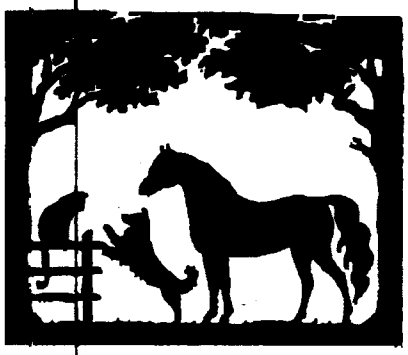

Full House Farm

21 October 1998

Benjamin H. Nolt, Jr.
Executive Secretary
State Horse Racing Commission
Room 304 Agriculture Building
2301 N. Cameron Street
Harrisburg, PA 17110-9408

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RE: Proposed change in definition of a PA-bred

Dear Mr. Nolt,

Please reconsider adcption of a proposed change in Section 163.531, definition of a Pennsylvania-bred horse. As my concerns are shared by others, perhaps this regulatory change could undergo more discussion before being acted upon.

I would like to make clear that, although I am a member of the Board of Directors of the Pennsylvania Horse Breeders Association, I am asking for reconsideration independently.

The proposed change was drafted before I became a board member. I have three separate suggestions for changing the language -- but not necessarily the intent -- of this proposal. As it stands, the regulatory change will substantially damage my growing business of Thoroughbred broodmare sales. As a longtime citizen of the Commonwealth and full-time horseman, it is clearly in my best interest to strengthen the PA-bred program so that I and others may reap the ever-increasing benefit of breeders awards. And I am very aware of the need to close loopholes that in the past have permitted out-of-state horse owners to benefit unfairly from a liberal breeders program.

However, instituting a residency rule for horses will greatly harm my sales business, in which I buy (in Florida, Kentucky, and Maryland sales) and resell in-foal mares. My husband and I chose to remain in Pennsylvania specifically because of the existing breeders program. But if it changes, I will no longer be able to sell broodmares soon after foaling at my Bucks County farm -- with a quick sale imperative so that they may be bred back to commercially marketable stallions of the buyers' choice, usually in Kentucky -- and have those foals be "Pennsylvania-breds" with my

Robert and Connie Nesteruk • 4052 Gannet Lane • Doylestown, PA 18901 • (215) 297-8627

Full House Farm

family as breeder. Other Pennsylvania horsemen with small farms and modest facilities (I have 12 stalls) feel as I do, that having to keep mares or foals for X amount of time in order to participate in the program seems unfair.

If the commission deems my suggestions impractical, so be it. But I feel compelled to express my concerns, because I have a stake in the Pennsylvania-bred program.

1. Could you revise the proposal to waive or exempt the residency rule for mares and/or foals for horsemen who reside in -- and pay taxes in -- the state of Pennsylvania? This might sound odd, because most Pennsylvania horsemen keep their horses in the state anyway ... but for those like myself who buy broodmares (such as in the nearby Maryland sales) that may only stay a month or two, an exemption would be most welcome.

2. Failing that, could you reduce the residency period to 30 days, long enough to satisfy the hopes of those who want farm owners to see increased revenues from boarding for out-of-state clients? I believe that 90 days will scare away clients, not encourage them "to participate more fully" based on conversations with boarding farms that even now have trouble wooing and collecting from out-of-state clients.

3. Or, perhaps you could consider changing the 90-day residency from "during the year of foaling" to "during the year of gestation and/or foaling" of a particular foal being registered as a PA-bred. This would permit mares who arrive at a farm (such as mine) in November or December in preparation for foaling early in the year, to be in the program. And this would be no more difficult to "enforce" than a 90-day residency, with bill of lading slips and board and vet bills used as proof of residency time.

Remember, we might not have had Lil E. Tee (Kentucky Derby winner) and Alphabet Soup (Breeders Cup winner) to brag about if residency had been a factor in those horses being PA-breds.

Sincerely,

Connie Nesteruk

Connie Nesteruk

Robert and Connie Nesteruk • 4052 Gannet Lane • Doylestown, PA 18901 • (215) 297-8627

11-28-98

Mr Ben Nolt Jr., Executive Secretary
P.A. State Horse Racing Commission
2301 N. Cameron Street
Harrisburg, P.A. 17101

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Dear Ben,

This letter is written in opposition to the proposed rule change allowing uncoupled entries.

The previous rule was initiated to safe guard the integrity of racing. It prevents one part of an entry from running interference for the other. It protects both horsemen and the public from those who would conspire to alter the outcome of a race.

Coupled entries is a good rule, serves a purpose and should remain in effect. To do otherwise is to encourage wrong doing.

Horse racing has always been a suspect sport, we should do all we can to maintain an image of respectability.

Cordially,
Eugene Kotteeda

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF AGRICULTURE
STATE HORSE RACING COMMISSION

December 1, 1998

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The Independent Regulatory Review Commission
14th Floor
333 Market Street
Harristown II
Harrisburg, Pennsylvania 17120

RE: PROPOSED RULEMAKING
Department of Agriculture
State Horse Racing Commission
58 Pa. Code Chapters 163 & 165
Rules of Racing
I.D. No. 34-63

Dear Sir or Madam:

In accordance with the Regulatory Review Act, which requires comments concerning proposed rulemaking be transmitted to your agency, please find enclosed a letter containing comments regarding the above-referenced subject matter.

Please include these comments in your records for consideration.

Sincerely,

Ben H. Nolt

Ben H. Nolt, Jr.
Executive Secretary

BHN/skf
Enclosures

ROOM 304
2301 NORTH CAMERON ST.
HARRISBURG, PA 17110-9408
717-787-1942
FAX 717-787-2271

D2

10-30-98

Pa. Racing Comm.

I would like to voice my opinion on the new rule in the process of going into effect soon. #1 I think it would possible lead to hidden ownerships to be able to run more horses in same race. #2 I think it would lead to devious acts like what I witnessed at Delaware Park on 10-27-98 in the 2nd race. The leading trainer had an uncoupled entry. One horse looked as if it would be about 1-1 and the other looked like 3-1 and the rest of the field looked like 10-1 or better. With 1 minute to post the 2nd horse went from 8-1 to 5-2. The other horse was 4-5. Out of the gate it appeared like the jockey on the 4-5 grabbed him leaving the gate, and he had gone to the lead his other starts. He was 10 lengths behind and clipped heals. He went 5 wide around the turn and still won. The other part ran second. The trainer told the jockey on the second place horse to put an objection on his own horse that had won the race. It was not upheld. I claimed the winner. When I went to the detention barn. to pick up the horse the grooms said the trainer was very angry because the they

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had bet on the other horse. I don't know that anything this blatent would occur, but I feel as if we are leaving the door open for wrong-doings.

Sincerely
David Geist
10-30-98

547 W. Cedar St. Palmyr, Pa. 17078

P.S. At a time when the public thinks that we are crooks something like this would not help.

Marilyn J. Latsha

NOTARIAL SEAL
MARILYN J. LATSHA, Notary Public
Grantville, Dauphin County
My Commission Expires May 28, 2001

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF AGRICULTURE
LEGAL OFFICE

October 6, 1998

Original: 1982
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Harris

Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17120

RE: PROPOSED RULEMAKING
Department of Agriculture
State Horse Racing Commission
58 Pa. Code Chapters 163 & 165
Rules of Racing
I.D. No. 34-63

Dear Mr. Nyce:

By letters dated September 14, 1998, the chairmen for the House and Senate State Government Committees were advised that the public comment period for the above regulation would expire on November 2, 1998. The actual date the public comment period will expire is **October 26, 1998**. The chairmen were sent notification of this change on this date.

My apologies for any inconvenience this may have caused. If you have any questions, please advise.

