

**SUBCHAPTER X. PRIOR APPROVAL OF RATES UNDER CERTAIN
CIRCUMSTANCES
28 TAC §§5.9980-5.9982**

1. INTRODUCTION. The Texas Department of Insurance adopts 28 TAC §§5.9980-5.9982, concerning prior approval of rates under certain circumstances. The proposed rules were published in the June 7, 2013, issue of the *Texas Register* (38 TexReg 3493). The commissioner adopts §5.9981 and §5.9982 with substantive changes to the text. The commissioner adopts §5.9980 with nonsubstantive changes to the text.

2. REASONED JUSTIFICATION. Government Code §2001.033(a)(1) requires the department to provide a reasoned justification for rule adoptions. The reasoned justification is set out in this order. The order contains a summary of the factual basis of the rules, a summary of comments received from interested parties, the names of entities who commented and whether they were in support of or in opposition to the adoption of the rules, and the reasons why the department agrees or disagrees with the comments and recommendations. The adopted rules are necessary to implement House Bill 1951, 82nd Legislature (2011), Regular Session, which amended Insurance Code Chapter 2251, Subchapter D, Prior Approval of Rates Under Certain Circumstances.

Specifically, Insurance Code §2251.151(f) requires the commissioner to adopt rules to define the financial conditions and rating practices that may subject an insurer to prior approval of rates, supplementary rating information, and any supporting

information under that subchapter and to establish a process for determining whether a statewide insurance emergency exists.

3. HOW THE SECTIONS WILL FUNCTION. Section 5.9980 establishes the financial conditions that subject an insurer to prior approval of rates. An insurer may be required to file all rates for prior approval under this section if the insurer is in a hazardous financial condition under Insurance Code Chapter 404, has been placed in supervision or conservatorship under Insurance Code Chapter 441, has been seized or placed in rehabilitation or receivership under Insurance Code Chapter 443, or has been required to make a special deposit with the comptroller under Insurance Code Chapter 406. An insurer subject to prior approval under this section must continue to file all rates, supplementary rating information, and any supporting information until the commissioner issues an order finding that the financial condition that subjected the insurer to this section no longer exists.

Section 5.9981 establishes the rating practices that may subject an insurer to prior approval of rates. An insurer may be required to file all rates for prior approval if the commissioner has disapproved an insurer's rate by order because the rate was found to be excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which the rates apply. An insurer may also be required to file rates for prior approval if the insurer has repetitively used rates that differ from the rates the insurer filed under Insurance Code §2251.101. When an insurer is placed in prior approval, §5.9981(b) requires the commissioner to periodically assess the insurer to determine whether the rating practices that subjected the insurer to prior approval continue to exist. If the

conditions no longer exist, the commissioner will issue an order excusing the insurer from prior approval.

Section 5.9982 establishes a process for determining whether a statewide insurance emergency exists that affects the availability of insurance and impacts a significant part of the state. The commissioner will consider the following factors to determine whether a statewide insurance emergency exists: there is a substantial increase in policies in a line of insurance being written by surplus lines or residual insurers; a line of insurance is not offered in a quantity or manner to adequately protect residents and policyholders as a result of a withdrawal plan or restriction plan filed under Chapter 827; the governor has declared a natural disaster; or the commissioner has declared a weather-related catastrophe. If the commissioner determines that a statewide insurance emergency exists, the commissioner may order insurers to file their rates for prior approval. The commissioner will periodically assess whether the statewide insurance emergency continues to exist. Once the commissioner declares a statewide insurance emergency exists, the commissioner will hold a public hearing to accept comments on whether the statewide insurance emergency still exists. If the commissioner determines that a statewide insurance emergency no longer exists, the commissioner will issue an order excusing insurers from prior approval of rates.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment on §5.9981: Commenters stated that the rule does not define the term, “rating practices,” and does not attempt to define what constitutes rating practices.

Commenters stated that the Legislature intended to define rating practices by what sort

of practices are going on in the marketplace, not by standards already existing in the statute. Commenters stated that district court cases define rating practices differently and distinguish between a disapproved rate and a rating practice.

