

In the Matter of the Proposed
Rules Relating to Prohibiting
Sex Discrimination in Insurance
Contracts

STATEMENT OF NEED AND
REASONABLENESS

Pursuant to the authority of Minnesota Statute 72A.19, subdivision 12 the department has proposed rules pertaining to prohibiting sex discrimination or discrimination based upon marital status in insurance contracts. Additional authority is found in Minnesota Statute 70A.20, subdivision 16 and Minnesota Statutes 45.023. The rule proposed is based upon the National Association of Insurance Commissioner's Model Regulation. The model regulation and the accompanying report regarding it are attached here to and incorporated by reference as part of this Statement of Need and Reasonableness. The model regulation has been deemed necessary because the insurance industry has allowed the development of unequal treatment of males and females as well as unequal treatment based upon marital status in the sale of insurance. Such discrimination is both an unfair trade practice under Minnesota Statutes and is equivalent to sexual discrimination under other laws.

Rule 2735.0100 Definitions. So as to best define the scope of the proposed rule two terms were deemed to need clarification. Those terms are "contracts" and "the insurer". The purpose of rendering these definitions in the rule was to assure that the rules were specific as to the type of contracts covered and the type of insurers that would be subjected to this particular rule. Both terms are used in many different forms in other rules and regulations and tend to have less than precisely understood definitions.

As the proposed rules are based upon a model act these will be the definitions used in every state which adopts the model regulation.

Rule 2735.0200 Purpose. This rule states the basis and philosophy of the rule.

Rule 2735.0400 Applicability and Scope. The question often arises in regard to the application of insurance rules and statutes as to whether or not they apply because some policies are issued outside the state. It is important to clarify that in this instance the intent is to make the rule applicable to all policies either delivered within the state or issued for delivery in the state so that all Minnesota citizens would have the protection of this rule no matter where the policy that covers them originates.

Rule 2735.0500 Availability Requirements. Restates the basic premise of the rule prohibiting denial of access to an insurance contract on the basis of sex or marital status. The balance of the rule is a reiteration of that premise along with a reiteration of specific practices that are prohibited. The specific practices do not limit the general statement but expand and provide examples of individual instances where such activities are prohibited.

Small Business Consideration

Pursuant to Minnesota Statute §14.115 the Department considered the impact of the rule on small businesses in the promulgation of these rules. This rule has broad impact upon the insurance industry as a whole, only a few members of which are small businesses. The purpose of the rule is to prevent sex discrimination. Lesser standards for small businesses would weaken the protection. Also it might have a negative effect on the competitive position of small businesses if they are perceived to have permission to discriminate.

In regard to subdivision 2 of 14.115 the department reviewed items a - e and decided as follows:

(a) as there are no reporting requirements less stringent requirements would not be applicable. The rule only allows for compliance or non-compliance. A lesser standard might be deemed to allow small business to discriminate a little which is contrary to the intent of the rule;

Items (b), (c), (d) and (e) would all be covered by the rationale set forth regarding (a). The nature of the harm to be prevented is such that there can only be a complete prohibition against the practice.

Sex Discrimination in Insurance - A Continuing Problem

by

Marcia D. Greenberger
 Lois J. Schiffer
 Women's Rights Project
 Center for Law and Social Policy
 1751 N Street, N.W.
 Washington, D.C. 20036
 (202) 872-0670

June 6, 1977

[Note: research for this paper was prepared pursuant to a contract with the Federal Insurance Administration and Department of Housing and Urban Development. However, the views expressed are those of the author and not necessarily those of the Federal Insurance Administration.]

That sex discrimination in insurance has been a serious problem can hardly be debated.¹ Unfortunately, there is little question that many of the discriminatory practices documented in the long series of reports still continue virtually unabated. Reviewed below is the work done by the NAIC to date on sex discrimination in insurance, some of the issues that remain to be addressed to eliminate unfair sex-discriminatory practices, and why it is important that an NAIC task force dealing with sex discrimination be reconstituted to address these issues.

