

INSURANCE  
DEPARTMENT OF BANKING AND INSURANCE  
OFFICE OF SOLVENCY REGULATION

FAIR Plan Surcharge

Proposed Amendment: N.J.A.C. 11:1-5.1

Authorized By: Steven M. Goldman, Commissioner, Department of Banking and Insurance.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Authority: N.J.S.A. 17:1C-6, 17:1-8.1 and 17:37A-1 et seq.

Proposal Number: PRN 2008-392

Submit comments by January 30, 2009 to:

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The agency proposal follows:

**Summary**

The Department of Banking and Insurance (Department) proposes to amend N.J.A.C. 11:1-5.1 to clarify existing requirements with respect to the "FAIR Plan surcharge." N.J.S.A. 17:37A-1 et seq. established the New Jersey Insurance Underwriting Association (Association), consisting of all insurers authorized to write property insurance on a direct basis in this State. Pursuant to N.J.S.A. 17:37A-7, the Association established a plan of operation providing for the provision of essential property insurance in this State (FAIR Plan). The purpose of the FAIR Plan is to provide essential property insurance to individuals unable to obtain such coverage in the voluntary market. N.J.S.A. 17:37A-18 et seq. established the New Jersey Insurance

Development Fund (Fund) for the purpose of providing a financial backup for the FAIR Plan.

N.J.S.A. 17:37A-19 provides that:

For the privilege of doing property insurance business in this State, and in addition to all other requirements of law, every insurer authorized to write such insurance in this State shall be obligated to collect from the insured under any policy of basic property insurance, a surcharge upon the premium paid for said policy in an amount which shall be annually determined by the Commissioner as hereinafter provided. This surcharge shall be collected by each insurer and paid over to the fund semiannually as provided for by the Commissioner.

N.J.S.A. 17:37A-20 provides that for the purpose of providing the monies necessary to maintain the Fund, the Commissioner of Banking and Insurance (Commissioner) shall establish a reasonable surcharge on all basic property insurance premiums paid for policies of insurance written in this State. However, the statute provides that, in any given calendar year, the aggregate amount of the surcharge shall not exceed a sum equal to five percent of the insurance premiums written on basic property insurance in this State in the most recent full calendar year. Pursuant to N.J.S.A. 17:37A-21, the Commissioner, on or before April 1, is required to ascertain and determine the net value of the Fund as of the preceding December 31. If the Commissioner determines that the net value of the Fund is below an amount equal to five percent of the premiums written on basic property insurance in this State by reason of payments from known and estimated liabilities of the Fund, a surcharge shall be collected by authorized property insurers and paid over to the Fund pursuant to N.J.S.A. 17:37A-19. Conversely, when the net

value of the Fund, as determined by the Commissioner, reaches an amount at least equal to five percent of the premiums written on basic property insurance in this State in the most recent full calendar year, no further surcharge on premiums and no payments to the Fund shall be made.

The Commissioner originally adopted N.J.A.C. 11:1-5.1 in 1977. The rule was amended from time to time to provide that if a surcharge is necessary, the Commissioner shall issue an Order that a surcharge be imposed in an amount prescribed. In addition, the rule sets forth various procedures for applying the surcharge to various types of policies and procedures with respect to collection and remittance of the surcharge.

The current rule includes a reference at N.J.A.C. 11:1-5.1(a) to a finding of fact by the then Commissioner that as of August 3, 1988, the Commissioner determined that the net value of the Fund as of December 31, 1987 was more than five percent of the premiums written on basic property insurance in New Jersey in calendar year 1987, and that no further surcharge on net premiums and no further payments to the Fund shall be made. The Department proposed to amend N.J.A.C. 11:1-5.1 in 1995 (see 27 N.J.R. 2528(a)). That proposed amendment was not adopted. The Department now proposes the same amendments to delete the reference to the finding of fact set forth in N.J.A.C. 11:1-5.1(a). This 1988 finding is no longer accurate. The Department believes that it is reasonable and appropriate to delete this reference and not include any further reference to specific findings of fact by the Commissioner with respect to the net value of the Fund, as such determinations may change from year to year, thus requiring amendment to the rule each time the factual circumstances change. This would be time consuming and would hamper the ability of the Commissioner to take requisite action in a timely manner with respect to prescribing the amount of the surcharge or terminating the collection of any surcharge in accordance with N.J.S.A. 17:37A-21. Moreover, this determination is based on

a mathematical calculation set forth in the statute, which is not subject to change. In any case, the determination would be set forth in the Commissioner's Order issued in accordance with N.J.A.C. 11:1-5.1(a) as proposed to be amended prescribing the amount of the surcharge or terminating its collection.

