

INSURANCE  
DEPARTMENT OF BANKING AND INSURANCE  
OFFICE OF PROPERTY AND CASUALTY  
OFFICE OF CONSUMER PROTECTION SERVICES

Commercial Automobile Insurance Plan; New Jersey Personal Automobile Insurance Plan; Renewal and Nonrenewal of Automobile Insurance Policies; Rate Filing Requirements: Voluntary Market Private Passenger Automobile Insurance; Rate Process for Limited Rate Changes: Calculations for Private Passenger Automobile Insurance Rate Change; Tier Rating Plans and Underwriting Rules; Appeals from Denial of Automobile Insurance; Eligible Persons Qualifications and Automobile Insurance Eligibility Points Schedule; Private Passenger Automobile Insurance Underwriting Rules; Private Passenger Automobile Insurance - Use of Alternate Underwriting Rules; Insurers Required to Provide Automobile Insurance Coverage to Eligible Persons; Special Rules for Effecting Coverage for Private Passenger Automobile Insurance; Insurers Required to Provide Survey Information; Automobile Insurance Urban Enterprise Zone Program; Fraud Prevention and Detection Plans; Activities for which a Person Must Be Licensed as an Insurance Producer

Adopted New Rules: N.J.A.C. 11:3-8.9, 8.10 and 8.11

Adopted Repeals and New Rules: N.J.A.C. 11:3-8.4 and 8.5 and 11:3-8 Appendix

Adopted Amendments: N.J.A.C. 11:3-1.1, 2.2, 2.8, 2.11, 8.2, 8.3, 8.6, 16.2, 16.3, 16B.2, 16B.3, 19A.1, 19A.3, 19A.4, 19A.5, 19A.6, 33.1, 34.2, , 45.1, 45.2, 46.2, 46.4, 46.6 and 46.7, 11:16-6.2 and 6.6; and 11:17A-1.2 and 1.7

Adopted Repeals: N.J.A.C. 11:3-2.13, 19A.7, 35, 35A, 40, 44 and 47

Proposed: June 16, 2008 at 40 N.J.R. 3572(a)

Adopted: November 19, 2008 by Steven M. Goldman, Commissioner, Department of Banking and Insurance

Filed: November 19, 2008 as R. 2008 d. 380, **with substantive changes** not requiring additional public notice and opportunity for comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 17:1-15e, 17:22-6.14a1 through 6.14a3 and 17:33B-15

Effective Date: December 15, 2008

Operative Date: January 1, 2009

Expiration Date: June 7, 2011, N.J.A.C. 11:3;  
July 30, 2011, N.J.A.C. 11:16  
June 21, 2010, N.J.A.C. 11:17A

Summary of Public Comments and Agency Responses:

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

1. Independent Insurance Agents and Brokers of New Jersey;
2. CURE Auto Insurance;
3. State Farm Insurance Companies;
4. NJ Personal Automobile Insurance Plan Governing Committee;
5. Property Casualty Insurers of America;
6. NJ Manufacturers Insurance Group;
7. Professional Insurance Agents of New Jersey;
8. The Insurance Services Office;
9. New Jersey Citizen Action;
10. Progressive Insurance;
11. United Services Automobile Association;
12. Insurance Council of New Jersey; and
13. B. Sachau

COMMENT: One commenter commended the Department on its timely proposal of amendments to address the phase out of the “take-all-comers” requirement and stated that it supported the majority of the proposed changes.

RESPONSE: The Department appreciates the support.

COMMENT: One commenter stated that it supported the Department’s proactive steps to clarify the language and organization of the regulations being amended. The commenter noted that

consistency in the terms used in the rules will help producers understand their obligations and help organizations that represent producers to give better advice to their members. The commenter also supported the Department's decision to repeal rules that are no longer applicable to the producer community.

RESPONSE: The Department appreciates the support.

COMMENT: One commenter noted that N.J.A.C. 11:3-35A was not included in the list of rules in the notice of proposal that indicates that the full text of the rules to be repealed can be found in the New Jersey Administrative Code.

RESPONSE: The commenter is correct N.J.A.C. 11:3-35A was omitted from the notice of where the list of rules being repealed could be found in the version of the proposals that the Department distributed. However, N.J.A.C. 11:3-35A was included in that list in the official notice of Proposal published in the New Jersey Register. Therefore, does not agree that there was any deficiency in the rule proposal.

COMMENT: One commenter stated that the Department did not repeal the following code sections related to the "take-all-comers" requirement: N.J.A.C. 11:3-2.13, 11:3-35A, 11:3-40 and 11:3-44 because the text of these rules was not included in the proposal.

RESPONSE: The Department does not agree with the commenter. The Office of Administrative Law does not print the text of rules that are proposed to be repealed in their entirety. All of the

rules listed by the commenter were properly referenced in the notice of proposal as being proposed for repeal and are, therefore, being repealed by this adoption.

COMMENT: One commenter objected to the references in the rule to the New Jersey Personal Automobile Insurance Plan (PAIP) Plan of Operation, specifically in N.J.A.C. 11:3-2.8 concerning the PAIP's ability to set the requirements for the qualification for a PAIP policy, and N.J.A.C. 11:3-2.11(a)5 concerning allocation of PAIP credits. The commenter stated that the delegation of such authority violated the notice and public comment provisions of the Administrative Procedure Act.

