XXXI. REGULATIONS GOVERNING UTILIZATION REVIEW ACTIVITIES BY PHYSICIANS

A. AUTHORITY AND PURPOSE OF THESE REGULATIONS

The Mississippi State Board of Medical Licensure adopts these regulations governing utilization review activities by physicians pursuant to Chapters 25 and 43 of Title 73 and Chapter 83 of Title 41 of the Mississippi Code (1972) Annotated, as Amended. The Mississippi State Board of Medical Licensure finds it necessary to fulfill its statutory responsibilities by adopting these regulations in order to protect the public, to set professional standards, and to enforce the provisions of current law regarding the performance of utilization review activities by physicians.

B. SCOPE OF THESE REGULATIONS

These regulations apply to any physician who performs utilization review activities regarding any person or entity located within the State of Mississippi, regardless of the location, type, or status of the physician's utilization review employment or practice of medicine, the presence or absence of the physician's license to practice medicine in Mississippi, the presence or absence of a claim of an ERISA or other federal preemption, the presence or absence of a physician-patient relationship with the person in Mississippi who is the subject of the utilization review activity, the type of utilization review activity performed (e.g., prospective, concurrent, or retrospective review), or the level at which the utilization review activity is performed (e.g., an initial benefit claim determination or an administrative appeal of an adverse determination).

No part of these regulations is intended to conflict with or supercede the authority of the Mississippi State Department of Health to regulate utilization review organizations and private review agents pursuant to Mississippi Code Annotated Section 41-83-1 et seq. and regulations adopted by the Mississippi State Department of Health. Furthermore, no part of these regulations is intended to conflict with or supercede the authority of a person other than a physician to participate in utilization review as authorized by Mississippi Code Annotated Section 41-83-1 et seq. and regulations adopted by the Mississippi State Department of Health.

C. DEFINITION OF UTILIZATION REVIEW ACTIVITIES

For the purposes of these regulations only, the Mississippi State Board of Medical Licensure has determined that the definition of the term "utilization review activities" includes, but is not limited to, the use of medical knowledge and professional judgment by a physician to give medical advice, perform medical services, conduct a

medical record review, serve as a medical consultant, apply service intensity or symptom severity criteria, monitor treatment, form medical opinions, or make diagnostic, therapeutic, medical necessity, benefit claim, or healthcare facility admission or continued stay certification decisions or recommendations, at any level of claim review or administrative appeal, regarding a medical service or benefit provided or proposed to be provided to a person or entity located within the State of Mississippi, for the purpose of determining whether such medical service or benefit should be covered or provided by an insurer, insurance plan, or other third party payor. The intent of this definition is to state explicitly that the Mississippi State Board of Medical Licensure (hereinafter referred to as "the Board"), after diligent investigation and analysis, finds as a fact that a physician's performance of utilization review activities is historically an area of State regulation that is subject to regulation by the Board. The Board also finds as a fact that a physician's utilization review activities involve medical decisions, not insurance or business decisions, that affect the health and safety of persons seeking healthcare in Mississippi. The Board does not intend for this definition to conflict with or supercede the definition of "utilization review" as contained in Mississippi Code Annotated Section 41-83-1(a) and regulations adopted by the Mississippi State Department of Health.

D. LICENSURE AND QUALIFICATION REQUIREMENTS FOR PHYSICIANS WHO PERFORM UTILIZATION REVIEW ACTIVITIES

1. Pursuant to Mississippi Code Annotated Section 73-43-11, the performance of utilization review activities by any physician, regardless of the physician's location, type of medical practice, utilization review employment or independent contractor status, or State(s) of medical licensure, regarding any person or entity located within the State of Mississippi, is subject to regulation by the Mississippi State Board of Medical Licensure.

2. In accordance with Mississippi Code Annotated Section 41-83-31, any utilization review activity performed by a physician that results in an adverse recommendation or adverse determination of medical necessity regarding any person or entity located within the State of Mississippi must be based on the evaluation and concurrence by a physician who holds an unrestricted license to practice medicine in Mississippi.