Agency Response: Insurance Code §2251.151(f) requires the commissioner to define the rating practices that would subject an insurer to prior approval under that subchapter. The statute does not require the commissioner to define generally what a rating practice is or what actions constitute a rating practice. Further, HB 1951 does not define a rating practice. Based on a survey of current case law, the department was unable to identify any legal opinion that specifically defined what a rating practice is or that limited how the commissioner may define a rating practice for purposes of placing an insurer in prior approval. For the purposes of this rule, a rating practice includes a rate that has been disapproved by the commissioner by order.

Comment on §5.9981: A commenter asserted that a broad definition of rating practices is not precluded by case law or how the department has previously referred to rating practices. The commenter stated that rating practices should be defined broadly to include all of the insurer's activities concerning the filing and using of rates, and those rating practices that trigger the commissioner's supervisory authority must include the use of rates that violate rate standards.

Agency Response: The department agrees with this comment. The adopted rule defines a rating practice for purposes of Insurance Code §2251.151 to include rates that have been disapproved by the commissioner by order and that violate Insurance Code Chapter 2251.

Comment on §5.9981: A commenter stated that describing rating practices to include rates that are excessive, inadequate, or unfairly discriminatory is inconsistent with existing statutory remedies for a rate that is found to be excessive or unfairly discriminatory.

Agency Response: The department disagrees. Placing an insurer under prior approval is not inconsistent with existing statutory remedies. Under the Insurance Code, the commissioner may disapprove a rate that is not yet in effect, or may disapprove a rate that is in effect only after a hearing. The prior approval of rates is a different remedy. Prior approval is another tool that the Legislature has provided to the department to ensure that rates are not excessive, inadequate, unfairly discriminatory, or unreasonable. Insurers may be subject to prior approval if the commissioner has disapproved an insurer's rate by order. Under prior approval, the insurer may not use rates and supplementary rating information until it has been filed with the department and approved by the commissioner in compliance with Subchapter D, or Chapter 2251.

Comment on §5.9981: A commenter is concerned about describing rating practices as when an insurer's rate has been disapproved because it was found to be excessive, inadequate, or unfairly discriminatory because of the political and subjective history that has surrounded the department's past actions in determining whether rates are excessive or unfairly discriminatory. The commenter stated that the statute defines an excessive rate based on a long-term profit that is unreasonably high in relation to the coverage provided. However, the department has focused its evaluation of whether a rate is excessive based on particular components used to develop the filed rate and has not analyzed how the rates of a company compare to other rates in a line of business or

market. Furthermore, in a contested proceeding, there may be as many as three different actuarial opinions on whether the rate is excessive.

Agency Response: One purpose of this rulemaking is to identify rating practices that may subject an insurer to prior approval under Insurance Code §2251.151. An insurer is not subject to prior approval under Insurance Code §2251.151 and these rules unless the commissioner has disapproved an insurer's rates by order because the rates were excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which the rates apply. Under Insurance Code §2251.051(b), a rate is excessive if it is likely to produce a long-term profit that is unreasonably high in relation to the insurance coverage provided. There is no further statutory criteria that a rate cannot be excessive when a reasonable degree of competition exists. If the commissioner disapproves a rate by order, whether the rate is not yet in effect, or after the rate is in effect, the order specifies the reasons why the rate fails to meet the requirements of Chapter 2251. If there has been a hearing, the order includes findings of fact as to why the rate is excessive. If an insurer is placed in prior approval because its rate has been disapproved, the insurer is entitled to a hearing. When an insurer is placed under prior approval, the commissioner will issue an order specifying the reasons for requiring the prior approval for rate filings and any steps the insurer must meet in order to be excused from prior approval. If the insurer requests a hearing, then the commissioner's order will be reviewed by an administrative law judge. These administrative processes provide transparency to the department's regulation of property and casualty insurance rates.

