

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the adoption of New) NOTICE OF PUBLIC HEARING ON
Rules I through XII pertaining to Air) PROPOSED ADOPTION
Ambulance and Hold Harmless)
Dispute Resolution)

TO: All Concerned Persons

1. On August 14, 2017, at 9:00 a.m., the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI), will hold a public hearing in the 2nd floor conference room, at the Office of the Montana State Auditor, Commissioner of Securities and Insurance, 840 Helena Ave., Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The CSI will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the CSI no later than 5:00 p.m. on August 3, 2017, to advise us of the nature of the accommodation that you need. Please contact Ramona Bidon or Lisa Monroe, CSI, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; (406) 444-1942; TDD (406) 444-3246; fax (406) 444-3499; or e-mail rbidon@mt.gov or lmmonroe@mt.gov.

3. The new rules as proposed to be adopted provide as follows:

NEW RULE I PURPOSE (1) These rules are intended to establish an expedient and economical process for resolving billing disputes between insurers or health plans and air ambulance services. The independent reviewer shall conduct all aspects of the dispute resolution process in a manner that furthers these objectives while providing for accurate determination of fair market price.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA
IMP: 2-18-720, 20-25-1320, 33-2-2306, MCA

Reason: These rules implement Senate Bill 44, passed by the 2017 Montana Legislature and signed into law by Governor Steve Bullock. In relevant part, the legislation provides a dispute resolution mechanism for insurers or health plans and air ambulance services who cannot reach agreement regarding the fair market price of services provided. The legislation requires the CSI to adopt procedural rules regarding the dispute resolution process, as well as rules regarding independent reviewer eligibility.

The rules are drafted to provide an efficient process leading to a reasoned determination by a qualified decision maker. The legislation makes clear that the dispute resolution is not a substitute for civil litigation, and the parties may pursue

that route following the independent review. Thus, these rules provide for a more flexible process responsive to the parties' preferences for how best to reach a determination of fair market price. The legislative intent of flexibility is reflected in Senate Bill 44 by the fact that the parties are first encouraged to negotiate an agreed-upon amount without recourse to dispute resolution, as well as their ability to mutually select their own independent reviewer.

NEW RULE II MAPA INAPPLICABLE (1) A dispute resolution process subject to this subchapter:

- (a) is not a contested case as defined in 2-4-102, MCA;
 - (b) is not a proceeding before the commissioner; and
 - (c) is not subject to the Montana Administrative Procedure Act, Title 2, chapter 4, MCA.
- (2) The independent dispute resolution process is exhausted upon issuance of the independent reviewer's final decision. A final decision:
- (a) is not appealable;
 - (b) does not limit or create any private rights or remedies for either party;
- and
- (c) does not preclude a party from pursuing any available remedies in a court of competent jurisdiction.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule II clarifies that the dispute resolution process is a private arbitration-style process not subject to the requirements of the Montana Administrative Procedure Act. The process is not a "proceeding before an agency" and does not determine "legal rights, duties, or privileges." See 2-4-102(4), MCA. The process is overseen by an independent reviewer, and does not result in a decision binding on either party. As a result, no appeal rights are available or necessary, and the independent reviewer's decision does not prevent subsequent litigation in a court of competent jurisdiction.

NEW RULE III CONFIDENTIALITY (1) The parties and independent reviewer shall maintain the confidentiality of all information protected under applicable law, including protected health information under the Health Insurance Portability and Accountability Act of 1996 or personal information protected under Title 33, Chapter 19, MCA. The parties shall limit disclosure of protected information, including to the independent reviewer, to the minimum necessary to effectuate the dispute resolution process.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, 33-19-106, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, 33-19-306, MCA

REASON: New Rule III ensures that all parties involved in a dispute resolution process abide by state and federal information privacy laws. For example, the Health Insurance Portability and Accountability Act of 1996 restricts the disclosure of protected health information held by health insurers, employer sponsored health plans, medical providers, and other parties. Likewise, Title 33, Chapter 19 of the Montana Code Annotated in some cases provides even broader protection of personal information. New Rule III ensures that parties are aware of and comply with these and other applicable privacy requirements during the dispute resolution process.

