

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

OFFICE OF PROPERTY AND CASUALTY

Changes to Medical Malpractice Liability Insurance Rates

Proposed New Rules: N.J.A.C. 11:27-14

Authorized By: Thomas B. Considine, Commissioner, Department of Banking and Insurance.

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17:29AA-1 et seq.

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

Proposal Number: PRN 2010-149.

Submit comments by September 17, 2010 to:

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The agency proposal follows:

Summary

N.J.S.A. 17:29AA-1 et seq., as amended by P.L. 2009, c. 248, effective August 1, 2010, (see N.J.S.A. 17:29AA-5.1) revised the method by which rates for medical malpractice liability insurance may be changed. Previously, changes in rates for medical malpractice liability

insurance could be implemented with notice being provided to the Department of Banking and Insurance (Department) within 30 days after the effectuation of such change, pursuant to N.J.S.A. 17:29AA-1 et seq. N.J.S.A. 17:29AA-5.1 modified this procedure to provide that, with respect to medical malpractice liability insurance for certain types of providers to be specified by the Commissioner of Banking and Insurance (Commissioner), the Commissioner shall designate a maximum rate change percentage, which shall be not less than plus or minus five percent and not more than plus or minus 15 percent, and within which any rate, supplementary rate information, or change or amendment thereof filed by an insurer or rating organization shall become operative not less than 30 days after the filing, unless disapproved by the Department prior to the expiration of the 30-day period. Filings by an insurer or rating organization proposing a rate change for providers so specified by the Commissioner that exceeded the designated maximum rate change range, or proposing an additional rate change within the designated maximum range during any 12-month period, would be subject to prior approval by the Commissioner pursuant to N.J.S.A. 17:29A-14. The statute provides that the Commissioner may designate categories, subcategories, specialties and subspecialties of providers, to which the rate change will apply. As the statute implicitly recognizes, the type of specialty practiced by a provider and the level of risk attendant upon practicing that specialty is the most significant factor affecting medical malpractice liability insurance rates. Thus, rates for obstetricians and neurosurgeons are significantly higher than rates for primary care physicians and dermatologists. Consequently, the proposed new rules provide that the Commissioner may determine to apply different ranges of rate changes for different categories and subcategories of providers and different specialties and subspecialties.

The Department proposes these new rules to: (1) establish the procedures by which the Commissioner shall specify the designated range of annual rate change applicable to the designated provider categories, which rate change may become effective 30 days after filing pursuant to N.J.S.A. 17:29AA-5.1a; (2) set forth the procedures to designate the provider categories to which the range of annual rate change process established by the proposed new rules shall be applicable; (3) set forth the filing requirements for all changes in medical malpractice liability insurance rates; and (4) prescribe procedures for changes in medical malpractice liability insurance rates subject to prior approval in accordance with N.J.S.A. 17:29A-14.

Proposed N.J.A.C. 11:27-14.1 sets forth the purpose and scope of the proposed new rules.

Proposed N.J.A.C. 11:27-14.2 sets forth the definitions of terms used in the subchapter.

Proposed N.J.A.C. 11:27-14.3 provides that the Commissioner shall designate the range of annual rate change pursuant to N.J.S.A. 17:29AA-5.1 as set forth therein.

1. If the Commissioner finds singly, or in combination, that there is a significant restriction on the availability and affordability of medical malpractice liability insurance for a category, subcategory, specialty or subspecialty of health care provider, or there are significant limitations on access to care by the citizens of this State to a category, subcategory, specialty or subspecialty of health care provider; and there is no significant negative impact to the capitalization and reserve requirements necessary to ensure the solvency of insurers, then the range of annual rate change shall be plus or minus five percent for that category, subcategory, specialty or subspecialty of health care provider.

2. If the Commissioner finds either singly or in combination, that the limitations in the paragraph above do not significantly exist, if data indicates high frequency and

severity of medical malpractice liability insurance claims; or if data indicates upward trends in the costs of investigating, defending and settling claims, then the range of annual rate change shall be plus or minus 15 percent for that category, subcategory, specialty or subspecialty of health care provider.

3. If the Commissioner finds one of the following, then the range of annual rate change shall not apply to that category, subcategory, specialty or subspecialty:

i. The data indicate that the circumstances in the paragraphs above do not significantly exist;

ii. That the nature of the category, subcategory, specialty or subspecialty of health care provider being insured; the complexity of such provider's insurance requirements and such provider's access to professional risk management services, are such that they not be rated as a class but each risk is individually rated; or

iii. The risk is of an unusual nature or high loss hazard or difficult to place.