The NAIC Task Force on Unfair Sex Discrimination

A Task Force on Unfair Sex Discrimination was established in 1975 by the (C1) Subcommittee to deal with the issue of sex discrimination in insurance. In 1976, the task force developed and presented a model regulation to eliminate unfair sex discrimination. In its preamble, the task force explained that "studies have disclosed a pattern of activities which can conveniently be divided into two categories. The first relates to the availability of equal coverage and the second is the comparability of the rates charged for that coverage."

Having divided the issues into two major categories, the task force then declared that it "has chosen to propose this model regulation for adoption as the first step in a two stage program. The second stage will involve the review of rating systems which are currently in use in an attempt to determine the validity of assumptions, statistics and actuarial methods which have been routinely accepted in the past." However, despite the fact that by the task force's own analysis it had addressed only half of the issues in its model regulation, the task force was disbanded before it could move to the second step in the process - a review of rating systems.

The Major Remaining Issues to be ReviewedI. Rating

Certainly, equal availability of coverage is important to secure, and the model regulation is a good step in this direction. But as the task force recognized, it is also clear that unless the rates charged for the coverage are fair, the availability of coverage may be of only theoretical value. And there is great debate about whether current rating practices are equitable, or whether instead they work an unfair disadvantage to women.

-
1. See e.g. Pennsylvania Insurance Department, 1974, Insurance Commissioner's Advisory Task Force on Women's Insurance Problems Final Report and Recommendations, Harrisburg, Pennsylvania; Task Force on Critical Problems, New York State Senate, Insurance and Women, October, 1974, Albany, New York; Michigan Department of Commerce, Insurance Bureau, Women's Task Force Report to the Michigan Commissioner of Insurance on Sex Discrimination in Insurance, June 2, 1975; California Commission on the Status of Women, Women and Insurance, February, 1975; Iowa Commission on the Status of Women, A Study of Insurance Practices that Affect Women, 1975; Lawyers for Colorado's Women, Inc., Insurance Task Force, Sex Discrimination in Health and Disability Insurance, February 7, 1975; Center for Public Representation, Sex Discrimination in Insurance: The Consumer Perspective, Madison, Wisconsin; Women's Equity Action League, Sex Discrimination in Insurance, Washington, D.C., 1977. All of these reports document widespread insurance practices which work to the disadvantage of women.

For example, one issue raised is whether present rating practices charging similarly situated women substantially more than men for disability insurance (even excluding maternity coverage) should be permitted to continue. A New York study dated June, 1976² seemed to indicate that in fact women in similar occupation classifications have appreciably higher morbidity rates than men (although even in this study women over 60 had lower morbidity rates than men).

However, the conclusions of this study have been questioned by other statistics and by the design of the study itself. Women Employed, a women's advocacy group based in Chicago, Illinois, testified at some length on this issue at hearings of the Illinois Insurance Department on Proposed Rule 26.05 (a regulation banning sex discriminatory practices) on February 3, 1976. In their testimony, they reviewed the experience of one insurance company which offered equal benefits under disability insurance to men and women at equal rates, Social Security Administration data, a Metropolitan Life Insurance Study, occupation and income as variables in disability, and hospitalization statistics. This information did not support substantially higher rates charged women for disability insurance. That testimony is attached.

It is important to note that the Social Security Administration data, for example, was based on insured and uninsured workers. In contrast, the New York Study was limited to those workers who had purchased disability insurance. Given the very high rates and unfavorable terms offered to women for disability insurance, it is reasonable to hypothesize that those women who paid the high price for the insurance did so because they knew that they were going to draw benefits (adverse selection). One can only conclude that more definitive studies need to be done in order to assess the validity of the actuarial statistics upon which disability insurance rates are based.