Comment on §5.9981: A commenter stated that rating practices should be defined in the context of recognized insurance or economic practices in relation to antitrust concerns, economics, and clear violations of certain provisions of the Insurance Code. The commenter suggested that rating practices could include “tracking,” which is a practice where one insurer pegs its rates on the rates adopted by a competitor; using rates based on race, creed, color, ethnicity, or national origin; using rates in a line of business or territory designed to create or maintain a monopoly; using rates intended to constitute a boycott of a particular class of business and results in an unreasonable restraint of trade; or taking a concerted action through rates that tends to result in an unreasonable restraint of competition or resulting in a monopoly in the business of insurance.

Agency Response: One purpose of the adopted rule is to identify rating practices that may subject an insurer to prior approval of rates under Insurance Code §2251.151. The rating practices identified in the rule include rates that have been disapproved by the commissioner by order because the rates were determined to be excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which the rates apply, or the insurer repetitively used a rate that is different than the rate filed under Insurance Code §2251.101. An unfairly discriminatory rate is a rate that is not based on sound actuarial principles; does not bear a reasonable relationship to the expected loss and expense experience among risks; or is based wholly or partly on the race, creed, color, ethnicity, or national origin of the policyholder or an insured. An insurer’s rates must comply with the rating standard contained in Insurance Code §2251.052(b) and in the adopted rule §5.9981(a)(1). Tracking, (when an insurer bases its rates on another

insurer's rates), does not necessarily violate the Insurance Code. The department declines to include this concept in the adopted rule.

Comment on §5.9981: A commenter stated the rule should be clarified as to when an insurer would be placed in prior approval because of a rating practice. The commenter stated insurers do not know they have violated a rule until after a contested case hearing. The commenter stated the rule should clarify the disapproval of a rate and whether the disapproval occurs when the commissioner issues an order, an administrative law judge issues a proposal for decision, or after a court has reviewed the agency action. The commenter asked if the commissioner can place an insurer in prior approval prior to the judicial review process being completed. The commenter stated insurers should not be placed in prior approval while they are appealing a rate disapproval.

Agency Response: The department has clarified §5.9881(a) to provide that the commissioner may order an insurer to file its rates for prior approval if the commissioner has disapproved the insurer's rates by order for being excessive, inadequate, unreasonable, or unfairly discriminatory or if the insurer has repetitively used a rate that differs from the rate filed under Insurance Code §2251.101. The department disagrees with placing an insurer in prior approval until after the commissioner's order has been reviewed by a court. HB 1951 does not limit the commissioner in placing an insurer under prior approval until after a judicial process, which may be protracted. The statute provides that if an insurer files a petition for review of the commissioner's order placing an insurer under prior approval, then under Insurance Code §2251.151(a-1), the insurer must use the rates in effect for the insurer at the time the insurer filed the petition. The

insurer may not file and use a higher rate unless it files the new rate and any supplementary rating and supporting information with the department, and obtains the commissioner's approval of the rate.

Comment on §5.9981: A commenter stated the rule creates uncertainty because it would allow a commissioner to place an insurer in prior approval after just one rate disapproval and this is inconsistent with the legislative intent.

Agency Response: The adopted rules implement House Bill 1951, 82nd Legislature, Regular Session (2011), which found that Texas has a clear and ongoing need to regulate insurance, but that changes are needed to improve the transparency and accountability of the department's current statutory responsibility. HB 1951 required the department to define by rule the rating practices, financial conditions, or statewide insurance emergencies that may result in placing an insurer under prior approval regulation. HB 1951 did not address the number of rate disapprovals required in order to place an insurer under prior approval; rather, the Legislature directed the department to define the rating practices that may subject an insurer to prior approval. The department drafted §5.9981(a) to identify rating practices that may subject an insurer to prior approval under the rule. The rule includes the circumstance where an insurer's rates are disapproved by a commissioner's order for being excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which the rates apply. By placing an insurer under prior approval for violating the rate standards in Insurance Code Chapter 2251, the rule ensures that subsequent rate filings comply with Insurance Code Chapter 2251 before they are effective.

Comment on §5.9981: A commenter stated that the proposed rule does not reflect the reality that actuaries may have a good faith dispute as to what constitutes an adequate rate. The commenter suggested that if there is a good faith dispute over a filed rate, the insurer should not be placed under prior approval.