Sincerely,

Jorge M. Augusto
Assistant Counsel

JMA:ajm

2301 NORTH CAMERON STREET
HARRISBURG, PA 17110-9408
717-787-8744
FAX 717-787-1270

P. O. Box 196
Pipersville, PA 18947

October 21, 1998

Benjamin H. Holt, Jr.
Executive Secretary State Horse
Racing Commission
Room 304 Agriculture Building
2301 N. Cameron Street
Harrisburg, PA 17110-9408

ORIGINAL: 1982
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Sandusky
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Re: Proposed Change in Definition of a PA-Bred

Dear Mr. Nolt:

Please reconsider adoption of a proposed change in Section 163.531, definition of a Pennsylvania-bred horse. If adopted as it stands, the new definition will substantially damage my business of Thoroughbred foaling and boarding.

I would ask you to instead consider revising the proposal to waive the 90-day residency rule for mares and/or their foals for horsemen who reside- and pay taxes in- the state of Pennsylvania. As a longtime citizen of the Commonwealth and full-time horseman, it is in my best interest to strengthen the Pa-bred program so that I may reap the ever increasing benefit of breeders awards. I am very aware of the need to close loopholes that in the past have permitted out-of-state horse owners to benefit unfairly from a liberal breeders program. However, instituting a residency rule for horses will greatly harm my foaling and boarding business. I will no longer be able to return mares after foaling which is imperative that they may be bred back to commercially marketable stallions of the buyer's choice, usually in Kentucky, and have those foals be Pennsylvania-bred with my family as breeder. As a horseman yourself, you know that breeding season is painfully short, and time does not wait for a broodmare. Ninety days spent "in jail" is more than two-thirds of the breeding season gone.

If the commission deems my suggestion not possible to implement, I ask that you reduce the residency period to 30 days, long enough to satisfy the hopes of those on the Board of Directors that they will see increased revenues from boarding for out-of-state clients, without unduly penalizing horse owners who do not with to breed back to Pennsylvania based stallions. I believe the Board of Directors were seriously misguided in thinking that a three-month period would encourage fuller participation in the program. I believe instead, it will do the very opposite. We would have no Lil E. Tee (Kentucky Derby winner) and Alphabet Soup (Breeders Cup winner) to brag about if residency had been a factor in those horses being PA-bred.

I chose to remain in Pennsylvania because, pure and simple, of the generous breeder's program. Imposing a 90-day residency rule, unfortunately, may force us to look to other states. Again, as a Pennsylvania resident, taxpayer and breeder, I strongly urge you to reconsider the proposal.

Very truly yours,

Shirley A. Lojeski

Alliance
of American Insurers

KEITH T. BATEMAN
Vice President – Policy Development, Workers Compensation/Health
kbateman@allianceai.org

October 2, 1998

Richard A. Himler, Director
Bureau of Workers' Compensation
P.O. Box 15121
Harrisburg, PA 17105-5121

RE: SPECIAL FUNDS ASSESSMENTS

Sir:

Thank you for the opportunity to provide comments about the proposal special funds assessments regulation. The Alliance of American Insurers is a national trade association representing over 260 property/casualty insurers. Our members write over 12 percent of the workers compensation premium in Pennsylvania and a significantly large percentage nationwide.

The Department and the Bureau are to be complemented for their efforts to be responsive to concerns expressed by the public about the proposed regulations. The current version is much improved over earlier proposals.

However, we still are afraid that, as presently worded, the proposed regulation will not achieve the legislative intent of shifting the assessments from insurers to a more direct assessment on insured employers.

The Alliance's concern is that as drafted the language may construed as not protecting Pennsylvania domestic insurers from other states' retaliatory taxes. Other states may interpret section 121.33 (b) (4), which states that the failure of an insurance carrier to receive payment from an insured employer does not limit an insurance carrier's responsibility to collect and remit the total amount calculated under (a) (2), as indicating that the obligation has not truly been shifted to the employer. Thus, the assessment may be viewed as a tax which remains on insurers.

The Alliance would be happy to work with the Department to try to further perfect the regulation so that the legislative intent will be accomplished. Please contact Neil Malady at our Pennsylvania office (717) 761-9101 or me at (630) 724-2107, if you would like to further discuss our comments.

Sincerely,

Keith T Bateman

KTB:nls

cc:Neil Malady

3025 Highland Parkway, Suite 800 • Downers Grove, Illinois 60515-1289
tel: 630.724.2107 • *fax:* 630.724.2190 • www.allianceai.org

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1520
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540

October 5, 1998

Richard A. Himler, Director
Bureau of Workers Compensation
Department of Labor and Industry
P.O. Box 15121
Harrisburg, PA 17105-5121

Re: Proposed Rulemaking - 34 Pa. Code Chapter 121 - Special funds assessments

Dear Mr. Himler:

The Insurance Federation and our national trade counterparts endorse the goals in the Bureau's proposed revisions to Chapter 121. We recommend that the Bureau incorporate the clarficiations in the comments of Pennsylvania Compensation and Coal Mine Compensation Rating Bureaus as better achieving those goals.

As noted in those comments, the Bureaus have worked with insurers (and the Bureau) in developing these clarifications. They are a practical way to achieve the goal of Act 57 of 1997 - switching the funding of the special funds from assessments on insurers to surcharges on employers remitted through insurers - while still ensuring an efficient means of collecting these funds and maintaining an accurate rate structure for the underlying workers compensation coverage.

I thank you and your team for your continued efforts on this. We look forward to working with you in reviewing and, I hope, implementing these clarifications.

Sincerely,

Samuel Marshall

Samuel R. Marshall

c: Robert Nyce, Executive Director
Independent Regulatory Review Commission

Pennsylvania Compensation Rating Bureau
The Widener Building • 6th Floor
One South Penn Square • Philadelphia, PA 19107-3577 • (215) 568-2371 • FAX (215) 564-4328

October 2, 1998

VIA HAND DELIVERY

Mr. Richard E. Himler
Director
Bureau of Workers' Compensation
P. O. Box 15121
Harrisburg, PA 17105-5121

RE: Proposed Rulemaking - Department of Labor and Industry
34 Pa. Code Ch. 121 - Special Funds Assessments

Dear Director Himler:

This letter and the narrative which accompanies it are written in response to the above referenced subject, as published in the Pennsylvania Bulletin, Volume 28, Number 36 on September 5, 1998.

As you know, the Pennsylvania Compensation Rating Bureau (PCRB) and the Coal Mine Compensation Rating Bureau of Pennsylvania (CMCRB) are the licensed rating organizations for workers compensation insurance in Pennsylvania. The PCRB serves as the licensed rating organization for workers compensation insurance other than coal mine exposures in the Commonwealth, while the CMCRB serves in that same capacity for workers compensation insurance pertaining to coal mine exposures in the Commonwealth. Recognizing the commonality of the functions and interests of our organizations as respects this matter, we have prepared and are submitting our comments jointly herein in lieu of presenting separate and substantially duplicative documents.

Please feel free to contact either or both of the undersigned in the event you have any questions in this matter or if we may be of any assistance to you or other Bureau of Workers' Compensation staff in the ongoing process of implementing final rules pertaining to Special Funds Assessments.

Sincerely,

Timothy L. Wisecarver
President
PCRB
The Widener Building - 6th Floor
One South Penn Square
Philadelphia, PA 19107-3577
(215) 568-2371
Facsimile: (215) 564-4328

Dale W. Broadwater
Executive Director
CMCRB
Commerce Building - Suite 403
300 North Second Street
Harrisburg, PA 17101
(717) 238-5020
Facsimile (717) 238-5020

TLW:DEB/kg
Enclosure

Pennsylvania Compensation Rating Bureau (PCRB)

Coal Mine Compensation Rating Bureau of Pennsylvania (CMCRB)

Comments on Proposed Rulemaking by Department of Labor and Industry

Title 34, Part VIII, Chapter 121

Pennsylvania Bulletin, Vol. 28, No. 36, September 5, 1998

The PCRB and CMCRB respectfully offer the following comments regarding the proposed rulemaking published by the Department of Labor and Industry (Department) as referenced above.

