

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #2

FILED  
1990 MAY 31 PM 2:31  
WEST VIRGINIA STATE  
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Insurance Commissioner TITLE NUMBER: 114

RULE TYPE: Legislative; CITE AUTHORITY \_\_\_\_\_

AMENDMENT TO AN EXISTING RULE: YES \_\_\_ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 27

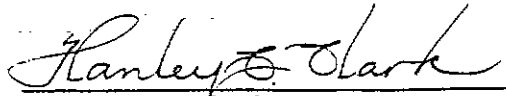
TITLE OF RULE BEING PROPOSED: Aids Regulations

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON Monday, July 2, 1990 AT 4:30 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

B. Keith Huffman, Esq.  
General Counsel  
Office of the Insurance Commissioner  
2019 Washington Street, East  
Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

  
Hanley C. Clark  
Insurance Commissioner

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

CONSENT TO PROPOSAL OF RULE

To Whom It May Concern:

Pursuant to West Virginia Code § 5F-2-2(a)(12), the undersigned hereby grants consent to the proposal of the following rule proposed by the Insurance Commissioner of the State of West Virginia: Title 33, Series 27, relating to AIDS testing and underwriting as to life and health insurance policies.

Signed this 13th day of February, 1990.



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Charles O. Lorensen  
Secretary of Tax and Revenue

FISCAL NOTE FOR PROPOSED RULES

Rule Title: AIDS Regulations

Type of Rule:  Legislative       Interpretive       Procedural

Agency: Insurance Commissioner      Address: 2019 Washington Street, East,  
Charleston, West Virginia 25305

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1. Effect of Proposed Rule	ANNUAL		Current	FISCAL YEAR	
	Increase	Decrease		Next	Thereafter
Estimated Total Cost			NONE		
Personal Services					
Current Expense					
Repairs & Alterations			NONE		
Equipment					
Other					

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2. Explanation of above estimates:

This rule will have no fiscal impact on the Insurance Commissioner or State Government.

3. Objectives of these rules:

The objectives of these Rules are to: (1) eliminate the use of unfairly discriminatory underwriting and testing practices with regard to AIDS by health and life insurers; (2) establish guidelines as to when an insurer can ask AIDS-related questions, what type questions may be asked, and when AIDS testing may be required, (3) establish a reasonable AIDS testing protocol, (4) insure the confidentiality of AIDS-related information released to the insurer by the applicant, and (5) allow insurers reasonable access to AIDS-related data so as to be able to perform proper underwriting of risks before coverage is bound on applicants.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

NONE

B. Economic Impact on Political Subdivisions; Specific Industries;  
Specific groups of citizens.

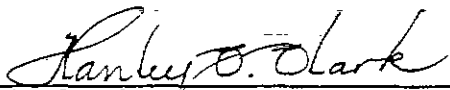
NONE

C. Economic Impact on Citizens/Public at Large.

NONE

Date: May 31, 1990

Signature of Agency Head or Authorized Representative



Hanley C. Clark  
Insurance Commissioner

SUMMARY

This rule establishes guidelines as to what extent and under what circumstances insurers who offer life and/or health insurance coverage can require a prospective insured to answer aids-related questions and submit to blood tests to determine the presence of the AIDS virus. Inter-alia the rule prohibits such questions and tests as to group policies and prohibits inquiries by the insurer to determine the applicants sexual preference or lifestyle.

WEST VIRGINIA LEGISLATIVE RULE  
INSURANCE COMMISSIONER

CHAPTER 33  
SERIES 27

AIDS REGULATIONS

- Section 1. Scope
- Section 2. Applicability
- Section 3. Definitions
- Section 4. Medical/Lifestyle Applications Questions and Underwriting Guidelines
- Section 5. Testing
- Section 6. Notice and Consent Form
- Section 7. Separability

WEST VIRGINIA LEGISLATIVE RULE  
INSURANCE COMMISSIONER

Chapter 33  
Series 27

FILED  
1983 MAY 31 PM 2:31  
OFFICE OF THE CLERK  
WEST VIRGINIA  
STATE HOUSE

AIDS REGULATIONS

Section 1. General

1.1 Scope - This legislative rule establishes standards for AIDS related underwriting questions and AIDS testing in connection with applications for life or health insurance policies.

