

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

OFFICE OF CONSUMER PROTECTION SERVICES

Unfair Claims Settlement Practices

Rules for Fair and Equitable Settlements and Reasonable Explanations Applicable to All Insurance; Rules for Fair and Equitable Settlements Applicable to Property and Liability Insurance

Adopted Amendments: N.J.A.C. 11:2-17.8 and 17.10

Proposed: April 4, 2016, at 48 N.J.R. 550(a) (see also 48 N.J.R. 629(a)).

Adopted: March 3, 2017, by Richard J. Badolato, Commissioner, Department of Banking and Insurance.

Filed: March 3, 2017, as R.2017 d.058, **with a non-substantial change** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 17:1-15.e, and 17:29B-1 et seq.

Effective Date: April 3, 2017.

Expiration Date: January 6, 2018.

Summary of Public Comments and Agency Responses:

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

1. MasterCard International Incorporated;
2. Allstate New Jersey Insurance Company; and
3. The Property Casualty Insurers Association of America.

COMMENT: All of the commenters appreciated and supported the Department's goal of modernizing its rules to permit payment of claims through electronic means and other payment methods.

RESPONSE: The Department appreciates the support of its rulemaking.

COMMENT: One commenter believed that the alternative payment methods permitted by the proposed amendments should also permit insurers to make annuity claim payments by prepaid debit card. The commenter noted that in responses to comments on the original proposed amendments to N.J.A.C. 11:2-17.8, the Department clarified that the amendments would not apply in the case of health coverage, life insurance, or annuities. While the commenter recognized that payments for health insurance and life insurance are governed outside of N.J.A.C. 11:2-17.8, the commenter requested that the Department reconsider its position for annuity payments. The Department stated in its responses to comments as part of the notice of repropoed amendment and proposed amendment that "[t]he use of single-use credit cards, debit cards, etc., generally apply in the case of property damage claims and are used to pay claimants for alternative housing." The commenter believed that the Department's justification for excluding the use of prepaid cards for annuity payments is inconsistent with trends in the marketplace. The commenter stated that prepaid debit card arrangements are commonly used to make recurring payments to consumers. The commenter cited, as an example, that many employers have adopted prepaid payroll card programs to disburse to employees recurring wage payments. The commenter stated that recipients of recurring payments on prepaid cards experience the advantage of direct deposit even though they do not have bank accounts. These

advantages include safety, by not having to carry large amounts of cash or risk lost or stolen checks; ease of automatically receiving a deposit through a card account; and convenience to make a purchase anywhere cards branded with the relevant payment network are accepted. The commenter also stated that recurring prepaid arrangements have enabled employers and government agencies to outsource many of the administrative responsibilities associated with managing a payment program, which, in turn, cuts costs. The commenter believed that insurers could similarly benefit in the same way if given the opportunity. The commenter, thus, believed that prepaid debit cards would be appropriate for annuity payments that are commonly used for other recurring payments by the private sector and government agencies.

RESPONSE: Upon review, the Department has determined that no change is required. The Department continues to believe, as was noted in the notice of reproposal, that use of alternative payment mechanisms is not appropriate for annuities in that annuities usually provide for periodic payments, whereas payments by use of debit/credit cards, etc., are more suited to one-time payments related to payments for claims for property/casualty coverage. The Department also notes that no insurer raised the objection/concern that this commenter raised. The Department notes that it will, however, monitor this issue and consider the commenter's suggestions for possible future amendment if deemed appropriate.

COMMENT: One commenter expressed concern with the characterization of prepaid cards as an "alternative payment method." The commenter stated that this phrase is not necessary to effect the purpose of the rules and that it may be read to suggest that prepaid cards are novel or outside the mainstream. The commenter stated that, to the contrary, over the last decade, consumers have been increasingly relying upon prepaid products to make purchases and access funds. The commenter noted that prepaid cards are often the only means for providing

financially underserved communities with access to modern banking systems. The commenter stated that a 2014 survey by the Pew Charitable Trusts found that 58 percent of consumers who use prepaid products do not currently have checking accounts but indicated they want to have a checking account in the future. The commenter stated that the benefits of prepaid cards to these individuals are numerous, including real-time access to funds; the ability to buy goods and services online and at brick-and-mortar retailers that only accept payment cards and, with the forthcoming issuance of a final rule on prepaid access from the Consumer Financial Protection Bureau, access to the same consumer protections that apply to traditional debit cards. The commenter, thus, requested that the Department modify proposed N.J.A.C. 11:2-17.10 to eliminate its reference to prepaid and/or reloadable debit cards as “an alternative payment method,” and that the rule be revised to read “with respect to first party claims, in addition to claim payments by check or draft, insurers may make claim payments by direct deposit, wire transfer or other electronic means where the claim payment is deposited directly into the claimant’s bank account, or by another payment method such as prepaid and/or reloadable debit or credit card, or other comparable method.”