Overview

PCRB and CMCRB were afforded the opportunity to review and discuss predecessor drafts of the proposed rule during its development by the Department and appreciate the Department's accessibility and objectivity at various points during that process. Further, PCRB and CMCRB understand that the Department must necessarily balance various potentially conflicting and complex considerations (i.e., accuracy, equity and practicality in the context of full compliance with statutory language) in proposing this rule.

Throughout the consideration of the matters addressed in these comments we have enjoyed the benefit of exchanges of ideas and information with the Insurance Federation of Pennsylvania (IFP). While PCRB and CMCRB present the following comments in the expectation that they may be useful to the Department as it proceeds toward adoption of final rules and while we accept responsibility for any errors, omissions or related issues arising from our comments, PCRB and CMCRB would note and acknowledge that the original suggestions and comments regarding some of the matters addressed herein resulted from the thoughts and efforts of IFP staff and members, for which we are grateful.

In general terms the PCRB and CMCRB believe that the proposed rulemaking provides a potentially equitable and practical basis for the implementation of provisions of H.B. 1027 or Act 57 of 1997. In recognition of the provisions of that legislation the PCRB and CMCRB have each previously made filings with the Insurance Commissioner, which were approved effective July 1, 1998, as interim means of implementing the Special Fund assessments on employers under the law. Those filings are expected to remain in effect until successor filings recognizing the final form of rules adopted by the Department of Labor and Industry are prepared by the rating organizations and submitted to and approved by the Insurance Commissioner, thus maintaining compliance with the law and pertinent administrative rules on an ongoing basis.

While taking no material conceptual issue with the proposed rulemaking, PCRB and CMCRB are of the opinion that in some key respects additional clarification of procedures specified therein could be beneficial to the several parties to the ultimate implementation and ongoing administration of this rule. Toward that objective the following comments and suggestions are made.

Points of Clarification

121.1 (b) Definitions. "Earned premium"

The proposed rule defines "earned premium" as follows:

> A "direct premium earned" as required to be reported to the Insurance Department on Special Schedule "W." Under section 655 of the Insurance Company Law of 1921 (40 P.S. § 815).

Data reported on the Special Schedule "W" in Pennsylvania can be used to derive a variety of direct premium earned amounts. The proposed rulemaking appears to be permissive as to the precise component(s) from Special Schedule "W" which are to be considered as "direct premium earned." Ideally, the direct premium earned used to allocate payment of the special funds addressed in the proposed rulemaking should be direct premium earned by insuring exposures which could produce or require expenditures from those same funds. This consideration would suggest that the following features of the "direct premium earned" should be used for such allocation purposes:

"Direct premium earned" should include:

(a) Premiums earned insuring benefits under the Pennsylvania Workers Compensation Act including coal mine exposures.

(b) Effects of premium adjustments produced by retrospective rating plans. Such adjustments reflect, within limits, either more favorable or more adverse loss experience than that supported by the guaranteed cost rates in effect in the Pennsylvania market. Such demonstrated superiority or inferiority would likely also be reflected in levels of required adjudicatory intervention from the Bureau of Workers Compensation, Department of Labor and Industry, and in potential obligations to be paid from the Subsequent Injury Fund and Supersedeas Fund respectively.

(c) Effects of premium adjustments produced by premium discount plans. Such adjustments reflect the decline of expense needs as a percentage of premium as policy size increases. As the potential needs for adjudication of claims by the Bureau of Workers Compensation, Department of Labor and Industry, and potential obligations to be paid from the Subsequent Injury Fund and Supersedeas Fund respectively are functions of

loss experience rather than expense costs, this adjustment would serve to make the allocation basis more consistent with the potential special fund obligations arising from the policies in question.

(d) Effects of premium adjustments produced by deviation and loss cost multiplier adjustments, premium credits for the Pennsylvania Certified Safety Committee Program, and premium adjustments arising from schedule rating plans and the Merit Rating Plan. While these programs collectively reflect prospective expectations about loss experience rather than demonstrated past experience as is the case for retrospective rating plans, the rationale for including effects of these programs in the allocation base for the special funds is otherwise similar to that articulated above for retrospective rating plans.

"Direct premium earned" should exclude:

(a) Effects of premium credits granted under deductible elections by insured employers. Claims incurred under various deductible provisions are not inherently less likely to require adjudicatory intervention from the Bureau of Workers Compensation, Department of Labor and Industry, than are claims incurred under standard, first-dollar coverage. Further, provisions of the Subsequent Injury Fund and Supersedeas Fund are equally applicable to claims incurred under deductible coverages and standard, first-dollar coverage.

(b) Premiums attributable to coverage under various federal benefit programs including the Federal Employers' Liability Act (FELA), the Jones Act, black lung, the United States Longshore and Harborworkers' Act (USL&HW, also known as "F class" business) and National Defense Projects . Claims incurred under these Acts are not adjudicated by the Bureau of Workers' Compensation, Department of Labor and Industry, and no payments from either the Subsequent Injury Fund or the Supersedeas Fund are made for such claims in Pennsylvania.

(c) Premiums attributable to excess policies written for specified retentions on otherwise self-insured employers in Pennsylvania. Because self-insurers will report total claim payments, including payments recoverable under such excess policies, and will pay assessments for the special funds accordingly, including premiums for these coverages would effectively double-count them in the allocation of assessments under the proposed rulemaking.

In terms of premium data, as reported on Part A of Special Schedule "W" in Pennsylvania, the above considerations would suggest that the most appropriate basis for allocation of special fund assessments between commercial insurers would be derived as follows:

Combining Part(s) A1, A2 and A-3, add Line 5 plus Line 8A plus Line 8B.

This approach is as consistent as possible with the inclusions and exclusions noted above. It should be noted that the adjustments for deductible coverages presented on Lines 8A and 8B are stated on Schedule W at the "designated statistical reporting level" and, thus, would technically be somewhat inconsistent with the basis for Line 5 which is at actual carrier level(s). This inconsistency is much less significant than would be the omission of deductible credits from the allocation basis entirely, the only other option supportable by Special Schedule "W" in its present form. If Special Schedule "W" were amended at some future time to include reporting of premium adjustments for deductible coverages on an actual carrier rate level, the inconsistency observed herein could be eliminated.

The PCRB and CMCRB would note that Special Schedule "W" is no longer filed by individual insurance company in Pennsylvania. As an accommodation to carriers, the Insurance Department presently allows group reporting for Special Schedule "W" and also allows reporting for combinations of companies within a group where the combination(s) represent something less than the entire group with which the companies in question are affiliated. The PCRB and CMCRB do not perceive these reporting procedures to preclude the assessment procedures outlined in the proposed rulemaking. However, these reporting procedures will require some effort in clearly defining, communicating and accounting for which company or companies a given premium figure applies to and how the assessment(s) generated thereby is/are to be paid and credited.

In some instances direct premium earned reported on Special Schedule "W" will be negative. This would generally be limited to unusual circumstances arising for relatively small carriers. However, the arithmetic consequence of retaining such negative numbers in the special funds assessment allocation would be that any carrier(s) having negative direct premium earned would receive refunds from the special funds in the following year. Under such a procedure, the aggregate amount of such refunds would be recovered from the majority of carriers having positive direct premium earned, and the correct total assessment would be realized.

The PCRB and CMCRB recognize that the issuance of refunds might be seen by the Department as being problematic. Employers insured by a given carrier might take particular issue if they found that concurrent with their remittance of special fund assessments to that carrier the insurer was also receiving a net refund from the special funds administered by the Department.

