Assessment of Public Comments on the Proposed Seventh Amendment to 11 NYCRR 25 (Insurance Regulation 10)

The Department of Financial Services ("DFS") received comments from a trade organization representing New York property/casualty insurers ("insurer trade"), a trade organization representing public adjusters ("public adjuster trade"), and from a property/casualty insurer.

11 NYCRR § 25.3

Comment: The public adjuster trade commented that the change to 11 NYCRR § 25.3(a) to prohibit public adjusters from accepting contracts between 6:00 p.m. and 8:00 a.m. would deprive an insured of timely, necessary, and desired professional representation.

Response: 11 NYCRR § 25.3(a) currently prohibits public adjusters from accepting contracts between 6:00 p.m. and 8:00 a.m. DFS is not adding a new requirement. Rather, DFS is just clarifying the text. Therefore, DFS did not make any changes in response to this comment.

11 NYCRR § 25.5

Comment: The public adjuster trade commented that the definition of "supplemental claim" in 11 NYCRR § 25.5(e) needlessly limits the rights of consumers without a regulatory purpose or basis because it refers to an insured retaining a public adjuster to prove the amount and extent of the loss and not the cause of the loss. The public adjuster trade commented that it cannot think of a conceivable, reasonable regulatory purpose to prevent consumers from revisiting issues of causation in a supplemental claim and that the trade thinks it is an illegal limitation on the rights of policyholders who have a need to dispute determinations regarding cause of loss with the help of a public adjuster.

Response: DFS added a definition of "supplemental claim" for the purpose of 11 NYCRR § 25.7(a), which allows a public adjuster to charge a fee of up to 20% on a supplemental claim if the aggregate fee charged is less than or equal to 12.5% of the full claim payment. DFS added language allowing for a higher fee for a

supplemental claim at the request of the public adjuster trade. The definition of "supplemental claim" does not limit the rights of policyholders or prevent consumers from revisiting issues of causation in supplemental claims. Rather, it only pertains to when a public adjuster can charge a fee of up to 20%. Currently, a right to a supplemental claim fee does not exist in the regulation. Therefore, the assertion that policyholders' rights are being illegally limited is incorrect and DFS did not make any changes to address this comment.

11 NYCRR § 25.6

Comment: The public adjuster trade commented that the language in 11 NYCRR § 25.6(e)(4) seemingly prevents any compensation being paid to the public adjuster if there is a referral to a relevant contractor without the necessary paperwork and signatures. The public adjuster trade requested that DFS add language clarifying that the limitation on the compensation only applies to compensation for the referral.

Response: DFS amended the regulation to clarify that the prohibition on the compensation is for the referral, which was DFS's intent and therefore is not a substantive change.

Comment: The public adjuster trade commented that DFS should add language to 11 NYCRR § 25.6(f) that states that "[f]or reasonable expenses incurred for experts and consultants performing services that are beyond the normal estimating process such as architects, engineers, specialized personal property experts, accountants, [and] lawyers, said expenses shall not be considered as part of the public adjuster's fee for purposes of calculating the maximum fee in Section 25.7 of the Part provided the expert and consultant services were performed with the knowledge, consent and approval of the insured."

Response: If the public adjuster needs to hire an outside expert or consultant, then the fee must be included in the compensation agreement and is subject to the statutory maximum. Thus, DFS did not make any changes to the regulation to address this comment.

Comment: The public adjuster trade commented that limiting the fee to up to 20% of the supplemental claim needlessly reduces the universe of consumers benefitted by the regulation and requested that public adjusters be able to charge a fee of up to 30%.

Response: DFS has had numerous conversations with the public adjuster trade regarding the appropriate fee for a supplemental claim. As DFS has previously informed the trade, DFS believes that 30% is too high and that 20% is fairer, especially since the regulation currently does not provide for any fee for a supplemental claim. A higher fee means that an insured gets less money as part of the insured's claim settlement. As a result, DFS did not make any changes in response to this comment.

11 NYCRR § 25.11

Comment: The public adjuster trade commented that a public adjuster should not be required to file the referral fee disclosure with the insurer because putting insurers in a position to supervise or oversee any aspect of the relationship between consumers and their representatives is anachronistic and inappropriate. The public adjuster trade commented that DFS should amend 11 NYCRR § 25.11(a) to require that the public adjuster maintain and retain this referral fee disclosure with reasonable and appropriate sanctions for failure to do so.

