

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: July 30, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Board of Risk and Insurance Management
90 MacCorkle Avenue, S.W., Suite 203
South Charleston, WV 25303
(304) 766-2646

LEGISLATIVE RULE TITLE: Title 115, Series 6

Preferred Medical Liability and High Risk Liability Program

1. Authorizing statute(s) citation WV Code § 29-12-1 et seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

June 27, 2003

b. What other notice, including advertising, did you give of the hearing?

c. Date of Public Hearing(s) or Public Comment Period ended:

July 28, 2003

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received X

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Jeff VanGilder, General Counsel

WV Board of Risk and Insurance Management

90 MacCorkle Avenue, S.W., Suite 203

South Charleston, WV 25303

(304) 766-2646 (304) 766-2653 - fax

- g. **IF DIFFERENT FROM ITEM 'f',** please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Same

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

Not Applicable

b. Date of hearing or comment period:

Not Applicable

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

Not Applicable

d. Attach findings and determinations and reasons:

Attached Not Applicable

115 CSR 6

**TITLE 115
BOARD OF RISK AND INSURANCE MANAGEMENT**

**SERIES 6
PREFERRED MEDICAL LIABILITY AND HIGH RISK
MEDICAL LIABILITY PROGRAM**

**BRIEF SUMMARY OF COMMENTS RECEIVED WITH REGARD
TO PROPOSED RULE**

No comments were received. Therefore, no response is necessary.

115 CSR 6

TITLE 115

BOARD OF RISK AND INSURANCE MANAGEMENT

SERIES 6

**PREFERRED MEDICAL LIABILITY AND HIGH RISK
MEDICAL LIABILITY PROGRAM**

STATEMENT OF CIRCUMSTANCES REQUIRING THIS RULE

The West Virginia Legislature found and declared that there was a need for the State of West Virginia to assist in making professional liability insurance available for certain health care providers. It further authorized the Board of Risk and Insurance Management to implement the administration of the preferred Medical Liability Program and the High Risk Medical Liability Program after having found that this program was necessary to assist in making Professional Liability Insurance available for certain necessary health care providers in West Virginia to assure that quality medical care is available to the citizens of the State. Subsequent legislation has brought about a need to revise the Rules.

The purpose of this proposed rule is to clarify language contained in the existing rule, and to provide additional language to align this rule with recently enacted legislation. The rule adds optometrist under health care providers. In addition, it identifies meeting requirements and allows for discussion of personal or financial information in executive session.

115 CSR 6

TITLE 115

BOARD OF RISK AND INSURANCE MANAGEMENT

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**PREFERRED MEDICAL LIABILITY AND HIGH RISK
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BRIEF SUMMARY OF PROPOSED RULE

The purpose of this proposed rule is to clarify language contained in the existing rule, and to provide additional language to align this rule with recently enacted legislation. The rule adds optometrist under health care providers. In addition, it identifies meeting requirements and allows for discussion of personal or financial information in executive session.

115CSR6
Title 115
Legislative Rules
State Board of Risk and Insurance Management
Series 6
Public Entities Insurance Program

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TITLE 115
LEGISLATIVE RULE
STATE BOARD OF RISK AND INSURANCE MANAGEMENT

FILED

2003 AUG -1 P 4: 50

SERIES 6
PREFERRED MEDICAL LIABILITY AND HIGH RISK
MEDICAL LIABILITY PROGRAM

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§115-6-1. General.**

1.1. Scope. -- These rules and regulations are to be applied to implement, clarify and/or explain the administration of the preferred Medical Liability Program and the High Risk Medical Liability Program. The purpose of the program is to assist in making Professional Liability Insurance available for certain necessary health care providers in West Virginia to assure that quality medical care is available for the citizens of the State.

1.2. Authority. -- W. Va. Code §29-12-5(e)(2)(N)1, et seq.

1.3. Filing Date. -- ~~March 27, 2002.~~ _____

1.4. Effective Date. -- ~~March 27, 2002.~~ _____

§115-6-2. Definitions.

2.1. "Board" means the state of board of risk and insurance management.