An alternative approach would be to require that all direct premium earned used in the assessment allocation be non-negative values. Under this method negative direct premium earned values would be revised to zeroes, the total direct premium earned would be recalculated accordingly, and the same (correct) total assessment would be realized without producing any refunds or increasing assessments for carriers actually reporting positive earned premiums to balance such refunds. While the PCRB and CMCRB have no compelling interest in the Department's ultimate determination in this regard, we would note that, for purposes of the annual adjustment of assessment performed to allocate PCRB and CMCRB expenses among our respective members, the latter system described above has been used for many years.

Special Funds Assessment Target

The PCRB and CMCRB note that for the Subsequent Injury Fund (121.22 (a) (2) (i)) assessments are to be proportional shares of the amounts of payments actually made in the previous year. For the Supersedeas Fund (121.23 (a) (1)) assessments are to be proportional shares of the amounts of payments actually made or accrued as payable in the previous year. In contrast, for the Administration Fund (121.31 (a)) self-insurers are to be assessed proportional shares of the amount of the current fiscal year budget. The PCRB and CMCRB are not clear whether these differences arise from statutory requirements outside the proposed rulemaking or if the Subsequent Injury Fund and the Supersedeas Fund do not have prospective budgets established or if some other consideration(s) apply. Logically, it would seem appropriate for concurrent assessments supporting all of the special funds to be premised on the same types of information and for consistent periods of time if at all possible.

121.22 Subsequent Injury Fund. (b)

The PCRB and CMCRB believe that it would be very impractical (and might in at least some cases actually be impossible) for an insurance carrier to actually collect from its insured employers the precise amount of the assessment specified in this paragraph.

Achieving this precise balance is impractical because, in order to accomplish this in the simplest case, two things would have to happen. First, each insurer would potentially have a different assessment rate for the special funds. Second, no insurer could determine its assessment rate until after all policies having exposure in a given calendar year had expired and been subject to final audit. In a real world scenario the precise balance implied in this paragraph would often be difficult for a carrier to achieve because most policies have some exposure in each of two successive calendar years. Once an assessment rate appropriate for a given calendar year is determined, the assessment for that portion of the insurer's policies extending into the following year is preordained. Depending on the relative amounts of exposure for these continuing policies and any new or renewal policies written in that subsequent year, balancing to a new assessment target for that later year could require large variations in assessments for a given carrier from year to year and could conceivably result in such anomalies as negative assessment rates.

In some instances (such as for a carrier not writing new or renewal business in a given year) one assessment rate would almost certainly be incorrect for either the last year in which writings were undertaken or for the ensuing "run-off" year.

The PCRB and CMCRB would suggest revising the language of 121.22 (b) and (c) to read as follows:

> 121.22 (b) [Each insurer will be assessed an amount determined by the formula, except that in the first year assessments will be made at a rate of 200%. Reassessments will be made annually for the continued maintenance of this fund.] Insured employers shall remit assessment amounts through their insurance carriers according to procedures

defined by the approved rating organization and approved by the Insurance Commissioner. On behalf of insured employers, each insurer will remit an amount determined by the formula set forth in subsection (c) of this Section.

(c) Insurance carriers shall remit to the Department on behalf of insured employers assessment amounts determined as follows:

$$\frac{\text{Amount of Earned Premium as Reported to the Insurance Department by an Insurance Carrier for the Preceding Calendar Year}}{\text{Total Amount of Earned Premium Reported by All Insurance Carriers for the Preceding Calendar Year}} \times \text{Aggregate Amount to be Collected by Insurance Carriers}$$

121.23 The Supersedeas Fund. (a) (3).

The same observations and suggestion advanced above with regard to 121.22 also apply to this section.

121.31 Workmen's Compensation Administration Fund.

The same observations and suggestion advanced above with regard to 121.22 and 121.23 also apply to this section.

121.34 Objections to Assessments.

The only parties to which a "Notice of Assessment Amount to be Collected" will be sent are self-insurers and insurance carriers. Appeals against those notices are to be presented to the Department in specified form.

Although the proposed rulemaking states that an insurer's objecting to an assessment does not relieve its obligation to promptly pay such assessment (see 121.34 (a)), the proposed rule-making also requires payment of the assessment determined by the Department to be appropriate after consideration of the appeal within ten days. This seems redundant, and the PCRB and CMCRB would speculate that what is intended is that any adjustment to the original assessment warranted based upon the Department's findings would be promptly transacted between the insurer and the Department.

Employers aggrieved by their own assessment are allowed and required by the proposed rulemaking to present an appeal of that assessment to the licensed rating organization in accordance with procedures governing all appeals of the rating system in Pennsylvania. In accordance with those prevailing procedures the first appeal would be taken to the rating

organization, and, if the employer remained dissatisfied with the rating organization's decision, a further appeal could be taken to the Insurance Commissioner.

In the event that an employer's special fund assessment is revised by the rating organization, the Insurance Commissioner or the courts, PCRB and CMCRB would note that a likely result of such revision(s) would be that the rating organization's procedures on file with the Insurance Department would be amended to either clarify or correct, as the case may be, the aspect(s) of those procedures found to have precipitated the revision in employer assessment and/or to revise parameters of those procedures so that overall employer assessments remained in balance with insurer remittances.

Timing of Calculation and Collection of Special Fund Assessments

The PCRB and CMCRB would note that the proposed rulemaking does not specify when calculations of special fund assessments will be performed or when the assessments thus generated will be collected. From the standpoint of rating organizations it would be very helpful if the former could be accomplished well in advance of the latter. We anticipate that rating organization filings with the Insurance Department will need to be amended periodically to reflect ongoing changes in assessment amounts and prevailing premium levels in Pennsylvania. If changes in assessments are derived and distributed by the Department without significant lag time between those events, rating organizations will be unable to prepare, submit, secure approval for and disseminate information about filings to maintain consistent and reasonable assessment procedures for employers, as is their responsibility under the proposed rulemaking, in a timely manner and in a fashion to allow reasonable implementation time for insurers responsible for collecting and remitting employer assessments.

Conclusion

The PCRB and CMCRB appreciate the opportunity to present these comments for consideration by the Department and would be pleased to provide any further discussion or explanation thereof upon request of the Department.

INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
333 MARKET STREET
14TH FLOOR
HARRISBURG, PA 17101

(717) 783-5417
Fax (717) 783-2664

November 5, 1998

Honorable Johnny J. Butler, Secretary
Department of Labor & Industry
1700 Labor and Industry Building
Harrisburg, PA 17120

Re: IRRC Regulation #12-53 (#1978)
Department of Labor & Industry
Special Funds Assessments

Dear Secretary Butler:

Enclosed are our Comments on your proposed regulation #12-53. They are also available on our website at http://www.irrc.state.pa.us.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact Fiona Wilmarth at 783-5438.

Sincerely,

Robert E. Nyce
Executive Director

REN:kcg
Enclosure
cc: Richard A. Himler
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF LABOR AND INDUSTRY REGULATION NO. 12-53

SPECIAL FUNDS ASSESSMENTS

NOVEMBER 5, 1998

We have reviewed this proposed regulation from the Department of Labor and Industry (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to the clarity of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 121.1(b) Definitions. – Clarity.

The proposed definition of "earned premium" refers to the direct premium earned as reported on Special Schedule W. In their comments, the Pennsylvania Compensation Rating Bureau and the Coal Mine Compensation Rating Bureau note that not all the premium information reported on Special Schedule W is relevant for calculating the earned premium. The commentators list the data from Special Schedule W which should be included and excluded from the calculation.

The definition of "earned premium" should identify the specific items from Special Schedule W that are to be used to determine the earned premium. We suggest the Department clarify this definition in the final-form regulation.

2. Section 121.22. Subsequent injury fund. – Clarity.

Section 121.22(a)(2)(ii) – Calculation of the assessments.

Section 121.22(a)(2)(ii) references the assessments as "accumulated" in Paragraph (a)(2)(i). Paragraph (a)(2)(i) contains the formula for calculating the assessments. Similar language is also found in Sections121.23(a)(2) and 121.31(b). We suggest the Department replace "accumulated" with "calculated" in these sections.