3. In accordance with Mississippi statutes, appellate court case law, and administrative agency regulations, if a request is made by a patient's treating physician to an insurer or a utilization review organization, then any utilization review activity that results in an adverse recommendation or adverse determination of medical necessity must be performed by an appropriately qualified utilization review physician, i.e., a physician with an unrestricted Mississippi license to practice medicine who is board-certified or board eligible and involved in the practice of medicine at least part time in at least one State in the relevant specialty or subspecialty of medicine that is the subject of the utilization review activity, and who is familiar with the local customs of medical practice, the healthcare

resources, and the treatment options available in Mississippi for the person or entity that is the subject of the utilization review activity.

E. PROFESSIONAL STANDARDS FOR PHYSICIANS WHO PERFORM UTILIZATION REVIEW ACTIVITIES

1. Any physician who performs utilization review activities must comply with these regulations and all applicable Mississippi statutes, appellate court case law, and other administrative agency rules, policies, and regulations, and must comply with nationally recognized standards of care and ethics principles regarding the performance of utilization review activities, including, but not limited to, guidelines established by the American Medical Association, utilization review accreditation organizations, relevant medical specialty associations, and other relevant guidelines or principles regarding evidence-based medicine. In keeping with principles of medical ethics and Mississippi appellate court case law, any physician who performs utilization review activities must consider the healthcare resources, treatment options, and local customs of medical practice in the Mississippi community where the affected person or entity is located; must take steps to avoid and disclose role conflicts or other conflicts of interest; must not substitute their medical judgment for that of any treating physician; and must not interfere with any physician-patient relationship.

2. In accordance with regulations adopted by the Mississippi State Department of Health, if any treating physician licensed to practice medicine in Mississippi provides to an insurer or utilization review organization a written statement within 72 hours of a person's hospital admission that certifies that the person was in need of emergency admission, then any utilization review physician who recommends or renders an adverse determination regarding medical necessity must show, if requested by the Mississippi State Board of Medical Licensure, clear and convincing evidence according to facts, guidelines, or principles developed from evidence-based medicine that the admitted person was not in need of immediate hospital care.

3. In accordance with Mississippi Code Annotated Section 41-83-31, any utilization review physician who recommends or renders an adverse determination of medical necessity must discuss, if requested, the reasons for the adverse determination with the patient's treating physician or other affected healthcare provider. The utilization review physician must comply with the request for discussion within 14 calendar days of receiving either oral or written notification of the request.

4. In accordance with Mississippi Code Annotated Section 73-25-34, any physician located outside of Mississippi who performs utilization review activities regarding any person or entity located within the State of Mississippi through the use of telemedicine (as defined in Code Section 73-25-34) must comply with the Mississippi statues and regulations regarding the practice of telemedicine in Mississippi.

F. COMPLAINT PROCEDURE, DUE PROCESS, AND PROFESSIONAL ACCOUNTABILITY

1. Any person who has reason to believe that any physician may have failed to comply with any part of these regulations in the performance of utilization review activities may make a written complaint to the Mississippi State Board of Medical Licensure or may make an oral complaint by calling the Board office at telephone number 601-987-3079. Any person who makes such a complaint may request that they remain anonymous.

2. Any physician, whether or not licensed to practice medicine in Mississippi, who performs utilization review activities regarding any person or entity located within the State of Mississippi may be subject to an investigation and peer review by the Mississippi State Board of Medical Licensure upon the receipt of a complaint regarding the physician's utilization review activities. Any such physician shall be afforded the due process procedures of the law and Board regulations.

3. Any physician, whether or not licensed to practice medicine in Mississippi, may be held professionally accountable by the Board, upon a finding by the Board that the physician, in the performance of utilization review activities, failed to comply with the licensure requirements, qualification requirements, or Professional Standards contained in these regulations, or demonstrated behavior including, but not limited to, unprofessional or unethical conduct, professional incompetence, professional negligence, or any other dishonorable or inappropriate conduct likely to deceive, defraud, or harm the public or a particular patient. However, in accordance with Mississippi Code Annotated Section 41-83-31(a), the fact that a physician in performing utilization review activities has recommended or rendered an adverse determination of medical necessity in a particular case involving a benefit claim or appeal shall not be used as the ground for action by the Board.