1.2 Authority - West Virginia Code §§ 33-2-10, 33-6-8, 33-6-9, 33-25A-3(1), 33-25A-20, and 16-3C-2(i).

1.3 Filing Date -

1.4 Effective Date -

Section 2. Applicability

2.1 Insurers - All insurers who deliver or issue for delivery in this state any policies for life or accident and sickness insurance are subject to this regulation.

2.2 Service Corporations - All health service corporations who deliver or issue for delivery in this state any subscriber's contracts for health insurance are subject to this regulation.

2.3 Health Care Corporations - All health care corporations who issue to enrollees in this state evidence of health insurance coverage are subject to this regulation.

2.4 Fraternal Benefit Societies:

(A) All fraternal benefit societies who deliver or issue for delivery life insurance benefit certificates in this state are subject to this regulation.

(B) All domestic, foreign, or alien societies who issue any certificate or other evidence of any contract of accident or sickness insurance in this state.

2.5 Health Maintenance Organizations - All health maintenance organizations who deliver or offer for delivery in this state any evidence of coverage are subject to this regulation.

Section 3. Definitions

- 3.1 Code - shall mean the West Virginia Code.
- 3.2 Commissioner - shall mean the Insurance Commissioner of the State of West Virginia.
- 3.3 Acquired Immunodeficiency Syndrome (AIDS) - shall mean a disease indicative of underlying cellular immunodeficiency.
- 3.4 AIDS Related Complex (ARC) - shall mean a syndrome in which the individual displays many of the same symptoms of AIDS, including the presence of the HIV antibody.
- 3.5 Human Immunodeficiency Virus (HIV) - shall mean the virus responsible for the potential development of the Acquired Immunodeficiency Syndrome.
- 3.6 Human T-Cell Lymphotropic Virus (HTLV III) - shall mean antibodies present in the blood that normally indicate exposure to the HIV virus.
- 3.7 Enzyme Linked Immunoassay (ELISA) - shall mean a test utilized to determine the existence of the HIV antibody.
- 3.8 Insurer - shall include all entities providing life or accident and sickness coverage.

Section 4. Medical/Lifestyle Applications Questions and Underwriting Guidelines

- 4.1 General Propositions:
- (A) No inquiry in an application for health or life insurance coverage, or in an investigation conducted by an insurer or an insurance support organization on its behalf in connection with an application for such coverage shall be directed toward determining the applicant's sexual orientation.
- (B) Sexual orientation may not be used in the underwriting process or in the determination of insurability.
- (C) Insurance support organizations shall be directed by insurers not to investigate, directly or indirectly, the sexual orientation of an applicant or beneficiary.

4.2 Medical/Lifestyle Applications Questions and Underwriting Standards.

(A) No question shall be used which is designed to establish the sexual orientation of the applicant.

(B) Questions relating to the applicant having or having been diagnosed as having AIDS or ARC are permissible if they are factual and designed to establish the existence of the condition.

For Example: Insurers should not ask "do you believe you may have . . .?", but rather "do you know or have reasons to know . . .?"

(C) Questions inquiring as to whether the applicant has ever tested positive for the presence of the HIV virus or HIV virus antibodies are permissible, however, questions inquiring as to whether the applicant has ever been tested for the presence of the HIV virus or HIV antibodies are prohibited.

(D) Questions relating to medical and other factual matters intending to reveal the possible existence of a medical condition are permissible if they are not used as a proxy to establish the sexual orientation of the applicant, and the applicant has been given an opportunity to provide an explanation for any affirmative answers given in the application

For Example: "Have you had chronic cough, significant weight loss, chronic fatigue, diarrhea, enlarged glands, . . .?" These questions must relate to a definite time period immediately preceding the application and must be specific. The applicant shall be given the opportunity to explain the described symptoms.

(E) Questions relating to the applicant's having or having been advised to seek treatment by a medical doctor, health nurse or other medical professional for a sexually transmitted disease are permissible.

(F) Neither the marital status, the "living arrangements," the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of an applicant may be used to establish, or aid in establishing, the applicant's sexual orientation.

(G) For purposes of rating an applicant for health and life insurance, an insurer may impose territorial rates, but only if the rates are based on sound actuarial principles or are related to actual or reasonably anticipated experience.