Section 121.22(d) – Payments from self-insurers and runoff self-insurers.

Section 121.22(d) states the following:

> Self-insured employers and runoff self-insurers shall be directly responsible to the Department for payment of assessments.

This language is also contained in Sections 121.23(c) and 121.31(e). It appears the intent of this provision is to require self-insured employers and runoff self-insurers to pay their assessments directly to the Department. To improve the clarity of this provision, we suggest the Department revise Sections 121.22(d), 121.23(c) and 121.31(e) to simply state that these parties shall pay their assessments directly to the Department.

3. Section 121.23. The supersedeas fund. – Clarity.

Section 121.23(d) states that "Applications will be processed administratively." It is unclear if this provision applies to all applications or only to uncontested applications. We suggest the Department clarify this provision in the final-form regulation.

4. Section 121.34. Objections to assessments. – Clarity.

Paragraph (a) contains the following language:

> ...Objection to assessment does not relieve an insurer of its obligation to promptly remit assessment amounts...

This language could be interpreted to mean that if an employer objects to an assessment amount, the insurance company is still required to submit the assessment pending resolution of the employer's objection. It is our understanding that this is not the Department's intent. When an employer objects to an assessment, the Department will hold a hearing and report its findings on the objection. If the findings indicate an amount is owed by the employer, the employer has ten days to pay the assessment. We suggest the Department revise Paragraph (a) to clarify that when a party objects to an assessment, payment is deferred until after a hearing and issuance of findings on the objection.

INDEPENDENT REGULATORY REVIEW COMMISSION

To: Sheila Born
Agency: Department of Labor & Industry
Phone (717) 787-5087
Fax: (717) 783-5225

From: Kristine M. Shomper
Deputy Director for Administration
Company: Independent Regulatory Review Commission
Phone: (717) 783-5419 or (717) 783-5417
Fax: (717) 783-2664

Date: November 5, 1998
# of Pages: 4

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Labor & Industry's regulation #12-53. Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Chris Comisac **Date:** 11/6/98 9:21 AM

M E M O R A N D U M

To: Chris Latta
Senate Labor and Industry Committee

Hugh Baird
Senate Labor and Industry Committee

Bruce Hanson
House Labor Relations Committee

Wesley Johnson, Jr.
House Labor Relations Committee

From: Fiona E. Wilmarth, Regulatory Analyst FEW
Independent Regulatory Review Commission

Date: November 6, 1998

Subject: Commission's Comments
Department of Labor and Industry
Regulation # 12-53 (IRRC #1978)
Special Funds Assessments

On Thursday, November 5, 1998, the Commission submitted its Comments to the Department of Labor and Industry on the above-referenced proposed regulation. If you have any questions, please contact me at 783-5438. Thank you for your time and consideration.

ATTACHMENT

PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

April 8, 1999

Honorable Johnny J. Butler, Secretary
Department of Labor & Industry
1700 Labor and Industry Building
Harrisburg, PA 17120

Re: IRRC Regulation #12-53 (#1978)
Department of Labor & Industry
Special Funds Assessments

Dear Secretary Butler:

The Independent Regulatory Review Commission approved the subject regulation at its April 8, 1999 public meeting. Our Order is enclosed and is available on our website at http://www.irrc.state.pa.us.

We appreciate the joint effort that went into producing a regulation that met the criteria and intent of the Regulatory Review Act.

Sincerely,

Alvin C. Bush
Vice Chairman

ACB:kcg
Enclosure
cc: Richard A. Himler

INDEPENDENT REGULATORY REVIEW COMMISSION

14th Floor, 333 Market Street
Harrisburg, PA 17101

Commissioners Present:

Public Meeting Held April 8, 1999

John R. McGinley, Jr., Chairman
Alvin C. Bush, Vice Chairman
Arthur Coccodrilli
Robert J. Harbison, III
John F. Mizner

Department of Labor and Industry
Special Funds Assessments

Regulation No. 12-53

BY ORDER OF THE COMMISSION

On August 26, 1998, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Department of Labor and Industry (Department). This rulemaking amends 34 Pa. Code Chapter 121. The authority for this regulation is found in Section 2218 of Act 57 of 1997 (71 P.S. § 578) and Sections 401.1 and 435 of the Workers' Compensation Act (71 P.S. §§ 710 and 991). The proposed regulation was published in the September 5, 1998 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on March 16, 1999.

In accordance with Act 57, the Department is revising Chapter 121 to clarify that the imposition, collection and remittance of assessments for certain funds shall be done "through insurers" rather than "imposed on" insurers. The revisions affect the Subsequent Injury Fund; the Workmen's Compensation Supersedeas Fund; and the Workmen's Compensation Administration Fund. The regulation also clarifies the formula for calculating the assessment for the Office of Small Business Advocate and the procedures for the operation of the Special Funds.

We have reviewed this regulation and find it to be in the public interest. The revisions bring the Department's regulations into compliance with Act 57.

THEREFORE, IT IS ORDERED THAT:

1. Regulation No. 12-53 from the Department of Labor and Industry, as submitted to the Commission on March 16, 1999, is approved; and

2. The Commission will transmit a copy of this Order to the Legislative Reference Bureau.

Alvin C. Bush, Vice Chairman

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1520
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540

April 5, 1999

Richard A. Himler, Director
Bureau of Worker's Compensation
Department of Labor and Industry
1171 South Cameron Street
Harrisburg, PA 17104

ORIGINAL: 1978
MCGINELY
COPIES: Coccodrilli
Wilmarth
Sandusky
Legal

Re: Final-Form Rulemaking - Workers' Compensation Special Fund Assessments

Dear Mr. Himler:

This is to support the final-form regulation submitted by the Department of Labor and Industry implementing Act 57 of 1997, whereby the assessments for the three special workers compensation funds were changed from being on insurers, to being collected through insurers on behalf of employers.

Our support is made on behalf of not only the Insurance Federation, but also our national counterparts, the American Insurance Association, the Alliance of American Insurers and the National Association of Independent Insurers.

We support the regulation as being the most efficient and practical means of implementing Act 57. The Department has addressed the concerns raised with respect to its original proposal by the rating bureaus and the trade associations; the resulting changes will enable these assessments to be collected with minimal administrative cost and in amounts that best reflect the true cost to employers.

We understand that several insurers have belatedly filed objections to the final-form regulation. They contend that the Department has gone beyond its statutory authority by basing assessments on an earned premium rather than a compensation-paid system.

I am not sure why these objections were not raised earlier in the IRRC's review. Notably, the insurers complaining of the regulation and the change in the assessment formula knew of all this when the regulation was proposed (or at least knew of it when they filed their administrative actions complaining about the change), so they cannot claim surprise.

In any event, the objections to the change in the assessment formula obscure several points.

First, these should be objections of employers, not insurers. As the complaining insurers note, these assessments will be paid by employers, not insurers - regardless of the formula. While these insurers have noted that it is employers who will pay these assessments, however, they have never contended that they are raising these objections on behalf of any employer-policyholder - either here or in their administrative challenges.

Second, the complaining insurers argue that the Department has no authority to make any change in the formula used to collect these assessments. They suggest that these assessments were always imposed on employers, with Act 57 being only a change of semantics to avoid retaliatory taxes from other states on insurers domiciled in Pennsylvania. Granted, any cost on an insurer is ultimately borne by its policyholders. But Act 57 was more than a semantic change: It switched the assessments from being on insurers to being on employers through insurers.

As such, the Department has not only the authority, but the responsibility, to develop a formula to best reflect this switch. The earned premium formula does this. It is more timely for employers than the compensation-paid method: It reflects employers' costs from the previous year, whereas the compensation-paid formula goes back several years.

The complaining insurers suggest that other formulas could better reflect the switch (although they contend the Department could not implement those formulas, either). Perhaps - although probably not with the same efficiency as the formula proposed by the Department in this regulation.