4. In holding a physician professionally accountable pursuant to due process procedures and to these regulations, the actions that the Mississippi State Board of Medical Licensure may take include, but are not limited to, one or more of the following: denying, suspending, restricting, or revoking a Mississippi license to practice medicine; issuing an advisory letter of concern or a notice of warning; issuing a cease and desist order; administering a public or private reprimand; requiring a program of education or a period of supervised practice; seeking an injunction in Chancery Court to prohibit the further performance of utilization review activities; seeking the assistance of the Chancery Court to cite a noncompliant physician for contempt of court; referring the matter to the appropriate legal authority for criminal prosecution as a misdemeanor or felony; and assessing up to $10,000 of the reasonable investigation costs expended by the Board.

5. Any physician who is found by the Mississippi State Board of Medical Licensure to have failed to comply with any part of these regulations may be reported by the Board to any person or organization appropriate under the circumstances in order to enforce or comply with the law or to protect the public, including, but not limited to, the National Practitioner Data Bank, the U.S. Department of Health and Human Services Office of the Inspector General, the Centers for Medicare and Medicaid Services, the Federation of State Medical Boards, the medical licensure authority of any State in which the physician is licensed to practice medicine, the Mississippi State Department of Health, the Mississippi Department of Insurance, the Mississippi Attorney General or District Attorney for criminal prosecution, and any other appropriate person, professional organization, government agency, healthcare entity, or legal authority.

6. As part of the procedures of due process, any physician may request, or may be summoned by the Board, to appear before the Board at a hearing to show cause why the physician should not be found to be out of compliance with these regulations. Any physician's failure to request a hearing or failure to appear when summoned to a hearing may be deemed by the Board to be a waiver of the physician's due process opportunity to appear before the Board and may result in a finding by the Board that the physician is out of compliance with these regulations *in absentia*.

G. COMPLIANCE POLICY AND EXEMPTIONS

1. In assuring compliance with these regulations, the Mississippi State Board of Medical Licensure shall have, in the Board's sole discretion, the authority to follow a "no exemptions" policy. Any physician who claims to be exempt from these regulations shall have the burden of proving to the Board by clear and convincing evidence that the exemption is valid.

2. Notwithstanding the licensure requirements and compliance policy contained in these regulations, the Mississippi State Board of Medical Licensure, in accordance with Mississippi Code Annotated Section 41-83-31, acknowledges that any utilization review physician who makes an adverse recommendation or adverse determination of medical necessity on behalf of the Comprehensive Health Insurance Risk Pool Association, or on behalf of a utilization review organization that has a managed care contract for utilization review of 9 or fewer persons who reside in Mississippi shall be exempt from the requirement to hold an unrestricted license to practice medicine in Mississippi. However, any utilization review physician who claims such an exemption must comply with the Professional Standards and the qualification requirements contained in these regulations.

3. Notwithstanding the compliance policy contained in these regulations, the Board acknowledges an exemption to these regulations in accordance with regulations adopted by the Mississippi State Department of Health, that these regulations do not apply to physicians performing in-house utilization review activities in

Mississippi for hospitals, home health agencies, clinics, private physician offices, or any other health facility, so long as the review does not result in the approval or denial of payment for hospital or medical services for a particular case. Such in-house utilization review activities performed by physicians in Mississippi are exempt from these regulations.

H. NOTICE OF REGULATION OF UTILIZATION REVIEW ACTIVITIES BY PHYSICIANS

1. At the time of an initial licensure application, and at the time of each application for a renewal of a license to practice medicine in Mississippi, all physicians shall acknowledge that they have had an opportunity to read these regulations by accessing the website of the Mississippi State Board of Medical Licensure (at internet address www.msbml.state.ms.us) or by requesting a printed copy of these regulations from the Board.

2. The Mississippi State Board of Medical Licensure shall provide a copy of these regulations, and all subsequent amendments thereto, to the State Health Officer and the Division of Licensure and Certification at the Mississippi State Department of Health, with the request that the Department of Health make these regulations available, or otherwise give notice of the existence of these regulations, to all utilization review organizations and private review agents that are certified by the Department of Health to conduct utilization review in Mississippi and to all healthcare facilities in Mississippi that are licensed by the Department of Health.

3. The Mississippi State Board of Medical Licensure shall provide a copy of these regulations to the Mississippi Hospital Association, the Mississippi State Medical Association, and any other appropriate person or organization at the discretion of the Board's Executive Director, with the request that those organizations give notice to their members of the existence of these regulations.

I. EFFECTIVE DATE

These regulations shall become effective on July 1, 2006.

