

Primer on the 80th percentile regulation – 3 AAC 26.110 (a)

Please see below a Background Primer on the state's 80th percentile regulation as well as talking points developed to assist in drafting letters and testimony for the January 6th State of Alaska, Division of Insurance public hearing (see attached for times and locations to provide testimony and comments).

The State of Alaska Division of Insurance is requesting stakeholders to attend the hearings and provide oral and or written comments on the 80th percentile rule and its effect on (1) consumers, (2) balance billing, and (3) healthcare costs.

Letters and written testimony must be received by the Division no later than 8:00 p.m. on January 6.

Please submit your comments directly to:

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Background

In the late 1990's and early 2000's the State was receiving significant complaints from consumers that their insurance companies were not reimbursing at their insurance plan levels, usually 70%/30% or 80%/20%. (For this background paper we will use insurance plans with 70/30 reimbursement rate.)

Division of Insurance Director Lori Wing-Heier recently stated in an article that at that time *"The division was receiving several complaints that a consumer would have their bill paid from the insurance company and then get a bill from the provider (balance billing) and they were very surprised at the amount that they still owed."*

The problem was a lack of transparency in the health insurance market place where insurance companies were self-defining what Usual and Customary (UCR) charges were and then applying the 70% reimbursement rate for services. Although they may have used the same data set they could decide which geographic area they used (how large or small) and which percentile defined UCR, resulting in varying reimbursement rates amongst insurance companies.

Additionally, in 2009 the New York Attorney General's Office contended that the Ingenix database used by insurers intentionally skewed "usual and customary" rates downward through faulty data collection, poor pooling procedures and the lack of audits, and as a result

consumers paid more out-of-pocket costs than they should have. The New York AG's Office said it believed having a health insurer determine the "usual and customary" rate—a large portion of which the insurer then reimburses—can create an incentive for the insurer to manipulate the rate downward. This investigation led to a settlement that created a new database called FAIR Health.

In an attempt to provide more transparency and greater consumer protections in 2004 the Alaska Division of Insurance adopted a regulation that required insurance companies to use the 80th percentile as the UCR. The intent of the regulation is to reduce the balance billing that a consumer receives from an out-of-network healthcare provider by requiring healthcare insurers to pay claims for services and supplies based on an amount that is equal to or greater than the 80th percentile of charges in a geographical area. Balance billing occurs when out-of-network providers bill patients for the difference between what they charge and the amount the consumer's insurer pays under their insurance policy.

The 80th percentile works like this: if a provider charges a fee for a procedure that is higher than what 80% of the providers charge in that region (according to the insurer's usual and customary fee schedule), the insurance plan will exclude coverage for the amount over the 80th percentile. The full amount above the 80th percentile will be a patient's responsibility as balance billing. If your provider charges a fee that is at or below what 80% of the providers in the region charge for that procedure (according to the company's usual and customary fee schedule), your claim will not be reduced and the patient will only be responsible for the insurance plan co-pay.

Recently much attention has been given to the high costs of certain procedures in Alaska compared to the United States and particularly the Pacific Northwest (most of these have been related to specialties, specifically orthopedic and cardiology procedures). Premera and others are arguing that for some specialties there is no real limit to what must be reimbursed because practices have enough market share to establish the 80th percentile. In other words, if a physician group has 21% of the market share for a procedure mathematically their charge can become the 80th percentile, therefore instead of a limit of 80th percentile there is no limit and all charges are reimbursed at the full amount. Insurance companies argue that without any downward price pressure Alaska charges have increased beyond a market rate.

Their math is not incorrect. Whether the 80th percentile is the perfect number is a legitimate debate, although 80th percentile is the norm in the industry within the U.S. and generally recognized as preserving a market rate.

A [2011 report](#) by the actuarial firm Milliman pointed to the 80th percentile rule as a factor driving up healthcare costs in the state. The report stated that Alaska is the only state in the country with this type of regulation. Although often repeated this statement is not now accurate as Alaska has been recently joined by at least New York and Connecticut which have added 80th percentile provisions. Further, that report is now based on data that is over 5 years old. In that time, many new physicians have come to Alaska and increased, not decreased, competition and patient choice. Additionally, the pool of providers who are not currently contracted with payors continues to shrink month by month.

The rule has also been criticized by the Alaska Health Care Commission, claiming that it drives up the cost of healthcare. The Commission found that the regulation “*exacerbated*” relative healthcare provider leverage in pricing stating “*since many providers have over 20% of their market share, this implies that those providers can ensure that their charges are below the 80th percentile and therefore, receive payment for their full billed charges.*” [AK Health Care Commission](#). However, the Alaska Division of Insurance does not have any data that indicates a single practice has more than 20% of a market share or that any specific practice which does has used that leverage unfairly.

