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State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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March 30, 2001

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HONORABLE ROBERT WELCH
SENATE CO-CHAIRPERSON
JOINT COMM FOR REVIEW OF ADM RULES
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MADISON WI 53702

A handwritten signature in cursive script, appearing to read "Randy Blumer".

Re: Section Ins 25, Wis. Adm. Code, relating to privacy of personal information
Clearinghouse Rule No. 00-189

Dear Senator Welch:

I am enclosing a copy of this proposed rule which has been submitted to the presiding officers of the legislative houses under s. 227.19 (2), Wis. Stat. A copy of the report required under s. 227.19 (3), Wis. Stat., is also enclosed.

Sincerely,

A handwritten signature in cursive script, appearing to read "Randy Blumer".

Randy Blumer
Deputy Commissioner of Insurance

RB:FN
Attachment: 1 copy rule & legislative report

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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SUBCHAPTER I-GENERAL PROVISIONS

Ins 25.01 Authority. This chapter is promulgated pursuant to the authority granted by ss. 601.41 (3), 610.70, 628.34 (12) and 633.17, Stats.

Ins 25.02 Purpose and scope. (1) **PURPOSES.** This chapter governs the treatment of nonpublic personal health information and nonpublic personal financial information about individuals by all licensees of the office of the commissioner of insurance except to the extent that a licensee is excepted from a provision of this chapter. This chapter does all of the following:

- (a) It requires a licensee to provide notice to individuals about its privacy policies and practices.
- (b) It describes the conditions under which a licensee may disclose nonpublic personal health information and nonpublic personal financial information about individuals to affiliates and nonaffiliated third parties.
- (c) It provides methods for individuals to prevent a licensee from disclosing that information.

(2) **COMPLIANCE.** This chapter applies to:

- (a) Nonpublic personal financial information about individuals who obtain or are beneficiaries of products or services primarily for personal, family or household purposes from licensees, about individuals who are beneficiaries under group health plans and claimants under workers' compensation policies, and about individuals who are third-party claimants against products or services obtained for business, commercial or agricultural

purposes. This chapter does not apply to information about companies or about individuals who obtain products or services for business, commercial or agricultural purposes; and

- (b) All nonpublic personal health information about individuals who obtain or are beneficiaries of products or services primarily for personal, family or household purposes from licensees, about individuals who are beneficiaries under group health plans and claimants under workers' compensation policies, and about individuals who are third-party claimants against products or services obtained for business, commercial or agricultural purposes, except to the extent the information is subject to s. 51.30, 146.81 to 146.84 or 610.70, Stats.

- (3) A licensee domiciled in this state that is in compliance with this chapter in a state that has not enacted laws or regulations that meet the requirements of Title V of the Gramm-Leach-Bliley Act (PL 102-106) is in compliance with Title V of the Gramm-Leach-Bliley Act in such other state.

Ins 25.03 Rule of construction. The examples in this chapter and the sample clauses in Appendix A of this chapter are not exclusive. Compliance with an example or use of a sample clause, to the extent applicable, constitutes compliance with this chapter .

Ins 25.04 Definitions. As used in this chapter, unless the context requires otherwise:

- (1) "Affiliate" means any company that controls, is controlled by or is under common control with another company.
- (2) (a) "Clear and conspicuous" means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.
 - (b) The following are examples of the application of "clear and conspicuous:"

1. 'Reasonably understandable.' A licensee makes its notice reasonably understandable if it does all of the following:
 - a. Presents the information in the notice in clear, concise sentences, paragraphs, and sections.
 - b. Uses short explanatory sentences or bullet lists whenever possible.
 - c. Uses definite, concrete, everyday words and active voice whenever possible.
 - d. Avoids multiple negatives.
 - e. Avoids legal and highly technical business terminology whenever possible.
 - f. Avoids explanations that are imprecise and readily subject to different interpretations.

2. 'Designed to call attention.' A licensee designs its notice to call attention to the nature and significance of the information in it if the licensee does all of the following:
 - a. Uses a plain-language heading to call attention to the notice.
 - b. Uses typeface and type sizes that are easy to read.
 - c. Provides wide margins and ample line spacing.
 - d. Uses boldface or italics for key words.

- e. In a form that combines the licensee's notice with other information, uses distinctive type size, style, and graphic devices, such as shading or sidebars.
3. 'Notices on web sites.' If a licensee provides a notice on a web page, the licensee designs its notice to call attention to the nature and significance of the information in it if the licensee uses text or visual cues to encourage scrolling down the page if necessary to view the entire notice and ensures that other elements on the web site, such as text, graphics, hyperlinks or sound, do not distract attention from the notice, and the licensee does any of the following:
- a. Places the notice on a screen that consumers frequently access, such as a page on which transactions are conducted.
 - b. Places a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature and relevance of the notice.
- (3) "Collect" means to obtain information that the licensee organizes or can retrieve by the name of an individual or by identifying number, symbol or other identifying particular assigned to the individual, irrespective of the source of the underlying information.
- (4) "Commissioner" means the commissioner of insurance.
- (5) "Company" means a corporation, limited liability company, business trust, general or limited partnership, association, sole proprietorship or similar organization.
- (6) (a) "Consumer" means an individual about whom a licensee has nonpublic personal information, who:

1. Seeks to obtain, obtains or has obtained an insurance product or service from a licensee that is to be used primarily for personal, family or household purposes;
2. Is a claimant under a workers' compensation policy;
3. Is insured under a group health plan;
4. Is a third-party claimant under an insurance product or service obtained for business, commercial or agricultural purposes,.

