ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

Tuesday, January 16, 2018
1:00 p.m.

A. Call to Order.

B. Reports of the Executive Subcommittee on Emergency Rules.

C. Update Regarding Act 781 of 2017 Rules Report Filings (Representative Dotson and Jessica Sutton).

D. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309:

1. ALTERNATIVE DISPUTE RESOLUTION COMMISSION (Chase Dugger and Jennifer Taylor)

a. SUBJECT: Requirements for the Certification of Mediators for Circuit Courts

DESCRIPTION: These are minimum qualifications for mediators eligible to mediate cases ordered to mediation by the Arkansas Circuit Courts. The purpose of the rule is to set out the requirements one must meet to be included on the Roster of Certified Mediators for the Circuit Courts. Ark. Code Ann. § 16-7-202 requires parties ordered to mediation by the circuit courts to select a mediator certified by the commission.

A majority of the revisions to this rule are meant to comply with Acts 848 and 1066 of 2015.

Act 848 addresses licensing, certification, and permitting for active military members, returning veterans, and their spouses. It requires state licensing and certification entities to 1) create a temporary licensure or certification process, 2) create an expedited

licensure or certification process, 3) consider military training in lieu of state requirements, 4) provide an extension of expirations periods for licenses and certificates, and 5) mandate a waiver of continuing education requirements in certain circumstances. The revisions to the ADR Commission's rules ensure the certification standards for mediators comply with Act 848. Section B (11), (12), (13); and Section D (3) and (8).

Act 1066 addresses circumstances in which a person was previously credentialed in Arkansas and seeks to reinstate a license, registration, or certification, and persons holding licenses or certifications from another state who seek credentialing in Arkansas. See Section D (8).

Other substantive changes include: 1) creation of a process for certified mediators to voluntarily relinquish certification, [See Section D (10)]; 2) change in the number of days the commission has to render a decision on denial of certification, [See Section B (6)]; 3) change in the expiration period for mediation training, [See Section C(1)(a)(3), C(2)(a)(3), C(4)(a)(3)]; and 4) expansion of options applicants have to satisfy the practical experience component for certification in the juvenile division [See Section C(4)(c)(2)].

Some revisions are not substantive, but are changes or clarifications to existing wording that are intended to make the rules easier to understand.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 29, 2017. No public comments were submitted to the agency. The proposed effective date is January 29, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Alternative Dispute Resolution Commission is authorized "to establish standards and regulations for the certification, professional conduct, discipline, and training of persons who shall be eligible and qualified to serve as compensated mediators, negotiators, conciliators, arbitrators, or other alternative dispute resolution neutrals in and for state and local courts." Ark. Code Ann. § 16-7-104(3)(A). These rules implement the provisions in Arkansas Code Annotated § 17-1-106, which address licensing, certification, and permitting for active

military members, returning military veterans, and their spouses, and § 17-1-107, concerning reinstatement of licenses.

b. **SUBJECT: Continuing Mediation Education Requirements for Certified Mediators**

DESCRIPTION: These are continuing mediation education requirements that must be met by mediator certified by the Arkansas ADR Commission in order to remain in good standing. This includes the number of hours of continuing mediation education that certified mediators must complete each year in order to remain in good standing; identify circumstances in which mediators are exempted from completing CME; and clarify what a mediator must do if they do not complete the minimum number of hours. The rule also specifies what continuing education providers must do to apply for approval.

The revision to this rule complies with the section of Act 848 of 2015 which mandates a waiver of continuing education requirements for active duty services members, returning military veterans, and spouses of active duty military and returning military veterans in certain circumstances. See Rule 3(d).

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 29, 2017. No public comments were submitted to the agency. The proposed effective date is January 29, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Alternative Dispute Resolution Commission is authorized "to establish standards and regulations for the certification, professional conduct, discipline, and training of persons who shall be eligible and qualified to serve as compensated mediators, negotiators, conciliators, arbitrators, or other alternative dispute resolution neutrals in and for state and local courts." Ark. Code Ann. § 16-7-104(3)(A). Pursuant to Ark. Code Ann. § 17-1-106(f), a state board or commission shall allow a full or partial exemption from continuing education required as part of licensure, certification, or permitting for a profession, trade, or employment in this state for the following individuals: (1) an active duty military service member deployed outside of the state; (2) a returning military veteran within one (1) year of his or her

discharge from active duty; or (3) the spouse of the active duty military service member deployed or the returning military veteran.

c. **<u>SUBJECT</u>: Requirements for the Certification of Mediators for Arkansas State Employee Grievance Program**

<u>DESCRIPTION</u>: These are minimum qualifications for mediators eligible to mediate cases that are part of the State Employee Grievance Program. This is necessary because Ark. Code Ann. § 16-7-202 requires mediators eligible to mediate State Employee Grievance cases to be certified by the Arkansas ADR Commission.

A majority of the revisions to this rule are meant to comply with Acts 848 and 1066 of 2015.

Act 848 addresses licensing, certification, and permitting for active military members, returning veterans, and their spouses. It requires state licensing and certification entities to 1) create a temporary licensure or certification process, 2) create an expedited licensure or certification process, 3) consider military training in lieu of state requirements, 4) provide an extension of expirations periods for licenses and certificates, and 5) mandate a waiver of continuing education requirements in certain circumstances. The revisions to the ADR Commission's rules ensure the certification standards for mediators comply with Act 848. Section B (11), (12), (13); and Section D (3) and (8).

Act 1066 addresses circumstances in which a person was previously credentialed in Arkansas and seeks to reinstate a license, registration, or certification, and persons holding licenses or certifications from another state who seek credentialing in Arkansas. See Section D (7).

