Office of the Registrar of Regulations,
Legislative Council,
State of Delaware

DEPARTMENT OF INSURANCE

OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Sections 311, 520, 2304(16), and 2312 (18 **Del.C.** §§311, 520, 2304(16) & 2312)

18 **DE Admin. Code** 903

PROPOSED

PUBLIC NOTICE

903 Prompt Payment of Settled Claims

A. Type of Regulatory Action Required

Re-proposal of amendments to Regulation 903 - Prompt Payment of Settled Claims.

B. Synopsis of the Subject Matter of the Regulation

In the March 1, 2020 edition of the *Register of Regulations* at 23 **DE Reg.** 730 and again in the April 1, 2020 edition of the *Register of Regulations* at 23 **DE Reg.** 831, the Commissioner of the Delaware Department of Insurance (Commissioner) published a notice of intent to amend Regulation 903 Prompt Payment of Settled Claims to:

- Allow insurance carriers to pay settled insurance claims other than claims that are subject to the Workers Compensation Statute at 19 **Del.C.** §2344 by electronic means; and
- Make grammatical and formatting edits throughout the regulation.

The authority for the proposed amendments is 18 **Del.C.** §§311, 520, 2304(16), and 2312, in accordance with the Delaware Administrative Procedures Act, 29 **Del.C.** Ch. 101.

The Department solicited written comments from the public for thirty (30) days as mandated by the Administrative Procedures Act at 29 **Del.C.** §10118(a) and for an additional 30 days at the discretion of the Department. The Department did not hold a public hearing on the proposal.

The Department received comments from nine commenters, which are on file with the Department. Two commenters endorsed the Department's proposed amendments wholesale. The other seven commenters offered comments that suggested substantive changes that require further public comment.

C. Summary of the Comments Received

Several commenters offered objections to the proposed definition of "claimant." These commenters opined that including the phrase "representatives (other than a provider) designated by such person and entitled to make claims on that person's behalf" in the definition of "claimant" seems overly broad and could include unintended persons such as creditors unrelated to the underlying claim or factoring companies, or other individuals who are not a party to the insurance contract and who are not contemplated under the statute. One commenter pointed out that given recent efforts in Delaware and beyond to reform assignment of benefits abuses, this purported expansion of the definition is cause for concern. One commenter suggested that the definition of claimant be revised to mean "a person covered under an insurance policy or a legal representative (other than a provider) designated by such person and entitled to make claims on that person's behalf, but does not include any provider or other third party who has provided services to a claimant."

In response to these comments, the Department has determined to clarify the definition of claimant upon re-proposal.

Several commenters opined that including the phrase, "any third-party administrator or other entity that adjusts, administers or settles claims in connection with insurance provided in the state" in the definition of "insurance carrier" is problematic. One commenter reasoned that this would include public adjuster firms, third party administrators, plaintiff attorneys, as well as estimators at repair facilities, and building contractors, which is inconsistent with the definition of insurer in 18 **Del. C.** §102 (10). In addition, the commenter suggested that this proposed change creates significant interpretation challenges where the regulation incorporates those terms by reference. To avoid these interpretation hazards, commenters suggested that the regulation adopt a definition of insurance carrier that mirrors the statute.

In response to these comments, the Department has determined to replace the term "insurance carrier" with "person" throughout the regulation, and to define "person" as it is defined in the underlying statute at 18 **Del.C.** §2302.

Subsection 5.1 lists the criteria for prompt payment. One commenter opined that the definition of "prompt" does not include the case scenario when claims are paid upon receipt of all documentation and completion of the investigation of the claim. This commenter suggested that subsection 5.1 be amended to include "The date the insurance carrier has received all of claimant's documentation and investigation of the claim is complete;" to the list of what constitutes prompt payment.

The Department accepts the commenter's suggestion by adding the suggested phrase at proposed new subsection 5.1.3.

