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[Name and Address Redacted]

**SUBJECT:** Confidentiality of Underwriting Rules Filed with Rate Applications Pursuant to California Insurance Code section 1861.05(b).

The California Department of Insurance received a request for a legal opinion regarding the issue presented below. The following legal opinion is issued pursuant to California Insurance Code section 12921.9.<sup>1</sup>

### **I. Issue Presented**

Does Insurance Code section 1861.07 require underwriting rules provided to the Insurance Commissioner in connection with an application for approval of property and casualty rates pursuant to Insurance Code section 1861.05(b) to be available for public inspection?

### **II. Summary Conclusion**

Yes. Underwriting rules provided to the Commissioner in connection with an application for approval of property and casualty rates pursuant to Insurance Code section 1861.05(b) must be available for public inspection pursuant to Insurance Code section 1861.07 regardless of whether such underwriting rules are marked "confidential," "proprietary," or "trade secret."

### **III. Background**

In 1988, California voters passed Proposition 103 adding Division 2, Chapter 9, Article 10 ("Article 10") to the Insurance Code which, among other things, "provided for consumer participation in the administrative rate-setting process." (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1035.) Article 10 includes Insurance Code section 1861.05(b) which requires any insurer that wishes to initially charge or change any rate for certain property and casualty insurance on risks in California, to file a complete rate application with the Commissioner.<sup>2</sup> A complete rate application must include, among other things, all data referred to in Insurance Code sections 1857.7 (contents of rate change application), 1857.9

<sup>1</sup> All references herein to the Insurance Code shall mean the California Insurance Code.

<sup>2</sup> The requirement to obtain prior approval of rates from the Commissioner generally applies to all property and casualty insurance in California except for the types of insurance set forth in Insurance Code section 1851.

(established insurer reports), 1857.15 (repealed) and 1864 (child care liability insurers' reports) "and such other information as the commissioner may require." (Ins. Code §1861.05(b).)<sup>3</sup>

The stated purpose of Article 10 was "to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." (*Historical and Statutory Notes*, 42A West's Ann. Ins. Code (1993 ed.) foll. §1861.01, p. 649.) To this end, Article 10 provides the Commissioner with broad authority over insurance rates and expressly provides that no subject rate shall be approved or remain in effect that is "excessive, inadequate, unfairly discriminatory or otherwise in violation of" Chapter 9 of the Insurance Code. (Ins. Code §1861.05(a).)

#### IV. Analysis

An "underwriting rule" for purposes of this legal opinion shall mean any rule or factor used by an insurer in the process of examining, accepting, or rejecting insurance risks, and classifying those risks selected in order to charge the proper premium for each. "Underwriting rules" shall also include, but not be limited to, the "eligibility guidelines" insurers must maintain pursuant to 10 CCR section 2360.2.<sup>4</sup> Because underwriting rules determine the types of risks to be insured and the coverages to be offered, underwriting rules must be analyzed in connection with the rate review process to evaluate the reasonableness of a proposed rate in relation to the specific risks to be insured and coverages to be offered to determine whether such rates are excessive, inadequate or unfairly discriminatory. (Ins. Code §1861.05(a).)

Additionally, the Commissioner is required to provide public notice of any application by an insurer for a rate change. (Ins. Code §1861.05(c).) A rate change application is deemed approved sixty days after public notice unless certain specified conditions are met. For example, a rate application is not deemed approved sixty days after public notice if a consumer or consumer representative requests a hearing within forty-five days after the public notice and the Commissioner grants the hearing, or determines not to grant the hearing and issues findings in support of that decision. (*Id.*)

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<sup>3</sup> Notwithstanding a prior determination that a rate application is complete, the Commissioner may later require the submission of relevant underwriting rules and other relevant documents from an applicant in order to perform a complete analysis of an application. (Cal. Code Regs., tit. 10, §2648.4(b).)

<sup>4</sup> Title 10 of the California Code of Regulations, section 2360.0(b) defines "Eligibility Guidelines" as specific, objective factors, or categories of specific, objective factors, which are selected and/or defined by an insurer, and which have a substantial relationship to an insured's loss exposure. Section 2360.2 requires an insurer to "maintain eligibility guidelines for every line of insurance offered for sale to the public" and further provides, "[t]he Eligibility Guidelines shall be sufficiently detailed to determine the appropriate rating plan for the insured. An insured or applicant who meets the eligibility guidelines shall qualify to purchase the insurance."

