



STATE OF NEW YORK  
INSURANCE DEPARTMENT  
25 BEAVER STREET  
NEW YORK, NEW YORK 10004

**REGULATION NO. 129  
11 CRR-NY 161.0**

**NY-CRR**

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK  
TITLE 11. INSURANCE  
CHAPTER V. RATES AND RATING ORGANIZATIONS  
SUBCHAPTER D. RATE REGULATION AND PROMOTION OF COMPETITION

**PART 161. FLEXIBLE-RATING SYSTEM; RATING PLANS; TORT REFORM REILING REQUIREMENTS**

**161.0 Preamble.**

- (a) On June 28, 1986, omnibus legislation embodied in chapters 220 and 221 of the Laws of 1986 was signed into law, in response to affordability and availability problems experienced in New York and the rest of the nation in connection with commercial risk insurance, professional liability insurance, and public entity insurance, as these terms are added and defined in section 107 of the Insurance Law. Companion legislation, containing tort reform measures in addition to those in the omnibus legislation, was signed into law on July 30, 1986, becoming chapter 682 of the Laws of 1986.
- (b) Among the components of this omnibus legislation is a significant change, a flexible-rating system ("flex-rating"), pursuant to new section 2344 of the Insurance Law, amended in part by chapter 235 of the Laws of 1989, in regard to rate changes for property/casualty commercial insurance markets not subject to prior approval. Since January 1, 1970, most commercial insurance markets have been subject to a competitive rating system, which permitted insurers on a file and use basis to revise rates upward or downward without prior approval of the Superintendent of Financial Services. This competitive rating system relied almost exclusively upon interaction among market forces, tending to produce wide cyclical swings in commercial insurance rates.
- (c) In order to promote stability and predictability of insurance rate changes in problem markets involving vital coverages and enhance consumer protection, the new laws institute the flex-rating system, a novel blending of prior approval and competitive rating principles. Flex-rating allows periodic rate changes within applicable flexibility bands ("flex-bands") on a file-and-use basis and, unless markets are specifically exempted by the superintendent from flex-rating, requires the superintendent's approval in order to implement rate changes beyond such bands. Exempt markets remain subject to file and use.
- (d) Section 2344 of the Insurance Law requires that regulations setting forth flex-rating exemptions, standards and procedures be promulgated. In addition, section 2344 provides that insurer rating plans, pursuant to which rates are modified in the development of premiums for individual risks, shall be approved by the superintendent compatible with criteria established by regulation. These rating plan standards will encourage sound underwriting, maximize risk management and permit recognition in an equitable manner among insureds of expected differences in loss and expense characteristics in accordance with reasonable rating plans.
- (e) Section 2344 also requires that, no later than 90 days after the effective date of the omnibus legislation, viz., on or before September 26, 1986, rates for commercial risk, professional liability and public entity insurance markets not exempted from flex-rating must be refiled by affected insurers, to reflect the likely cost-reductive effects reasonably attributable to the Civil Practice Law and Rules, Court of Claims Act, and Not-for-Profit Corporation Law amendments that are also integral parts of the omnibus and companion legislation.

**161.1 Definitions.**

For the purposes of this Part, the following definitions shall apply:

