

No. 2018- 5330

**OFFICIAL ORDER  
of the  
TEXAS COMMISSIONER OF INSURANCE**

Date: JAN 03 2018

**Subject Considered:**

EXPRESS SCRIPTS UTILIZATION MANAGEMENT COMPANY  
One Express Way  
St. Louis, Missouri 63121

**CONSENT ORDER**  
TDI ENFORCEMENT FILE NO. 11350

**General remarks and official action taken:**

This Order is in consideration of whether disciplinary action should be taken against Express Scripts Utilization Management Company (ESUM).

**WAIVER**

ESUM acknowledges that the Texas Insurance Code and other applicable law provide certain rights. ESUM waives all of these rights and any procedural rights in consideration of the entry of this consent order.

Pursuant to TEX. INS. CODE § 82.055(b), ESUM agrees to this consent order with the express reservation that ESUM does not admit to a violation of the Texas Insurance Code or of a rule of TDI, and ESUM maintains that the existence of a violation is in dispute.

**FINDINGS OF FACT**

1. TDI certified ESUM, organization identification No. 44228, as a health utilization review company effective November 24, 2009.
2. ESUM performs pre-authorization coverage reviews for prescription drugs on behalf of insurance companies that delegate this duty to it.
3. In November of 2015, ESUM submitted a renewal application to TDI. As part of the renewal, ESUM submitted a notification letter template that the department previously requested ESUM to revise.

4. On January 15, 2016, TDI commenced a desk audit of ESUM. During the audit, TDI staff came to believe ESUM had violated multiple Texas insurance laws while conducting utilization reviews.
5. ESUM employs a web-based portal that can be used to request prior authorization for drugs and services. Providers can either enter the requested information into the web-based portal, or they can provide the information to ESUM by phone or fax.
6. Creating ESUM's utilization review screening criteria is a multi-step process. The standard screening criteria are created or approved by an ESUM physician, then they are transcribed into a layperson's vernacular ("lay criteria") by non-physician, clinical staff for programming into the web-based portal's interface and into ESUM's automated systems.
7. ESUM failed to implement a process it included in the utilization review plan it filed with TDI where any non-medical staff will transfer calls to an ESUM pharmacist in the event the caller identifies his or herself as a physician.
8. ESUM failed to afford requesting providers a reasonable opportunity to discuss requested prescriptions with an ESUM physician prior to it issuing adverse determinations. TDI determined ESUM did not always make adequate attempts to contact providers prior to a denial, nor did it always provide requesting providers with a telephone number to contact ESUM directly to request a peer-to-peer discussion.
9. ESUM allowed pharmacists and other unauthorized individuals to make decisions to deny requests for prescriptions without consulting an ESUM physician.
10. ESUM failed to consistently use the proper templates and attachments when notifying parties that their request was not approved. The unapproved notifications did not contain information required by Texas insurance laws including:
  - a. a description of the clinical basis for the determination,
  - b. an explanation of the process to appeal a determination with ESUM,
  - c. an explanation of the policyholder's right to an independent review by an independent review organization (IRO),
  - d. TDI's form for requesting an independent review by an IRO,
  - e. the evidence the policyholder would need to appeal the determination, and
  - f. an explanation of the policyholder's right to complain to ESUM or TDI about the review.
11. ESUM has since filed updated policies and procedures to ensure compliance with the statutes in this order. The changes include:

- a. the reaffirmation that non-medical employees will not request or receive patient medical information directly from an individual the employee knows to be a physician;
- b. the establishment of a physician review of all coverage requests that cannot be initially approved;
- c. modifications to how it handles instances when it does not receive requested information from providers;
- d. the institution of new procedures for pre-denial outreach to afford a reasonable opportunity for peer-to-peer consultation, making outreach to the prescribing provider at least one business day prior to issuing an adverse determination informing him or her of the opportunity for and the process to request a peer-to-peer consultation;
- e. modifications to letter templates and procedures to ensure the appropriate forms and templates are used properly; and
- f. a prohibition on pending cases past regulatory deadlines.

