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Ms. Cynthia Amann
Chair, NAIC Privacy Protections (D) Working Group
Missouri Department of Insurance
301 W High St Rm 530
Jefferson City, MO 65101

Dear Ms. Amann:

I am writing on behalf of a Coalition¹ of health insurers, who represent some of the country's largest major medical insurers and health maintenance organizations, to comment on the NAIC Privacy Protections (D) Working Group's ("Working Group") proposed FIRST WORKING GROUP EXPOSURE DRAFT OF PRIVACY POLICY STATEMENT dated August 30, 2021 ("Exposure Draft"). We offer the following comments regarding the right to portability of information.

Portability, as that term is used in the GDPR and the CCPA, means something quite different from its use in HIPAA and NAIC insurance reforms models², and is inappropriate for application to the United States health insurance industry. The way that term is used in the GDPR and the CCPA it is also quite different from how the term is defined the Exposure Draft. The Exposure Draft includes the following definition of "data portability"

‘DEFINITION: Data portability, in common understanding, is the idea of having data stored in or created in a way that is easier to transport physically or electronically from one

¹ CVS Health/Aetna, Anthem, Cigna and UnitedHealthcare, who together provide health insurance and health maintenance organization coverage to more than 200 million members nationwide, are the members of this Coalition.

² In HIPAA and NAIC usage, portability is the ability to move from one health insurer to another without new preexisting condition limitations. Although popular, the term is not a privacy concept.

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system to another or one place to another. *It facilitates the consumer's right to access their information.*³

The GDPR portability concept operates under the assumption that the individual consumers should be able to decide with whom they conduct business, whose services they want to use, and where their information resides. Implicit in the concept is that portability addresses the concern that individuals be prevented from moving to another service provider. This harm does not exist in the health insurance industry. Employers and individuals regularly switch insurers, and individuals have the right to authorize and direct that their information be provided to another health insurer for quotes and potentially to replace coverage within the context of open enrollment periods which preserve markets and consumer options.

The Exposure Draft incorrectly defines portability as a tool to facilitate access to information. In the EU, portability is something much larger, and more problematic, than simply accessing information. There, portability is the ability of individuals, who are data subjects, to receive the personal data they have provided to a "controller" and transmit it to another controller without hindrance from the controller that presently has the data. The first "controller" is then required to delete the individual's personal information and not save or store it. While this makes sense for internet service providers, for example, it does not make sense in the group or individual health insurance markets. While the concept might work in the technology space, where individuals are free to change internet service providers at any time, there are contractual and risk management concerns, as well as health care concerns, that make this concept unworkable for consumers and insurers in the context of its application to our health insurance system and industry.

As discussed previously, an unfettered right to "portability," where that concept includes the responsibility to delete the information transmitted, runs counter to many states' insurance laws. State laws require insurance companies to maintain information for a variety of purposes, including record retention, which have all been discussed previously during our debates on the rights to amend and delete. The claims process also necessitates that health carriers maintain information on policyholders and, in fact, good health policy mandates that health insurers and health provider maintain accurate records of their policyholders and patients.

In an earlier letter, we noted that the United States Department of Health and Human Services ("HHS") recently published comments that share our concerns regarding well-intentioned, but potentially ill-conceived privacy regulation. In the executive summary to its proposed modifications to the HIPAA privacy rule, the HHS specifically warns that when done improperly, privacy rules "could present barriers to coordinated care and case management-or impose other regulatory burdens without sufficiently compensating for, or offsetting, such burdens through

³ Working Paper at page 39. *Emphasis added*

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privacy protections." HHS also warns that the unintended consequences of privacy rules that fail to consider all the nuances of our health care system could "impede the transformation of the health care system from a system that pays for procedures and services to a system of value-based health care that pays for quality care."

HHS raises these concerns, in part, because of the unique nature of health insurance, the regulation of health information and the interconnectivity of health insurance, health care providers and the health information that they share. HHS is properly concerned that otherwise well-intentioned regulation of health information could instead harm consumers by negatively impacting the coordination of care and case management. HHS' concerns regarding unintended consequences are quite appropriate when one carefully considers the possible ramifications of imposing this definition of portability on health insurers. As a result, the coalition strongly recommends that the Working Group reject the EU concept of data portability for health insurers.

Thank you for the opportunity to comment. If you have any questions, please feel free to reach out to me at either (202) 247-0316 or cpetersen@arborstrategies.com. We look forward to working with the Working Group as it discusses topics for possible inclusion in a white paper or possible revised NAIC privacy model.

Sincerely yours,



Chris Petersen
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cc: Lois Alexander