Other substantive changes include: 1) creation of a process for certified mediators to voluntarily relinquish certification, [See Section D (9)]; 2) change in the number of days the commission has to render a decision on denial of certification, [See Section B (6)]; and 3) change in the expiration period for mediation training [See Section C(1)(c)].

Some revisions were not substantive, but are changes or clarifications to existing wording that are intended to make the rules easier to understand.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 29, 2017. No public comments were submitted to the agency. The proposed effective date is January 29, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Alternative Dispute Resolution Commission is authorized "to establish standards and regulations for the certification, professional conduct, discipline, and training of persons who shall be eligible and qualified to serve as compensated mediators, negotiators, conciliators, arbitrators, or other alternative dispute resolution neutrals in and for state and local courts." Ark. Code Ann. § 16-7-104(3)(A). These rules relate to the mediators for the State Employee Grievance Program, which are required to be certified in mediation by the Arkansas Alternative Dispute Resolution Commission. *See* Ark. Code Ann. § 21-1-704. These rules implement the provisions in Arkansas Code Annotated § 17-1-106, which address licensing, certification, and permitting for active military members, returning military veterans, and their spouses, and § 17-1-107, concerning reinstatement of licenses.

2. DEPARTMENT OF CAREER EDUCATION (Randy Prather)

a. SUBJECT: Plumbing Apprenticeship Programs

DESCRIPTION: Changes to the rules include changes to wording for consistency and clarification and reflection of new law, as follows:

Add definition of Final Year of Apprenticeship

"Final Year of apprenticeship" means when an apprentice plumber has obtained four hundred eighty (480) hours or more of classroom instruction and completed six thousand (6,000) or more hours of on-the-job work in an approved United States Department of Labor apprenticeship program.

Add New Plumbing rules that deal with the 4th year Apprentices

An apprentice plumber who is in his or her final year of an apprenticeship may engage in plumbing without the direct supervision of a master plumber or journeyman plumber if he or she is working under the indirect supervision of a master plumber or journeyman plumber.

- As used in this section, "indirect supervision" means that an apprentice plumber is able to contact a master plumber or journeyman plumber for direction or advice, but the master plumber or journeyman plumber does not have to meet the reasonable proximity requirements under subdivision and this section [*sic*].
- An apprentice plumber who is in his or her final year of an apprenticeship may contact a master plumber or journeyman plumber in person or by telephone call, text message, electronic mail, or other similar form of communication.
- An apprentice plumber who is in his or her final year of an apprenticeship shall possess and be capable of providing to an inspector a valid and unexpired identification card issued by the local apprenticeship committee that indicates the apprentice is in his or her final year of apprenticeship.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 20, 2017. The Department received no comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

In Section VII(b), 4th bullet, it appears that there might be some extra language in "does not have to meet the reasonable proximity requirements *under subdivision and of this section*." **AGENCY RESPONSE:** We prefer to leave this as the law reads.

Pursuant to Ark. Code Ann. § 17-38-402(2), the board shall have the power to adopt rules and regulations as to the qualifications, training, and supervision of apprentice plumbers "subject to the approval of the Department of Health." Was the Department of Health consulted on these rules? **AGENCY RESPONSE:** Yes,

we contacted the Health Department, and Director Higginbottom said it looked good.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The instant proposed rules include changes made in light of Act 971 of 2017, sponsored by Senator Bart Hester, which amended the law concerning the supervision of apprentice plumbers in the final year of an apprenticeship. The authority and responsibility of the Department of Career Education and the Career Education and Workforce Development Board ("Board") shall include general control and supervision of all programs of vocational, technical, and occupational education in secondary institutions. *See* Ark. Code Ann. § 25-30-107(b)(1). Pursuant to Arkansas Code Annotated § 25-30-102(c)(2)(A)–(B), the Board shall administer the career education and workforce development programs administered by the Board and shall adopt rules to administer the Board and the programs developed by the Board. Further authority for the rulemaking can be found in Ark. Code Ann. § 17-38-402(2), which provides that the Board shall have the power to adopt rules and regulations as to the qualifications, training, and supervision of apprentice plumbers subject to the approval of the Department of Health.[1]

3. DEPARTMENT OF HUMAN SERVICES, COUNTY OPERATIONS (Dave Mills)

a. SUBJECT: Medical Services Policy Manual Sections A-180, C-120, C-130, C-150, E-265 and E-270

DESCRIPTION: This proposed rule change revises Medical Services policy to switch Arkansas from a "determination" state to an "assessment" state and to remove the process of using projected income to determine Medicaid eligibility.

[1] While the statute refers to the State Board of Career Education, Act 892 of 2015, § 5, renamed the State Board of Career Education to the Career Education and Workforce Development Board.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period expired on December 13, 2017. The Department did not receive any comments.

The rule will require CMS approval, pending as of January 9, 2018. The proposed effective date for the changes to the rule is February 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Generally, the Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). Arkansas Code § 20-77-107 specifically authorizes the Department to "establish and maintain an indigent medical care program." The proposed amendments to existing rules are specifically authorized by the recent Acts of the Extraordinary Sessions of the 90th and 91st General Assemblies. The Department is authorized to promulgate rules to implement the Arkansas Works Program, *see* Ark. Code Ann. §23-61-1004(c) (Supp. 2017), and to establish rules for income eligibility standards for Arkansas Works program participants. *See* Ark. Code Ann. §23-61-1003(10) (Supp. 2017). Indeed, federal rules require that the state agency that is designated to administer or supervise the state plan for Medicaid must be certified by the State Attorney General to have legal authority to administer or supervise the plan and to make rules and regulations in administering the plan. *See* 42 CFR 431.10.

