



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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REPORT ON Section Ins 25, Wis. Adm. Code, relating to privacy of personal information

Clearinghouse Rule No 00-189

Submitted Under s. 227.19 (3), Stats.

The proposed rule-making order is attached.

(a) Statement of need for the proposed rule

This rule is based on a model was prepared by the National Association of Insurance Commissioners ("NAIC") to meet the requirements of the federal Title V of the 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. This rule implements the GLB privacy provisions and is necessary to establish standards for licensees relating obtaining and disclosing nonpublic personal information.

(b) Modifications made in proposed rule based on testimony at public hearing:

The following modifications were made in response to testimony at the public hearing or letters submitted for the public hearing:

1. The Wisconsin Insurance Alliance ("WIA") pointed out that commercial property and casualty insurance and workers' compensation insurance policies are not subject to s. 610.70, Stats. WIA noted that the proposed rule accurately reflected that application of s. 610.70, Stats., but asked that the rule include a clear statement to that effect to minimize confusion. Such a statement was included.

2. The WIA pointed out that s. 102.13, Stats., permits sharing of health information for the purpose of processing a workers compensation claim and asked that the rule include a reference to that provision. Such a provision was included.
3. Wisconsin Association of Health Plans ("WAHP") asked that the requirement to give a group or workers compensation policyholder (usually the employer) notice of privacy policies be deleted. The rule was modified to require that the policyholder be given only the initial privacy notice.
4. The WIA asked that it be made clear that the initial privacy notice need not be given when a binder is issued. The rule was modified to make it clear that the privacy notice need not be given when a binder is issued provided that a consumer may request delivery and provided that the privacy notice is given when the policy is delivered.
5. State Farm asked that the rule be modified to make it clear that a reciprocal insurer is subject to its provisions. The modification was made.
6. The WIA asked that the rule explicitly include among the exceptions permitting sharing of nonpublic person financial information sharing for the purpose of workers compensation premium audits, workers' compensation first reports of injury, and workers' compensation loss runs. These exceptions are consistent with provisions already included but explicit provisions were added to the rule.
7. The WIA and the WAHP suggested several editorial or technical changes that did not have a substantive effect that were incorporated into the rule.

(c) Persons who appeared or registered regarding the proposed rule:

Appearances For:

None

Appearances Against:

In part: Stephen Meli
Center for Public Representation
925 Bascom Mall
Madison, WI 53706

Appearances For Information:

Timothy D. Fenner
Indendent Insurance Agents of Wisconsin
PO Box 1767
Madison WI

Joe Kochelski
Wisconsin Association of Health Plans
10 E. Doty #503
Madison WI 53703

Don Meator
Farmers Insurance Group
500 Elm Grove Rd.
Elm Grove, WI

Registrations For:

Kip Kobussen
General Casualty
One General Drive
Sun Praire, WI 53590

Steve Radke
Northwestern Mutual Life Insurance Company
Wisconsin Association of Life and Health Insurers
720 E. Wisconsin Ave
Milwaukee WI 53202

Ron Hermes
Health Insurance Association of America
16 N. Carroll St. Suite 305
Madison 53703

Registrations Against:

None

Registrations Neither for nor against:

Lynn M. Retan
Greater LaCrosse Health Plans
217 S. Hamilton St
Suite 200
Madison WI 53703

Mary Hoffenbredl
Atrium Health Plan Inc
4222 Bazley Pkwy
Madison WI 53705

Letters received:

Each of the parties who appeared submitted a letter.

(d) Response to Legislative Council staff recommendations

All comments were addressed in the revised draft.

(e) Regulatory flexibility analysis

1. None of the methods specified under s. 227.14 (2), Stats., for reducing the rule's impact on small businesses were included because all must be treated equally and thus it is not possible to have different rules for one segment of the population.
2. No issues were raised by small businesses during the hearing on the proposed rule.
3. The proposed rule does not impose any additional reporting requirements on small businesses.
4. The proposed rule will require by small businesses to incorporate into their systems the require notices. Since much of the obligation to provide those notices is imposed on insurers, small businesses will largely be able to rely on the processes established by the insurers. To the extent that an insurer is a small business, or that a licensee small business is not associated with an insurer, the small business will incur costs to incorporate in their existing processes the preparation and delivery of privacy and opt out notices. These costs can not be quantified.
5. No methods specified under s. 227.114 (2), Stats., are included in the proposed rule, except that agents are not required to comply to the extent that the insurer they represent complies on their behalf.

(f) Fiscal Effect

See fiscal estimate attached to proposed rule.

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PROCESSING INSTRUCTIONS TO AGENCY HEADS

[ENCLOSED ARE THE SENATE AND ASSEMBLY RULE JACKETS CONTAINING THE LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT. AN ADDITIONAL COPY OF THE CLEARINGHOUSE REPORT IS ENCLOSED FOR YOUR FILES.]

