AMERICAN ACADEMY of ACTUARIES

February 17, 2000

Assistant Secretary for Planning and Evaluation
U.S. Department of Health and Human Services
Attention: Privacy-P
Room G-322A, Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Re: Proposed Standards for Privacy of Health Information
(12 CFR Subchapter C)

Dear Madam Secretary,

The American Academy of Actuaries (Academy) is pleased to provide its comments on the proposed federal regulations regarding the privacy of individually identifiable health information (IIHI). The Academy supports the goal of protecting the privacy of individual medical records. However, that goal needs to be achieved in a way that preserves the ability of actuaries to provide critically important services to, or on behalf of, health insurers, health plans, providers, employers, employees and beneficiaries of health care services. These services are essential to providing financially sound health benefits to individuals and families.

The Academy is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is non-partisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials and agencies, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification and practice, and the Code of Professional Conduct for all actuaries practicing in the United States.

I. Concerns Related to Actuarial Standards

It is important to understand that when performing their professional duties, actuaries are required to follow both the Academy's Code of Professional Conduct and the profession's promulgated Actuarial Standards of Practice (Standards). In some cases, when actuaries sign reports and other documents required by state insurance regulators, they must certify that their opinions comply with the appropriate Standards.

We are concerned that there may be inconsistencies in the proposed regulations that make it difficult for actuaries to perform their jobs and comply with the Standards. In this letter we

reference several of those Standards. For your convenience, we enclosed copies of those Standards with this letter and attached an appendix listing the relevant Standards by number and title.

Whether acting as employees or consultants, actuaries provide an array of services to entities that are subject to the proposed regulations, most notably health insurers, health plans and health care providers. Included among these services are developing and publishing studies, which are then used by these organizations in the design, pricing and financial management of insurance.

Our reading of the proposed privacy regulations leads us to believe that some changes are needed to allow actuaries to provide these risk-management services in a manner that complies with both our Standards and the new federal regulations. To be in compliance with these Standards, actuaries need in certain instances to be able to analyze underlying data (see Standards 6, 12, 23) and use data which may or may not come from enrolled individuals (see Standards 6, 16, 34). In addition, in order to comply with the Standards when dealing with such issues as reinsurance, provider risk contracts or catastrophic coverage for self-insured employers, actuaries need to be able to use IIHI on behalf of an entity that is not the enrolling health plan (see Standards 16, 26). These activities could be inadvertently curtailed by these regulations.

II. Research Activities

The actuarial profession has a long and respected history of conducting research on the morbidity and mortality of populations. Government agencies such as the Health Care Financing Administration (HCFA), the Social Security Administration, as well as state insurance regulators benefit from this research. This information is also used by insurance entities in determining how best to underwrite and price their products. It is this research which enables the actuarial profession to help maintain an economically viable private insurance system.

Actuaries will typically collect comparable data from multiple sources in order to obtain credible experience within specified segments of a covered population. It is important to understand that **the actuary has no intrinsic interest in the information of a given individual**. Rather, in order to combine information from multiple sources correctly, it is necessary to maintain individual identifiers so that the actuary can link together all data relating to a given individual. For example, statistically credible data on the frequency and length of hospitalizations by age group and cause cannot usually be determined from the data of a single health plan. In order to carry out valid research, the actuary would therefore be required to use data from multiple sources.

Studies of beneficiaries moving between fee-for-service Medicare and Medicare+Choice plans are additional examples of instances where the actuary would need to be able to link multiple source data associated with a given individual. Such studies are obviously extremely important in helping HCFA and Congress keep Medicare on a sound financial footing, but would be problematic to undertake in light of these regulations.

Our belief is that actuarial research would **not** be considered “research” as defined in Section 164.504 of the regulation since the knowledge generated by actuarial research is not, strictly speaking, “related to health” as specified in the definition. In this case, Section 164.510(j) of the regulation would not apply to actuarial research, and actuarial research would not be exempt from

the regulatory restrictions on the use or disclosure of IIHI. This would imply that actuarial research would need to be conducted with de-identified information rather than with IIHI.

