

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #7

Do Not Mark In This Box
Filing Date

FILED

2001 NOV 29 P 4:44

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: Insurance Commission TITLE NUMBER: 114

CITE AUTHORITY: W. Va. Code §§ 33-2-10 and 33-20B-2 (e)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 59

TITLE OF RULE BEING PROPOSED: Consent to Rate and Guide "a" Rate
Agreements

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

PLEASE SEE ATTACHED

Use additional sheets if necessary



Authorized Signature

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

This proposed emergency rule sets forth the standards and procedures for approval of consent to rate agreements and guide "a" rate agreements between medical malpractice insurers and their insureds. On November 6, 2001, The West Virginia Legislature passed Senate Bill 6014 which amended West Virginia Code Sections 33-20B-2 relating to rate making for medical malpractice insurance. This emergency rule is being proposed pursuant to the language in subsection (e) of West Virginia Code Section 33-20B-2, which requires the Insurance Commissioner to propose rules for legislative approval. The rule must be filed as an emergency rule to accommodate insureds with policies that are close to expiring and who will be without medical malpractice insurance coverage absent an agreement with the insurer on a non-standard rate at which the insurer will write the risk. In order to meet the immediate needs of health care providers in obtaining coverage, this rule must be promulgated as an emergency rule.

Department of Tax and Revenue
Agency Questionnaire

Re: Emergency Legislative Rule to be Filed

Consent to Rate and Guide "a" Rate Agreements

TITLE 114, SERIES 59

EMERGENCY

Question 1: Are regulations required?

Yes, pursuant to West Virginia Code Section 33-20B-2(e), amended by the Legislature during special session on November 6, 2001, the Insurance Commissioner is required to propose legislative rules for promulgation in accordance with Chapter 29A, Article 3 of the West Virginia Code.

Question 2: Is the rule you are proposing controversial? If yes, what are the pros and the cons?

Yes, the rule may be controversial among health care providers and insurance companies that write medical malpractice policies. The amendment that specifically authorized consent to rate and guide "a" rate agreements in the medical malpractice line was generally supported by representatives of physician groups as a way to ensure that coverage would be available for those providers who present a greater than normal risk and are therefore unable to obtain coverage using standard filed rates. Some health care providers, however, may not agree that consent to rate or guide "a" rate agreements should be allowed because it will enable the insurer to require a higher premium than those based on filed rates or other changes to coverage before the policy will be renewed or written. Insurers may not like that the rule requires a supplement to filed rates upon which consent to rate agreements will be based, and that the Commissioner's approval will be required for these agreements. The positive aspects of the rule are that it will set forth procedures and standards for approval of these agreements between the insured and insurer, and will require the agreement of the insured before approval by the Commissioner. In addition, the insurer must certify that it has explained to the insured how the proposed premium in the agreement has been derived, thereby increasing the insured's understanding of the process.

Question 3: Is the rule you are proposing a copy of another state's rule? A model rule? Custom-drafted?

The rule is custom-drafted.

Question 4: What are the really important things you think the Secretary of Tax and Revenue should know about this rule and the issues that surround it?

Consent to rate and guide "a" rate agreements in the medical malpractice insurance line are now specifically allowed, based on amendments to West Virginia Code Section 33-20B-2(e). Because of the urgency of the medical malpractice insurance situation, it is necessary that this rule be filed as an emergency rule in order to have standards and procedures in place to approve these agreements as insurers and insureds begin to enter into them almost immediately. The rule is drafted to give the Insurance Commissioner sufficient information upon which to approve the agreements, while protecting where possible certain facts giving rise to the agreement. The insurer will be required to explain to the insured the manner in which the premium in the agreement was calculated, and certify to the Insurance Commissioner that the agreement is in accordance with an appendix to its rating manual that has been filed and approved by the Commissioner.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE:

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: OFFICE OF THE INSURANCE COMMISSIONER
ATTN: Legal Division
1124 Smith Street
Post Office Box 50540
Charleston, West Virginia 25305-0540

EMERGENCY RULE TITLE: CONSENT TO RATE AND GUIDE "A" RATE AGREEMENTS
(Title 114, Series 59)

1. **Date of filing:**

2. **Statutory authority for promulgating emergency:**

West Virginia Code Sections 33-2-10 and 33-20B-2(e).

3. **Date of filing of proposed legislative rule:**

4. **Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?**

The emergency rule adds a new series, Series 59, to the Insurance Commission rules. The rule is new.

5. **Has the same or similar emergency rule previously been filed and expired?**

No.

CONSENT TO RATE AND GUIDE "A" RATE AGREEMENTS

Title 114, Series 59

EMERGENCY

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6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety and welfare.

See response to Question #8.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code of federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to public interest.