Response: An insurer needs a copy of the referral fee disclosure so that the insurer knows how much the public adjuster's fee is when it is writing the check. Thus, DFS did not make any changes in response to this comment.

Comment: The insurer trade and property/casualty insurer commented that DFS should amend 11 NYCRR § 25.11(b) so that an insurer only must include the public adjuster on all written communications, and not oral communications, because requiring an insurer to include the public adjuster in oral communications may hamper communication with the insured. The insurer trade gave an example of a situation in which the insured contacts an insurer's underwriting department and asks about the effect of the loss on the policy. The insurer

trade also recommended that DFS amend the regulation to require a public adjuster to communicate any written or verbal offer to the insured within a specified timeframe and respond to such offer in writing to the insurer.

Response: 11 NYCRR § 25.11(b) requires an insurer to include the public adjuster in any written or oral communications that ***the insurer initiates*** with the insured unless the insured instructs the insurer otherwise in writing. Thus, the insurer only needs to include the public adjuster in oral communications that the insurer initiates and this requirement would not hamper the ability of an insured to initiate a conversation with the insurer. DFS has received complaints of insurers contacting insureds directly about a claim settlement or otherwise excluding public adjusters from claim settlement discussions when the insurers know that the insureds have hired public adjusters to assist the insureds. The Insurance Law allows an insured to hire a public adjuster to represent the insured and the insurer must respect that representation.

DFS is not aware of any issues involving a public adjuster failing to communicate any written or verbal offer to the insured and or responding to the insurer's offer.

Therefore, DFS did not make any changes to the regulation in response to these comments.

11 NYCRR § 25.12

Comment: The public adjuster trade commented that in the absence of a direction to pay letter, 11 NYCRR § 25.12(a) precludes a two-party check payable to both the insured and the public adjuster for the contracted fee. The trade cautioned that the amendments are fatally flawed and taken together appear to be unconstitutional because the regulation will require professional public adjusters to assume fiduciary responsibilities for an insurance claim knowing that there is little likelihood they will be recompensed for their services and expenses incurred.

Response: 11 NYCRR § 25.12 currently provides that "[w]hen a claim is settled where the insured is represented by a public adjuster, ***upon the request of the insured***, the insurer's check may be made payable to both the public adjuster and the insured or to the public adjuster named as a payee… ." (Emphasis added.) The

regulation already permits the insured to determine to whom the check is made payable and is silent as to whom the insurer should make the check payable if the insured does not make a request. The amendments to this section clarify to whom an insurer must make a check payable and when.

The insurance contract is between the insured and the insurer. The public adjuster is not a party to this insurance contract. The insured hires a public adjuster to assist the insured just like the insured may hire any other third party to assist with a loss, such as a building contractor. There is nothing unconstitutional about a public adjuster not having a right to compensation directly from the insurer when the insured does not submit a direction to pay letter. Moreover, there is no fiduciary responsibility assumed by the public adjuster because it does not have a right to direct payment from the insurer. 11 NYCRR§ 25.12 gives public adjusters more rights to payment than to any other third party an insured may hire in relation to a loss or claim. If the public adjuster is concerned that an insured will not pay the public adjuster for the adjuster's work, then the public adjuster can choose not to take the job. If the insured does not pay the public adjuster or there is otherwise a dispute over the fee, the public adjuster can sue the insured with whom the adjuster has a contract, just like any other third party hired to perform a job. Therefore, DFS did not make any changes in response to this comment.

Comment: The insurer trade asked that DFS amend the final sentence of 11 NYCRR § 25.12(a)(2) to read as follows: "[t]he public adjuster's fee check may be issued solely to the public adjuster only if the insured, in accordance with this section, has made such a request of the insurer and the loss payee's or mortgagee's interest would be satisfied by the balance of the claim proceeds, or if such request is made by both the insured and the loss payee or mortgagee." The insurer trade further requested that DFS amend the language of the proposed direction to pay letter such that the "I hereby direct" clause reads: "***[p]rovided the interests of all loss payees or mortgagees are satisfied***, I hereby direct (Name of Insurer) to issue a check or checks as follows." (Emphasis added.) The insurer explained that these amendments would clarify any potential confusion regarding the payment protocols for paying a public adjuster's fee for claims where there is a mortgagee listed on the policy,

providing consistency with the Department's position in Office of General Counsel ("OGC") Opinions from May 12, 2003 and July 26, 2005.