### CONCLUSIONS OF LAW

1. The commissioner has jurisdiction over this matter pursuant to TEX. INS. CODE chs. 82, 84, and 4201; 28 TEX. ADMIN. CODE § 19.1715; and TEX. GOV'T CODE §§ 2001.051-2001.178.
2. The commissioner has the authority to dispose of this case informally pursuant to TEX. GOV'T CODE § 2001.056, TEX. INS. CODE §§ 36.104 and 82.055, and 28 TEX. ADMIN. CODE § 1.47.
3. ESUM violated TEX. INS. CODE § 4201.252(b) by allowing personnel other than a physician, nurse, physician assistant, or other health care provider qualified to provide the requested service to obtain oral or written information directly from a patient's health care provider regarding the patient's specific medical condition, diagnosis, or treatment options or protocols.
4. ESUM violated TEX. INS. CODE § 4201.206 and 28 TEX. ADMIN. CODE § 19.1710 by failing to provide prescribing health care providers reasonable opportunities to discuss patient treatment plans and the clinical bases for ESUM's determinations with a physician prior to the issuance of adverse determinations.
5. ESUM violated 28 TEX. ADMIN. CODE § 19.1710(1) by failing to provide a telephone number to health care providers to contact ESUM to discuss a pending adverse determination.
6. ESUM violated 28 TEX. ADMIN. CODE § 19.1705(d) by allowing adverse determinations to be made by employees who were not appropriate physicians, doctors, or other health care providers with appropriate credentials to determine medical necessity or appropriateness, or experimental or investigative nature of health care services.

7. ESUM violated 28 TEX. ADMIN. CODE § 19.1718 by failing to timely send notifications of adverse determination not later than the third calendar day after the date a request for preauthorization for an HMO or preferred provider benefit plans.
8. ESUM sent adverse determination notices that did not include:
  - a. the principal reasons for the adverse determination, pursuant to TEX. INS. CODE § 4201.303(a)(1) and 28 TEX. ADMIN. CODE § 19.1709(b)(1);
  - b. the clinical basis for the adverse determination, pursuant to TEX. INS. CODE § 4201.303(a)(2) and 28 TEX. ADMIN. CODE § 19.1709(b)(2);
  - c. a description of the screening criteria used as guidelines in making the adverse determination, pursuant to TEX. INS. CODE § 4201.303(a)(3) and 28 TEX. ADMIN. CODE § 19.1709(b)(3);
  - d. a description of the procedure for the complaint and appeal process, including notice to the enrollee of the enrollee's right to appeal an adverse determination to an IRO and of the procedures to obtain that review, pursuant to TEX. INS. CODE §§ 4201.303(a)(4) and 4201.325 and 28 TEX. ADMIN. CODE §§ 19.1709(b)(8) and 19.1711;
  - e. a description of immediate review by an IRO and the procedures to obtain that review, in the instances where an enrollee had a life-threatening condition, pursuant to TEX. INS. CODE § 4201.303(b) and 28 TEX. ADMIN. CODE § 19.1709(b)(9);
  - f. a description of the enrollee's right to an immediate review by an IRO and of the procedures to obtain that review, for an enrollee who is denied the provision of prescription drugs or intravenous infusions, pursuant to TEX. INS. CODE § 4201.303(c);
  - g. the professional specialty of the physician, doctor, or other health care provider that made the adverse determination, pursuant to 28 TEX. ADMIN. CODE § 19.1709(b)(4);
  - h. a description of the procedure for ESUM's complaint system, including TDI's address, toll-free telephone number, and a statement explaining that a complainant is entitled to file a complaint with TDI, pursuant to 28 TEX. ADMIN. CODE §§ 19.1705(f) and 19.1709(b)(5);
  - i. a description of the procedures for appealing an adverse determination, pursuant to TEX. INS. CODE § 4201.352 and 28 TEX. ADMIN. CODE §§ 19.1709(b)(6) and 19.1711; or
  - j. a copy of the request for a review by an IRO form, available at TDI's website, pursuant to 28 TEX. ADMIN. CODE § 19.1709(b)(7).

It is ordered that Express Scripts Utilization Management Company will comply with the following:

1. ESUM will require an employee physician to review and approve the lay criteria as part of its screening criteria approval process, in accordance with the requirements of TEX. INS. CODE ch. 4201 and 28 TEX. ADMIN. CODE § 19.1705. ESUM will ensure that all existing lay criteria utilized by clients subject to TDI utilization review regulations are reviewed and approved by an employee physician by no later than 12 months from the

date of this order, and will send quarterly updates on its progress to URAGrp@tdi.texas.gov.

2. For the years 2018, 2019, and 2020, ESUM will have annual, independent audits of its utilization review business for clients subject to TDI utilization review regulations, conducted at the cost of ESUM. These audits will be inclusive of all such reviews, regardless of whether they end in an approval or a denial. ESUM may use any independent auditor of its choosing. The scope of the annual audit will be reasonably related to ESUM's compliance with those TDI utilization review regulations previously identified as issues. ESUM will then submit a report to the department detailing the following:
  - a. the findings of the audit;
  - b. any modifications ESUM is planning on making to its policies and procedures, including any Texas-specific addendums, in response to such findings;
  - c. any other measures it intends to take to address any Texas compliance issues; and
  - d. the anticipated completion date of any planned corrective action.