- (a) An '*a*' rated risk means any insurance coverage for which rates are individually determined based upon judgment because neither a rate service organization, nor the insurer has yet established a manual rate based upon experience, except that if a rate service organization or the insurer acquires sufficient experience to establish, or the insurer itself has, a manual rate for such coverage, then such coverage shall no longer be considered an '*a*' rated risk for such insurer.
- (b) *Base rate* means the rate designed to reflect the average aggregate experience of a particular market, prior to adjustment for individual risk characteristics resulting from application of any rating plan.
- (c) *Commercial risk insurance* has the meaning set forth in section 107(a)(47) of the Insurance Law.
- (d) *Commercial umbrella policy* means a commercial liability insurance policy (except as modified by subdivisions [i] and [j] of this section) written as excess over underlying policies providing standard form general liability and motor vehicle liability insurance issued to and warranted to exist by the named insured, that include coverage limits of at least \$300,000 in the aggregate for bodily injury liability, and \$50,000 for property damage liability. With respect to losses not covered by underlying insurance, the policy shall require an insured's retention of risk, and be excess over, at least \$10,000 per accident or occurrence.
- (e) A *composite rating plan* is any rating plan or system whereby the manual rates for a policy insuring general liability with several exposure bases for different liability coverages or insuring several different insurance exposures (such as automobile liability, general liability, burglary, glass, etc.) may be converted into one or more selected exposure bases (such as payroll or sales).
- (f) An *expense reduction plan* is any rating plan or system whereby a base rate for property or liability insurance is reduced based upon a reduction in acquisition, underwriting or loss adjustment expenses associated with the risk.
- (g) An *experience rating plan* is any rating plan or system whereby a base rate for liability insurance is adjusted or modified based on the actual past loss experience of the insured.
- (h) A *flexibility band* or *flex-band* means the percentage range of rate level increases or decreases that an insurer may implement without the prior approval of the superintendent.
- (i) *High limits excess liability policy* means any commercial liability policy, including a commercial umbrella policy, when written over:
  - (1) one or more underlying liability policies that in the aggregate provide primary coverage of at least \$1 million; or
  - (2) a self-insured liability retention of at least \$1 million.
- (j) *Hyper limits excess liability policy* means any commercial liability policy, including a commercial umbrella policy, when written over:
  - (1) one or more underlying liability policies that in the aggregate provide primary or intermediate coverage of at least \$5 million; or
  - (2) a self-insured liability retention of at least \$5 million.
- (k) An *individual risk premium modification plan* or *IRPM plan* is any rating plan or system whereby a base rate for property insurance is adjusted or modified based upon a schedule of debits and credits reflecting observable rating characteristics, not reflected in the base rate itself, expected to affect an individual insured's future loss exposure.
- (l) *Jumbo risk* means a large business entity that generates gross revenues exceeding \$100 million annually and that develops an annual comprehensive general liability premium of at least \$500,000, but such term shall not include any public entity or not-for-profit corporation.
- (m) *Loss costs* are that portion of a rate intended to represent the reasonably anticipated costs of claim payments and loss adjustment expenses associated with such claim payments. *Loss costs* do not include provisions for expenses (other than loss adjustment expenses) such as acquisition costs, overhead and taxes nor profit.
- (n) A *loss rating plan* is any rating plan or system whereby the rates for particular insureds are based primarily upon the experience of the insured only, regardless of the experience of other insureds within the same market or related markets.
- (o) A *manual rate* means a rate, designed to apply on a generic basis to similar risks within the same market, filed by an insurer or rate service organization with the department and made part of the rating manual used by an insurer or rate service organization.
- (p) *Market* has the meaning set forth in section 2344(a)(1) of the Insurance Law.
- (q) *Package modifiers* mean factors used to adjust monoline rates when two or more insurance coverages are combined in a single commercial multiple peril package policy.
- (r) *Pivot rate level* means the rate level in effect 12 months prior to the effective date of a rate revision filed under flex-rating.
- (s) *Professional liability insurance* has the meaning set forth in section 107(a)(49) of the Insurance Law.
- (t) *Public entity* has the meaning set forth in section 107(a)(51) of the Insurance Law.
- (u) *Public entity insurance* has the meaning set forth in section 107(a)(50) of the Insurance Law.
- (v) *Rate* has the meaning set forth in section 2344(a)(2) of the Insurance Law, whether developed independently by an insurer or rate service organization, adopted by an insurer in whole from a rate service organization or consisting of loss costs adopted by an insurer from a rate service organization combined with the insurer's independently developed expense and profit components.

- (w) *Rate level* means the average rate charged by an insurer on its distribution of risks for a given market.
- (x) *Rate service organization* has the meaning set forth in section 2313(a) of the Insurance Law.
- (y) *Renewal* means the issuance or offer to issue by an insurer of a policy superseding a policy previously issued and delivered by the same insurer, or another insurer within the same group or under common management.
- (z) A *retrospective rating plan* means a rating plan or system whereby the premium payable by an individual insured is subject to a contractual adjustment after policy expiration based upon actual loss experience, compared to projected loss experience, for the policy term.
- (aa) A *schedule rating plan* is any rating plan or system whereby a base rate for liability insurance is adjusted or modified based upon a schedule of debits and credits reflecting observable rating characteristics, not reflected in the base rate itself, expected to affect an individual insured's future loss exposure.
- (bb) *Special risk insurance* has the meaning set forth in Part 16 of this Title (Regulation 86), dealing with the free trade zone.
- (cc) An *authorized insurer* shall have the meaning set forth in section 107(a)(10) of the Insurance law.