Several commenters objected to the proposed deletion of the concept of "remittance" from the prompt payment requirements of subsection 5.1. One commenter pointed out that remittance is the date the draft is sent, while payment is

the date the amount is received by the payee and opined that the proposed revision to subsection 5.1 could shorten the settlement timeline for a payee who prefers a paper check. Prompt settlement would be reduced from 30 days to 30 days less mailing time. The commenter also pointed out that banks often place holds on electronic payments and queried whether insurers will be required to factor these electronic holds into the settlement timeline.

One commenter opined that while the insurer has control over when the payment is remitted, they do not have control over when that payment is received. The commenter therefore suggested that prompt payment continue to be defined in terms of remittance of payment as follows:

"Prompt payment is defined as remittance of the check or electronic payment within 30 days from any one of the following dates: . . . ."

The Department accepts the suggested phrase concerning remittance and has incorporated it into subsection 5.1.

Proposed new subsection 5.2.1 sets out practices for electronic payment. Several commenters asked the Department to clarify whether it intended to require that all claims be settled electronically, or to merely allow carriers the option of offering individuals an electronic settlement option, and ultimately suggested that subsection 5.2.1 be permissive, not mandatory. Two of these commenters reasoned that not all payments, particularly payments with dual payees, are suitable for electronic payment, pointing out that dual payments to lienholders, public adjusters, mortgage holders or to an attorney on a settlement draft cannot be sent to a single electronic account. Additionally, this requirement may undermine contractual duties to protect mortgagors and lienholders, and that some insurers act to reduce their and their customer's exposure to electronic transfer fraud, by limiting the size of electronic payments.

A third commenter suggested that requiring rather than allowing carriers to remit settlement payments electronically would require either significant enhancements to the commenter's existing legacy claims payment systems that lack such capability, or the implementation of new systems, both of which will involve budgeting for the cost of the enhancement and time to develop and implement the revised systems. This commenter suggested that subsection 5.2.1 be revised as follows:

5.2.1 The insurance carrier ~~shall~~ may allow a claimant to choose to receive the payment by check or by electronic payment; and . . . .

The Department's intention was to make electronic payment optional. The Department is revising subsection 5.2.1 accordingly.

Proposed new subsection 5.2.2 provides that an electronic payment can be made by any means so long as the payee does not incur an electronic fee. Several of the commenters objected to this requirement as impractical. One commenter offered that this would require insurers to know the billing practices of any banking institution the payee chooses and pointed out that "with 6,799 federally insured banks in the United States this would be a daunting task." This commenter opined that the burden of this decision should rest with the individual making it, namely, the claimant. Two commenters suggested that the clause "or other electronic transaction method for which the payee incurs or may incur any transaction fees" be stricken and that the following language be added to the regulation as proposed new subsections 5.5.3 and 5.5.4:

5.5.3 When using an electronic payment method, insurance carrier shall not use an institution or issuer to pay claims that imposes charges and/or fees upon the claimant that reduce the claim payment amount in any way, nor shall the insurance carrier itself impose any such charges or fees upon the claimant.

5.5.4 Fees that may be incurred due to the claimant's election of certain means to access the funds, such as fees charged by the claimant's bank to accept a wire transfer, or fees for multiple ATM withdrawals charged by the claimant's bank under the terms of the claimant's account, or fees charged by the financial institution used by the claimant to access monies (such as ATM fees charged by banks other than the bank in which the claimant has an account), shall not be considered a prohibited fee that reduces the claim payment amount.

Another commenter suggested that Subsection 5.2.2 be revised as follows:

5.2.2 If the payee chooses to receive an electronic payment, the payment may be by prepaid card or other electronic transaction method. For electronic, prepaid card or other electronic payment methods, the insurer cannot impose any charges or fees to the claimant nor use an institution or issuer to pay claims that imposes charges or fees to the claimant that reduce the claim payment.

The Department has determined to address these commenters' concerns by revising subsection 5.2.2 as suggested.

One commenter objected to the usage of "insurance carrier" in subsection 6.1 and in Section 7.0 opining that such usage extends the Department's administrative authority to assess interest and fines to entities not under its statutory authority such as building contractors and body shop estimators.

