

DEPARTMENT OF INSURANCE

OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Sections 311 and 2312 (18 **Del.C.** §§311 & 2312)
18 **DE Admin. Code** 902

PROPOSED

PUBLIC NOTICE

902 Prohibited Unfair Claim Settlement Practices [Formerly Regulation 26]

A. Type of Regulatory Action Required

Third re-proposal of amendments to Regulation 902 - Prohibited Unfair Claim Settlement Practices [Formerly Regulation 26].

B. Synopsis of Subject Matter of the Regulation and Proposed Amendments

In the May 1, 2020 edition of the *Register of Regulations*, the Department published a proposal to update and clarify requirements concerning prohibited unfair claim settlement practices that are set forth in Regulation 902 (see 23 **DE Reg.** 920 (05/01/2020)). In that proposal, the Department proposed adding new subsection 3.1.14, which included a failure to promptly settle a claim as required under Regulation 903 as an unfair claim settlement practice. The Department also took the opportunity of the proposal to make grammatical and formatting edits throughout the regulation. Upon further review, the Department determined not to proceed with proposed new subsection 3.1.14 and withdrew that proposal, as violations of Regulation 903 are already a defined unfair claims settlement practice.

Instead, the Department proposed to add new subsection 3.2 to Regulation 902, which would have specifically provided that three instances of an insurer's commission of a prohibited claim settlement practice within a 36-month period, as listed in subsection 1.2.1 (to be recodified at subsection 3.1), shall give rise to a rebuttable presumption that the insurer is in violation of this regulation and 18 **Del. C.** §2304(16)f. This first re-proposal was published in the June 1, 2020 edition of the *Register of Regulations* (see 23 **DE Reg.** 997 (06/01/2020)). The Department again took the opportunity of the re-proposal to make grammatical and formatting edits throughout the regulation.

In response to comments from the regulated community that are summarized in the second re-proposal, the Department determined to revise proposed new subsection 3.2 by raising the frequency of instances of commission of a prohibited claim settlement practice from three instances within a 36-month period to four percent of claims sampled.

This second re-proposal was published in the October 1, 2020 edition of the *Register of Regulations* (see 24 **DE Reg.** 330 (10/01/20)). The Department again took the opportunity of the re-proposal to make grammatical and formatting edits throughout the regulation.

C. Summary of Comments Received on the Department's Second Re-proposal

All of the comments received on the second re-proposal came from members of the regulated community and their representatives. Some commenters appreciated the Department's clarification that the presumption is rebuttable. However, all commenters remained concerned about the amount of the threshold, the size of the sample population, and whether the threshold is applied on a per practice or practices basis. One commenter opined that the proposed amendments are arbitrary and exceed the Department's regulatory authority, and many reiterated the concern that the 4 percent threshold deviates from the 7-10 percent incident tolerance recommended in the National Association of Insurance Commissioners Market Conduct Examiners Handbook (not more than 7% when identifying a business practice for claims and 10% for other trade practices).

One commenter opined that the plural "unfair claims settlement practices" could be misinterpreted to "knit together" disparate acts to meet the threshold, suggesting that the Department limit the application of the threshold to a single behavior. Similarly, another commenter opined that if an exception rate is adopted, it should be tied to a specific prohibited practice rather than overall compliance so that a general business practice is not established cumulatively based on more than one prohibited practice from different sections of the Code.

Another commenter correctly pointed out that proposed new subsection 3.2 is not intended to create a separate violation in and of itself because such an expansion is expressly prohibited by 18 **Del. C.** § 2312, and requested that the Department add clarifying language to that effect.

Commenters also pointed out that since the proposed language would create a prima facie determination of a general business practice that insurers would be able to rebut, a clarification is necessary to limit the findings to enforcement by the Commissioner, as opposed to creating a cause of action for any person or entity other than the Commissioner. The requested limitation would mimic a similar limitation codified in Regulation 903.

One commenter pointed out that the presumption should apply to all of 18 **Del. C.** § 2304(16), not just to 18 **Del. C.** § 2304(16)(f).