Arkansas law provides that, in establishing the Medicaid Eligibility Verification System, which is designed to prevent fraud, the Department has the flexibility to decide whether Arkansas shall be an "assessment state" or a "determination state" for purposes of Medicaid eligibility determinations by the federally facilitated marketplace. *See* Ark. Code Ann. §20-77-2102 (b) (Supp. 2017). An "assessment state" means a state with a federally facilitated marketplace that can elect to have the federally facilitated marketplace make assessments of Medicaid eligibility and then transfer the account of an individual to the state Medicaid agency for a final determination. A "determination state" means a state that requires the eligibility determination made by the federally

facilitated marketplace to be accepted by the state Medicaid agency.

Under federal rules, Arkansas has discretionary authority to consider reasonably predictable future income or loss of income and to elect to use projected annual income for the Medicaid eligibility determination. *See* 42 CFR 435.603(h).

4. <u>DEPARTMENT OF HUMAN SERVICES, DEVELOPMENTAL DISABILITIES SERVICES</u> (Melissa Stone)

a. <u>SUBJECT</u>: DDS Policy 1035: Agency Definition of Disability/Eligibility for Services

<u>DESCRIPTION</u>: DDS is proposing changes to DDS Policy #1035, which sets forth the definition of developmental disability for all DDS services and programs.

Policy #1035 is derived from Ark. Code Ann. § 20-48-101, which defines "developmental disability." That statute has been modified several times, but the policy has not been amended to track the statutory language. The amendment brings Policy #1035 in line with Ark. Code Ann. § 20-48-101.

<u>PUBLIC COMMENT</u>: A public hearing was held on December 4, 2017. The public comment period expired on December 8, 2017. The Department received no comments.

The proposed effective date is February 1, 2018.

<u>FINANCIAL IMPACT</u>: There is no financial impact.

<u>LEGAL AUTHORIZATION</u>: The Department's Division of Developmental Disabilities Services is responsible for the overall coordination of services for Arkansans with developmental disabilities. The authority for the revision to update its policy is found in Chapter 48 of Title 20 of the Arkansas Code, which provides for the Treatment of the Developmentally Disabled. The definition of "developmental disability" includes a disability that is attributable to an intellectual disability, cerebral palsy, spina bifida, Down syndrome, epilepsy, or an autism spectrum disorder. *See* Ark. Code Ann. §20-48-101(2) (Repl. 2014).

b. **<u>SUBJECT</u>: DDS Policy 1087: Criminal Records Check**

<u>DESCRIPTION</u>: DDS is proposing changes to DDS Policy #1087, which sets forth the process and policy used to conduct criminal records checks on employees and owners of DDS providers.

This updates Policy 1087 to conform to federal and state law regarding conducting criminal records checks. The duplicative language found in the Standards for Conducting Criminal Record Checks for Employees of Developmental Disabilities Service Providers will also be repealed.

<u>PUBLIC COMMENT</u>: A public hearing was held on December 4, 2017. The public comment period expired on December 8, 2017. The Department received no comments.

The proposed effective date is February 1, 2018.

<u>FINANCIAL IMPACT</u>: There is no financial impact.

<u>LEGAL AUTHORIZATION</u>: The Department of Human Services' Division of Developmental Disabilities Services ("DDS") is responsible for the overall coordination of services for Arkansans with developmental disabilities. The authority for the revision to update DDS's criminal records check policy is found in Chapter 38 of Title 20 of the Arkansas Code, which provides the procedures for the Department's Criminal Background Checks applicable to service providers, operators, employees or potential employees of a service provider. *See* Ark. Code Ann. §20-38-101, et seq. (Supp. 2017).

Additional authority is found in Chapter 48 of Title 20, concerning Treatment of the Developmentally Disabled, which requires DDS to establish by rule requirements for criminal history records checks for applicants and employees of certified providers of an alternative community services waiver program, an early intervention program, or a nonprofit community program. *See* Ark. Code Ann. §20-48-812(a), (e) (Repl. 2014).

5. **<u>DEPARTMENT OF HUMAN SERVICES, OFFICE OF FINANCE AND ADMINISTRATION</u> (Misty Eubanks)**

a. **<u>SUBJECT</u>: Social Services Block Grant Pre-Expenditure Report for SFY July 1, 2017 – June 30, 2018**

<u>DESCRIPTION</u>: This is the Social Services Block Grant Pre-Expenditure Annual Report for July 1, 2017 through June 30, 2018, and it is submitted in order for the state to receive SSBG funds. Social Services Block Grant enables states to claim limited federal funds to provide social services designed to assist individuals or families to become less dependent on others for financial support or personal care; to protect children and adults from neglect, abuse, or exploitation, and to provide family maintenance; to avoid unnecessary or premature institutionalization; and to gain appropriate placement if institutionalization is necessary.

<u>PUBLIC COMMENT</u>: No public hearing was held. The public comment period expired on November 28, 2017. The Department received no comments.

The proposed effective date for the revisions to the report is February 1, 2018.

<u>FINANCIAL IMPACT</u>: There is no financial impact.

<u>LEGAL AUTHORIZATION</u>: Federal law amended title XX of the Social Security Act establishing the Social Services Block Grant (SSBG), from which funds are allocated to states to support social services for vulnerable children, adults, and families. States have broad discretion in the specific services they support with SSBG funds and may tailor these funds over time to changes in the needs of their populations. Federal law authorizing SSBG requires the state to develop (with public input), and to submit to the federal government, an annual SSBG Pre-Expenditure Report and an interim, revised SSBG Pre-expenditure Report if the planned use of SSBG funds changes during the year.

The Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). The Department also has the authority to assure

conformity with all applicable federal dictates with the power to, by rule, adopt or implement all federal statutes, rules, and regulations as may be currently in force, or as may be adopted or amended, when such rule is necessary to conform to federal statutes, rules, and regulations affecting programs administered or funded by or through the Department. *See* Ark. Code Ann. §25-10-129(b) (Supp. 2017).

The DHS Office of Finance is responsible for the overall management and administration of the SSBG program, including centralized planning, policy development, financial management, financial standards, overall financial monitoring, and reporting.

6. ARKANSAS INSURANCE DEPARTMENT (Booth Rand)

a. SUBJECT: Rule 115: Prior Authorization Transparency Act

DESCRIPTION: This proposed Rule implements a provision within Act 815 of 2017, "An Act to Clarify Various Provisions of the Prior Authorization Transparency Act" (hereafter, the Prior Authorization Act"). The provision is codified in Ark. Code Ann. § 23-99-1113(a)(2)(A) and requires the Insurance Commissioner to issue a rule on or before January 1, 2018, to define which "benefit inquiries" are subject to the Prior Authorization Act.

AID is proposing in this Rule to provide a definition and description of which medical provider "benefit inquiries" are subject to the protocols governing healthcare services and prescription drugs that are subject to the Prior Authorization Act. A "benefit inquiry" is simply a medical provider or pharmacy benefit inquiry about prospective coverage or payment which is made to a healthcare insurer or HMO for future services or drugs---services or drugs which are however not on an insurer list requiring prior approval.

During the 2017 legislative session, in meetings with Act 815's sponsor (Senator Irvin) and the medical providers and health insurers, the issue was discussed about which "benefit inquiries" would be subject to the Prior Authorization Act. This was discussed or debated because "benefit inquiries" subject to the Act would enjoy all of the many protections of that Act, including a 2-day turn around on review, a restriction on rescission, and other protections. The sponsor and AID and various affected industries

were unable to define the term, “benefit inquiry,” during the time frame of that session. In general, the medical providers wanted little limitation as to which benefit inquiries would be subject to the Act, however the health insurers wanted benefit inquiries to involve significant potential claims. The sponsor deferred to AID to define this term by Rule in Section 10 of the Act.

This proposed Rule amends the pre-existing Rule on Prior Authorization which implemented earlier versions of prior authorization requirements. This proposed Rule accomplishes three (3) purposes: (1) it provides a definition not in the Prior Authorization Act of a “benefit inquiry” [in Section 4]; (2) it describes the manner and threshold amount for a “benefit inquiry” [in Section 10]; and (3) corrects and updates earlier rule language to be consistent with more recently enacted legislation in 2017 in Act 815.

<u>Section 4</u>

Section 4 of the proposed rule provides a definition of a “benefit inquiry.” This term is not defined in the Act. The proposed definition however is consistent with the meaning of this term as understood by the sponsor, Department and affected industry. It is not controversial. It is simply an inquiry for benefits or payment by a healthcare provider for a prospective service or drug which is not already required to be pre-authorized by a health insurer. The terms in the definition referring to “Healthcare provider, Healthcare insurer, etc.,” are all references to the definitions in Act 815. AID did make the requirement here that the provider making the inquiry must be an Arkansas-licensed provider and also the provider has to make an inquiry for a service or drug for a valid member under an active policy to prevent providers from simply calling insurers to shop or survey payment rates.

<u>Section 10</u>

Section 10 implements the Act upon “benefit inquiries” defined in Section 4 of the rule. AID decided to apply a $1,500 claim threshold to the benefit before it would be subject to prior authorization requirements. The insurers wanted a higher threshold of $2k and above, the medical providers wanted a lower threshold of $1k on the claims. AID adopted a threshold somewhat in the middle of the respectively desired amounts, trying to exclude trivial or insignificant service inquiries being subject to

all the Act's controls. Another insurer wanted to use a list of medical services, with no numerical claim amount thresholds, which would be "benefit inquiries," subject to prior authorization. AID decided to use monetary amounts to avoid having to amend this Rule each year to add, remove or modify designated services. Section 10 also permits the provider to be making the inquiry whether in-network or out of network. There was some discussion about whether the provider should be required to be in-network with that health insurer or HMO.

PUBLIC COMMENT: A public hearing was held on December 8, 2017. The public comment period expired on the same date. The Arkansas Insurance Department (AID) provided the following public comments:

Public Comments

(AID responses in italics)

AID held its administrative hearing on December 8, 2017. AID received 5 public comment letters and 3 public comments in testimony during the administrative hearing.

AID submitted into the administrative record a public comment letter from Arkansas Blue Cross and Blue Shield ("ABCBS") dated August 7, 2017. ABCBS submitted draft language requesting adoption of a list of medical services to be used to determine which benefit inquiries would be subject to the Prior Authorization law. ABCBS also suggested requiring the provider to be Arkansas licensed and to be in-network with the insurer.

AID RESPONSE: AID did not want to adopt a generalized list of services due to the concern that AID would have to amend, add or modify medical services each year in the rule. AID preferred a simple numerical claim amount. AID adopted the suggestion to require the provider to be Arkansas licensed. AID did not however adopt a restriction that the provider be an in-network provider. AID believes there exist many consumers obtaining out of network services and sees no practical benefit for an in-network restriction.