Agency Response: Before being placed under prior approval, the rule requires that the commissioner disapprove a rate by order because the rate was inadequate, excessive, unreasonable, or unfairly discriminatory. The department acknowledges that there are good faith disputes about what constitutes an adequate rate, whether a rate is excessive or unreasonable, or whether a rate may be unfairly discriminatory. Chapter 2251 provides an administrative process that includes a hearing to address disputes. The hearing provides an opportunity for an insurer to challenge the commissioner's order and to allow an administrative judge to review a commissioner's order.

Comment on §5.9981: A commenter stated that the rule describing rating practices should be amended to add "unreasonable" as a standard as it is in Insurance Code §2251.052(b).

Agency Response: The department agrees and has amended §5.9981(a)(1) to include the word "unreasonable."

Comment on §5.9981: A commenter asked that §5.9981 be clarified to state what actions the commissioner must take before placing an insurer under prior approval because of a rating practice. The commenter suggested that the rule require the commissioner to issue an order under Insurance Code §§2251.103, 2251.104, or 2251.105.

Agency Response: The department has amended the text of §5.9981(a) to state that the commissioner may order an insurer to submit its rates, supplementary rating information, and any supporting information for prior approval if the commissioner has disapproved an insurer's rate by order.

Comment on §5.9981(b): A commenter stated that the department is exceeding its authority in §5.9981 by establishing a time frame of "not longer than two years" for the duration of an insurer's time in prior approval. The commenter stated House Bill 1951 required the commissioner to periodically assess whether the conditions requiring prior approval for an insurer continue to exist and that the rule as written would benefit insurers. A commenter requested that §5.9981(b) be struck in its entirety. The commenter asked how many insurers the department has placed under prior approval in the last ten years and how long the insurers were in prior approval.

Agency Response: In response to this comment, the department has amended §5.9981(b) to provide that the commissioner will periodically assess whether a rating practice that subjected the insurer to prior approval continues to exist. If the rating practice no longer exists, then the commissioner will issue an order excusing the insurer from prior approval under that section. The department has placed two insurers' rates under prior approval for rating practices, both of which are no longer under prior approval. The department placed State Farm Lloyds in prior approval for homeowners' rates from July 2006 to July 2008. The department placed Allstate Texas Lloyds in prior approval for homeowners' rates from August 2007 to May 2008.

Comment on §5.9981: A commenter expressed concern that §5.9981 will have a chilling effect on insurers utilizing the file-and-use system for fear that they will be

placed in prior approval for filing a rate that may be unfairly discriminatory, inadequate, or excessive. A commenter stated that §5.9981 weakens the notion of fair play and predictability of the rate filing system, confuses the rate with a notion of rating practices, and has the opposite effect of what was intended in HB 1951. A commenter suggested that the rule be rewritten to address and better define what constitutes a rating practice.

Agency Response: The department disagrees with this comment. Insurers are required to file rates that comply with the rate standards in Insurance Code §2251.051 and §2251.052. Insurers are also required to comply with the filing requirements in Insurance Code §2251.101. Moreover, an insurer may only be placed in prior approval if the insurer's rate has been disapproved by a commissioner's order. The department disagrees that requiring compliance with the rate standards and applicable provisions of the Insurance Code creates a chilling effect. Prior approval is an additional tool to incentivize insurers to comply with the existing rate standards in Chapter 2251.

Comment on §5.9981: A commenter stated that §5.9981(a)(1) incorrectly characterizes a denied rate as a rating practice, and believes that a filed rate, in and of itself, is not sufficient to constitute a rating practice. The commenter stated that there is nothing in HB 1951 to suggest that a rating practice is intended to include a disapproved rate. The commenter stated that the Legislature has considered legislation on prior occasions that would have allowed the department to place an insurer in prior approval for a disapproved rate, but rejected that approach, and so should the department.

Agency Response: The department disagrees with this comment. HB 1951 did not define rating practices, but directed the department to define the rating practices that would subject an insurer to prior approval under Insurance Code §2251.151. Nothing in

HB 1951 restricts the department from defining a rating practice for purposes of prior approval to include a rate that has been disapproved by commissioner's order for being excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which the rate applies. Further, an insurer may be subject to prior approval if the insurer has filed and repetitively used a rate that differs from the filed rate. These are objective criteria that the commissioner may rely on in determining whether to place an insurer under prior approval.

