

Assessment of public comments for the Second Amendment to 11 NYCRR 154 (Insurance Regulation 150).

The New York State Department of Financial Services (“Department”) received comments from consumer groups, insurers, and insurer trade organizations. The Department also received numerous letters from consumers in support of the rule.

Comment: Insurers commented that statutory and decisional law permits an insurer to use actuarially justified rating and underwriting factors, including occupation and education in private passenger auto, and that the Superintendent of Financial Services (“Superintendent”) lacks the authority to prohibit or restrict the use of these or any factors in the absence of specific statutory authorization. Insurers and insurer trade organizations commented that the rule incorrectly references the legal standard for regulating the fairness of insurance rates. They assert that insurers do not bear the burden of establishing that a “reasonable relationship” exists between the characteristics of a class and the hazard insured against. Rather, they allege that the appropriate test is whether the factors are explicitly prohibited under New York law and whether an insurer can demonstrate actuarial soundness. An insurer commented that the Department has not provided any evidence that use of education and occupation is unfairly discriminatory.

In addition, an insurer commented that its use of these factors in initial tier placement is supported by actuarially tested data and that the Department has never disapproved its use of these factors in tier rating. Another insurer commented that the Department has been aware of the use of education and occupation in initial tier placement for several years, and has had the authority to disapprove filings that include education and occupation if the Department felt that their use was truly unfairly discriminatory. The insurer alleges that the Department approved rate filings in the interim for both the insurer and other insurers that use education and occupation in initial tier placement.

Insurers, a national trade organization for property/casualty insurers (“national p/c trade”), and a state trade association representing property/casualty insurers (“state p/c trade”) commented that this rule is an overreach

of administrative authority and improperly creates a ban on the use of education and occupation that is outside the Superintendent's authority.

Response: Insurance Law § 2303 requires that rates not be unfairly discriminatory and it is the insurer's burden to prove to the Superintendent that they are not. The Superintendent already has discretion under Article 23. The rule does not grant the Superintendent any more authority than she already has. The Superintendent is simply applying existing standards which, in fact, are the same standards that the Superintendent uses generally for ratemaking and specifically has used with respect to the use of education and occupation as tier-movement factors. The Department has thoroughly considered all of the information submitted regarding these issues. After exhaustive review, no insurer has demonstrated to the Superintendent's satisfaction that the use of such factors would not be unfairly discriminatory.

The comments that the Department has never disapproved the insurer's use of education and occupation in tier rating and that the Department has affirmatively approved several rate filings that use education and occupation in initial tier placement are patently false. Regarding initial tier placement, Insurance Regulation 150 currently does not require an insurer to file with the Department its initial tier placement risk classifications. Therefore, there is nothing for the Superintendent to approve or disapprove. With regard to tier movement, which criteria insurers file with the Superintendent, the Department is not aware of approving any such tier movement factor because no insurer has demonstrated to the Superintendent's satisfaction that the use of such factors would not result in unfairly discriminatory rates.

Therefore, the Department did not make any changes in light of these comments.

Comment: A national insurer trade organization commented that the rule sets a problematic precedent by disregarding the use of actuarial science in assessing insurance risk in favor of a more subjective approach whereby an insurer must prove that a reasonable relationship exists between the characteristics of a class and the hazard insured against. The trade organization stated that it is unaware of any actuarial standard or New

York law that would lead to the conclusion that a reasonableness standard is required, and that underwriting factors that are proven to be actuarially justified should not be subject to unnecessary restrictions or limitations.

A state p/c trade commented that if a rating classification reflects differences in loss costs, then the rate is not unfairly discriminatory. Therefore, according to this commenter, education and occupation meet generally accepted actuarial standards.

Insurers and a national p/c trade commented that it is well established that an actuarially sound risk classification is not unfairly discriminatory unless it violates a specific public policy codified by statute. They claim that actuarial soundness is the only criteria for which risk classifications are to be evaluated and the proposed rule's requirement that a reasonable relationship exists between the characteristics of a class and the hazard insured against is not grounded in the law.