Proposed N.J.A.C. 11:27-14.4 sets forth the procedures for the designation of the range of annual rate change. The proposed new rule sets forth the procedures for the Commissioner's findings as provided in N.J.A.C. 11:27-14.3 and that these findings shall be made no less frequently than once every three years as follows:

1. The Department shall issue a public notice setting forth the range or ranges of annual rate change and the categories of providers to which each such range will apply in accordance with N.J.A.C. 11:27-14.3 pursuant to data at the time of issuance not earlier than 60 days prior to the effective date thereof. The public notice shall be disseminated to those interested parties on the Department's distribution list, and shall be posted on the Department's

web site. In addition, the public notice shall be published in the New Jersey Register. The public notice shall also provide that interested parties shall have 30 days from the date of posting on the Department's web site to provide written comments or additional data for the Commissioner's determination under N.J.A.C. 11:27-14.3.

2. After giving due consideration to any comments and data received, the Commissioner shall thereafter issue an Order specifying categories of providers and the designated range(s) of annual rate change that will be applicable to medical malpractice liability insurance for such providers pursuant to the standards set forth in N.J.A.C. 11:27-14.3. The Order shall be disseminated to those interested parties on the Department's distribution list and to all persons who submitted written comments on the public notice, and shall also be posted on the Department's web site. In addition, the Order shall be published in the New Jersey Register and shall constitute a final agency decision.

Proposed N.J.A.C. 11:27-14.5 provides that any medical malpractice liability insurance rate changes, unless required to be filed for prior approval pursuant to this subchapter, shall be filed with the Department no later than 30 days prior to the implementation thereof, and thereafter may be implemented unless disapproved by the Department within the 30-day period.

Proposed N.J.A.C. 11:27-14.6 sets forth the filing requirements for changes or modifications to rates for all medical malpractice liability insurance. The information required is essentially the same as that which medical malpractice liability insurers currently submit in support of rate filings. These requirements include: (1) a narrative overview; and (2) data regarding New Jersey premium, exposures, losses or loss costs, loss adjustment expenses, underwriting expenses and profit provisions as necessary to support the proposed rating system.

This proposed rule also provides that required data shall be submitted through the System for Electronic Rate and Form Filing (SERFF) and shall otherwise comply with N.J.A.C. 11:1-2. In addition, the proposed rule provides that filers shall submit data based on their own loss experience to the extent it is credible. Further, the proposed rule requires that filers account for changes to legislative, regulatory, social, economic or operational factors that have an impact on loss frequency or severity, or on loss adjustment or underwriting expenses. The proposed rule also provides that filers adopting the loss costs filed by a rating organization shall comply with the requirements of N.J.A.C. 11:13-8.

Proposed N.J.A.C. 11:27-14.7 provides timeframes for the Department to act on filings requiring prior approval and for filers to request a hearing pursuant to N.J.S.A. 17:29A-14c. These procedures are based on (and in some cases shorter than) those set forth in N.J.A.C. 11:3-18 with respect to rate filings for private passenger automobile insurance.

Proposed N.J.A.C. 11:27-14.8 provides that any change to an insurer's or a rating organization's rating system that has no impact on premiums charged (for example, a rating rule change with no impact on premium) shall be filed with the Department for review no later than 30 days prior to the implementation thereof. Such change thereafter may be implemented unless disapproved by the Department within the 30-day period.

Proposed N.J.A.C. 11:27-14.9 sets forth the penalties for violations of the 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 proposal 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 implement N.J.S.A. 17:29AA-1 et seq., as amended by P.L. 2009, c. 248, by establishing the procedures which the Commissioner shall use to designate the range of annual rate change through which the “file and use” process for rate changes for provider categories specified by the Commissioner as set forth in the proposed rules may be utilized; the procedures to designate the categories to which the annual rate change process shall apply; the filing requirements for all rate changes; and the procedures for rate filings subject to prior approval. These proposed new rules will have a beneficial social impact by providing an enhanced level of review and certainty with respect to medical malpractice liability insurance rate changes for certain designated categories of providers than that provided under the current system, and by advising filers of the requirements for rate filings.