As discussed above, the Department has determined to substitute all references to "insurance carrier" with the statutorily defined term "person."

One commenter objected to the proposed effective date of the regulatory amendments as 11 days after publication because the "compressed timeline" may present significant challenges for small insurers, self-insured entities, or previously unregulated entities who have little or no experience with electronic payment.

Since the Department is revising the proposed regulation to make clear that payment through electronic means is voluntary, this concern is no longer ripe and, therefore, the Department will not be amending the proposed effective date of the regulatory amendments.

In response to the comments received, the Department is re-proposing the amendments with revisions that address

the commenters' concerns as discussed above.

D. Notice and Public Comment

The Department does not plan to hold a public hearing on the re-proposed amendments to Regulation 903. The amendments as re-proposed appear below and may also be viewed at the Department of Insurance website at http://insurance.delaware.gov/information/proposedregs/.

Any person may file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendments to the regulation. Any written submission in response to this notice and relevant to the proposed amendments must be received by the Department of Insurance no later than 4:30 p.m. EST, the 31st day, July, 2020. Any such requests should be directed to:

Leslie W. Ledogar, Regulatory Specialist
Delaware Department of Insurance
ATTN: Docket 4233-2019
1351 West North St., Ste. 101
Dover, DE 19904
(302) 674-7379
Email: Leslie.Ledogar@delaware.gov

903 Prompt Payment of Settled Claims

1.0 Authority

This regulation is adopted by the Commissioner pursuant to the authority granted by 18 **Del.C.** §§311, 520, 2304(16), and 2312, and promulgated in accordance with the Delaware Administrative Procedures Act, 29 **Del.C.** Ch. 101.

2.0 Scope

This regulation ~~will apply~~ applies to all ~~insurers~~ persons that settle claims either pursuant to a legal action or otherwise.

3.0 Purpose

The purpose of this regulation is to ~~ensure prompt payment of claims pursuant to the settlement of claims by insurance carriers~~ set forth requirements for prompt payment of settled insurance claims by persons as required by 18 **Del.C.** §2304(16)(f).

4.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

"**Claimant**" means a person covered under an insurance policy or a representative designated by such person and who is entitled to make claims on that person's behalf including that person's legal representative, but does not include any provider or other third party who has provided services to a claimant.

"**Commissioner**" means the Commissioner of the Delaware Department of Insurance.

"**Person**" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society and other legal entity engaged in the business of insurance, including agents, brokers and adjusters. Person shall also mean medical service plans and hospital service plans as defined in 18 **Del.C.** §6302. For purposes of this regulation, medical hospital service plans shall be deemed to be engaged in the business of insurance.

~~4.0~~5.0 Prompt Payment

5.1 Under 18 **Del.C.** §2304(16)(f), persons are required in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear. A person shall make prompt payment of a claim that has settled. For ~~the purpose~~ purposes of this ~~regulation~~ regulation, prompt payment is defined as remittance of the check or electronic payment within 30 days from any one of the following dates:

5.1.1 ~~the~~ The date ~~of agreement, memorialized in writing~~ on which a settlement agreement is fully executed, including the settlement of a case prior to a hearing but pursuant to an action filed in court;

5.1.2 The date a final order is issued by the court;

5.1.3 The date that all of claimant's documentation has been received and investigation of the claim is complete; or

5.1.4 ~~unappealed~~ The last day by which an arbitration award may be appealed as provided in applicable appellate court rules, when neither party to the arbitration has elected to file an appeal.