Response: As previously stated, Insurance Law § 2303 requires that rates not be unfairly discriminatory, and the burden is on the insurer to prove such. The comment that it is well established that an actuarially sound risk classification is not unfairly discriminatory unless it violates a specific public policy codified by statute is not correct. If it were correct, then there would be no reason for the general language in § 2303, which requires that rates not be unfairly discriminatory. While the Legislature may have determined that specific factors, like race, may not be used in the making of rates, regardless of whether their use would result in an unfairly discriminatory rate, Insurance Law § 2303 authorizes the Superintendent to determine whether the use of certain factors would result in unfairly discriminatory rates. This is a determination for the Superintendent to make, based upon whatever supporting information that the insurer provides and other relevant information available to the Superintendent, including actuarial analyses.

Moreover, pursuant to the State Farm decision, the Superintendent may reject a filing unless the insurer provides an explanation as to why one insured who otherwise presents exactly the same objective risk characteristics as another insured should receive a higher rate. Therefore, an insurer must explain how there is a

reasonable relationship between education or occupation and the insured's driving ability or habits such that an insurer would predictably suffer a greater or lesser risk of loss. If it is not rational or plausible to assert that a person with a high school degree is more likely to file a claim for automobile loss than a person with a graduate degree, then the factor is inappropriate. As noted in the State Farm decision, just providing statistical data is not enough, as statistical data alone does not establish causation or the absence of unfair discrimination.

Thus, the Department did not make any changes to the rule in light of these comments.

Comment: An insurer and the national p/c trade objected to the statement in the rule that certain insurers used education or occupation to establish initial tier placement without adequate substantiation that education or occupation relates to the individual's driving ability or habits such that the insurer would suffer a greater risk of loss. They stated that data and information was provided to the Department on numerous occasions substantiating the strongly risk predictive nature of these factors. The trade organization also commented that complying with the requirement is either not reasonably attainable or that the rule will require insurers to prove something that is impossible to prove.

Another national insurer trade organization commented that it is concerned that it would be difficult, if not impossible, for an insurer to demonstrate to the Superintendent's satisfaction that the use of education or occupation does not violate Insurance Law Article 23 given that the proposed rule states that the Department concluded, as a result of an investigation, that insurers failed to provide sufficient support for the existence of the necessary relationship for the use of education or occupation.

An insurer commented that it provided credible actuarial data to show the relationship between education and occupation and losses, that the Department has never questioned that the correlation exists, and that this correlation is all that is necessary to show there is a reasonable relationship and that the use of education and occupation is not unfairly discriminatory under the law.

Response: During its investigation, the Department asked insurers to explain, consistent with applicable law, how there is a reasonable relationship between education or occupation and the insured's driving ability or habits such that an insurer would predictably suffer a greater or lesser risk of loss. However, insurers only provided statistical data, and failed to provide any suitable explanation as to why such classifications are not unfairly discriminatory. The regulation makes clear that the Superintendent has not prohibited the use of such classifications if the insurer can adequately demonstrate that the rates would not be unfairly discriminatory. However, if insurers are not able to explain to the Superintendent how there is a reasonable relationship between education or occupation and the insured's driving ability or habits, then insurers should not use these factors in initial tier rating or tier movement because they are discriminatory.

Therefore, the Department did not make any changes to the rule in light of this comment.

Comment: An insurer commented that the rule reserves for DFS full discretion to define the "reasonable relationship" test and the type of explanation that would satisfy the test, that that this discretion could lead to the unpredictable application of the law.

Response: The Superintendent already has broad discretion under Insurance Law § 2303 to determine whether rates are unfairly discriminatory and the Superintendent exercises that authority each day as provided by law. This rule does not grant the Superintendent any more authority than § 2303 already grants her. Therefore, the Department did not make any changes in light of this comment.

Comment: The national p/c trade commented that the rule fails to define what the "reasonable relationship" requirement entails or how an insurer could demonstrate a "reasonable relationship" to the Superintendent's satisfaction, and it appears that meeting the test may turn on intuitive or subjective factors, which should not have a role in such determinations under actuarial science. An insurer commented that the rule fails to identify what "supports" are sufficient to establish the relationship needed for use of occupational status and fails to provide what "convincing evidence" insurers must submit to use education level attained.

The insurer requested that the Department amend the rule to remove the Superintendent's "satisfaction" standard and replace it with language that clearly defines the actuarial supports or data needed to justify the use of education and occupation.