Economic Impact

Insurers transacting medical malpractice liability insurance in this State, and rating organizations filing rates on behalf of such insurers, will be required to bear any costs associated with adherence to the standards set forth in these rules and the Orders ultimately issued by the Commissioner. The Department notes that the primary impact is imposed not by these rules or Orders, but by the legislation itself, which provides that rate changes for medical malpractice liability insurance may be modified within a range established by the Commissioner, for provider categories designated by the Commissioner, in a given 12-month period, that any rate changes outside that range, or additional changes made within such 12-month period shall be subject to prior approval pursuant to N.J.S.A. 17:29A-14, and that any rate changes that are not subject to prior approval pursuant to the proposed rules shall be filed with the Department no later than 30 days prior to the implementation thereof, and thereafter may be implemented unless disapproved

by the Department within the 30-day period. As noted in the Social Impact above, this provides an additional level of scrutiny and certainty with respect to medical malpractice liability insurance rate changes for designated categories of providers than is provided under the current system, while continuing to afford medical malpractice liability insurers the ability to seek to modify rates to the extent actuarially justified. Professional services required to comply with the proposed new rules would include actuarial services. Insurers should already possess or have contracted with third parties for such services for purposes of establishing their rates and other customary activities. Accordingly, no additional professional services should be required in order to comply with the proposed new rules. Moreover, while not subject to prior approval, with the exception of special risks as defined in N.J.S.A. 17:29AA-3, medical malpractice liability insurers had been required to file their rates with the Department no later than 30 days after they become effective. The information required in the proposed new rules is substantially similar to that insurers currently file. Accordingly, the proposed new rules should impose no significant additional costs on insurers, while providing policyholders, and ultimately the public, with the substantial benefit of enhanced scrutiny by the Department of changes to medical malpractice liability insurance rates for provider categories specified by the Commissioner that are outside of the range designated by the Commissioner.

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 believe 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 proposed new rules together with their written comments on other aspects of the proposal.

Agriculture Industry Impact

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

Regulatory Flexibility Analysis

The proposed new rules may 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 medical malpractice liability insurers or rating organizations domiciled in this State.

The proposed new rules provide no differentiation in compliance requirements based on business size. The costs of compliance are set forth in the Economic Impact above. As noted in the Summary above, the proposed new rules implement N.J.S.A. 17:29AA-5.1, to provide the procedures by which the Commissioner shall designate a range of annual rate change that may be made once within a 12-month period by insurers transacting medical malpractice liability insurance in this State, or rating organizations acting on behalf of such insurers, by filing notice of such rate change to become effective no less than 30 days after filing such notice, and that may thereafter be implemented unless disapproved within the 30-day period. The proposed new rules also set forth the filing requirements and procedures for changes or modifications to

medical malpractice liability insurance rates that will be subject to prior approval pursuant to these rules and in accordance with N.J.S.A. 17:29A-14. Different procedures or requirements for insurers or rating organizations that are “small businesses” would be inappropriate as it would frustrate the intent of the Legislature in enacting N.J.S.A. 17:29AA-5.1. As reflected in the statute, that intent was to provide an enhanced level of scrutiny for certain changes to medical malpractice liability insurance rates, while providing a streamlined process for insurers to implement changes to such rates applicable to certain providers that fall within the statutory range as designated by the Commissioner. Moreover, the Department believes that all insurers and rating organizations should be in a position to comply with the proposed filing requirements with minimal additional cost. Professional services required to comply with the proposed new rules would include actuarial services. Insurers should already possess or have contracted with third parties for such services for purposes of establishing their rates and other customary activities. Accordingly, no additional professional services should be required in order to comply with the proposed new rules. As noted in the Economic Impact above, while not subject to prior approval or filing, medical malpractice liability insurers are currently required to file their rate changes with the Department no later than 30 days after they become effective. The information required in the proposed new rules is substantially similar to that insurers currently file. Accordingly, the proposed new rules should impose no significant additional costs on 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.

Housing Affordability Impact

The proposed new rules will not have an impact on housing affordability in this State because the proposed new rules relate to rate changes for medical malpractice liability insurance pursuant to N.J.S.A. 17:29AA-5.1.

Smart Growth Development Impact

The Department believes that there is an extreme unlikelihood that the proposed new rules would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan because the proposed new rules relate to the procedures for rate changes for medical malpractice liability insurance pursuant to N.J.S.A. 17:29AA-5.1.

Full text of the proposed new rules follows:

SUBCHAPTER 14. CHANGES TO MEDICAL MALPRACTICE LIABILITY INSURANCE RATES

11:27-14.1 Purpose and scope

(a) This subchapter sets forth:

1. The procedures by which the Commissioner shall establish the designated range of annual rate change that may become effective 30 days after filing pursuant to N.J.S.A. 17:29AA-5.1;

2. The filing requirements for changes in rates for medical malpractice liability insurance;
and

3. The procedures for the review of medical malpractice liability insurance rates subject to prior approval.

(b) This subchapter shall apply to all insurers transacting medical malpractice liability insurance in this State and all rating organizations filing rate changes on behalf of such insurers.