RESPONSE: The Department does not agree with the commenter. The Department believes that now that the "take-all-comers" requirement has been repealed, it is appropriate to have the eligibility criteria for the residual market and PAIP credit plans stated in the PAIP Plan of Operation. The Plan can be amended rapidly to meet changing circumstances. All amendments to the PAIP Plan of Operation must be approved by the Commissioner.

COMMENT: One commenter was concerned about the possible growth of the PAIP if the qualifications for PAIP and the PAIP rates are set too low and it becomes a market of choice for New Jersey residents. The commenter also questioned whether the general PAIP eligibility requirements set forth at N.J.A.C. 11:3-2.8(a)2 mean that an insured with a renewal offer from a voluntary market insurer would be prohibited from applying to the PAIP for coverage.

RESPONSE: The Department agrees with the commenter that the PAIP should not become the market of choice for New Jersey residents. As noted by the commenter, N.J.A.C. 11:3-2.8(a)2 only sets forth the general requirements for PAIP eligibility. The documentation to be provided by the applicant and issues such as whether an insured with a renewal offer from a voluntary insurer is eligible to apply for the PAIP will be addressed in the PAIP Plan of Operation, and must be approved by the Commissioner.

COMMENT: Several commenters stated that the proposal is not clear as to whether more than one declination by a voluntary carrier is required for PAIP eligibility. These commenters were concerned that the PAIP eligibility requirements in the rule were too broad and would lead to the rapid growth of the residual market. Another commenter noted that three declinations are required before legal and medical malpractice liability insurance coverage can be exported to the surplus lines market and suggested this standard for auto insurance as well. Several commenters suggested that the rule be amended upon adoption to require three declinations from voluntary market insurers before the applicant is eligible for the PAIP.

RESPONSE: As noted above in response to another comment, N.J.A.C. 11:3-2.8(a)2 only sets forth the general requirements for PAIP eligibility. The number of declinations and the documentation required to be provided will be detailed in the PAIP Plan of Operation.

COMMENT: One commenter stated its support for requiring only a self-certification that the insured attempted and failed to find coverage in the voluntary market. The commenter did not support requiring applicants to actually furnish declinations with PAIP applications. Another

commenter objected to this requirement, stating that it was too vague and did not include a definition of “attempted.”

RESPONSE: As noted above in response to another comment, N.J.A.C. 11:3-2.8(a)2 only sets forth the general requirements for PAIP eligibility. The number of declinations and the documentation required to be provided will be detailed in the PAIP Plan of Operation.

COMMENT: One commenter requested that the rules be amended upon adoption to state that a declination for failure to meet the requirements of a membership company could not be used to establish eligibility for the PAIP.

RESPONSE: As noted above in response to another comment, N.J.A.C. 11:3-2.8(a)2 only sets the general requirements for PAIP eligibility. Issues such as how to treat declinations from membership companies will be detailed in the PAIP Plan of Operation.

COMMENT: One commenter representing the Governing Committee of the PAIP generally supported the definition of the “qualified applicant” in N.J.A.C. 11:3-2.8(a)2, but noted that it was concerned that the expiration of the “take-all-comers” requirement might lead to an increase in the number of applications to the PAIP. The commenter noted that there have been discussions in the PAIP Governing Committee to address this issue.

RESPONSE: As noted above in response to another comment, the Department is also concerned about an increase in PAIP applications once the “take-all-comers” requirement is repealed. The Department supports the efforts of the PAIP Governing Committee to address this issue.

COMMENT: One commenter agreed with the deletion of N.J.A.C. 11:3-2.11(a)5 and 6, which pertain to insurer credits against PAIP assignments. The commenter requested that the rule be amended upon adoption to permit the PAIP to establish additional programs in its Plan of Operation to give insurers credits against PAIP assignments for writing other types of risks, such as those with seven or more motor vehicle points, or for writing risks outside of the PAIP at renewal. The commenter believed that this flexibility would help alleviate any influx of risks into the PAIP and would encourage the voluntary writing of risks.

RESPONSE: The Department appreciates the support. However, the revisions suggested by the commenter would be a substantive change requiring additional notice and public comment. The Department will monitor the phase-out of the “take-all-comers” requirement and, if it determines that additional flexibility in credit programs for insurers is necessary, it will propose amendments to the rule in the future.

COMMENT: One commenter requested that N.J.A.C. 11:3-8.3(b)1 be amended upon adoption to provide that the acceptance of a renewal offer was not timely if it was received four days after the due date. The commenter believed that such an addition would provide insurers with a legal presumption on an issue that is sure to arise. Another commenter asked for clarification as to whether the three-day “grace period” applied only to renewal premiums that are sent by regular

mail and not to payments made in person, sent by overnight delivery, by telephone, direct debit, electronically on a company's website or via a policyholder's banking account. The commenter also asked for confirmation that the three-day "grace period" applies only to renewal premiums, and not to regular installment payments or payments made in response to a cancellation notice.