RESPONSE: Upon review, the Department has determined not to change this provision. The Department does not believe that the use of the term “alternative” implies that such payment method(s) is/are outside of the mainstream or in any way less desirable. The definition of “alternative” is defined in general use as “[a] choice between two mutually exclusive possibilities ...”; and “one of a number of things from which one must be chosen.” See Webster’s New Collegiate Dictionary, 2001. The purpose of the phrase is to recognize that the use of reloadable payment cards is different from an actual funds transfer, insofar as the use of

those cards could require payment of fees or other restrictions, and that their use requires agreement by the consumer.

COMMENT: One commenter suggested that the Department delete the reference to N.J.A.C. 11:2-17.10 in N.J.A.C. 11:2-17.8(k) because the latter section addresses making payments by direct deposit, wire transfer, or other electronic means where the claim payment is deposited directly into the claimant's bank account but does not include prepaid and/or reloadable debit or credit cards or other comparable methods. The commenter believed that the reference in N.J.A.C. 11:2-17.8(k) to N.J.A.C. 11:2-17.10 creates confusion. The commenter suggested that the second sentence in N.J.A.C. 11:2-17.8(k) be revised to read: "Payment by direct deposit, wire transfer, or other electronic means where the claim payment is deposited directly into the claimant's bank account shall be considered the equivalent of payment by check or draft."

RESPONSE: Upon review, the Department has determined that no change is required. The reference to N.J.A.C. 11:2-17.10 is merely a cross-reference to that section, which establishes that payments by such methods are permitted with the requirements associated with such payment methods.

COMMENT: One commenter expressed concern with N.J.A.C. 11:2-17.10(b)2, which provides:

No claim shall be paid pursuant to this subsection unless the use of the payment method has first been affirmatively and voluntarily agreed to by the claimant after the insurer has fully explained to the claimant in writing all aspects of the program, including the disclosure of any potential fees. Failure of the claimant to select

an alternative payment method shall not be construed as consent to the use of such method.

The commenter stated that it has concern with the proposed mandate of a *full* explanation of *all aspects* of the program, *in writing*. The commenter questioned what the Department would consider a “full explanation.” The technicalities of the program the commenter utilizes (“Fast Mobile”) involve participation by banking institutions with an exchange platform that most customers would not be interested in. The commenter stated that insurers do not explain how checks interface at banks or electronic fund transfers that occur today. The commenter believed that a written explanation is not warranted where the process requires voluntary, affirmative customer action, as explained below. The commenter stated that with its program, “Fast Mobile,” a payment is initiated using an e-mail address or mobile phone number given to the adjuster/processor by the customer, specifically for the purpose of processing payment. When the payment is made, an e-mail or SMS text message is sent to the customer from Bank of America with a link and instructions for the customer to follow in order to receive payment in the bank account of their choice. Simultaneously, the commenter sends a payment confirmation e-mail to the customer advising that payment has been issued to its banking partner, Bank of America, and that the customer will receive a message at the e-mail address or mobile phone number given with an update on the next steps on how to accept payment. The commenter stated that where customer action is required, it requests that the Department accept this process as voluntary affirmative agreement and not require a separate explanation of the program in writing before processing. The commenter stated that providing a separate explanation would be unorthodox in the handling of a claim, seemingly suggesting that there is some risk associated

with the process, and would cause delay, detracting from the purpose of the option to speed payment and access funds.

In order to address this concern, the commenter proposed that N.J.A.C. 11:2-17.10(b)2 be amended to read as follows (suggested additions in boldface **thus**; suggested deletions in brackets [thus]):

No claim shall be paid pursuant to this subsection unless the use of the payment method has [first] been affirmatively and voluntarily agreed to by the claimant after the insurer has [fully] explained **the process** to the claimant [in writing all aspects of the program,] including the disclosure of any potential fees. Failure of the claimant to select an alternative payment method shall not be construed as consent to use such method.

The commenter further stated that it does not charge any fees associated with the transaction and in fact pays all bank fees associated with the transaction directly to the bank. However, for those insurers that may not pay all fees on behalf of customers, the commenter believed that it is reasonable for the Department to require written disclosure and offer the following amendment in the alternative:

No claim shall be paid pursuant to this subsection unless the use of the payment method has been affirmatively and voluntarily agreed to by the claimant. Where the payment method may impose potential fees to the claimant, the insurer must secure written consent before issuing payment. Failure of

the claimant to select an alternative payment method shall not be construed as consent to the use of such method.

RESPONSE: Upon review, the Department has determined not to change this provision. The Department believes that it is reasonable and appropriate to require that a claimant agree *before* payments are made via an alternative payment in all cases, not only where potential fees may be charged. Also, the commenter's suggested change would still require consent of the claimant to the use of the alternative payment method, but deletes the word "first." It is unclear what purpose agreement by the claimant would serve if it had not been given prior to accepting payment pursuant to an alternative method, or when such agreement would be required.

Similarly, as part of the prior consent requirement, the Department believes that it is reasonable and appropriate to require the agreement to come "after the insurer has fully explained to the claimant in writing all aspects of the program, including the disclosure of any potential fees" in order to ensure that the claimant can make an informed choice. The Department does not intend that the requirement that the insurer explain "all aspects of the program" requires the insurer to delve into the minutiae of the technical workings of the vendor arrangement, programs, or software, but rather should provide details as to how the funds will be provided to the claimant and how he or she may access same, and, importantly, whether any fees will be charged for this service.

