

Michigan Office of Administrative Hearings and Rules

Administrative Rules Division (ARD)

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**REGULATORY IMPACT STATEMENT
and COST-BENEFIT ANALYSIS (RIS)**

Agency Information:

Department name:

Insurance and Financial Services

Bureau name:

Insurance

Name of person filling out RIS:

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Rule Set Information:

ARD assigned rule set number:

2019-136 IF

Title of proposed rule set:

Utilization Review

Comparison of Rule(s) to Federal/State/Association Standard:

1. Compare the proposed rules to parallel federal rules or standards set by a state or national licensing agency or accreditation association, if any exist.

There are no parallel federal rules or standards set by a state or national licensing agency or accreditation association.

A. Are these rules required by state law or federal mandate?

Yes. These rules are mandatory under Section 3157a of the Insurance Code, MCL 500.3157a, which was added by Public Act 21 of 2019. Section 3157a(3) requires the Department of Insurance and Financial Services (DIFS) to promulgate rules to establish a utilization review program.

B. If these rules exceed a federal standard, please identify the federal standard or citation, describe why it is necessary that the proposed rules exceed the federal standard or law, and specify the costs and benefits arising out of the deviation.

There is no applicable federal standard.

2. Compare the proposed rules to standards in similarly situated states, based on geographic location, topography, natural resources, commonalities, or economic similarities.

Many states have administrative rules pertaining to utilization review in contexts other than automobile no-fault insurance (particularly workers' compensation). However, only one other state, New Jersey, has rules for utilization review for personal injury protection benefits. While both New Jersey's rules and the proposed rules establish a system for administering insurer decisions regarding benefit payment, medical necessity of health and medical care, bill review, and provider appeals, New Jersey's rules are substantially more detailed, as required by New Jersey statute. New Jersey's rules require providers to give insurers advance notice of proposed treatment for certain identified injuries and certain diagnostic tests, and to follow specific "care paths" for treatment. Michigan's proposed rules do not contain such requirements, in large part because Michigan's and New Jersey's enabling statutes are different.

A. If the rules exceed standards in those states, please explain why and specify the costs and benefits arising out of the deviation.

These rules do not exceed standards in similarly situated states. As noted above, only New Jersey has utilization review rules pertaining to PIP benefits, which are largely dissimilar to the proposed rules. The proposed rules do not exceed the standards in New Jersey's rules.

3. Identify any laws, rules, and other legal requirements that may duplicate, overlap, or conflict with the proposed rules.

These rules do not duplicate, overlap, or conflict with any other laws, rules, or legal requirements. The utilization review program is a new requirement established by Public Act 21 of 2019, which substantially amended the provisions of the Insurance Code related to no-fault automobile insurance. The rules have been drafted to avoid conflict and overlap with relevant provisions of the Insurance Code; specifically, provisions related to health care providers' right to file suit for payment of benefits and the timelines for doing so (MCL 500.3142 through 500.3145); provisions related to payment for "reasonably necessary" benefits (MCL 500.3107); and MCL 500.3157, which imposes a fee schedule for benefits as of July 1, 2021.

A. Explain how the rules have been coordinated, to the extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter. This section should include a discussion of the efforts undertaken by the agency to avoid or minimize duplication.

There are no federal, state, or local laws applicable to the same activity or subject matter.

4. If MCL 24.232(8) applies and the proposed rules are more stringent than the applicable federally mandated standard, a statement of specific facts that establish the clear and convincing need to adopt the more stringent rules and an explanation of the exceptional circumstances that necessitate the more stringent standards is required.

MCL 24.232(8) does not apply to the proposed rules because there are no applicable federally mandated standards governing the implementation of a utilization review program for the administration of personal injury protection benefits.

5. If MCL 24.232(9) applies and the proposed rules are more stringent than the applicable federal standard, either the statute that specifically authorizes the more stringent rules or a statement of the specific facts that establish the clear and convincing need to adopt the more stringent rules and an explanation of the exceptional circumstances that necessitate the more stringent standards is required.

