INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
OFFICE OF PROPERTY AND CASUALTY

Private Passenger Automobile Insurance-Use of Alternate Underwriting Rules

Adopted Amendments: N.J.A.C. 11:3-35.3, 35A.1, 35A.3, 35A.4, 35A.6 and 35A.7

Proposed: October 4, 2004 at 36 N.J.R. 4364(a).

Adopted: September 19, 2005 by Donald Bryan, Acting Commissioner, Department of Banking and Insurance

Filed: September 20, 2005 as R. 2005 d. 345, without change but with proposed N.J.A.C. 11:3-35A.4(d) not adopted.

Authority: N.J.S.A. 17:1-8.1, 17:1-15e, 17:33B-15 and 17:29D-1

Effective Date: October 17, 2005

Expiration Date: January 4, 2006

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received timely written comments from the following:

1. QBE Insurance Corporation; and
2. Riker, Danzig, Scherer, Hyland & Perretti (on behalf of Proformance Insurance Company)

COMMENT: One commenter questioned whether the proposed amendments apply to private passenger automobiles written under a commercial automobile insurance policy.

RESPONSE: The current rules, and thus the proposed amendments related thereto, do not apply to private passenger automobiles written under a commercial automobile insurance policy. See N.J.A.C. 11:3-35A-2. The proposed amendments relate to alternate underwriting rules that may

be utilized by insurers writing personal lines private passenger automobile insurance, on the basis of which such insurers may refuse to issue or may limit coverage for new business pursuant to N.J.S.A. 17:33B-15, as amended by P.L. 2003, c. 89. Since this statute does not require that insurers offer coverage under commercial automobile insurance policies, these amendments do not apply to such policies.

COMMENT: One commenter expressed concern with proposed new N.J.A.C. 11:3-35A.4(d), which provided that, for purposes of determining whether an insurer has satisfied the growth requirements in N.J.A.C. 11:3-35A.4(a)1 through 10, business assumed from another insurer shall be excluded.

First, the commenter believed that the rule was confusing in that it uses the term "assumed business" in the first sentence, but then uses an example of Company X "assuming business on renewal from Company Y." The commenter believed that the use of the phrase "assuming business on renewal" confuses the type of new business intended to be excluded. The commenter stated that "assumed business" means the transfer of in-force insurance liability from one company to another at a specific point in time. Business that transfers "on renewal" is business that leaves one company for another at the end of the term of an individual contract of insurance. The commenter believed that this is significant because business that transfers on renewal always is moved to the insurer of the policyholder's choice on a policy-by-policy basis. Conversely, the commenter stated that business that is assumed is a transaction between insurers for an entire book of business. The commenter believed that the type of new business intended to be excluded cannot be determined from a plain reading of the rule. In any case, the

commenter believed that the rule conflicts with the enabling statute, N.J.S.A. 17:33B-15, as amended by P.L. 2003, c. 89 and should not be adopted for the following reasons.

First, the commenter stated that N.J.S.A. 17:33B-15d(1) provides the specific formula for calculating the growth requirements that permit the use of alternate underwriting guidelines for cessation of new business in a given territory. The commenter stated that the statute does not make any exception to the formula for new business obtained by way of an assumption agreement or by way of offers upon renewal. The commenter stated that the statute is clear and unambiguous. In addition, the commenter stated that the legislative history supports this reading of the statute in that the Statement of the Assembly Banking and Insurance Committee puts no qualification on how the growth requirement must be achieved. The commenter stated that, consistent with this reading of the Act, the rules presently contain no such qualification or pre-condition. Rather, the commenter stated that the rules currently provide that in-force exposures shall be "as filed in the consolidated report" for each reported period. See N.J.A.C. 11:3-35A.4. In addition, the commenter stated that the current rule contains a definition of "new business" in N.J.A.C. 11:3-35A.2, which includes business that the Department now seeks to exclude. Finally, the commenter stated that the Department has no express or implied authority to change the statutory formula set forth in the statute. The commenter concluded on this point that the Department proposes a rule that is inconsistent with its existing rule and the statute. The commenter stated that the Department cannot ignore its own "precedent" and is bound by the current rule.

Secondly, the commenter stated that the rule would render the growth requirements in the statute unobtainable and the entire statute meaningless. The commenter stated that the overall growth in the New Jersey automobile insurance market from December 31, 2002 to December

31, 2003 was 0.45 percent according to Department Bulletins 03-06 and 04-04. Accordingly, the commenter stated that it is not mathematically possible to achieve five percent growth, the initial growth requirement set forth in N.J.S.A. 17:33B-15d(1), without counting business previously written by another insurer. The commenter stated that the Department's interpretation of the statute thus leads to an absurd, arbitrary and capricious result.

Finally, the commenter asserted that the rule results in the unconstitutional treatment of similarly situated insurers without a rational basis in violation of the Equal Protection Clause of the United States Constitution's Fourteenth Amendment and State Constitutional equal protection principles. The commenter stated that the distinction made by the Department between insurers writing non-replacement carrier new policies and those writing new policies as replacement carriers has no rational basis. Both classes of insurers write new policies. The commenter believed that the "absurdity" of the rule is revealed when it is noted that every policy that is nonrenewed and is not written by the replacement carrier is considered new business for which growth credit is given to the non-replacement carrier that writes the policy. The commenter stated that the fact that the replacement carrier may receive other consideration from the withdrawing carrier for acting as a replacement carrier is of no consequence, because the statute is only concerned with the writing of policies that are "new" to each carrier.

RESPONSE: While the Department does not agree with all of the commenter's assertions and conclusions, it has chosen not to adopt this new provision. At the time the proposal was published in October of 2004, the Department was concerned that a failure to amend the rule in this way would have a chilling effect on the availability of automobile insurance in New Jersey. Due to the development of an increasingly competitive market, that has proven not to be the

case. Based upon these changed market conditions, the Department has chosen not to adopt this provision at this time.

Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments are not subject to any Federal requirements or standards.

Full text of the adoption follows (deletion from proposal indicated in brackets with asterisks *[thus]*):

11:3-35A.4 Growth requirements

(a) – (c) (No change from proposal.)

*[(d) For purposes of determining whether an insurer has satisfied the growth requirements in (a)1 through 10 above, an insurer that has assumed business from another insurer during the reporting period shall combine the in-force exposures of the company from which it is assuming business with its own exposures at the beginning and end of the reporting period. Example: Company X has 1,000 in-force exposures in a territory on December 31, 2003, the beginning of the reporting period. On August 1, 2004, Company X begins assuming business on renewal from Company Y, which had 600 in-force exposures in that territory on December 31, 2003. At the end of the reporting period on December 31, 2004, Company X has 1,200 in-force exposures in the territory and Company Y has 450 in-force exposures. To determine whether Company X grew in the territory, the in-force exposures of Company X and Y are combined at the beginning and end of the reporting period as follows: December 31, 2003: 1000 + 600 =

1,600; December 31, 2004: 1,200 + 450 = 1,650 . For purposes of using its alternate underwriting rules, Company X has grown by 50 exposures or three percent in the territory.]*

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