

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

FINAL

REGULATORY IMPLEMENTATING ORDER

902 Prohibited Unfair Claim Settlement Practices [Formerly Regulation 26]

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

A. 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 pay a settled 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, in its first re-proposal of amendments to Regulation 902, 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)) and the Department held a public hearing on October 22, 2020. The Department again took the opportunity of the re-proposal to make grammatical and formatting edits throughout the regulation.

B. 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 combined 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.

C. Summary of the Department's Re-Notice and Public Comment for the Third Re-Proposal

In response to the comments received on the second re-proposal, the Department published a third re-proposal on August 1, 2021 (see 25 **DE Reg.** 156). The Department held a virtual and in-person meeting on Tuesday, October 26, 2021 at 10:00 a.m.

In the third re-proposal, the Department proposed new subparagraph 3.2 to clarify that:

- The four percent of claims found to be a prima facie evidence of 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 added 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 added 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 new subsection is modeled after a similar provision in the Code of Maryland Regulations at COMAR 31.15.07.09. The Department also added 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.

In addition to oral comments received during the public hearing, the Department received two sets of comments from the regulated community. One of the commenters was appreciative of the revisions made to the regulation and were particularly appreciative of the addition of the provisions concerning how to rebut the presumption.

However, the commenter continued to express concern that the four percent unfair claims sampled threshold in proposed new subsection 3.2 would disproportionately affect those lines of insurance that typically have low policy counts such as life insurers, smaller property and casualty carriers and large personal auto carriers, all of whom process claims less frequently than high volume lines of insurance.

Both commenters also reiterated the previously made objection that the threshold deviates from the standards in the NAIC Unfair Claim Settlement Practices Act ("Model Act") and Examiners Handbook. They also opined that the Department has not identified a need for the proposed amendments based on market analysis and data.

Both commenters also expressed concern that the proposed amendments are likely to discourage informal resolution of market conduct exam findings, as well as self-reporting and self-remediation of claims processing errors or violations and requested an exemption of any adverse findings on general business practices if violations are promptly remediated upon discovery and self-reported.

One commenter suggested that if the Department is unwilling to follow the seven percent threshold recommended in the Examiners Handbook, that the Department follow the six percent threshold for property and casualty carriers and five percent threshold set for life and annuity carriers set by Maryland in its regulation on general business practices. The commenters also suggested that the Department follow Maryland's lead by creating specific sampling sizes to accommodate the varying sizes of companies.

Lastly, the commenters requested amendatory language to proposed new subsection 3.4 to broaden the information an insurer may present to the Commissioner to overcome the presumption created under subsection 3.2. The commenters' noted that their suggested language "would bring Delaware in line with its neighboring state of Maryland" by citing to MD COMAR 31.15.07.09.

II. FINDINGS OF FACTS

1. The Commissioner finds that it is appropriate to amend 18 **DE Admin. Code** 902 as re-proposed and amended because it appropriately addresses the comments received from the regulated community, and the public was given proper notice and a chance to comment on the proposed amendments as required under the Administrative Procedures Act at 29 **Del.C.** § 10115.

2. The Commissioner declines to further amend the regulation to add thresholds for certain lines of business or to specify sampling sizes to accommodate varying sizes of companies, or to provide an exemption for issues that are resolved expeditiously, as such amendments are unnecessary. Proposed new subsection 3.4 broadly allows carriers to

present relevant factors to rebut the presumption of an unfair trade practice, and the Department suggests that data concerning claims frequency by line of business and expeditious resolution may be presented by a carrier under proposed new subsection 3.4.

3. While the commenters suggested that adopting their proposed revisions to new subsection 3.4 would "bring Delaware in line with its neighboring state of Maryland" by citing to Maryland regulation 31.15.07.09, the Commissioner notes that new subsection 3.4 as contained in the third re-proposal is already *identical* to the language in Maryland regulation MD COMAR 31.15.07.09. Notwithstanding that new subsection 3.4 already tracks the Maryland regulation, the Commissioner agrees to move the language regarding insurers' ability to provide relevant evidence to rebut a presumed violative general business practice to the beginning of subsection 3.4. Moving the word "relevant" in proposed new subsection 3.4 from the end of this provision to the beginning of the provision will add clarity while not being violative of the Administrative Procedures Act prohibition against making substantive changes on adoption (see 29 **Del.C.** § 10118(c)). The provision on adoption will read as follows:

An insurer may overcome the presumption that a general business practice violation has occurred by presenting [any relevant] evidence to the Commissioner[, including evidence] relating to the harm to claimants caused by the violation, the nature of the violation, [and] the insurer's [intent, and other relevant factors.] [intent.]

III. DECISION TO ADOPT THE PROPOSED AMENDMENTS

For the foregoing reasons, the Commissioner concludes that it is appropriate to amend 18 **DE Admin. Code** 902, as herein described.

IV. EFFECTIVE DATE OF ORDER

The effective date of the Regulation shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*, pursuant to 29 **Del.C.** § 10118 and 29 **DE Admin. Code** 101-5.1.

IT IS SO ORDERED.

The 15th day of July, 2022.

Trinidad Navarro
Commissioner
Delaware Department of Insurance

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

1.1 ~~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."~~

1.2 ~~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.~~

4.2.13.1 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:

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

4.2.1.23.1.2 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.

- 1.2.1.33.1.3 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.
- 1.2.1.43.1.4 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.
- 1.2.1.53.1.5 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.
- 1.2.1.63.1.6 Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become clear.
- 1.2.1.73.1.7 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.
- 1.2.1.83.1.8 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.
- 1.2.1.93.1.9 Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge of the insured.
- 1.2.1.103.1.10 Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which the payment has been made.
- 1.2.1.113.1.11 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.
- 1.2.1.123.1.12 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.
- 1.2.1.133.1.13 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 **[any relevant]** evidence to the Commissioner~~], including evidence~~ relating to the harm to claimants caused by the violation, the nature of the violation, ~~[and] the insurer's [intent, and other relevant factors, intent.]~~

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.

26 DE Reg. 112 (08/01/22) (Final)