MCL 24.232(9) does not apply to the proposed rules because there are no applicable federal standards governing the implementation of a utilization review program for the administration of personal injury protection benefits.

6. Identify the behavior and frequency of behavior that the proposed rules are designed to alter.

The proposed rules are designed to impose uniform standard for utilization review, which will in turn ensure greater consistency in automobile insurers' determinations regarding the appropriateness of care provided to injured persons. The rules are also designed to establish an administrative process whereby a provider may appeal an insurer's determination to DIFS, which may result in fewer disputes between providers and insurers.

A. Estimate the change in the frequency of the targeted behavior expected from the proposed rules.

The proposed rules may result in fewer disputes between providers and insurers because DIFS will issue orders that resolve provider appeals. The proposed rules may also ensure greater consistency in automobile insurers' determinations regarding the appropriateness of care provided to injured persons.

B. Describe the difference between current behavior/practice and desired behavior/practice.

At present, there is no uniform standard for automobile insurers' utilization review programs. The rules will provide a uniform standard to ensure consistency of utilization review determinations. In addition, there is presently no process—short of litigation—for health care providers to appeal from determinations made by auto insurers. The rules will establish an appeals process that will allow health care providers to appeal to DIFS when they disagree with a benefit determination made by an automobile insurer.

C. What is the desired outcome?

The desired outcome is twofold: to impose a uniform standard for utilization review, and to establish an appeals process for providers.

7. Identify the harm resulting from the behavior that the proposed rules are designed to alter and the likelihood that the harm will occur in the absence of the rule.

PA 21 and 22 of 2019 were generally intended to lower the cost of automobile insurance in Michigan. The requirement to promulgate these rules, see MCL 500.3157a, was intended to contain costs related to care provided to injured persons. At present, there is no dispute resolution process, outside the judicial system, available to auto insurers and health care providers to resolve disputes. In the absence of these rules, these parties would continue to resort solely to litigation to resolve disputes.

A. What is the rationale for changing the rules instead of leaving them as currently written?

The proposed rules establishing a utilization review program are new rules required by the amended provisions of the Insurance Code related to no-fault automobile insurance, Section 3157a of the Insurance Code, MCL 500.3157a, which was added by Public Act 21 of 2019, and so there are not rules as currently written.

8. Describe how the proposed rules protect the health, safety, and welfare of Michigan citizens while promoting a regulatory environment in Michigan that is the least burdensome alternative for those required to comply.

Establishing a utilization review program will help ensure that persons injured in motor vehicle accidents receive an appropriate level of medical and health care, and that the charges for such care are appropriate. The rules are intended to allow for uniformity and consistency in no-fault insurance costs and medical and health care pricing. The rules are intended to balance that goal with a process that is effective yet not unnecessarily burdensome for health care providers and insurers. With that said, DIFS will carefully consider all public comments that suggest ways to make the rules less burdensome for those entities required to comply.

9. Describe any rules in the affected rule set that are obsolete or unnecessary and can be rescinded.

The proposed rules are new rules; therefore, there is no affected rule set that is obsolete or unnecessary or that can be rescinded.

10. Please provide the fiscal impact on the agency (an estimate of the cost of rule imposition or potential savings for the agency promulgating the rule).

DIFS has already budgeted for 5 FTEs for FY 2020 for the utilization review program, at an estimated cost of \$625,000.

11. Describe whether or not an agency appropriation has been made or a funding source provided for any expenditures associated with the proposed rules.

An agency appropriation has been made; no additional funding sources are necessary.

12. Describe how the proposed rules are necessary and suitable to accomplish their purpose, in relationship to the burden(s) the rules place on individuals. Burdens may include fiscal or administrative burdens, or duplicative acts.

MCL 500.3157a requires that DIFS promulgate rules that: 1) establish criteria or standards for utilization review; and 2) provide procedures related to utilization review, including a method for appealing determinations to DIFS. In order to meet these requirements, the rules necessarily must impose certain burdens on insurers and providers, including record disclosure requirements, costs associated with personnel who will comply with the program, and other associated costs. DIFS will carefully consider public comment from affected entities on how to reduce the burdens associated with the rules while still complying with the statutory mandate to promulgate rules that accomplish both of the above-listed items.