## **161.2 Tort reform refiling requirements.**

- (a) To alleviate affordability and availability problems affecting commercial risk, professional liability and public entity insurance, the omnibus and companion laws contain a number of significant measures in the nature of tort reform:
  - (1) modification of the joint and several liability doctrine;
  - (2) new appellate standard for review of verdicts;
  - (3) credit for collateral sources;
  - (4) itemized verdicts required in tort actions;
  - (5) periodic payment of substantial future damages;
  - (6) penalties for frivolous litigation;
  - (7) immunity for uncompensated nonprofit directors and officers; and
  - (8) modification of toxic tort statute of limitations.
- (b) With the exception of paragraphs (a)(7) and (8) of this section, these reforms are across-the-board measures, affecting tort actions regardless of the identity of plaintiffs or defendants. Collectively, these meaningful measures can reasonably be expected to reduce commercial risk, professional liability and public entity insurance costs. These overall cost savings must be reflected in appropriate reduced rates for these coverages.

## **161.3 Exempt markets.**

- (a) As a general proposition, markets that have experienced recent sharp swings in rate level will not be exempted from flex-rating. Designed to promote stability over the long range in the interests of insureds, insurers, consumers and the public-at-large, the flex-rating system envisions broad rate change flexibility coupled with increased regulatory scrutiny of substantial rate changes, whether in an upward or downward direction.
- (b) Following public hearings, market surveys and other information analyzed by the department, the superintendent has determined the identity of those commercial risk, professional liability and public entity insurance markets that should be exempted from flex-rating. Because competition is sufficient to assure that rates will not be excessive in the particular market or such market is conducted in a manner not resulting in inadequate rates, not destructive of competition or detrimental to the solvency of insurers, the superintendent at this time exempts the following markets from flex-rating:
  - (1) Lines of insurance, as reported on page 14 of the annual statement blank, as follows:
    - (i) fire and allied lines;
    - (ii) farmowners;
    - (iii) ocean marine;
    - (iv) inland marine;
    - (v) earthquake;
    - (vi) fidelity;
    - (vii) surety;
    - (viii) aircraft;
    - (ix) glass;
    - (x) burglary and theft;
    - (xi) boiler and machinery; and
    - (xii) credit (including credit unemployment); and
  - (2) The following types of markets:

- (i) those components of commercial multiple peril (CMP) package policies providing any section 161.3(b)(1) coverage (except that flex-rating shall apply to any changes in package modifiers, to the combined effect of package modifiers and rate changes affecting separately rated liability components of such package policies, and to indivisibly rated business owners policies [BOP] and business auto policies [BAP]);
- (ii) hyper limits excess liability policies;
- (iii) high limits excess liability policies (except in the case of renewal policies);
- (iv) any excess liability policy written over one or more underlying policies, all of which are themselves exempt from flex-rating pursuant to this section;
- (v) 'a' rated risks (except in the case of renewal policies);
- (vi) special risk insurance;
- (vii) jumbo risks;
- (viii) nuclear liability;
- (ix) pollution liability; and
- (x) residual value insurance.

(c) These exempt markets will thus remain subject to the competitive rating system. With the exception of continuing prior approval pursuant to section 2305(b) or section 2328 of the Insurance Law for such markets as public livery, medical malpractice, workers' compensation, title and mortgage guaranty insurance, and individual consent-to-rate submissions, flex-rating will apply to all other commercial risk, professional liability and public entity insurance policies, commencing with rate filings submitted to the department on and after September 26, 1986. Flex-rating does not apply to personal lines property/casualty insurance markets or to nonproperty/casualty insurance markets.

(d) By amending this Part, the superintendent can determine at any time, following a hearing, to add, modify or eliminate any exemption. By amending this Part, the superintendent may also modify the definition of any market or modify flex-bands applicable to nonexempt markets. In the event that a market that has been exempt should become subject to flex-rating, an appropriate flex-band for that market will be established. The determination of whether or not to continue a market under flex-rating or exemption from flex-rating will be reviewed periodically by the superintendent.

#### **161.4 Flexibility bands.**

(a) Flex-bands will be periodically reviewed by the superintendent, in light of factors such as:

- (1) the extent and nature of competition;
- (2) size and significance of the coverage;
- (3) level and range of rates and rate changes among insurers;
- (4) investment and underwriting experience of insurers;
- (5) reinsurance availability;
- (6) consumer complaints;
- (7) extent of denials and restrictions of coverage;
- (8) volume of cancellations and nonrenewals; and
- (9) changing conditions in the economic, judicial and social environment.