This proposed emergency rule sets forth the standards and procedures for approval of consent to rate agreements and guide "a" rate agreements between medical malpractice insurers and their insureds. On November 6, 2001, The West Virginia Legislature passed Senate Bill 6014 which amended West Virginia Code Section 33-20B-2 relating to rate making for medical malpractice insurance. This emergency rule is being proposed pursuant to the language in Subsection (e) of West Virginia Code Section 33-20B-2, which requires the Insurance Commissioner to propose rules for legislative approval. An emergency rule must be promulgated in order to accommodate insureds with policies that are close to expiring and who will be without medical malpractice insurance coverage absent an agreement with the insurer on a non-standard rate at which the insurer will write the risk. If there are no standards and procedures in place for approval of these agreements, insurers will be forced to look for coverage in the excess lines market, which is coverage through an insurer not licensed to do business in this state, at perhaps higher cost or less favorable terms of coverage. If coverage cannot be found in the excess lines market, those health care providers may simply be unable to obtain coverage absent the promulgation of this emergency rule. Providers without medical malpractice coverage who continue to practice medicine risk their personal assets if they commit malpractice, and the public interest is greatly served by having adequately insured health care providers practicing in this state so that damages suffered by the public as a result of medical negligence are compensated.

Insurance Commissioner
Emergency Rule
Title 114, Series 59

CONSENT TO RATE AND GUIDE "A" RATE AGREEMENTS

Title 114, Series 59

BRIEF SUMMARY OF RULE

This emergency rule is proposed pursuant to the provisions of Senate Bill 6014, passed during the sixth 2001 special legislative session on November 6 2001, which amended West Virginia Code Section 33-20B-2. The rule provides standards and procedures for approval of consent to rate and guide "a" rate agreements proposed by insurers providing medical malpractice insurance policies to health care providers. The rule requires insurers to file an appendix as part of or as a supplement to its rating manual which will set forth the risks and reasons for which it will request approval of consent to rate agreements. The insurer must, with the agreement of the insured, request approval of each agreement using a form set forth in the rule. The rule states that the use of guide "a" rates will be based upon the insurer's ability to demonstrate that the risk being insured is one for which the insurer has no credible loss experience and that therefore the use of a guide "a" rate is appropriate. The rule further sets forth the period of time within which the Commissioner must approve an agreement before the agreement is deemed approved, and the actions to be taken upon disapproval. Finally, the rule provides for the assessment of a penalty or other action upon violation of the rule. The form agreement may be amended as deemed necessary by filing a procedural rule. This emergency rule creates a new series, Series 59, in the insurance commission rules.

Insurance Commissioner
Emergency Legislative Rule
Title 114, Series 59

CONSENT TO RATE AND GUIDE "A" RATE AGREEMENTS

Title 114, Series 59

STATEMENT OF CIRCUMSTANCES

On November 6, 2001, The West Virginia Legislature passed Senate Bill 6014 which amended West Virginia Code Section 33-20B-2 relating to rate making for medical malpractice insurance. This emergency rule is being proposed pursuant to the language in Subsection (e) of West Virginia Code Section 33-20B-2, which requires the Insurance Commissioner to propose rules for legislative approval which set forth the standards and procedure for reviewing and approving consent to rate and guide "a" rate agreements between insured health care providers and their insurers. The rule must be filed as an emergency rule to accommodate insureds with policies that are close to expiring and who will be without medical malpractice insurance coverage absent an agreement with the insurer on a non-standard rate at which the insurer will write the risk.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Consent to Rate and Guide "a" Rate Agreements
 Title 114, Series 59
 EMERGENCY RULE

Type of Rule: XX Legislative ___ Interpretive ___ Procedural

Agency: Insurance Commissioner

Address: Post Office Box 50540
 1124 Smith Street, Greenbrooke Building
 Charleston, West Virginia 25305-0540

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1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	Increase	Decrease	Current	Next	Thereafter
ESTIMATED TOTAL COST	None				
PERSONAL SERVICES	None				
CURRENT EXPENSE	None				
REPAIRS AND ALTERNATIONS	None				
EQUIPMENT	None				
OTHER	None				

2. Explanation of above estimates:

The rule will have no additional fiscal impact upon state, local or federal government.

3. Objectives of these rules:

The objective of this rule is to set forth the standards and procedures for approval of consent to rate and guide "a" rate agreements by the Insurance Commissioner in order to carry out the provisions of West Virginia Code Section 33-20B-2(e) dealing with rates and rate making in connection with medical malpractice insurance.