A. Despite the identified burden(s), identify how the requirements in the rules are still needed and reasonable compared to the burdens.

Because the rules are mandatory, the requirements are still needed despite any burdens they may impose. As explained in more detail in the Small Business Impact Statement, DIFS consulted with stakeholders to develop a revised draft of the rules that eliminated or decreased many of the burdens identified in the original draft.

13. Estimate any increase or decrease in revenues to other state or local governmental units (i.e. cities, counties, school districts) as a result of the rule. Estimate the cost increases or reductions for other state or local governmental units (i.e. cities, counties, school districts) as a result of the rule. Include the cost of equipment, supplies, labor, and increased administrative costs in both the initial imposition of the rule and any ongoing monitoring.

DIFS estimates that there will be no increase or decrease in revenues to other state or local governmental units as a result of the proposed rules.

14. Discuss any program, service, duty, or responsibility imposed upon any city, county, town, village, or school district by the rules.

No program, service, duty or responsibility will be imposed upon any city, county, town, village, or school district by the proposed rules.

A. Describe any actions that governmental units must take to be in compliance with the rules. This section should include items such as record keeping and reporting requirements or changing operational practices.

To the extent municipalities that self-insure for no-fault insurance are required to comply with MCL 500.3157a, they may be required to develop a utilization review program and/or participate in the provider appeal process. DIFS is seeking public comment on the extent to which self-insurers plan to participate.

15. Describe whether or not an appropriation to state or local governmental units has been made or a funding source provided for any additional expenditures associated with the proposed rules.

No additional expenditures are associated with the proposed rules, so no appropriation or funding sources have been secured for state or local governmental units other than that described in the response to #10.

16. In general, what impact will the rules have on rural areas?

The proposed rules will have an impact on rural areas only to the extent affected insurers or providers are located in rural areas and will need to comply with the rules. Any rural impact will not be disproportionate.

A. Describe the types of public or private interests in rural areas that will be affected by the rules.

Providers and insurers located in rural areas will be affected by the rules to the same degree as providers in non-rural areas. A provider's or insurer's location will not have any bearing on the degree to which the rules affect it.

17. Do the proposed rules have any impact on the environment? If yes, please explain.

The proposed rules will not have any impact on the environment. In implementing the provider appeal portion of the utilization review program, DIFS will require electronic delivery of records where possible to eliminate costs associated with physical document delivery.

18. Describe whether and how the agency considered exempting small businesses from the proposed rules.

DIFS considered whether to exempt small businesses from the rules by applying different standards to providers that are small businesses. However, DIFS decided not to do so because all applicable providers and insurers, regardless of size, must comply with the proposed rules in order to effectuate the purpose of the statutory mandate, which is to contain costs associated with care provided to injured persons. Applying different standards to providers based on their size would likely result in disparity in treatment and benefit payment, which the rules are expressly intended to eliminate.

19. If small businesses are not exempt, describe (a) the manner in which the agency reduced the economic impact of the proposed rules on small businesses, including a detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rules upon small businesses as described below (in accordance with MCL 24.240(1)(a-d)), or (b) the reasons such a reduction was not lawful or feasible.

In developing the Regulatory Impact Statement, DIFS solicited feedback on an initial draft of the rules from numerous stakeholders that represent small businesses as defined in MCL 24.207a. The responses DIFS received indicated concern on the part of these small businesses regarding the burdens that could result from the rules. In response to these concerns, DIFS did the following in order to comply with the mandate to reduce the disproportionate impact of the rules on small businesses:

- Eliminated reporting requirements that providers felt were burdensome and duplicative of existing reporting requirements, and which would have disproportionately impacted small businesses in terms of staffing needs and costs.
- Eliminated provisions that imposed billing timelines on providers; many small-business providers indicated that these were infeasible and would result in disproportionate impacts on staff and existing billing programs.
- Eliminated claim form requirements to allow more flexibility and to avoid providers having to overhaul billing systems.
- Eliminated claims processing requirements applicable to insurance companies to avoid duplication and conflict with existing claims processing mechanisms.
- Streamlined the appeals process in order to decrease staffing and other costs to providers and insurance companies that participate in the process.
- Simplified the reporting requirement for insurance companies to decrease costs associated with technology implementation and data tracking.
- Eliminated the requirement that insurance companies perform utilization review for claims over a specific dollar amount.