The report will be accompanied by an attestation from an ESUM officer or director regarding the completion of the audit. ESUM will send these reports for the previous calendar year by June 1st in the years 2019, 2020, and 2021 by email to URAGrp@tdi.texas.gov.

3. For the years 2017, 2018, and 2019, ESUM will file with the department an annual quality improvement plan on its Texas utilization review business. The filing will include:
  - a. a spreadsheet, in an electronic, searchable format, detailing the following information for every Texas complaint (as defined by 28 TEX. ADMIN. CODE § 19.1703(b)(6)) that ESUM received regarding a utilization review it completed for a client subject to TDI utilization review regulations in the prior calendar year:
    - i. the name of the complainant,
    - ii. whether the complainant was a consumer or a provider,
    - iii. the date the complaint was received,
    - iv. a description of the complaint,
    - v. the date the prescription request was received by ESUM,
    - vi. the final outcome of the complaint, and
    - vii. the date the complaint was resolved or otherwise closed;
  - b. a spreadsheet, in an electronic, searchable format, detailing the following information for all ESUM utilization review decisions for a client subject to TDI utilization review regulations that were subsequently appealed (to include complaints as appeals as set out in TEX. INS. CODE § 4201.351) in the prior calendar year:
    - i. the reason for the denial,
    - ii. the date the appeal was received,
    - iii. the date the appeal was completed, and
    - iv. the outcome of the appeal;
  - c. copies of documentation of all appeal decisions (to the extent such documents are either created, maintained, or provided by ESUM);

- d. a description of all service goals relating to compliance with TDI utilization review regulations accomplished in the prior calendar year, to include the dates when the goals or any major milestones of those goals were completed;
  - e. a description of all prospective service goals relating to compliance with TDI utilization review requirements, the anticipated plan to achieve these goals, and projected timeline for completion;
  - f. a description of any changes to ESUM standard screening criteria made in the past year; and
  - g. a description of the type and the recipients of any communications ESUM has sent out regarding changes to its review plan or standard screening criteria made in the past year and affecting clients subject to TDI utilization review regulations.
- ESUM will send these reports by June 1<sup>st</sup> in the years 2018, 2019, and 2020, by e-mail to URAGrp@tdi.texas.gov.

If ESUM is unable to obtain requested information that is maintained solely by a third party, ESUM will notify TDI of the third party's refusal or inability to provide the information, describe the request it made, and describe the third party's reason for refusing to or being unable to provide such information. ESUM will not be in violation of this order for failing to provide information that is maintained by a third party, if it has made a good faith, yet unsuccessful attempt to acquire it.

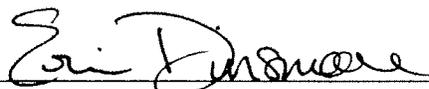
4. It is further ordered that Express Scripts Utilization Management Company pay an administrative penalty of \$200,000. ESUM must pay the penalty in full by no later than 30 days from the entry date of this consent order. The penalty must be paid by cashier's check or money order made payable to the "State of Texas" and sent to the Texas Department of Insurance, Attn: Enforcement Section, Division 60851, MC 9999, P.O. Box 149104, Austin, Texas 78714-9104.



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Kent C. Sullivan  
Commissioner of Insurance

APPROVED AS TO FORM AND CONTENT:



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Erin Dinsmore, Staff Attorney  
Enforcement Section

Affidavit

STATE OF Missouri

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COUNTY OF St. Louis

Before me, the undersigned authority, personally appeared the affiant, who was duly sworn by me and deposed as follows:

"My name is Christine Houston. I am of sound mind, capable of making this statement, and have personal knowledge of these facts which are true and correct.

I hold the office of President and am the representative of Express Scripts Utilization Management Company. I am duly authorized by said organization to execute this statement.

Express Scripts Utilization Management Company waives rights provided by the Texas Insurance Code and other applicable laws, and acknowledges the jurisdiction of the commissioner.

Express Scripts Utilization Management Company knowingly and voluntarily enters into this consent order, and consents to the issuance and service of the consent order by the commissioner of insurance of the state of Texas."

Christine Houston

Affiant

SWORN TO AND SUBSCRIBED before me on October 9<sup>th</sup>, 2017.

(NOTARY STAMP)

Rebecca Hilsabeck  
Signature of Notary Public



REBECCA HILSABECK  
My Commission Expires  
September 30, 2019  
St. Charles County  
Commission #15999831