2.2. "Health Care Provider" means a person licensed by his or her respective Board to practice medicine in this state as a medical doctor or an osteopath or a podiatrist, optometrist, pharmacist, registered nurse holding an advanced practice announcement, a physician's assistant, a dentist, a physical therapist, a chiropractor, a professional limited liability company or medical corporation, an association, partnership or other entity organized for the purpose of rendering professional services by persons who are health care providers, a hospital medical clinic, psychiatric hospital, or other medical facility authorized by law to provide professional medical services or such other health care provider as the Board may from time to time approve. A "health care provider" does not include any provider of professional medical services that has ~~M~~ medical ~~M~~ malpractice ~~I~~ insurance pursuant to article twelve of Chapter Twenty-Nine (29).

2.3. "Sexual Acts" means that sexual conduct which constitutes a criminal or tortious act under the laws of West Virginia.

2.4. "Prior acts" coverage means coverage for claims arising out of the providing of medical services, including medical treatment, which are first reported to the board during the effective policy period, but which occurred on or after the retroactive date reported in the policy declarations.

2.5. "High risk" means the probability of loss is greater than average based on criteria specified in W.Va. Code §29-12B-9 and established by the board.

2.6. "Retroactive date" means the date designated in the policy declarations, before which coverage is not applicable.

2.7. "Tail coverage" or "extended reporting coverage" is coverage that protects the health care provider against all claims arising from professional services performed while the claims-made policy was in effect and included in the policy but reported after the termination of the policy.

2.8. The "preferred medical liability program and the high risk medical liability program" is also known as the "West Virginia Health Care Provider Professional Liability Insurance Availability Act."

§115-6-3. Implementation of Insurance Coverage.

3.1. Date coverage to be offered. Coverage may be offered pursuant to the statute, and may have an effective date retroactive to the effective date of Article 12B, Chapter 29 of the West Virginia Code.

3.2. Amount of Coverage. The amount of insurance coverage available to the particular health care provider is determined by statute, and subject to the policies and procedures of the board.

3.3. Premium Rates. The premium rate schedule is to be established by the board using the criteria of the statute under the board's policies and procedures.

3.4. Coverage Form. Insurance issued through the "West Virginia Health Care Provider Professional Liability Insurance Availability Act" will be issued under the policies and procedures of the board with such forms and policy provisions consistent with the providing of insurance to health care providers in West Virginia under this act.

3.5. Excess Coverage. The Board may, but is not required, to obtain excess verdict liability coverage for the programs described in this act.

3.6. Administration. The board may establish such policies and procedures to administer the preferred medical liability program and the high risk medical liability program and exercise and perform other powers and duties and functions specified in the statute. The board may set the time and place of the meeting, may allow attendance by speaker phone, teleconferencing or other means where necessary. Three members of the five-member board shall be a quorum. The vote of the majority of the quorum present is required for a motion to be approved.

3.7. Actuary. The Board may establish such policies and procedures necessary to obtain and implement (at least annually) from an independent outside source ratings to be used for premiums for the preferred medical liability program and high risk medical liability program.

3.8. Underwriting Criteria. The board may prepare such policies and procedures to determine and annually review the underwriting criteria for the preferred medical liability program and high risk medical liability program.

3.9. Legislative Reports. The board may implement such policies and procedures to prepare and publish separate summaries for the preferred medical liability program and the high risk medical liability program during the proceeding fiscal year before each regular session of the Legislature.

3.10. Surcharge. The board may implement such policies and procedures to determine and annually review the claims history, debit or surcharge for the high risk medical liability program.

3.11. Transfer. The board may implement such policies and procedures to determine and annually review the criteria for transfer from the preferred medical liability program to the high risk medical liability program.

3.12. Agents. The board may implement such policies and procedures to determine and annually review the role of agents and the amount of commission, if any, to be paid, in the preferred medical liability program and the high risk medical liability program.

3.13. Legislative Recommendations. The board may implement such policies and procedures to study and annually evaluate the operation of the preferred medical liability program and the high risk medical liability program and make such recommendations to the legislature to insure its continued viability including but not limited to recommendations for civil justice reform.