A. Identify and estimate the number of small businesses affected by the proposed rules and the probable effect on small businesses.

Stakeholders identified small businesses in the following categories: physicians, nurse practitioners, physician's assistants, chiropractors, physical therapists, occupational therapists, rehabilitation providers, community hospitals, and auto insurance companies. The precise number of small businesses is not known but is estimated to be in the tens of thousands, as it will affect every health care provider who provides care to persons injured in automobile accidents. There are approximately 43,000 licensed allopathic and osteopathic licensed physicians in Michigan, of which approximately 65% are active in providing patient care. This number does not include health care professionals other than physicians.

B. Describe how the agency established differing compliance or reporting requirements or timetables for small businesses under the rules after projecting the required reporting, record-keeping, and other administrative costs.

In response to the feedback DIFS received, DIFS opted to decrease the compliance and reporting requirements overall rather than establish different requirements for small businesses. Uniformity in these requirements is essential to ensuring that all providers are treated consistently, although the streamlined requirements will benefit primarily small businesses due to the fact that any regulatory burdens imposed on them will typically impact their staff and systems more directly.

C. Describe how the agency consolidated or simplified the compliance and reporting requirements for small businesses and identify the skills necessary to comply with the reporting requirements.

In response to the concerns voiced by small businesses, DIFS greatly simplified the proposed compliance requirements that would apply to providers and insurance companies, including the reporting requirement applicable to insurance companies. As a result, while affected small businesses must comply with the utilization review program to the same extent as larger companies, the compliance requirements are substantially decreased and should result in fewer burdens to small businesses than the rules originally proposed.

D. Describe how the agency established performance standards to replace design or operation standards required by the proposed rules.

The proposed rules do not include any design or operation standards.

20. Identify any disproportionate impact the proposed rules may have on small businesses because of their size or geographic location.

The proposed rules would not have any disproportionate impact on small businesses due to their size or geographic location because none of the requirements will differ based on size or geographic location.

21. Identify the nature of any report and the estimated cost of its preparation by small businesses required to comply with the proposed rules.

The only report in the rules is the annual report proposed in R 500.70, which is required of insurance companies. DIFS will consider public comment on the format of the report in order to minimize the costs associated with its preparation but expects the costs to be minimal.

22. Analyze the costs of compliance for all small businesses affected by the proposed rules, including costs of equipment, supplies, labor, and increased administrative costs.

Small businesses may incur increased labor and administrative costs associated with personnel required to file and monitor appeals from auto insurer determinations. These costs may be offset by successful appeals; however, the degree to which that will be true cannot be estimated at this point.

23. Identify the nature and estimated cost of any legal, consulting, or accounting services that small businesses would incur in complying with the proposed rules.

Additional costs for legal, consulting, or accounting services may be incurred in order to participate in the provider appeal process and compile the annual report. However, provider appeals are not mandatory and providers do not need to be represented by counsel, so this may minimize the legal costs associated with appeals. Billing tasks associated with the appeals are already handled by providers' and insurers' accounting departments.

24. Estimate the ability of small businesses to absorb the costs without suffering economic harm and without adversely affecting competition in the marketplace.

