

INSURANCE  
DEPARTMENT OF BANKING AND INSURANCE  
OFFICE OF SOLVENCY REGULATION

Medical Malpractice Liability Insurance  
Reporting Requirements

Proposed New Rules: N.J.A.C. 11:27-11

Authorized By: Steven M. Goldman, Commissioner, Department of Banking and Insurance

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17:23-20 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2008-54

Submit written comments by May 2, 2008 to:

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The agency proposal follows:

Summary

In the recent past, the medical malpractice liability insurance market has been strained in New Jersey, as well as throughout the nation. The issues of availability and affordability of medical malpractice liability insurance have been matters of concern. One ramification of availability and affordability problems with medical malpractice liability insurance is the potential negative impact such problems may have on adequate access to high-quality health care by New Jersey residents. To that end, the Legislature enacted the New Jersey Medical Care Access and Responsibility and Patients First Act, P.L. 2004, c. 17 (the Act), which provides

various reforms to address the vital interests of the State in ensuring that health care practitioners can continue to provide high-quality health care, and that such health care continues to be available to the residents of this State.

One of the areas that can impact availability and affordability of medical malpractice liability insurance is volatility of rates for such coverage. Volatility of rates, as well as the financial condition of the insurer, may be affected by the level of reserves established by the company and reinsurance agreements entered into by the insurer. Reinsurance agreements impact the financial condition of the insurer to the extent that there is an actual transfer of risk from the ceding medical malpractice liability insurer to the reinsurer. With respect to reserves, insurers are required to establish loss reserves based on the opinion of a qualified actuary as required by the instructions to the National Association of Insurance Commissioners (NAIC) annual statement form required to be filed annually by each insurer pursuant to N.J.S.A. 17:23-1 and N.J.A.C. 11:1-21. However, the Department of Banking and Insurance (Department) has found that on occasion some insurers do not establish reserves at the amount or within the range recommended by the actuary, or that the actuary's recommended amount or range is not adequate. Given the potential impact on the availability and affordability of medical malpractice liability insurance of failing to establish adequate reserves or failing to transfer an adequate amount of risk through reinsurance, the Department believes that it is reasonable and appropriate to establish reporting requirements to enable the Department to properly monitor these aspects of the financial condition of medical malpractice liability insurers in this State. This will better enable the Department to ensure that medical malpractice liability insurers are being operated in a sound manner, thus avoiding the disruptions and hardships that can result from the lack of

availability and affordability of such coverage. This, in turn, furthers the goal of the Act that the residents of this State continue to have access to high-quality health care in this State.

Proposed N.J.A.C. 11:27-11.1 sets forth the purpose and scope of the proposed new rules. The proposed new rules do not apply to insurers with less than \$1 million of direct written premium in medical malpractice liability insurance on a countrywide basis as of December 31 immediately preceding, or to insurers with less than \$1,000,000 of direct written premiums in medical malpractice liability insurance in this State as of December 31 immediately preceding and which do not write coverage for physicians or surgeons for the relevant period. The \$1 million dollar threshold is consistent with the provisions for requesting an exemption from filing a Statement of Actuarial Opinion under the NAIC instructions, and for exemption from the annual audited financial reports rules, N.J.A.C. 11:2-26.

Proposed N.J.A.C. 11:27-11.2 sets forth the definitions of terms used throughout this subchapter.

Proposed N.J.A.C. 11:27-11.3 provides that, within 60 days of initiating discussions to enter into a new, renewal of or amendment to any ceded reinsurance contract covering medical malpractice liability insurance, but no later than 30 days prior to the execution of such reinsurance agreement or amendment to any existing agreement, an insurer shall file with the Department for its review a copy of the complete ceded reinsurance agreement, including all amendments thereto; the reinsurance attestation maintained in accordance with the instructions to the NAIC annual statement; and the underwriting file related to such agreement. The proposed new rule also provides that the insurer shall notify the Department within 10 days of executing the reinsurance agreement, which notice shall also, if applicable, set forth any changes to a previously filed agreement with the same reinsurer. The proposed rule also provides that

domestic insurers that are members of a holding company system shall also continue to be subject to the prior notification requirements regarding reinsurance agreements entered into with affiliates set forth in N.J.S.A. 17:27A-4. This confirms that such insurers continue to be subject to the notification requirements set forth in that statute.

