



Medical Protective  
Princeton Insurance Company  
Patient's Compensation Fund  
PLICO  
MedPro RRG

October 1, 2021

Hon. Russell Toal  
Custodian of the PCF  
c/o Freya Tschantz, PCF Records and Docketing  
Via email to [Freya.tschantz2@state.nm.us](mailto:Freya.tschantz2@state.nm.us)

Re: Comments Regarding Proposed PCF Rule Amendments

The Medical Protective Company (“MedPro”), is in receipt of the Notice of Proposed Rulemaking, Docket No. 21-0005-PCF, and the proposed revisions to the New Mexico Patient Compensation Fund (“PCF”) rules within New Mexico Administrative Code 13.21. MedPro submits the following comments on the proposed rules based upon its experience as the nation’s leading health care liability insurer and as a longtime participating carrier with the PCF.

#### Entity Enrollment

Section 13.21.2.8 of the proposed rules states as follows:

- C.** An independent provider that is a business entity, including solo corporations:
- (1)** must have at least one qualified health care provider as a member or employee of the entity;
  - (2)** must have all qualifiable health care provider members or employees admitted to the fund to have the business entity eligible for fund coverage; and
  - (3)** shall pay an applicable business entity surcharge to the fund.

As a technical comment, MedPro does not find the term “qualifiable health care provider” defined or otherwise used in the New Mexico Medical Malpractice Act, as amended by HB 75, or in the remainder of the rules. It is unclear whether “qualifiable health care provider” is intended to have a meaning different from “health care provider,” a term which is defined to be limited to certain professionals who are eligible for PCF participation provided other criteria are met. For example, is a physician who has obtained claims-made professional liability coverage a “health care provider” but not a “qualifiable health care provider?” MedPro thus recommends that this term either be defined, or replaced with the defined term “health care provider.”

More substantively, MedPro submits that proposed NMAC 13.21.2.8(C)(2) goes too far, and is not narrowly tailored to the interest the PCF is seeking to protect. MedPro understands that the PCF wishes to ensure that the appropriate surcharge is collected for all risk which the PCF is assuming. Since entity surcharge is based on the surcharge of the entity's associated health care providers, the PCF understandably wants to avoid assuming risk for non-admitted providers for which no surcharge is collected.

The proposed rule ignores, however, that there are scenarios in which a health care provider member or employee who is not admitted to the fund is excluded from the entity's professional liability insurance coverage. That is, the insurance policy excludes any entity liability related to the acts of the non-admitted provider. Because PCF coverage follows the underlying coverage, the PCF assumes no risk for a claim related to the non-admitted and excluded provider.

One scenario in which this issue arises is where one provider in a group does not qualify for the carrier's admitted rates, and is thus separately covered on a surplus lines policy. Since the provider is insured on admitted paper, the provider is not eligible for the fund. However, as long as liability for this provider's acts is excluded from the group entity's policy and thus also excluded from PCF coverage, MedPro sees no reason why the entity – which may employ dozens of other providers – should not be eligible for enrollment.

Accordingly, MedPro recommends that proposed NMAC 13.21.2.8(C)(2) be revised as follows:

(2) must have all ~~qualifiable~~ health care provider members or employees admitted to the fund to have the business entity eligible for fund coverage, unless the business entity's malpractice liability policy excludes liability for any non-admitted health care provider members or employees; and

MedPro submits that the availability of PCF enrollment of entities in such scenarios is in the best interest of the medical community, and will not harm the PCF.

#### Solo Corporation Shared Limits

MedPro requests that the PCF rules clarify that solo corporations may share malpractice insurance limits with the entity's sole provider. The PCF website says, "Solo corps cannot have a shared limit to physician's policies." (See <https://pcf.osi.state.nm.us/index.php/carriers/>, No. 7). However, the PCF has recently represented that this is not really the PCF's position, and that it has no concerns with shared limits on the underlying policy. The proposed rules should address this issue and clarify that solo corporations may share limits with the provider and that both may be admitted to the fund. If such shared limits are not permitted, health care providers must bear additional costs by being required to maintain separate limits coverage for their solo corporations.

MedPro appreciates the Superintendent's consideration of these comments, and welcomes the opportunity to clarify or further discuss any of the points above as part of the rulemaking process.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Landrigan". The signature is written in a cursive style with a large initial 'T' and 'L'.

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