

Delaware Compensation Rating Bureau, Inc. (DCRB)

Supplemental Comments to “Workers Compensation Task Force Report to the Governor and General Assembly of the State of Delaware”

The DCRB is a member of the Workers Compensation Task Force, and provided extensive informational materials used by the Task Force in the course of its discussions and work. House Joint Resolution 3 permits any member of the Task Force that wishes to formally dissent from the findings or recommendations of the Task Force to do so as part of the Task Force’s report.

The DCRB is a private, non-profit 501(c) (6) corporation. The DCRB’s core mission is to serve as the licensed rating or advisory organization, as the case may be, pursuant to all relevant Delaware laws and regulations. In particular, DCRB serves as the designated advisory organization pursuant to Title 18, Chapter 26 of the Delaware Code, titled Workmen's Compensation Rating, and the DCRB is licensed by the Delaware Department of Insurance to serve in that capacity.

The DCRB is not organized to represent or speak on behalf of its membership, which consists of all insurance carriers licensed to underwrite workers compensation insurance in the State of Delaware, on matters of public policy. It is for that reason that the DCRB abstained from all substantive votes conducted by the Task Force during the course of its meetings.

The DCRB strongly believes that some background and clarification pertaining to selected elements of the Task Force’s report will be useful to the Governor, the General Assembly and other readers. For that reason we respectfully submit the following comments pertaining to the subjects of DCRB filings and data management, and request that our comments be included with the Task Force’s report.

DCRB Filings

- *Background – Current DCRB Processes*

Title 18, Chapter 26, § 2607 and § 2610 of the Delaware Code require the advisory organization to make annual filings of rating plans with the Delaware Department of Insurance. Each annual DCRB filing is based upon two types of data – calendar year “financial” data and unit statistical plan data. Both are submitted to the DCRB by the insurers licensed to underwrite workers compensation insurance in Delaware. The financial data for a given calendar year is due to be compiled, organized and submitted to the DCRB by mid- to late-April each year. Unit statistical data consists of detailed experience for each Delaware workers compensation insurance policy and includes exposures by

classification and information including loss amounts, type of claim and open or closed status for each individual claim. Unit statistical data is submitted to the DCRB throughout the year according to a schedule under which initial reports are due 20 months after policy inception and subsequent reports are due at 12-month intervals thereafter.

Once the most recent financial data is received in late April, the DCRB undertakes an extensive and systematic review of each insurance carrier's submission. This review applies tests and comparisons designed to validate data based on internal consistency, balancing against other independent sources, reasonableness of changes from prior year reports and other quantitative and logical comparisons. A concurrent screening of unit statistical data is done for the same purposes of assuring the accuracy, completeness and consistency of data that DCRB will use in the preparation of its filing. The editing and summarization of data at the DCRB take four to six weeks' time.

As soon as these critical processes of data preparation have been completed, the DCRB's actuarial staff begins the analyses required to derive (a) overall change indications for residual market rates and voluntary market loss costs, (b) classification relativities for those rating values, (c) Experience Rating Plan parameters, (d) excess loss factors and (e) other pricing program values and parameters (such as Construction Classification Premium Adjustment Program offsets by classification). The length of time required to complete this work varies somewhat from year to year depending on factors that appear to be contributing to the indicated changes and information available from external sources, but generally extends over a period of slightly more than one month.

When DCRB staff has completed its initial work, the draft filing is presented as quickly as possible to a joint meeting of two working committees maintained by the DCRB to assist in the technical work related to rating value filings. One of these committees, the "Classification and Rating Committee," is comprised of six insurance carrier representatives and two employer organization representatives. The insurance carrier members of this Committee typically hold positions in the underwriting or line of business management functions of their companies. The second committee is the "Actuarial Committee," which has six members who must be lettered actuaries representing insurance companies. Other interested parties may attend this meeting to learn about the filing, and the Department of Insurance and its outside actuarial firms are standing invitees to, and frequent participants in, this annual meeting.

The committee meeting includes a discussion of the analytical processes used and key results obtained by the DCRB staff's preliminary work. While the committees have no "voting" authority to mandate methods, procedures or changes in the filing materials, they are welcome to offer suggestions and

comments for staff's consideration. In some years the committee meeting does not result in changes to the DCRB staff work, while in other years changes are made based on comments, suggestions and recommendations advanced by those in attendance.

Data collection, editing and verification of the data, completion of the draft filing and conducting the joint committee meeting generally last until the end of July, at which point the DCRB submits its final filing proposals to the Department of Insurance. The proposed effective date for these DCRB filings is December 1 of each year. Maintaining the filing date is critical for the equitable and consistent treatment of policyholders, who are subject to each annual filing's changes on the effective date of their normal annual policy renewal dates. Accordingly, the time available between the submission of the filing and the filing's effective date is four months. Consistent with prior public comment, it is very important for the market to know the outcome of the filing about 60 days in advance of the effective date (at which time carriers are actively marketing, and employers are actively shopping for, renewal or replacement coverages). In short, business owners need to know what their insurance costs will be for the following year.

