

RULES AND REGULATIONS

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 89]

Preparation of Forms

The Insurance Department (Department) amends Chapter 89 (relating to approval of life, accident and health insurance) to read as set forth in Annex A. This final-form rulemaking is made under the Department's general rulemaking authority as set forth in sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P.S. §§ 66, 186, 411 and 412), section 314 of the Accident and Health Filing Reform Act (40 P.S. § 3801.314) and the Department's rulemaking authority under the Unfair Insurance Practices Act (40 P.S. §§ 1171.1—1171.15). See *PALU v. Insurance Department*, 371 A.2d 564 (Pa. Cmwlth. 1977) (further explaining the Insurance Commissioner's authority to promulgate regulations under the Unfair Insurance Practices Act).

Purpose

This final-form rulemaking, as set forth in Annex A, will allow for the voluntary collection of demographic data, including questions related to race and ethnicity when certain criteria are met. Specifically, this amendment to § 89.12 (relating to application forms) will allow insurers to collect data that will help them develop better tools to address inequities in life, accident and health insurance coverage. Moreover, this amendment will be consistent with Federal and State efforts to address equity issues across society generally. For example, at the Federal level, the 2023 Notice of Benefit and Payment Parameters takes significant steps toward requiring health insurers to collect race and ethnicity data; beginning with the 2025 benefit year, health insurers will be required to collect it. Amending § 89.12(e) will allow the Commonwealth's health insurers to comply with this upcoming Federal requirement and remove an inconsistency between Federal and State provisions.

The provision, as currently written in § 89.12(e), addresses the inequities that were the focus of the landmark Civil Rights Act of 1964 (42 U.S.C. §§ 2000a—2000h-6), which prohibited “discrimination or segregation on the ground of race, color, religion or national origin.” Following that National precedent, on July 1, 1969, the Department issued § 89.12 for application forms, including: “Questions as to race or color are not permitted on the application.” See § 89.12(e).

In the 54 years since the 1969 issuance, society has continued to grapple with racial and ethnic equity issues. More recently, society has recognized that inequities can only be addressed if they are adequately identified. To identify those issues and measure improvement in addressing them, data is necessary. This final-form rulemaking will allow insurers to collect that data, if they choose, while continuing to prohibit insurers from using that data in an unfairly discriminatory manner. This is consistent with ongoing Federal initiatives outlined in the 2023 Notice of Benefit and Payment Parameters and will allow the Commonwealth's regulations to remain consistent with Federal law.

Comments and Responses

Notice of proposed rulemaking was published at 53 Pa.B. 2046 (April 15, 2023), with a 30-day comment

period. The Insurance Federation of Pennsylvania (IFP), Independence Blue Cross (IBC) and Oscar Health, Inc. (Oscar) submitted comments during the public comment period. These comments were taken into consideration.

The IFP expressed support for the proposed rulemaking without any additional comments.

IBC expressed support for the proposed rulemaking without additional comments.

Oscar expressed support for the proposed rulemaking without additional comments.

The Independent Regulatory Review Commission (IRRC) expressed no objections, comments or recommendations on the proposed rulemaking. In consideration of the support received, the Department made no changes to Annex A from the proposed rulemaking to this final-form rulemaking.

Affected Parties

This final-form rulemaking will affect foreign and domestic health and life insurers that hold a certificate of authority to write health and life insurance contracts in this Commonwealth.

Fiscal Impact

State government

This final-form rulemaking will have no fiscal impact upon the Department.

General public

This final-form rulemaking will have no fiscal impact upon the general public.

Political subdivisions

This final-form rulemaking will have no fiscal impact upon political subdivisions.

Private sector

This final-form rulemaking will have no fiscal impact upon the private sector, except for a possible minimal impact to the regulated entities who choose to collect the data.

Paperwork

This final-form rulemaking would impose minimal additional paperwork on the Department because it would review attestations and related information submitted by insurers choosing to collect the demographic data. The Department does not anticipate that this additional review will materially impact its regulatory activities.

Effective Date / Sunset Date

This final-form rulemaking will become effective immediately upon publication in the *Pennsylvania Bulletin*. The Department continues to monitor the effectiveness of regulations on a triennial basis; therefore, no sunset date has been assigned.

Contact Person

Questions or comments regarding this final-form rulemaking may be addressed in writing to Richard Hendrickson, Department Counsel, Insurance Department, 1341 Strawberry Square, Harrisburg, PA 17120, within 30 days following the publication of this notice in

the *Pennsylvania Bulletin*. Questions and comments may also be e-mailed to rihendrick@pa.gov or faxed to (717) 772-1969.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 4, 2023, the Department submitted a copy of the proposed rulemaking, published at 53 Pa.B. 2046, and a copy of a Regulatory Analysis Form to IRRC and the chairperson of the Banking and Insurance Committee of the Senate and to the chairperson of the Insurance Committee of the House of Representatives for comment.