RESPONSE: The Department does not agree with the commenter's suggestion. The rule referred to by the commenter was adopted in 2003 as N.J.A.C. 11:3-19A.7 (the text of the notice of adoption can be found on the Department's website at: <http://www.state.nj.us/dobi/proposed/ad031122.pdf>). The Department is not aware of anyone raising the issue that the commenter described in the five years since the rule was adopted. This provision has simply been recodified in the proposal as N.J.A.C. 11:3-8.3(b)1 with minor editorial changes. The Department also believes that the text of the rule very clearly provides that it applies only to the mailing of renewal premiums.

COMMENT: One commenter objected to the \$25.00 fee permitted to be charged by insurers for late receipt of a renewal payment. The commenter believed that no fee should be charged unless the payment is a month late. In addition, the commenter stated that \$25.00 was too high a fee.

RESPONSE: The Department does not agree with the commenter. As noted above in response to another comment, the provisions of this rule were recodified in this adoption and have been in effect since 2003. The rule provided that the postmark should be used to determine whether an insurance renewal was mailed before the expiration date of the policy. The three-day provision was provided for those insurers whose mail handling systems cannot save envelopes. Insureds



should try and get their renewal payments to the insurer before the policy expires. If the payment arrives late but is presumed to have been mailed timely, the insurer is permitted to charge a late fee, which is similar in concept and in amount to those charged by credit card companies for late receipt of payments.

COMMENT: One commenter strongly supported the proposal that allows insurers to nonrenew insurance policies within the guidelines set by N.J.A.C. 11:3-8.11.

RESPONSE: The Department appreciates the support.

COMMENT: Several commenters recommended either deleting the phrase “any of” in N.J.A.C. 11:3-8.4(a)4 or replacing it with “one of.” Another commenter suggested amending that sentence to read, “4. The [insured] policy no longer satisfies any [of] one of the insurer’s acceptance criteria.” (suggested additions are underlined; suggested deletions are in brackets) The commenter believed that the term “policy” would be more appropriate than “insured” since the policy may no longer meet the acceptance criteria by virtue of the activities of the members of a household and not just the named insured.

RESPONSE: The Department agrees in part with the commenters and has changed the rule upon adoption to delete the phrase, “any of.” The Department does not agree that “insured” should be changed to “policy.” The rule does not refer to “named insured.” The Department believes that the use of the term “insured” here means any person insured on the policy.

COMMENT: One commenter did not believe that insurers should be permitted to nonrenew up to two percent of its policyholders per territory as permitted by N.J.A.C. 11:3-8.4(a)2. The commenter believed that insurers used such nonrenewals to target young drivers.

RESPONSE: The Department does not agree with the commenter. The ability of an insurer to nonrenew up to two percent of its policyholders per territory is provided by statute. See N.J.S.A. 17:29C-7.1b.

COMMENT: One commenter suggested that N.J.A.C. 11:3-8.5(a) be amended upon adoption to delete the requirement that the insurer provide the “specific” acceptance criteria that the insured did not meet and the “specific” facts on which the decision to non-renew was based. The commenter believed that the degree of specificity mandated would become an unnecessary regulatory burden on insurers.

RESPONSE: The Department does not agree with the commenter. The Department believes that the insured is entitled to know exactly what circumstance(s) resulted in the insurer’s determination to nonrenew the policy. The Department also does not believe that this requirement would pose an additional regulatory burden on insurers. The language in N.J.A.C. 11:3-8.5(a) follows that of N.J.A.C. 11:3-8.3(e)1ii, which was proposed to be deleted, and which required similar specificity when an insurer nonrenewed a policy for failure to meet its underwriting rules.

COMMENT: One commenter suggested amending N.J.A.C. 11:3-8.5(c) as follows (suggested additions are underlined; suggested deletions are in brackets):

A notice of nonrenewal mailed to the insured shall not be effective unless (c)3 below and either (c)1 or 2 below are satisfied:

1. The notice is sent by certified mail; or
2. The notice is sent by regular mail and at the time of the mailing of the notice the insurer has obtained from the U.S. Postal Service a date-stamped proof of mailing showing the name and address of the insured; and
3. The insurer retains a duplicate copy of the mailed notice of non-renewal that is certified to be a true copy.

The commenter believed that the change would clarify that non-renewal notices have to be mailed to the insured.

RESPONSE: The Department does not agree with the commenter that the change is necessary. The rule clearly states that the only two ways that a nonrenewal notice can be effective are through regular or certified mail.

COMMENT: One commenter stated that the requirements for nonrenewal notices set out in N.J.A.C. 11:3-8.5 do not clearly address the standards for renewal in N.J.A.C. 11:3-8.4(a)1.

RESPONSE : The Department agrees with the commenter that the requirements for nonrenewal notices in N.J.A.C. 11:3-8.5(a) make reference to nonrenewal for failure to meet an insurer's acceptance criteria and do not refer to nonrenewals based on N.J.A.C. 11:3-8.4(a)1. The

Department has changed the rule upon adoption to clarify that the notice of a nonrenewal based on failure to meet an insurer's acceptance criteria shall include the specific criteria that was not met. The Department has deleted the reference to acceptance criteria in the second sentence, to clarify that any notice of nonrenewal must state the specific facts on which the insurer relied to make the decision to nonrenew the policy.

