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INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF INSURANCE

Fraud Prevention and Detection

Readoption with Amendments: N.J.A.C. 11:16

Adopted Repeal and New Rule: N.J.A.C. 11:16-6 Appendix

Proposed: September 3, 2013, at 45 N.J.R 1989(a) (notice of administrative correction to proposal and extension of comment period from November 2, 2013, to November 15, 2013 - see 45 N.J.R. 2091(a)).

Adopted: January 24, 2014, by Kenneth E. Kobylowski, Commissioner, Department of Banking and Insurance, with the approval of Ronald Chillemi, Acting Insurance Fraud Prosecutor, as to N.J.A.C. 11:16-6.7 and 11:16-6 Appendix.

Filed: January 24, 2014, as R.2014 d.035, **without change**.

Authority: N.J.S.A. 17:1-8.1, 17:1-15.e, 17:23-8 et seq., 17:23-19, 17:23-20 et seq., 17:33A-1 et seq., and 47:1A-2.

Effective Date: January 24, 2014, Readoption;
February 18, 2014, Amendments, Repeal, and New Rule.

Expiration Date: January 24, 2021.

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received written comments from Vincent C. Ceglia, Compliance Manager, UnitedHealthcare Community Plan; Leah Walters,

Vice President, State Relations, American Council of Life Insurers; Megan Green, JD, CLU, ChFC, Counsel, State Farm Insurance Companies; Edward C. Eastman Jr. Esq., Executive Director, N.J. Land Title Association, and of Lomurro Davison Eastman & Munoz; Eric M. Goldberg, Vice President, American Insurance Association; Barbara H. Peterson, Regional Director Government Relations, Assurant Employee Benefits; Micaela A. Isler, Assistant Vice President-State Government Relations, Property Casualty Insurers Assn. of America; and Chuck Leitgeb, Vice President, Insurance Council of New Jersey.

COMMENT: The commenter requests that the Department adopt an additional definition for a "pattern of fraud" similar to the New Jersey False Claims Act which defines fraud as "a pattern of 5 or more claims." The commenter noted that the Department should bear in mind that the specific operational policies and procedures of an insurer may include proprietary processes for detecting and preventing fraud, waste, or abuse (FWA) and requests if a listing of such processes is sufficient. The commenter further requests an exclusion in the proposal relating to the fact that Office of Insurance Fraud Prosecutor ("the OIFP") does not investigate Medicaid Fraud and that Medicaid, Medicaid managed care organizations (MCOs), and Medicare Dual Special Needs Plans ("Dual SNPs") do not refer cases to the OIFP. The commenter also requests clarification surrounding the annual reporting requirements and whether it is expected that Medicaid and Medicare Dual SNP and FWA activities be included in annual filings as these are reported annually to other agencies.

RESPONSE: The New Jersey False Claims Act, N.J.S.A. 2A:32C-1, et seq., does not include a definition of "fraud" or "pattern of fraud." The Department disagrees with the commenter's request for the addition of a definition of "pattern of fraud" as a "pattern of 5 or more claims."

The Department refers the commenter to the New Jersey Fraud Prevention Act, N.J.S.A. 17:33A-3, ("the Act"), which defines "pattern" as five or more related violations of the Act. The Department asserts that there should be no confusion on what constitutes a pattern of fraud for the purposes of the Fraud Act and these rules, as both the statute and the definition of "pattern" being adopted for inclusion in the rules clearly indicate that "pattern" means five or more related violations of the Fraud Act. Per the Act, the statutory definitions apply to the defined terms "[a]s used in this act" (N.J.S.A.17:33A-3). The definitions being codified through this adoption apply to the defined terms as used in this chapter. The definition is limited to these purposes. For example, these rules do not establish what constitutes "clear evidence of fraud" as that phrase is used in the Health Claims Authorization, Processing and Payment Act, P.L. 2005, c. 352 ("the HCAPPA").

The commenter also asks if a listing of proprietary processes for detecting and preventing FWA is sufficient for the creation of the procedure manual. N.J.A.C. 11:16-6.9(f) makes fraud filings confidential and not subject to inspection, and the minimum requirements for a procedure manual are outlined in N.J.A.C. 11:16-6.5(b). Merely listing the processes utilized by the insurer would not enable the Department to conduct a meaningful review of a filing and would not comply with those requirements. The approval process provides guidance and dialogue in creating the manual.

The commenter refers to a requirement to file with the Department a business model relative to "FWA program partners." It is presumed that the reference to "FWA" means "fraud, waste and abuse" and that "program partners" is a reference to the Medicaid Fraud Division. It appears that the commenter's entity is a Medicaid service organization (MSO) operating as a health maintenance organization (HMO) and is exempt from N.J.A.C. 11:16-6.5, 6.6, and 6.9.

Since the commenter's entity is an MSO, it is exempted from the fraud plan and annual report filing requirements of this chapter.