Under section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), IRRC and the Banking and Insurance Committee of the Senate and the Insurance Committee of the House of Representatives were provided copies of comments received as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on November 15, 2023, this final-form rulemaking was deemed approved by the Banking and Insurance Committee of the Senate and the Insurance Committee of the House of Representatives. Under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)), IRRC met on November 16, 2023, and approved the final-form rulemaking.

Findings

The Commissioner finds that:

(1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law, and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 53 Pa.B. 2046.

(4) This final-form rulemaking adopted by this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code Chapter 89, are amended by amending § 89.12 to read as set forth in Annex A.

(b) The Department shall submit this final-form rulemaking to IRRC and the Banking and Insurance Committee of the Senate and the Insurance Committee of the House of Representatives, as required by law.

(c) The Department shall submit this final-form rulemaking to the Office of General Counsel and the Office of Attorney General for approval as to legality and form, as required by law.

(d) The Department shall certify this final-form rulemaking, as approved for legality and form, and deposit them with the Legislative Reference Bureau, as required by law.

(e) This final-form rulemaking shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

MICHAEL HUMPHREYS,
Insurance Commissioner

(*Editor's Note:* See 53 Pa.B. 7475 (December 2, 2023) for IRRC's approval.)

Fiscal Note: Fiscal Note 11-261 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 31. INSURANCE

PART IV. LIFE INSURANCE

CHAPTER 89. APPROVAL OF LIFE, ACCIDENT AND HEALTH INSURANCE

Subchapter A. REQUIREMENTS FOR ALL POLICIES AND FORMS

PREPARATION OF FORMS

§ 89.12. Application forms.

(a) When submitting a policy form to which a copy of the application will be attached when the policy is issued, a copy of the application shall be attached to the policy form. If the form of the application has already been approved, the form number and date of approval shall be shown either on the form or in the transmittal letter.

(b) If it is the practice of the insurer to attach a reduced size reproduction of the application to a form when issued, the application should be attached to each copy of the form submitted. The application should be legibly reproduced in the size to be used in the contract.

(c) An application which includes a provision for home office endorsements or corrections may not be approved for use unless it is specifically stipulated therein that a change may not be made in the amount of insurance, the age at issue, the plan of insurance or benefits applied for by the endorsements or corrections. This subsection does not apply to group applications.

(d) Applications shall contain clear and direct questions by the insurer permitting answers by the applicant only in the form of direct statements of known facts. Applications may not contain questions or representations based on indefinite or ambiguous terms or which are inconsistent with policy provisions and may not require the making of warranties by the applicant.

(e) An insurer may include questions as to demographic factors, including race and ethnicity, on an application subject to all of the following:

(1) The application clearly states that the disclosure of the data is voluntary.

(2) Questions as to the data include the following answer options verbatim:

(i) Prefer Not to Answer.

(ii) Other.

(3) At the time of application or when the data is collected, the insurer provides to the insured a written statement that contains the following information:

(i) The data will be maintained as private.

(ii) The data may not be used by the insurer for eligibility determinations, underwriting or rating purposes.

(iii) The insurer may not deny an application based on the applicant's refusal to answer the questions related to demographic data on the application.

(4) At the time of application or when the data is collected, the insurer provides a written explanation to the insured regarding all of the following:

- (i) Why the data is being requested by the insurer.
- (ii) How the data will support efforts to provide equitable coverage.
- (5) The insurer provides a written attestation to the Department that the insurer's application, collection and use of data meets Federal and State law regarding unfair discrimination, including all of the following:

- (i) The insured's data is maintained as private.
- (ii) The insured's data may not be used by the insurer for eligibility determinations, underwriting or rating purposes.

(iii) The insurer may not deny an application based on the applicant's refusal to answer the questions related to demographic data on the application.

(6) The insurer shall provide the written attestation in paragraph (5) for each product by the following dates:

- (i) June 20, 2024, for products in existence as of the effective date of this regulation.
- (ii) The date the product is filed.
- (iii) The date that there is a material change to the application or data collection process, even if not required to be filed.

(f) Nothing in this section may be construed to require an insurer to collect demographic information, including race and ethnicity data, at the time of application or otherwise.

[Pa.B. Doc. No. 23-1760. Filed for public inspection December 22, 2023, 9:00 a.m.]