COMMENT: Several commenters pointed out that N.J.A.C. 11:3-8.10(a) should reference N.J.A.C. 11:3-8.9(a)1, not N.J.A.C. 11:3-8.9(a), and that N.J.A.C. 11:3-8.10(b) should reference N.J.A.C. 11:3-8.9(a)2 through 5, not N.J.A.C. 11:3-8.9(b). In addition, one commenter noted that N.J.A.C. 11:3-8.9(a)3. contains two erroneous statutory citations.

RESPONSE: The commenters are correct, and the rules have been changed upon adoption to correct the cross-references in N.J.A.C. 11:3-8.10(a) and (b) and to include the correct statutory citations in N.J.A.C. 11:3-8.9(a).

COMMENT: Several commenters noted N.J.A.C. 11:3-8.11(a)3 permits insurers, known as membership companies, that require their policyholders to be members of or employees of members of certain groups, clubs or organizations, such as trade associations or the military, to be exempt from the prohibition on using employment as an acceptance criteria. The rule as proposed stated that such companies had to have the limitation on eligibility for coverage in the company's bylaws. The commenters noted that the rules that define membership for the company may be found in a document other than the company's bylaws. The commenters suggested alternative language for this provision that follows language used to make a similar

distinction in the definition of an “eligible person” in N.J.S.A. 17:33B-13 as follows (suggested additions are underlined; suggested deletions are in brackets):

3. The occupation, education or insurance score of the applicant or insured; provided that, as it relates to occupation, this paragraph shall not be construed to prohibit the operation of an insurer that[, pursuant to its organizational bylaws,] limits coverage to persons who are members or employees of members of certain groups, clubs or organizations, such as trade associations or the military (so-called membership companies) when membership is a condition for insurance and is uniformly and consistently applied on a statewide basis; and ....”

RESPONSE: The Department agrees with the commenter and has changed the rule upon adoption as follows (additions are underlined; deletions are in brackets):

3. The occupation, education or insurance score of the applicant or insured; provided that, as it relates to occupation, this paragraph shall not be construed to prohibit the operation of an insurer that\*[, pursuant to its organizational by-laws,]\* **\*has been approved by the Department to\*** limit\*[s]\* coverage to persons who are members or employees of members of certain\***groups, clubs or**\* organizations, such as trade associations or the military (so-called membership companies) **\*when membership is a condition for insurance and is uniformly and consistently applied on a statewide basis\***; and

The Department has added the phrase “approved by the Department” to clarify that any such limitation on the availability of coverage must be approved by the Department. In addition, the Department is changing N.J.A.C. 11:3-46.4(b)1i, a similar provision in the Urban Enterprise Program (UEZ) rule, upon adoption to make similar changes to the description of insurers permitted to have alternate goals to meet their UEZ quota.

COMMENT: One commenter asked for clarification as to whether the prohibition on the use of the occupation, education or insurance score of the applicant or insured in N.J.A.C. 11:3-8.11(a)3 would prohibit insurers from using the applicant's use of his or her car in employment as an acceptance criterion.

RESPONSE: Currently, companies are permitted to have acceptance criteria that exclude vehicles used for certain business uses, such as wholesale or retail deliveries. For example, vehicles used for pizza delivery, newspaper delivery, mail delivery, etc., can be excluded. Most companies have a business use classification in their rating system, and therefore, should rate a risk that uses his or her car in employment according to their class plan. For example, a real estate agent will be permitted to be rated under the private passenger auto rules classified and rated as business use. The new and amended rules will not prohibit the use of similar acceptance criteria.

COMMENT: One commenter requested clarification as to the relationship between N.J.A.C. 11:3-19A.3(g), authorizing the use of an applicant's occupation, education and/or insurance score to determine tier placement when used with other approved tier criteria, and the prohibition in N.J.A.C. 11:3-19A.5(a)3 on placement of someone in a non-standard tier if he or she has less than four motor vehicle violation points. The commenter provided as an example a driver who has accumulated four or fewer motor vehicle points and would qualify for the standard tier. The purchase of collision coverage is an approved rating factor that, if purchased by the driver, would place him or her in a preferred tier. The commenter questioned whether the Department would

approve a rating plan that would put the same driver in a less-than-standard tier if he or she did not possess a four-year college degree.

RESPONSE: The Department approves rating plans that comply with applicable New Jersey statutes and rules, including N.J.A.C. 11:3-19A.3(g) and 11:3-19A.5(a)3, and that are supported by insurer or other relevant industry experience. The Department looks at the totality of each filing to make a determination as to whether to approve a rating plan, and therefore, is unable to respond to the commenter's example because it does not include all of the information that would be needed to determine tier placement.

COMMENT: One commenter stated that:

The proposed rule, 11:3-8.11 reads: a new subsection (g) is proposed to provide: 'No insurer may assign any applicant for insurance to a rating tier solely on the basis of the applicant's occupation, education or insurance score.' If enacted, the proposed subsection would, for the first time, explicitly sanction the use of education and occupation in automobile insurance rating (currently, education and occupation are not explicitly sanctioned in New Jersey statutes or regulations, and in fact, the use of lawful occupation is prohibited.)