The complaining insurers also argue that the regulation should not be given retroactive effect. Act 57, however, took effect on July 1, 1998, and all other insurers have been paying the assessments for the special funds consistent with the formula in this regulation. The retroactivity in this regulation simply matches what has already happened; without it, the special funds might not get any assessments - hardly the General Assembly's purpose in enacting Act 57.

Thank you for the opportunity to comment on this regulation. We hope the IRRC approves it on April 8.

Sincerely,

Samuel Marshall

Samuel R. Marshall

c: Robert E. Nyce, Executive Director
Fiona E. Wilmarth, Regulatory Analyst
Independent Regulatory Review Commission

FAX

INSURANCE FEDERATION OF PA
1600 MARKET STREET
SUITE 1520
PHILADELPHIA, PA 19103

Date _____

Number of pages including cover sheet ____

To:
Fiona Wilmerth

From:
Jen Warfield

Phone _____
Fax Phone _____
CC: _____

Phone 215-665-0500
Fax Phone 215-665-0540

REMARKS:

☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

RECEIVED
99 APR -5 PM 5:00
INDEPENDENT REGULATORY REVIEW COMMISSION

LAW OFFICES OF

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World Wide Web: http://www.saul.com

INTERNET EMAIL
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March 30, 1999

VIA FAX
Honorable Joseph M. Gladeck, Jr., Chairman
House Committee on Labor Relations
41 - A Capitol East Wing
Harrisburg, PA 17120

ORIGINAL; 1978
MCGINLEY
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Wilmarth
Sandusky
Legal

ATTENTION: Bruce Hanson

RE: IRRC Regulation # 1978
Department of Labor & Industry
Bureau of Workers' Compensation
Special Funds Assessments

Dear Representative Gladeck:

We represent several Workers' Compensation insurers in Pennsylvania on whose behalf we have filed objections to the 1998 assessments for the support of the Workers' Compensation Administration Fund. Our clients are: AmGuard Insurance Company, EastGuard Insurance Company, NorGuard Insurance Company (all members of the Guard Insurance Group based in Wilkes-Barre); Old Guard Insurance Company (based in Lancaster, PA); and Rockwood Casualty Insurance Company (based in Rockwood, PA). Each of these insurers received assessments in the fall of 1998 which were significantly higher than they had anticipated. The reason for the unexpected increases in assessments was that the Bureau of Workers' Compensation ("Bureau") had changed the methodology for calculating each company's assessment from a calculation based upon the amount of their compensation payments to one based upon earned premium.

The formula used by the Bureau in 1998 was the same formula contained in the "Final Form Regulations" now before your committee and the Independent Regulatory Review Commission ("IRRC") for approval. Unfortunately, the Bureau did not feel it was necessary to obtain the approval of IRRC or the standing committees of the General Assembly before implementing its new formula. As discussed below, however, the lack of proper regulatory approvals is not the only legal flaw in the Bureau's new assessment system.

In its Regulatory Analysis Form accompanying the final form regulation, the Bureau indicates that it has proposed this regulation in order to "clarify" Act 57 of 1997. Section 2218 of Act 57 provides as follows:

> Effective July 1, 1998, the assessments for the maintenance of the Subsequent Injury Fund, the Workmen's Compensation Supersedeas Fund and Workmen's Compensation Administration Fund under sections 306.2, 443 and 446 of the act of June 2, 1915 (P.L. 736, No. 338), known as the "Workers' Compensation Act", shall no longer be imposed on insurers but shall be imposed, collected and remitted through insurers in accordance with regulations promulgated by the Department of Labor and Industry.

Section 446 of the Workers' Compensation Act, referred to in the above provision of Act 57, directs the Department of Labor and Industry ("L&I") to "make assessments and collect moneys based on the ratio that such insurer's or self-insurer's payments of compensation bear to the total compensation paid in the preceding calendar year in which the assessment is made". Nothing in Act 57 indicates an intention on the part of the General Assembly to change the basis for calculation of the assessments required by Section 446. Act 57 merely provided that the assessments would no longer be imposed *on* insurers and it authorized L&I to develop by regulation a process for imposing, collecting and remitting assessments *through* insurers.

While Act 57 did not specify on whom the assessments would be imposed if not on insurers, the fact is that workers' compensation insurers have only one source for those payments, i.e, the employers who pay workers' compensation premiums. Of course, these are the same people who eventually paid the assessments prior to Act 57. The cost of assessments needed to pay for running the workers' compensation system have always been passed through to employers in the form of higher premiums. Act 57 attempted to clarify the pass-through characteristic of the assessments for the benefit of the insurance industry so they would not be subject to retaliatory taxes in other states. No change in law or regulation was needed in order to *accomplish* the pass-through, because it was already happening in fact.

Act 57 did not repeal Section 446 of the Workers' Compensation Act. In fact, Act 57 refers specifically to the assessment for the "Workers' Compensation Administration Fund under section[s] ... 446" of the Workers' Compensation Act. Section 446 requires that the assessment be calculated on the basis of compensation paid in the prior year. Once that figure has been calculated by the Bureau, Act 57 requires that the Bureau *impose* the assessment on employers, that insurers *collect* the assessment from employers and that employers *remit* the assessment through insurers to the Bureau.

It is important to keep in mind that, regardless of whether the assessment is calculated on the "compensation paid" basis or on the "earned premium" basis called for in the proposed regulation, the amount imposed on an individual employer bears no relationship to his own loss

experience. Even under the Bureau's proposed regulation, the assessment would be based upon each insurer's proportionate share of total earned premium in the prior year. An individual employer may not have been insured by the same carrier in the year before the assessment is imposed, so his assessment will depend upon how much earned premium was paid to his new carrier by other employers, not on the amount he paid to his former insurer. Therefore, it cannot be said in support of the Bureau's proposed change that the new assessment base is necessary in order to begin imposing assessments on employers. The fact is that, even under the new system, the assessment base is still an insurer base, not an employer base.

If the Bureau really wanted to impose the assessment directly on employers, it would base the assessment on the number of employees covered by workers' compensation and each employer would pay a flat rate per employee. Unfortunately, the Workers' Compensation Act does not permit that kind of change in the assessment base, any more than it permits the change proposed by the Bureau from a compensation-paid system to an earned premium system.

It is clear, therefore, that the proposed final form regulation should be rejected by IRRC and the standing committees because it is beyond the statutory authority of the Department of Labor & Industry and does not conform to the intention of the General Assembly in the enactment of the statute upon which the regulation was based. 71 P.S. §745.5a(h). An administrative agency has no authority to amend a statutory mandate by regulatory action. Section 446 requires that assessments be based upon compensation paid in the prior year. Section 446 does not authorize the calculation of assessments on the basis of earned premiums. It is that simple.

The proposed regulation also does not conform with the intention of the General Assembly because it does not do the one thing that Act 57 asked the Department to do, to spell out how the assessment would be imposed, collected and remitted. About the only thing the regulation has to say on that subject is that L&I is delegating that responsibility to the insurance industry. The proposed regulation would amend various sections of Title 34 of the Pennsylvania Code to require employers to comply with "procedures defined by the approved rating organization", which are the two rating bureaus which all workers' compensation insurers are required to participate in as members. 34 Pa. Code §§121.22(d); 121.23(c); 121.31(e) (proposed). However, Act 57 did not give the rating bureaus any authority to decide how employers shall remit their assessments. The General Assembly delegated that responsibility to L&I.

Even if your committee should determine that the proposed regulation does conform with the statutory mandate, we must object to the attempt by L&I to make the regulation retroactive so that it would apply to all assessments made on or after July 1, 1998. If Act 57 did nothing else, it clearly required L&I to adopt regulations before implementing any change in the manner in which assessments would be imposed, collected and remitted. Unfortunately, L&I did not do that. Instead, they issued assessments in the fall of 1998 using exactly the same system of calculation for which they are now seeking regulatory approval. Several insurers who received

those assessments have filed formal objections because the new system substantially increased their assessments above what they would have been using the compensation-paid formula and because those companies did not believe they had the right to recoup the increased assessments from their insureds. Those appeals have been consolidated for an administrative hearing which is expected to occur in the summer of this year.