Another insurer commented that the rule leaves undefined the prerequisites for approval of education or occupation, leaving this entirely to the subjective discretion of the Superintendent and thus unreviewable in an Article 78 proceeding. The insurer requested that the Department amend the rule to state that unfair discrimination does not exist in underwriting and rate making provided that risk characteristics comport with generally accepted actuarial standards and to remove the Superintendent's discretion to reject or disapprove such risk characteristics unless the Superintendent finds that there is a clear and demonstrated failure to comply with generally accepted actuarial methods and the Superintendent sets forth the basis for any such finding in writing.

Response: As previously stated, Insurance Law § 2303 requires that rates not be unfairly discriminatory and under clear New York law, the burden is on an insurer to prove that to the Superintendent. This rule does not change the current law under which insurers already have been operating or grant the Superintendent any more discretion than she already has.

The comment that the Department amend the rule to state that unfair discrimination does not exist in underwriting and rate making provided that risk characteristics comport with generally accepted actuarial standards and to remove the Superintendent's discretion to reject or disapprove such risk characteristics unless the Superintendent finds that there is a clear and demonstrated failure to comply with generally accepted actuarial methods and the Superintendent sets forth the basis for any such finding in writing would in fact be contrary to the statute that provides the Superintendent with the authority to review insurers' rates to ensure that they are not unfairly discriminatory, and would impermissibly shift the burden of proving that the rates are not unfairly discriminatory from the insurer to the Superintendent.

The comment that the decision of the Superintendent is unreviewable in an Article 78 proceeding is false as any final determination by the Superintendent is reviewable and subject to the usual standards applicable to any determination by the Superintendent.

Therefore, the Department did not make any changes in response to this comment.

Comment: The consumer groups asked that the Department amend the rule to prohibit the use of education or occupation altogether.

Response: The Department did not make any changes in response to this comment because to create an out-right ban on the use of these factors and not give an insurer an opportunity to prove that the use of the factors does not violate Insurance Law § 2303 would be inconsistent with the law.

Comment: A consumer group commented that if the Department retains the provisions in the rule that would allow an insurer to use education and occupation under certain circumstances, such as demonstrating to the Superintendent's satisfaction that their use will not result in a rate that is unfairly discriminatory, then the Department should amend the rule to require a public hearing to be held when an insurer seeks to use one of these factors so that interested parties may review and assess insurer claims of actuarial support and compliance with Insurance Law Article 23.

Response: Insurers make many rate classification filings with the Department. It would not be practical for the Department to hold a public hearing every time an insurer makes such a filing. Moreover, the Superintendent, upon advice of an actuary, should be determining whether the rate classification will not result in a rate that violates Article 23 and meets the criteria set forth in the rule, not outside parties who are not trained in the field of actuarial science. The Superintendent always has the discretion to hold a public hearing, if the Superintendent believes that such would be helpful. Therefore, the Department did not make any changes in response to this comment.

Comment: A consumer group commented that with respect to the language in the rule that states that an insured's income may not be a risk characteristic, whether directly or indirectly, the Department should amend the rule to require that there be a presumption that if occupation groups are not demonstrably income neutral, then they are indirectly using income as a characteristic and must be prohibited.

Response: The Superintendent must determine on a case-by-case basis whether the insurer has demonstrated to the Superintendent's satisfaction that the occupations are grouped in a way that is not directly or indirectly related to income. The Superintendent must consider sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience. Concluding in advance that certain factors must be neutral would be contrary to the standards of Article 23 because that may result in a rate that is unfairly discriminatory, excessive or inadequate.

Therefore, the Department did not make any changes in response to this comment.

Comment: A consumer group commented that if the Department retains the provisions in the rule that allow an insurer to use education and occupation if the insurer meets certain criteria, such as demonstrating to the Superintendent's satisfaction that their use will not result in a rate that is unfairly discriminatory, then the Department should amend the rule to: (1) require insurers to show that occupation has a reasonable relationship with driving ability or habits and predictable influence on risk of losses; (2) require that any differences in prices must be commensurate with difference in loss costs; and (3) prohibit occupation from serving as a direct or indirect proxy for income.

Response: The rule already states this in section 154.6(c)(2). Therefore, the Department did not make any changes in light of this comment.