The commenter also noted that the new rule contradicts the requirements of N.J.A.C. 11:3-35.5(b), which requires insureds with no eligibility points to be assigned to the standard tier. The commenter noted that N.J.A.C. 11:3-35 has been proposed for repeal, but stated that,

...the requirement of the regulation are currently in place specifically to ensure New Jersey residents are able to control their costs for car insurance so long as they practice safe driving and accrue no eligibility points (which means they have been involved in no chargeable accidents or moving violations within the last 36 months). However, under the proposed regulations, the Department would allow insurance companies to assign a driver who has no eligibility points to a tier above the standard tier (which must have a relativity of 1.0) simply because he/she lacks higher educational attainment, is employed in a non-professional job and/or has a poor insurance score.

The commenter believed that this would benefit the wealthiest segment of New Jersey's driving population while penalizing the poorest. Another commenter stated that by adopting rules that permit "lawful occupation" to be used as a tier placement criteria, the Department will codify an underwriting criterion that has long been considered a prohibited surrogate for territory.

RESPONSE: First, one commenter incorrectly refers to N.J.A.C. 11:3-8.11 as the location of the provision being commented upon. The subsection (g) referred to by the commenter was added by the proposal to N.J.A.C. 11:3-19A.3.

The commenters demonstrate a misunderstanding of the current New Jersey auto insurance marketplace. This is understandable since the statutes and rules governing auto insurance have been changed repeatedly over the last 15 years. In addition to implementing the phase-out of the "take-all-comers" requirement, the adopted new rules, amendments and repeals also seek to clarify the terminology and better organize the rules relating to writing, renewing and rating auto insurance policies.

The commenter refers to the provisions of N.J.A.C. 11:3-35. N.J.A.C. 11:3-35 was adopted as part of the implementation of the Fair Automobile Insurance Reform Act of 1990 (FAIRA), which established the "take-all-comers" requirement. However, the list of standards for underwriting rules in N.J.A.C. 11:3-35.3(c) was incorporated from a rule that pre-dated FAIRA. This rule prohibited the use of occupation as a basis for cancelling or non-renewing an auto insurance policy. The previous prohibition was unrelated to issues of race, creed or ethnicity, but instead arose from concerns about the availability of coverage for applicants in certain occupations that were perceived to generate more claims. These occupations included bartenders, entertainers and persons employed by race tracks. Other high-profile occupations



such as actors/actresses, professional athletes and politicians were perceived to represent “target defendants” more likely to be sued. Auto insurers in some other jurisdictions simply refused to write persons in these occupations, so the rule was adopted to assure availability and continuity of coverage for such consumers in New Jersey. Occupation has never been determined by the Commissioner to be a surrogate for territory and, as noted above, the prohibition on its use as an acceptance criteria was not based on any such concerns.

FAIRA also restricted premium differentials to eligibility point surcharges in “standard/non-standard” rating systems. N.J.A.C. 11:3-35 was also adopted to implement and enforce these provisions of FAIRA.

In 1997, the Legislature significantly amended the automobile insurance laws, including repealing FAIRA’s provisions establishing “standard/non-standard” rating systems, and substituted in their place “tier rating,” which allowed insurers greater flexibility in the factors permitted to affect individual rates. As a result, the requirements of N.J.A.C. 11:3-35 no longer applied to any voluntary market auto insurance rate filings made after March 1, 1998. N.J.A.C. 11:3-35.1(c) states that “No private passenger automobile insurer shall make any filing pursuant to this subchapter after March 1, 1998.” However, N.J.A.C. 11:3-35 was not repealed at that time because the auto insurance residual market mechanism, the New Jersey Personal Automobile Insurance Plan, continued to use a standard/non-standard rating system for a number of years.

The Department implemented the 1997 statute by promulgating N.J.A.C. 11:3-19A. N.J.A.C. 11:3-19A.5, which addresses standards of approval, disapproval or modification of underwriting rules and tier ratings plans, included tier placement criteria. N.J.A.C. 11:3-19A-7, which addresses underwriting rules for eligible persons, included the acceptance criteria to be

used by insurers. Both types of criteria, however, were referred to as “underwriting rules”. Neither N.J.A.C. 11:3-19A.5 nor 19A.7 made any mention of occupation, either as an acceptance or a tier placement criterion. This omission occurred because, under the “take-all-comers” requirement, insurers have to accept all applicants who meet the definition of an eligible person. The term “eligible person” was defined by statute at N.J.A.C. 17:33B-13. However, occupation has never been prohibited as a rating factor.

In 2003, the laws governing auto insurance were changed yet again. The “take-all-comers” requirement was to be phased-out over five years and this, plus other reforms, sufficiently changed the auto insurance marketplace in New Jersey so as to attract large national companies that had not done business in New Jersey for many years, such as GEICO and Progressive, to enter the market.

The phase-out of the “take-all-comers” requirement began by permitting insurers to use underwriting rules with alternate acceptance criteria in order to exempt insurers that met specific growth targets from the obligation to cover all eligible persons. The Department’s rules implementing this were set forth at N.J.A.C. 11:3-35A. Since these rules establish acceptance criteria standards (that is, whether an applicant is able to obtain or retain coverage), the standards continued the prohibition on the use of occupation or profession as an acceptance criteria that had been in place before the passage of FAIRA in 1990 mandated that insurers take all persons who met the definition of an “eligible person.”

