



July 10, 2023

Via email:

Lois Alexander (laalexander@naic.org)

NAIC Market Regulation Manager

Katie C. Johnson (VA), Chair

Cynthia Amann (MO), Co-Vice Chair

Chris Aufenthie (ND), Co-Vice Chair

Privacy Protections (H) Working Group

National Association of Insurance Commissioners

1100 Walnut Street, Suite 1500

Kansas City, MO 64106

Re: National Association of Insurance Commissioners Consumer Privacy Protection Model Law (#674): Exposure Draft of Article VI, Sections 17 and 18 and Article VII, Sections 19 and 20

Dear Chair Johnson, Vice Chairs Amann and Aufenthie, and Members of the Privacy Protections Working Group:

On behalf of the National Association of Professional Insurance Agents (PIA)¹, thank you for the opportunity to provide comments on the National Association of Insurance Commissioners (NAIC) Privacy Protections Working Group's (PPWG) updated draft of Article VI, Sections 17 and 18, and Article VII, Sections 19 and 20 of the Consumer Privacy Protection Model Law (#674) (herein referred to as "MDL #674"). We appreciate the PPWG's continued attention to the challenges posed by the application of current and nascent technologies and business practices to NAIC's current consumer protection regulatory regime.

1. PIA shares the PPWG's goal of protecting insurance consumer data, and our feedback reflects that shared goal.

PIA appreciates the work that the PPWG has invested in both exposure drafts and the time the PPWG has continued to devote to this important subject over the past eighteen months or so. We also valued the time spent on consideration of the draft at the PPWG meeting held during the NAIC National Meeting in Louisville earlier this year and at the June interim meeting in Kansas

¹ PIA is a national trade association founded in 1931 whose members are insurance agents and agency owners in all 50 states, Puerto Rico, Guam, and the District of Columbia. PIA members are small business owners and insurance professionals serving insurance consumers in communities across America.

City. We were particularly grateful for the time PIA staff spent privately with the PPWG during a videoconference this past spring. During that meeting, we described the evolving ways independent agents are using data to strengthen the independent agency model and facilitate the growth of their small and mid-sized businesses all around the country.

In each forum, we have appreciated the regulators' collaborative mindset and the thoughtful questions they have posed. We look forward to continuing our partnership with PPWG members and interested regulators to ensure that the final version of MDL #674 both protects consumer data and cultivates the longevity and strength of the independent agency system in the United States. Both goals will benefit consumers.

Like the members of the PPWG, we share the goals of ensuring that consumer data is protected; that consumers get the opportunity to know how their data is being used; that they have the choice not to share data gratuitously in ways that make them uncomfortable; and that they are aware of that choice and are given the chance to exercise it. Empowering consumers to limit the circumstances in which their data may be shared is valuable, and data belonging to insurance consumers may be particularly susceptible to exploitation because of the extent to which transmission of consumers' personal information is required for consumers purchasing insurance products.

PIA's concerns about the newly exposed sections of Articles VI and VII are set forth below. We have omitted Article VI, Section 17 ("Investigative Consumer Reports") and Article VII, Section 20 ("Confidentiality") because we do not currently have concerns regarding those sections.

2. Article VI, Section 18: Compliance with HIPAA and HITECH.

a. Section 18(B): Potential source of ambiguity.

Section 18 governs the duties of licensees that are already subject to the consumer protection standards set forth in the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, commonly referred to as "HIPAA") and the Health Information Technology for Economic and Clinical Health Act (Public Law 111-5, commonly referred to as "HITECH"). Section 18 deems such licensees to be complying with MDL #674. Licensees relying on this section are required to submit to the appropriate state insurance regulatory authority "a written statement from an officer of the licensee certifying that the licensee collects, processes, retains, and shares all personal information *in the same manner as protected health information*" (emphasis added).

The identical phrase "in the same manner as protected health information" appears in Sections 18(A) and 18(B). In Section 18(A), though, the sentence containing that phrase begins, "A licensee that is subject to *and compliant with* ..." (emphasis added). The phrase "and compliant with" eliminates a possible source of ambiguity in Section 18(A) that its absence from Section 18(B) leaves in place.