NEW RULE IV NOTICE OF DISPUTE – CONTENT (1) Within 30 days of determining that an insurer or health plan and an air ambulance service cannot resolve a billing dispute, the parties shall file a notice of dispute with the commissioner. The notice shall be mailed to: Office of the Montana State Auditor, c/o Chief Legal Counsel, 840 Helena Avenue, Helena, MT 59601.

(2) The notice must specify:

- (a) the parties to the dispute;
- (b) the date of service;
- (c) the insured and (if different) the individual transported by the air ambulance service;
- (d) the amount in controversy after insurer or health plan payment;
- (e) whether the parties have agreed upon an independent reviewer, and if so, his or her contact information; and
- (f) the contact information of each party's representative for purposes of the dispute.

(3) If multiple billing disputes between the parties are ripe for dispute resolution when the notice of dispute is filed, whether or not involving transport of the same individual, the parties shall identify all such disputes in the notice. The disputes must be consolidated and the assigned independent reviewer shall hear all identified disputes.

(4) Parties shall make reasonable efforts to jointly file the notice of dispute with the commissioner. If one party is uncooperative, a party may file the notice of dispute without the participation of the uncooperative party. In such a case, the filing party shall document in the notice the efforts made to coordinate with the other party.

(5) The parties shall notify each other of the acceptable form of service before or at the time the notice of dispute is filed. If a party does not specify a form of service, service shall be effectuated by mail to the last known business address of the entity.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: The dispute resolution process is triggered by the parties' filing of a notice of dispute with the CSI. New Rule IV specifies the required content of the notice of dispute. The rule ensures the notice of dispute contains the information

necessary to effectuate the initial steps of the dispute resolution process. For example, the notice of dispute will inform the CSI of whether assignment of an independent reviewer is unnecessary because the parties have jointly selected one. The content will also allow the independent reviewer to verify he or she has no disqualifying conflicts. Finally, parties will serve pleadings and other documentation upon each other throughout the course of the proceeding, and the rule provides the means of determining the proper method of service from the outset of the dispute resolution process.

NEW RULE V INDEPENDENT REVIEWER SELECTION—SUBSTITUTION

(1) If the parties to a dispute agree upon an independent reviewer, the independent reviewer is presumed to be qualified without further verification by the commissioner.

(2) If a party believes an assigned independent reviewer has a conflict of interest, the party may request assignment of a different independent reviewer. Upon receipt of the request, the commissioner shall randomly appoint a replacement independent reviewer.

(3) Each party may request assignment of a different independent reviewer under (2) only once per dispute.

(4) A request under (2) must be made within 10 calendar days after the commissioner notifies the parties of assignment of the independent reviewer or replacement independent reviewer.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-719, 2-18-720, 20-25-1319, 20-25-1320, 33-2-2305, 33-2-2306,
MCA

REASON: Senate Bill 44 requires the CSI to adopt rules regarding eligibility of the independent reviewer. New Rule V primarily ensures that the parties have confidence in the impartiality of the decision maker. Parties may mutually select an independent reviewer, thereby agreeing that his or her qualifications are sufficient; in such a case, further vetting by the CSI is unnecessary. The section permitting substitution of an independent reviewer provides the parties a remedy if they perceive a potential conflict not previously identified by the CSI; at the same time, the rule ensures parties do not repeatedly substitute independent reviewers in order to select one preferred by them.

NEW RULE VI PRELIMINARY HEARING (1) Unless otherwise ordered by the independent reviewer or agreed to by the parties, within 30 days of appointment the independent reviewer shall hold a telephonic preliminary hearing.