11:27-14.2 Definitions

The following 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 insurer authorized or admitted to transact medical malpractice liability insurance in this State.

“NAIC” means the National Association of Insurance Commissioners.

“Prospective loss cost” means that portion of a rate that does not include provisions for expenses (other than loss adjustment expenses) or profit, and are based on historical aggregate losses and loss adjustment expenses adjusted through development to their ultimate value and projected through trending to a future point in time.

“Rate” means the unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or covered thereunder is multiplied to determine the premium. The unit charge may be expressed as a single number or as a prospective loss cost and an adjustment to account for the treatment of expenses, profit and variations in loss experience.

“Rate change” means a change to any part of a rating system that results in a change to an insured’s premium that is not accompanied by a corresponding change in coverage.

“Rating organization” means every person or persons, corporation, partnership, company, society or association engaged in the business of rate-making for two or more insurers.

“Rating system” means every schedule, class, classification, rule, guide, standard, manual, table or rating plan by whatever name described containing the rates and rules used by any insurer in determining or ascertaining a rate.

11:27-14.3 Designation of range of annual rate change limitation

(a) The Commissioner shall designate the range of annual rate change pursuant to N.J.S.A. 17:29AA-5.1 as set forth in this section.

1. If the Commissioner finds singly, or in combination, that there is a significant restriction on the availability and affordability of medical malpractice liability insurance for a category, subcategory, specialty or subspecialty of health care provider, or there are significant limitations on access to care by the citizens of this State to a category, subcategory, specialty or subspecialty of health care provider; and there is no significant negative impact to the capitalization and reserve requirements necessary to ensure the solvency of insurers, then the range of annual rate change shall be plus or minus five percent for that category, subcategory, specialty or subspecialty of health care provider.

2. If the Commissioner finds either singly or in combination, that the limitations in (a)1 above do not significantly exist, if data indicate high frequency and severity of medical malpractice liability insurance claims; or if data indicate upward trends in the costs of

investigating, defending and settling claims, then the range of annual rate change shall be plus or minus 15 percent for that category, subcategory, specialty or subspecialty of health care provider.

3. If the Commissioner finds one of the following, then the range of annual rate change shall not apply to that category, subcategory, specialty or subspecialty:

i. The data indicate that the circumstances in (a)1 or 2 above do not significantly exist;

ii. The nature of the category, subcategory, specialty or subspecialty of health care provider being insured; the complexity of such provider's insurance requirements and such provider's access to professional risk management services, are such that they are not rated as a class but each risk is individually rated; or

iii. The risk is of an unusual nature or high loss hazard or difficult to place.

11:27-14.4 Commissioner's findings

(a) The Commissioner's findings as provided in N.J.A.C. 11:27-14.3 shall be made no less frequently than once every three years as follows:

1. The Department shall issue a public notice setting forth the Commissioner's proposed findings in accordance with N.J.A.C. 11:27-14.3 pursuant to data at the time of issuance not earlier than 60 days prior to the effective date thereof. The public notice shall be disseminated to those interested parties on the Department's distribution list utilized pursuant to N.J.A.C. 1:30-5.2(a)6, and shall be posted on the Department's web site: www.njdoji.org. In addition, the public notice shall be published in the New Jersey Register.

The public notice shall provide that interested parties shall have 30 days from the date of its posting on the Department's web site to provide written comments or additional data for the Commissioner's determination under N.J.A.C. 11:27-14.3.

2. After giving due consideration to any comments and data received, the Commissioner shall thereafter issue an Order prescribing each designated range of annual rate change and the categories of providers whose medical malpractice liability insurance rate changes shall be subject to each range pursuant to the standards set forth in N.J.A.C. 11:27-14.3. The Order shall be disseminated to those interested parties on the Department's distribution list utilized pursuant to N.J.A.C. 1:30-5.2(a)6, and to all persons who submitted written comments on the public notice referenced in (a)1 above, and shall also be posted on the Department's web site: www.njdobi.org. In addition, the Order shall be published in the New Jersey Register. The Order shall constitute a final agency decision.

(b) Any filing by an insurer or rating organization proposing a rate change that exceeds the designated range established by the Commissioner for a category of provider specified as set forth in (a) above, or proposing an additional rate change within such range during any 12-month period for a category of provider so specified, shall comply with the requirements set forth in N.J.A.C. 11:27-14.6 and shall be subject to prior approval by the Commissioner pursuant to N.J.S.A. 17:29A-14.