Comment on §5.9981: A commenter stated that the term "pattern" is not defined in §5.9981(a)(2) and should be clarified as to whether a pattern means the use of one, two, or three or more instances of using a rate that is different than the rate filed. The commenter stated the rule leaves it up to the department's discretion as to what constitutes a pattern.

Agency Response: In response to the comment, the department has revised the rule text to delete the word "pattern." The department has changed the text of §5.9981(a)(2) to provide that the commissioner may place an insurer in prior approval under that section if the commissioner has determined by order that an insurer has repetitively used a rate that differs from the rate filed. Insurers are required to use rates that are filed under Insurance Code §2251.101. This rule may subject insurers who repetitively use rates, (more than once), that are inconsistent with the rates filed under Insurance Code §2251.101 to prior approval. While the department recognizes that implementation errors may be made, the failure to use the rates that are filed under Insurance Code §2251.101 has the potential to adversely affect consumers.

Comment on §5.9981: A commenter stated that an insurer uses a rate that is different from a filed rate usually because of a programming error. The commenter is concerned that this type of error will be construed as a pattern. The commenter suggested that the rule be amended to include a pattern of using a rate different from the rate filed that causes harm to the consumer, or a *de minimus* damage.

Agency Response: In response to comment, the department has amended §5.9981(a)(2) to remove the word “pattern” and replaced it with the word “repetitive.” This means that if an insurer has used a rate more than once, that is different than the filed rate, the insurer may be subject to prior approval of rates under §5.9981. The department declines to amend the rule to include an exception for *de minimus* harm. While the department recognizes that programming errors may occur, insurers are still required to comply with Insurance Code §2251.101, which requires insurers to use the rates that are filed. Even if a rate that is being used differs from the filed rate under Insurance Code §2251.101 and does not adversely impact the consumer, (when the rate being used is not higher than the rate filed), the rate being used could be inadequate or may violate the Insurance Code for other reasons. Insurers must use the rates that are filed in compliance with Insurance Code Chapter 2251. An exception to this requirement would create a disincentive for compliance.

Comment on §5.9981: A commenter stated §5.9981(a)(2) needs further clarification because it may result in insurers not self-reporting rating errors for fear that the department will determine that a pattern exists. The commenter stated §5.9981(a)(2) will have a chilling effect on self-reporting, because self-reporting may be used against an insurer. A commenter suggested that the rule be amended to state the

commissioner will not use self-reporting by an insurer as grounds for placing an insurer in prior approval.

Agency Response: In response to comments, the department has revised the rule language to delete the word “pattern” and replace it with the word “repetitive.” The department has changed the text of §5.9981(a)(2) to provide that the commissioner may place an insurer in prior approval under that section if the commissioner has determined by order that an insurer has repetitively used a rate that differs from the rate filed. This means that if an insurer uses a rate that differs from the rate filed more than once, the insurer may be subject to prior approval of rates. While the department recognizes that insurers self report errors, insurers must comply with the requirements of Insurance Code Chapter 2251, which requires that insurers use only the rates that are filed. The department declines to amend the rule text to create an exception to this for insurers who self report using a different rate than the rate filed under Insurance Code §2251.101 as it would create a disincentive for compliance.

Comment on §5.9881: A commenter suggested that §5.9981(a)(2) be amended to include a “no harm, no foul” provision; and that it should state that the commissioner will not place an insurer in prior approval if the insurer uses a rate that is lower than the rate that was filed, or if the insurer does not charge the policyholder more than it would have if it had used the filed rate.

Agency Response: The department declines to amend the rule based on this comment. Even if a rate that is different than the rate that is filed under Insurance Code §2251.101 does not adversely impact the consumer, (the rate being used is not higher than the rate filed), the rate being used could be inadequate or may violate the

Insurance Code for other reasons. Further, insurers must use the rates that are filed in compliance with Chapter 2251. An exception to this requirement would create a disincentive to comply with Insurance Code §2251.101.