(2) During the preliminary hearing, the parties and independent reviewer shall address any issues precedent to the hearing, including as applicable:

- (a) establishing a scheduling order;
- (b) whether the parties intend to call experts, and if so, whether the parties will exchange expert reports;
- (c) procedures for maintaining confidentiality of documents or testimony;

(d) whether the hearing will be conducted telephonically, in person, or by written submissions;

(e) any dispositive issues, including any assertion that the dispute is not properly subject to the dispute resolution process;

(f) coordinating document exchanges; and

(g) any mechanisms to streamline the dispute resolution process, such as the use of pre-filed testimony.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule VI sets forth a procedure for a preliminary hearing. This hearing is intended to facilitate the efficient exchange of discovery-related information, resolve any objections regarding the applicability of the dispute resolution process to the particular circumstances, and provide notice of the forum in which the evidentiary hearing will be held.

NEW RULE VII DISCOVERY (1) Within 14 days after the preliminary hearing, the parties shall exchange all documents upon which they intend to rely at hearing, and a list of all witnesses they intend to call. The parties shall promptly supplement the disclosures as additional documents or witnesses become known.

(2) Each party is limited to one deposition except as agreed otherwise, or as ordered by the independent reviewer.

(3) A party may request additional documentation from the other party that it reasonably believes to be relevant and material to the outcome of the dispute. If a party refuses to comply, the requesting party may petition the independent reviewer, who shall require production if the request is for documentation reasonably believed to meet the standards of relevance and materiality.

(4) Parties may not propound discovery in the form of requests for admission or interrogatories.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule VII provides a framework for discovery in the dispute resolution process. This process is limited to the determination of one substantive issue: the fair market price of the services provided. The facts surrounding the event leading to the claim (e.g., the distance and nature of the transport, as well as medical care provided en route) are much less likely to be in dispute than the parties' interpretations as to how the value of services is properly calculated. Therefore, discovery avenues available to the parties (deposition and requests for production, as well as potential expert disclosures as contemplated under New Rule VI) are calculated to elicit material information, while maintaining efficiency and limiting dilatory or overly burdensome discovery requests. The parties may seek relief from the independent reviewer in the event of any discovery disputes.

NEW RULE VIII EVIDENCE AND PROCEDURE (1) The Montana Rules of Evidence and Montana Rules of Civil Procedure do not apply to the independent dispute resolution process.

(2) The parties may offer such evidence as is relevant and material to the dispute.

(3) The independent reviewer shall determine the admissibility of evidence. The independent reviewer may exclude evidence that is cumulative or irrelevant, or if the evidence cannot be sufficiently authenticated.

(4) The independent reviewer may render any necessary procedural determinations not set forth by statute or this subchapter.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule VIII provides the independent reviewer broad discretion regarding evidentiary and procedural rulings, consistent with the degree of discretion authorized under Senate Bill 44. Parties have greater flexibility in the types and sources of evidence than would otherwise be available under the Montana Rules of Evidence. At the same time, New Rule VIII maintains the efficiency of the process by requiring evidence to be material, as well as granting the independent reviewer significant leeway to exclude evidence not helpful in making the fair market price determination. This more flexible approach is consistent with the fact that the arbitration-style dispute resolution process is not a contested case hearing or civil litigation.

NEW RULE IX PREPARATION FOR HEARING (1) No less than 14 days prior to the adjudicatory hearing, the parties shall jointly submit a stipulation identifying all facts not in dispute, including as applicable:

(a) distance and method of transportation;

(b) actual rates of air ambulance billing and insurer or health plan reimbursement;

(c) characteristics of the transport vehicle and personnel;

(d) services provided during transport that were billed to the insured; and

(e) each party's calculation of the fair market price for the services provided.

(2) No less than 10 days prior to the adjudicatory hearing, each party shall submit a prehearing brief setting forth its calculation of the fair market price for the services provided, and summarizing the basis for that calculation. A prehearing brief may not exceed 10 double-spaced pages, inclusive of any attachments.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule IX streamlines the dispute resolution hearing by requiring the parties to narrow the factual issues in dispute prior to the hearing. By stipulating to

undisputed facts, the parties may reduce the time and expense associated with establishing foundational matters at hearing not material to the disagreement over the fair market price. Additionally, the required prehearing brief serves to apprise the independent reviewer and opposing parties of the basis for each party's position, resulting in a hearing more efficiently addressing the factors dispositive to the independent reviewer's calculation.