11:27-14.5 Filing procedures

Any medical malpractice liability insurance rate changes, unless such are required to be filed for prior approval pursuant to this subchapter, shall be filed with the Department no later

than 30 days prior to the implementation thereof, and thereafter may be implemented unless disapproved by the Department within the 30-day period.

11:27-14.6 Rate filing requirements

(a) Any insurer or rating organization seeking to change or modify its rating system for medical malpractice liability insurance shall provide the following information in support of its application:

1. A narrative overview that sets forth the contents of the filing, and explains the reasons and procedures used to develop the proposed rating system; and

2. Data regarding New Jersey premium, exposures, losses or loss costs, loss adjustment expenses, underwriting expenses and profit provisions as necessary to support the proposed rating system. Filers shall provide all underlying calculations, including any judgments made.

(b) All required data shall be submitted through the NAIC electronic filing system SERFF (System for Electronic Rate and Form Filing), and otherwise comply with N.J.A.C. 11:1-2. The information shall be provided in a Microsoft Excel or compatible spreadsheet. All calculated values shall be given as a formula in the spreadsheet.

(c) All rate filers shall submit data in support of their proposed rating system based on their own loss experience to the extent it is credible, and their own expense and profit provisions.

(d) Filers shall account for impacts of significant changes to legislative, regulatory, social, economic, or operational factors that have an impact on loss frequency or severity, or on loss adjustment or underwriting expenses.

(e) Rating organizations shall not be required to provide data regarding premium, underwriting expense, or profit provisions.

(f) Where the application is by an insurer that is a member of a rating organization, the insurer may refer to the loss and loss adjustment expense data filed by the rating organization to comply with the requirements of this section. Filers adopting the loss costs filed by a rating organization shall comply with the requirements of N.J.A.C. 11:13-8.

11:27-14.7 Procedures for review and action on filings requiring prior approval

(a) In computing any period of time fixed by this subchapter, the day of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is on a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday.

(b) Provisions of this subchapter that establish time limits may be relaxed or modified by the Commissioner for good cause shown.

(c) A determination by the Department that a filing requiring prior approval is complete relates solely to the presence in the filing of the items required by N.J.A.C. 11:27-14.6 and shall not be considered a finding regarding the accuracy or reasonableness of the information or calculations.

(d) The time period for the Department's review of a prior approval filing shall commence the day after the filing is received.

(e) The Department shall advise the filer if the filing is incomplete not later than 15 days after receipt of the filing.

1. The filing shall be deemed to be complete if the filer is not notified that the filing is incomplete within the 15-day period.

2. Notice to the filer that the filing has been found to be incomplete shall specify the missing item(s) or information.

3. The Department may disapprove an incomplete filing as a nonconforming filing. Any resubmission of the filing after the deficiency has been cured shall be considered initial receipt.

(f) If the Department requests further information from the filer, which information must be provided to the Department upon request, the filer shall submit the information to the Department within 10 days of the receipt of the request.

(g) Not later than 45 days after receipt of a filing requiring prior approval by the Department, the filer may request in writing a hearing on the filing. A request for hearing shall include a statement of facts and issues in sufficient detail so as to notify the Department and any other party of the matters in dispute.

(h) Upon receipt of a request for a hearing, or not later than 60 days after receipt of a filing by the Department, the Commissioner shall determine whether the matter is a contested case and notify all parties in writing.

1. If no hearing is requested the Commissioner shall enter an appropriate final determination disposing of all issues raised by the filing. The final determination shall be issued not later than 60 days from receipt of the filing, except for good cause the Commissioner may extend the time to issue a final determination by not more than 30 days.

2. If a hearing is requested the Commissioner may hear the matter; direct that the matter be transmitted to the Office of Administrative Law; or may appoint a salaried employee of the Department to hear the matter pursuant to N.J.S.A. 17:29A-14c.

(i) The hearing shall be conducted pursuant to the provisions of N.J.S.A. 17:29A-14c and the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and applicable administrative rules, N.J.A.C. 1:1 and 1:11.

11:27-14.8 Changes to rating system with no impact on premium

Any change to an insurer's or rating organization's rating system that has no impact on premiums charged (for example, a company introduces a new limit and factor with no impact on premium) shall be filed with the Department for review no later than 30 days prior to the implementation thereof. Such change thereafter may be implemented unless disapproved by the Department within the 30-day period.

11:27-14.9 Penalties

Failure to comply with this subchapter may result in the imposition of penalties as authorized by law, including, but not limited to, those penalties authorized pursuant to N.J.S.A. 17:33-2.