Rule Title: Consent to Rate and Guide "a" Rate Agreements
Title 114, Series 59
EMERGENCY

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

This rule will establish standards for approval of agreements that will allow an insurer to charge a premium in connection with a medical malpractice insurance policy that is higher or lower than the insurer's filed manual rate that would otherwise be applied to the risk being insured. The rule could therefore affect health care providers, who will be required to pay more for coverage on an individual basis if the health care provider poses an unusually high risk. These types of agreements between insureds and insurers were previously prohibited in the medical malpractice line. Now that they are allowed, subject to approval by the Insurance Commissioner, it is likely that more insureds will be required to pay higher premiums in order to obtain coverage. However, these insureds may be ones that otherwise would be unlikely to find coverage without such an agreement.

C. Economic Impact on Citizens/Public at Large.

For insureds who must pay higher premiums pursuant to a consent to rate agreement or guide "a" rate agreement in order to obtain coverage, the increased cost may be passed on by the provider and the cost of health care could be affected.

Date: _____

Signature of Agency Head or Authorized Representative

MARY JANE PICKENS, ASSOCIATE COUNSEL

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**WEST VIRGINIA EMERGENCY LEGISLATIVE RULE
INSURANCE COMMISSIONER**

**SERIES 59
MEDICAL MALPRACTICE INSURANCE
CONSENT TO RATE AND GUIDE "A" RATE AGREEMENTS**

Section

- 114-59-1. General.
- 114-59-2. Definitions.
- 114-59-3. Approval Required for All Non-standard Rates.
- 114-59-4. Amendments to the West Virginia Medical Malpractice Policy Agreement Form.
- 114-59-5. Violation.

Appendix A. Application for Approval of Consent to Rate Agreement or Use of Guide "a" Rate.
"West Virginia Medical Malpractice Policy Agreement"

**TITLE 114
WEST VIRGINIA EMERGENCY LEGISLATIVE RULE
INSURANCE COMMISSIONER**

FILED

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**SERIES 59
MEDICAL MALPRACTICE INSURANCE
CONSENT TO RATE AND GUIDE "A" RATE AGREEMENTS**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§114-59-1. General.

1.1. Authority. -- This rule is promulgated pursuant to the authority granted by W.Va. Code §33-20B-2 and §33-2-10.

1.2. Scope. -- Except as otherwise provided, this rule applies to any insurer authorized to transact insurance in West Virginia that writes policies providing medical malpractice insurance coverage for health care providers. This rule prescribes standards and procedures for reviewing and approving consent to rate and guide "a" rate agreements for medical malpractice insurance policies.

1.3. Filing Date. --

1.4. Effective Date. --

§114-59-2. Definitions.

2.1. "Commissioner" means the commissioner of insurance.

2.2. "Consent to rate" means a written agreement between an insurer and an insured resulting in a rate applied to the risk that exceeds the standard manual rate approved by the commissioner in a rate filing that would otherwise apply to the risk

2.3. "Guide 'a' rate" means a rate that is not backed up by credible loss experience statistics of the carrier writing the risk. These rates are used for unusual risks and are based on the judgment of an underwriter on an individual risk basis.

2.4. "Medical malpractice insurance" means insurance coverage for any claim for damages or loss against a health care provider arising out of the death or injury of any person proximately caused by negligence in the rendering of, or the failure to render, health care services.

2.5. "Non-standard rate" means a rate that is either higher or lower than manual rates set forth in an approved filing that would otherwise apply to a particular risk.

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2.6. "Rating manual" means the rates, schedules of rates, classification rules, rating rules, minimum premiums, minimum premium rules, policy fees or rules and any other information which the insurer uses to determine the final dollar charge for medical professional liability insurance coverage.

§114-59-3. Approval Required for All Non-standard Rates.

3.1. Any insurer that wishes to negotiate consent to rate agreements or apply guide "a" rates in connection with the issuance or renewal of any policy providing coverage for medical malpractice liability, shall first file with the commissioner as part of its filing made pursuant to subsection (a), section three, article twenty-b of chapter thirty-three of the West Virginia Code, or as a supplement to the filing, an appendix which describes the specific risks or reasons for which non-standard rates will be applied to particular risks. The appendix must also set forth the ranges of rates which will be applied to risks that may be the subject of consent to rate agreements; *Provided*, that the appendix is not required to include rate ranges that will apply to guide "a" rates.

3.2. An insurer shall obtain from the insurance applicant all information necessary to determine the proper application of a non-standard rate before seeking approval from the commissioner of a consent to rate agreement or guide "a" rate. The application for approval of a consent to rate agreement or the use of a guide "a" rate in connection with a specific risk shall be signed by the insured and the insurer, and shall be submitted by the insurer on the West Virginia Medical Malpractice Policy Agreement form, Appendix A to this rule.

3.3. An application submitted by an insurer pursuant to subsection 3.2 of this rule shall:

a. In the case of a consent to rate agreement, include the insurer's certification that the risk or reasons for which approval of the consent to rate agreement is requested, and the rate to be applied to the risk, are set forth in the appendix to the rating manual previously approved by the commissioner as provided in subsection 3.1 of this section; or

b. In the case of a guide "a" rate, demonstrate that the insurance applicant is a risk for which the insurer has no credible loss experience statistics.