(b) Flex-bands define the extent to which, during a one-year period in connection with a particular market, rate level increases or decreases may take effect without prior approval. The following flex-bands shall be in effect, beginning September 26, 1986, in regard to the specified markets:

(1)	municipal liability	±15%
(2)	public school liability	±15%
(3)	child care liability	±10%
(4)	nonprofit philanthropic and civic activity liability	±15%
(5)	public officials liability	±15%
(6)	nonprofit IRC section 501(c)(3) directors and officers	±10%
(7)	other directors and officers liability	±20%
(8)	professional liability	±20%
(9)	other errors and omissions liability	±20%
(10)	recreational liability	±15%
(11)	other owners, landlords and tenants liability	±15%
(12)	other manufacturers and contractors liability	±15%
(13)	products liability	±20%

(14)	completed operations liability	±20%
(15)	liquor law liability	±15%
(16)	nonlivery commercial motor vehicle	±15%
(17)	CMP combined effect (see section 161.3[b][2][i] exception)	±15%
(18)	business owners policies (BOP)	±15%
(19)	business auto policies (BAP)	±15%
(20)	high limits excess liability renewal policies	±30%
(21)	‘a’ rated renewal policies	±30%
(22)	all other liability	±20%

(c) Flex-bands for legal services insurance and prepaid legal services plans.

(1) The flex-band for a prepaid legal services plan, including legal services insurance written as part of such a plan, is ±20 percent.

(2) The flex-band for legal services insurance written as part of a policy of liability insurance shall be:

(i) the same flex-band that applies to the underlying liability insurance policy, where there is no separate identifiable premium for the legal services insurance; and

(ii) ±20 percent, where there is a separate identifiable premium for the legal services insurance.

### 161.5 Flex-rating rules and standards.

For those commercial risk, professional liability and public entity insurance markets subject to (and not exempt from) flex-rating, the following rules and standards shall govern:

(a) To determine whether a rate change falls within or beyond an applicable flex-band, the insurer should compare the resulting rate level (current rate level plus rate change) as of its proposed effective date with its pivot rate level, where the initial pivot rate level has been adjusted to reflect tort reform pursuant to section 161.2 of this Part.

(b) If the percentage difference between the resulting rate and that pivot rate is less than or equal to the applicable flex-band percentage, then the rate change may become effective on a file-and-use basis. However, if the percentage difference is greater than that band, then prior approval must be sought and received prior to implementation of any part of the proposed rate increase.

(c) In addition to overall rate level increases or decreases that may be made on a file-and-use basis within a flex-band, the rate (except for ‘a’ rated risks) may be adjusted for an individual insured in a particular market based upon appropriate changes in class (where such class or subclass does not itself constitute a nonexempt market subject to flex-rating) relativities and territorial relativities, increased limits factors, deductible relativity factors, or similar factors. (For example, the public school liability market, subject to a ±15-percent flex-band in terms of the overall rate level, consists of elementary, intermediate and high school subclasses in different territories. Given that these subclasses do not themselves constitute this nonexempt market, class and territorial adjustments may be made to reflect appropriate relativities, so long as total adjustments for both class and territory sum back to the overall rate level for public schools.)

(d) The rate for any individual insured in a particular market may not, without prior approval, be increased or decreased by more than plus (+) or minus (–) 20 percent beyond the overall rate level change, as a combined result of all rate adjustments permitted by subdivision (c) of this section, except that this limitation shall not apply to individual premium or rate changes resulting from the application of rating plans conforming to the rules and standards set forth in section 161.8 of this Part. (For example, the total upward or downward rate adjustment due to class and territorial relativities, when combined with adjustments for increased limits and deductibles, cannot without prior approval exceed 20 percent beyond the overall rate level change for any individual insured in the public school liability market or any other market, while none of these adjustments may be made in connection with an ‘a’ rated risk, such as a fireworks factory. Thus if an insurer files a rate revision of +10 percent for a market subject to a 15 percent flex-band and, in addition, wishes to revise its class or territorial relativities, the maximum permitted rate increase affecting any individual insured would be:  $(1.10 \times 1.20) = +32\%$ .)