Proposed N.J.A.C. 11:27-11.4 sets forth requirements for the filing with the Department, by no later than March 15 of each year, of a copy of the actuarial opinion summary and, by no later than June 1 of each year, of a copy of the actuarial report that are maintained pursuant to the instructions to the NAIC annual statement filed pursuant to N.J.S.A. 17:23-1. In addition, the actuarial report shall include the actuarial estimate and/or range for the reserves recommended to be established by the insurer. The proposed rule also requires that insurers provide, with the actuarial report, a detailed justification supporting the management decision for the level of reserves selected, signed by the chief executive officer and chief financial officer of the insurer, which shall also include a justification for the selection by the management of the insurer of applicable loss sensitive items as set forth in the proposed new rule.

Proposed N.J.A.C. 11:27-11.5 provides that all documents and information filed pursuant to the proposed new rules shall be confidential and shall not be deemed a public record for purposes of the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

Proposed N.J.A.C. 11:27-11.6 sets forth penalties for violations of this subchapter.

A 60-day comment period is provided for this notice of proposal and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the notice is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

### Social Impact

The proposed new rules will enhance the Department's ability to monitor medical malpractice liability insurers' operations to ensure that they are being operated in a sound manner. To the extent that the proposed new rules enable the Department to better identify insurers that may not be establishing adequate reserves as ultimately determined or accepted by the Department after its examination or analysis, this may reduce the volatility of medical malpractice liability insurance rates, thereby helping to avoid problems related to the availability and affordability of such coverage that have occurred in the past in this State, to which volatility in rates contributed. This, in turn, will help ensure that practitioners are in a position to continue to provide high-quality health care to the residents of this State, thus benefiting the residents of this State and furthering the goals of the Act.

### Economic Impact

Insurers to which the proposed new rules apply will be required to incur costs associated with filing the documents required by the proposed new rules. However, the Department believes that these costs should be minimal in that the information required is, in general, currently required to be maintained by insurers in accordance with the instructions to the NAIC annual statement required to be filed with the Department annually pursuant to N.J.S.A. 17:23-1. The Department does not believe that any additional professional services should be required in order to comply with the proposed new rules. The Department also believes that any costs that may be imposed are outweighed by the potential benefits to be achieved by helping to alleviate affordability and availability problems associated with medical malpractice liability insurance in this State.

### Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal requirements or standards.

### Jobs Impact

The Department does not anticipate that any jobs should be generated or lost as a result of the proposed new rules.

The Department invites commenters to submit any data or studies concerning the jobs impact of the proposal together with their comments on other aspects of the proposal.

### Agriculture Industry Impact

The proposed new rules will not have any impact on the agriculture industry in New Jersey.

### Regulatory Flexibility Analysis

The proposed new rules will apply to small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. To the extent that the proposed new rules apply to small businesses, they will apply to insurers transacting medical malpractice liability insurance in this State. The costs that will be imposed on such insurers are as set forth in the Economic Impact above. The proposed rules do not provide any differentiation in compliance requirements (described in the Summary above) specifically based on business size. The proposed new rules do not apply, however, to insurers with less than \$1 million of direct written

premium in medical malpractice liability insurance on a countrywide basis as of December 31 immediately preceding, or to insurers with less than \$1,000,000 of direct written premiums in medical malpractice liability insurance in this State as of December 31 immediately preceding and which do not write coverage for physicians or surgeons for the relevant period. Premium volume is indicative of business size. Moreover, as noted in the Economic Impact above, the Department does not believe that the proposed new rules will impose any undue burden on insurers in that they generally require that insurers file information they are currently required to develop and maintain pursuant to other statutory requirements.

The purpose of the proposed new rules is to better enable the Department to monitor the activities and financial condition of medical malpractice liability insurers. This will facilitate a higher level of stability in their conditions, and thereby help avoid availability and affordability problems in this State, and the costs and potential disruptions to the provision of high-quality health care to residents of this State attendant thereon. As the proposed rules are not applicable to insurers with less than \$1 million of direct written premium in medical malpractice liability insurance in New Jersey as set forth in N.J.A.C. 11:27-11.1(b), these new rules reflect the Department's conclusion that it is unnecessary to impose these requirements upon smaller medical malpractice liability insurers.