Additionally, the Department proposes to amend the rule to confirm and clarify the current procedure. When the Commissioner determines that the net value of the Fund is equal to an amount less than five percent of the premiums written on basic property insurance in this State for the calendar year immediately preceding, the Commissioner shall prescribe by Order the amount of the surcharge that each insurer authorized to write such insurance in this State is obligated by N.J.S.A. 17:39A-19 to collect on the premium paid for each policy of basic property insurance in this State. Similarly, upon determining that the net value of the Fund equals or exceeds five percent of the premiums written on basic property insurance in this State, the Commissioner shall order that the imposition and collection of the surcharge be terminated. The amendments clarify that any Order issued by the Commissioner (either establishing the amount of the surcharge property insurers are required to collect or terminating a surcharge) shall set forth the Commissioner's findings of fact with respect to his or her determination of the net value of the Fund and the amount of the surcharge. Moreover, the amendments provide that the essential terms of the Order shall be published in the New Jersey Register to ensure that appropriate notice is provided to New Jersey policyholders and the public.

Further, the Department proposes to amend N.J.A.C. 11:1-5.1(b)1iii, with respect to the computation of the premium for commercial multiple peril policies subject to the surcharge, to ensure consistency and reflect the manner in which premiums for commercial multiple peril policies are reported in the statutory annual statement.

The Department also proposes to amend N.J.A.C. 11:1-5.1(d) to delete the ability of insurers to combine the “FAIR Plan Surcharge” with any surcharge that may be imposed to recoup any New Jersey Property-Liability Insurance Guaranty Association (PLIGA) assessment imposed pursuant to N.J.S.A. 17:30A-8a(3). The Department believes that this is reasonable and appropriate since any PLIGA surcharge is a “recoupment” retained by the insurer, while the FAIR Plan surcharge is to be paid over to the Fund. This is also consistent with N.J.A.C. 11:1-6, which sets forth the procedures for the imposition and collection of the PLIGA surcharge, and which requires that the surcharge be “separately identified.” The Department also believes that this will ensure that policyholders are fully apprised of the amount of each surcharge.

Further, the proposed amendments permit insurers to round the amount of the surcharge to the nearest whole dollar. This practice is prohibited under the current rule.

Finally, the Department proposes to amend the rule to make various technical revisions to the existing rule as a matter of form and to clarify the original intent consistent with the amendments set forth above.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

The proposed amendments confirm and clarify existing procedures with respect to the collection and termination of any surcharge imposed pursuant to N.J.S.A. 17:37A-19 upon a determination by the Commissioner that the net value of the Fund is above or below an amount equal to five percent of the premiums written on basic property insurance in this State for the preceding calendar year. The Department believes that these proposed amendments will avoid

any confusion with respect to the implementation of existing law and procedures regarding the specification of the amount of and the collection and termination of any surcharge required pursuant to N.J.S.A. 17:37A-21. These proposed amendments enhance notice to the public, which will further ensure that all policyholders of this State are apprised of any surcharge that may be imposed pursuant to law.

### **Economic Impact**

These proposed amendments will not independently impose any additional economic impact upon insurers transacting business in this State or upon policyholders of this State. The proposed amendments merely confirm and clarify existing procedures with respect to the imposition, collection and termination of any surcharge to be payable to the Fund as mandated by statute. Insurers will continue to be required to incur any administrative costs associated with the imposition, collection and payment over to the Fund of any surcharge mandated by statute. No additional professional services should be required in order to comply with the proposed amendments. Similarly, all policyholders will be required to pay any surcharge on premiums for basic property insurance in this State. However, these costs are imposed by N.J.S.A. 17:37A-18 et seq., rather than by these proposed amendments.

### **Federal Standards Statement**

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

### **Jobs Impact**

The Department does not anticipate that any jobs will be generated or lost as a result of the proposed amendments.

The Department invites commenters to submit any data or studies concerning the jobs impact of the proposed amendments together with their comments on other aspects of the proposal.

### **Agriculture Industry Impact**

The proposed amendments will not have any impact on the agriculture industry in New Jersey.

### **Regulatory Flexibility Statement**

A regulatory flexibility analysis is not required because these proposed amendments do not impose any reporting, recordkeeping or other compliance requirements on “small businesses” as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. As set forth in the Summary above, these proposed amendments do not impose any new reporting, recordkeeping or compliance requirements with respect to the imposition, collection or termination of any surcharge required pursuant to N.J.S.A. 17:37A-21. Rather, these proposed amendments merely confirm and clarify existing requirements with respect to the imposition, collection and termination of such a surcharge pursuant to law, and modify existing computation of premiums for commercial multiple peril policies to reflect the present computation of such premiums as reported in the statutory annual statement. Accordingly, no regulatory flexibility analysis is required.

### **Smart Growth Statement**

The proposed amendments will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

### **Housing Affordability Impact**

The proposed amendments will not have any impact on housing affordability in this State in that they apply to the imposition, collection and termination of any surcharge payable to the Fund as mandated by statute.

### **Smart Growth Development Impact**

The proposed amendments will not have an impact on smart growth in this State and there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey in that they apply to the imposition, collection and termination of any surcharge payable to the Fund as mandated by statute.