Comment on §5.9982: A commenter stated that a “statewide insurance emergency” needs to be clarified, and that a disaster could refer to a localized event such as a fire or hurricane—and it would be a statewide disaster under the rule. The commenter stated §5.9982 is not clear on whether a natural disaster declaration in one area or region of the state would be sufficient to invoke prior approval. The commenter suggested that the language be clarified to specify the scope of a natural disaster that is needed to invoke the statewide insurance emergency provision, and clarify that the provision only applies when a catastrophe impacts a significant portion of the state.

Agency Response: Insurance Code §2251.151(f)(2) requires the commissioner to define the process by which the commissioner determines that a statewide insurance emergency exists. Section 2251.151 of the Insurance Code and HB 1951 do not define a statewide insurance emergency. The department describes the circumstances that the commissioner may consider in determining whether a statewide insurance emergency exists in §5.9982. One of these circumstances includes whether there is a natural disaster or a catastrophe. The department agrees that a localized event may not necessarily be a statewide insurance emergency. However, the department declines to limit the scope of a natural disaster or a catastrophe in the rule because the rule clearly applies to a statewide insurance emergency. Further, §5.9982 provides the commissioner with flexibility to determine if a natural disaster or catastrophe is one that is a statewide insurance emergency—an emergency that has statewide impact.

Comment on §5.9982: A commenter stated that Insurance Code §2251.151(f)(2) does not require the department to establish a deadline by which insurers would no longer have to file rates.

Agency Response: The department has amended the text of the rule in response to comments. The rule now provides that the commissioner may order an insurer to file all rates, supplementary rating information, and any supporting information under this section and will periodically assess whether a statewide insurance emergency continues to exist. If the conditions no longer exist, then the commissioner will issue an order excusing insurers from prior approval.

Comment on §5.9982: A commenter stated that the declaration of a disaster or catastrophe does not indicate that an insurance emergency exists, and the department should eliminate §5.9982(b) and replace it with language that limits prior approval to instances where the insurer is at risk of insolvency or has engaged in a pattern of making excessive, inadequate, or unfairly discriminatory rate filings.

Agency Response: The department declines to remove §5.9982(b). The department agrees that a natural disaster or catastrophe may not necessarily result in a statewide insurance emergency; however, a natural disaster or catastrophe may potentially result in a statewide insurance emergency and the commissioner may consider this circumstance. Further, §5.9980 and §5.9981 address the financial conditions and ratings practices, including the filings of rates that are excessive, inadequate, or unfairly discriminatory, that may subject an insurer to prior approval.

Comment on §5.9982: A commenter stated that §5.9982 creates an overly broad definition of what constitutes a statewide insurance emergency and the rule proposal

goes beyond what may be contemplated to be an insurance emergency. The commenter stated that if the department determines the marketplace is not providing insurance in sufficient quantities, placing insurers in prior approval would be a disincentive for insurers to enter the market.

Agency Response: The department disagrees that the definition of a statewide insurance emergency is overly broad. Insurance Code §2251.151(f)(2) requires the commissioner to define the process by which the commissioner determines that a statewide insurance emergency exists. Insurance Code §2251.151 and HB 1951 do not define a statewide insurance emergency. Section 5.9982 describes the circumstances the commissioner may consider in determining whether a statewide insurance emergency exists. Once the commissioner issues an order finding that a statewide insurance emergency exists, the commissioner will hold a public hearing to provide opportunity for stakeholders to comment on the emergency and to discuss what actions, if any, the commissioner should consider to address the emergency.

Comment on §5.9982: A commenter stated that the factors in §5.9982 for a statewide insurance emergency should also include a substantial increase in policies being written by insurers of last resort or residual markets.

Agency Response: The department has amended the text based on this comment. The department has added residual insurers to §5.9982(b)(1).

Comment on §5.9982: A commenter stated that §5.9982(b)(2) does not contemplate inadequate quantities of insurance that arise through practices other than withdrawal or restrictions plans. The commenter suggests the rule be revised to include scenarios

where insurers may tighten underwriting guidelines or implement aggressive rating practices to an unhealthy degree, creating a crisis for policyholders.