A primary concern voiced by small businesses in response to DIFS' request for feedback was the economic harm posed by Section 3157 of the Insurance Code, MCL 500.3157, which establishes a "fee schedule." In some instances, concerns regarding the adverse economic impact of the fee schedule were conflated with the utilization review program. Section 3157a(5) allows a provider to appeal from an insurer's determination that, among other things, the "cost" of medical care was "inappropriate under this chapter" (i.e., Chapter 31 of the Code). In order to assess these types of appeals, DIFS will necessarily have to refer to the fee schedule set forth in Section 3157, which takes effect on July 2, 2021 and for which separate rulemaking may be necessary. The rules, as revised in response to stakeholder feedback, establish a streamlined utilization review and appeals process that is intended to minimize the economic impact on small businesses.

25. Estimate the cost, if any, to the agency of administering or enforcing a rule that exempts or sets lesser standards for compliance by small businesses.

Administering and enforcing rules that exempt or set lesser standards for small businesses would result in increased costs to DIFS because DIFS would have to establish a separate certification program applicable to small businesses, and a separate appeals process for small businesses.

26. Identify the impact on the public interest of exempting or setting lesser standards of compliance for small businesses.

Because the goal of the rules is to establish a uniform utilization review certification and appeals process, the public interest would not be served by exempting or setting lesser standards of compliance for small businesses.

27. Describe whether and how the agency has involved small businesses in the development of the proposed rules.

DIFS requested written input from multiple entities representing small businesses.

A. If small businesses were involved in the development of the rules, please identify the business(es).

DIFS received input from the following entities, which are either small businesses or which represent small businesses: Brain Injury Association of Michigan, Michigan State Medical Society, Michigan Health & Hospital Association, American Property Casualty Insurance Association, Insurance Association of Michigan, the Michigan Association for Justice, Children's Orthogenic Institute, K&C Rehabilitation, Willowbrook Rehabilitation Services, Hope Network Neuro Rehabilitation, and Ridgemoor Case Management.

28. Estimate the actual statewide compliance costs of the rule amendments on businesses or groups.

Although the entities listed in the response to #27A provided feedback on the costs associated with the rules, no entities provided actual estimates. Therefore, actual statewide compliance costs associated with the proposed rules (these are new rules and not rule amendments) cannot be reasonably ascertained at this time. As noted in the Small Business Impact Statement, there will be some costs associated with provider appeals, and some insurance companies will have to establish utilization review programs if they do not already have them. However, most insurance companies already have utilization review programs, and virtually all providers have billing personnel who pursue payments from auto insurers.

A. Identify the businesses or groups who will be directly affected by, bear the cost of, or directly benefit from the proposed rules.

Entities regulated under the no-fault automobile insurance statute will be directly affected by and bear the cost of the proposed rules. Persons injured in motor vehicle accidents and medical providers will also be affected by the proposed rules.

B. What additional costs will be imposed on businesses and other groups as a result of these proposed rules (i.e. new equipment, supplies, labor, accounting, or recordkeeping)? Please identify the types and number of businesses and groups. Be sure to quantify how each entity will be affected.

Additional costs imposed on regulated entities or healthcare providers to comply with the proposed rules will be associated with recordkeeping for provider appeals; these should be relatively minimal because providers already have processes for pursuing insurance payments. Insurers that are small businesses will incur costs associated with developing or maintaining a utilization review program; however, these costs should also be minimal because insurers already have these types of programs.

29. Estimate the actual statewide compliance costs of the proposed rules on individuals (regulated individuals or the public). Include the costs of education, training, application fees, examination fees, license fees, new equipment, supplies, labor, accounting, or recordkeeping.

As noted above in response to item 28, there will likely be minimal compliance costs associated with training employees of providers and insurers affected by the proposed rules. Actual individual compliance costs cannot reasonably be ascertained at this time.

A. How many and what category of individuals will be affected by the rules?

Individual health care providers providing health or medical care to those injured in motor vehicles accidents will be most affected by the rules. DIFS estimates that approximately 28,000 individual health care providers will be affected.

B. What qualitative and quantitative impact do the proposed changes in rules have on these individuals?

The proposed rules would provide a process for individual health care providers to appeal insurer determinations to DIFS.

30. Quantify any cost reductions to businesses, individuals, groups of individuals, or governmental units as a result of the proposed rules.