PLEASE NOTE: Your agency must complete the following steps in the legislative process of administrative rule review:

1. On the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Report Received by Agency."
2. On the appropriate line or lines on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date or dates and, in column 2, "Public Hearing Held" OR "Public Hearing Not Required."
3. Enclose in both clearinghouse rule jackets, in triplicate, the notice and report required by s. 227.19 (2) and (3), Stats. [The report includes the rule in final draft form.]
4. Notify the presiding officer of the Senate and Assembly that the rule is in final draft form by hand delivering the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk. At the time of this submission, on the appropriate line on the face of the clearinghouse rule jacket, each Chief Clerk will enter, in column 1, the appropriate date and, in column 2, "Report Received from Agency." Each clearinghouse rule jacket will be promptly delivered to each presiding officer for referral of the notice and report to a standing committee in each house.
5. If the agency does not proceed with the rule-making process on this rule, on the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Rule Draft Withdrawn by Agency" and hand deliver the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk.

FOR YOUR INFORMATION: A record of all actions taken on administrative rules is contained in the Bulletin of Proceedings of the Wisconsin Legislature. The clearinghouse rule jackets will be retained by the Legislature as a permanent record.

[See reverse side for jacket sample.]

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TCA:jal;kja
3/00

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 00-189

AN ORDER to create chapter Ins 25, relating to privacy of personal information.

Submitted by **OFFICE OF THE COMMISSIONER OF INSURANCE**

12-29-00 RECEIVED BY LEGISLATIVE COUNCIL.

01-30-01 REPORT SENT TO AGENCY.

RS:DD;jal;ksm

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached

YES

NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached

YES

NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached

YES

NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached

YES

NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached

YES

NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached

YES

NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached

YES

NO

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CLEARINGHOUSE RULE 00-189

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. The statutory provisions referenced in the analysis under "statutory authority" should be compared with the statutory provisions listed in s. Ins 25.01. Presumably, the references should be consistent. The reason for inclusion of some of the references is not self evident.

b. The last paragraph under the portion of the analysis discussing protection of nonpublic personal health information indicates that the health information provisions of the rule do not apply to licensees who are in compliance with health information privacy regulations promulgated pursuant to the Health Information Portability and Accountability Act. The analysis notes that these regulations will not be effective for two years. Section Ins 25.77 states if a licensee complies with all requirements of the federal regulations, "except for its effective date provision," the licensee is not subject to the provisions of subch. V of the proposed rule. It is not clear whether subch. V is intended to apply to such licensees before the federal rules become effective. If it is intended that certain licensees are exempt from the rule, based on assumptions as to what the federal rules will be (i.e., are exempt from subch. V immediately), delegation issues may be raised.

2. Form, Style and Placement in Administrative Code

a. It is conceded: (1) that uniformity among the states concerning compliance with federal privacy rules is desirable; and (2) that, given the subject matter of the rule, a degree of

complexity and resort to technical terms and terms of art is unavoidable. However, the choice to use the National Association of Insurance Commissioners (NAIC) model as the basis of the rule results in a rule that is a substantial departure from accepted drafting style in this state. While many differences in form and style arguably are of little consequence, some of the differences make the rule awkward and unnecessarily difficult to read: (1) including substance in definitions; (2) including in substance commentary that more properly should be placed in notes; and (3) assuming some titles are substance. Further, the overall organization and sequence of provisions of the rule are poor and a number of provisions are awkwardly drafted. Many deficiencies can be traced to the extremely awkward use of "examples."

Examples of less consequential departures from standard form and style include inconsistent use of subunit titles and use of parentheses.

Because it is assumed that the Office of the Commissioner of Insurance will continue to use the NAIC model as a basis of the rule, most of the style deficiencies observed in the rule relating to form and style will not be noted in these comments.

b. Given the length of the rule, the analysis is cursory. For example, there is no discussion of the kinds of information included in "nonpublic personal financial information." While the analysis, as far as it goes, does a good job of summarizing a complex rule, consideration should be given to expanding the analysis to include more substance.

c. The definition of "consumer" in s. Ins 25.04 (6) (a) is particularly awkward.

d. Section Ins 25.04 (6) (b) 4. a. creates subunits below the subparagraph level. This is to be avoided in rule drafting and, consequently, divisions (i) to (iv) should be collapsed into subpar. a.

e. In s. Ins 25.04 (11) (b) 3., the parentheses should be replaced by commas. [The entire rule should be reviewed for this problem.]

f. Section Ins 25.04 (18) should include "(18)" before reference to "(a)."

g. Reference to a "few" examples in s. Ins 25.15 (3) (b) 1., lacks specificity; can a more definite requirement be provided? See also, par. (c) 2.

h. Appendix A contains a number of "sample clauses." These should be referenced in notes to the corresponding provisions of the rule.

i. It is assumed that when the rule is sent to the Legislature for standing committee review, it will contain a final regulatory flexibility analysis. [See s. 1.02 (6), Manual.]