Agency Response: The department declines to amend the rule based on this comment. An insurer's rates must comply with Chapter 2251. The purpose of Chapter 2251 is to promote the public welfare by regulating insurance rates to prohibit excessive, inadequate, or unfairly discriminatory rates; promote the availability of insurance; promote price competition among insurers to provide rates and premiums that are responsive to competitive market conditions; and prohibit price-fixing agreements and other anticompetitive behavior by insurers. Any aggressive rating practice must comply with Chapter 2251. Any rate that does not comply with Chapter 2251 may be disapproved by the commissioner. Further, if an insurer is placed in prior approval, the department will review that insurer's rates, supplementary rating information, and any supporting information prior to the rate going into effect and being used. The commissioner may only approve a rate if it complies with the requirements of Chapter 2251 of the Insurance Code. Further, this rulemaking does not address underwriting guidelines. Underwriting guidelines are regulated by other provisions in the Insurance Code. Each insurer is required to file underwriting guidelines with the department under Insurance Code §38.002(b). Further, as required by Insurance Code §38.002(e), the underwriting guidelines must be sound, actuarially justified, or otherwise substantially commensurate with the contemplated risk, and may not be unfairly discriminatory.

Comment on §5.9982: A commenter stated that §5.9982 is not clear if the intent of that section is to restrict insurers' ability to file-and-use if there is a statewide disaster.

The commenter stated that if that is the intent, then §5.9982 may interfere with the financial stability of insurers who may have suffered significant losses due to the disaster, and it undermines the notion of file-and-use.

Agency Response: Insurance Code §2251.151(a)(2) provides that the commissioner may require an insurer to file rates, supplementary rating information, and any supporting information with the department for commissioner approval if the commissioner determines that a statewide insurance emergency exists. Insurance Code §2251.151(f)(2) requires the commissioner to define the process by which the commissioner determines that a statewide insurance emergency exists. Section 2251.151 of the Insurance Code and HB 1951 do not define a statewide insurance emergency. The department included circumstances such as a natural disaster or catastrophe in the rule that the commissioner may consider in declaring a statewide insurance emergency. If a statewide insurance emergency is declared, then insurers may have to file their rates under prior approval until the commissioner finds that the statewide insurance emergency no longer exists. The rules are not intended to restrict insurers from filing actuarially justified rates and using those rates. However, prior approval of rates, in the event of a statewide insurance emergency, is a tool provided by the Legislature for addressing an emergency situation that may affect rates. This tool furthers the purpose of Insurance Code Chapter 2251, which is to promote the public welfare by regulating insurance rates to prohibit excessive, inadequate, or unfairly discriminatory rates and to promote the availability of insurance.

Comment on §5.9982: A commenter suggested that the department review Insurance Code §542.059, which allows the extension of claims handling deadlines in the event of

a weather-related catastrophe or major natural disaster, and states that §542.059 is not as broad as the proposed rule language and is more limited in terms of scope of disaster. The commenter stated that proposed §5.9303(c) describes conditions that must exist for a weather-related event to be considered a catastrophe or major natural disaster by the department, which is based in part on total losses of \$5 million or more for insurers. The commenter said this standard is too low for declaring a statewide insurance emergency and changing rate filing processes for insurers, because the definition is depends upon a request by a single insurer or a group of insurers.

Agency Response: The department considered Insurance Code §542.059 and the corresponding rule, 28 TAC §5.9303, before drafting the text of the current rule concerning a statewide insurance emergency. Insurance Code §542.059 concerns the extension of claims-handling deadlines in the event of a weather-related catastrophe or major natural disaster. Section 5.9303(c) provides that a weather-related event may be considered a catastrophe or major disaster, for purposes of extending claims handling deadlines, if the estimated dollar losses are \$5 million or more in the aggregate for all insurers, and the estimated number of claims are 3,000 or more in the aggregate for all insurers. The purpose of Insurance Code §542.059 and the corresponding rule is different from the purpose of this rule, which concerns statewide insurance emergencies and prior approval of rates. The adopted rules in this rulemaking serve to define the process by which the commissioner may determine that a statewide emergency exists for the purpose of placing insurers under prior approval for rates and supplementary rating information. The amount of losses and number of claims resulting from a natural disaster or catastrophe are irrelevant to whether an insurer or insurers should be placed

under prior approval for rates. A statewide insurance emergency is an emergency that impacts a significant portion of the state and affects insurance rates and availability.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