AID submitted into the administrative record a public comment letter from Ambetter dated August 8, 2017. Ambetter requested using a monetary amount and claim threshold to apply for benefit inquiries. Ambetter requested excluding prescription drugs from benefit inquiries subject to prior authorization.

AID RESPONSE: AID adopted a monetary threshold. AID believes including prescription drugs for prior authorization is consistent with Act 815 which defines Healthcare services to include

prescription drugs in 23-99-1103(10)(A). We therefore have no latitude to exclude prescription drugs.

AID submitted into the administrative record a public comment letter from the Arkansas Medical Society ("AMS") dated August 8, 2017. AMS requested a $1k monetary threshold for benefit inquiries, suggested that the inquiries include both in-network and out of network inquiries, and, finally had no objection to limiting the inquiries to an Arkansas licensed provider.

AID Response: AID adopted all of these suggestions but instead opted to use a $1,500 claim threshold instead of a $1k claim threshold.

AID submitted into the administrative record a public comment letter from United Healthcare ("UHC") dated August 8, 2017. UHC requested using a monetary threshold as a gauge for benefit inquiries subject to prior authorization, suggested requiring the provider making an inquiry on behalf of the patient that the patient be a valid member under an active policy, and UHC requested that the provider be required to be in-network.

AID Response: AID adopted using a monetary threshold, AID adopted requiring an active policy and member. AID however would apply the rule to also include out of network inquiries due to the number of our consumers obtaining out of network services, and the need for such patients and providers to understand coverage and payment limitations of the health insurer given the fact that in-network providers would be better positioned to know those limitations already, out of network providers, less so.

AID submitted into the record a public comment letter from QualChoice health plans ("QCA") dated August 8, 2017. QCA suggested using a $5k claim threshold for benefit inquiries, requested the claim threshold to apply to allowed charges and requested the insurer be allowed to request medical necessity information.

AID Response: AID believes a 5k threshold is too high to capture many family practice or clinic inquiries, AID believes using allowed charge versus billed charges complicates or restricts out of network providers from making inquiries because they are not subject to network allowances as clearly and efficiently as in-network providers, AID believes the insurer can already make the request for medical necessity information if the inquiry relates to medical necessity to the same extent as all services are allowed that review under the prior authorization requirements.

AID received into the administrative record testimonial comments from ABCBS, QCA, AMS, and UHC during the

December 8, 2017, hearing. All of these comments were largely the same as stated above in their letters.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Insurance Department may promulgate rules for the implementation of the Prior Authorization Transparency Act. *See* Ark. Code Ann. 23-99-1118 (Supp. 2017). Act 815 of 2017, sponsored by Senator Missy Irvin, required the Insurance Department to issue a rule, on or before January 1, 2018, that defines which benefits are subject to the prior authorization requirements under the Prior Authorization Act. *See* Ark. Code Ann. §23-99-1113(a)(2)(A) (Supp. 2017).

b. SUBJECT: Rule 27: Minimum Standards for Medicare Supplement Policies

DESCRIPTION: AID is proposing to amend various sections of AID Rule 27. AID Rule 27 is AID's "Medigap" rule or Medicare Supplement Rule. This Rule is AID's Medigap or Medicare Supplement Rule which was first promulgated in 1981. It is currently approximately over 100 pages long, although it is important to note for the current proposed rule changes, we are only adding two sections to this Rule. The Rule provides standards for Medigap insurance sold in this State. Medigap insurance is private insurance which is purchased by Medicare beneficiaries to cover benefits or out of pocket costs that Medicare does not cover. Medigap benefits are largely affected by Federal law with deference given to States in wide areas to regulate and administrate the products. There are 10 Medigap plan types available, and each plan is labeled with a different letter that corresponds with a certain level of coverage. As a general rule, the more out of pocket costs are covered in the plan, the higher the premium. Plans "F" and "C" cover most, if not all out of pocket Medicare costs.

AID is proposing to amend its Rule 27 and add two more sections.

Addition of Section 9.2

Section 9.2 is added to comply with the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA). MACRA prohibits Medigap issuers from selling Medigap Plans, "C," and "F" for Medicare beneficiaries turning 65 after 2020. The reason behind this is that the federal government maintains that such products permit the beneficiary to use or utilize more Medicare covered services, driving up the federal Medicare costs. The NAIC has worked with the federal government and states for adequate language to implement this prohibition and developed rule language to comply with federal law. In the absence of state law changes, the federal government will pre-empt state laws on this issue who have not adopted these reforms under MACRA. This is amended into Section 9.2 of this rule.

Addition of Section 27

Section 25 of this proposed Rule is AID's implementation of Senator Rapert's sponsored Act 684 of 2017. The Act (attached) requires Medigap issuers to make a Medigap product available to persons under 65 who are on Medicare and federal disability under federal law. There exists language in the current rule which prohibits the sale of such products to anyone under 65. Therefore, AID has amended the Rule to add Section 25, to require Arkansas Medigap issuers to make available at least one of the Medigap plans, to persons on disability. The proposed Section 25, requires the issuers to make available a Medigap plan no later than July 1, 2018. The Medigap disability applicants are rated uniformly within the particular Medigap plan designated for disability enrollees; however, they are separately rated from the age 65 plus plans.
Act 684 of 2017 requires AID to have this rule reviewed and approved by the Senate Committee of Insurance and Commerce before January 1, 2018. AID presented this Rule and discussed the findings to the Committee on December 5, 2017. The Committee reviewed and approved this Rule and proposed changes on December 5, 2017.

