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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

May 16, 2002

Honorable M. Diane Koken, Commissioner  
Insurance Department  
1326 Strawberry Square  
Harrisburg, PA 17120

Re: Regulation #11-209 (IRRC #2257)  
Insurance Department  
Privacy of Consumer Health Information

Dear Commissioner Koken:

Enclosed are the Commission's Comments which list objections and suggestions for consideration when you prepare the final version of this regulation. These Comments are not a formal approval or disapproval; however, they specify the regulatory criteria which have not been met.

The Comments will soon be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce  
Executive Director

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Enclosure

cc: Honorable Nicholas A. Micozzie, Majority Chairman, House Insurance Committee  
Honorable Anthony DeLuca, Democratic Chairman, House Insurance Committee  
Honorable Edwin G. Holl, Chairman, Senate Banking and Insurance Committee  
Honorable Jack Wagner, Minority Chairman, Senate Banking and Insurance Committee

# Comments of the Independent Regulatory Review Commission

on

## Insurance Department Regulation No. 11-209

### Privacy of Consumer Health Information

May 16, 2002

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Insurance Department (Department) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

#### **Section 146b.2. Definitions. - Clarity.**

##### *Licensee*

The definition of this term excludes governmental health insurance programs. We request the Department clarify whether or not a licensee that administers a governmental health insurance program is bound by the requirements in this regulation.

##### *Nonpublic personal health information*

In its comments, the American Insurance Association (AIA) notes that the wording of Paragraph (i)(B) is not parallel to Paragraph (i)(A), and suggests revised language to make the two provisions parallel. We agree that AIA's suggested revisions would add clarity.

#### **Section 146b.11. Authorization required for disclosure of nonpublic personal health information. - Statutory Authority; Clarity.**

##### *Subsection (b)*

This subsection allows disclosure of nonpublic personal health information "to the extent that the disclosure of nonpublic personal health information is necessary for the performance of ... insurance functions...." This provision differs from the corresponding provision in the National Association of Insurance Commissioners (NAIC) model regulation. We have two concerns.

First, for clarity, the Department should either delete the phrase "to the extent that the disclosure of nonpublic personal health information is necessary" in this section, or specify the criteria used to determine when disclosure is "necessary."

Second, the regulation is silent regarding when, and by whom, the "necessary" disclosure determination is made. We request the Department explain how this provision will be implemented.

Subsection (b)(23) lists “reporting” as an insurance function which may be exempt from the requirement to obtain authorization from the consumer prior to disclosing nonpublic personal health information. Clarity would be improved by listing examples of the types of “reporting” included in this exemption.

*Subsection (c)*

This subsection allows an insurer to “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 ... information for a purpose other than to carry out ... insurance functions....” Commentators note that this provision is not included in the NAIC model and question the Department’s authority to impose requirements on third parties that are not licensed by the Department.

We request that the Department explain how it will enforce this requirement. Specifically, what enforcement authority will the Department have if a third party violates the terms of an agreement? If the Department intends to hold the licensee responsible for the acts of a third party, the regulation should specify the licensee’s responsibilities and the consequences for not meeting those responsibilities.

*Subsection (d)*

This subsection provides that the Insurance Commissioner may add insurance functions to the list found in Subsection (b) by publication of a notice in the *Pennsylvania Bulletin*. Substantive amendments to the regulation may only be made in compliance the Commonwealth Documents Law, the Commonwealth Attorneys Act, and the Regulatory Review Act. Therefore, any future additions to the list in Subsection (b) must be made through the rulemaking process.

**Section 146b.12. Authorizations. - Need; Reasonableness.**

Subsection (d) requires licensees to retain authorizations and revocations of authorization for six years. Given that an authorization is valid for no more than two years, why is it necessary to require a six-year record retention period?

**Section 146b.24. Compliance dates. - Consistency with Statute; Clarity.**

We have three concerns in regard to this section. First, Subsections (a) and (b) refer to licensees’ annual “receipts.” A commentator questioned if the term “receipts” means premiums. For clarity, we suggest the final-form regulation include a definition of “receipts” in Section 146b.2.

*Definitions.*

Second, Subsection (a) lists the compliance date for licensees with \$5 million or more in annual receipts, while Subsection (b) lists the compliance date for licensees with \$5 million or less in annual receipts. The final-form regulation should be revised to reflect one compliance date for receipts that amount to \$5 million.

Third, the regulation lists compliance dates of April 14, 2003 and April 14, 2004. These dates are consistent with the implementation dates for the Federal Health Insurance Portability and Accountability Act (HIPAA) privacy regulation. However, commentators have expressed concerns that the compliance dates for the HIPAA regulation could change after the promulgation of this regulation. This concern is due to the issuance of a federal Notice of Proposed Rulemaking which could delay the HIPAA compliance dates relating to the requirement for agreements between licensees and third parties.

We understand that the Department intends for the compliance dates for this regulation to be consistent with HIPAA. Therefore, the Department should consider adding language which would clarify that compliance with this regulation will be required on the same dates that compliance with the HIPAA regulation is required.