Comment: A consumer group commented that if the Department does not prohibit the use of education and occupation altogether, then the Department should closely scrutinize any attempt to justify the use of education and employment information in pricing. The consumer group also commented that the Department

should proactively educate members of the public about their rights under the final rule so that drivers may be alert to this discriminatory practice and act as appropriate, such as updating their profiles with their insurers or moving to an insurer that does not discriminate based on education and occupation.

Response: The Department will closely scrutinize any attempt to justify the use of education and occupation in rating, including in initial tier placement and tier movement. The Department also will consider proactively educating members of the public about their rights under the final rule. However, no amendments to the rule are necessary to address these comments.

Comment: A consumer group commented that the Department should continue to seek out ways to use its regulatory authority to make the auto insurance marketplace fairer, more competitive, and transparent. The consumer group stated that the focus must continue to be on driving factors, not on criteria that do not bear on driving, that are difficult for drivers to affect, and that have been and are suspect as proxies for unlawful discrimination.

Response: This is a general comment that is not specific to the rule.

Therefore, the Department did not make any changes to the rule in light of this comment.

Comment: Consumer groups commented that the Department should amend the rule to ensure that the use of education and occupation as rating factors do not serve as proxies for other prohibited factors, including race, ethnicity, and national origin.

Response: The Department agrees that factors should not serve as proxies for other prohibited factors. Under the law, with respect to this rule, the Superintendent must determine on a case-by-case basis whether the insurer has demonstrated to the Superintendent's satisfaction that the use of education or occupation does not serve as a proxy for other prohibited factors, including race, ethnicity, and national origin.

Therefore, the Department did not make any changes to the rule in response to this comment.

Comment: An insurer commented that the establishment of factors for both unemployed persons and homemakers must be done in way that is supported by loss data to not be unfairly discriminatory under New York law. The commenter claims the establishment of neutral factors for these groups is a public policy decision and is not in the Superintendent's power given the underlying lack of statutory support.

Response: Generally, the Department believes the factors for unemployed persons and homemakers should be neutral. An insurer may submit information to the Superintendent as part of a rate or tier filing that treatment of these groups should be different, and the Superintendent will consider that information in reviewing the filing.

Comment: An insurer commented that a common trait of tiering factors is that they are not subject to change at renewal. The insurer stated that it would be willing, and has offered previously, to address education and occupation as a rating factor, which would accommodate premium changes at renewal when a person's occupational or educational status changes.

Response: This comment is not accurate. There is nothing that prevents an insurer from changing its tiering factors at renewal. Insurance Regulation 150 does not require an insurer to file its initial tier placement with the Department. If an insurer filed its initial tier placement with the Department, then the Department would consider whether the rating factors result in a rate that is unfairly discriminatory in violation of Insurance Law Article 23. However, while Insurance Law § 2349 permits unlimited "downtiering" to a better rated tier, it restricts to three percent of policies "uptiering" to a worse rated tier.

Comment: An insurer commented on the language in the rule that requires an insurer that, as of the rule's effective date, has utilized education or occupation in its initial tier placement, to amend its multi-tier rating program and tier movement rules within 90 days after the effective date to comply with the rule for policies issued or renewed after that date. The insurer states this language fails to distinguish between the obligations for insurers seeking to use education and occupation moving forward and insurers that "had utilized" education

and occupation previously. The insurer further states that the phrase “had utilized” creates considerable ambiguity as to whether any obligation exists for those insurers that stop using education and occupation before the rule’s effective date, while another insurer commented that it is unclear what the obligations of an insurer are if that insurer is not using education and occupation at the time the rule takes effect, but did use those factors at one time, versus an insurer that is using education and occupation at the time that the rule takes effect. An insurer suggested that any obligations for amending initial tier programs or placement should apply only to those insurers planning to use these factors after the rule’s effective date.

The national p/c trade and an insurer commented that the rule fails to provide any guidance on whether this language in the rule applies prospectively to new policies issued on or after the rule’s effective date or if it also applies to existing policies renewed on or after the rule’s effective date.

The national p/c trade also commented that the rule also fails to provide any detail as to the process for re-underwriting the policies of existing policyholders, thereby seemingly leaving the details of this process completely to the Superintendent’s discretion. The national p/c trade alleges that this makes it impossible for insurers to plan or have any clarity relative to the details and potential impact of this process.