The adopted new rules, amendments and repeals complete the process started by the 2003 statutory amendments. All references to “take all comers” and “eligible persons” have been removed from the Department’s rules. For the sake of clarity, and because insurers can now develop their own acceptance criteria, which may differ from their tier placement criteria, the

Department is no longer using the term “underwriting rules.” Rather, the adoption now refers to “acceptance criteria” for the rules that determine whether coverage will be provided at all, and refers to “tier placement criteria” for the rules that relate to how an insurer determines the price of coverage.

As this background demonstrates, while the use of occupation or profession as an acceptance criteria has consistently been prohibited by the Department for non-“membership” insurers, the use of occupation or profession in combination with other permissible factors in rating (that is, as part of the determination of the premium charged for coverage) has never been prohibited by any rule. N.J.A.C. 11:3-19A.3(g) as amended does not prohibit the use of education and occupation in tier placement. Rather, N.J.A.C. 11:3-19A.3(g) proscribes their use as a sole criteria in tier placement.

COMMENT: One commenter stated that, after the passage of N.J.S.A. 17:29A-46.2, the Department promulgated rules that “maintained an unambiguous prohibition” on using occupation in underwriting rules. As an illustration of this, the commenter referenced part of the summary of comments and responses in the notice of adoption of N.J.A.C. 11:3-35A. The commenter stated further that in the current proposal, the Department is abandoning its previous position established over decades.

RESPONSE: The Department does not agree with the commenter. As noted above in response to a previous comment, N.J.S.A. 17:29A-46.2 was passed as part of the auto reforms in 1997. It was implemented by the adoption of N.J.A.C. 11:3-19A, which contains no prohibition on the use of occupation in either the acceptance criteria or tier placement criteria of an insurer’s

underwriting rules. The statutory authority for N.J.A.C. 11:3-35A, part of the adoption of which was quoted by the commenter, is N.J.S.A. 17:33B-15, the phase out of the “take-all-comers” requirement. As noted above in response to a previous comment, when the “take-all-comers” requirement began to be phased-out, first by N.J.A.C. 11:3-35A and then the current adoption, the Department prohibited the use of employment as an acceptance criteria for non-member companies just as it had before the “take-all-comers” requirement was enacted. In addition, the long-standing prohibition upon the use of occupation alone to determine tier placement is continued.

COMMENT: One commenter expressed strong support for the proposed rules governing the use of acceptance criteria to accept and renew auto insurance policies. The commenter stated that the proposal would increase competition in the New Jersey market and attract new insurers. The commenter noted that this proposal represents the implementation of the final element of the 2003 Reform Act that brought competition back to the New Jersey auto insurance marketplace.

RESPONSE: The Department appreciates the support.

COMMENT: Several commenters stated that the adopted new rules, amendments and repeals are legally flawed because they substitute the terms “acceptance criteria” and “tier rating criteria” for the term “underwriting rules.” The commenters stated that this would eliminate the requirement that underwriting rules must be filed with the Commissioner, citing N.J.S.A. 17:29A-46.2b, since technically there would be no underwriting rules. One commenter stated

that it could not understand how the Department was disregarding the legislative intent of N.J.S.A. 17:29A-46.2.

RESPONSE: The Department does not agree with the commenters. As noted above in the response to a previous comment, the Department is not changing the statutory requirement pertaining to “underwriting rules” found in N.J.S.A. 17:29A-46.2. Rather, the Department is resolving the confusion in terminology that has existed with respect to the separate and distinct sets of standards for acceptance and rating that in the past were both denoted as “underwriting rules” and referred to interchangeably in the years when “take all comers” was the only acceptance criterion. N.J.A.C. 11:3-19A.3 cites N.J.S.A. 17:29A-46.2, and requires that tier placement criteria must be filed with and approved by the Department. The adopted new rules, amendments and repeals are consistent with and implement the intent of the statute by requiring those filings and that insurers file a certification that their acceptance criteria do not include any of the prohibited categories.

COMMENT: One commenter stated that the adopted new rules, amendments and repeals violate the requirement in N.J.S.A. 17:29A-46.2 that, “underwriting rules do not operate in such a manner as to assign an insured to a rating plan on the basis of territory or any other factor which the commissioner finds is a surrogate for territory.” The commenter provided census data that it claimed clearly showed that education, “serves as an unlawful surrogate for territory.” The commenter stated that persons with lower levels of education are “over-represented” in New Jersey’s urban lower-income areas such as Camden, Newark, Paterson and Trenton. The commenter stated further that the adopted new rules, amendments and repeals “would allow

insurers to exclude what might be perceived as undesirable territorial risks by simply hiding behind the characteristic trait of a person's education as a pretense. The commenter stated that there did not appear to be any rational basis for education to be prohibited as an acceptance criterion but permitted for tier placement.

RESPONSE: The Department does not agree with the commenter that the ability of an insurer to use education as a tier placement criteria is a substitute for territory. First, the Commissioner has never determined that education is a substitute for territory. Second, the Department is aware of no evidence that insurers are using or would like to use educational attainment as a surrogate for territory, because education is not a mathematically adequate surrogate for territory for insurance purposes. The census data provided by the commenter, as well as other data reviewed by the Department, proves this to be true. The data show that there is too broad a range of educational attainment among given populations for this characteristic to be a sufficiently predictive substitute for territory or other demographic categories. For example, census data show that most adults statewide have less than a bachelor's degree. The fact that this is also the case in a given territory is not particularly meaningful. The Department believes that insurers that use education as a rating factor are instead relying on direct statistical correlations between that characteristic and other factors, such as claims history.