For Example: If a particular territory demonstrates a general propensity for high risk, an insurer may impose a rate higher for that territory than for similar risks located in other territories.

(H) No questions shall seek to determine if the applicant has demonstrated AIDS-related concerns or has sought AIDS-related counseling.

(I) No adverse underwriting decision shall be made because medical records or a report from an insurance support organization show(s) that the applicant has demonstrated AIDS-related concerns or has sought counseling. This subsection does not apply to an applicant seeking treatment and/or diagnosis.

#### Section 5. Testing

5.1 AIDS-related testing in connection with the application for group life or accident and sickness insurance is prohibited.

5.2 Whenever an applicant is requested to take an AIDS-related test in connection with an application for insurance, the use of such a test must be revealed to the applicant and his or her written, informed consent obtained.

5.3 The applicant should demonstrate an actual understanding that the test is being performed, of the nature of the test, of the persons to whom the results of that test may be disclosed, of the purpose for which test results may be used, of any limitations on the accuracy and meaning of the test results, and of any foreseeable risks and benefits resulting from the test.

5.4 The person requesting the test, and not the individual or individual's health care provider, must underwrite the cost of the test.

5.5 The individual undergoing the test has a choice to receive the test result directly or to designate in writing, prior to the administration of the test, any other person, such as a health care professional or clergyman, who may receive the results.

5.6 Except as specified in section 5.5 above, the insurer and its agents shall not release or disclose either that the test has been conducted or the test results to any other party. Such information shall specifically not be released to any insurance support or information sharing organization such as the Medical Information Bureau (MIB) or to reinsurers, provided that the health care professional performing the test may release the test results to the insurer which requested the test and to such other parties and under such conditions as are dictated by West Virginia Code §§ 16-3C-3 and 33-3C-4.

5.7 The testing is required to be administered on a nondiscriminatory basis for all individuals in the same class and no proposed insured may be denied coverage or rated a substandard risk on the basis of such testing unless acceptable testing protocol is followed. The following is the acceptable testing protocol for use in this state and an insured may not be denied coverage on the basis of AIDS related questions unless:

(A) An initial enzyme linked immunoabsorbent assay (ELISA) blood test is administered to the proposed insured, and it indicates the presence of HIV antibodies in the blood; and

(B) A second ELISA blood test is administered and it indicates the presence of HIV antibodies in the blood; and

(C) A Western Blot blood test is conducted and it confirms the results of the two ELISA tests.

5.8 If any of the test results in the ELISA-ELISA-Western Blot series produce a negative result, the testing ceases and the applicant cannot be denied coverage based on AIDS-related concerns.

For Example: If the initial ELISA test yields a negative result, the testing ceases. If the initial ELISA test yields a positive result and the subsequent ELISA test yields a negative result, the testing ceases. If both ELISA tests yield a positive result and the Western Blot test yields a negative result, for purposes of insurability, the results are negative.

5.9 News of a positive test result could result in serious emotional trauma to the applicant. For this reason, it is recommended that positive results be communicated to the applicant face to face by a qualified health care professional who could provide AIDS counseling.

Insurance Commissioner  
Leg. Rule 33  
Series 27, Sec. 6

Section 6. Notice and Consent Form

6.1 A notice and consent form must be executed by each applicant before AIDS-related testing is performed as to such applicant on behalf of any insurer.

6.2 The notice and consent form required by section 6.1 shall be as is set out in Appendix A attached hereto.

Section 7. Separability

7.1 If any provision of this regulation or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the regulation and the application thereof to other persons or circumstances shall not be affected thereby.

Insurance Commissioner  
Leg. Rule 33  
Series 27

APPENDIX A

Examiner \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_

Insured \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_

NOTICE AND CONSENT FOR BLOOD TESTING  
WHICH MAY INCLUDE AIDS VIRUS (HIV) ANTIBODY/ANTIGEN TESTING

To determine your insurability, the insurer named above (the Insurer) has requested that you provide a sample of your blood for testing and analysis. All tests will be performed by a licensed laboratory.

