

SUBCHAPTER A. GENERAL PROVISIONS
28 TAC §12.4

SUBCHAPTER G. EXEMPTIONS FOR INDEPENDENT REVIEW ORGANIZATIONS
28 TAC §12.601

INTRODUCTION. The Texas Department of Insurance (TDI) proposes to amend 28 TAC §12.4 and to add new Subchapter G, consisting of §12.601, concerning preauthorization exemptions for independent review organizations (IROs). These amended and new sections implement House Bill 3459, 87th Legislature, 2021.

EXPLANATION. Amended §12.4 and new Subchapter G, consisting of §12.601, are necessary to conform TDI's utilization review rules with HB 3459. HB 3459 allows a health maintenance organization or insurer to rescind an exemption from preauthorization requirements under certain conditions. A physician or provider may appeal an adverse determination regarding a preauthorization to an IRO to review the appropriateness of the rescission determination by the health maintenance organization or insurer.

The proposed amended and new sections are described in the following paragraphs.

Section 12.4. The amendments to §12.4(a) replace the phrase "of this subchapter" with "of this title" and add a reference to the section heading for consistency with current agency language preferences and drafting practices. The amendments to §12.4(b) remove obsolete applicability language. New language states that independent reviews of adverse determinations regarding preauthorization exemptions made under Texas Insurance Code Chapter 4201, Subchapter N, must comply with new §12.601 as added by this proposal.

Subchapter G. Exemptions for Independent Review Organizations. TDI proposes to add new Subchapter G, which consists of new §12.601.

Section 12.601. New §12.601 outlines requirements and procedures for appeals of adverse determinations regarding a preauthorization exemption.

New §12.601(a) defines "adverse determination regarding a preauthorization exemption," "issuer," "physician," "preauthorization exemption," and "provider" in order to clarify these terms, which may have different meanings in other contexts in 28 TAC Chapter 12, and to refer to the preauthorization exemption process in 28 TAC Chapter 19.

New §12.601(b) states that the independent review of an adverse determination regarding a preauthorization exemption, the IRO that performs that review, and the appropriate issuer are subject to Insurance Code Chapter 4201, Subchapter N, and 28 TAC Chapter 12, except as otherwise specified in §12.601.

New §12.601(c) states that for the purposes of §12.601, a physician or provider should be identified using the National Provider Identifier under which a physician or provider makes preauthorization requests.

New §12.601(d) states that an issuer must submit a request for independent review of an adverse determination regarding a preauthorization exemption to TDI on behalf of a physician or provider.

New §12.601(e) requires that the IRO use the same random sample of claims used in the issuer's initial determination to rescind the preauthorization exemption and that only claims that did not meet the screening criteria are subject to independent review. A physician or provider can request that the IRO review another random sample of claims under Insurance Code §4201.656(d) to the extent that the issuer conducted a retrospective review of more claims than were included in the original random sample.

New §12.601(f) states that appeals for an adverse determination regarding a preauthorization exemption follow TDI's process for assigning IROs under 28 TAC §12.502, except that TDI will only provide notice of the appeal to the IRO, the issuer, and the physician or provider.

New §12.601(g) states that 28 TAC §12.206 does not apply to an IRO's independent review of an adverse determination regarding a preauthorization exemption.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Rachel Bowden, director of the Regulatory Initiatives Office, has determined that during each year of the first five years the proposed amendments and new section are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the amendments and section, other than that imposed by statute. Ms. Bowden made this determination because the proposed amendments and section do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the amendments and section.

Ms. Bowden does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments and section are in effect, Ms. Bowden expects that administering the amendments and section will have the public benefit of ensuring that TDI's rules conform to Insurance Code Chapter 4201, Subchapter N, and implement a cohesive preauthorization exemption process under that subchapter.

Ms. Bowden does not expect that the proposed amendments and section will impose new economic costs on persons required to comply with them. Amended §12.4 and new §12.601(b) require that issuers, IROs, and the independent review of rescissions of preauthorization exemptions follow all other rules pertaining to IROs in Chapter 12, with limited exceptions. These rules require, among other things: (1) each IRO to apply to TDI for registration as a certified IRO and pay either an original application fee of \$1000 or a renewal fee of \$400; (2) issuers to pay IROs either \$650 or \$460 for each independent

review, depending on the classification of the review; (3) all IROs to be subject to on-site examinations by TDI; and (4) all independent reviews to be conducted under an independent review plan. However, IROs are already subject to these requirements and costs, and TDI does not anticipate new organizations to apply for certification as IROs just to engage in independent reviews of adverse determinations regarding preauthorization exemptions. Therefore, these costs to IROs are existing costs and are not directly attributable to this rule proposal. Additionally, issuers are required by Insurance Code §4201.656(b) to pay IROs for independent reviews of adverse determinations regarding preauthorization exemptions, and the fee amounts already set in rule (\$650 or \$450) are intended to fund the IRO's operations. See Tex. Ins. Code §4202.006, concerning Payor Fees. Therefore, the issuer costs described above are attributable to statute and not this rule proposal.