XXXI. REGULATIONS REGARDING THE CONDUCT OF PHYSICIANS WHO PERFORM UTILIZATION REVIEW MEDICAL CONSULTATION ACTIVITIES

A. AUTHORITY AND PURPOSE OF THESE REGULATIONS

The Mississippi State Board of Medical Licensure adopts these regulations regarding the conduct of physicians who perform utilization review medical consultation activities pursuant to its statutory authority to regulate physician conduct that is contained in Chapters 25 and 43 of Title 73 of the Mississippi Code (1972) Annotated, as Amended. The Mississippi State Board of Medical Licensure finds it necessary to perform its statutory responsibilities by adopting these regulations in order to fulfill its duty to protect the public as part of the historic police powers of the State, to set professional standards, to enforce the provisions of current law regarding the performance of utilization review medical consultation activities by physicians, and to further other legitimate government purposes that are in the public interest and in accordance with the provisions of Mississippi law.

B. SCOPE OF THESE REGULATIONS

1. These regulations apply to any physician who performs utilization review medical consultation activities regarding any person or entity located within the State of Mississippi, regardless of the location, type, or status of the physician's utilization review medical consultation activities, the presence or absence of the physician's medical license in Mississippi, the presence or absence of a physician-patient relationship with the person in Mississippi who is the subject of the utilization review medical consultation activity, or the type of utilization review medical consultation activity performed (e.g., prospective, concurrent, or retrospective review, an initial review, or a subsequent review of an adverse determination).

2. In tailoring these regulations as closely as possible to the provisions of Mississippi law, the Board does not intend for any part of these regulations to conflict with or supercede the authority of the Mississippi State Department of Health to regulate utilization review organizations pursuant to Mississippi Code Annotated (1972) Section 41-83-1 et seq. and regulations adopted by the Mississippi State Department of Health. Furthermore, the Board does not intend for any part of these regulations to conflict with or supercede the authority of a person other than a physician to participate in "utilization review" as defined and authorized by Mississippi Code Annotated (1972) Section 41-83-1 et seq. and regulations adopted by the Mississippi State Department of Health.

C. TERMINOLOGY

1. For the purposes of these regulations only, the Mississippi State Board of Medical Licensure (hereinafter referred to as "the Board") has determined that under the

provisions of Mississippi law, a physician who performs any of the following utilization review medical activities serves in the role of a consulting physician, and that the term "utilization review medical consultation activities" includes, but is not limited to, the use of medical knowledge and professional judgment by a physician licensed or otherwise lawfully practicing within this State to

a. make medical decisions,
b. form medical opinions,
c. give or suggest medical advice,
d. perform or direct the performance of medical services,
e. conduct a medical record review,
f. serve as a medical consultant,
g. apply medical service intensity or symptom severity criteria,
h. monitor, prescribe, suggest, or recommend medical treatment,
i. question or review a treating physician's medical decisions,
j. make diagnostic, therapeutic, or healthcare facility admission or continued stay medical decisions or recommendations,
k. review an adverse determination or other recommendation regarding a medical service made by a non-treating physician or other person, or
l. discuss a person's medical care or medical condition or the reason for an adverse determination with the person's treating physician, his or her designee, or other affected healthcare provider,

at any level of review, regarding the appropriateness of a medical service provided or proposed to be provided to a person or entity located within the State of Mississippi.

2. The Board does not intend for the terminology used in these regulations or the requirements of these regulations to conflict with or supercede any provision of Mississippi law, including the definition of "utilization review" as contained in Mississippi Code Annotated (1972) Section 41-83-1(a) and regulations adopted by the Mississippi State Department of Health.

D. LICENSURE AND QUALIFICATION REQUIREMENTS FOR PHYSICIANS WHO PERFORM UTILIZATION REVIEW MEDICAL CONSULTATION ACTIVITIES

1. In accordance with the provisions of law in Mississippi, the performance of utilization review medical consultation activities by any physician, regardless of the physician's location, type of utilization review medical consultation activities, or State(s) of medical licensure, regarding any person or entity located within the State of Mississippi, is an otherwise lawful practice within the State of Mississippi that is subject to regulation by, and professional accountability to, the Mississippi State Board of Medical Licensure.

