

HOUSE No. 1853

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act relative to the competitive determination of workers' compensation insurance rates..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 152 of the General Laws is hereby amended by striking out
2 section 53A, as appearing in the 2006 Official Edition, and inserting in place thereof the
3 following section:-

4 Section 53A. (a) As used in this section, the following terms shall, unless the context
5 clearly requires otherwise, have the following meanings:-

6 “Commissioner”, the commissioner of insurance established under chapter 26.

7 “Division”, the division of insurance.

8 "Loss cost modifier (“LCM”)”, shall mean that provision within the rates proposed or
9 approved for any insurer or pool writing workers’ compensation and employers’ liability
10 insurance, intended to account for such company’s or pool’s (i) projected expenses, other than
11 allocated loss adjustment expense; (ii) profit and contingency allowance; and (iii) expected
12 difference in loss experience or allocated loss adjustment expense from that of the loss and
13 allocated loss adjustment experience of the industry as a whole. Except for any expense constant

component, LCMs shall be expressed as decimals to be applied equally and uniformly to the prospective loss costs approved by the commissioner for use by the filer across all hazard and industry groups. The LCM shall not include any provision to account for assessments collected on behalf of the residual market or to support any trust funds created pursuant to section 65.

“Pool”, shall mean the reinsurance pool established pursuant to section 65C.

"Prospective loss cost", shall mean that portion of a workers' compensation and employers' liability rate that does not include provisions for expenses (other than allocated loss adjustment expenses), profit and contingency, or variations in company loss and allocated loss adjustment expense experience as compared with the experience of the industry as a whole. Such loss costs shall be based on historical aggregate losses and allocated loss adjustment expenses, both reasonably adjusted through development to their ultimate value and projected through trending to a future point in time.

"Rate", shall mean the cost of workers' compensation and employers' liability insurance per exposure unit, which shall be derived from a prospective loss cost for such exposure adjusted by a filed LCM.

(b) Any insurance company authorized to transact business in this commonwealth under subclause (b) or (e) of clause Sixth of section 47 of chapter 175 may, except as provided in clause (c) of section 54 of said chapter 175, insure the payment of the compensation provided for by this chapter, and when any such company insures such payment, it shall file with the commissioner, or, if it is a member of or subscriber to a rating organization under section 52C, authorize such rating organization to file with the commissioner on its behalf, its classification of risks and projected loss costs relating thereto.

(c)(1) The commissioner shall designate a rating organization, duly qualified under said section 52C, to file with the commissioner proposed loss costs and classifications of risks associated with writing workers' compensation and employers' liability insurance in the commonwealth, for use in both the voluntary market and the pool. Said rating organization shall annually file, on or before November 1 of the year such filing is made, industry-wide classifications of risks, prospective loss costs, and minimum premium determination rules for use throughout the entire market. Prospective loss costs and classifications of risk shall be developed for the entire insured workers' compensation market utilizing loss experience without regard to whether such experience came from the voluntary market or the pool. In any instance in which the most recent aggregated 3 years of calendar-accident year data of the loss-plus-all expense ratios of the top 15 insurers in voluntary and pool market share, with all the companies smaller than the fourteenth largest combined to make the fifteenth "company" in such list, contain any companies whose loss-plus-all expense ratios exceed 150% of the median combined ratio of such companies, the commissioner shall, when considering the appropriateness of filed loss costs at the next prospective loss cost proceeding, exclude the voluntary and residual market premiums, payrolls, losses and allocated loss adjustment expenses of such high-ratio companies.

The designated rating organization shall also file all necessary parameters, rating and statistical reporting rules, and forms to be used by any company wishing to write retrospectively rated or large deductible policies. The designated rating organization may also file any desired changes to existing rating plans and other adjustments requested to be applied to the rates and classifications within the voluntary market or pool. Prospective loss costs and any additional requests made within prospective loss cost filings shall be approved by the commissioner only if

it is determined after a hearing that their use will not, given reasonable LCMs, produce premiums that are inadequate, excessive, or unfairly discriminatory.

(2) Non-rating organization members making individual company prospective loss cost filings must utilize only such classifications of risk and rating plans as are consistent with those filed by the designated rating organization as set forth herein and approved by the commissioner.

(3) Within 30 days after the prospective loss cost filing under this section the commissioner shall initiate a hearing to ensure that the proposed classifications are reasonable and equitable and the proposed loss costs fall within a range of reasonableness and are not excessive, inadequate, or unfairly discriminatory for the risks to which they apply.