3.4. If the risk or reasons for which approval of a consent to rate agreement are not included in the appendix to the rating manual previously approved by the commissioner as provided in subsection 3.1 of this section, the application for approval of a consent to rate agreement submitted by the insurer shall describe the risk and state with specificity the reasons for the agreement. For the purposes of this subsection, a statement that "coverage is not available at manual rates," or similar statements will be deemed insufficient.

3.5. An application for approval of a consent to rate agreement or the use of a guide "a" rate in connection with a specific risk shall be approved or denied by the commissioner within fifteen

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days of receipt of the application by the commissioner. Failure of the commissioner to disapprove the application within this time shall result in its approval.

3.6. In the event a consent to rate agreement or the use of a guide "a" rate in connection with a specific risk is disapproved by the commissioner, the disapproval must specify in what respect(s) the commissioner finds the application to be unacceptable. Notice of the disapproval shall be provided to the agent, the insurer and the insured.

3.7. At any subsequent policy renewal, the requirements of this section must be complied with and a new application for approval must be filed by the insurer.

3.8. The insurer shall retain a copy of each signed consent to rate agreement and a copy of all underwriting and other policy information generated in connection with each consent to rate agreement or guide "a" rate for a period of three years after the date that the policy expires, and shall make this information available to the commissioner upon request.

§114-59-4. Amendments to West Virginia Medical Malpractice Policy Agreement Form.

4.1. The commissioner may as needed amend the West Virginia Medical Malpractice Policy Agreement form, which is Appendix A to this rule, by procedural rule.

§114-59-5. Violation.

5.1. Upon a determination by the commissioner that there is probable cause to believe that any insurer has charged a non-standard rate in violation of West Virginia Code Section 33-20B-2 or this rule, the commissioner shall provide written notice to the insurer of the time and place at which the insurer shall appear to show good cause why a civil penalty, refund to the insured, or transfer from surplus should not be ordered.

5.2. If, after notice and hearing as provided in subsection 5.1 of this section, the commissioner determines that a violation has occurred, the commissioner shall assess a civil penalty and/or order that the insurer issue a refund to the insured or transfer from surplus the difference between the manual rate otherwise applicable to the risk and the rate charged.

- (13) IN THE CASE OF A **CONSENT TO RATE AGREEMENT**, THE INSURER MUST CERTIFY THAT THE REASON THIS AGREEMENT IS NECESSARY IS ONE OF THE SPECIFIED REASONS STATED IN THE APPENDIX TO THE RATING MANUAL AS REQUIRED BY §114-59-3.1.

The WV Insurance Commission Filing Number assigned to the aforesaid appendix is:

IF THE RISK OR REASON(S) THIS AGREEMENT IS NECESSARY IS NOT ONE OF THOSE SPECIFIED IN THE FILING REQUIRED BY §114-59-3.1, THE INSURER MUST DESCRIBE THE RISK AND STATE WITH SPECIFICITY THE REASONS FOR THE AGREEMENT.

- (14) IN THE CASE OF A **GUIDE "A" RATE AGREEMENT**, THE INSURER MUST CERTIFY THAT THE REASON(S) THIS AGREEMENT IS NECESSARY IS THAT THIS IS A RISK FOR WHICH THE INSURER HAS NO CREDIBLE LOSS EXPERIENCE STATISTICS.

CERTIFICATION

State of _____ County of _____

To-wit:

I, _____, do swear or affirm that I have carefully examined each of the questions asked in items (12), (13), and (14) in this Agreement and each of the responses thereto and, to the best of my knowledge and ability, all responses, information, exhibits, and documentary evidence submitted in support thereof are true and correct.

 (Type or Print Name)

 (Title of Insuring Company Official)

 (Signature)

 (Date)

Sworn to and subscribed before me this _____ day of _____ 19 _____.

My commission expires: _____.

{Notary Seal}

 Notary Public

The above was completed prior to my signing. I note that the rate(s) being charged is:

Choose one option below:

() **in excess of the rate(s) filed and approved manual rate(s) for this insurer.**

() **below the rate(s) filed and approved manual rate(s) for this insurer.**

INSURED SIGNATURE _____

WARNING: THE INSURED SHOULD INVESTIGATE THE POSSIBILITY OF ELIGIBILITY FOR OTHER PLANS THAT MAY BE AVAILABLE TO THE INSURED AT THE TIME OF SIGNING.

NOTICE: An application for approval of a consent to rate agreement or the use of a guide "a" rate or other non-standard rate in connection with a specific risk shall be approved or denied by the Commissioner within 15 days of receipt of the application by the Commissioner. Failure of the Commissioner to disapprove the application within this time shall result in its approval.