5.2 Payment shall be made in accordance with the following:

5.2.1 The person may allow a claimant to choose to receive the payment by check or by electronic payment;

5.2.2 If the claimant chooses to receive an electronic payment, the person shall not:

5.2.2.1 Use an institution or issuer to pay claims that imposes charges or fees upon the claimant that reduce the claim payment amount in any way; or

5.2.2.2 Impose any charges or fees upon the claimant in connection with the electronic payment;

5.2.3 For purposes of subsection 5.2 of this regulation, a fee that may be incurred by the claimant due to the claimant's election of certain means to access the funds, including but not limited to the following, shall not be considered a prohibited fee that reduces the claim payment amount:

• Fees charged by the claimant's bank to accept a wire transfer;

• Fees for multiple ATM withdrawals charged by the claimant's bank under the terms of the claimant's account; or

• Fees charged by the financial institution used by the claimant to access monies (such as ATM fees charged by banks other than the bank in which the claimant has an account); and

5.2.4 Notwithstanding anything in this regulation to the contrary, payments for settled workers compensation claims shall be made in the form required by 19 **Del.C.** §2344.

~~5.0 Settlement of Claims~~

~~5.1 The language in 18 **Del.C.** §2304 (16)(f) requires good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear. The aforementioned section also applies in those instances where a case is settled prior to a hearing but pursuant to an action filed in court. Once liability has been resolved and an amount agreed upon, or ordered by the court, or awarded by an arbitration panel, the carrier is required to make prompt payment.~~

6.0 ~~Procedure and~~ Penalties for Failure to Remit Prompt Payment of a Settled Claim

6.1 ~~In the event that an insurance carrier does not remit prompt payment pursuant to this regulation and~~ If the Department ~~has determined~~ determines that ~~said carrier~~ a person has ~~done so~~ failed to remit prompt payment of a settled claim as required by 18 **Del.C.** §2304(16)(f) and this regulation in bad faith and with such frequency as to indicate a general business practice, the Department ~~shall~~ may file an administrative action against the ~~carrier pursuant to~~ person in accordance with 18 **Del.C.** §323 and the Administrative Procedures Act. ~~The commissioner~~ If the Commissioner finds after a hearing that the person has violated 18 **Del.C.** §2304(16)(f) and this regulation, the Commissioner may ~~take all of the following actions~~:

6.1.1 Award interest to the claimant in an amount equal to the prime rate of interest plus 3% on the amount of the claim, which shall be calculated from the applicable date ~~the claim was settled or ordered, in an amount equal to the prime rate of interest plus 3%.~~ listed in subsection 5.1 of this regulation;

6.1.2 Fine the ~~insurer~~ person according to the provisions outlined in 18 **Del.C.** §~~329,~~ §329 and impose other such penalties as provided in 18 **Del.C.** §520.

6.1.3 Fine any ~~person(s)~~ person involved with the claim ~~and/or~~ or settlement according to the provisions outlined in 18 **Del.C.** §2308(a)(1).

7.0 General Business Practice

7.1 Within a ~~36 month~~ 36-month period, three instances of a ~~carrier's~~ person's failure to make prompt payment, as defined in ~~section 4.0 above~~ Section 5.0 of this regulation, shall give rise to a rebuttable presumption that the ~~insurer~~ person is in violation of 18 **Del.C.** §2304 (16)(f).

7.2 The ~~36 month~~ 36-month period established in ~~section 7.1 above~~ subsection 7.1 of this regulation shall be measured from the applicable date ~~the amount was agreed upon, ordered by the court, or awarded by arbitration~~ as set forth in subsection 5.1 of this regulation.

8.0 Separability

~~8.1~~ If any provision of this Regulation or the application of any such provision to any person or circumstance shall be held invalid the remainder of such provisions, and the application of such provision to any person or circumstance other than those as to which it is held invalid, shall not be affected and shall remain valid.

9.0 Causes of Action and Defenses

This regulation shall not create a cause of action for any person or entity, other than the Delaware Insurance Commissioner, against ~~an insurer~~ a person or ~~its~~ the person's representative based upon a violation of 18 **Del.C.** §2304(16). In the same manner, nothing in this regulation shall establish a defense for any party to any cause of action based upon a violation of 18 **Del.C.** §2304(16).

10.0 Effective Date

This regulation shall become effective 30 days after publication in the *Delaware Register of Regulations.* The amendments to this regulation shall become effective on the eleventh day after publication of a final order signed by the Commissioner adopting the amendments into this regulation.

24 DE Reg. 32 (07/01/20) (Prop.)