Similarly, actuarial statistics upon which other types of insurance are based must also be reviewed. It is extremely important to have standards set concerning the proper methodology for conducting the reviews so that valid conclusions could be made. This standard-setting would be a particularly appropriate assignment for a task force on sex discrimination. Similarly, it should develop model regulations which would give guidance to states as to the proper way of setting rates based upon these studies.

2. Treatment of Pregnancy.

In defining equal coverage, the task force made a judgement that it is unfair to exclude coverage of pregnancy-related complications, but did not make a similar judgement with respect to costs involved in a normal pregnancy either for health or disability insurance. The validity of excluding such costs for purposes of a state or an employer's disability insurance plan was upheld by the Supreme Court under the Constitution and Title VII of the 1964 Civil Rights Act. See Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 97 S.Ct. 401 (1976).

However, these decisions do not control state laws which prohibit sex discrimination in employment or insurance. For example, shortly after the Gilbert decision came down, the New York Court of Appeals declared that exclusion of pregnancy-related disabilities from an employer's disability plan violated the state's fair employment practices law.³ Similar interpretations were issued by administrators of fair employment commissions or courts in at least 14 states and the District of Columbia.⁴

-
2. State of New York Insurance Department, Disability Income Insurance Cost Differentials Between Men and Women, June, 1976.
 3. The Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board (New York Court of Appeals, No. 495, 1976). See also Anderson v. Upper Bucks County Voc. Technical School (Commonwealth Court of Pennsylvania, May 6, 1977). However the New York decision is now being challenged in a pending action, American Airlines v. State Human Rights Appeal Board (New York Court of Appeals, No. 496, 1976).
 4. The states are Alaska, California, Connecticut, District of Columbia, Hawaii, Montana, New Jersey, Rhode Island, Kansas, Massachusetts, Michigan, South Dakota, Iowa and Wisconsin.

Moreover, legislation has been introduced in Congress to overturn the Gilbert decision for purposes of Title VII. Therefore, the issue of proper treatment of pregnancy is still very much an open question. It is important therefore that in addition to reviewing the issue of rating, a sex discrimination task force review the proper treatment of pregnancy in light of the developing law.

3. Other issues to be Addressed.

In addition to rating and pregnancy, there are a series of other issues which should be addressed by a sex discrimination task force. One is an analysis of the status of the model regulation, where it has been adopted and what have been the problems of implementation to date. In a telephone conversation with an employee of the National Insurance Advertising Regulation Service on June 2, 1977, we were advised that a report on those states which had adopted the regulation would not be ready until the end of the year.⁵ The information should certainly be collected in a more prompt fashion, together with information on the regulation's strengths and weaknesses.

Second, a task force should look at methods for advising the public of the existence of the model regulation and those states where it is in effect. It is only with such an education campaign that the women will be made aware of their rights, and therefore be in a position to protect their interests.

Third, a task force should review the enforcement mechanisms in place in the states and determine whether new mechanisms are needed to ensure compliance with the anti-sex discrimination provisions. For example, the role of complaints and their proper handling should be addressed.

Fourth, the task force should address the issue of national health insurance and how various proposals would affect women. Not enough serious attention has been given to this most important issue.

Finally, the task force should study the relationship between general employment practices of the insurance industry and the kinds of insurance programs they offer. A determination should be made of the responsibility of insurance commissioners to assure that the industry they are responsible for regulating does not have discriminatory employment practices and policies.

Conclusion

In light of the long list of critical issues affecting women and insurance which remain unresolved, it is extremely unfortunate that the Sex Discrimination Task Force was disbanded. The work that it did in developing the model regulation was a commendable first step. But it was only a beginning. Through a contract with the Federal Insurance Administration, the Women's Rights Project of the Center will be preparing a report by December 1977 addressing many of the issues discussed above. The project stands ready to offer any assistance that would be helpful to the Sex Discrimination Task Force if and when it is reestablished. We would hope that the NAIC does not believe, nor does it wish to indicate, that there are no longer any problems of sex discrimination which merit attention. The task force should begin again to address critical issues which affect more than half of our population.

