NAIC

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

April 25, 2000

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The Honorable James Jeffords
Chair
Senate Health, Education, Labor and Pensions Committee
428 Dirksen Senate Office Building
Washington, D.C. 20510-6300

Dear Chairman Jeffords:

The National Association of Insurance Commissioners (NAIC), representing the nation's fifty-five chief insurance regulators, submits the enclosed document and asks that it be included in the record for the hearing on "Medical Records Privacy" held by your committee on April 26, 2000.

The enclosed document is the comment letter the NAIC sent to the United States Department of Health and Human Services regarding its proposed health information privacy regulation. The letter raises many concerns including the following:

- Limited Applicability and Scope:
  The regulation only applies to a limited group of entities (health plans, health care providers and health care clearinghouses) and only applies to paper records. While we recognize that HHS is limited in its authority and jurisdiction to apply the standards established in the regulation, we think the regulation should apply to a broader group of entities that use and disclose protected health information and should apply to all insurers, not just health insurers. We think the regulation should protect all forms of individually identifiable health information, both paper and electronic.

- Preemption of State Laws:
  While we appreciate HHS' intent to create federal minimum standards, to preserve stronger state laws, and to protect certain state laws from any preemption, the NAIC membership has serious reservations about how the preemption standard used in the proposed regulation is to be implemented. The general rule is that "provisions" of state law are preempted to the extent that they are "contrary" to the federal statutory and regulatory scheme. We have found similar standards not to be very helpful in comparing state laws to federal requirements. A state must examine all its laws relating to health information privacy to determine whether or not its laws are contrary to the requirements in the proposed regulation. This in and of itself is a major project for states to undertake.

We offer a suggestion to help the operation of and to ease the administrative burden of implementing this standard. We propose that the states be given the greatest amount of flexibility in determining what the necessary scope of "provision" is when applying the general rule's contrary standard. In the regulation, HHS has recognized that states know their laws best and are best informed about how to apply their laws. The NAIC membership believes that the definition should preserve to the maximum extent possible state privacy initiatives that extend beyond the covered subject matter of the proposed regulation.

- Determination Process:
  There are several serious flaws with this proposed process:
  - First, the determination process is overly burdensome for states. Not only do states have to conduct a "contrary analysis" for all of their laws that protect health information and then submit requests for exceptions to HHS, but they also have to wait for HHS to make a determination in order for the states to enforce their laws.
  - Second, the proposed regulation states that the federal standard applies until a determination is made. Cessation of state regulation in the interim will essentially leave plans unregulated until HHS makes a determination. We believe the current assumption in the proposed regulation that the federal standard applies until a determination is made should be reversed. State laws should stand until and unless HHS has determined otherwise.
  - Third, the proposed regulation does not establish a time frame or deadline by which HHS has to issue a determination. We suggest that HHS revise its regulation to include a time period by which HHS has to make a determination. We also suggest that if HHS does not make a determination after a specified amount of time, then a default determination should be issued in favor of the state.
  - Finally, even if states are granted an exemption from preemption through the HHS determination process, there is a three-year time limit on how long a state law is exempt pursuant to this determination. The process is quite burdensome for the states, so we question the provision requiring states to ask for a re-determination on the same laws every three years as a waste of time and resources for the states and for HHS. The time limit should be eliminated.

- Lack of Guidance in Classifying State Insurance Laws:
  There is lack of guidance regarding state laws that are contrary to the proposed regulation but that could fall into more than one category of state laws that are exempt from preemption. State insurance laws easily could fall into several of the categories of exceptions. An example is a state law regulating health insurance plans (category one) that is more stringent than the federal regulation (category two) and requires health insurance plans to report information (category 3). We request that a clarification be included in the regulation stating that if a state law falls within several different exceptions, the state chooses which exception shall apply. The presumption should be that the state has the best knowledge of its laws and it has correctly classified its laws in the appropriate category of exceptions. We think this simple clarification statement will avert much litigation and prevent state insurance departments from having to defend endless challenges to their classification of their laws.

- Lack of Clarity in Classifying State Insurance Department Activities:
  The proposed regulation establishes a list of exceptions to the authorization requirement, such that protected health information may be used or disclosed without authorization in certain circumstances. However, under the HHS proposed regulation, the activities of state insurance departments fit under any one or more of the following three exceptions: (1) for disclosure to health oversight agencies for health oversight activities; (2) for disclosure for law enforcement purposes; and (3) for use and disclosure for judicial and administrative proceedings. The regulation is unclear about the role of insurance departments relative to these exceptions, and each of these exceptions has its own requirements and processes. We ask HHS to include language in the text of the proposed regulation stating that if a state insurance activity falls within several different exceptions, the state chooses which exception shall apply. In addition, we ask HHS to recognize the broad scope of legally authorized activities performed by insurance departments and to reflect those activities in the regulation.

- Permitted Versus Required Disclosure:
  Under the proposed regulation covered entities are "permitted" but not "required" to disclose necessary protected health information to health oversight and law enforcement agencies. We believe that covered entities under investigation by a state agency should be required to provide that state agency with access to necessary health information when performing its legally mandated duties. This disclosure should not be optional. By not requiring insurers to provide state insurance departments with access to records, filings and other documents that may contain individually identifiable information, state insurance departments' ability and authority to perform their regulatory responsibilities is undermined. In addition, obtaining authorization from all of an insurer's clients for investigation of an insurer's business practices is not feasible or practical.

In addition to these concerns, the members of the NAIC would appreciate further discussions with the witnesses regarding the interaction between the HHS regulation and the privacy requirements found in the newly enacted Gramm-Leach-Bliley Act.

For insights into the NAIC's position regarding the issues surrounding proposed federal health information privacy legislation, I refer you to the testimony the NAIC submitted to Congress on April 27, 1999, May 27, 1999, and July 20, 1999. These testimonies may be found on our website at www.naic.org/1news/testimonies/index.htm.

If you have any questions please contact Mary Beth Senkewicz, Senior Counsel for Health Policy, at (202) 624-7790.

Sincerely,

Signature on original

Kathleen Sebelius
Vice-President, NAIC
Chair, NAIC Health Insurance Task Force
Commissioner of Insurance, State of Kansas

Enclosure
CC: The Honorable Edward M. Kennedy