COMMENT: One commenter stated that it believed that groups of insurance companies should accept and reject applicants uniformly. The commenter asserted that absent uniform acceptance criteria within a group of insurers, an unfair advantage is created for such groups, "as they would be able to selectively reject drivers for reasons pertaining to their education, occupation and

insurance score by denying them coverage in one affiliate entity while placing them in an entirely separate affiliate with higher base rates for the same coverages.

RESPONSE: The Department disagrees that an insurer group that uses multiple companies to write its risks has an unfair advantage over single-company insurers. Individual insurers are permitted to use rating systems that incorporate multiple rating tiers with varying base rates, thereby replicating a multiple-company approach.

COMMENT: One commenter noted that upon adoption of the proposal, lead time will be necessary for insurers to make changes in procedures, file certifications and do programming. The commenter requested that the Department adopt the proposal as quickly as possible to give insurers as much time as possible to implement the changes before the January 1, 2009 deadline.

RESPONSE: The Department notes that P.L. 2003, c. 89 was enacted on June 9, 2003 and explicitly provides that the “take all comers” mandate shall no longer be in effect as of January 1, 2009. The Department believes that insurers will have sufficient time to implement the necessary changes before the January 1, 2009 deadline, because the legislative mandate has been known since 2003.

COMMENT: One commenter noted that N.J.A.C. 11:3-36.4(d), which relates to auto physical damage inspections, states that insurers may waive inspections based on “underwriting criteria.” The commenter inquired about the relationship of “underwriting criteria” to the use of the term “acceptance criteria” in the proposal.

RESPONSE: The “underwriting criteria” referenced in N.J.A.C. 11:3-36.4(d) is not related to “acceptance criteria” as used in the adopted amendments and new rules. In the case of a physical damage inspection, the insurer has already accepted the business. N.J.A.C. 11:3-36.4(d) only refers to the criteria that the insurer uses to decide whether to waive the inspection of the vehicle. The Department recognizes that the use of the term “underwriting criteria” may be confusing in light of the changes made in the adopted amendments and new rules. The Department will clarify the terminology in future rulemaking. Until such time, insurers should continue to file the “underwriting criteria” that they use to waive physical damage inspections as part of the filing of their rating manual rules.

#### Summary of Agency-Initiated Changes:

Upon review, the Department has determined that parts of N.J.A.C. 11:3-8.3(e), which were proposed for repeal, were inadvertently not recodified into N.J.A.C. 11:3-8.5(a). Specifically, the time frames for the issuance of nonrenewal notices prescribed by N.J.S.A. 17:29C-9 were not recodified into N.J.A.C. 11:3-8.5(a). The Department is, therefore, amending the rule upon adoption to include these statutorily prescribed timeframes in the rule.

Upon review, the Department has determined that it mistakenly included a reference in proposed N.J.A.C. 11:3-19A.5(b)4 to the factors set forth in N.J.S.A. 10:5-12(l) in the New Jersey Law Against Discrimination. That provision states that it is a violation of the Law Against Discrimination, “for any person to refuse to buy from, sell to,... or otherwise do business with any other person on the basis of...” [a list of protected classes.] Adopted new rule N.J.A.C. 11:3-8.11(a)1 does include a prohibition on discrimination in the sale of auto insurance



that references this section of the Law Against Discrimination. However, N.J.A.C. 11:3-19A.5(b)4 does not address the sale of auto insurance, but rather concerns the placement of insureds into rating tiers. Because N.J.A.C. 11:3-19A.5(b)4 specifies factors upon which the rating criteria applicable to auto insurance policies cannot be based, as opposed to factors upon which auto insurance applications cannot be denied, the Department has determined that the proposal to include a reference to N.J.S.A. 10:5-12(1) in N.J.A.C. 11:3-19A-5(b)4 should not be adopted. Accordingly, the current text of that rule, which prohibits discrimination in rating based upon race, creed, color or national ancestry and which tracks the language in the rating-related provisions in the insurance Trade Practices statute, N.J.S.A. 17:29B-4(c) and (d), will remain in effect. Moreover, reference to the Law Against Discrimination for the prohibited factors in determining rating would be inconsistent with the intent of the Legislature. N.J.S.A. 17:33B-32b, enacted on March 12, 1990 as part of the Fair Automobile Insurance Reform Act of 1990, P.L. 1990, c. 8, would have expressly prohibited that the determination of rates and premiums for private passenger automobile insurance, in whole or in part, directly or indirectly, upon the age, sex or marital status of the persons insured. This provision was to take effect no later than January 1, 1993. However, N.J.S.A. 17:33B-32 was repealed in its entirety by P.L. 1992, c. 133, with such repeal effective retroactively to March 12, 1990. The Legislature did not change this prohibition as part of its extensive reforms to the private passenger automobile insurance statutes enacted in 2003. The Legislature thus did not intend to prohibit the use of age and sex in determining rates, as the Department's inadvertent reference to the Law Against Discrimination, N.J.S.A. 10:5-12(1), in its proposed amendment to N.J.A.C. 11:3-19A.5(b)4 would have provided.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rules, amendments and repeals are not subject to any Federal requirements or standards.