Response: It has been OGC's longstanding position that the public adjuster's fee check may be issued solely to the public adjuster only if the insured, in accordance with 11 NYCRR § 25.12, has made such a request of the insurer, and the mortgagee's interest would be satisfied by the balance of the claim proceeds, or if such a request is made by both the insured and the mortgagee. OGC Opinion No. 03-05-11 (May 12, 2003). If the mortgagee's interest would not be completely satisfied by the balance of the claim proceeds, or if the mortgagee has not agreed to pay the adjuster by separate check, then the insurer must make a fee check payable to the mortgagee as well as to the public adjuster. Id. The amendments made to the regulation would not change that position. Therefore, it is not necessary to revise the regulation in this fashion and DFS did not make any changes to the regulation in response to this comment.

Comment: The public adjuster trade commented that the language in 11 NYCRR § 25.12(a)(3) that states that "[a]ny payment made to a public adjuster shall be only for those elements of the claim for which the public adjuster represents the insured" is an unnecessary intrusion on the relationship between the consumer and their professional representatives and that the language will be interpreted as inappropriately disallowing a payment to the public adjuster.

Response: Insurance Law § 2108(p) references a public adjuster receiving compensation "for or on account of services rendered to such insured as a public adjuster." Since the public adjuster's fee is taken from any claim settlement, thereby reducing the overall amount the insured receives from the insurer for the loss or damage, it is appropriate that the public adjuster only receive a fee for the elements of the claim for which the public adjuster represented the insured. Therefore, DFS did not make any changes in response to this comment.

Comment: The public adjuster trade commented that the language in 11 NYCRR § 25.12(a)(5), which states that "[a] public adjuster shall not condition doing business with an insured on the insured signing a direction

to pay letter that directs the insurer to name the public adjuster on the check" is unconstitutional and that a public adjuster must always be entitled to condition doing business on a reasonable expectation of payment for services rendered.

Response: This language does not prohibit a public adjuster from being compensated for services rendered. Rather, it prohibits a public adjuster from forcing the insured to sign a direction to pay letter that directs the insurer to name the public adjuster on the check the insurer issues. There is nothing unconstitutional about that. There may be reasons why the insured does not want the public adjuster listed on the check. As stated above, a public adjuster is not a party to the insurance contract. The public adjuster is hired by the insured to assist the insured just like any other third party, such as a building contractor. The public adjuster may obtain compensation directly from the insured with whom it has a contract. Therefore, DFS did not make any changes in response to this comment.

11 NYCRR §§ 25.7 and 25.13

Comment: The property/casualty insurer requested that DFS amend 11 NYCRR §§ 25.7 and 25.13 to include a numerical example that demonstrates how the public adjuster's fee is taken from the claim payment the insurer makes because its claims department has advised that insureds are not always aware that the public adjuster's fees are taken from the settlement amount, not in addition to the settlement amount.

Response: DFS is not aware of any issues regarding insureds not being aware of how the public adjuster's fees are paid. To the extent there is any confusion, the direction to pay letter that the insured must complete and file with the insurer should clarify how the public adjuster's fee is paid. Therefore, DFS did not make any changes in response to this comment.

Comment: The public adjuster trade requested that DFS amend the forms set forth in 11 NYCRR § 25.13 in accordance with all their comments on the regulation and to amend the proposed compensation agreement to include assignment language to the effect that an insured agrees "to assign and to pay the adjuster for such

services." The public adjuster trade stated that it does not understand how preventing voluntary assignment helps either the consumer or the public adjuster.

Response: DFS did not amend the forms set forth in 11 NYCRR § 25.13 in accordance with all the trade's comments on the regulation for all the reasons set forth above. In addition, DFS did not include assignment language in the compensation agreement because including it would make it mandatory, not voluntary, and there is no reason why an insured must be forced to give an assignment. Therefore, DFS did not make any changes in response to these comments.

General Comment

Comment: The property/casualty insurer asked that DFS amend the regulation to provide insurers with an outlet to report patterns of excessive or fraudulent claims because the insurer alleges that it is common for public adjusters to grossly inflate the adjustment of losses.

Response: Insurers already have an outlet to report patterns of excessive or fraudulent claims. Insurers may submit a complaint to DFS and must report fraudulent insurance acts to DFS pursuant to Insurance Law § 405. Therefore, DFS did not make any changes to the regulation in response to this comment.