PUBLIC COMMENT: A public hearing was held on October 23, 2017. The public comment period expired on October 23, 2017. The Arkansas Insurance Department (AID) provided the following public comments:

Public Comments

(AID responses in italics)

AID held its administrative hearing on October 23, 2017. AID received 2 public comment letters.

AID submitted into the administrative record a public comment letter from Fresenius Medical Care dated October 19, 2017. The medical center requested a Medigap plan to be available to persons who Medicare under 65 who have End Stage Renal disease.

AID RESPONSE: the current proposed rule makes a product available to anyone on federal Medicare and disability and there is no carve out for End Stage Renal Disease.

The medical center requested that the policies available to disability applicants be priced or rated the same as those above 65 years of age.

AID RESPONSE: our position on this is to allow these applicants to be rated separately to the above 65 age group to reduce premium increases in the above 65 age group. AID however is requiring that WITHIN the product made available to disability applicants, the individuals are rated equally and uniformly.

AID submitted into the administrative record a public comment letter from the America's Health Insurance Plans (AHIP) dated October 19, 2017. AHIP requested delaying implementation on the disability availability Section 25 until 1-1-2019, so that the Medigap issuers won't be forced to immediately file and have approved policy language changes on the effective date of the Rule, to meet open enrollments in 2018. *AID Response: AID believes a 1-1-2019 is too long of a delay for Section 25, and decided to permit a mid-course effective date for Section 25, and has proposed to adopt a July 1, 2018 date, as opposed to an immediate effective date for Section 25, such that a Medigap issuer can wait no longer than July 1, 2018 to make a Medigap product available to a disability applicant. Medigap issuers are however free to make one available immediately after the effective date of the rule, after approval of the policy by AID.*

AID received live public comments during the administrative hearing on October 23, 2017. Attorney Kendra Pruitt from the Mitchell Law Firm representing AHIP presented the same concerns AHIP expressed in its October 19, 2017 letter. *AID's response to this comment is the same as the AID response in the immediately above paragraph.* Leverne Clements, who works in SHIIP, the Senior Health Insurance Information Program, asked about why Plans "C" and "F" will no longer be available.

AID's response was that that decision was made by the federal government and MACRA, but that change will be implemented for new enrollees in 2020.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) made changes to Medigap policies that cover the Part B deductibles for "newly eligible" Medicare Beneficiaries on or after January 1, 2020. *See* Section 401 of the Medicare and CHIP Reauthorization Act ("MACRA"). States that want to retain regulatory authority over Medicare Supplement or "Medigap" products in their state must implement any changes to federal laws impacting Medicare Supplement policies. Failure to adopt the current laws could result in states losing regulatory authority over these products as authority would revert back to the federal government.

Act 684 of 2017, sponsored by Senator Jason Rapert, declared that the General Assembly intends to ensure that Arkansans have access to Medigap coverage that is currently available to individuals with disabilities residing in other states. The Act required the State Insurance Department to amend its Rule 27 to allow for the sale and purchase of certain policies of Medigap coverage by Arkansans who are under sixty-five (65) years of age and have Medicare due to a disability. The Act also required that, on or before January 1, 2018, the Department submit its proposed amendment of the rule to the Senate Committee on Insurance and Commerce for review and approval. The Department must also include written findings that address the Medigap premium assessment process and a written description of specific efforts it has taken to ensure that Medigap premiums that are made available under the proposed rule are competitively priced.

"The Insurance Commissioner shall adopt reasonable regulations to establish specific standards for policy revisions of Medicare supplement policies and certificates." Ark. Code Ann. §23-79-404(c) (Repl. 2014)

7. **STATE BOARD OF OPTOMETRY (Kevin O'Dwyer)**

a. **SUBJECT: Prescription Drug Monitoring Program**

DESCRIPTION: Act 820 of 2017 required the State Optometry Board to amend Chapter V, Article IX Governing Prescribing Controlled Substances to include education requirements for prescribing physicians and potential involvement in the Prescription Drug Monitoring Program.

PUBLIC COMMENT: A public hearing was held on November 30, 2017, and the public comment period expired on that date. No public comments were submitted to the board. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Optometry is authorized to make rules and regulations for the administration and enforcement of Ark. Code Ann. § 17-90-101 *et seq*. *See* Ark. Code Ann. § 17-90-204(1). These rules implement Act 820 of 2017, sponsored by Senator Jeremy Hutchinson, which mandates prescribers to check the Prescription Drug Monitoring Program when prescribing certain medications. Under Act 820, the board is authorized to promulgate rules limiting the amount of Schedule II narcotics that may be prescribed and dispensed by licensees of the board. *See* Ark. Code Ann. § 17-90-204(8).

b. **SUBJECT: Tele Optometry**

DESCRIPTION: Chapter 1, Article XIV has been amended to comply with Act 203 of 2017 which requires the Optometry Board to develop rules to govern tele optometry and establish a proper physician/patient relationship.

PUBLIC COMMENT: A public hearing was held on November 30, 2017, and the public comment period expired on that date. No public comments were submitted to the board. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

<u>LEGAL AUTHORIZATION</u>: The State Board of Optometry is authorized to make rules and regulations for the administration and enforcement of Ark. Code Ann. § 17-90-101 *et seq*. *See* Ark. Code Ann. § 17-90-204(1). These rules implement Act 203 of 2017, sponsored by Senator Cecile Bledsoe, which creates the Telemedicine Act. State licensing and certification boards for a healthcare professional shall amend their rules where necessary to comply with this act. *See* Ark. Code Ann. § 17-80-406.