(e) In the event that more than one flex-band would apply to a given type of risk for the same coverage, the narrowest or most specific applicable flex-band governs. If rating can be compartmentalized for different coverages for the same type of risk, then that risk may be subject to more than one flex-band. (For example, a day-care center is included in owners, landlords and tenants liability but, rather than the broader and more general ±15-percent flex-band, the narrower and more specific ±10-percent flex-band for child care liability governs. Commercial risk insurance policies issued to plumbers illustrate separately rated coverage components subject to different flex-bands of ±20 percent applicable to “completed operations liability” and ±15 percent applicable to “other manufacturers and contractors liability”.)

(f) A flex-band applies to coverages in the particular market for which there are manual rates. Any ‘a’ rated coverages in such market are exempt from flex-rating until renewal, when a ±30-percent flex-band becomes applicable to those ‘a’ rated coverages.

(For example, municipal liability consists of multiple coverages, where some of these coverages are 'a' rated while there are manual rates for the rest.)

(g) Following a rate change which required and received prior approval, no further rate change in the same direction within an applicable flex-band can be made by the insurer with respect to that market for a 12-month period after the effective date of such approval. If, notwithstanding this limitation, an insurer determines that it requires such a further rate change, it may seek the superintendent's prior approval. The pivot rate adjusted pursuant to section 161.2 of this Part for tort reform savings will not be considered a prior-approved rate for purposes of this section. Rate changes in the direction opposite to the prior-approved rate change will be permitted on a file-and-use basis, within the applicable flex-band, with the approved rate serving as the new pivot rate level.

(h) Rate changes within an applicable flex-band may be implemented on a file-and-use basis by an insurer in regard to a particular market no more than three times during any 12-month period (other than pursuant to the section 161.2 tort reform refiling requirement), unless prior approval is sought and granted, subject to the provisions of section 3426 of the Insurance Law which, in general, permits premium increases during the 12-month required policy period for a commercial risk, professional liability and public entity insurance policy only commensurate with subsequent additional insured value pursuant to the policy or at the insured's request.

(i) In connection with commercial multiple peril insurance policies, component coverages must be rated separately and the statewide rate level change shall be based only on the premiums generated by the coverages within nonexempt markets subject to flex-rating, including the effect of any changes in the package modifiers used in the rating of the policy. (For example, if a filing proposed a 50-percent increase in the rates for the liability portion of commercial multiple peril policies, and the overall effect is only 10 percent because there were no changes [or decreases] in the rate levels of the other coverages within exempt markets, the rate change would exceed the applicable flex-band, and the entire filing would require prior approval. Similarly, if a filing proposed a 15-percent increase in the rates for the liability portion of commercial multiple peril policies, and a change in the package modifier from 0.70 to 0.90, the filing would exceed the 20-percent flex-band, and the filing would require prior approval.)

(j) Policyholders' dividends issued from earned surplus will not be considered rate decreases for purposes of this Part.

(k) Filings that consist solely of rule changes without pricing or rating impact shall not be considered rate filings for purposes of this Part.

(l) In the event that the rate change affecting one component of a rate filing exceeds its applicable flex-band, making that rate change subject to prior approval, the entire rate filing shall also become subject to prior approval.

(m) Pivot rate levels shall be subject to review and adjustment by the department in accordance with section 2344(f) of the Insurance Law. All commercial risk, professional liability and public entity insurance rate increases filed with the department between June 1, 1986 and the effective date of this Part [September 10, 1986] will be reviewed to assure that they are adequately supported and otherwise meet the standards of the Insurance Law. Commercial risk, professional liability and public entity insurance rate increases filed with the department during the period June 1, 1985 through May 31, 1986 will be reviewed on a selective basis, focusing upon those markets which received the sharpest increases and affect the largest number of insureds.

(n) In order to establish appropriate pivot rate levels, commercial risk, professional liability and public entity insurance rates will also be subject to review and adjustment by the department in connection with:

- (1) rates for a new program sought to be implemented by an insurer or a rate service organization;
- (2) rates filed by an insurer or a rate service organization which did not previously have rates in effect; and
- (3) rates filed by a newly licensed insurer.

Such rates shall be deemed the pivot rate levels as if they had been in effect for the 12 months prior to their effective date.

(o) The rate level effect of an insurer's rate change will be subject to retrospective audit by the department of the insurer's actual exposures written at the revised rate. Misrepresentation of rate revision effects will subject the insurer, in the absence of adequate explanation, to administrative penalties as provided in the Insurance Law.

(p) The flex-band applicable to excess liability policy rates subject to flex-rating, whether upon issuance or renewal, shall be the specific flex-band applicable to the particular market pertaining to the underlying primary coverage. The flex-band applicable to high limits excess liability policy rates upon renewal shall be the 'a' rated flex-band.