#### Smart Growth Impact

The proposed new rules will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

## SUBCHAPTER 11. REPORTING REQUIREMENTS

### 11:27-11.1 Purpose and scope

(a) The purpose of this subchapter is to establish reporting requirements regarding reinsurance agreements and loss reserves established by insurers transacting medical malpractice liability insurance in this State.

(b) Except as set forth in this subchapter shall apply to insurers transacting medical malpractice liability insurance in this State. This subchapter shall not apply to any insurer that has less than \$1,000,000 of direct written premiums in medical malpractice liability insurance on a countrywide basis as of December 31 immediately preceding, or an insurer that has less than \$1,000,000 of direct written premiums in medical malpractice liability insurance in this State as of December 31 immediately preceding and that do not write coverage for physicians or surgeons for the relevant period.

### 11:27-11.2 Definitions

The words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Commissioner” means the Commissioner of the New Jersey Department of Banking and Insurance.

“Department” means the New Jersey Department of Banking and Insurance.

“Insurer” means an entity authorized pursuant to N.J.S.A. 17:17-1 et seq. or admitted pursuant to N.J.S.A. 17:32-1 et seq. to transact medical malpractice liability insurance in this State.

“NAIC” means the National Association of Insurance Commissioners.



### 11:27-11.3 Reinsurance agreements

(a) Within 60 days of initiating discussions to enter into a new, renewal of or amendment to any ceded reinsurance contract covering medical malpractice liability insurance, but no later than 30 days prior to the execution of such reinsurance agreement or amendment to any existing agreement, whether such agreement covers medical malpractice liability as a single line or in combination with other lines, an insurer shall file with the Department:

1. A copy of the complete ceded reinsurance agreement, including all amendments thereto;
2. The reinsurance attestation maintained in accordance with the instructions to the NAIC annual statement, required pursuant to N.J.S.A. 17:23-1; and
3. The underwriting file related to such agreement.

(b) The insurer shall also notify the Department within 10 days of executing the reinsurance agreement filed pursuant to (a)1 above, which notification shall also, if applicable, set forth any changes to a previously filed agreement with same reinsurer.

(c) In addition to (a) and (b) above, domestic insurers that are members of a holding company system shall also continue to be subject to the prior notification requirements regarding reinsurance agreements entered into with affiliates set forth in N.J.S.A. 17:27A-4.

### 11:27-11.4 Actuarial reports

(a) An insurer transacting medical malpractice liability insurance shall file with the Department by no later than March 15 of each year a copy of the actuarial opinion summary and, by no later than June 1 of each year, a copy of the actuarial report that are maintained pursuant to the instructions to the NAIC annual statement filed pursuant to N.J.S.A. 17:23-1. The actuarial

report shall include the actuarial estimate and/or range for the reserves recommended to be established by the insurer.

(b) Insurers shall file with the actuarial report required pursuant to (a) above a detailed justification supporting the management decision for the level of reserves selected, signed by the chief executive officer and chief financial officer of the insurer. In addition, the written justification shall include a justification for the selection by the management of the insurer of applicable loss sensitive items, which shall include, but not be limited to, the following:

1. Death, disability and retirement (DDR) reserves booked as part of unearned premiums;
2. Other extended reporting endorsement reserves booked as part of unearned premiums;
3. Statutory reserves;
4. Technical reserves;
5. Retroactive reinsurance reserves (assumed and/or ceded);
6. Other reserves reported as write-in lines on Page 3 (Liabilities) on the NAIC annual statement;
7. Accrual/return for direct commissions;
8. Accrual/return for ceded and/or assumed commissions; and
9. Accrual/return for interest on reinsurance funds held.

(c) The loss sensitive items filed pursuant to (b) above shall be addressed if they are related to medical malpractice liability insurance written either solely or in combination with other lines.

11:27-11.5 Confidentiality

All of the documents and information filed pursuant to this subchapter shall be confidential and shall not be deemed a public record for purposes of the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

11:27-11.6 Penalties

Failure to comply with the provisions of this subchapter shall result in the imposition of penalties pursuant to law, including, but not limited to, penalties set forth in N.J.S.A. 17:33-2.

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Date

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Steven M. Goldman  
Commissioner

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