There is the potential for cost reduction to insurers or providers depending on the result of appeals decisions made by DIFS. There is no cost reduction anticipated for governmental units due to the proposed rules.

31. Estimate the primary and direct benefits and any secondary or indirect benefits of the proposed rules. Please provide both quantitative and qualitative information, as well as your assumptions.

The primary and direct benefit of the proposed rules is to help lower the overall costs of automobile insurance by ensuring that injured persons receive necessary care. In addition, the proposed rules are intended to provide persons injured in motor vehicle accidents with an appropriate level of medical and health care.

32. Explain how the proposed rules will impact business growth and job creation (or elimination) in Michigan.

The proposed rules should not significantly impact business growth or job creation or elimination in Michigan. Stakeholders, as noted in #24 above, have expressed concerns regarding the fee schedule adopted in MCL 500.3157. The proposed rules necessarily refer to that section in order to assess the “cost” of care: to the extent the fee schedule impacts business growth and job creation or elimination, that impact would occur independently of the proposed rules.

33. Identify any individuals or businesses who will be disproportionately affected by the rules as a result of their industrial sector, segment of the public, business size, or geographic location.

Health care providers and automobile insurers will be disproportionately affected by the rules due to the subject matter of the rules.

34. Identify the sources the agency relied upon in compiling the regulatory impact statement, including the methodology utilized in determining the existence and extent of the impact of the proposed rules and a cost-benefit analysis of the proposed rules.

DIFS relied on the following sources to compile the Regulatory Impact Statement:

- Feedback from the stakeholders listed in the response to #27A.
- Budget estimates prepared by DIFS’ Office of Financial and Administrative Services.

A. How were estimates made, and what were your assumptions? Include internal and external sources, published reports, information provided by associations or organizations, etc., which demonstrate a need for the proposed rules.

In providing the above estimates, DIFS relied on information provided by the following sources: feedback from the stakeholders listed in the response to #27A, budget estimates prepared by DIFS’ Office of Financial and Administrative Services.

35. Identify any reasonable alternatives to the proposed rules that would achieve the same or similar goals.

There are no reasonable alternatives to the proposed rules because DIFS is statutorily required to promulgate these rules.

A. Please include any statutory amendments that may be necessary to achieve such alternatives.

There are no statutory amendments that would achieve an alternative to these rules.

36. Discuss the feasibility of establishing a regulatory program similar to that proposed in the rules that would operate through private market-based mechanisms. Please include a discussion of private market-based systems utilized by other states.

Rulemaking is mandatory under Section 3157a(3) of the Insurance Code, MCL 500.3157a(3). That section expressly requires that DIFS handle provider appeals of insurer determinations. Private market-based mechanisms will play a role to some degree in the utilization review programs that auto insurers will be required to develop because those programs are largely conducted by insurers’ internal staff or by contracting with independent medical review organizations. DIFS is not aware of any private market-based systems utilized in other states that standardize utilization review among no-fault automobile insurers.

36. Discuss the feasibility of establishing a regulatory program similar to that proposed in the rules that would operate through private market-based mechanisms. Please include a discussion of private market-based systems utilized by other states.

DIFS considered several alternatives that were not incorporated into the revised rules, as follows:

- Including technical review of coding, billing, and claims in the provider appeals process. This was not included because DIFS received feedback that it would be duplicative of existing technical review and overly burdensome for health care providers, especially smaller providers.
- A mandatory “reconsideration” process prior to providers being able to appeal to DIFS. This was not included because it was too burdensome to providers.
- Provider reporting requirements. This was not included because it did not provide significant benefit to DIFS’ utilization review process and was burdensome for providers.
- Claims processing and coding requirements. These were not included in order to decrease the burden on providers and insurance companies and prevent duplication of existing processes.

38. As required by MCL 24.245b(1)(c), please describe any instructions regarding the method of complying with the rules, if applicable.

After the rules have been promulgated, DIFS will issue guidance to affected entities regarding compliance. This guidance will likely include the following: forms with instructions for insurers applying for certification of their utilization review programs and forms with instructions for providers who wish to appeal to DIFS.