#### **161.6 Prior approval situations under flex-rating.**

Under the flex-rating system, the superintendent's prior approval of rates is required in the following situations:

(a) Where an insurer or a rate service organization seeks to implement a rate change that exceeds the applicable flex-band.

(b) Where an insurer or a rate service organization seeks to implement a rate change that exceeds the maximum permitted variation for an individual insured. (If a filing proposed changes in class relativities which would result in rate changes ranging from, for example, +40 percent to -12 percent for individual insureds in the affected classes, independent of any other rate changes, the filing would require prior approval.)

- (c) Where an insurer or a rate service organization seeks to implement a further rate change in the same direction as a rate change that has already been prior-approved in the 12-month period immediately preceding the effective date of such proposed change.
- (d) Where an insurer or rate service organization seeks to implement a rate change when it has already implemented three rate revisions within the applicable flex-band for a particular market during the 12-month period immediately preceding the effective date of such proposed change. (For example, an insurer implemented a three-percent rate increase on November 15, 1986, an additional five-percent increase on March 1, 1987, and another seven-percent rate increase on June 1, 1987, all in regard to the professional liability insurance market. On September 1, 1987, it wishes to implement yet another three-percent rate increase for this same market. Even though the overall rate changes do not exceed the 20-percent flex-band, this last filing would require prior approval, but could be implemented on a file-and-use basis after November 15, 1987.)
- (e) Where the rate change affecting one component of a rate filing made by an insurer or a rate service organization exceeds its applicable flex-band and thus is subject to prior approval, the entire filing also requires prior approval.

#### **161.7 Filing of rates and the relation and role of rate service organizations.**

- (a) In connection with adoption by an insurer of rates published by a rate service organization:
  - (1) Whenever, pursuant to this Part, the superintendent prior approves a rate or loss cost filed by a rate service organization on behalf of its members and subscribers, those members and subscribers using or deviating from the rate service organization rates or loss costs, and which have given the rate service organization appropriate filing authority, may adopt such revisions without further prior approval, provided that such adoption is made effective within 90 days of the effective date of the rate service organization revision.
  - (2) Insurers that are not members or subscribers of the rate service organization, as well as those members and subscribers which do not elect to adopt the revision within 90 days, may not implement a prior-approved rate service organization rate or loss cost revision, that prior approval notwithstanding, without the specific prior approval of the superintendent.
- (b) Insurers adopting prior-approved rate service organization rate or loss cost revisions may not simultaneously adopt any changes in deviations from the rate service organization rates or any modification of a rate service organization's loss costs, or effect any change in the insurer's expected loss ratio, which would have the effect of increasing or decreasing the insurer's rates by more than the percentage approved for the rate service organization rate or loss cost revision, and must obtain prior approval in order to implement any such change. (For example, for a market subject to a  $\pm 20$ -percent flex-band, should a rate service organization obtain prior approval for a 25-percent rate increase, an insurer with a current 10-percent downward deviation could maintain its deviation and adopt the filing, but could not, without obtaining independent prior approval, eliminate this deviation.)
- (c) No rate filing, whether made by an insurer or by a rate service organization, and whether or not prior approval is required, shall remain effective for use (or deviation) by insurers more than three years after the effective date of the particular insurer's or rate service organization's rate filing. Every insurer and rate service organization shall update each of its rate filings, or file a statement with the department that its analysis indicates that no updating is appropriate, at least once every three years.

#### **161.8 Rating plan rules and standards.**

For rating plans applicable to commercial risk, professional liability or public entity insurance policies, the following rules and standards shall govern:

- (a) Experience rating, schedule rating, IRPM, loss rating, composite rating and retrospective rating plans may be used in the rating of commercial risk, professional liability and public entity insurance policies, and may not be used in rating personal lines policies. Expense reduction plans may be used in connection with commercial and personal lines policies.
- (b) Such rating plans shall contain reasonable internal credibility constraints and, for eligibility purposes, may only be used in the rating of risks which would otherwise generate at least the following basic limits premium for the type(s) of insurance addressed by the particular rating plan, except that an indivisibly rated policy shall generate a basic limits premium of at least \$3,500 in order to qualify for application of an experience rating, schedule rating or IRPM plan:
  - (1) Experience Rating     \$ 2,500
  - (2) Schedule Rating       \$ 2,500
  - (3) IRPM                     \$ 2,500
  - (4) Expense Reduction    \$10,000
  - (5) Retrospective Rating \$25,000
- (c) Such rating plans may also be used in the rating of commercial motor vehicle policies insuring five or more vehicles.
- (d) Any rating plan designed to be applied simultaneously to property, liability or other types of coverages shall contain reasonable factors that give appropriate recognition to the distinct exposures involved in such coverages, except that the divisible

premium attributable to each of the different coverages involved may not be combined for purposes of determining whether such risk meets the premium thresholds set forth in subdivision (b) of this section.