The Department notes that the existing rules require (other than claims with respect to Super Storm Sandy, which were subject to specific requirements) that all first-party claim payments be made by "check or draft." It is unclear how the commenter's payment by electronic means or Fast Mobile comply with the existing rules.

COMMENT: One commenter noted that N.J.A.C. 11:2-17.8(k) states that “payment by direct deposit, wire transfer, or other electronic means where the claim payment is deposited directly into the claimant’s bank account as permitted by N.J.A.C. 11:2-17.10 shall be considered the equivalent as payment by check or draft.” The commenter stated that, in actuality, laws and regulations regarding the use of electronic funds transfers and the use of checks/drafts are very different, and this section appears to “muddy” those distinctions. The commenter stated that if the Department’s intent is to make it clear that the deposit of electronic funds into one’s account is considered receipt, similar to receipt of a check or draft, it should be clarified. The commenter suggested something along the lines of “... shall be considered the equivalent as receipt of payment.”

RESPONSE: Upon review, the Department has determined that no change is required. The commenter has apparently misconstrued the intent of the rule. N.J.A.C. 11:2-17.8(k) provides the requirements with respect to first-party claims (and third-party claims as set forth in N.J.A.C. 11:2-17.10(c)) regarding the time and method to provide a statement setting forth the coverage under which payment is made and an explanation of how the benefit payment was calculated. Specifically, it provides that the statement must be issued contemporaneously with payment, regardless of whether payment is made by check, draft, or electronic means. Thus, for the purpose of issuing the statement, electronic payments are considered the equivalent of payment by check or draft for the requirement to issue the statement. The amendments, however, require that in those instances where payment is made by electronic means and electronic notification of the statement is not possible, the statement must be sent via regular mail to the claimant at the time payment is made.

COMMENT: One commenter stated that the calculation of the payment set forth in N.J.A.C. 11:2-17.8(k) is not clear since the level of detail or itemization is not specified. In addition, the commenter stated that it is not clear whether this section applies for first-party payments only, or whether third-party payments are also contemplated. The commenter stated that the Summary statement of the rulemaking indicates the intent is to apply the first-party and third-party payments, but this section may need to make it clear that this is the intent.

RESPONSE: With respect to the comment that the calculation of the payment set forth in N.J.A.C. 11:2-17.8(k) is not clear since the level of detail or itemization is not specified, the Department notes that this language is part of the existing rule and was not proposed for change. However, the Department also notes that the existing rule provides insurers with flexibility in providing the level of detail necessary to enable claimants to reasonably understand the benefits included in the claim payment.

With respect to the comment that it is not clear whether N.J.A.C. 11:2-17.8(k) applies for first-party payments only, or whether third-party payments are also contemplated, the Department notes that the amendments, by their terms, apply to third-party claims as well. See N.J.A.C. 11:2-17.10(c). The Department is making a technical change to N.J.A.C. 11:2-17.8(k) upon adoption to reference the payment of third-party claims as set forth in N.J.A.C. 11:2-17.10(c), to confirm the Department's intent that payment of claims through electronic means also applies to third-party claims.

COMMENT: One commenter requested clarification of the intent or objective of the sentence in N.J.A.C. 11:2-17.8(k) that "the requirement to provide the statements set forth in this paragraph

shall not apply to claims in which the claim payment figure was arrived at through negotiations between the insurer and the first party claimant.”

RESPONSE: The purpose of this existing sentence was to relieve insurers of the obligation to provide the statement setting forth the coverage under which payment is made and how the benefit payment was calculated in instances in which the claim payment figure was arrived at through negotiations between the insurer and the first-party claimant. Through the negotiation process, claimants would be aware of the coverage under which payment is made and how the benefit payment was calculated. Thus, it is not necessary to provide this information in the form of a statement at the time of payment.

Federal Standards Statement

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

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***):

11:2-17.8 Rules for fair and equitable settlements and reasonable explanations applicable to all insurance

(a) – (j) (No change.)

(k) With respect to first party claims*, **and third party claims as set forth in N.J.A.C. 11:2-17.10(c)***, insurers shall make claim payments by check or draft. Payment by direct deposit, wire transfer, or other electronic means where the claim payment is deposited directly

into the claimant's bank account as permitted by N.J.A.C. 11:2-17.10 shall be considered the equivalent payment by check or draft. All payments shall be made contemporaneously with issuance of a statement setting forth the coverage under which payment is made and in sufficient detail so that first party ***and third party*** claimants can reasonably understand the benefits included within the claim payment. The statement shall include an explanation of how the benefit payment was calculated. Where payment is made by electronic means, whenever possible the statement shall be provided electronically at the same time that such payment is made. Where electronic notification is not possible, the statement shall be sent via regular mail to the claimant at the time payment is made. The requirement to provide the statement set forth in this paragraph shall not apply to claims in which the claim payment figure was arrived at through negotiations between the insurer and the first party ***or third party*** claimant.

(1) (No change.)