288 property/casualty insurers doing business in Pennsylvania that provide approximately 32% of the state's property/casualty insurance coverage. These companies have a vital interest in obtaining guidance as to compliance with the privacy provisions of Gramm-Leach-Bliley (GLB) and in uniform privacy standards.

First and foremost is the issue of the need for a health privacy regulation at all in Pennsylvania. GLB does not include health information privacy and therefore does not require any action on the states' part on this issue. This is of grave concern to the property and casualty industry. It could result in dual compliance standards for property/casualty insurers and confusion and frustration for the consumer. The dual compliance issue arises from regulations on health information privacy promulgated by the United States Department of Health and Human Services. While these regulations do not impact property/casualty insurers directly, they probably will do so indirectly. Many people with whom or entities with which property/casualty insurers contract or otherwise do business with clearly fall within the federal regulations. They will have to insist that the property/casualty insurers comply with the federal health information standards in order to do business with those insurers. If these standards are different from the Pennsylvania regulation, however, property/casualty insurers will face having to comply with two different privacy standards. That entails costs for the insurers. It most likely also entails problems for the consumer such as: multiple authorization forms for release of the same information, duplicate but inconsistent notices on privacy protection policies, and delay in claims payment because necessary information takes longer to obtain.

Phone: (847) 297-7800 FAX: (847) 297-5064
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Ltr. to John R. McGinely, Jr.
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Second, workers' compensation coverage is included in the regulation. The definition of "consumer" expressly references workers' compensation. GLB excludes workers' compensation coverage in that it is limited to products or services used primarily for personal, family or household purposes. Approving the regulation with the inclusion of workers compensation in Pennsylvania will subject workers' compensation carriers and the businesses they insure to new privacy practices and procedures.

Third, is the issue that claims processing functions, including the administration and processing of first and third party claims, are included under the insurance function exemptions, yet the definition of consumer includes claimants under an insurance policy issued by the licensee. The industry is concerned that this will cause confusion. Clarification that the regulation does not apply to third party claimant in the definition of consumer is needed.

Thank you for reviewing these concerns of the property and casualty industry

Sincerely,



Ann M. Weber
Counsel

AMW/rp
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- cc: Honorable Nicholas A. Micozzie
- Honorable Anthony DeLuca
- Honorable Edwin G. Holl
- Honorable Jack Wagner
- Peter J. Salvatore
- Eloise J. Frazier