New York Insurance Association

June 30, 2017

Mr. Stephen Doody, Deputy Superintendent for Property and Casualty
NYS Department of Financial Services (DFS)
One State Street
New York, NY 10004

Re: Proposed 2nd Amendment to Insurance Regulation 150 (11 NYCRR 154),
Private Passenger Motor Vehicle Insurance Multi-Tier Programs

Dear Mr. Doody:

I am writing to comment on the above-captioned proposed regulation to ban the use of occupational status or educational level of an auto insurance policyholder as a factor in either initial tier placement or tier movement unless the insurer demonstrates to DFS that the use of occupation or education does not result in a rate that violates Insurance Law article 23. The New York Insurance Association (NYIA) is the state trade association that has represented the property and casualty insurance industry in New York for more than 130 years. Our extensive membership includes auto insurance carriers who comprise over 40% of the NYS auto insurance market. On both legal and public policy grounds, this proposed regulation exceeds the Superintendent's authority and should not be adopted.

The courts have construed New York's Insurance Law article 23 provisions prohibiting unfairly discriminatory property and casualty rates as "seek[ing] to assure that the rate charged shall bear reasonable relationship to or be commensurate with the risk assumed and adequate for the class of risk to which they apply." Employers' Liability Assurance Corp. v. Aresty, 11 A.D. 2d 331, 335 (1st Dep't, 1960), affd 11 N.Y. 2d 696 (1962). Furthermore, New York's courts have determined that "differential premium rates on the basis of sound underwriting practices accurately assessing risks/future costs are not by nature misleading to the public or prejudicial to policyholders." Matter of Health Insurance Association of America v. Corcoran, 154 A.D. 2d 61, 68 (3rd Dep't, 1990) affd for reasons stated below, 76 N.Y. 2d 995 (1990). New York case law does not just stand for the proposition that classifying risks and establishing differential rates for risks based on higher and lower risk categories is not contrary to Insurance Law, it also recognizes that such risk classification is a positive for the New York insurance consumer. "Indeed, valid underwriting practices promote fairness to the policyholder in not requiring him or her to bear in premiums the costs of insuring others in higher risk categories..." Id at 68.

New York Insurance Law section 2304(c) authorizes auto insurers to group risks by classifications in order to establish rates and premiums. Auto insurers are also permitted to

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modify classification rates to generate rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions, or both. Id. Most importantly, those standards "may measure any difference among risks that can be demonstrated to have a probable effect upon losses or expenses." Id.

The standard of "unfair discrimination" is an actuarial concept and not something that is open to interpretation. As long as a rating classification reflects differences in loss costs, it is not unfairly discriminatory. "New York deems discrimination to be 'fair' so long as the insurance company's differential treatment of insureds is appropriate under generally accepted actuarial standards." Fleisher v. Phoenix Life Ins. Co., 18 F. Supp. 3d 456, 479 (SDNY, 2014), citing Polan v. State of New York Ins. Dep't., 3 A.D. 3d 30 (1st Dep't, 2003); Corcoran, 154 A.D. 2d 61 (3d Dep't, 1990). For the following reasons, we respectfully submit that education and occupation do meet generally accepted actuarial standards.

Two states performed an extensive examination of the use of education and occupation in underwriting for automobile insurance. These states are New Jersey and Maryland. Both states concluded that education and occupation, similar to credit-based insurance scoring, are valid predictors of loss. Maryland's Insurance Administration concluded that "[e]ducation and occupation, as underwriting factors, meet the actuarial standards of practice related to classification." A complete copy of the New Jersey report, which contains the Maryland study, is available at: New Jersey DOBI report.

New Jersey's examination is particularly noteworthy, both because of its proximity to New York and its similar demographic profile to New York. NYIA previously provided the complete New Jersey and Maryland reports to DFS on October 26, 2015 with our letter to then-Acting Superintendent Anthony Albanese and we accordingly refer you to those reports. New Jersey specifically refuted contentions that the education and occupation factors are not actuarially justified, that their use resulted in dramatically higher prices for certain classes of drivers, and that they are used as proxies for race and income (see page 14 of the New Jersey report Analysis of the New Jersey Citizen Action Report on their website).

Furthermore, and of the utmost importance, New Jersey's Department of Banking and Insurance actuaries found the use of occupation and education was actuarially valid. This finding was seconded by Maryland, where their market conduct examination report concluded (see page 4 of the Maryland report on department's website):

1) education and occupation are predictors of loss;
2) the use of education and occupation as risk characteristics meets actuarial standards of practice and principles related to risk classification; and
3) from an actuarial perspective, the use of education and occupation is reasonable.