(e)

(1) Once filed and approved in conformity with this section, the use of an experience rating, schedule rating, IRPM or expense reduction plan shall become mandatory, and shall be applied uniformly in a nondiscriminatory manner for all eligible classes of risk, except that experience rating plans may be applied only when, for the experience period specified in the plan, there is verifiable experience, which the current insurer shall make a good faith effort to obtain. (For example, if an insurer files an experience rating plan applicable to all liability risks with manual premiums over \$2,500, then all such risks for which verifiable experience is in fact obtained are to be experience-rated by that insurer, which could not elect to exclude an insured from the plan's provisions nor disregard the results.)

(2) Every experience rating plan shall set forth the specific procedures that the insurer will employ to obtain and verify experience applicable to each prospective insured, and shall also set forth the specific procedures that the insurer will employ to provide other authorized insurers with the verifiable experience of their own insureds upon the written request of such an insured or its authorized agent or broker.

(f) An expense reduction plan shall:

(1) permit only expense reductions that can be demonstrated;

(2) provide for the proper documentation by the insurer of all such expense reductions;

(3) not provide for reduction in the insured's premium based upon a reduction in the otherwise applicable commission payable to the agent or broker, unless made part of the insurer's filed and approved expense reduction plan and such reductions are applied in a fair and nondiscriminatory manner to all eligible classes of risk; and

(4) not provide for modification of rates in excess of minus (–) 15 percent.

(g) The adjustments contemplated by schedule rating and IRPM plans must be based only on rating characteristics not already reflected in the base rates. Such plans must clearly indicate the objective criteria that permit upward and downward adjustment of the base rates. Individual underwriting files shall contain the specific criteria, relative to the risk being rated, and document the particular circumstances that support each debit or credit.

(h) Schedule rating and IRPM plans may not provide for modification of rates in excess of plus (+) or minus (–) 15 percent.

(i) The overall rate effect of applying schedule rating plans, IRPM plans and experience rating plans on any individual insured risk shall not, in the aggregate, provide for modification of filed rates applicable to such risk in excess of plus (+) or minus (–) 25 percent, except that:

(1) In the event that application of an experience rating plan produces a modification that exceeds plus (+) or minus (–) 25 percent, such modification may be applied in its entirety; and

(2) No additional rate modifications shall be applied that would increase the level of rate modification beyond that determined by such experience rating plan, but rate modifications may be applied that reduce the maximum level of modification as determined by the application of the experience rating plan.

(For example, if the indicated experience rating modification for a particular risk is –35 percent, no schedule rating credits may be applied. Schedule rating debits could be applied, since they would reduce the indicated experience rating credit. If the indicated experience rating modification were –15 percent, schedule rating credits could be applied to the extent that the combined effect of experience rating and schedule rating does not exceed the maximum allowable modification of plus (+) or minus (–) 25 percent.)

(j) The superintendent may disapprove without a hearing any rating plan that fails to conform with the rules and standards set forth in this section.

(k)

(1) The provisions of this section regarding schedule rating and IRPM plans apply to rating plans that provide for ranges of debits and credits, the exact application of which is determined in accordance with the informed judgment of the individual company underwriter based upon an analysis of each risk's loss potential.

(2) Such provisions do not preclude use of filed and approved rating classifications that provide for application of specific, pre-established debits or credits given the presence or absence of a specific risk management, loss control, or cost control procedure or device. (For example, a rating classification could provide that a specific credit be applied to all risks with installed smoke alarms or fire extinguishers.)

(3) If neither the application of a credit (or debit), nor its amount, is discretionary, such credit (or debit) can be applied through an approved rating classification, rather than a schedule or IRPM rating plan within the meaning of this section, and thus would not require a premium credibility threshold nor be subject to the other provisions governing rating plans set forth in this section.