Full text of the adopted new rules and amendments follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks **\*[thus]\***):

## 11:3-8.4 Standards for nonrenewals

(a) Subject to the limitation set forth in N.J.A.C. 11:3-8.6, an insurer may issue a notice of nonrenewal to the named insured, in the following instances:

1. – 3. (No change from proposal.)
4. The insured no longer satisfies \*[any of]\* the insurer's acceptance criteria.

## 11:3-8.5 Issuance of nonrenewal notices

(a) **\*A notice of nonrenewal shall not be valid unless it is mailed or delivered by the insurer to the insured no less than 60 days and no more than 90 days prior to the expiration of the current policy, except that the Commissioner may direct by Order that a notice of nonrenewal must be mailed or delivered up to 90 days prior to the expiration of the current policy. No such order shall be applicable to nonrenewal notices issued within 30 days after the date of the order.\*** A notice of nonrenewal shall not be valid unless it specifies the reason(s) underlying the action being taken\*.\* \*[and identifies]\* **\*Nonrenewal notices based on the insured's failure to meet the insurer's acceptance criteria shall identify\*** the specific acceptance criteria that the insured being non-renewed has failed to fulfill. Non-renewal notices shall identify the specific facts relied upon by the insurer in determining to non-renew the insured, including dates and other facts necessary to identify the incident(s), which form the basis for the insurer's determination \*[that the acceptance criteria referenced in the notice has not been fulfilled]\*\* **\*to nonrenew the policy\***.

1. – 2. (No change from proposal.)

(b) – (c) (No change from proposal.)

11:3-8.9 Standards for cancellation

(a) Pursuant to N.J.S.A. 17:29C-7, a notice of cancellation shall be effective only when based on one or more of the following reasons:

1. – 2. (No change from proposal.)

3. The driver's license or motor vehicle registration of another named insured or person insured under the policy who either resides in the same household or customarily operates an automobile insured under the policy has been suspended or revoked during the policy term for one or more of the following reasons:

i. Conviction of operating a motor vehicle under the influence of alcohol or drugs (N.J.S.A. 39:4-~~[50.4]~~ **\*50\***);

ii. Conviction of refusal to submit to a chemical test (N.J.S.A. ~~[2C:11-2]~~ **\*39:4-50.4a\***);

iii. – ix. (No change from proposal.)

4. – 5. (No change from proposal.)

11:3-8.10 Issuance of cancellation notices

(a) No notice of cancellation issued pursuant to N.J.A.C. 11:3-8.9(a)~~\*1\*~~, non-payment of premium, shall be effective unless it is mailed or delivered by the insurer in accordance with N.J.S.A. 17:29C-8 to the named insured at least 15 days prior to the effective date of the cancellation.

(b) No notice of cancellation issued pursuant to N.J.A.C. 11:3-8.9~~[(b) through (e)]~~ **\*(a)2 through 5\*** shall be effective unless it is mailed or delivered by the insurer in accordance

with N.J.S.A. 17:29C-8 to the named insured at least 20 days prior to the effective date of the cancellation.

(c) – (d) (No change from proposal.)

11:3-8.11 Acceptance criteria

(a) An insurer is prohibited from using any of the following in its acceptance criteria:

1. – 2. (No change from proposal.)

3. The occupation, education or insurance score of the applicant or insured; provided that, as it relates to occupation, this paragraph shall not be construed to prohibit the operation of an insurer that\*[, pursuant to its organizational by-laws,]\* **\*has been approved by the Department to\* limit\*[s]\* coverage to persons who are members or employees of members of certain\*groups, clubs or\* organizations, such as trade associations or the military (so-called membership companies) \*when membership is a condition for insurance and is uniformly and consistently applied on a statewide basis\***; and

4. (No change from proposal.)

(b) – (c) (No change from proposal.)

11:3-19A.5 Standards of approval, disapproval or modification of tier placement criteria and tier ratings plans

(a) (No change from proposal.)

(b) Tier placement criteria shall meet the following standards:

1. – 3. (No change from proposal.)

4. Tier placement criteria shall not be based on \*[any factor set forth in the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(1)]\* **\*race, color, creed, religion, national origin or ancestry\***.

11:3-46.4 Qualified insurers

(a) (No change.)

(b) The documents submitted pursuant to (a) above shall set forth with specificity:

1. The insurer's goal, which shall be the number of in-force exposures needed to meet its UEZ share, as calculated pursuant to N.J.A.C. 11:3-46.3(f).

i. In the case of an insurer that has **\*been\*** approved \*[organizational bylaws that include membership requirements]\* **\*by the Department to limit coverage to persons who are members or employees of members of certain groups, clubs or organizations, such as trade associations or the military (so-called membership companies) when membership is a condition for insurance and is uniformly and consistently applied on a Statewide basis\***, its goal shall be to increase accessibility and marketshare in UEZs so that it insures at least the same percentage of potential eligible members in UEZs as its percentage marketshare of eligible members located outside the UEZs. The insurer also shall be able to demonstrate the potential number of eligible members in and outside the UEZs with credible data;

2. - 6. (No change.)

(c) - (g) (No change from proposal.)