

STATEMENTS OF POLICY

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 89]

Non-Enforcement of Prohibition on Data Collection—Statement of Policy; Notice 2022-05

[52 Pa.B. 2128]

[Saturday, April 9, 2022]

The Insurance Department (Department) adds the following statement of policy in § 89.12a (relating to application exceptions—statement of policy) regarding non-enforcement of the provision in § 89.12(e) (relating to application forms) originally published in the July 1, 1969 Guidelines for Examination of Policies, Applicable Rates and Related Forms. The other provisions in § 89.12 remain in effect.

Background

The provision in § 89.12(e) for individual and group policy forms for life, accident and health insurance sets forth guidance to specify that those policies were not allowed to be underwritten on the basis of "race or color." The provision addressed the inequities that were the focus of the landmark Civil Rights Act of 1964 (Pub.L. No. 88-352), 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." 31 Pa. Code § 89.12(e).

The 1969 prohibition was, at the time, ground-breaking in its approach to racial and ethnic equality. Significantly, in that era, while the Commonwealth's insurance law did prohibit unfair discrimination, it did not call out race or color or ethnicity as a discriminatory factor. See section 626 of The Insurance Company Law of 1921 (40 P.S. § 761); see also section 353 of The Insurance Company Law of 1921 (40 P.S. § 477a). Not until 1974, with the passage of the Unfair Insurance Practices Act (40 P.S. §§ 1171.1—1171.15), was discrimination in underwriting or eligibility requirements on the basis of "race, religion, nationality or ethnic group" specifically prohibited in the Commonwealth's insurance laws. See 40 P.S. § 1171.5(a)(7)(iii).

In the 50 years since the 1969 issuance, society has grappled with racial and ethnic tensions, and has come to the current decade recognizing that inequities can only be addressed if they are adequately identified. To identify those issues and measure improvement in addressing them, data is necessary. The National Association of Insurance Commissioners in 2020 created a Special Committee on Race and Insurance, with one

charge focusing specifically on the issue of the need to "consider enhanced data reporting. . .to identify race and other sociodemographic factors of insureds. . . ."1 The Federal government likewise has more recently focused on data collection. President Joe Biden, in one of his first acts as President, issued an Executive Order titled "Advancing Racial Equity and Support for Underserved Communities through the Federal Government." Executive Order 13985 of January 20, 2021 (86 FR 7009 (January 20, 2021)). Consistent with that directive, the Centers for Medicare & Medicaid Services of the Department of Health and Human Services, in its proposed Notice of Benefit and Payment Parameters for 2023, has proposed requiring insurers to report race and ethnicity data to address health equity issues:

For race and ethnicity data, we propose to require issuers to report race and ethnicity in accordance with the October 30, 2011 HHS Implementation Guidance on Data Collection Standards for Race, Ethnicity, Sex, Primary Language, and Disability Status (2011 HHS Data Standards) which is collected at a granular level that would allow HHS to better analyze more subpopulations than our current data allows us to do, thereby allowing us to consider more areas of health equity, as well as to better address discrimination in health care and health disparities.

...

[This data collection] would serve the compelling government interest of promoting equity in health coverage and care. . . .

Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023; Proposed Rule, 87 FR 584, 628 (January 5, 2022). Id. at 629-30 & n.171 (referencing Executive Order 13985). See also Pennsylvania COVID-19 Response Task Force: Health Disparity. Policy Recommendation Report, July 22, 2020.²

Purpose

Recognizing the importance of data collection to promote health equity, the Department is announcing its policy of non-enforcement of the prohibition under § 89.12(e). To foster diversity, equity and inclusion efforts, the Department will not enforce the provision in subsection (e) and will permit entities issuing insurance products regulated by the Department to collect race and ethnicity data on an application for diversity, equity and inclusion purposes only. Further, because the Commonwealth's insurance laws clearly prohibit discrimination, including discrimination on the basis of race and ethnicity, see sections 353 and 626 of The Insurance Company Law of 1921 (40 P.S. §§ 477a and 761) and section 5(a)(7) of the Unfair Insurance Practices Act, the Department clarifies that both questions as to race or color and data collection will be permitted when asked or collected in a manner that promotes health equity, but both activities must be done in a manner that guards against potentially discriminatory uses of this data. That is, where this information is sought to be collected to promote health equity, and not for eligibility, underwriting or rating purposes, the information may be collected, either on an application or in conjunction with the application and enrollment process. Unfair discrimination remains prohibited.

Note that for some types of insurance, such as comprehensive major medical insurance, a policy may not be underwritten and data would not be able to be used to impact a small group's or individual's premium rate as an explicit matter of law.³ For other types of

insurance, policies may be subject to eligibility or underwriting criteria or to rating variations based on demographic and other factors, albeit within the constraints of the laws prohibiting unfair discrimination. See 40 P.S. §§ 477a, regarding rates, 671, regarding rates and benefits, and 1171.5(a)(7), regarding rates; underwriting based on, inter alia, race and ethnicity.

