

HOUSE BILL REPORT

HB 2302

As Reported by House Committee On:

Insurance, Financial Services & Consumer Protection

Title: An act relating to interpretive or policy statements by the insurance commissioner.

Brief Description: Establishing procedures for the issuance of interpretive or policy statements by the insurance commissioner.

Sponsors: Representative Santos.

Brief History:

Committee Activity:

Insurance, Financial Services & Consumer Protection: 2/21/07, 2/27/07 [DP].

Brief Summary of Bill

- Requires the Insurance Commissioner (Commissioner) to file proposed text of a proposed interpretive or policy statement for publication in the Washington State Register.
- Allows any person to object to a proposed interpretive or policy statement, within 45 days of publication, by stating that the Commissioner has exceeded his or her authority or that a rule must be adopted instead of an interpretive or policy statement.
- Requires the Commissioner to take one of the following actions after an objection: withdraw the proposed interpretive or policy statement; adopt the proposed interpretive or policy statement by rule; or notify the Joint Administrative Rules Review Committee and request a review of the proposed interpretive or policy statement.

HOUSE COMMITTEE ON INSURANCE, FINANCIAL SERVICES & CONSUMER PROTECTION

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass. Signed by 8 members: Representatives Kirby, Chair; Kelley, Vice Chair; Roach, Ranking Minority Member; Strow, Assistant Ranking Minority Member; Hurst, Rodne, Santos and Simpson.

Staff: Jon Hedegard (786-7127).

Background:

The Insurance Commissioner (Commissioner) oversees the business of insurance in this state. There are specific insurance statutes to implement and enforce. There are also specific and general grants of rule-making authority given to the Commissioner.

The Administrative Procedures Act (APA), chapter 34.05 RCW, provides the general structure of administrative rule-making in this state. Rule-making procedures requiring notice and comment periods are established in the APA. Agencies may issue interpretive or policy statements by publishing notice of the issuance of a statement in the Washington State Register (Register). These interpretive and policy statements are advisory only.

The Joint Administrative Rules Review Committee

The Joint Administrative Rules Review Committee (JARRC) is a legislative agency. The JARRC states the mission of the agency is to determine if:

- agency rules conform to the intent of the statute(s) they purport to implement;
- agency rules are adopted in conformance with the statutory requirements for adoption of rules; and
- agency interpretive or policy statements are being used instead of rules.

If a majority determines that the rule does not conform to legislative intent, the JARRC must notify the agency of its objections and the reasons for the objections. The agency must schedule a hearing on the objection within 30 days, then must notify the JARRC of its action within seven days after the agency hearing. If the JARRC determines the agency has failed to amend or withdraw the rule, it will prepare and file a formal objection against the rule for publication in the next Register and subsequent publication of Administrative Code.

By a majority vote, the JARRC may also recommend suspension of the rule. Within 30 days, the Governor must approve or disapprove the suspension. If approved, the suspension remains in effect until 90 days after the next legislative session.

The JARRC does not review an agency rule if the objection is a matter of substantive policy, rather than one of legislative intent. Matters of substantive policy are referred to an appropriate standing committee for consideration of whether the statute involved should be amended.

The JARRC will not accept review when a rule has become the subject of a lawsuit. If a question remains after the litigation has been completed, a request for review may be submitted to the JARRC.

Review of policy or interpretive statements

A person may petition an agency requesting the conversion of interpretive and policy statements into rules. Upon submission, the agency shall notify the JARRC of the petition. Within 60 days after submission of a petition, the agency must:

- deny the petition in writing, stating its reasons for the denial; or
- begin rule-making under the APA.

Any person may petition the JARRC for a review of a proposed or existing policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent. A petition to review a statement, guideline, or document that is of general applicability, or its equivalent, may only be filed for the purpose of requesting the committee to determine whether the statement, guideline, or document that is of general applicability, or its equivalent, is being used as a rule that has not been adopted in accordance with all provisions of law. Within 30 days of the receipt of the petition, the rules review committee must acknowledge receipt of the petition and describe any initial action taken.

A petition for review of a policy or interpretive statement must:

- identify the specific policy or interpretative statement to be reviewed;
- identify the specific statute which the rule interprets or implements;
- state why the petitioner believes that the policy or interpretive statement meets the definition of a rule and should have been adopted as a rule under the APA; and
- identify any known judicial action regarding the policy or interpretive statement or statutes identified in the petition.

If by a majority vote, the JARRC finds that an agency is using a policy or interpretive statement in place of a rule, the agency affected must be notified of the findings. Within 30 days of the notice, the agency must file notice of a public hearing on the JARRC's finding.