(l) The provisions of this section supersede any inconsistent provisions of Part 160 of this Title in connection with commercial risk, professional liability or public entity insurance policies.



### **161.9 Insurers under common control.**

In the event an expiring policy is renewed with another insurer under common control, as defined in section 107(a)(16) of the Insurance Law, both expiring and renewing insurers under common control shall maintain records, subject to the department's examination, documenting the specific underwriting criteria or other valid business reasons for shifting the policy.

### **161.10 Policies subject to audit.**

(a) An audit to determine final premium for policies under which the initial premium is based on an estimate of the insured's exposure base shall be conducted within 180 days after expiration of such policy, and may not be waived except in the following circumstances:

- (1) the total annual premium attributable to the auditable exposure base is not reasonably expected to exceed \$1,500;
- (2) the policy requires notification to the insurer with the specific identification of any additional exposure units for which coverage is requested (*i.e.*, motor vehicles); or
- (3) the policy is a commercial umbrella for which the rate or premium is determined by the application of a factor to the rate or premium of an auditable underlying policy.

(b) The insurer shall, as soon as practicable following such audit, refund or credit the insured's account for any return premium due the insured, or bill and make a good faith effort to collect any additional premium due the company, as a result of the audit.

(c) If an insured fails to cooperate with the insurer in its attempt to conduct such audit, including failure to return any questionnaires or self-audit worksheets, the insurer shall nonrenew such insured upon completion of the current policy period, in accordance with the provisions of section 3426 of the Insurance Law, due to the insurer's inability to establish a proper premium for such insured.

### **161.11 Flex-rating submissions.**

(a) Under the flex-rating system, insurers must supply adequate support for all rate changes, whether or not prior approval is required, including class and territorial changes and effects. Although meeting competition is an important motivating factor in rate changes, the dimensions of all such changes must be justified. In the event that a rate change beyond the applicable flex-band is sufficiently justified by an insurer, prior approval will be granted. If the need for rate relief can be demonstrated, a rate filing should be made.

(b) All flex-rating changes must be statistically or judgmentally supported. Wherever possible, the insurer or rate service organization shall provide statistical support for the rate change, including incurred losses and loss adjustment expense data, on reported and unreported and outstanding and paid categories. When data are not available, or volume is so low as to lack credibility, data bearing upon a larger or related market, or upon the experience of other insurers in the same market, should be supplied. If the rate change is based upon judgment, the key factors in forming that judgment must be identified and explained.

(c) The superintendent may request additional information in support of a filing, even if the rate change is within the applicable flex-band. If prior approval is required because a proposed rate change exceeds the flex-band, a properly supported rate filing shall be deemed approved unless disapproved by the superintendent within 30 days, which the superintendent may with cause extend an additional 30 days and with further cause extend an additional 15 days, in accordance with section 2344(d) of the Insurance Law.

(d) In order to expedite the flex-rating review process, in filing rate change submissions, insurers must use the appropriate forms prescribed by the superintendent, responding by affirmation of a responsible officer as fully as possible to the interrogatories therein, and shall contain, wherever appropriate and whenever feasible, the following supporting information:

- (1) paid and outstanding loss and allocated loss adjustment expense experience, on New York and countrywide bases;
- (2) premiums earned, exposure base and type of coverage (*e.g.*, occurrence or claims-made, deductibles, key endorsements and exclusions, liability limits, defense cost treatment);
- (3) trend and development factors and indications, including the basis for such factors and indications; and
- (4) factors considered, where the rate filed is based upon judgment, in exercising such judgment.

### **161.12 Individual risks.**

(a) Except as set forth in subdivision (b) of this section, individual rate filings for 'a' rated risks, including 'a' rated commercial umbrella policies, shall not be required to be filed with the superintendent. All such information, as described in section 161.11 of this Part, shall be retained in the insurer's individual underwriting file for each policy issued, for a period of five years from the date of first issuance of such policy, and shall be available for inspection by the superintendent at any time.

(b) Premium rates subject to prior approval as set forth in section 2305(b) of the Insurance Law and section 161.4(b)(21) of this Part shall continue to be submitted in accordance with the requirements of section 161.11 of this Part.

(c) Premium and loss statistics on commercial umbrella policies shall be separately maintained by insurers writing such coverage and shall be segregated from statistics on other commercial liability insurance policies. Such statistics shall be reported to the superintendent upon request.

**Current through March 15, 2020**

© 2020 Thomson Reuters. No claim to original U.S. Government Works.