+

FROM: Women Employed
37 South Wabash
Chicago, Illinois 60603

DATE: February 3, 1976

RE: "Women Employed" Testimony at Hearings of the Illinois Insurance Department on Proposed Rule 26.05

Women Employed is shocked at the insurance industry's response to Proposed Rule 26.05. The industry claims to be in support of the regulation which would ban the sale of discriminatory insurance policies. Yet, in their testimony, they

5. Telephone conversation with employee of research department of National Insurance Advertising Regulation Service, June 2, 1977.

MODEL REGULATION TO ELIMINATE UNFAIR SEX DISCRIMINATION

Table of Contents

Preamble	
Section 1.	Purpose
Section 2.	Authority
Section 3.	Definition
Section 4.	Applicability and Scope
Section 5.	Effective Date
Section 6.	Availability Requirements

Preamble.

This model regulation responds to conditions within the insurance industry and among regulatory authorities which have allowed the development of unequal treatment of males and females and treatment which varies according to marital status in the sale of insurance. Reasonably exhaustive research has been conducted by several states in an effort to identify the nature of such unequal treatment. These studies have disclosed a pattern of activities which can conveniently be divided into two categories. The first relates to the availability of equal coverage and the second is the comparability of the rates charged for that coverage.

The primary area of difficulty arises in the health and disability lines of insurance where the morbidity tables which are currently in use and current company experience reflect a higher utilization of benefits by female insureds. As a result, many companies restrict the types and amounts of coverage which are available to females and charge rates for females which exceed male rates for identical coverage. Life insurance and annuity rates reflect lower mortality rates for females although the adequacy of the rate differentials are subject to question since general population mortality studies produce larger differences in male and female mortality than is generally assumed by either the life insurance industry or regulatory authorities in their development of reserves, cash values and premium rates. Many life insurance companies have also been found to apply restrictions to the availability of coverage to females which do not apply to males.

The automobile insurance business is characterized by a rating system which produces higher rates for males and unmarried individuals. Higher rates for these classes of insureds result from higher claim levels. Availability of automobile insurance with some companies is also affected by marital status. The premium rates charged for homeowner and property insurance do not vary by sex although a single or divorced female may encounter more difficulty in obtaining coverage than a male in similar circumstances.

Although discriminatory practices have been identified in both the premium rates and availability of insurance, an appropriate objective is to determine which of these practices constitute an unfair discrimination and to adopt regulations which prohibit those practices. Since there is apparently no segment of the public or the insurance industry which is prepared to dispute the right of females to have equal access to insurance, it is desirable to adopt a regulation which enforces this standard of equality. This model regulation is designed to accomplish that purpose as it relates to contract language and underwriting practices.

On the other hand however, since the business of insurance is built upon the ability of the insurance company to evaluate risk and assign a price tag to that risk, any attempt to tamper with the pricing mechanism of the insurance business must be approached with great care. The subjects of premium rates and availability of coverage have been determined to be separate issues which can be dealt with more effectively if handled separately. As a result, the NAIC Task Force on Unfair Sex Discrimination has chosen to propose this model regulation for adoption as the first step in a two stage program. The second stage will involve the review of rating systems which are currently in use in an attempt to determine the validity of assumptions, statistics and actuarial methods which have been routinely accepted in the past.

Several states, including Pennsylvania, New York, New Jersey and Oregon, have adopted regulations similar to this model with little or no opposition. The major insurance industry trade associations have actually taken a public position of not opposing adoption of such regulations and many insurance companies are presently in the process of voluntarily removing all sex related restrictions in their contract language and underwriting rules. This model regulation, however, is necessary to assure that this standard is adhered to by the entire industry.