(b) The following are examples of consumers:

1. An individual who provides nonpublic personal information to a licensee in connection with obtaining or seeking to obtain financial, investment or economic advisory services relating to an insurance product or service is a consumer regardless of whether the licensee establishes an ongoing advisory relationship.
2. An applicant for insurance prior to the inception of insurance coverage is a licensee's consumer.
3. An individual is a licensee's consumer if all of the following conditions exist:
 - a. The individual is a beneficiary of a life insurance policy underwritten by the licensee, a claimant under an insurance policy issued by the licensee, a named insured or an annuitant under an insurance policy or an annuity, respectively, issued by the licensee, or a mortgagor of a mortgage covered under a mortgage insurance policy.

- b. The licensee discloses nonpublic personal financial information about the individual to a nonaffiliated third party other than as permitted under ss. Ins 25.50, 25.55 and 25.60.
- (c) The following are examples of individuals who are not consumers:
- 1. Provided that the licensee provides the initial notice under s. Ins 25.10 to the plan sponsor, group or blanket insurance policyholder, group annuity contract-holder, or workers' compensation policyholder and that the licensee does not disclose to a nonaffiliated third party nonpublic personal financial information about such an individual other than as permitted under ss. Ins 25.50, 25.55 and 25.60, an individual is not the consumer of the licensee solely because the individual is any of the following:
 - a. A participant or a beneficiary of an employee benefit plan that the licensee administers or sponsors or for which the licensee acts as a trustee, insurer or fiduciary.
 - b. Covered under a group or blanket insurance policy or group annuity contract issued by the licensee.
 - c. A claimant under a workers' compensation policy.
 - 2.
 - a. The individuals described in subd. 1 a. to c. are consumers of a licensee if the licensee does not meet all the conditions of subd. 1.
 - b. In no event shall the individuals, solely by virtue of the status described in subd. 1 a. to c., be deemed to be customers for purposes of this chapter.

3. An individual is not a licensee's consumer solely because he or she is a beneficiary of a trust for which the licensee is a trustee.
 4. An individual is not a licensee's consumer solely because he or she has designated the licensee as trustee for a trust.
 5. An individual who is a consumer of another financial institution is not a licensee's consumer solely because the licensee is acting as agent for, or provides processing or other services to, that financial institution.
- (d) "Consumer" includes the legal representative of an individual who is a consumer.
- (7) "Consumer reporting agency" has the same meaning as in Section 603(f) of the federal Fair Credit Reporting Act (15 U.S.C. 1681a(f)).
- (8) "Control" means any of the following:
- (a) Ownership, control or power to vote 25 % or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons.
 - (b) Control in any manner over the election of a majority of the directors, trustees or general partners, or individuals exercising similar functions, of the company or by an agreement establishing an attorney in fact for a reciprocal as define by s. 600.03 (41), Stats.
 - (c) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company.
- (9) "Customer" means a consumer who has a customer relationship with a licensee.

- (10) (a) "Customer relationship" means a continuing relationship between a consumer and a licensee under which the licensee provides one or more insurance products or services to the consumer that are to be used primarily for personal, family or household purposes.
- (b) The following are examples relating to customer relationship:
1. A consumer has a continuing relationship with a licensee if any of the following conditions exist:
 - a. The consumer is a current policyholder of an insurance product issued by or through the licensee.
 - b. The consumer obtains financial, investment or economic advisory services relating to an insurance product or service from the licensee for a fee.
 2. A consumer does not have a continuing relationship with a licensee under any of the following conditions:
 - a. The consumer applies for insurance but does not purchase the insurance.
 - b. The licensee sells the consumer airline travel insurance in an isolated transaction.
 - c. The consumer is no longer a current policyholder of an insurance product or no longer obtains insurance services with or through the licensee.
 - d. The consumer is a beneficiary or claimant under a policy and has submitted a claim under that policy, choosing a settlement option involving an ongoing relationship with the licensee.

- e. The consumer is a beneficiary or a claimant under a policy and has submitted a claim under that policy, choosing a lump sum settlement option.
- f. The customer's policy is lapsed, expired, or otherwise inactive or dormant under the licensee's business practices, and the licensee has not communicated with the customer about the relationship for a period of twelve consecutive months, other than annual privacy notices, material required by law or regulation, communication at the direction of a state or federal authority, or promotional materials.
- g. The consumer is an insured or an annuitant under an insurance policy or annuity, respectively, but is not the policyholder or owner of the insurance policy or annuity.
- h. The consumer's last known address according to the licensee's records is deemed invalid. An address of record is deemed invalid if mail sent to that address by the licensee has been returned by the postal authorities as undeliverable and if subsequent attempts by the licensee to obtain a current valid address for the consumer have been unsuccessful.

(11) (a) "Financial institution" means any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in Section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(b) Financial institution does not include any of the following:

- 1. Any person or entity with respect to any financial activity that is subject to the jurisdiction of the

Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

2. The Federal Agricultural Mortgage Corporation or any entity charged and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*).
 3. Institutions chartered by Congress specifically to engage in securitizations, secondary market sales, including sales of servicing rights, or similar transactions related to a transaction of a consumer, as long as the institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.
- (12) (a) “Financial product or service” means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under Section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).
- (b) Financial service includes a financial institution’s evaluation or brokerage of information that the financial institution collects in connection with a request or an application from a consumer for a financial product or service.
- (13) “Health care” means any of the following:
- (a) Preventive, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, procedures, tests or counseling that involves any of the following:
 1. It relates to the physical, mental or behavioral condition of an individual.