A representative of health insurance carriers raised a conflict between Regulation 1310 - Standards for Prompt, Fair and Equitable Settlement of Claims for Health Care Services, which was adopted by the Commissioner pursuant to 18 Del. C. § 2304(16) and the new thresholds proposed at Regulation 902-3.2. The commenter pointed out that Regulation 1310 deems three instances of non-compliance with prompt pay guidelines within a 36 month time period to give rise to a rebuttable presumption of an unfair practice in violation of 18 Del. C. § 2304, which applies only to health plans, and which conflicts with the 4 percent of claims sampled as proposed in Regulation 902 and applies to all carriers.

D. Summary of Department's Third Re-proposal

In response to the comments received, the Department has determined to revise proposed new subparagraph 3.2 to clarify that:

- The four percent of claims found to be a violative general business practice must fall within the same category of prohibited practices as listed in subsection 3.1 of the regulation;
- The violative general business practice must also fall within the same 12-month period;
- The presumption applies under all of 18 Del. C. §2304(16); and
- The presumption does not apply to health care claims to which Regulation 1310 applies.

The Department also proposes to add new subsection 3.3 to clarify that the presumption that a general business practice violation occurred does not, in and of itself, create an additional and separate general business practice violation.

The Department also proposes to add new subsection 3.4 to set forth a procedure that an insurer may follow to rebut the presumption that a violative general business practice has occurred. This proposed new subsection is modeled after a similar provision in the Code of Maryland Regulations at COMAR 31.15.07.09.

The Department proposes to add new subsection 3.5 that limits the cause of action afforded under the regulation to enforcement actions conducted by the Commissioner. Proposed new subsection 3.6 excepts from regulation under Section 3.0 those health care general business practice violations that are otherwise regulated by 18 DE Admin. Code 1310.

The Delaware Code authority for the regulation and the proposed amendments is 18 Del.C. §§311 and 2312.

E. Notice and Public Comment for the Third Re-Proposal

The Department will hold a virtual public hearing and a simultaneous in-person meeting on the proposed amendments to Regulation 902 on Monday, **August 23, 2021 at 9:00 a.m.** The hearing will be facilitated through WebEx at:

- <https://stateofdelaware.webex.com/stateofdelaware/j.php?MTID=ma230bbdd684b998a7ecfdaf84f2148f9>
- meeting number (access code): 1790 36 2461 and
- meeting password: zePHXmp9q79.

Holding a virtual public meeting was specifically permitted by Paragraph 5 of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat issued by Governor John Carney on March 12, 2020 and extended monthly thereafter (see <https://governor.delaware.gov/health-soe/> for the complete list of modifications and extensions). With the anticipated expiration of the State of Emergency, the Legislature passed SB 94 w/ SA 1, which allows any public body to hold a virtual meeting if there is a physical anchor location where the public can attend the meeting in person and the virtual meeting conforms to all requirements under the Freedom of Information Act (FOIA).

The proposed amendments appear below and may also be viewed on the Department of Insurance website at <http://insurance.delaware.gov/information/proposedregs/>.

Any person may file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendments to the regulation. Any written submission in response to this notice and relevant to the proposed amendments must be received by the Department of Insurance no later than 4:30 p.m. EST, the 7th day of September 2021. Any such requests and any questions concerning connecting to the public hearing should be directed to:

Regulatory Specialist
Delaware Department of Insurance
ATTN: Docket 4259-2020
1351 West North Street, Suite 101
Dover, DE 19904
(302) 674-7379
Email: DOI_Legal@delaware.gov

902 Prohibited Unfair Claim Settlement Practices [Formerly Regulation 26]

~~Claim Settlement Practices Which, When Committed Or Performed with Such Frequency as to Indicate a General Business Practice, Are Prohibited~~

1.0 Purpose

The purpose of this regulation is to set forth unfair claim settlement practices which, when committed or performed with

such frequency as to indicate a general business practice, are prohibited.

2.0 Authority

This regulation is adopted by the Commissioner pursuant to the authority granted by 18 Del.C. §§311 and 2312, and promulgated in accordance with the Delaware Administrative Procedures Act, 29 Del.C. Ch. 101.

4.0 Authority for Regulation; Basis for Regulation 3.0 Prohibited Unfair Claims Settlement Practices

4.1 ~~18 Del.C. §314~~ authorizes the Insurance Commissioner to "...make reasonable rules and regulations necessary for or as an aid to the administration or effectuation of any provision of this title."