The proposal also requires that independent reviews of adverse determinations regarding preauthorization exemptions be randomly assigned to IROs as provided in 28 TAC §12.502. Under the current rule, certified IROs must accept an assignment unless conflicted out. TDI anticipates that an IRO may have to add staff to accommodate new requests for independent reviews that result from rescissions of preauthorization exemptions. Whether an IRO must add staff will depend on decisions by issuers, including the numbers of preauthorization requirements imposed, preauthorization exemptions granted, and subsequent rescissions of preauthorization exemptions; the number of providers that choose to request independent reviews; and the IRO's internal processes and needs. Though costs may vary, TDI estimates the following possible needs: individual employee compensation for administrative assistants at a mean hourly wage of \$17.00 per hour for up to 100 staff hours, medical records specialists or health technicians at a mean hourly wage of \$21.20 per hour for up to 250 staff hours, and computer programmers at a mean hourly wage of \$49.35 for up to 40 staff hours to implement the

new appeals process and to aid in reviewing each appeal regarding a preauthorization exemption. These wages are based on the latest information from the Labor Market and Career Information (LCMI) Department of the Texas Workforce Commission at texaswages.com/WDAWages. But to the extent that an IRO does need to add staff to perform independent reviews of adverse determinations of preauthorization exemptions, TDI anticipates that the cost of additional staff will be covered by the fees issuers must pay under existing 28 TAC §12.403 to fund the IRO's operations.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments and section will not have an adverse economic effect on small or micro businesses, or on rural communities. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a cost on regulated persons. Therefore, no additional rule repeals or amendments are required under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments and new section are in effect, the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase or decrease in fees paid to the agency;
- will create a new regulation;
- will expand, limit, or repeal an existing regulation;
- will increase the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m., central time, on May 9, 2022. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC-GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030.

The Commissioner will also consider written and oral comments on the proposal in a public hearing under Docket No. 2832 at 2:00 p.m. central time, on May 12, 2022, in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin Texas.

SUBCHAPTER A. GENERAL PROVISIONS
28 TAC §12.4

STATUTORY AUTHORITY. TDI proposes amendments to §12.4 under Insurance Code §4201.003 and §36.001.

Insurance Code §4201.003 authorizes the Commissioner to adopt rules to implement Insurance Code Chapter 4201.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The proposed amendments to §12.4 implement Insurance Code Chapter 4201, Subchapter N.

TEXT.

§12.4. Applicability.

(a) All independent review organizations (IROs) performing independent reviews of adverse determinations made by utilization review agents, health insurance carriers, health maintenance organizations, and managed care entities, must comply with this chapter. IROs performing independent reviews of adverse determinations made by certified workers' compensation health care networks and workers' compensation insurance carriers must comply with this chapter, subject to §12.6 of this title (relating to Independent Review of Adverse Determinations of Health Care Provided Under Labor Code Title 5 or Insurance Code Chapter 1305) [~~subchapter~~].

(b) All IROs performing independent reviews of adverse determinations regarding preauthorization exemptions made under Insurance Code Chapter 4201, Subchapter N, concerning Exemption From Preauthorization Requirements for Physicians and Providers Providing Certain Health Care Services, must comply with §12.601 of this title (relating to Preauthorization Exemptions). [~~This chapter is effective on July 7, 2015. Unless otherwise~~

~~provided, this chapter applies to all requests for independent review filed with the department on or after July 7, 2015. All independent reviews filed with the department before July 7, 2015, will be subject to the rules in effect at the time the independent review was filed with the department.]~~

SUBCHAPTER G. EXEMPTIONS FOR INDEPENDENT REVIEW ORGANIZATIONS
28 TAC §12.601

STATUTORY AUTHORITY. TDI proposes new §12.601 under Insurance Code §4201.003 and §36.001.

Insurance Code §4201.003 authorizes the Commissioner to adopt rules to implement Insurance Code Chapter 4201.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Section 12.601 implements Insurance Code Chapter 4201, Subchapter N.

TEXT.

§12.601. Preauthorization Exemptions.

(a) In this section, the following words and terms have the following meanings unless context clearly indicates otherwise.

(1) Adverse determination regarding a preauthorization exemption--Has the same meaning as defined in §19.1730 of this title (relating to Definitions).

(2) Issuer--Has the same meaning as defined in §19.1730 of this title.

(3) Physician--Has the same meaning as defined by Insurance Code §843.002, concerning Definitions.

(4) Preauthorization exemption--Has the same meaning as defined in §19.1730 of this title.

(5) Provider--Has the same meaning as defined in Insurance Code §843.002.

(b) An independent review of an adverse determination regarding a preauthorization exemption, the independent review organization (IRO) that performs the review, and the appropriate issuer are subject to Insurance Code Chapter 4201, Subchapter N, concerning Exemption from Preauthorization Requirements for Physicians and Providers Providing Certain Health Care Services, and the associated standards and requirements in this chapter, except as otherwise specified in this section.

(c) For purposes of this section, a physician or provider should be identified using the National Provider Identifier under which a physician or provider makes preauthorization requests.

(d) Notwithstanding §12.501 of this title (relating to Requests for Independent Review), an issuer must submit a request for independent review of an adverse determination regarding a preauthorization exemption to the department on behalf of a physician or provider.

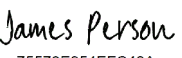
(e) The IRO must review the same random sample of claims on which the issuer's rescission was based, unless the physician or provider requests another random sample. Only the claims that the issuer's retrospective review determined did not meet the screening criteria are subject to independent review. If requested by the physician or provider, the IRO may review another random sample of claims under Insurance Code §4201.656(d), concerning Independent Review of Exemption Determination, to the extent that the issuer conducted a retrospective review of more claims than were included in the original random sample.

(f) Appeals for an adverse determination regarding a preauthorization exemption to an IRO follow the department's process for assigning IROs under §12.502 of this title (relating to Random Assignment), except that notification under §12.502(a) will only be made to the IRO, the issuer, and the physician or provider.

(g) Section 12.206 of this title (relating to Notice of Determinations Made by Independent Review Organizations) does not apply to a review by an IRO under this section.

CERTIFICATION. This agency certifies that legal counsel has reviewed the proposal and found it to be within the agency's authority to adopt.

Issued in Austin, Texas, on March 25, 2022.

DocuSigned by:

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James Person, General Counsel
Texas Department of Insurance