3.14. Five Year Plan. The Board may implement such policies and procedures to establish a five year financial plan to ~~insure~~ ensure an adequate premium base to cover the long tail nature of the claims-made coverage provided by the preferred medical liability program and the high risk medical liability program. The board may approve such policies and procedures to retain the services of an impartial professional actuary to determine that the plan may reasonably be expected to generate sufficient revenues and meet all estimated program and administrative costs. The board may implement such policies and procedures to submit its final approved five year financial plan to the Governor and the Legislature by the first day of January preceding the fiscal year; The board may implement such policies and procedures to identify factors that the board shall consider appropriate including the trends for the program in the industry and the claims history and the number and category participants in each program and the settlement claims and judicial results; The board may implement such policies and procedures to identify that the participants in the program have made a diligent search for comparable coverage in the voluntarily insurance market and have been unable to obtain the same.

3.15. Meetings. The board may implement such policies and procedures for board meetings on at least a quarterly basis to review the implementation of its current financial plan in light of its actual experience.

3.16. Reinsurance. The board may implement such policies and procedures for the purchase of reinsurance if it deems it to be appropriate.

3.17. Tail Coverage Availability. The board shall implement such policies and procedures to establish an optional extended reporting coverage or tail coverage availability.

3.18. Settlements. The board may implement such policies and procedures to enter into settlements or structured settlements where appropriate for claims made against the preferred medical liability program or the high risk medical liability program.

3.19. Unacceptable Risk. The board may implement such policies and procedures for the refusal of the Board to provide insurance coverage for individual physicians whose prior loss experience or current professional training and capability or other issues are such that the physician represents an unacceptable risk of loss if coverage is provided.

3.20. Termination. The board may implement such policies and procedures for the termination of coverage for nonpayment of premiums upon written notice of the termination forwarded to the health care provider not less than 30 days prior to the termination of coverage.

3.21. Transfer of Insurance Obligations. The board may implement such policies and procedures to assign coverage or transfer all insurance obligations and/or risk of existing or in-force contracts of insurance to a third-party medical professional liability insurance carrier with the comparable coverage conditions as determined by the board. These policies and procedures shall effect a novation of the transferred contract of insurance, which such novation shall extinguish all liability of the board and the state of West Virginia.

3.22. Medical Malpractice Advisory Panel. The board may implement such policies and procedures that it deems appropriate to meet and consult with the medical malpractice advisory panel.

3.23. Medical Malpractice Advisory Panel Administration. The board may institute such policies and procedures as needed to consult with and/or administer the state medical malpractice advisory panel, its creation, composition, duties, and compensation; the board may implement such policies and procedures for the organization, meetings, records, and reports of the panel as it deems necessary; the board may implement such policies and procedures as it deems necessary for the establishment and maintenance of health care provider professional liability insurance programs; the board may implement such policies and procedures as it deems necessary to establish the eligibility criteria for participation in the health care provider professional liability insurance programs including the preferred medical liability program and the high risk professional liability insurance program; the board may implement such policies and procedures as necessary for the deposit, expenditure, and investment of premiums and for the payment for settlements or judgments; the board may implement such policies and procedures as necessary to maintain confidential information from disclosure; the board may implement such policies and procedures as it deems necessary for the issuance of any appeal bond, if necessary.

§115-6-4. Miscellaneous Provisions.

4.1. Administration of Claims. The board may implement such policies and procedures for the administration of all claims as against the preferred medical liability program and the high risk medical liability program.

4.2. Designation of Agents. The board may implement such policies and procedures for the use and commissions of designated agents, if any, for the procurement of insurance.

4.3. Settlement of Claims. The board may implement such policies and procedures as needed to negotiate and effect settlement of any and all insurance claims arising from losses or damages under the preferred medical liability program or the high risk medical liability program. The execution and delivery and settlement of claims and releases, need not be done with the consent of either the insured or the knowledge and consent of the Attorney General. Any discussion or consideration of the financial or personal information of an insured may be held by the board in executive session closed to the public, notwithstanding the provisions of article nine-a, chapter six of this code.

4.3.a. The board is hereby authorized and empowered to negotiate and effect settlement of any and all insurance claims arising from the insurance coverage afforded by the West Virginia Health Care Provider Professional Liability Availability Act [W. Va. Code §29-12B-1 et seq.].