However, the current standard for de-identification in the regulation is too stringent to enable the performance of meaningful actuarial research using de-identified data. Consequently, we would recommend amending section 164.506(d)(2)(ii)(A). Item 2 in this subsection would not allow the collection of information by zip code or other geographic area or similar size (three to five digit zip codes are sufficient for actuarial purposes). Item 5 would curtail our ability to collect birth year, which is an important parameter in almost all actuarial research such as in the analysis of morbidity and claim costs. In addition, the impact of Items 11 and 12 is not clear. We would like to stress that de-identified information, in order for it to remain useful for actuarial research purposes, needs to be linked to a particular individual enrolled with a specific employer group.

Section 160.204(a)(1) also appears too broad to us. We believe that requests for state exceptions should demonstrate that the exception would not hinder any required actuarial research.

III. Actuarial Activities

While actuaries frequently perform the types of research noted above using data from several covered entities, they may also provide other services to a covered entity which would and should be protected under the privacy rules. We would like to see the following language included in the regulations:

> "Nothing in these regulations shall be interpreted as prohibiting access by actuaries to health plan data, including data on individuals (with perhaps scrambled identifiers that eliminate anyone's ability to identify the individual by name or Social Security Number), if such data is necessary for the actuary to perform actuarial analyses for covered entities and their contractors. Such analyses include, but are not limited to, plan/product design and pricing, reserving, analysis of experience, rate filings with regulatory bodies, contribution analyses for employers or such other studies deemed necessary to the completion of the actuaries' role, particularly in support of maintaining sound plan designs, pricing and reserving/financing, and assuring appropriate/equitable distribution of plan costs, as well as actuarial research. For purposes of this regulation an Actuary is defined as a member of the American Academy of Actuaries."

An example of one of these activities is the establishing of reserves, which these regulations fail to consider. Setting reserves is an integral part of running a health plan, and therefore the actuary needs access to individual information to properly set reserve levels for these products. We recommend that HHS amend the definition of "health care operations" to include the setting of reserves for insured and self-insured programs.

Another example where the actuary may need to use IIHI is in the development of large claim reserves, which entails the analysis of actual expenses and likely future expenses. In order to set

such reserves appropriately, the actuary may need information from a medical case manager or claims administrator, and so would need to use IIHI. Please keep in mind that The Code of Professional Conduct makes it clear that an actuary should not use information received in one part of their work for other purposes that are not appropriate.

Finally, in completing the actuaries' duties, there will be the need to request data from the records of the covered entity. The regulations provide for both special requests and the provision of information in the normal course of business. We have a concern that the requirements of Section 164.506(b)(1) that only "the minimum amount of health information necessary to accomplish the intended purpose" should be disclosed could limit the information normally provided to the actuary to what is typically needed. This would exclude information that is sometimes necessary to resolve issues that may come up during an actuary's work. Given the time frames for reporting of financial information, the ability to make a secondary request may not be a satisfactory solution.

If you have any questions regarding our comments, please contact the Academy's Health Policy Analyst, Angela Heim at 202-223-8196. Again, we appreciate the opportunity to comment on the proposed privacy regulations and we are eager to offer our assistance in any way possible.

Sincerely,

James J. Murphy, MAAA
Vice President, Health

Appendix - Relevant Actuarial Standards of Practice

- No. 6, Measuring and Allocating Actuarial Present Values of Retiree Health Care and Death Benefits

- No. 12, Concerning Risk Classification

- No. 16, Actuarial Practice Concerning Health Maintenance Organizations and Other Managed-Care Health Plans

- No. 23, Data Quality

- No. 26, Compliance with Statutory and Regulatory Requirements for the Actuarial Certification of Small Employer Health Benefit Plans

- No. 34, Actuarial Practice Concerning Retirement Plan Benefits in Domestic Relations Actions