Response: If an insurer used education and occupation at any time in the past and the insurer still has policies in effect that were rated when the insurer was using education and occupation, then the insurer must amend its multi-tier rating program and tier movement rules to the Superintendent’s satisfaction within 90 days after the rule’s effective date to comply with the rule for all policies issued on or after that day.

The Department amended the rule to clarify that with regard to policy renewals, an insurer must remedy any continuing impact of the insurer’s prior use of education level attained and/or occupational status in initial tier placement on an insured’s premium rate. The Department does not consider this to be a substantive change.

Comment: An insurer commented that the requirement that insurers file their rules governing initial tier placement for the Superintendent’s prior approval would give an advantage to those insurers not using

education and occupation because their rules would not be subject to the Superintendent's prior approval, which would give those insurers more market flexibility. The insurer also commented that the rule does not provide a timeframe within which the Department must review and approve initial tier placement rules.

Response: The Department believes it is crucial to review an insurer's rules governing initial tier placement where the insurer is using education and occupation because of what the Department found during its investigation. If an insurer is concerned about having to file with the Superintendent, then it should not use education and occupation in its initial tier placement.

Regarding the comment that the rule does not provide a timeframe within which the Department must review and approve initial tier placement rules, Insurance Law § 2307 would apply to the review and approval of initial tier placement rules. This section states that an insurer may not use a rating classification or territory unless the Superintendent has approved it or 90 days has elapsed and the Superintendent has not disapproved it as unfairly discriminatory or violative of public policy.

Comment: The national p/c trade commented that it does not object to the requirement that an insurer provide tier movement rules that address a change in the insured's occupational status at the time of renewal where the insured's initial tier placement is influenced by occupational status because any premium change resulting from a change in status should be in accordance with actuarial data. However, if such data indicates that a premium increase is warranted due to an occupation change, then according to this trade an insurer should be permitted to increase the premium, otherwise the insured's premium in the riskier occupation would be unfairly subsidized by other insureds.

Response: The language in § 154.6(c)(2) sets forth minimum requirements. There may be other features, with regard to initial tier placement, if the insurer demonstrates to the Superintendent's satisfaction that it will not result in a rate that violates Insurance Law Article 23. As noted, § 2349 prohibits an insurer from uptiering more than three percent of its business.

Comment: The state p/c trade commented that the rule would have a negative impact on the New York auto insurance market to the detriment of consumers. For example, the trade asserts that occupations considered low-risk by some insurers include police officers, firefighters and librarians. The state p/c trade stated that these individuals benefit from the use of occupation in rating when written by some insurers and thus would see a rate increase if this rule is enacted. The state p/c trade also stated that the fact that these occupations are considered low-risk by some insurers also clearly demonstrates that occupation groups are not a proxy for income.

An insurer commented that while it agrees that rating and underwriting based on income is not appropriate, it should also be pointed out that occupation is not a surrogate for income and plays no role in its development of occupational groups.

An insurer also commented that it should be clear that rate differentials will vary upwards and downwards depending upon the loss characteristics of each occupational group.

Response: The Superintendent must determine on a case-by-case basis whether an insurer has demonstrated to the Superintendent's satisfaction that any factors that are used are based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience. If the Superintendent approves any occupational groupings, then the Department agrees that rate differentials between the groups should be based upon the loss characteristics of each occupational group. However, the rule does not need to state such because that is how it works currently with every rating classification.

Therefore, the Department did not make any changes in light of these comments.

Comment: A consumer group commented that the Department should amend the rule so that all written notices provided to the first-named insured are clear and easily understandable, and should require insurers to print the notices in eye-catching fonts and colors to increase the chances that consumers will see and act on the notices.

Response: The notice language is similar to other notice language in the Insurance Law and regulations promulgated thereunder in that it requires the written notice to “conspicuously” explain the required information in the notice. The Department usually does not specifically require insurers or other licensees to print notices in “eye-catching fonts and colors” as the Department leaves it to the insurer to decide what is conspicuous depending on how the notice is being viewed (e.g., electronically on a screen or on paper). Therefore, the Department did not make any changes in response to this comment.