Any hearing on projected industry loss costs shall be completed within 45 days of its commencement and a written decision thereon shall be issued within 30 days of the close of such hearing. If, after said hearing, the commissioner disapproves any part of the filing, the reasons for such disapproval shall be specified in the decision which shall also indicate what changes would be necessary to make any refiling approvable. Any projected loss cost filing shall be deemed approved if the commissioner does not commence the hearing within 30 days of receipt of the filing, complete the hearing within 45 days of its commencement, or issue a written decision within 30 days of its completion. The rating organization, non-member company that has made an individual prospective loss cost filing, or other aggrieved party to a proceeding may seek review of the commissioner's decision before the supreme judicial court.

(d) When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine

whether such filing meets the requirements of this section, the commissioner may require such insurer to furnish the information upon which it supports such filing. Any filing may be supported by the experience or judgment of the insurer or rating organization making the filing, the experience of other insurers or rating organizations, and any other factors which the insurer or rating organization deems relevant.

(e)(1) Simultaneous with its annual filing of prospective industry-wide loss costs, the rating organization designated by the commissioner to administer the pool pursuant to section 65C shall separately file LCMs to be used in the pool as of the effective date of such new loss costs. Such LCMs shall be approved as adequate, not-excessive and not unfairly discriminatory if and only if they reflect the following factors: (i) a loss and allocated loss adjustment expense multiplier of 1.0; (ii) a multiplier reflecting a reasonable estimate of the general and unallocated loss adjustment expenses in the overall workers' compensation market; (iii) any appropriate loss and expense constants; (iv) a reasonable profit-and-contingency multiplier; and (v) such tables and parameters as are necessary for member companies to write retrospectively rated or deductible policies.

In reviewing the appropriateness of the rating organization's filed multipliers for expense and for profit and contingency, the commissioner shall be guided by a review of the most recent company LCM filings and shall endeavor to place such pool components within the voluntary market range. The pool profit and contingency component shall reflect any data that indicates that the risk of covering randomly assigned exposures may be slightly higher than that of covering similar risks freely chosen by an insurer as well as any changes in the economic and company expense environments since the voluntary market LCMs reviewed were last placed on file. The commissioner may find a pool profit and contingency multiplier unreasonable if such

multiplier is deemed likely to contribute to the creation or sustainability of a pool size that reflects unhealthy market conditions. Each industry-wide loss cost filing and pool LCM filing shall, if not disapproved, be effective as of July 1 following completion of the hearing on prospective loss costs. Decisions disapproving pool LCMs shall indicate what changes are deemed necessary to make such LCMs acceptable to the division.

(2) Except as provided below with respect to filings already on file that continue to be in compliance with this section, each company that is a member of the bureau duly designated by the commissioner to make such filings shall, subsequent to the annual approval of an industry-wide prospective loss cost filing and the placing on file of a pool LCM, submit to the division of insurance an LCM filing upon which it desires its rates to be based. Individual companies not belonging to said rating bureau must also make separate filings of their LCMs subsequent to approval of their estimate of prospective company loss costs. In making individual company loss cost and LCM filings, due consideration shall be given by an insurer to its past and prospective loss and allocated loss adjustment expense experience within and outside the commonwealth, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to past and prospective expense both countrywide and those specially applicable to the commonwealth, and to all other relevant factors within and outside the commonwealth, including the experience or judgment of the insurer.

(3) In addition to its final proposed modifier, each insurer's LCM filing shall set forth the following components of such modifier:

(i) A multiplier which shall reflect the filer's estimate of its loss and allocated loss adjustment expenses. Each such factor to be applied to the industry loss and allocated loss

adjustment expense costs approved by the commissioner shall be at least .75, but no greater than 1.25. The commissioner may approve a filing that includes different multipliers for different industrial classes under this paragraph but only if such differential multipliers are actuarially supported by the filer and are not violative of subsection (f).

(ii) A multiplier which shall reflect the filer's estimate of its general and unallocated loss adjustment expense costs. Such factor to be applied to the industry loss and allocated loss adjustment expense costs approved by the commissioner shall not be lower than 0.33 or higher than 0.50.

(iii) A multiplier which shall reflect the filer's estimate of its profit and contingency requirements. Such factor to be applied to the industry loss and allocated loss adjustment expense costs approved by the commissioner shall be no less than the result of subtracting 1.025 from the average of 1.0 and the workers' compensation discount factor applicable to the earliest tax year shown for countrywide flows on the most recent IRS publication regarding discount factors for unpaid losses under Section 846, or any corresponding successor section of the Internal Revenue Code, and shall be no greater than one thousand basis points (0.001) higher than said result.