The Bureau is now attempting to render those appeals moot by obtaining retroactive authority to do something that was not authorized when they did it. For the reasons discussed above, we believe that the entire regulation should be rejected on the grounds that it is beyond the statutory authority of the agency and does not conform with the legislative intent. At the very least, the House Committee on Labor Relations should disapprove the retroactivity provision in the regulation, thereby preserving the appeal rights of our insurance company clients.

Thank you for your consideration of these comments. If you have any questions about our position, please let me know.

Sincerely,

Patrick T. Beaty

cc: Honorable Robert E. Belfanti, Jr.
Thomas J. Kuzma, Esq.

FACSIMILE COVER SHEET

SAUL EWING

SAUL, EWING, REMICK & SAUL LLP
Penn National Insurance Tower
2 North Second Street, 7th Floor
Harrisburg, PA 17101

From: PATRICK T. BEATY
Pages (including cover): 5
Client/Matter #: 12109/70058

Date: March 30, 1999
Direct Phone: (717) 238-7672
Direct Fax: (717) 257-7580

To: Name	Fax Number	Phone Number
Bruce Hanson	705-1860	
Thomas Kuzma	783-4469	
Wes Johnson	787-5763	

CC: Name	Fax Number	Phone Number

Comments: See attached.

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

DATE: 31 MAR 99

SENDING TO:

Telecopy Number: 783-2664

Department/Company: IRRC

Name: ATTN: FIONA WILMARTH

Number Of Pages Including Cover Sheet: 6

Message: FYI, LTR FROM PATRICK BEATTY.

SENT FROM:

Name: BARB HANKEN

Department: HOUSE L/R COMMITTEE

Telecopy Number:

LAW OFFICES OF

SAUL, EWING, REMICK & SAUL LLP

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March 30, 1999

VIA FAX
Honorable Joseph M. Gladeck, Jr., Chairman
House Committee on Labor Relations
41 - A Capitol East Wing
Harrisburg, PA 17120

ATTENTION: Bruce Hanson

RE: IRRC Regulation # 1978
Department of Labor & Industry
Bureau of Workers' Compensation
Special Funds Assessments

Dear Representative Gladeck:

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The formula used by the Bureau in 1998 was the same formula contained in the "Final Form Regulations" now before your committee and the Independent Regulatory Review Commission ("IRRC") for approval. Unfortunately, the Bureau did not feel it was necessary to obtain the approval of IRRC or the standing committees of the General Assembly before implementing its new formula. As discussed below, however, the lack of proper regulatory approvals is not the only legal flaw in the Bureau's new assessment system.

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It is clear, therefore, that the proposed final form regulation should be rejected by IRRC and the standing committees because it is beyond the statutory authority of the Department of Labor & Industry and does not conform to the intention of the General Assembly in the enactment of the statute upon which the regulation was based. 71 P.S. §745.5a(h). An administrative agency has no authority to amend a statutory mandate by regulatory action. Section 446 requires that assessments be based upon compensation paid in the prior year. Section 446 does not authorize the calculation of assessments on the basis of earned premiums. It is that simple.

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Even if your committee should determine that the proposed regulation does conform with the statutory mandate, we must object to the attempt by L&I to make the regulation retroactive so that it would apply to all assessments made on or after July 1, 1998. If Act 57 did nothing else, it clearly required L&I to adopt regulations before implementing any change in the manner in which assessments would be imposed, collected and remitted. Unfortunately, L&I did not do that. Instead, they issued assessments in the fall of 1998 using exactly the same system of calculation for which they are now seeking regulatory approval. Several insurers who received

those assessments have filed formal objections because the new system substantially increased their assessments above what they would have been using the compensation-paid formula and because those companies did not believe they had the right to recoup the increased assessments from their insureds. Those appeals have been consolidated for an administrative hearing which is expected to occur in the summer of this year.

The Bureau is now attempting to render those appeals moot by obtaining retroactive authority to do something that was not authorized when they did it. For the reasons discussed above, we believe that the entire regulation should be rejected on the grounds that it is beyond the statutory authority of the agency and does not conform with the legislative intent. At the very least, the House Committee on Labor Relations should disapprove the retroactivity provision in the regulation, thereby preserving the appeal rights of our insurance company clients.

Thank you for your consideration of these comments. If you have any questions about our position, please let me know.

Sincerely,

Patrick T. Beaty

cc: Honorable Robert E. Belfanti, Jr.
Thomas J. Kuzma, Esq.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 South Cameron Street, Room 103
Harrisburg, PA 17104-2501
(717) 783-4467
April 6, 1999

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Legal
Rec'd as fax on 4/5/99

VIA FACSIMILE AND HAND DELIVERY

Mary S. Wyatt, Chief Counsel
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Special Funds Assessment Regulations;
IRRC Regulation #1978

Dear Ms. Wyatt:

I write in response to the attached letter from Mr. Patrick T. Beaty, Esquire to the Honorable Joseph M. Gladeck, Jr. dated March 30, 1999[1]. Therein, Mr. Beaty raises some concerns regarding the Department's Special Funds Assessment Final Form Regulations (IRRC Regulation # 1978; Tracking No. 12-53). Preliminarily, I note that Mr. Beaty neither commented on the regulations as proposed nor offers any concrete alternatives to the pending rulemaking in his letter.

Mr. Beaty contends that no regulation is necessary to effectuate the provisions of Act 57 of 1997 (Act 57). The express language of Act 57, however, directly contradicts this assertion. Act 57 clearly indicates that the legislature recognized the desirability of regulations to effectuate its provisions by stating that the assessments were to be accomplished "in accordance with regulations promulgated by the Department of Labor and Industry." See 71 P.S. § 578.

Additionally, Mr. Beaty contends that no regulation is necessary to accomplish a pass-through assessment because insurers had already been passing the costs of assessments on to employers. Mr. Beaty is correct in noting that insurers historically passed the costs of assessments onto employers, just as any business passes its operating expenses on to its customers in the form of higher prices. Act 57, however, called for a more direct remittance and collection process, which the Department has developed in conjunction with the regulated community.

Mr. Beaty also argues that Act 57 did not repeal section 446 of the Workers' Compensation Act, 77 P.S. §1000.2. In conjunction with this argument, Mr. Beaty provides an alternative reading of Act 57, suggesting that the Bureau impose assessments on employers. However, such a system

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[1] The arguments contained in Mr. Beaty's March 30 letter are the same arguments advanced in his March 31 letter to Chairman John R. McGinley, Jr.

is not supported by Act 57, which requires that both collection and imposition of assessments, along with remittance of assessments, be accomplished *through* insurers. Mr. Beaty's suggestion is also impracticable and unworkable because it would require the Bureau to bill approximately 250,000 employers for the assessments.

Ironically, after arguing that "[n]o change in law or regulation was needed to *accomplish* the pass-through [assessment]," Mr. Beaty argues that the Department's regulations do not go far enough in regulating the relationship between insurers and employers. Mr. Beaty states that "[a]bout the only thing the regulation has to say on that subject is that L&I is delegating that responsibility to the insurance industry."

In response, I note that it is the "approved rating organizations" (i.e., the Pennsylvania Compensation Rating Bureau (PCRB) and the Coal Mine Compensation Rating Bureau (CMCRB)), not the Department, that are statutorily obligated, with the approval of the Insurance Commissioner, to set rules relating to the appropriate rates and premiums. See 77 P.S. §§1035.1-.22. It is the PCRB and CMCRB which have historically calculated the amount by which assessments should increase premium. Additionally, the system described in the regulations is an efficient mechanism supported by representatives of the regulated community, and the rating organizations themselves.