NEW RULE X HEARING (1) Unless otherwise requested by either party, all hearings during the independent dispute resolution process must be held telephonically.

(2) Each party shall present evidence and testimony in support of its fair market price calculation. Witnesses shall be subject to examination by the adverse party and independent reviewer.

(3) The parties may consent to waive a telephonic or in-person hearing and proceed by filing opening and rebuttal briefs, with supporting affidavits and evidence, under terms established by the independent reviewer.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule X provides for a telephonic hearing by default. Given that billing disputes are minimally reliant upon fact witness (including eyewitness) testimony, the advantages normally associated with an in-person hearing such as observation of witness demeanor are less significant. Moreover, a telephonic hearing limits the parties' accrual of unnecessary expenses. At the same time, the rule provides the parties the flexibility to conduct a hearing in their preferred medium, whether telephonically, in person, or via briefing. The hearing process provides for presentation of evidence and witnesses as is typical in adversarial proceedings.

NEW RULE XI NON-COMPLIANCE WITH ORDER (1) An independent reviewer may order sanctions as necessary to address a party's willful or repeated non-compliance with its obligations under statute, these rules, or an order of the independent reviewer.

(2) Sanctions may include:

(a) disallowing testimony or admission of evidence;

(b) drawing adverse inferences;

(c) a determination that the other party's calculation accurately reflects the fair market price of the services provided; or

(d) any other sanction appropriate for regulation of the proceedings not otherwise disallowed by law.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: New Rule XI outlines the authority of the independent reviewer to address conduct harmful to the effective resolution of the independent review process. Senate Bill 44 does not grant the independent reviewer authority to levy monetary sanctions, but does convey the authority to regulate the proceedings. Therefore, the independent reviewer may apply procedural sanctions consistent with the nature and severity of the party's misconduct.

NEW RULE XII FINAL DETERMINATION (1) An independent reviewer shall issue a written final determination of the fair market price of the services provided no later than 60 days following the hearing.

(2) The final determination must provide a reasoned basis for the fair market price with supporting factual findings and legal conclusions.

(3) The final determination may not be held confidential, except that any information protected from disclosure by law must be redacted prior to dissemination to a third party.

AUTH: 2-18-720, 20-25-1320, 33-2-2306, MCA

IMP: 2-18-718, 2-18-719, 2-18-720, 20-25-1318, 20-25-1319, 20-25-1320, 33-2-2304, 33-2-2305, 33-2-2306, MCA

REASON: The provision of a written determination of fair market price, with supporting findings and conclusions, informs the parties of the independent reviewer's reasoning based upon the factors identified in Senate Bill 44. Even if the parties choose to litigate the matter outside the dispute resolution process, this detailed explanation of the determination will assist parties in understanding the strengths and weaknesses of their positions. The public nature of the final determination facilitates an information exchange helpful to payors and air ambulance services in better understanding the monetary value of air ambulance transports and related medical services.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Michael A. Kakuk, Attorney, Office of the Montana State Auditor, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-0385; fax (406) 444-3497; or e-mail mkakuk@mt.gov, and must be received no later than 5:00 p.m., August 22, 2017.

5. Michael A. Kakuk, Attorney, has been designated to preside over and conduct this hearing.

6. The CSI maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list may sign up by clicking on the blue button on the CSI's website at: <http://csimt.gov/laws-rules/> and may specify the subject matter they are interested in. Notices will be sent by e-mail unless a mailing preference is noted in the request. Requests may also be sent to the CSI in writing. Such written request

may be mailed or delivered to the contact information in 2 above, or may be made by completing a request form at any rules hearing held by the CSI.

7. The bill sponsor contact requirements of 2-4-302, MCA apply and have been fulfilled. The primary bill sponsor was contacted by mail on June 27, 2017.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Michael A. Kakuk
Michael A. Kakuk
Rule Reviewer

/s/ Kris Hansen
Kris Hansen
Chief Legal Counsel

Certified to the Secretary of State July 10, 2017.