



September 22, 2021

State of Washington Office of the Insurance Commissioner 302
Sid Snyder Ave., SW
Olympia, WA 98504
Attention: **Michael Walker**

Sent via email to: rulescoordinator@oic.wa.gov.

RE: Notice of Proposed Rulemaking; Notice of Hearing – issued August 30, 2021 for hearing date October 19, 2021: Proposed Amendment to WAC 284-02-070(2) [Administrative Hearings - Insurance Commissioner Matter (R 2021-09)]

Dear Commissioner Kreidler:

On behalf of the National Association of Mutual Insurance Companies (NAMIC), the American Property Casualty Insurance Association (APCIA), and the NW Insurance Council (NWIC), we write to reiterate our concerns with the OIC’s Notice of Proposed Rulemaking proposing amendments to **WAC 284-02-070(2)** that would impose discovery restrictions in Administrative Hearings, specifically adjudicative hearings in contested cases. As noted in our previous Joint Comment Letters submitted in response to the related CR-101 and the First Stakeholder Draft, we believe that restricting the discovery rights of insurers, while leaving untouched the Commissioner’s broad powers to require that insurers provide documents, depositions and other materials on demand, would unjustly hinder the ability of insurers to meaningfully participate in adjudicative hearings in contested cases.

We submit these comments for the record for the October 19, 2021 hearing and again urge you to immediately withdraw R 2021-09 and the July 20, 2021 Stakeholder Draft.

The Trades

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

The National Association of Mutual Insurance Companies is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner’s insurance market and 53 percent of the auto market.

NW Insurance Council is a non-profit, insurer-supported organization providing information about auto,

home and business insurance to consumers, media and policymakers in Washington state, with a diverse membership of Washington-based, regional and national insurers providing coverage to Washington's drivers, homeowners, renters, agriculturalists and businesses.

The Proposed Amendments to WAC 284-02-070(2) Conflict with the Goals of An Administrative Hearing

As we previously noted, the Commissioner's own website describes the goal of an administrative hearing: "for the presiding officer to be presented with all pertinent information in order to make the best decision." <https://www.insurance.wa.gov/about-administrative-hearings> . The changes proposed in the Stakeholder Draft do not advance this goal but would instead inhibit the ability of the parties to provide *all pertinent information*.

Pursuant to **RCW 48.37.070 (5)(a)**, "the commissioner may take depositions, ... or documentary evidence, administer oaths, and examine under oath any individual relative to ...the subject of any hearing or investigation": The Commissioner may also issue subpoenas pursuant to **RCW 34.05.446**. Notably, the Stakeholder Draft does not propose any change to the scope of these powers.

The proposed amendment to **WAC 204-02-070(2)(e)** deletes the incorporation by reference of WA Civil Discovery Rules 26-27 and limits discovery to *only* those methods set forth in the proposed amended **WAC 204-02-070(2)(e)(i)**. The proposed amendment to **WAC 204-02-070(2)(e)(i)** would redefine what constitutes discovery and deem depositions to be unacceptable. These changes would significantly narrow the scope of discovery and reduce insurers' access to information, with no corresponding limitation on the Commissioner's access to information. This would substantially shift the balance in contested adjudicative proceedings and impair the due process rights of insurers that are required to participate in such proceedings.

The proposed Amendment proposes further limiting the ability of insurers to access information by suggesting the addition of **WAC 204-02-070(2)(e)(iv)**, which would restrict the number of questions that can be asked and the number of admissions or documents that insurers can request, again with no corresponding limitation on the Commissioner's access to information. Although proposed **WAC 204-02-070(2)(e)(iv)** suggests that a presiding officer or administrative law judge might permit additional discovery, the provision goes on to discourage presiding officers and administrative law judges from doing so and turns the usual discovery burden on its head by requiring the requesting party to establish that the discovery is necessary and otherwise unavailable. These additional limitations, and shifting of the discovery burden, would further impair insurers' due process rights.

As demonstrated above, the proposed changes to **204-02-070(2)(e)** would unjustly shift the balance in contested adjudicative hearings to the advantage of the Commissioner. The additional amendments proposed as **204-02-070(2)(f)** go even further, shielding the Commissioner and his deputy from depositions in *every* contested adjudicative hearing, without regard to the potential relevance and importance of such a deposition and essentially prohibiting discovery into most actions of the Commissioner, his deputy, and his staff, without regard to the potential relevance and importance of such information.

The Amendments Proposed in the Notice of Proposed Rulemaking Conflict with the Requirements of the WA Administrative Procedure Act

The WA APA, **RCW 34.05.449**, requires “full disclosure of relevant facts and issues” and provides that the presiding officer in an adjudicative hearing “shall afford to *all parties* the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.” [emphasis added.] As noted in our comments to the CR 101 and comments responding to the First Stakeholder Draft, these provisions of the APA align with the overall purpose of an administrative hearing. And, as demonstrated above, the proposed amendments to **WAC 284-02-070(2)** would severely limit, if not eliminate, the opportunity for regulated entities to “respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence” by changing the definition of discovery, reversing the usual burdens of proof, and foreclosing discovery of relevant evidence.

The Proposed Amendments Will Impede Development of an Adequate Record for Judicial Review

Parties subject to Agency action have a right to seek Judicial Review. **RCW 34.05** establishes the exclusive means of judicial review of agency action, and **RCW 34.05.562** limits the circumstances under which a Court may consider evidence beyond that contained in the hearing record to only evidence that “relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

The changes proposed in the Notice of Proposed Rulemaking would severely restrict discovery by insurers and not only impede the ability of insurers to meaningfully participate in adjudicative hearings but also prevent insurers from seeking appropriate judicial review.

For the reasons set forth above, we urge you to refrain from adopting the proposed amendments to **WAC 284-02-070(2)** and immediately withdraw R 2021-09 and the related Stakeholder Draft.

Thank you for your consideration.

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