- *Current Regulatory Processes and Procedures*

The Department of Insurance retains an actuarial consultant to perform reviews of carrier filings submitted to it. For annual DCRB filings, the Department secures the services of two independent actuarial firms to perform separate reviews. Thus, for each DCRB filing the Department of Insurance obtains two separate opinions about appropriate change indications for residual market rates and voluntary market loss costs.

The earlier of these independent evaluations has typically been completed within a month to six weeks of when the DCRB has submitted the filing. The later review has been completed as late as over three months after the DCRB filing has been submitted.

For the past half-dozen DCRB annual filings, the Department of Insurance has scheduled a public hearing at which interested parties could comment on the DCRB filing. Until the December 1, 2012 filing these hearings were lightly attended, with the principal area of comment being that of insurance agents and producers urging that decisions on the filings be made sufficiently in advance of the proposed effective date so that buyers and sellers of workers compensation insurance policies in Delaware could transact those purchases and sales with knowledge of the applicable rates and prices.

Task Force Report Recommendations re: DCRB Filings

The Task Force report includes four recommendations which apply to, and/or could affect, the preparation, submission and adjudication of annual DCRB rating value filings. These recommendations are set forth below for ease of reference:

Change Title 18, Section 2610 of the Delaware Code to require appointment by the Department of Insurance (DOI) of an attorney to represent ratepayers through the rate-setting process, with authority for the appointed attorney to retain an actuarial expert and demand additional data and other factual information from the applicant. . . . Costs would be borne by the applicant.

Require that both DCRB and DOI provide an estimate for the rate impact of each of the task force's recommendations (or, if no estimate can be provided, explain why no estimate can be provided), as part of the 2013 rate filing and analysis.

Require that both DCRB and the Insurance Department provide an estimated rate impact based on analysis of initial medical cost data resulting from implementation of Senate Bill 238, as part of the 2013 rate filing and analysis.

Require by statute that any rating bureau, as part of its annual lost cost filing with DOI, provide the Data Collection Committee with data indicating the total medical cost increases for each individual carrier with a 1% or greater share of the Delaware market whose losses are included in the data underlying the rate filing. The Data Collection Committee shall, in turn, direct DOI to conduct an examination of any carriers whose medical expenses are deemed by the Data Collection Committee to be so high as to warrant further examination.

The DCRB has already completed portions of the work and estimates that are the subjects of the Task Force's second and third recommendations above, and continues to address remaining elements of those recommendations with all possible dispatch. The DCRB expects to be able to fully address the goals of these two recommendations for purposes of its next residual market rate and voluntary market loss cost filing (effective December 1, 2013).

The last of the four recommendations shown above requires the DCRB to provide the Data Collection Committee with unspecified information pertaining to "medical cost increases" for each individual insurer with a one percent or greater market share and whose data is included in the information underlying each annual DCRB rating value filing. The Data Collection Committee would then be

empowered to direct the Department of Insurance to conduct examinations of any of those carriers whose medical expenses are deemed by the Data Collection Committee to be so high as to warrant such examination.

Based on the most recent available calendar year premium writings (2011), there were thirty-three (33) insurance carriers each writing at least one percent of the Delaware workers compensation market. If one-third of those carriers were deemed by the Data Collection Committee to “warrant examination,” then the Department of Insurance would be charged with conducting almost a dozen separate company examinations in response to this recommendation. The DCRB has no experience or information that would be specific to these kinds of examinations, but the logistics around identifying examination procedures, gathering requested files and information, performing the examination review and drafting each examination report (including providing opportunities for the entities being examined to respond to their draft reports) would require significant amounts of time to accomplish.

If the carrier examinations were ongoing and the adjudication of DCRB filings were allowed to proceed regardless of the status of those examinations, then the calendar for deciding the filings would be unimpaired except to the extent that the same Department of Insurance staff might be involved in both of those endeavors. However, if it were contemplated that the carrier examinations had to be completed each year before the adjudication of the DCRB filing, material delays in that already-compressed process would certainly result.

We also note that the last of the four recommendations above proposes a process that would have members of a volunteer committee¹ (known as the “Data Collection Committee”) directing a state agency (the Department of Insurance) in the performance of its work. Not only would it be unprecedented to have a volunteer committee directing the actions of a state agency, but in this instance it would be all the more remarkable because the Data Collection Committee was formed by the Legislature “to advise the Commissioner.” We believe that implementation of this recommendation would represent an unlawful delegation by the Legislature of the regulator’s power and responsibility.