COMMENT: The commenter raises concerns regarding N.J.A.C. 11:16-6.5 and the new language proposed at new subsection (c) which references unfair claims practices. The commenter asks if the new language means that an insurer who only sells health insurance must also provide training on the property/casualty unfair claims settlements practices regulation and law in its fraud prevention and detection procedures manuals. If yes, the commenter suggests that including such language could be confusing. The commenter also notes that subsection (c) provides that it applies "as used in (b) above," which sets forth the requirements on fraud prevention and detection procedures manuals. The commenter seeks clarification on how this applies to health insurers for the previous reason stated.

RESPONSE: The amendment in question is new N.J.A.C. 11:16-6.5(c)1i, which does not affect life insurers. However, the amendment being adopted provides at subparagraph (c)1i that unfair claims settlement practices are understood to include the actions referenced in N.J.S.A. 17B:30-13 and N.J.A.C. 11:2-17, which address unfair claim settlement practices by health insurers, and those in N.J.S.A. 17:29B-4(9) and N.J.A.C. 11:2-17, which address unfair claims settlement practices by property/casualty insurers. It is not the Department's intent that health insurers include in their training materials information exclusive to property/casualty insurers or that property/casualty insurers include in their training materials information exclusive to health insurers.

COMMENT: The commenter thanks the Department for its efforts to improve the Fraud Prevention and Detection regulations.

RESPONSE: The Department appreciates the commenter's expression of support for the proposed adoption with amendments.

COMMENT: The commenter opines that it is clear that the title insurance industry is not within the scope of those insurers outlined in N.J.A.C. 11:16-6.1(a) to which Subchapter 6, Fraud Prevention and Detection Plans, applies (requirement to have a plan for the prevention and detection of fraud in accordance with standards outlined in the regulation) since land title insurers are not "insurers as defined by N.J.S.A. 17:33A-3 and N.J.A.C. 11:16-6.2."

According to the commenter, N.J.A.C. 11:16-6.1(b) technically includes the title insurance industry within the scope of those insurers which must use standard fraud reporting forms as it appears the title insurance industry is included in the existing definition of "insurer" which is not being amended. The commenter therefore suggests that N.J.A.C. 11:16-6.1(b) be amended to exclude the title insurance industry (along with similar insurance industries to which the regulation is not addressed) from the application of the regulation by adding the following bold and underlined wording:

> (b) The subchapter also sets forth the reporting standards and forms necessary to refer insurance fraud matters to the Office of Insurance Fraud Prosecutor ("OIFP"). These provisions apply to all insurers as defined by N.J.S.A. 17:33A-3 and N.J.A.C. 11:16-6.2 including those with PAIP and CAIP assignments, <u>excepting title insurance, surety bonds, credit insurance, mortgage guaranty insurance, municipal bond coverage, fidelity insurance, investment return assurance, and ocean marine insurance.</u>

RESPONSE: The Department declines to make the suggested amendment. The Department is charged with the protection of the public from individuals and entities within the title insurance

industry who violate the insurance laws of New Jersey including those who commit insurance fraud. While it is correct that title insurers are not required by N.J.A.C. 11:16-6.19(a) to file fraud prevention and detection plans because they are not auto or health insurers and, accordingly, are also not required to file annual reports of the effectiveness of an approved plan, title insurers are nevertheless considered an "insurance company" under the Act (see N.J.S.A. 17:33A-3) and are subject to the annual fraud assessment imposed by the Department pursuant to the Act.

COMMENT: The commenter applauds the Department's efforts to reduce insurance fraud and appreciates the positive movement in training requirements for non-Special Investigative Unit (SIU) personnel. Nonetheless, the commenter expresses concern that "the amount of training and classroom-only setting" requirements remain outside what is customary or needed to properly prepare individuals to fight insurance fraud. The commenter further expresses concern that the proposal will result in unnecessary expenditure of resources that might otherwise be employed toward actually identifying and preventing fraud. The commenter further noted that:

> "Fifteen states plus the District of Columbia and Puerto Rico require fraud training. New Jersey has the most onerous hour requirements by far: 4.5 for non-SIU new hires and 9 hours for SIU new hires (the Department proposed to require annual training requirements for these groups at 2 hours and 9 hours.) In comparison, Arkansas has the second most stringent hourly training requirement-requiring 3 hours of annual training for SIU staff and has no requirement for claim handlers or underwriters. New York and California have no hourly requirements."

The commenter states that if the proposed amendments are adopted, the State's fraud training requirements will be "outsized" compared to the rest of the country and burdensome. Therefore, the commenter suggests the following changes to the proposal:

"Maintain the experienced claims adjuster training exemption.

Training programs do not need to have specific topical components as set forth in N.J.A.C.11:16-6.5(a)(2)(ii), noting that the California approach to SIU is superior, offering discrete, focused topics at differing levels for newly hired employees, integral anti-fraud personnel and SIU personnel.

The entry level program hour requirement should be modified to 4.5 hours for SIU and 3 hours for non-SIU. Continuing annual education should be 3 hours for SIU and 1 hour for non-SIU.