4.2 ~~18 Del.C. Ch. 23~~ entitled "Unfair Business Practices in the Insurance Business," ~~18 Del.C. §2304(16) Unfair Claim Settlement Practices; 18 Del.C. §2304(17) Failure to Maintain Complaint Handling Procedures; and 18 Del.C. §2304(18) Misrepresentation in Insurance Applications,~~ provide the basis for this regulation.

4.2.43.1 ~~The Following Claim Settlement Practices When Committed~~ following unfair claim settlement practices when committed or Performed performed with such ~~Frequency~~ frequency as to ~~Indicate~~ indicate a ~~General Practice~~ general business practice are ~~Prohibited~~ prohibited:

4.2.4.43.1.1 Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue.

4.2.4.23.1.2 Failing to acknowledge and respond within 15 working days, upon receipt by the insurer, to communications with respect to claims by insureds arising under insurance policies.

4.2.4.33.1.3 Failing to implement prompt investigation of claims arising under insurance policies within 10 working days upon receipt of the notice of loss by the insurer.

4.2.4.43.1.4 Refusing to pay claims without conducting an investigation based upon all available information when the notice of loss received by the insurer indicates that such an investigation is necessary to properly determine such a denial of payment.

4.2.4.53.1.5 Failing to affirm or deny coverage or a claim or advise the person presenting the claim, in writing, or other proper legal manner, of the reason for the inability to do so, within 30 days after proof of loss statements have been received by the insurer.

4.2.4.63.1.6 Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become clear.

4.2.4.73.1.7 Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts which they might be entitled to under normal fair claims evaluations.

4.2.4.83.1.8 Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

4.2.4.93.1.9 Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge of the insured.

4.2.4.103.1.10 Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which the payment has been made.

4.2.4.113.1.11 Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of a formal proof of loss form, both of which submissions contain substantially the same information, unless the formal proof of loss is required by law, prevailing rules, or the policy.

4.2.4.123.1.12 Failing to promptly settle claims, where liability has become clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

4.2.4.133.1.13 Failing when requested to promptly provide an explanation of the basis in the insurance policy in relation to facts or applicable law for denial of a claim or for the offer of a compromise settlement. Such explanation may be made verbally but when given, must be documented in the claims file.

3.2 It shall be considered prima facie evidence of a general business practice of committing an unfair claim settlement practice if the Department finds that, within a given sample of claims sampled by the Department during an investigation or examination of the insurer, the total number of unfair claims settlement practices exceeds four percent or more of claims, and the general business practice violation occurred within:

3.2.1 A single category of practices prohibited under subsection 3.1 of this regulation; and

3.2.2 A single 12-month period.

- 3.3 The presumption that a general business practice violation occurred pursuant to subsection 3.2 of this regulation is not, in and of itself, an additional general business practice violation.
- 3.4 An insurer may overcome the presumption that a general business practice violation has occurred by presenting evidence to the Commissioner relating to the harm to claimants caused by the violation, the nature of the violation, the insurer's intent, and other relevant factors.
- 3.5 This regulation shall not create a cause of action for any person or entity, other than the Delaware Insurance Commissioner, against a person or the person's representative based upon a violation of 18 Del.C. §2304(16).
- 3.6 Section 3.0 of this regulation does not apply to general business practice violations if the general business practice is otherwise regulated under 18 DE Admin. Code 1310.

2.04.0 Violations; Penalties

- 2.4 Failure to comply will subject the violators to the provisions of ~~18 Del.C. §1732 (c)(2) and 18 Del.C. §2307(a)~~ 18 Del.C. §§1712, 2307(a) and 2308, which deals deal with hearings, license revocation, suspension or fine for non-compliance of any regulation.

3.05.0 Severability

If any provision of this Regulation shall be held invalid, the remainder of the Regulation shall not be affected thereby.

4.06.0 Effective Date

This Regulation ~~shall become~~ became effective August 1, 1977. The amendments to this Regulation shall become effective ten (10) days after publication of the final order adopting the amendments.

25 DE Reg. 156 (08/01/21) (Prop.)