While the Maryland study was limited to how one auto insurance company applied education and occupation in their underwriting, it is still instructive in terms of demonstrating how these valid underwriting criteria can be used properly.

Taking a broader view of the legal and constitutional issues raised by this proposed regulation, this proposal's restriction on use of the valid underwriting criteria of education or occupation in auto insurance classification of risks may run afoul of the separation of powers doctrine. While New York public policy does grant state administrative agencies broad powers to administer the law, there is a limit to this administrative power. As expressed in Boreali v. Axelrod, 71 N.Y. 2d 1 (1987), even statutes such as Insurance Law sections 2301 and 2303 granting broad authority to a New York State administrative agency must be "interpreted in light of the limitations that the Constitution imposes." Boreali at page 9. Specifically, Article III, section 1 of the New York Constitution vests the lawmaking power of the state in the legislature. Similarly to sections 2301 and 2303 of the Insurance Law, the broad grant of authority cited by the New York Health Department as the basis for their authority to restrict the use of tobacco in public places was New York Public Health Law section 225 (5) (a). That section authorized the Health Department to "deal with any matters affecting the ... public health." Boreali at page 9. The New York Court of Appeals in Boreali noted that "however facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits...". Boreali at page 9.

As a result, it is the law in New York that "even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives...." Boreali at page 9. NYIA submits that this proposed regulation is the same overreach of administrative authority as it seeks to establish social policy regarding auto insurance underwriting using education or occupation. Only the New York State Legislature may make broad-based public policy determinations. Rent Stabilization Association of NY City v. Higgins, 83 N.Y. 2d 156, 169 (1993), citing Boreali at 9. Therefore, this issue should be addressed by the Legislature after robust public debate and consideration.

Turning to the public policy grounds, it must be first noted that the underwriting process includes the assessment, evaluation and pricing of risk and is a crucial and indispensable aspect of insurance. Insurance companies need to be able to undertake this function in as free and unencumbered a manner as possible in order for the insurance marketplace to operate at peak efficiency, a result that directly benefits New York insurance consumers and the society as a whole. Limitations and restrictions on underwriting freedom hamper innovation and thereby reduce competition, which negatively impacts New York consumers who will have fewer choices at higher prices. If adopted, the proposed regulation concerning education and occupation would have a negative impact on the New York auto insurance market, to the detriment of consumers. For example, certain occupations considered low-risk by some carriers include police, firefighters and librarians. These individuals benefit from the use of occupation in rating when written by some carriers and thus would see a rate increase if this regulation is enacted. The fact that these occupations are considered low-risk by some carriers also clearly demonstrates that occupation groups are not a proxy for income.

When underwriting freedom is allowed, insurers compete by attempting to evaluate individual risks more accurately than rival insurers. An important part of this work is the

refinement of risk classification, which permits insurers to more precisely estimate the losses that an individual is likely to experience. Competitive, risk-based underwriting enhances fairness in pricing, prudent conduct, greater availability of coverage, and risk-sharing among insurers.

As you know, the New York private passenger automobile insurance market is presently robust and quite competitive. Many insurance companies are competing for business in New York. Overall, the private passenger auto insurance market in this state is vibrant and meets the needs of consumers.

One of the sources of the current competitive market in New York is the regulatory framework that governs the rating of auto insurance policies. This framework was developed over many years, and has responded well to variegated, changing economic conditions. Included in this regulatory framework are the freedom to underwrite, the flexible rating system established under Regulation 129, and the use of multi-tiering. New York's auto insurance consumers benefit from these features. Specifically, underwriting freedom, including the use of "occupation and education," benefits the auto insurance consumer because it enables insurers to treat similarly-situated insureds similarly.

In closing, NYIA cannot stress enough how crucial it is that any and all criteria that demonstrate a correlation with risk be allowed to be used by insurance companies in underwriting risks, including education and occupation. New York insurance consumers and the entire New York insurance market benefit from ensuring maximum underwriting freedom and flexibility. This is not the time to hinder the competitiveness of New York's auto insurance market by restricting actuarially valid underwriting criteria.

Please feel free to contact me if you have any questions or wish to discuss further.

Sincerely,

Ellen Melchionni

Ellen D. Melchionni, CAE
President

cc: Maria T. Vullo, Superintendent
Scott Fischer, Executive Deputy Superintendent