(iv) Any expense or loss constants the filer proposes to charge provided that no such constants shall exceed those currently approved for use in the pool at the time of the company LCM filing.

The factor to be multiplied by the approved loss and allocated loss adjustment expense cost by class shall be the sum of the multipliers described above in (i), (ii), and (iii). The final company modifier shall also include any constants described in (iv).

(4) Both the pool and individual company insurers' final rates shall be determined by applying filed loss cost modifiers to the most recently approved loss and allocated loss adjustment expense costs for the industry as a whole. Rating plans for retrospectively rated or deductible policies written by an insurer shall be consistent with and derivable from parameters approved in the industry-wide loss cost filing. Companies shall use the rates, rules, or amounts approved for the pool for minimum premium determinations and for per capita and other non-payroll based class rates. The classification and experience rating systems approved for the industry as a whole, in accordance with this section, shall be adopted by every insurer without modification.

(5) Except where company solvency or continuation is an issue, or where there has been a change in the law affecting company costs, individual company LCM filings shall be effective no earlier than 30 days following their receipt by the division of insurance. No pool or individual company filed LCM shall become effective if, within 21 days of its receipt by the division, the state rating bureau asserts in writing to the filing company or bureau and the commissioner that there are one or more defects in the form or manner of any such filing, explaining the nature of such alleged defects and recommending an acceptable manner of their removal. In such instances the company or pool may not use its filed LCM and may either revise its filing in the manner recommended by the state rating bureau or request a hearing to review the prohibition of its use. The state rating bureau shall disapprove an individual company's LCMs as defective only for the following reasons: (i) such filing contains one or more LCM components that are violative of this section; (ii) such filing would tend to impair or threaten the solvency of the filer; (iii) such filing would likely create a monopoly in the market; or (iv) such filing is expected to produce one or more rates, classifications or premiums that are in any

171 respect unfairly discriminatory. If the company or the pool chooses to revise the filing based on
172 the state rating bureau's objections, the earliest date upon which the filing may be used, if no
173 earlier date is agreed upon by the company and the division, shall be 65 days from the division's
174 receipt of the original filing.

175 The commissioner shall commence any hearing pursuant to this subsection within 21
176 days of the division's receipt of the filer's request for a review of the state rating bureau's written
177 reasons for disapproval of the filing. In the case of an individual company filing, the
178 commissioner shall, by written decision, disapprove the filed LCM after the hearing if, and only
179 if, it is found that the filed LCM contains one or more of the substantive or formal failures set
180 forth in the disapproval by the state rating bureau. Decisions on LCM hearings shall be issued
181 no later than 21 days following commencement of such hearings. In any instance in which either
182 the hearing is not commenced within 21 days of receipt of the filer's request or the decision is
183 not issued within 21 days of the hearing's commencement, the LCM filing shall be deemed
184 approved and become effective no sooner than 65 days from the division's receipt of the
185 company's request for a hearing or the effective date proposed by such company, whichever is
186 the later date.

187 (6) Whenever the commissioner disapproves an individual company LCM filing in
188 accordance with this section, the commissioner may, by sole discretion, authorize the insurer to
189 use either that LCM in effect for such entity prior to the disapproved filing or that LCM most
190 recently placed on file for the pool. Effective LCMs, whether placed on file by the division as
191 submitted or authorized for use by the commissioner pursuant to a hearing as set forth above,
192 shall remain in effect at least until July 1 of the following year. Companies need not refile and
193 may continue to use any effective LCMs subsequent to approved changes in prospective loss

costs when all the components of such LCMs continue to comply with every provision of this section. The commissioner may at any time after any company's LCM has been in effect for a year, require such company to file a new LCM, indicating what changes are deemed to be required to make such LCM comply with this section.

(7) Both the pool and individual insurers shall have the right to appeal any decision of the commissioner regarding LCMs pursuant to section 14 of chapter 30A, except that all such appeals shall be filed with the Supreme Judicial Court.

(f) Insurers' LCM filings shall be in such form and manner as will enable the commissioner to ensure that all filed LCM components are within the constraints provided by subsection (e) and to determine both the filer's basis for its proposed LCM and the premiums such insurer would charge its insureds if such filing were to be approved. When any filing is not accompanied by the information upon which the insurer supports such filing, or the commissioner does not have sufficient information to determine whether such filing meets the requirements of this section, she may require the filer to furnish the information upon which it supports such filing.