8. <u>ARKANSAS SECURITIES DEPARTMENT</u> (David H. Smith)

a. <u>SUBJECT</u>: Amendments to the Rules of the Arkansas Securities Commissioner

<u>DESCRIPTION</u>: A summary of the Proposed 2017 Amendments to the rules of the Arkansas Securities Commissioner follows:

<u>Rule 204.01 General (Administration)</u> An additional form is adopted for a Uniform Notice of Regulation A – Tier 2 Offering.

<u>Rule 301.01(c) – Supervision Requirements</u> The provisions requiring a Business Continuity Plan are amended to more closely follow national model rules.

<u>Rule 302.02 – Investment Adviser Registration Procedure</u> Rule 302.02(b)(1)(B)(iv) is amended to clarify required elements of advisory contracts used by investment advisers.

<u>Rule 302.02 – Investment Adviser Registration Procedure</u> Rule 302.02(h) is added to provide an exemption for certain investment advisers to private funds. This rule closely follows a national model rule.

<u>Rule 306.01 – Records and Reports (Examinations) of Investment Advisers</u> Language to existing required business records is amended to clarify that electronic copies of original communications may be kept as required records. Additional language was added to clarify required elements of advisory contracts used by investment advisers.

Rule 308.02 – Fraudulent, Deceptive, Dishonest, or Unethical Practices of Investment Adviser or Representative Rules 308.02(p) and (u) are amended to clarify required elements of advisory contracts used by investment advisers.

Rule 309.01 – Protections of Vulnerable Adults from Financial Exploitation This Rule adds a definition for clarity to the newly adopted legislation in Securities Act Section 23-42-309 that provided new protections for vulnerable adults.

Rule 504.01 – Transactions Exempt under Section 23-42-504(a) Rule 504.01(a)(12) is added to provide additional clarifying provisions to the newly adopted model exemption for Arkansas-only Crowdfunding Offerings in the Securities Act Section 23-42-504(a)(12). This exemption will allow for easier business formation for projects involving one million dollars or less. Investors that are not accredited are restricted to investments of five thousand dollars or less.

Rule 509.01 – Covered Securities (Notice Filings) Rule 509.01(c) is amended to specify filing requirements for offerings made under Tier 2 of Federal Regulation A and Section 18(b)(3) of the Securities Act of 1933.

Rule 604.13(b) – Summary Order Rule concerning Summary Orders is amended for clarity.

PUBLIC COMMENT: A public hearing was held on November 28, 2017. The public comment period expired on November 28, 2017. The Securities Department provided the following comment and its response:

The Department received a November 20, 2017, letter submitted by the Financial Services Institute ("FSI"), an advocacy association comprised of members from independent financial advisers. In summary, FSI commended the Department for updating its business continuity and succession planning requirements and for including important protections against financial exploitation of vulnerable adults. They also suggested that some terms could be further defined.

In its offered modification to the proposed amended rules, the FSI suggests that the terms "fair and reasonable," used in the context that investor advisory contracts are required to be fair and

reasonable and include certain elements, may be confusing an should be clarified by stating it means that contracts must comply with just and equitable principles of trade, as well as be in good faith and their clients' best interest:

The Proposed Amended Rules require all investment advisory contracts to be "fair and reasonable." Further, it would be "fraudulent, deceptive, dishonest or unethical" for an investment adviser to enter into, extend, or renew any investment advisory contract, unless it is "fair and reasonable" and contains certain disclosures. FSI and its members are concerned that because "fair and reasonable" in this context is not clearly defined, including it in the Proposed Amended Rules' definition of fraud may create confusion and have unintended consequences.
The Securities Act already requires investment advisers and representatives to act primarily for the benefit of their clients and to comply with just and equitable principles of trade in the conduct of their business. Further, Investment Advisers who are registered with the SEC (RIAs) already have a duty to act in the best interest of their clients and to provide investment advice in their clients' best interest. RIAs also owe their clients duties of good faith and loyalty. In light of these existing requirements, we suggest either removing the language "fair and reasonable" from the definition of fraud; or clarifying "fair and reasonable" to mean complying with just and equitable principles of trade, as well as acting in good faith and in their clients' best interest.

RESPONSE:
After careful consideration of the suggestion by FSI, the Department has not made changes to the rule amendments filed with the Bureau of Legislative Research on October 19, 2017. The Department believes additional clarifying language of Rule 308.02(p) is unnecessary. Rule 308.02 already contains in its introductory paragraph the requirements that registrants have a duty to act primarily for the benefit of their clients and observe just and equitable principles of trade. The amendment to Rule 308.02(p) merely amends the existing rule to mirror the requirements for registration in Rule 302.02 and for keeping adequate business records in Rule 306.02.

The proposed effective date is pending review and approval by the Legislature.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Generally, the Securities Commissioner may make, amend, and rescind any rules, forms, and orders which are necessary to carry out the provisions of the Arkansas code chapter governing Securities. *See* Ark. Code Ann. § 23-42-204 (Repl. 2000). Act 668 of 2017, sponsored by Representative Robin Lundstrum, amended various Arkansas Securities laws that regulate securities transactions and protect investors from securities fraud. The Securities Commissioner may by rule or order approve a limited registration for a broker-dealer, agent, investment adviser, representative, or bank office with such limitations, qualifications, or conditions as the Commissioner deems appropriate. *See* Ark. Code Ann. §23-42-302 (Supp. 2017).