Tests may be performed to determine the presence of antibodies or antigens to the Human Immunodeficiency Virus (HIV), also known as the AIDS Virus. The HIV antibody test that we perform is actually a series of tests done by a medically accepted procedure. The HIV antigen test directly identifies AIDS viral particles. These tests are extremely reliable. Other tests which may be performed include determinations of blood cholesterol and related lipids (fats) and screening for liver or kidney disorders, diabetes, and immune disorders.

All tests results will be treated confidentially. They will be reported by the laboratory to the Insurer. There will be no other disclosure by the insurer of test results or even that the tests have been done.

Also you may direct that test results be disclosed directly to you, or if you prefer to your personal physician or other health care provider. (Indicate in appropriate area below.) You should also be aware that the health care professional who performs the blood testing is subject to West Virginia Code §§ 16-3C-3 and 16-3C-4 which authorizes that they may disclose test results to certain limited individuals under certain limited circumstances [these relate primarily to (1) persons you authorize to see the test results, (2) health care providers who may come into contact with you or specimens obtained from you, (3) the United States center for disease control, (4) a court order to release the results, and (5) identified sex partners and persons sharing needles.] These persons are required by West Virginia Code §§ 16-3C-3 and 16-3C-4 to keep test information confidential. (A copy of §§ 16-3C-3 and 16-3C-4 are attached for your futher information.)

If your HIV test results are normal, no routine notification will be sent to you. If the HIV test results are other than normal, the Insurer will contact you. The Insurer may also contact you if there are other abnormal test results which in the Insurer's opinion, are significant. If you have not already indicated one, the Insurer may ask you at that time for the name of a physician or other health care provider to whom you may authorize disclosure and with whom you may wish to discuss the results.

Positive HIV antibody/antigen test results do not mean that you have AIDS, but that you are at significantly increased risk of developing AIDS or AIDS-related conditions. Federal authorities say that persons who are HIV antibody/antigen positive should be considered infected with the AIDS virus and capable of infecting others.

Positive HIV antibody or antigen test results or other significant blood abnormalities will adversely affect your application for insurance. This means that your application may be declined, that an increased premium may be charged, or that other policy changes may be necessary.

I wish my test results to be released to:

(Initial Please)

\_\_\_\_\_ Myself only.

\_\_\_\_\_ My physician, health care provider, or other person indicated below.

\_\_\_\_\_ Both myself and my physician, health care provider or other person indicated below.

Physician, Health Care Provider, or other person.

Name: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

I have read and I understand this Notice and Consent For Blood Testing Which May Include HIV Antibody/Antigen Testing. I voluntarily consent to the withdrawal of blood from me by

Insurance Commissioner  
Leg. Rule 33  
Series 27

APPENDIX A

needle, the testing of that blood, and the disclosure of the test results as described.

Authorization period for this consent form expires \_\_\_\_\_.

I understand that I have the right to request and receive a copy of this authorization. A photocopy of this form will be as valid as the original.

_____ Proposed Insured	_____ Date of Birth	
_____ Signature of Proposed Insured or Parent/Guardian	_____ Date	_____ State of Residence

§ 16-3C-3. Confidentiality of records; permitted disclosure;  
no duty to notify.

(a) No person may disclose or be compelled to disclose the identity of any person upon whom an HIV-related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons:

- (1) The subject of the test;
- (2) Any person who secures a specific release of test results executed by the subject of the test;
- (3) A funeral director or an authorized agent or employee of a health facility or health care provider if the funeral establishment, health facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a need to know such information: Provided, That such funeral director, agent or employee shall maintain the confidentiality of such information;
- (4) Licensed medical personnel or appropriate health care personnel providing care to the subject of the test, when knowledge of the test results is necessary or useful to provide appropriate care or treatment, in an appropriate manner: Provided, That such personnel shall maintain the confidentiality of such test results. The entry on a patient's chart of an HIV-related illness by the attending or other treating physician or other health care provider shall not constitute a breach of confidentiality requirements imposed by this article;
- (5) The department or the centers for disease control of the United States public health service in accordance with reporting requirements for a diagnosed case of AIDS, or a related condition;
- (6) A health facility or health care provider which procures, processes, distributes or uses: (A) A human body part from a deceased person with respect to medical information regarding that person; or (B) semen provided prior to the effective date of this article [Sept. 1, 1988] for the purpose of artificial insemination; (C) blood or blood products for transfusion or injection; (D) human body parts for transplant with respect to medical information regarding the donor or recipient;
- (7) Health facility staff committees or accreditation or oversight review organizations which are conducting program monitoring, program evaluation or service reviews so long as any identity remains anonymous; and
- (8) A person allowed access to said record by a court order which is issued in compliance with the following provisions:
  - (i) No court of this state may issue such order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest;