In addition, Mr. Beaty's argument that the regulations be disapproved because they are effective July 1, 1998 is without merit. The express language of Act 57 requires that assessments issued on and after July 1, 1998 be imposed, collected and remitted through insurers in accordance with regulations promulgated by the Department.

Finally, I note that the Bureau's pre-regulatory actions should have no bearing on an analysis of the pending regulations' statutory authority or the intention of the General Assembly. Mr. Beaty has appealed assessments issued under Act 57 of 1997 on behalf of a handful of insurers. Those appeals are currently pending before the Department, and his arguments regarding those assessments will be properly addressed therein.

Thank you for your consideration of this matter. I look forward to meeting with you at the public meeting scheduled for April 8.

Very truly yours,

Thomas J. Kuzma
Deputy Chief Counsel

cc: Sheilah Borne, Director, Legislative Affairs
Donald Smith, Deputy Secretary for Compensation and Insurance
Fiona Wilmarth, Regulatory Analyst
Thomas Howell, Assistant Counsel

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March 31, 1999

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John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
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Harrisburg, PA 17101

RE: IRRC Regulation # 1978
Department of Labor & Industry
Bureau of Workers' Compensation
Special Funds Assessments

Dear Chairman McGinley:

We represent several Workers' Compensation insurers in Pennsylvania on whose behalf we have filed objections to the 1998 assessments for the support of the Workers' Compensation Administration Fund. Each of these insurers received assessments in the fall of 1998 which were significantly higher than they had anticipated. The reason for the unexpected increases in assessments was that the Bureau of Workers' Compensation ("Bureau") had changed the methodology for calculating each company's assessment from a calculation based upon the amount of their compensation payments to one based upon earned premium. The formula used by the Bureau in 1998 was the same formula contained in the "Final Form Regulations" now before the Independent Regulatory Review Commission ("IRRC") for approval. Unfortunately, the Bureau did not feel it was necessary to obtain the approval of IRRC or the standing committees of the General Assembly before implementing its new formula. As discussed below, however, the lack of proper regulatory approvals is not the only legal flaw in the Bureau's new assessment system.

In its Regulatory Analysis Form accompanying the final form regulation, the Bureau indicates that it has proposed this regulation in order to "clarify" Act 57 of 1997. Section 2218 of Act 57 provides as follows:

> Effective July 1, 1998, the assessments for the maintenance of the Subsequent Injury Fund, the Workmen's Compensation Supersedeas Fund and Workmen's Compensation Administration Fund under sections 306.2, 443 and 446 of the act of June 2, 1915 (P.L. 736, No. 338), known as the "Workers' Compensation Act", shall no longer be imposed on insurers but shall be imposed, collected and remitted through insurers in accordance with regulations promulgated by the Department of Labor and Industry.

Section 446 of the Workers' Compensation Act, referred to in the above provision of Act 57, directs the Department of Labor and Industry ("L&I") to "make assessments and collect moneys based on the ratio that such insurer's or self-insurer's payments of compensation bear to the total compensation paid in the preceding calendar year in which the assessment is made". Nothing in Act 57 indicates an intention on the part of the General Assembly to change the basis for calculation of the assessments required by Section 446. Act 57 merely provided that the assessments would no longer be imposed *on* insurers and it authorized L&I to develop by regulation a process for imposing, collecting and remitting assessments *through* insurers.

While Act 57 did not specify on whom the assessments would be imposed if not on insurers, the fact is that workers' compensation insurers have only one source for those payments, i.e, the employers who pay workers' compensation premiums. Of course, these are the same people who eventually paid the assessments prior to Act 57. The cost of assessments needed to pay for running the workers' compensation system have always been passed through to employers in the form of higher premiums. Act 57 attempted to clarify the pass-through characteristic of the assessments for the benefit of the insurance industry so they would not be subject to retaliatory taxes in other states. No change in law or regulation was needed in order to *accomplish* the pass-through, because it was already happening in fact.

Act 57 did not repeal Section 446 of the Workers' Compensation Act. In fact, Act 57 refers specifically to the assessment for the "Workers' Compensation Administration Fund under section[s] ... 446" of the Workers' Compensation Act. Section 446 requires that the assessment be calculated on the basis of compensation paid in the prior year. Once that figure has been calculated by the Bureau, Act 57 requires that the Bureau *impose* the assessment on employers, that insurers *collect* the assessment from employers and that employers *remit* the assessment through insurers to the Bureau.

It is important to keep in mind that, regardless of whether the assessment is calculated on the "compensation paid" basis or on the "earned premium" basis called for in the proposed regulation, the amount imposed on an individual employer bears no relationship to his own loss experience. Even under the Bureau's proposed regulation, the assessment would be based upon each insurer's proportionate share of total earned premium in the prior year. An individual employer may not have been insured by the same carrier in the year before the assessment is imposed, so his assessment will depend upon how much earned premium was paid to his new carrier by other employers, not on the amount he paid to his former insurer. Therefore, it cannot

be said in support of the Bureau's proposed change that the new assessment base is necessary in order to begin imposing assessments on employers. The fact is that, even under the new system, the assessment base is still an insurer base, not an employer base.

If the Bureau really wanted to impose the assessment directly on employers, it would base the assessment on the number of employees covered by workers' compensation and each employer would pay a flat rate per employee. Unfortunately, the Workers' Compensation Act does not permit that kind of change in the assessment base, any more than it permits the change proposed by the Bureau from a compensation-paid system to an earned premium system.

It is clear, therefore, that the proposed final form regulation should be rejected by IRRC because it is beyond the statutory authority of the Department of Labor & Industry and does not conform to the intention of the General Assembly in the enactment of the statute upon which the regulation was based. 71 P.S. §745.5a(h). An administrative agency has no authority to amend a statutory mandate by regulatory action. Section 446 requires that assessments be based upon compensation paid in the prior year. Section 446 does not authorize the calculation of assessments on the basis of earned premiums. It is that simple.

The proposed regulation also does not conform with the intention of the General Assembly because it does not do the one thing that Act 57 asked the Department to do, to spell out how the assessment would be imposed, collected and remitted. About the only thing the regulation has to say on that subject is that L&I is delegating that responsibility to the insurance industry. The proposed regulation would amend various sections of Title 34 of the Pennsylvania Code to require employers to comply with "procedures defined by the approved rating organization", which are the two rating bureaus which all workers' compensation insurers are required to participate in as members. 34 Pa. Code §§121.22(d); 121.23(c); 121.31(e) (proposed). However, Act 57 did not give the rating bureaus any authority to decide how employers shall remit their assessments. The General Assembly delegated that responsibility to L&I.

Even if your commission should determine that the proposed regulation does conform with the statutory mandate, we must object to the attempt by L&I to make the regulation retroactive so that it would apply to all assessments made on or after July 1, 1998. If Act 57 did nothing else, it clearly required L&I to adopt regulations before implementing any change in the manner in which assessments would be imposed, collected and remitted. Unfortunately, L&I did not do that. Instead, they issued assessments in the fall of 1998 using exactly the same system of calculation for which they are now seeking regulatory approval. Several insurers who received those assessments have filed formal objections because the new system substantially increased their assessments above what they would have been using the compensation-paid formula and because those companies did not believe they had the right to recoup the increased assessments from their insureds. Those appeals have been consolidated for an administrative hearing which is expected to occur in the summer of this year.

The Bureau is now attempting to render those appeals moot by obtaining retroactive authority to do something that was not authorized when they did it. For the reasons discussed above, we believe that the entire regulation should be rejected on the grounds that it is beyond the statutory authority of the agency and does not conform with the legislative intent. At the very least, IRRC should disapprove the retroactivity provision in the regulation, thereby preserving the appeal rights of our insurance company clients.

Thank you for your consideration of these comments. If you have any questions about our position, please let me know.

Sincerely,

Patrick T. Beaty