Each company group having more than one company writing workers' compensation insurance within the commonwealth shall make a single filing containing all the LCMs such group proposes to employ within its entire group, and its filing shall provide objective and not unlawfully discriminatory criteria for placing risks in particular companies within such group. For purposes of this section, a company group's LCMs shall be considered unfairly discriminatory if (i) they include 1 or more LCMs that are deemed to violate any anti-discrimination statute; (ii) they include one or more LCMs that could produce rates that are not

uniform within any classification of risk written within any company; or (iii) they could produce disparate rates within the same industrial classification as between 2 or more companies within the same company group, and such differences are not entirely a function of objective and not unlawfully discriminatory criteria filed along with such group's LCMs. Nothing in this paragraph shall be construed to prohibit companies from utilizing policyholder dividend plans that return diverse dividends within any class at the close of a policy period based on company or individual risk performance; provided, however, that no specified dividend amounts may be promised or paid to policyholders in advance of annual declarations.

The commissioner may promulgate rules or regulations as deemed necessary to carry out the provisions of this section.

(g) Where a claim against an insured that has affected the insured's experience rating has been found non-compensable, or where an insurer recovers previously paid workers' compensation benefits from a negligent third party, or where an insurer has been reimbursed by the insured or the Workers' Compensation Trust Fund for payments made pursuant to subsection 2 of section 65, the insurer shall submit a revised statistical unit report to the appropriate rating bureau within 65 days of such finding, recovery or reimbursement.

(h) The commissioner shall, by the use of experience rating credits, the institution of a payroll cap on premium computation, or other method, provide for equitable distribution of premiums among employers paying higher than average wages and those paying lower than average wages.

(i) The advisory council established pursuant to section 15 of chapter 23E may request loss data from any insurance company or rating organization. Any insurance company or

rating organization that is the recipient of such a request may, if it believes that the request is unduly burdensome or unreasonable, file a motion to be heard by the commissioner concerning whether all or part of the request requires response. The commissioner may, if the commissioner finds the request is unduly burdensome or unreasonable, deny the request in whole or in part.

At any prospective loss cost or pool LCM hearing conducted pursuant to this section, the advisory council may present a written statement and oral testimony relating to any issues that may arise during the course of such hearing. Said advisory council may not cross-examine witnesses produced by other parties or appeal any decision of the commissioner.

(j)(1) The commissioner shall make a finding on the basis of information submitted in any prospective loss cost filing made pursuant to this section that the insurer or insurers employ cost control programs and techniques acceptable to the commissioner which have had or are expected to have a substantial impact on fraudulent claim costs, unnecessary health care costs, and any other unreasonable loss costs, as well as on the efficient and adequate collection of the appropriate premium charges owed the insurer or insurers. If the commissioner does not find such cost control programs and techniques, the commissioner may disapprove such filing. The commissioner shall also have authority to make findings, after a hearing on any prospective loss cost filing made pursuant to this section, that the proposed loss costs are excessive due to the failure of the insurer or insurers to utilize adequate programs to control loss costs or to collect the appropriate premium charges. If the commissioner so finds, the commissioner shall disapprove such a filing or, in the alternative, shall limit in any manner determined to be appropriate the amount of any adjustment in premium charges based upon changes in loss costs and premium collections. The commissioner may issue regulations designed to further achievement by

insurers of adequate controls on loss costs and of adequate collection of the appropriate premium charges owed to the insurers.

(2) The commissioner shall promulgate rules and statistical plans, which may be modified from time to time and which shall be used thereafter by each insurer in the recording and reporting of its loss and expense experience, in order that the experience of all insurers may be made available, at least annually, in such form and detail as may be necessary to aid the commissioner in the performance of the commissioner's duties. In promulgating such rules and plans, the commissioner shall give due consideration to the rating systems on file with the division and to the rules and to the form of the plans used for statistical reporting in other states. The commissioner may designate one or more rating organizations or other agencies to assist in gathering such experience and making compilations thereof. Such compilations shall be made available, subject to rules promulgated by the commissioner, to insurers and rating organizations. Any such statistical agent appointed by the commissioner pursuant to this section to assist in the gathering, compilation and dissemination of statistical data shall be authorized to assess reporting companies for the reasonable costs of such services, as approved by the commissioner. Every statistical agent and rating organization designated by the commissioner and every insurer that is not a member of any such rating organization shall share the information and experience necessary for the calculation of experience modifications and other derivable elements from approved rating plans with every other non-member insurer, approved statistical agent, and rating organization requiring such information and experience in order to estimate loss costs or LCMs for its own insureds or those of its members or subscribers. Any statistical plan promulgated by the commissioner pursuant to this section may include provisions for reasonable fines or other penalties for late or inaccurate reporting, and shall provide for a process by which

insurers may appeal any such penalties. Failure to cooperate with the commissioner's statistical agent or to pay any penalties levied pursuant to this section may subject insurers to suspension, revocation, or other limitation of the right to offer insurance in the commonwealth, subject to the provisions of section 4 of chapter 175.