In Section 18(B), the second use of the phrase "in the same manner as protected health information," does not include the descriptor "compliant with." The PPWG likely intends for

both sections to require licensees to treat consumer information subject to MDL #674 with the level of rigor associated with HIPAA/HITECH compliance. However, the phrase “in the same manner as,” without the description of the licensee as “compliant with” injects potential ambiguity into Section 18(B) that does not exist in Section 18(A). Section 18(B) appears to leave open the possibility that a malevolent licensee could under-protect consumer information susceptible to MDL #674, particularly if such a licensee already under-protects its “protected health information.”

To eliminate this potential loophole in Section 18(B), we recommend replacing “in the same manner as protected health information” with “as if it were protected health information,” so that the applicable standard for the protection of consumer information is unequivocal and equally rigorous, whether the data is subject to the substantive provisions of MDL #674 or the HIPAA/HITECH deemer clause.

Striking through ~~eliminated words~~ and underlining additional text, revised Section 18(B) would thus read:

- B. Any such licensee shall submit to the [Commissioner] a written statement from an officer of the licensee certifying that the licensee collects, processes, retains, and shares all personal information ~~in the same manner~~ as if it were protected health information.

b. Section 18(B): Defining “officer.”

Additionally, because an “officer” of each licensee availing itself of the deemer clause will have a duty to submit a written statement certifying that the licensee is compliant with HIPAA/HITECH, we recommend adding a definition of the word “officer” to Article I, Section 3, “Definitions,” or, in the alternative, referring here to an existing definition of the word “officer,” if one appears elsewhere within the NAIC consumer protection regulatory regime.

3. Article VII, Section 19: Power of the Commissioner.

a. Section 19(A): Unfair application of law.

Section 19(A) provides state insurance commissioners with the power to examine and investigate licensees for potential violations of MDL #674. Our concern about Section 19(A) focuses on the relationship between its first sentence and its final sentence, which says that a commissioner’s investigation or examination must “be conducted pursuant to [insert applicable statutes governing the investigation or examination of *insurers*]” (emphasis added). However, the first sentence of Section 19(A) explicitly allows such investigations or examinations to be performed as to all licensees, not only insurers.

These word choices appear to give commissioners the power to investigate or examine any licensee, whether insurer or non-insurer, and only subject commissioner activity to applicable statutes when such investigations and examinations involve insurers. When commissioners are investigating or examining non-insurers, on the other hand, the current language appears to allow commissioners to proceed uninhibited by applicable statutes. To remedy this apparent unfair application of law, we recommend that Section 19(A) be revised as follows:

- A. The Commissioner shall have power to examine and investigate the affairs of any licensee to determine whether the licensee has been or is engaged in any conduct in violation of this Act. This power is in addition to the powers which the Commissioner has under [insert applicable statutes governing the investigation or examination of insurers]. Any such investigation or examination shall be conducted pursuant to [insert applicable statutes governing the investigation or examination of ~~insurers~~ licensees].

b. Section 19(B): “Any” v. “every.”

Section 19(B) states that commissioners “have the power to examine and investigate the affairs of *every* insurance support organization acting on behalf of a licensee ...” (emphasis added). This wording is taken verbatim from MDL #670, as the exposure draft suggests. However, the word “every” could imply that a commissioner’s examination and investigation of the affairs of *any* insurance support organization acting on behalf of a particular licensee would require the commissioner to also examine and investigate *every other* insurance support organization acting on behalf of that licensee. To eliminate the availability of this interpretation, which seems to be at odds with the drafters’ intent, we recommend revising Section 19(B) as follows:

- B. The Commissioner shall have the power to examine and investigate the affairs of ~~every~~ any insurance support organization acting on behalf of a licensee that either transacts business in this state or transacts business outside this state that affects a person residing in this state to determine whether such insurance support organization has been or is engaged in any conduct in violation of this Act.

4. Conclusion.

We are grateful to the PPWG for its adherence to an aggressive timeline and for its flexibility in exposing the revisions to Article VI, Sections 17 and 18 and Article VII, Sections 19 and 20 of MDL #674 while the PPWG’s work on the remaining sections continues. We look forward to discussing the revisions with the members and interested regulators of the PPWG during its upcoming calls and during the in-person PPWG meeting in Seattle next month. As always, we appreciate the PPWG’s recognition of the concerns that are specific to the independent agent community and are thankful for the opportunity to provide the independent agent perspective.

Please contact me at lpachman@pianational.org or (202) 431-1414 with any questions or concerns. Thank you for your time and consideration.

Sincerely,



Lauren G. Pachman
Counsel and Director of Regulatory Affairs
National Association of Professional Insurance Agents