

# Arbor Strategies, LLC

**Chris Petersen**

804-916-1728

[cpetersen@arborstrategies.com](mailto:cpetersen@arborstrategies.com)

September 23, 2021

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 Coalition<sup>1</sup> of health insurers representing 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 in the hopes that we can provide additional focus to the Working Group's discussion and streamline the Exposure Draft with the goal of having the document available for the December national meeting.

In our September 9, 2021 comment letter, the Coalition stated that the Exposure Draft needed a more specific definition of the right to opt out of data sharing. The existing draft includes a rather broad definition which is not consistent with existing law or practices. It defines the right to opt out as "simply the ability of consumers to retain control of what data can be shared and to whom."<sup>2</sup> However, opt out rights are not absolute. Consumers may not opt out of state or federally mandated disclosures. For example, consumers are not, and should not be, given the right to instruct insurers not to disclose information for law enforcement purposes. Opt out rights only apply under specific circumstances and they are only a way for consumers to

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<sup>1</sup> 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.

<sup>2</sup> Exposure Draft at page 6.

control specific types of uses and disclosures. Any definition adopted by the Working Group should reflect that reality.

Therefore, recommend that the definition on page 6 of Exposure Draft be amended as follow:

▪**DEFINITION:** The right to opt out of information is ~~This is simply~~ the ability of consumers to retain control, under specified circumstances, of whether certain information can be shared and to whom. ~~The Working Group believes the current model law is on the right path.~~

~~Section 13 of MDL 670 requires written authorization of the individual before disclosing/sharing personal or privileged information about an individual collected or received in connection with an insurance transaction. If adopted by states, consumers have an automatic opt out of data sharing unless written authorization that meets the requirements is received by the insurer. The problem is not whether there is an opt out, the problem is whether it is clear to the consumer that they have opted in by inadvertently signing a document with very fine print regarding authorization to disclose personal or privileged information.~~

~~MDL 672 provides for the specifics of how the authorization is collected and makes sure it becomes clearer to the consumer that certain information is collected and will be shared if given authorization. a.~~

~~Definition— i. Opt out gives consumers the ability to direct a company not to sell/share their personal information to a third party. This “right” does not stop a company from distributing the data within the organization that collected it, even to different business units. ii. This “right” also does not stop all transfers to third parties as companies can continue to provide personal information to their service providers pursuant to a written contract that meets the law’s requirements. Further, companies can continue to provide data that does not meet the definition of personal information.....~~

Opt out rights must be considered in the overall framework of privacy laws. Privacy laws generally follow this basic rule: Consumer information may only be disclosed 1) by authorization or 2) if the disclosure is otherwise permitted or required by law. The right to opt out is a restriction on the right of insurers to disclose information as otherwise permitted by law. For example, Model 672 defines the right to opt out as follows: “opt out means a direction by the consumer that the licensee not disclose nonpublic personal financial information about that consumer to a nonaffiliated third party, other than as otherwise permitted by law.” The Exposure Draft notes, and we agree with the premise, that “Working Group believes that Model 672 is on the right path.”

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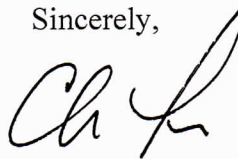
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Our September 9, 2021 comment letter also sets forth some general observations that are critical to the development of any privacy policy statement or model. These general observations are:

1. Changes to the privacy rules must be done cautiously and carefully to avoid consumer and insurer confusion;
2. Any new model should include a HIPAA safe harbor to reflect the reality that a robust regulatory framework also exists for HIPAA protected data; and
3. The rules that apply to technology companies are not appropriate for health insurers in light of the obligations that health insurers have to their members.

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](mailto:cpetersen@arborstrategies.com). We look forward to working with the Working Group as it discusses topics for possible inclusion in a revised NAIC privacy model.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Petersen". The signature is fluid and cursive, with the first name "Chris" and the last name "Petersen" clearly distinguishable.

Chris Petersen

cc: Lois Alexander