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MEMORANDUM

April 6, 2001

TO: Senate Committee on Insurance, Tourism and Transportation
FR: Senator Roger Breske, Chair
RE: Proposed Administrative Rule 00-189; *Relating to privacy of personal information.*

Administrative Rule 00-189 was recently referred to the Senate Committee on Insurance, Tourism and Transportation. For your reference, I have included the analysis from the Office of the Commission of Insurance. If you would like to request a hearing, please contact Vaughn in my office before ***Friday, April 20, 2001.***

ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE CREATING A RULE

To create ch. INS 25, Wis. Adm. Code, relating to privacy of personal nonpublic information.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE

Statutory authority: ss. 600.01(2), 601.41(3), 633.17 and 628.34(12), Stats.

Statutes interpreted: ss. 600.01, 610.70, 633.17 and 628.34 (12), Stats.

Rule governing privacy of Consumer Financial and Health Information

This rule is based on the National Association of Insurance Commissioners ("NAIC") model Privacy of Consumer Financial and Health Information Regulation. That model was prepared by the NAIC to meet the requirements of Title V of the federal Gramm-Leach-Bliley Act ("GLB"). The objective of the NAIC in preparing that model was to achieve uniformity with the federal privacy rules for financial information.

The NAIC model addresses nonpublic personal health information more comprehensively, and with greater protection, than provided under the GLB federal privacy rules. The NAIC concluded that the insurance industry has unique access to nonpublic personal health information such that greater protection than provided under the federal privacy rules was warranted. This rule incorporates the NAIC provisions concerning nonpublic personal health information, but applies those provisions only to the extent that state law does not already provide protection for health information. State law currently includes provisions that govern patient health care records obtained from providers and provisions that govern information insurers obtain directly from individuals in connection with personal lines insurance (for example life, home and automobile and health insurance). Accordingly, the NAIC (and this rule's) provisions governing nonpublic personal health information primarily apply to information an insurer obtains from an individual in connection with administration of commercial property and casualty insurance.

1. Protection of Nonpublic Personal Financial Information:

The financial information portion of the proposed rule tracks the GLB privacy regulations that were promulgated by the federal banking agencies in May 2000. Licensees (all individuals or entities required to obtain a license under the Wisconsin

insurance code, including agents, brokers, third party administrators and insurers) must provide notices describing their privacy policies to their consumers and customers, and provide consumers and customers with the opportunity to prohibit the sharing of nonpublic personal financial information with nonaffiliated third parties ("opt out"). Agents may rely on compliance by the insurers they represent. Disclosure among affiliated entities is not restricted. "Nonpublic personal financial information" includes any nonpublic information obtained by a licensee from a consumer, not just "financial" information. However it does not include health information because health information is subject to separate protections. In addition, the rule makes it clear that the GLB provisions are effective in this state on and after the effective date for the rule.

The proposed rule includes certain exceptions to the general prohibition on sharing information with non-affiliates without going through the privacy notice and opt out procedures. These exceptions are intended to allow sharing with non-affiliates for normal business reasons contemplated in the transaction. The proposed rule permits sharing nonpublic personal financial information with nonaffiliated third parties if the licensee gives initial notice of its privacy policies to the consumer (or in the case of a group or workers compensation policy, to the policyholder) and the information is shared under an agreement for the third party to provide services or under a joint marketing agreement. The proposed rule also permits sharing nonpublic personal financial information with non-affiliates to accomplish the purpose of processing and servicing a consumer transaction and for certain enumerated purposes, including purposes authorized by law, to protect against fraud or breach of confidentiality, to provide information to rate advisory, accreditation, and rating organizations, to attorneys and accountants, to regulators, in connection with a merger or sale of a business, and to respond to a subpoena or court ordered disclosure.

The restrictions on sharing information with non-affiliates apply to information obtained from individuals who are not customers of the licensee but who provide information to obtain a benefit under a policy or as claimant. However licensees are not required to provide privacy notices to those consumers or follow the opt out procedure unless they share the information other than as permitted under the rule.

The rule includes provisions that prohibit the sharing of account access information. The rule also includes a provision that prohibits unfair discrimination based on refusal to give consent to the sharing of information.

2. Protection of Nonpublic Personal Health Information:

The rule includes separate provisions governing health information that is obtained by an insurer from an individual. Current law already protects health information under most circumstances so the rule applies to the few situations not already addressed, primarily health information obtained in the course of administration of a property and casualty commercial policy. Section 610.70, Stats., already protects personal medical information that is obtained by an insurer in connection with administration of a personal lines policies (life, auto, homeowners and health). The rule makes it clear that s. 610.70, Stats., applies to personal medical information obtained in connection with those types of policies. Under the rule (and current law) an insurer is responsible for ensuring that its agents comply with s. 610.70, Stats. The rule's health information provisions do not apply to patient health care records obtained from providers because those records are already subject to restrictions under s. 146.82, Stats.

Those licensees not governed by s. 610.70, Stats., primarily commercial property and casualty insurers, brokers and third party administrators, are subject to provisions of the rule that prohibit the licensee from sharing health information with any person, affiliated or non-affiliated, unless they obtain affirmative consent to the sharing of health information with any person. The rule includes exceptions to this restriction intended to allow the licensee to disclose the health care information consistent with the purpose for which it was obtained. Some of these include claims administration; claims adjustment and management; detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity; underwriting; policy placement or issuance; loss control; rate-making and guaranty fund functions; reinsurance and excess loss insurance; risk management; case management; disease management; quality assurance; quality improvement; performance evaluation; provider credentialing verification; utilization review; peer review activities; and actuarial, scientific, medical or public policy research. 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. An insurer may apply for, and receive approval for, an additional function if the commissioner determines it is fair and reasonable to the interests of consumers.

The health information provisions of the rule do not apply to licensees who are in compliance with the health information privacy regulations promulgated by the U.S. Department of Health and Human Services ("DHHS") pursuant to the Health Information Portability and Accountability Act ("HIPAA"), including if the licensee complies with the regulation before its applicability date. The DHHS regulations have been promulgated but will not apply to health information for at least two years. The DHSS regulations apply to "health plans." That term is defined to include health insurers. Accordingly it is likely this exception will have limited, if any, application. Health insurers are subject to s. 610.70, Stats., not the health information provisions of this rule, and must continue to comply with s. 610.70, Stats., regardless of whether they comply with the DHSS regulation.

This rule is effective on the first day of the first month commencing after the date of publication. However, licensees are required to commence providing initial notice of their privacy policies for renewing policies on and after the first day of the fourth month commencing after publication.

SECTION 1. Chapter Ins 25 is created to read:

CHAPTER 25

PRIVACY OF CONSUMER FINANCIAL AND HEALTH INFORMATION

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