Additionally, Premera and others are using examples from a second 2011 Milliman http://dhss.alaska.gov/ahcc/Documents/drivers_healthcare_costs.pdf report to show the disparity in Alaska cost. One example often cited shows insurers paid an average of \$153 in Washington state for a cardiac stress test compared to \$589 in Alaska, almost four times as much.

Director Lori Wing-Heier was asked in a recent article if she was willing to get rid of the regulation and she stated: “*... we’ve got to be assured that it’s the right thing to do for consumers, that the bills are going to be paid and that it’s not going to impact rates in a negative way.*”

The regulation as it is today applies to only approximately 50% of Alaska’s insured as it does not apply to self-insured and ERISA plans, however, appropriately the State of Alaska recognizes the regulation for its covered members.

If the 80th percentile regulation is repealed or amended to a lower percentile consumers will necessarily pay more out-of-pocket through balanced billing i.e. more than their 30% co-pay for care. This will result in cost-shifting from insurers to insured – or higher healthcare costs to Alaskan consumers which is the very basis for the recent calls to re-examine the regulation. It will most certainly result in constituents calling legislators and the State to complain about even higher out-of-pocket costs. Additionally, removing the 80th percentile regulation will provide insurance companies with even greater leverage in negotiations with healthcare providers. This latter point is of particular concern as while the provider base in Alaska has grown since the aged 2011 Milliman report, Alaska’s insurance market has shrunk considerably, giving a near monopoly to 1-2 private insurers left in the state.

The Division of Insurance is primarily concerned with protecting consumers and not inclined to repeal the regulation at this time. However, there is considerable pressure from insurance companies and the public over rising costs of healthcare in Alaska. As a result, the Division has been asked to hold a formal “listening session” to gather information on the 80th percentile regulation.

Talking Points for Testimony // Letters

Rule’s Effect on Consumers

- State your opposition to any proposed change that amends or removes the regulatory requirement that “Usual and Customary” charges be based on the 80th percentile of market pricing.
- Indicate your support for the State maintaining the requirement that the basis for determining UCR is the 80th percentile.
 - The 80th percentile is the industry practice within the United States.
 - Most insurers who are not required to follow this regulation, ERISA and self-insured including the State of Alaska, choose to utilize the 80th percentile for purposes of claims payment basis. They do this as it is the right thing to do and it protects their insured.
 - In 2004 Premera testified that this aspect of the regulation, the 80th percentile, was intended *“to provide a standard for the claims payment basis that is unlikely to result in significant changes for major carriers doing business in Alaska.”*
 - Allowing individual insurance carriers to establish different standards for claims payment will make it virtually impossible for a consumer to know what they are purchasing.
- The Regulation is working as intended providing transparency and greater consumer protections for Alaskans.
- In the end this isn’t about physicians or insurance companies. It’s about patients. And patients should be able to rely on their insurance to pay market rates. If a consumer purchases an insurance plan with a 70% reimbursement they should have protections that that is what they will receive.
- The “usual and customary” rate used to determine out-of-network payment should reflect the market value for the services and it should be audited regularly to assure that insurance companies do not control the data which is used for its determination.
- The current regulation provides a transparent objective and reliable method of establishing “usual and customary” charges that protects consumers while maintaining the availability of healthcare services in Alaska.

Rule’s Effect on Healthcare Costs

- The regulation was put into place because consumers were suffering from insurance companies’ policies and practices to reduce reimbursements. We know this is the intent of the insurance companies and we know this will have significant negative impacts on patients. <http://www.nytimes.com/2012/04/24/nyregion/health-insurers-switch-baseline-for-out-of-network-charges.html>
- Alaska has unique issues that drive high cost. One major challenge is the recruitment and retention of quality providers as it’s very difficult and costly in Alaska.(Even the President of Premera Alaska won’t move to Alaska and lives in the lower 48)
- Most of the complaints with the 80th percentile regulation focus on specialties with the accusation that in some markets specialists control more than 20% of the market and thus can set whatever rate they wish. While we recognize that if a single market participant has more than 20% of the market they could set rates we have yet to see any data that demonstrates this is actually the case.
- Additionally, Alaska has very strong anti-trust and consumer protection laws that can protect Alaskans without removing the 80th percentile protections afforded patients.

- This is about insurance companies wanting to increase their bargaining leverage and force physicians into their networks.
 - Jim Grazko President of Premera Alaska in asking to remove the 80th percentile said, *“there’s not any real reason for some of these providers to come to the table and want to negotiate if they’re going to be paid close to billed charges anyway. So I think it would provide an immediate fairly high-impact incentive for providers to want to contract with payers.”*
 - The State should not allow consumers to be used as leverage in private party negotiations. Nor should the state act to regulate private insurance without a full and complete study of potential impacts to TRICARE, Medicare, and Medicaid beneficiaries’ access.
- As Moda has recently left the Alaska individual insurance market Premera enjoys a monopoly on the market. If anything this monopoly should drive greater regulation to ensure consumers are protected.