4.3.b. The Executive Director, or his designees, shall have the authority to issue a written settlement determination on behalf of the board and/or to approve payment of judgments or settlements under this program after receipt and review of one of the following:

4.3.b.1. A certified copy of a final judgment against a health care provider insured by either of the medical liability programs created pursuant to the act;

4.3.b.2. A certified copy of an order approving settlement in a summary proceeding; or

4.3.b.3. Appropriate documentation that justifies the proposed settlement.

4.3.c. The form and substance of what constitutes "a written settlement determination" shall be developed by, and at the discretion of, the Executive Director.

4.3.d. All payments in satisfaction of any settlement or judgment shall be in accordance with established board policies and procedures.

4.3.e. If claim payments are issued by way of a check or draft drawn on an account issued to the State of West Virginia, payment shall be deemed to have been made at the time a request for issuance of a state check or draft is made by or on behalf of the board notwithstanding the length of time required for actual issuance of the check or draft.

4.4. Annual Certification. (Procedure for Annual Certificate of "Diligent Search, as Prescribed by W. Va. Code §29-12-5(c)(2)(i)(iv)") The physician or health care provider seeking to provide annual certification that they have made a diligent search for comparable coverage in the voluntary insurance market and have been unable to obtain the insurance must follow the requirements for this certification as determined by the board.

4.5. Coverage Criteria. The following criteria may be reviewed by the Board of Risk and Insurance Management to determine whether insurance coverage will be provided to a physician whose loss experience or current professional training and capability or other matters are such that the physician represents an unacceptable risk of loss if coverage is provided:

4.5.a. The number and outcome of prior claims of medical malpractice against the physician in the last five-year period.

4.5.b. The number of adverse verdicts rendered against the physician in the previous five-year period.

4.5.c. The status of the physician with the West Virginia Board of Medicine.

4.5.d. The number and amount of settlements reached on behalf of said physician in regard to the claims asserted in the previous five-year period.

4.5.e. Provisions for coverage may also be made pursuant to the policies and procedures

of the board for part-time practicing physicians and for the financing of insurance premiums.

All of these items may be taken into consideration among others and any refusal to insure a physician based on this act shall be made in writing together with the reasons therefore. Any physician aggrieved under this act shall have the right to appeal this decision.

4.6. Appeal. In the event that a health care provider who has made application to the program believes that they are aggrieved by the underwriting decisions made pursuant to the act, the board may institute and implement policies and procedures for an appeal. The appeal may be made to the executive director. In the event that the aggrieved individual or entity disagrees with the decision of the executive director, the appeal may be taken to the full board. The decision of the full board by majority vote when a quorum is present shall be final. The appeal process is confidential and subject to being heard in executive session. There is no appeal from claims, claims resolution or other matters not specifically addressed herein.

4.7. Discontinuation of the Preferred Medical Liability Program or the High Risk Medical Liability Program. The board may implement policies and procedures consistent with the statute allowing the discontinuation of the preferred medical liability program or the high risk medical liability program.

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

TITLE 115

SERIES 6

Rule Title: Preferred Medical Liability & High Risk Medical Liability Program

Type of Rule: x Legislative Interpretive Procedural

Agency: WV Board of Risk & Insurance Management

Address: 90 MacCorkle Avenue, S.W.

Suite 203

South Charleston, WV 25303

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	2,000		2,000	----	----
PERSONAL SERVICES	----				
CURRENT EXPENSE	----				
REPAIRS & ALTERATIONS	----				
EQUIPMENT	----				
OTHER	2,000		2,000	----	----

2. Explanation of Above Estimates:

BRIM would need rates developed by our actuary for an optometrist.

3. Objectives of These Rules:

Rule Title: Preferred Medical Liability & High Risk Medical Liability Program

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

See above.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: *None*

C. Economic Impact on Citizens/Public at Large.

Optometrists would have the availability of the BRIM program.

Date: 7/31/03

Signature of Agency Head or Authorized Representative:

Charles E. Jones

Tom Susman
Tom Susman, Acting Cabinet Secretary
Department of Administration