j. Section Ins 25.70 (2) refers to additional insurance functions that may be added with the approval of the commissioner. When these additional functions are known, they should be promulgated as part of ch. Ins 25.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the first narrative paragraph of the analysis, “achieve” should replace “achieving” in the last sentence.

b. The first narrative paragraph of the analysis indicates that the objective of the NAIC in preparing the model legislation on which the rule is based is to achieve uniformity with the federal privacy rules for “financial” information. How, then, does the portion of the rule relating to protection of nonpublic personal health information relate to the NAIC model and the federal privacy rules?

c. In the first paragraph of the analysis under “protection of nonpublic personal financial information,” the acronym “TPA” should be spelled out.

d. In the last paragraph, first sentence, of the analysis under “protection of nonpublic personal financial information,” “apply” should replace “applies.”

e. It is not clear where in the rule it is made clear that an insurer is responsible for ensuring that its agents are in compliance with s. 610.70, Stats., as asserted in the last sentence of the first paragraph of the analysis under “protection of nonpublic personal health information.” Section Ins 25.80 does not provide what the analysis indicates.

f. Under “additional provisions,” the analysis indicates that the rule includes provisions prohibiting the sharing of account access information. Is the analysis referring to s. Ins 25.40? If so, under the rule, that provision is included in the limits on disclosures of financial information under subch. III. It is not clear why that provision is separated from that portion of the analysis discussing protection of nonpublic personal financial information.

g. Section Ins 25.02 (1) (intro.) indicates that the chapter governs the treatment of specified information about individuals by “all” licensees. However, certain licensees are not governed as specified by the provisions of subch. V of the rule.

h. The purpose and effect of s. Ins 25.02 (3) is unclear.

i. In s. Ins 25.04 (2) (b) 3. (intro.), should “ensure” be “ensures”?

j. In s. Ins 25.04 (6) (b) 5. (intro.), it appears that the word “a” should be inserted before the word “workers’.”

k. In s. Ins 25.04 (8) (c), one element of the definition of “control” is the power to exercise a controlling influence over the management or policies of the company, “as the commissioner determines.” There is no standard provided for the commissioner to make that determination.

l. In the examples included with the definition of “customer relationship” in s. Ins 25.04 (10) (b) 2., it appears that “consumer” and “individual” are inconsistently used. Based on

the introductory clause of subd. 2., it appears that "consumer" should be used throughout the examples.

m. In s. Ins 25.04 (16) (b), "an" should be substituted for "a" preceding "insurance."

n. In s. Ins 25.04 (20) (a), there is nothing in the definition of "personally identifiable financial information" that links the specified information to "financial" information; i.e., as drafted, any kind of information provided or obtained as specified in the definition could be considered "financial information."

o. In s. Ins 25.15 (3) (b) 1. (intro.), the phrase "These might" should be replaced by the phrase "Examples may." In sub. (3) (c), the phrase "using more detailed categories" is used. More detailed than what categories? Finally, this section contains two subsections that are numbered "(5)."

p. Section Ins 25.17 (1) (b) 1. (intro.) refers to "adequate notice" that the consumer can opt-out. There is reference in sub. (1) (a) (intro.) to a "clear and conspicuous notice" that "accurately explains the right to opt-out." However, there is no express requirement of an "adequate" notice.

q. Section Ins 25.17 (1) (b) 1. a. contains the cross-reference "as described in s. Ins 25.15 (1) (b) and (c)." The referenced provisions do not "describe" anything.

r. Section Ins 25.17 (4) (b) and (c) should be compared for consistency. Paragraph (b) allows either option; par. (c) seems to say that if the second option is chosen, then the first one applies as well.

s. Is s. Ins 25.17 (4) (d) intended to refer to an opt-out direction from a joint consumer only?

t. In s. Ins 25.20 (2) (a) (intro.), "any" is misspelled.

u. Section Ins 25.25 (2) (a) (intro.) fails to indicate what notice or notices are being referred to. Compare par. (b) (intro.), which refers to notice of "privacy policies and practices."

v. Section Ins 25.25 (3) (b) refers to a customer requesting a licensee to refrain from sending any information regarding the customer relationship. Should the rule address how and when this may occur?

w. In s. Ins 25.30 (1) (b), the referenced rules should be preceded by "ss."

x. In s. Ins 25.30 (2) (b), should reference be made to "other than as permitted in ss. Ins 25.50, 25.55 and 25.60"?

y. In s. Ins 25.35 (2) (b) 2., a space should be provided between the "n" and "s" in "ins." See also sub. (4) (intro.), s. Ins 25.25 (5) (a) and sample clauses A-5 and A-6 in this regard.

z. It appears that s. Ins 25.60 (1) (e) 2. does not grammatically follow the introductory clause.

aa. Section Ins 25.60 (3) is meaningless. It appears to be intended to follow an introductory clause but there is no introductory clause.

ab. The cross-reference in s. Ins 25.73 (2) should be clarified. Is reference to a disclosure authorization under s. 610.70, Stats., intended to be limited to the purposes specified under s. 610.70 (2) (b), Stats.?