Rule’s Effect on Balance Billing

- Alaska healthcare, like the lower 48, is built on the premise of cost shifting. Medicare, Medicaid, TRICARE and VA pay well below market rates with physicians increasing charges on private payors to subsidize government care.
 - Insurance companies are not required to be concerned about these patients – only their own insured. However, physicians do care and work to find ways to provide government healthcare recipients access to appropriate care.
 - Reducing insurance reimbursements will reduce the number of physicians that are able to accept Medicare, Medicaid, TRICARE and VA patients.
- Allowing Insurance companies to reduce the basis for reimbursements for out-of-network care below the 80th percentile will not lower healthcare cost. While complicated, healthcare care costs are based on cost of providing the care, which includes high cost of recruitment and retention of physicians and their employees, high cost of living, and subsidizing government healthcare care programs. Prior to 2004 and the adoption of 3 AAC 26.110(a) Alaska experienced healthcare care cost increases. The 80th percentile regulation is not the driver of cost increases.
- If this regulation is changed we will see the same behavior that lead to its adoption – patients shouldering a larger percentage of healthcare care costs and patients not receiving the full value of the insurance product they believe they are purchasing.
- In many areas of the State insurance networks are simply inadequate to provide timely access to network healthcare care services. Forcing patients to shoulder higher costs to seek timely out-of-network care when networks are inadequate is unfair to the consumer.

Healthcare in Alaska

- Patient access to quality healthcare has vastly improved and expanded in Alaska allowing consumers to get needed specialty and sub-specialty care here at home rather than being forced to travel out of state.
- TRICARE, AK VA, Alaska Native Tribal Health Consortium, Medicare and Medicaid beneficiaries all have reaped tremendous benefits from the 80th percentile regulation. Prior to the positive

impacts of this regulation, government entities (as aforementioned) found it difficult to obtain timely access to specialty care often requiring their beneficiaries to travel outside the state of Alaska resulting in a significant cost associated with travel, per diem, lodging etc to the government entity administrating the benefit. Various models were used in the past (particularly by TRICARE and AK VA) to determine network adequacy i.e. the number of physicians in various specialties required by a population of people. One such model, referenced to as the Graduate Medical Education Advisory Committee, illustrated grave deficiencies across-the-board. Today, due to the positive impact of the 80th percentile regulation, those deficiencies have for the most part been fully resolved eliminating a significant cost to the government entities (tax payer), enhancing the quality of life for the beneficiary and arguably providing better quality of care. When patients are treated in their own communities, they are better served! Keep care local should be a message embraced by all stakeholders. Over the last decade, providers have made enormous investments in healthcare infrastructure across the state.

- It is expensive and very difficult to recruit and retain quality professionals to move to Alaska in any profession. It is even more challenging in healthcare, particularly among specialists, whose training programs often span 15 years and whose families are well rooted in their urban training centers by the time they are able to practice.
- Alaska was historically a challenging place for Seniors and our most vulnerable patients to access network care. Yet that has largely improved in recent years. The 80th percentile rule allows more providers to provide care to these patients.
- If this rule were to be eliminated it would greatly impact the ability of providers to continue to care for these patients because government reimbursement rates are so inadequate .
- All considered, we are extremely fortunate to have such a robust network of primary care and specialty physicians in Alaska. It was not always so. There is little that one has to travel out of state for today, and that improves the quality of life for all Alaskans.

Finally... the Affordable Care Act

The data from the 2011 Milliman report, while dated, did show large disparities in cost between selected procedures in Alaska compared to the Pacific Northwest. However, the majority of consumer complaints from the last five years are the result of the increased cost of insurance due to Affordable Care Act mandates and not increases in physician billing. The vast majority of the complaints over cost increases come from those with commercial insurance coverage who have seen their annual deductibles over the last six years jump from \$500 to \$10,000 or even \$15,000 with corresponding double digit annual percentage increases in their premiums. The primary cause of those exponential increases is the Affordable Care Act as Insurance companies struggle to offer broad ACA compliant plans to those who have pre-existing illnesses, expanded benefits, etc. Those costs are unsustainable but are not due to a sudden change or increase in physician's rates in Alaska.

Due to recent national political events, it is highly likely that in 2017 the Affordable Care Act will be either repealed or materially altered. It would seem irresponsible to significantly alter or repeal the Alaska consumer protections offered by the 80th percentile rule before the state knows what the new healthcare marketplace will look like and how that will affect the cost of health insurance for Alaskans.