9. ARKANSAS TREASURER OF STATE (Emma Willis, Grant Wallace, and Dave Mills)

a. SUBJECT: The Arkansas ABLE Program Rules and Regulations

DESCRIPTION: The Arkansas Achieving a Better Life Experience (ABLE) Program is established pursuant to the Arkansas ABLE Act. The program is designed to satisfy the requirements of Section 529A of the Internal Revenue Code of 1986, as amended, and any regulations, rulings, announcements and other guidance issued thereunder. The Arkansas ABLE Committee established these rules governing the operation of the program. To the extent that these rules and regulations are interpreted to be inconsistent with provisions of Section 529A, the provisions of Section 529A shall prevail. The program may be affected by subsequent changes in federal and state legislation. The committee shall have the right to modify these rules from time to time to comply with then current federal law and regulations applicable to the program and for other purposes.

PUBLIC COMMENT: A public hearing was held on November 28, 2017. The public comment period expired on November 28, 2017. There were no comments.

The proposed effective date is pending review and approval by the Legislature.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The proposed rules comply with Act 1238 of 2015, sponsored by Representative Julie Mayberry, and Act 324 of 2017, sponsored by Representative Andy Mayberry, to govern the operation and management of the Achieving a Better Life Experience ("ABLE") Program in Arkansas. ABLE Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, were created as a result of the federal Achieving a Better Life Experience Act of 2014 or better known as the ABLE Act. *See* 26 U.S.C. 529A, as amended, as provided under the Tax Increase Prevention Act of 2014, Pub. L. No. 113-295.

An ABLE "Program Committee" is composed of the director of the Department of Human Services, the director of Arkansas Rehabilitation Services of the Department of Career Education and Workforce Development, and the Treasurer of State, or their respective designees. *See* Ark. Code Ann. §20-3-105(a) (Supp. 2017). The Committee is authorized to adopt rules necessary to administer the ABLE Program and for the general administration of the program. *See* Ark. Code Ann. §20-3-105(c) and (d)(2) (Supp. 2017). The Treasurer of State shall manage the program for the Committee; provide office space, staff, and materials for the Committee; perform other services necessary to implement the Act; and conduct outreach and engage in financial educational activities with individuals with disabilities, stakeholders within the community of individuals with disabilities, and their support system. *See* Ark. Code Ann. §20-3-105(b) (Supp. 2017).

Under Arkansas law, the rules shall ensure that (a) a rollover from an ABLE account does not apply to an amount paid or distributed from the ABLE account to the extent that, not later than the 60th day after the date of the payment or distribution, the amount received is paid into another ABLE account for the benefit of the same designated beneficiary or an eligible individual who is a member of the family of the designated beneficiary, but this limitation does not apply to a transfer if the transfer occurs within 12 months after the date of a previous transfer for the benefit of the designated beneficiary; (b) a person may make contributions for a taxable year for the benefit of an individual who is an eligible individual for the taxable year for the benefit of an individual who is an eligible individual for the taxable year to an ABLE account that is established to meet the qualified disability expenses of the designated beneficiary of the account; (c) a designated beneficiary

is limited to one (1) ABLE account; (d) an ABLE account may be established only for a designated beneficiary who is a resident of Arkansas or a resident of a contracting state; and (e) other requirements of the Act shall be met. *See* Ark. Code Ann. §20-3-106 (Supp. 2017).

E. Rules Deferred from the December 12, 2017 Meeting of the Administrative Rules and Regulations Subcommittee.

1. <u>STATE PLANT BOARD, PESTICIDE DIVISION</u> (Susie Nichols)

a. <u>SUBJECT</u>: Dicamba Use and Application

<u>DESCRIPTION</u>: This rule to amend Arkansas Regulation on Pesticide Classification will restrict the use of dicamba for agricultural uses from April 16th through October 31st of all pesticides containing dicamba except for use on pastures, rangeland, turf, ornamental, direct injection for forestry activities and home use. The rule requires individuals who intend to apply dicamba by ground to complete online training provided by the University of Arkansas. This rule will protect farmers who have chosen not to use this pesticide technology and the general public.

<u>PUBLIC COMMENT</u>: A public hearing was held on November 8, 2017, and the public comment period expired on October 30, 2017. Provided by the Board and attached as an exhibit hereto is a summary of the public comments received and the Board's responses. Also attached as an exhibit hereto is the report of the Board submitted after its consideration of the recommendations made by the Subcommittee at its December 12, 2017 meeting.

The proposed effective date is pending legislative review and approval.

<u>FINANCIAL IMPACT</u>: There is no financial impact.

<u>LEGAL AUTHORIZATION</u>: The State Plant Board shall administer and enforce the Arkansas Pesticide Use and Application Act ("Act"), codified at Arkansas Code Annotated §§ 20-20-201 through 20-20-227, and shall have authority to issue regulations after a public hearing following due notice to all interested persons to carry out the provisions of the Act. *See* Ark. Code Ann. § 20-20-206(a)(1). When the Board finds it necessary to carry out the

purpose and intent of the Act, regulations may relate to the time, place, manner, amount, concentration, or other conditions under which pesticides may be distributed or applied and may restrict or prohibit use of pesticides in designated areas during specified periods of time to prevent unreasonable adverse effects by drift or misapplication to: plants, including forage plants, or adjacent or nearby lands; wildlife in the adjoining or nearby areas; fish and other aquatic life in waters in reasonable proximity to the area to be treated; and humans, animals, or beneficial insects. *See id*. In issuing regulations, the Board shall give consideration to pertinent research findings and recommendations of other agencies of this state, the federal government, or other reliable sources. *See* Ark. Code Ann. § 20-20-206(a)(2).

F. Adjournment.