SECTION 2. Subsection (5) of section 65 of chapter 152 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by adding the following paragraph:-

For purposes of making assessments pursuant to this section, each company's standard premium shall be put at pool level. "Standard premium" as used in this section, and as it is used as a basis for the equitable distribution of losses or other costs associated with the assigned risk pool under section 65C, shall be as defined by the Massachusetts workers' compensation statistical plan, approved by the commissioner; provided, however, that any such definition shall require that standard premium shall be subsequent to the application of experience modification and any credits applied under the Massachusetts construction credit program, but shall be prior to the application of any large deductible credits or all risk adjustment program charges.

SECTION 3. Section 65A of chapter 152 of the General Laws, as so appearing, is hereby amended by striking out the first two sentences and inserting in place thereof the following:-

Any employer whose application for voluntary workers' compensation insurance is rejected or not accepted by at least 2 company groups within 5 days may make application to the duly appointed assigned risk pool administrator for admission to the pool. In order for such an employer to be eligible for such admission, the employer shall have complied substantially with this section, as well as with all laws, orders, rules and regulations in force and effect relating to

the welfare, health and safety of his employees and shall not be in default of payment of any premium for workers' compensation insurance. Upon receipt of a completed application accompanied by evidence of the company group declinations of coverage referenced above from an employer otherwise meeting the requirements of this section, said administrator shall designate an insurer who shall forthwith, upon receipt of payment for the premium therefor, issue to such employer a guaranteed cost policy of insurance at rates calculated in the manner set forth in section 53A to provide all compensation required by this chapter. Nothing in this chapter shall be construed to require any employer written through the pool to accept a voluntary offer of coverage at a cost in excess of the cost of continued or renewed residual market coverage or to require the pool to non-renew any pool risk that has received a voluntary offer at premiums that are either higher than those in the pool or that require the payment of premiums or loss-reimbursements that may be affected by losses occurring during the same policy period for which coverage is being offered. The commissioner may order occasional mandatory non-renewals of policies written through the pool, require new pool applicants to provide affirmations or other evidence of their inability to obtain voluntary market coverage, or undertake other such depopulation initiatives deemed to be appropriate. To assist both new businesses seeking coverage in the voluntary market and currently insured employers seeking the lowest premiums available, the division shall annually post on its website the percentage differences between the pool rates and the rates at which workers' compensation is being sold pursuant to the most recently filed individual company LCMs.

SECTION 4. In August of any year in which either the Herfindahl-Hirschman Index of market concentration for the Massachusetts workers' compensation market rose above 1,500 during the prior year, or the commissioner, for any other reasons, believes either that competition

may have been insufficient to protect consumer interests or may have been conducted in a manner that was either detrimental to a healthy competitive market or to quality workers' compensation insurance products being widely offered in a non-discriminatory manner at reasonable prices, may hold a hearing on the state of competition in the workers' compensation market. If the primary reason for the commissioner's belief that the workers' compensation market is insufficiently competitive is a function of either (i) the residual market pool's contribution to the Herfindahl-Hirschman Index of more than 30% or (ii) a significant change in the residual market load borne by voluntary market carriers, the commissioner may make an adjustment to the pool profit and contingency multiplier at the next loss cost proceeding without holding a hearing on the state of competition in the workers' compensation market.

Decisions on any market competition hearing held pursuant to this section shall be issued no later than September 15th of the year in which such hearing is held. If the commissioner finds, based on clear and convincing evidence produced at such hearing, that competition as allowed by this section has not sufficiently protected either broad consumer or industry interests during the prior year and administered pricing would better serve such interests, the commissioner shall order the rating bureau designated to file industry loss costs under this section to instead file overall rates on behalf of the entire industry on each of the next 2 filing dates. In such instances, all companies shall be required to utilize only approved industry-wide rates during each of the next 2 rate years. The hearings on such bureau rate filings shall be conducted within the same time frames as those set forth in this chapter for prospective loss cost filings. After such 2 year period, prices shall again be determined through the use of prospective loss cost filings and residual market and company LCMs as set forth herein. Market

350 competition hearings under this section shall not be held during any year following the issuance
351 of an industry-wide rate approval.

352 SECTION 5. This act shall take effect 90 days after enactment. Rates and
353 classifications in effect prior to that date shall remain in effect thereafter until new rates and
354 classifications become effective pursuant to the provisions of this act.