Instruction should be available in the classroom OR via the Web in a superior virtual classroom, thus reducing job interference.

Eliminate the requirement that insurers file fraud training plans."

Another commenter noted that the current national environment encourages national debate on fraud trends and, therefore, the use of non-New Jersey specific trainers would enhance prevention efforts.

RESPONSE: The Department disagrees with the commenter's suggestion that the newly established annual training requirements of nine hours for SIU, 4.5 hours for new hires, and two hours for non-SIU personnel are excessive as compared to other states. The Department solicited input from a representative group of New Jersey's SIU community on the proposed readoption. Based upon the SIU community's input, the Department proposed to reduce the training hours in some cases and to maintain the existing training hours in others. The

comparison by the commenter of New Jersey to other states does not take into account the unique challenges in detecting and investigating auto insurance fraud in this State. The Department recognizes that since the classroom training requirements were first adopted, there have been significant advancements in the effectiveness of online training and virtual classroom technology. As a result, the Department will be flexible with regard to the utilization of such proven training technologies, so long as the content of the course is sufficient. The Department disagrees with the commenter's suggestion to eliminate the requirement that insurers file training plans, as their doing so enables the Department to confirm that the plans' content is in conformity with the requirements imposed by the rules. The Department notes that companies routinely file comprehensive training programs that require little modification. In addition, prior approval of such programs may serve as a defense when a policyholder challenges an adverse claim or underwriting decision and may lessen the likelihood that an investigator's experience and/or knowledge is challenged in legal proceedings in an attempt to discredit a training program. The Department further disagrees with the commenter regarding the request to exempt experienced adjusters from basic entry level training. N.J.A.C. 11:16 does not define "experience" in terms of time or position in exposure to fraud prevention techniques.

With regard to national level training as compared to New Jersey SIU training, the Department is receptive to national-based fraud training if, upon filing such plans, insurers are able to demonstrate that New Jersey specific issues are being addressed.

COMMENT: The commenter commends the Department for its willingness to accept the industry's concerns regarding the number of training hours required for non-SIU personnel and

appreciates the Department's reduction of such hours to 4.5 hours of classroom training for Basic Entry Level Training and not less than two hours for continuing education training.

RESPONSE: The Department appreciates the commenter's expression of support regarding the reduction of training hours.

COMMENT: The commenter expresses support for the proposed revisions to N.J.A.C. 11:16-6.5(a)2iii which, according to the commenter, provide requirements for adequate training of non-SIU personnel while recognizing such personnel's supportive and vital role in fraud prevention and detection. The commenter does not object to the changes proposed for the filing of fraud plans or the changes to the fraud manual, and urges that the Department allow 180 days to fully implement the changes.

RESPONSE: The Department appreciates the commenter's support for the proposed readoption with amendments. The changes to the fraud plan, manual content, and filing process effectuated by these amendments are technical rather than substantive and the Department realizes the burden that an en masse refiling would impose on insurers as well as the Department. Consequently, an insurer that implements the reduced hours is not required to file an amended plan post-readoption, provided that such insurer is able to provide proof of the date of compliance upon request.

The new rule does not contemplate retrospective training for pre-February 7, 2000, hires. Any staff hired after that date would have received this training on an annual basis, presuming their employing insurer had complied with this rule. Therefore, the Department will require new filings only by new companies, and refilings only by those carriers that seek to implement substantive plan amendments in addition to amendments related to the reduced hours of training.

COMMENT: The commenter expresses concern that the rule continues to require a fraud plan filing for each subsidiary, when the vast majority of states allow companies to file a plan on a group basis, which according to the commenter is more efficient. The commenter is further concerned with the maintenance of confidentiality of fraud plans filed with the Department pursuant to N.J.A.C. 11:16-6.11, as the public disclosure of such information by the insurers to the Department may allow individuals to circumvent anti-fraud measures. Therefore, the commenter requests that upon adoption the confidentiality protection be expanded to cover anti-fraud plans and materials filed with the Department.

RESPONSE: The Department appreciates the commenter's concern regarding the possible redundancy. The Department has previously accepted and encourages plan and manual filings on a group basis, so long as the cover page includes the name and NAIC number of each company for which the plan is submitted. (See N.J.A.C. 11:16-6.3(b).) The Department agrees with the commenter regarding the importance of confidentiality and notes that N.J.A.C. 11:16-6.9(f) does provide confidentiality to the plan filings. The rule states in part that: "All information included in an insurer's plan submitted to the [Market Conduct Unit of the Department] pursuant to this subchapter…shall be confidential and not subject to public disclosure or inspection." Accordingly, the Department has concluded that the amendments suggested by the commenter are unnecessary.

Federal Standards Statement

Executive Order No. 27 (1994) and P.L. 1995, c. 65 require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include

in the rulemaking document a comparison with Federal law. A Federal standards analysis is not required in this instance because there are no Federal standards or requirements applicable to the rules proposed for readoption with amendments, repeal, and new rule.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 11:16.

Full text of the adopted amendments and new rule follows:

TEXT