The first recommendation listed above would result in several changes to the current procedures applicable to the review and adjudication of DCRB filings (discussed previously herein), and it could potentially impose an unprecedented financial burden on the DCRB.

¹ Senate Bill 1 (2007) provides that this committee (the “Data Collection Committee”) be comprised of “interested persons.” Although some of these “interested persons” are designated by the Legislature, while others are not. Furthermore, of those who are designated, some are to be the members of the workers’ compensation advisory group established by §2301D(c) of Title 19 of the Delaware Code, a section that was repealed in April, 2012.

The appointment of an attorney to represent insured employers would be a new step in the process. Based on the Task Force's discussion of this recommendation, the retaining of an actuary by that attorney is envisioned as being done instead of, rather than in addition to, the engagement of a second outside actuary by the Department of Insurance. If this is the case then the number of actuarial opinions presented with respect to each filing would not change under this recommendation. Currently, the DCRB pays the expense of one of the Department of Insurance's actuarial reviews of each filing, while the Department pays for the second such review. The Task Force recommends that the applicant (the DCRB) pay the costs of both the attorney and actuary acting on behalf of employers, and the DCRB would presumably also continue to bear the expense of the review performed by the Department of Insurance's retained actuary.

The Task Force's discussion of this recommendation contemplates the holding of a formal hearing that would include the presentation of testimony, other evidence and argument to a hearing officer.

A formal hearing to develop a comprehensive legal record with respect to a filing has not been required to decide any DCRB filing, at least within the last 20 years. Such an endeavor would represent a costly and potentially protracted undertaking, with substantial efforts on both sides of the issue being required to present information for the record that would already be well-known and established for the Department of Insurance, the DCRB and the independent actuarial consultants. Given the available time within each calendar year for the collection of data, preparation of a filing, technical review of filing proposals and adjudication of a filing, a formal hearing could itself consume much of, and perhaps even more than, the total time available for the Department of Insurance to decide DCRB filings if the marketplace is to know about approved rating values at least somewhat in advance of their effective date. Such an investment of time would run counter to repeated, previous expressions of concern from agents and brokers about the real world difficulties imposed by late, and even in some cases retroactive, approval of new loss costs and residual market rates in Delaware.

Representation of insured employers in the filing review process is accomplished in other jurisdictions through such measures as making available legal and/or actuarial services, sometimes with governmental funding thereof, and the DCRB does not object to such resources being available to ratepayers here. However, engagement of employers in the filing review process does not automatically require the event of a formal hearing. If the Department of Insurance finds it necessary to hold a formal hearing on a DCRB filing, it is already able to do so, but requiring such an event on an annual basis would almost certainly delay a

final decision on each DCRB filing until sometime after, perhaps even well after, the standing effective date of December 1. The DCRB would advise care and caution before replacing a currently available discretionary tool for the regulator with a pro-forma requirement that could have negative implications for the timing of the filing review process. Moreover, it would be manifestly unfair to require the DCRB to bear the uncapped costs – legal and actuarial – incurred by the policyholder representative in connection with administrative litigation. Finally, it would be an unlawful delegation of authority to empower a ratepayer advocate to demand from the DCRB whatever data and factual information the advocate would like to see. Any requests for data or other factual information must be advanced by way of applications for the issuance of subpoenas, consistent with established law.²

Data Management Considerations

The Task Force Report includes several recommendations that would require the DCRB and/or insurers to provide “data” or “reports” to specified audiences or bodies. Those recommendations are repeated below for ease of access:

Change Title 18, Section 2610 of the Delaware Code to require appointment by the Department of Insurance (DOI) of an attorney to represent ratepayers through the rate-setting process, with authority for the appointed attorney to retain an actuarial expert and demand additional data and other factual information from the applicant.

Require by statute that any rating bureau, as part of its annual lost cost filing with DOI, provide the Data Collection Committee with data indicating the total medical cost increases for each individual carrier with a 1% or greater share of the Delaware market whose losses are included in the data underlying the rate filing. The Data Collection Committee shall, in turn, direct DOI to conduct an examination of any carriers whose medical expenses are deemed by the Data Collection Committee to be so high as to warrant further examination.

Require that standing committees established to monitor and respond to changes in medical costs receive more frequent reports from insurance carriers and have the ability to properly analyze those reports.

² See, e.g., 29 Del Code § 10125. (entitled, “Conduct of public hearings; burden of proof; record.”): (“(b) In connection with such hearings, the agency or its designated subordinate may be empowered to: (1) Issue subpoenas for witnesses and other sources of evidence, either on the agency's initiative or at the request of any party;”).