2. In accordance with the provisions of law in Mississippi, any utilization review medical consultation activity that results in an adverse determination must be based on the prior evaluation and concurrence in the adverse determination by a physician licensed to practice in Mississippi.

3. In accordance with the provisions of law in Mississippi (including regulations adopted by the Mississippi State Department of Health), if a request is made by a patient's treating physician, then any utilization review medical consultation activity that results in an adverse determination must be performed by an appropriately qualified utilization review consultation physician, i.e., a physician licensed in Mississippi who is board certified or board eligible and engaged in the same type of practice and relevant specialty or subspecialty of medicine that is the subject of the utilization review medical consultation activity, and who possesses and uses the degree of skill ordinarily used by members of his or her profession in good standing.

E. PROFESSIONAL STANDARDS FOR PHYSICIANS WHO PERFORM UTILIZATION REVIEW MEDICAL CONSULTATION ACTIVITIES

1. In accordance with the ethical duty of all physicians to respect the law, any physician who performs utilization review medical consultation activities must comply with these regulations and all applicable Mississippi statutes, court rulings, and other administrative agency rules, policies, and regulations, including regulations adopted by the Mississippi State Department of Health.

2. In accordance with the provisions of law in Mississippi, any physician who performs utilization review medical consultation activities must comply with ethics principles established by the American Medical Association and relevant medical specialty associations of which the physician is a member.

3. In accordance with the provisions of law in Mississippi, any utilization review consultation physician who renders an adverse determination must discuss, if requested, the reasons for the adverse determination with the patient's treating physician or other affected healthcare provider. The utilization review consultation physician must comply with the request for discussion within 14 calendar days of receiving either oral or written notification of the request.

F. PROFESSIONAL ACCOUNTABILITY FOR PHYSICIAN CONDUCT IN VIOLATION OF THESE REGULATIONS

1. In accordance with the provisions of law in Mississippi, any physician licensed or otherwise lawfully practicing within this State (i.e., regardless of whether the physician is licensed in Mississippi) who performs utilization review medical consultation activities may be disciplined or otherwise held professionally accountable by the Board, upon a finding by the Board by clear and convincing

evidence that the physician is unqualified as evidenced by conduct including, but not limited to,

a. incompetent professional practice,
b. unprofessional conduct, or
c. any other dishonorable or unethical conduct likely to deceive, defraud, or harm the public (e.g., dishonest, illegal, or negligent conduct in the performance of utilization review medical consultation activities).

2. Any violation of Section D or Section E of these regulations as enumerated above shall constitute unprofessional conduct in violation of Mississippi Code Annotated (1972) Section 73-25-29(8), as amended.

G. ACTIONS AVAILABLE TO THE BOARD

1. In accordance with the provisions of law in Mississippi, any physician licensed or otherwise lawfully practicing within this State (i.e., regardless of whether the physician is licensed in Mississippi) who performs utilization review medical consultation activities regarding any person or entity located within the State of Mississippi may be subject to an investigation by the Mississippi State Board of Medical Licensure upon the receipt of a written complaint regarding the physician's conduct in the performance of utilization review medical consultation activities. At any time after the receipt of a written complaint, the Board in its sole discretion may refer the complaint to the medical licensure authority of another State where the utilization review consultation physician is licensed, or may refer the entire complaint or any portion thereof to any other appropriate authority, including the Mississippi State Department of Health or the Mississippi Attorney General.

2. In accordance with the provisions of law in Mississippi, when disciplining a physician licensed in Mississippi or holding professionally accountable any physician otherwise lawfully practicing within this State for the performance of utilization review medical consultation activities in an incompetent, unprofessional, negligent, illegal, dishonest, dishonorable, or unethical manner, the actions that the Mississippi State Board of Medical Licensure may take include, but are not limited to, one or more of the following:

a. denying, suspending, restricting, or revoking a Mississippi medical license;
b. administering a public or private reprimand to a Mississippi licensed physician;
c. assessing up to $10,000 of the reasonable investigation costs expended by the Board in investigating a Mississippi licensed physician;
d. moving for an injunction in Chancery Court to prohibit any physician's further performance of utilization review medical consultation activities;
e. petitioning the Chancery Court to cite any noncompliant physician for contempt of court;

f. referring the matter to another medical licensure authority or other authority for action regarding any physician; and
g. taking any other action regarding any physician that the Board may deem proper under the circumstances (e.g., issuing an advisory letter of concern; issuing a notice of warning; issuing a cease and desist notice; adopting a resolution of disapproval of any physician's utilization review medical consultation activities; or reporting the Board's findings and/or actions to any person or organization in order to enforce or comply with the law or protect the public).