If an insurer fails to submit its underwriting rules with each rate application or denominates its underwriting rules as confidential and not subject to public disclosure, such rate application would not include and make available for public inspection all information required by the Commissioner (Ins. Code, §1861.05(b)) to evaluate fully the requested rate change. Under such circumstances, the public would be improperly denied the full statutorily guaranteed forty-five day public-notice period to analyze a complete rate application and determine whether to request a hearing with respect to the application. (Ins. Code §1861.05(c).) Accordingly, a rate application that does not include underwriting rules or denominates such underwriting rules as confidential or not subject to public inspection is incomplete under Insurance Code section 1861.05(b) and insufficient to trigger public notice of the rate application pursuant to Insurance Code section 1861.05(c).<sup>5</sup>

Insurance Code section 1861.07 states “[a]ll information provided to the commissioner pursuant to [Article 10] shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply.” The first clause of Insurance Code section 1861.07 broadly requires public disclosure of “all information provided to the commissioner pursuant to [Article 10],” and includes any information necessary to determine whether any rule or factor used by the insurer impermissibly affects the fairness, availability, and affordability of insurance. (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at p. 1043.) Consequently, Insurance Code section 1861.07, on its face, makes underwriting rules and other relevant documents provided to the Commissioner in connection with a rate approval application pursuant to Article 10 subject to public inspection.

The second clause of Insurance Code section 1861.07 specifically identifies two statutory exemptions from disclosure that do not apply to information provided to the Commissioner in connection with a rate application filed pursuant to Article 10. Specifically, Government Code section 6254(d) exempts from disclosure certain records relating to regulatory information filed with any state agency, and Insurance Code section 1857.9 exempts from disclosure certain records relating to information filed by insurers with the Department of Insurance.

The drafters of Proposition 103 presumably added the second clause to Insurance Code section 1861.07 to make clear that these exemptions do not apply to information filed in connection with rate applications pursuant to Insurance Code section 1861.05(b) because their application would nullify the broad disclosure mandate of Insurance Code section 1861.07 and would be contrary to the goal of fostering consumer participation in the rate-review process. (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at p. 1044.) Indeed, the Proposition 103 drafters’ use of the inclusive term “all” to describe the information subject to public disclosure bolsters this construction of Insurance Code section 1861.07. (*Ibid.*, citing

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<sup>5</sup>As a general rule, insurers file their underwriting rules with every Proposition 103 rate application. Notwithstanding Insurance Code section 1861.07, certain insurers have attempted to withhold their underwriting rules from public inspection by marking them “confidential,” “proprietary,” or “trade secret.” To date, when an insurer marked its filed underwriting rules as “confidential,” the Department, after giving the insurer an opportunity to respond, released the insurer’s underwriting rules upon a request by a member of the public.

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*California Assn. of Dispensing Opticians v. Pearle Vision Center* (1983) 143 Cal.App.3d 419, 429 [use of “inclusive terms such as ‘in any form directly or indirectly’ and ‘or otherwise’ indicated that the listed items were not intended to be exclusive”].)

When viewed in this context, the exemptions from disclosure in Insurance Code section 1861.07 “are meant to be examples rather than an exhaustive listing of all those statutory exemptions that are inapplicable.” (*Id.*) For example, “trade secret information is ... not exempt from disclosure” under Insurance Code section 1861.07. (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at p. 1047.) Providing public access to all information submitted to the Commissioner pursuant to Article 10 is consistent with Proposition 103’s goal of fostering consumer participation in the rate review process. The application of any other statutory exemption from disclosure would also nullify the broad disclosure mandate of Insurance Code section 1861.07. Accordingly, there is no statutory exemption to the disclosure requirements set forth in Insurance Code section 1861.07 applicable to underwriting rules. (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at p. 1046-47.)

Based on the foregoing, underwriting rules filed in connection with a rate application pursuant to Insurance Code section 1861.05(b) must be available for public inspection pursuant to Insurance Code section 1861.07 regardless of whether such underwriting rules are marked “confidential,” “proprietary,” or “trade secret.” (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at p.1046.)

We trust the foregoing is responsive to your request. If, however, you have any questions or require any additional information, please contact me directly.

Very truly yours,



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