The agency's notice must:

- include the JARRC's findings; and
- must be published in the Register and mailed to interested parties.

The agency must fully consider all written and oral submissions regarding the JARRC's findings.

Within seven days of the agency hearing on the JARRC finding, the affected agency must notify the JARRC of its intended action.

If, by a majority vote, the JARRC finds that the agency will not replace the policy or interpretive statement with a rule, the JARRC may file with the code reviser notice of its objections with a statement of the reasons for the objections within 30 days. The JARRC must provide the notice and statement to the agency also.

If the JARRC makes an adverse finding regarding a policy or interpretive statement, the JARRC may, by a majority vote of its members, advise the governor of its finding.

Summary of Bill:

The Commissioner must file the text of any proposed interpretive or policy statement for publication in the Register.

Any person may file a written objection to the rules coordinator of the Office of the Insurance Commissioner to a proposed interpretive or policy statement within 45 days after the notice of proposed interpretive or policy statement is published stating that the Commissioner has exceeded his or her authority or that a rule must be adopted instead of an interpretive or policy statement. A person who has filed a written objection may withdraw the objection.

If a person has objected to a proposed interpretive or policy statement stating that the Commissioner has exceeded his or her authority or that a rule must be adopted instead of an interpretive or policy statement and not withdrawn the objection, the Commissioner may:

- withdraw the proposed interpretive or policy statement and file a notice of the withdrawal in the Register;
- adopt the proposed interpretive or policy statement by rule under the requirements of the APA; or
- notify the JARRC of the objection to the proposed interpretive or policy statement. The notification must be treated as a request for the JARRC to review the proposed interpretive or policy statement.

If no written objections are filed with the Commissioner within 45 days after the notice of proposed interpretive or policy statement is published, or if all objections that have been filed are withdrawn by the persons filing the objections, the Commissioner may file notice issuing the interpretive or policy statement with the Register.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) I have been interested in the subject of policy statements issued by the Insurance Commissioner (Commissioner) since the subject arose in a committee hearing last session. I am troubled by the concept that the Commissioner may be exercising authority that has not been explicitly granted by the Legislature. As I investigated further, I became concerned that the Office of the Insurance Commissioner (OIC) may be stretching beyond their authority and cutting short the public dialogue on important public policy matters. I believe the bill resolves these concerns. It outlines clear steps for issuance of a policy statement by the Commissioner. It respects the OIC's administrative role and the Legislature's role in setting policy. It allows for rational rules and a transparent process for those governed by these policy statements. My concern isn't actually focused on any single statement issued by the OIC. I have an allegiance to a broader principle of checks and balances upon which our democratic

principles must rely. Our founders established separate branches of government to serve distinct and separate functions. I'll leave you with two thoughts from the debate in the *Federalist Papers*. In number 51, James Madison notes that "In a republican government, the legislative authority necessarily predominates." In number 48, James Madison states "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The bill is an effort to lay down parameters and restrain power that encroaches.

I urge passage of the bill. It is an appropriate clarification and reinforcement of existing law. We have an issue with one specific policy statement issued by the OIC. The Commissioner has a number of available tools to address issues. One tool is to request legislation and ask for a change in the law. Another tool is to adopt rules under the APA. In rule-making, there are notice and the opportunity to comment prior to action. The Commissioner can also issue policy statements. At times, this is done properly. There was a recent State Supreme Court decision regarding alternate dispute resolution procedures in provider contracts. Many people disagreed with the decision. The OIC policy statement properly informed the regulated community of the decision and the methods to comply with the decision. The policy statement that we have an issue with changes the law around rating of health plans offered by associations. This was established by the Legislature in 1995 and has been interpreted consistently since. This December, the OIC changed the interpretation. We encouraged the OIC to seek legislation on this subject if they wanted to change the law. We asked for rule-making but were told that they didn't have the authority to adopt rules. That is a puzzling statement because they believe they had the authority to issue the policy statement. We have filed suit over this issue. This bill would have prevented an issue like this from occurring. In recent years, we have seen an increase in OIC policy statements. Commissioner Senn was viewed as a very active Commissioner; she issued 28 policy statements in eight years. Commissioner Kreidler has issued 30 in six years and the pace is accelerating. We don't believe that these issuances are never proper but we have concerns about some of them and the trends.

(Opposed) None.

Persons Testifying: Representative Santos, prime sponsor; and Jeff Ginggold and Lane Powell for Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.