H. COMPLIANCE DUTY AND EXEMPTIONS

1. In assuring compliance with these regulations, the duty shall be on the physician, not on any other person or entity, to ensure that his or her utilization review medical consultation activities comply with these regulations. Any physician who claims to be exempt from these regulations shall have the burden of proving to the Board by a preponderance of the evidence that the exemption is valid, which must be done on a case-by-case basis.

2. In accordance with Mississippi Code Annotated (1972) Section 41-83-31(a), the fact that a utilization review consultation physician rendered an adverse determination in a particular case shall not be used as the ground for professional accountability or disciplinary action by the Board. However, since complaints about physicians' utilization review medical consultation activities are likely to involve adverse determinations, the Board out of necessity may be required to investigate the underlying facts and circumstances involved in an adverse determination, or a pattern of adverse determinations, in order to determine whether a physician's utilization review medical consultation activity involves conduct that is subject to professional accountability or disciplinary action by the Board (e.g., an adverse determination rendered on the basis of incompetent, unprofessional, negligent, illegal, dishonest, dishonorable, or unethical conduct). Therefore, this limitation on the Board's authority to discipline a physician based solely on the fact of an adverse determination in a particular case does not preempt the Board's authority to regulate the conduct of physicians who perform utilization review medical consultation activities or to investigate and discipline or otherwise hold accountable a physician regarding the underlying conduct involved in making an adverse determination.

3. Notwithstanding the licensure requirements and compliance policy contained in these regulations, the Mississippi State Board of Medical Licensure, in accordance with Mississippi Code Annotated (1972) Section 41-83-31, acknowledges that any utilization review medical consultation physician who makes an adverse determination for the Comprehensive Health Risk Pool or for a reviewer of 9 or fewer persons who reside in Mississippi shall be exempt from the requirement to hold a medical license in Mississippi.

However, any utilization review medical consultation physician who claims such an exemption is nevertheless engaged in an otherwise lawful practice within this State and therefore must comply with the Professional Standards and the other qualification requirements contained in these regulations.

4. Notwithstanding the compliance policy contained in these regulations, the Board acknowledges an exemption to these regulations in accordance with regulations adopted by the Mississippi State Department of Health, so that these regulations do not apply to physicians who perform in-house utilization review activities (also known as "quality assurance," "performance improvement," or "peer review") for Mississippi hospitals, home health agencies, clinics, private physician offices, or any other health facility. Such in-house activities performed by physicians in Mississippi for quality assurance, performance improvement, or peer review purposes are exempt from these regulations.

I. NOTICE OF REGULATION OF UTILIZATION REVIEW MEDICAL CONSULTATION ACTIVITIES BY PHYSICIANS

1. At the time of an initial licensure application, and at the time of each application for a renewal of a license to practice in Mississippi, all physicians shall acknowledge that they have had an opportunity to read these regulations by accessing the website of the Mississippi State Board of Medical Licensure (at internet address www.msbml.state.ms.us) or by requesting a printed copy of these regulations from the Board.

2. The Mississippi State Board of Medical Licensure shall provide a copy of these regulations, and all subsequent amendments thereto, to the Division of Licensure and Certification at the Mississippi State Department of Health.

3. Before the effective date of these regulations (i.e., November 1, 2006), the Mississippi State Board of Medical Licensure shall provide a copy of these regulations to the Governor of Mississippi, the State Health Officer, the Mississippi Attorney General, the Mississippi Division of Medicaid, the Mississippi State Medical Association, the Mississippi Hospital Association, the Federation of State Medical Boards, and any other appropriate person or organization at the discretion of the Board's Executive Director, with the request that those organizations give notice to their members or other interested parties of the existence of these regulations.

4. For further information regarding the Board's research, opinions, comments, conclusions, and findings of fact related to utilization review medical consultation activities by physicians, see the Appendix to these regulations.

J. EFFECTIVE DATE

These regulations shall become effective on November 1, 2006, and shall be effective prospectively regarding the conduct of physicians beginning on that date.