One subject which is a recurring topic of interest in the research which has been conducted is that of pregnancy related covering in health insurance contracts. Since normal pregnancy is not a sickness or injury as a result of an accident and can generally be planned or avoided, the NAIC Task Force has not subscribed to the theory that such coverage should be mandated in all health insurance contracts in the name of equal availability of coverage. Such action is beyond the scope of the authority of this regulation and if the subject is to be addressed, it should be included in the NAIC Health Insurance Minimum Standards Regulation. This model regulation does, however, contain language which may either be retained in this regulation or transferred to the Minimum Standards Regulation, whichever is most convenient in a particular jurisdiction. That language relates to mandatory coverage of pregnancy complications and the restriction of coverage for the genital organs of one sex only. Restrictions on these areas of coverage have been deemed to be tantamount to unfair sex discrimination since they apply to sickness or injury which affects only one sex.

This regulation may appropriately be promulgated pursuant to the authority of the Insurance Trade Practices Act either under the unfair discrimination section or as a regulation identifying a previously undefined unfair trade practice.

Section 1. Purpose.

The purpose of this regulation is to eliminate the act of denying benefits or coverage on the basis of sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers.

Section 2. Authority.

This regulation is issued pursuant to (variable authority of each state — promulgation of this regulation under the State's Unfair Trade Practices Act is considered to be the most viable source of authority).

Section 3. Definition.

Contracts — any insurance policy, plan, or binder, including any rider or endorsement thereto offered by an insurer.

Insurer — any insurance company, association, reciprocal or inter-insurance exchange, non-profit hospital plan, nonprofit professional health service plan, health maintenance organization, fraternal benefit society or beneficial association.

Section 4. Applicability and Scope.

This regulation shall apply to all contracts delivered or issued for delivery in this state by an insurer on or after the effective date of this regulation and to all existing group contracts which are amended on or after the effective date of this regulation.

Section 5. Effective Date.

This regulation shall be effective on (insert the date of adoption or promulgation).

Section 6. Availability Requirements.

Availability of any insurance contract shall not be denied to an insured or prospective insured on the basis of sex or marital status of the insured or prospective insured. The amount of benefits payable, or any term, conditions or type of coverage shall not be restricted, modified, excluded, or reduced on the basis of the sex or marital status of the insured or prospective insured except to the extent the amount of benefits, term, conditions or type of coverage vary as a result of the application of rate differentials permitted under the (insert name of state) Insurance Code. However, nothing in this regulation shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents benefits. Specific examples of practices prohibited by this regulation include but are not limited to the following:

- a. Denying coverage to females gainfully employed at home, employed part-time or employed by relatives when coverage is offered to males similarly employed.
- b. Denying policy riders to females when the riders are available to males.
- c. Denying maternity benefits to insureds or prospective insureds purchasing an individual contract when comparable family coverage contracts offer maternity benefits.
- d. Denying, under group contracts, dependent coverage to husbands of female employees, when dependent coverage is available to wives of male employees.
- e. Denying disability income contracts to employed women when coverage is offered to men similarly employed.
- f. Treating complications of pregnancy differently from any other illness or sickness under the contract.

- g. Restricting, reducing, modifying, or excluding benefits relating to coverage involving the genital organs of only one sex.
- h. Offering lower maximum monthly benefits to women than to men who are in the same classification under a disability income contract.
- i. Offering more restrictive benefit periods and more restrictive definitions of disability to women than to men in the same classifications under a disability income contract.
- j. Establishing different conditions by sex under which the policyholder may exercise benefit options contained in the contract.
- k. Limiting the amount of coverage an insured or prospective insured may purchase based upon the insured's or prospective insured's marital status unless such limitation is for the purpose of defining persons eligible for dependents benefits.

Note: Although the above examples are oriented toward unfairly discriminatory practices in the accident and sickness disability incomes and life insurance lines, this model regulation is appropriate for use in prohibiting the use of sex or marital status as the sole base either to deny coverage or to offer differential coverage in all lines of insurance.

Legislative History (all references are to the Proceedings of the NAIC).

1976 Proc. 1 502-504