Since its inception in 1917, the DCRB has been collecting various types of experience data pertaining to workers compensation insurance. Just since the passage of Senate Bill 1 in 2007, the DCRB has provided voluminous and extensive tabulations, summaries and other presentations (based on data which the DCRB has collected and compiled) to audiences including all of the following:

- The Delaware Department of Insurance
- The Delaware Workers Compensation Data Collection Committee
- The Delaware Health Care Advisory Panel
- The Delaware Workers Compensation Task Force
- OptumInsight, a vendor engaged by the Health Care Advisory Panel for purposes of reviewing and updating the Delaware Health Care Payment System Fee Schedule
- INS Consultants, Inc.
- AIS Risk Consultants, Inc.

Depending on the specific data used to produce a given informational product, varying types of sensitive, confidential and/or proprietary information are included in the data held by the DCRB. The DCRB has consistently provided appropriate and effective levels of detail in the materials prepared for distribution to outside parties in support of the intended purposes of the information provided, while also protecting the identity and specific amounts and/or values attributable to individual claimants, employers, medical service providers, insurers and other entities. The bases for the DCRB's continuing attention to the critical need to protect the private, confidential and proprietary nature of various data include, but are not necessarily limited to, the following:

- The business relationships between the DCRB and its member insurers, and the fiduciary obligation arising for DCRB with respect to the data and related information provided to it by those members
- Del. Code, Title 16, Chapter 12, §1210 (Definitions) and § 1212 (Disclosure of protected health information) (setting forth the policies of the State of Delaware that (a) personal medical records/data ("protected health information") is not public information and may not be disclosed without the informed consent of the individual (or the individual's lawful representative) who is the subject of the protected health information, except as expressly provided by statute, and (b) protected health information disclosed pursuant to statute shall be disclosed in a non-identifiable form whenever possible, and disclosure of such information shall be limited to the minimum amount of information which the person making the disclosure reasonably believes is necessary to accomplish the purpose of the disclosure.)

- Del. Code, Title 18, Chapter 25, § 2525 (Recording and reporting of loss and expense experience) (providing that insurer reports of loss and expense experience that are filed with the Department of Insurance shall be deemed confidential and shall not be revealed by the Department of Insurance to any other insurer or other person, but the Department of Insurance may make compilations including such experience)(note that the DCRB, an advisory organization, is designated by the Insurance Commissioner to assist the Commissioner in gathering, compiling and reporting relevant statistical information.)
- Del. Code, Title 18, Chapter 26, § 2617 (Advisory Organization: permitted activity) (providing that an advisory organization is authorized to distribute information that is filed with the Commissioner only if the information is “open to public inspection.”)
- Del. Code, Title 29, Chapter 100 (Freedom of Information Act), § 10002 (Definitions) (providing that “public records” do not include (a) any medical file, the disclosure of which would constitute an invasion of personal privacy, under any state or federal law as it relates to personal privacy, (b) trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature, or (c) any records specifically exempted from public disclosure by statute or common law.

The DCRB expects and intends to continue to serve a broad spectrum of constituencies through, among other services, the compilation of informed and accurate reports derived from data entrusted to it in its role as a private entity licensed as the advisory organization for workers compensation insurance in Delaware. To date, in interacting with various bodies and individuals interested in matters related to workers compensation insurance, the DCRB has endeavored, with almost universal success, to develop approaches to the presentation and conveying of information that have both met the needs of the recipient(s) while maintaining appropriate protections and safeguards against the disclosure of sensitive, proprietary or confidential information.

Indeed, the DCRB has not only been in the position of needing to respect and safeguard certain aspects of its own data, but it has been advised by others that similar considerations precluded certain disclosures to it. For example, during the course of the Workers Compensation Task Force meetings, the DCRB approached the Department of Labor for access to certain information given to that Department by hospitals and ambulatory surgical centers under provisions of Senate Bill 238 of 2012. The DCRB sought that data for use in an evaluation of the effects of that law on Delaware workers compensation costs that had been requested by the Task Force, but was advised that the information it had requested was proprietary, privileged and confidential.

Toward the purpose of enabling the DCRB, its members and a broad range of constituent bodies and groups to continue to interact successfully, constructively and appropriately in the context of the interests of all whose information may be included in and/or discernible from data held by the DCRB and others, the DCRB would caution against wording of statutes or regulations that might be interpreted as requiring the replication and surrender of “data” or “information” including or possibly allowing the derivation of information not otherwise in the public domain. Such a result would impose unfair and potentially damaging burdens on those providing and receiving data that should be protected, and has to date proven unnecessary for the successful exchange of information at sufficiently aggregated levels as to avoid concerns of confidentiality.