**Full text** of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

## SUBCHAPTER 5. FIRE AND CASUALTY INSURANCE

## 11:1-5.1 FAIR Plan Surcharge

[(a) On August 3, 1988, the Commissioner of Banking and Insurance ascertained and determined that the net value of the New Jersey Insurance Development Fund, as of December 31, 1987, was more than five percent of the premiums written on basic property insurance in New Jersey in calendar year 1987. Accordingly, no further surcharge on said premiums and no further payments to said Fund shall be made.]

**(a) In accordance with N.J.S.A. 17:37A-21, the Commissioner shall, on or before April 1, determine the net value of the New Jersey Insurance Development Fund (Fund), as of the immediately preceding December 31. Upon finding that the net value of the Fund is less than five percent of the premiums written on basic property insurance, as that term is defined in N.J.S.A. 17:37A-2, in this State for the calendar year immediately preceding, the Commissioner shall, pursuant to N.J.S.A. 17:37A-20 and 21, prescribe by Order the amount of the policy premium surcharge, which, pursuant to N.J.S.A. 17:37A-19, authorized property insurers are obligated to collect from the insured under any policy of basic property insurance. The amount of the surcharge shall be established by the Commissioner in the Order, but the aggregate amount of the surcharge shall not exceed five percent of the premiums written on basic property insurance in this State in the most recent calendar year. Upon determining that the net value of the Fund equals or exceeds five percent of the premiums written on basic property insurance in this State for the calendar year immediately preceding, the Commissioner shall order that the imposition and collection of the surcharge be terminated.**

**1. Any Order issued by the Commissioner shall set forth the Commissioner's findings of fact with respect to his or her determination of the net value of the Fund and the amount of the surcharge.**

**i. The Commissioner shall establish the amount of any surcharge so as to replenish the Fund to a level equal to five percent of the premiums written on basic property insurance in this State within a reasonable time.**

**2. The essential terms of the Order shall be published in the New Jersey Register.**

(b) Application of **the** surcharge when [imposed] **ordered** by the Commissioner [of Banking and Insurance] shall be as follows:

1. [A] **The** surcharge shall be imposed in an amount prescribed in an [order] **Order** of the Commissioner [of Banking and Insurance] on premiums of the following policies and endorsements effective on or after the date fixed by the Commissioner in his or her [order] **Order**.

i – ii. (No change.)

iii. Commercial multiple peril policies. For the purpose of this computation, [65 percent of the commercial multiple peril premium shall constitute the premium subject to the surcharge, except that on individual risks where such percentage appears unreasonable, a company may use actual division by line, provided the company maintains a separate record of those risks] **insurers shall utilize the premium as reported for commercial multiple peril (non-liability portion) in the Exhibit of Premiums and Losses in the annual statement filed pursuant to N.J.S.A. 17:23-1.**

iv. (No change.)

2. The surcharge[, if deemed necessary by the Commissioner of Banking and Insurance,] shall apply to all new and renewal policies effective on or after the date fixed by the Commissioner in his or her [order] **Order** and to the additional premiums on all endorsements effective on or after that date.

3. Policies written for a term longer than one year with an effective date on or after the date fixed by the Commissioner in his or her [order] **Order** shall be [charged, if deemed necessary by the Commissioner of Banking and Insurance,] **surcharged** in accordance with this section.

4. Return of the surcharge[, if any is charged by order of the Commissioner of Banking and Insurance,] is permitted on policy activity, such as endorsements decreasing premium and cancellations effective **on or after** the date fixed by the Commissioner in his or her [order] **Order**.

5. For policies with an effective date on or after the date fixed by the Commissioner in his or her [order] **Order**, which are subject to audit, the surcharge[, if any is charged by order of the Commissioner of Banking and Insurance] shall be based on the audited premium.

6. The surcharge[, if deemed necessary by the Commissioner of Banking and Insurance,] shall be charged in full. [Rounding] **Insurers may round the amount of the surcharge** to the nearest whole dollar [is not permitted].

7. [If a surcharge is deemed necessary by the Commissioner of Banking and Insurance, commissions] **Commissions** and premium taxes shall not be payable [thereon] **on the surcharged amount**, and the insurer is prohibited from absorbing such surcharge as an inducement for insurance or for any other reason.

(c) [If a surcharge is deemed necessary by the Commissioner of Banking and Insurance, the] **The** surcharge shall be collected by each insurer and paid over to the State Treasurer of New Jersey[,] not later than March 1 and September 1 of each year.

(d) [The method of billing shall be as follows:

1. If the surcharge is deemed necessary by the Commissioner of Banking and Insurance] **On bills for premiums**, the surcharge shall be a separate charge to the insured in addition to the premium to be paid [and], shall be shown separately [or combined with the] **from any** Guaranty Association charge **and shall be identified as “IDF Surcharge” or such other designation as the Commissioner may advise insurers is acceptable.**

[2. If a surcharge is deemed necessary by the Commissioner of Banking and Insurance, when the surcharge is combined with the Guaranty Association charge, it shall be identified as “Surcharges,” and when it is shown separately, it shall be identified as “Surcharge.”]

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