Recognizing the statutory prohibitions against unfair discrimination, and in light of the discriminatory uses to which race and ethnicity data have been used in times past, an insurer may find it prudent to assure the applicant of, and demonstrate to the Department, the insurer's non-discriminatory purposes for the data collection, that is, to promote diversity, equity and inclusion. To that end, an insurer soliciting race and ethnicity data may be expected to clearly articulate to prospective insureds and to enrollees:

- (1) why the data is being requested;
- (2) how it will support efforts to provide equitable care;
- (3) how the data will be maintained as private; and
- (4) that their disclosure of demographic data is: (i) voluntary, with "prefer to not answer" and "other" options available for all demographic questions; and (ii) based on self-identification.

Further, particularly where eligibility for a policy may be based on information supplied on an application, or where a policy may be underwritten or rated using that information, an insurer may find it prudent to request the data on a separate document or at a point in time after the individual has been enrolled and the individual's premium established.⁴

The Department is committed to fostering diversity, equity and inclusion, and supports the efforts of insurers to identify existing disparities, evaluate the effectiveness of initiatives to address those disparities and ultimately to eradicate inequities in the insurance marketplace.

Force and Effect

This statement of policy provides guidance to the Department's staff, insurance companies, consumers and the general public regarding the nonenforcement of § 89.12(e) for purposes of fostering diversity, equity and inclusion. This statement of policy does not constitute a rule or regulation entitled to the force and effect of law.

Fiscal Impact and Paperwork Requirements

This statement of policy does not have a fiscal impact nor does it impose additional paperwork requirements, as it does not alter the filing requirements set forth in § 89.12(e).

Further Information

Specific questions relating to information provided in this statement of policy may be directed to the Insurance Department, Office of Chief Counsel, 1341 Strawberry Square, Harrisburg, PA 17120 or by e-mail to ercarlisle@pa.gov.

Effective Date

This statement of policy takes effect immediately upon publication in the *Pennsylvania Bulletin*.

MICHAEL HUMPHREYS,
Acting Insurance Commissioner

(Editor's Note: The provisions of 31 Pa. Code Chapter 89 are amended by adding § 89.12a to read as set forth in Annex A.)

Fiscal Note: 11-2022-05. No fiscal impact; (8) recommends adoption.

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

§ 89.12a. Application exceptions—statement of policy.

Notwithstanding § 89.12(e) (relating to application forms), to foster diversity, equity and inclusion efforts, an insurer may, on an application, collect race and ethnicity data for diversity, equity and inclusion purposes only.

[Pa.B. Doc. No. 22-520. Filed for public inspection April 8, 2022, 9:00 a.m.]

¹ https://content.naic.org/sites/default/files/national_meeting/_Race%20Ins%20FINAL.pdf (at Attachment One-A). See also, 2022 Charge # 1 of the NAIC Special (EX) Committee on Race and Insurance, https://content.naic.org/cmte_ex_race_and_insurance.htm (seeking to address unseen "practices within the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups."). This work continues as a regulatory priority in 2022 for the NAIC. <https://content.naic.org/about/regulatory-priorities>. (All links accessed on March 24, 2022.)

² The Task Force Report included this recommendation regarding health disparities: 5. Continue accurately tracking (and mandating tracking) all races, ethnicities, and identities as this provides the healthcare industry with valuable insights. The push to include SOGI data during the pandemic, through the work of the Task Force, was highlighted as a needed data set and stakeholders were happy to see that development.

Pennsylvania COVID-19 Response Task Force: Health Disparity. Policy Recommendation Report, July 22, 2020, at page 19. <https://www.governor.pa.gov/wp-content/uploads/2020/08/20200813-COVID-19-Health-Disparity-Report.pdf> (accessed Feb. 14, 2022). The data collected included identification of race in, inter alia, "access to insurance." See id. at Appendix 1.

³ See 42 U.S.C.A. § 300gg-1 (as added in 1996 as former § 300gg-11), regarding guaranteed availability, and § 300gg-2 (as added in 1996 as former § 300gg-12), regarding guaranteed renewability. See also Pennsylvania Health Care Insurance Portability Act (40 P.S. §§ 1302.1—1302.7). Thus, neither race nor ethnicity, nor any other potentially discriminatory factor, may be used to determine eligibility or otherwise underwrite comprehensive major medical health insurance in the individual or small group market, and no person in a large group may be excluded from the group based on their race or ethnicity.

Moreover, in the individual and small group markets, the Affordable Care Act provided an additional protection by requiring that rating be based on statewide single risk pools, and curtailing the very few factors that may be used to adjust an individual's rate (family size, age, tobacco use and geography). See 42 U.S.C.A. § 18032, regarding single risk pools; § 300gg, regarding limited rating factors. Moreover, whether individual, small group or large group coverage, health status factors may not be used to vary an individual's premium. 42 U.S.C.A. § 300gg-4.

⁴ This guideline focuses on the provision articulated in § 89.12(e), which relates to life, accident and health insurance. Insurers that issue other types of insurance may also seek to collect data on race and ethnicity to promote diversity, equity and inclusion; the same prudential measures are commended to those insurers.