Neither for or against, with changes: Texas Watch, Office of Public Insurance Counsel, Insurance Counsel of Texas, Property & Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and the Association of Fire & Casualty Companies of Texas.

6. STATUTORY AUTHORITY. The rules are adopted under Insurance Code §2251.151 and §36.001. Section 2251.151 authorizes the commissioner to require insurers to file rates for prior approval under certain circumstances, requires the commissioner to define by rule the financial conditions and rating practices that may subject an insurer to prior approval, and requires the commissioner by rule to establish a process for determining whether a statewide insurance emergency exists. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

7. TEXT.

§5.9980. Financial Conditions. (a) The following financial conditions may require an insurer to file with the department for the commissioner's approval all rates, supplementary rating information, and any supporting information:

(1) a finding by the commissioner that an insurer is in a hazardous financial condition under Insurance Code Chapter 404 and §8.3 of this title (relating to Hazardous Conditions and remedy of Hazardous Conditions);

(2) an insurer has been placed in supervision or conservatorship under Insurance Code Chapter 441;

(3) an insurer has been seized or placed in rehabilitation or receivership under Insurance Code Chapter 443; or

(4) an insurer has been required to make a special deposit with the comptroller under Insurance Code Chapter 406.

(b) An insurer subject to this section must continue to file all rates, supplementary rating information, and any supporting information until the commissioner issues an order finding that the financial condition that subjected the insurer to this section no longer exists.

§5.9981. Rating Practices. (a) The commissioner may order an insurer to file with the department for the commissioner's approval all rates, supplementary rating information, and any supporting information for a rating practice if the commissioner has disapproved a rate by order because:

(1) an insurer filed a rate that was found to be excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which the rates applied in violation of Insurance Code §2251.052; or

(2) the insurer has repetitively used rates that differ from the rates filed under Insurance Code §2251.101.

(b) The commissioner will periodically assess whether the rating practices that subjected the insurer to this section continue to exist. If the conditions no longer exist, the commissioner will issue an order excusing the insurer from prior approval.

§5.9982. Statewide Insurance Emergency. (a) The commissioner may order an insurer to file with the department for the commissioner's approval all rates, supplementary rating information, and any supporting information if the commissioner determines that a statewide emergency exists affecting the availability of insurance and impacting a significant part of the state.

(b) The commissioner will consider the following factors in determining whether a statewide insurance emergency exists that impacts the availability of insurance:

(1) there is a substantial increase in policies in a particular line of insurance being written by surplus or residual insurers;

(2) the commissioner has determined that a line of insurance is not offered in a quantity or manner to adequately protect the residents and policyholders in this state as a result of a withdrawal plan or restriction plan filed under Chapter 827; or

(3) the governor declares a natural disaster or the commissioner declares a weather-related catastrophe.

(c) If the commissioner determines a statewide insurance emergency exists, the commissioner may order insurers to file all rates, supplementary rating information, and any supporting information for approval. The commissioner will periodically assess whether a statewide insurance emergency continues to exist.

(d) After the commissioner issues an order under this section, the commissioner will hold a public hearing within 60 days after the issuance of the order declaring a statewide insurance emergency.

(1) At the public hearing, the commissioner will accept comments as to whether a statewide insurance emergency still exists.

(2) If the commissioner finds that a statewide insurance emergency does not exist, the commissioner will issue an order excusing insurers from filing rates under this section.

8. CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas on November 19, 2013.



Sara Waitt, General Counsel
Texas Department of Insurance

The commissioner orders the adoption of §§5.9980-5.9982.



Julia Rathgeber
Commissioner of Insurance

Commissioner's Order No. **2852**