§ 16-3C-3

(ii) Pleadings pertaining to disclosure of test results shall substitute a pseudonym for the true name of the test subject of the test. The disclosure to the parties of the test subject's true name shall be communicated confidentially, in documents not filed with the court;

(iii) Before granting any such order, the court shall, if possible, provide the individual whose test result is in question with notice and a reasonable opportunity to participate in the proceedings if he or she is not already a party;

(iv) Court proceedings as to disclosure of test results shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that the public hearing is necessary to the public interest and the proper administration of justice; and

(v) Upon the issuance of an order to disclose test results, the court shall impose appropriate safeguards against unauthorized disclosure, which shall specify the person who may have access to the information, the purposes for which the information may be used and appropriate prohibitions on future disclosure.

(b) No person to whom the results of an HIV-related test have been disclosed pursuant to subsection (a) of this section may disclose the test results to another person except as authorized by subsection (a).

(c) Whenever disclosure is made pursuant to this section, except when such disclosure is made to persons in accordance with subdivisions (1), (3), (4), (5), (6) and (7), subsection (a) of this section, it shall be accompanied by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of the information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is NOT sufficient for this purpose."

(d) Notwithstanding the provisions set forth in subsections (a) through (c) of this section, the use of HIV test results to inform individuals named or identified as sex partners or contacts or persons who have shared needles that they may be at risk of having acquired the HIV infection as a result of possible exchange of body fluids, is permitted. The name or identity of the person whose HIV test result was positive is to remain confidential. Contacts or identified partners may be tested anonymously at the state department of health designated test sites, or at their own expense by a health care provider or an approved laboratory of their choice. A cause of action will not arise against the department, a physician or other health care provider from any such notification.

(e) There is no duty on the part of the physician or health care provider to notify the spouse or other sexual partner of, or persons who have shared needles with, an infected individual of their HIV infection and a cause of action will not arise from any failure to make such notification. However, if contact is not made, the department will be so notified. (1988, 3rd Ex. Sess., c. 1.)

§ 16-3C-4. Substituted consent.

(a) If the person whose consent is necessary under this article for HIV-related testing or the authorization of the release of test results is unable to give such consent or authorization because of mental incapacity or incompetency, the consent or authorization shall be obtained from another person in the following order of preference:

- (1) A person holding a durable power of attorney for health care decisions;
- (2) The person's duly appointed legal guardian;
- (3) The person's next-of-kin in the following order of preference: spouse, parent, adult child, sibling, uncle or aunt, and grandparent.

(b) The person's inability to consent shall not be permitted to result in prolonged delay or denial of necessary medical treatment.

(c) The information required to be provided to the patient pursuant to subsections (b) and (d), section two [§ 16-3C-2(b) and (d)] of this article, shall be provided to the person giving substituted consent hereunder. (1988, 3rd Ex. Sess., c. 1.)

STATE OF WEST VIRGINIA



GASTON CAPERTON  
GOVERNOR

HANLEY C. CLARK  
INSURANCE COMMISSIONER

OFFICES OF THE  
**INSURANCE COMMISSIONER**  
2019 WASHINGTON STREET, EAST  
CHARLESTON, WEST VIRGINIA 25305

LEGAL DIVISION  
304) 348-0401

FACSIMILE  
(304) 348-0412

May 31, 1990

HAND DELIVERED

Ms Judy Cooper  
Office of Secretary of State  
State Capitol  
Charleston, WV 25305

Dear Ms Cooper:

Enclosed please find for filing the "Notice of a Comment Period on a Proposed Rule," "Fiscal Note for Proposed Rules," "Consent to Proposal of Rule" and a copy of the proposed rule "AIDS Regulations" for Series 27, Title 114.

Sincerely,

*B. Keith Huffman*  
B. Keith Huffman  
General Counsel

BKH/iw  
Enclosures