



ISSUE BRIEF

I. Introduction

The state of Michigan will receive over \$1.5 billion over the next eighteen years from opioid litigation settlements. This money, much of which has been deposited in the Michigan Opioid Healing and Recovery Fund,¹ is already beginning to flow into state, county, city and township accounts, but without significant improvements in Michigan’s transparency and accountability practices, the state could squander its best opportunity to remedy and reduce the harms of the opioid epidemic.

This memo briefly explains a regulatory approach pursued by the Opioid Policy Institute and Center for Popular Democracy to increase transparency in Opioid Healing and Recovery Fund spending. This memo is divided in two parts: (1) discussing how Michigan state agencies can promulgate rules as gap fillers for vague statutes and (2) describing the responsibilities of the Department of Treasury and its ability to promulgate regulations related to the settlement

II. Michigan State Agencies Can Promulgate Rules Based on Statutes

Michigan has an Administrative Procedure Act (“MAPA”) which provides state agencies the ability to create guidelines, promulgate rules, conduct adjudications, and to allow for public input.² The purpose of the MAPA is to enable state agencies the ability to provide gap fillers in “broad (and often vague or even contradictory) policy directives from the legislature.”³ The MAPA applies broadly to most state agencies as the MAPA defines agency as “a state department, bureau, division, section, board, commission, trustee,

¹ MCL § 12.253.

² Administrative Procedures Act of 1969 (MAPA).

³ William C. Fulkerson & Dennis J. Donohue, *A Practical Introduction to Administrative Law in Michigan*, THE MICH. BAR (2002), <https://www.michbar.org/file/barjournal/article/documents/pdf4article378.pdf>.

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authority or officer, created by the constitution, statute, or agency action.”⁴ Furthermore, the statute also defines rules broadly as an “agency regulation, statement, standard policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency.”⁵ Rules have the same force and effect as laws.⁶

Rulemaking can be initiated by either the agency itself or by the filing of a request by an individual.⁷ If the agency does decide to pursue rulemaking, it must file with the Office of Regulatory Reinvention (ORR) and receive ORR’s approval.⁸ Once approved, the agency may move forward drafting the rule. During this process, the agency must give notice of a public hearing and provide the public the ability to present data, views, questions, and arguments.⁹ The agency is expected to file an agency report that contains the comments from public input.¹⁰ The final rule must be approved by the Legislative Service Bureau, the ORR, and the Joint Committee on Administrative Rules.¹¹ The Committee consists of 5 members of the Senate and 5 members of the House of Representatives. The Committee may object to the proposed rule by filing a notice of objective that is supported by a concurrent majority of Committee members. The Committee may only object

⁴ MCL § 24.203(2).

⁵ MCL § 24.207.

⁶ Fulkerson & Donohue, *supra* note 2.

⁷ MCL §§ 24.238, 24.239.

⁸ MCL § 24.239.

⁹ MCL § 24.241.

¹⁰ MCL § 24.245(2).

¹¹ MCL §§ 24.245, 24.245(a).



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in limited conditions¹² and if it does not file an objection, ORR may file the rule and that rule would immediately take effect.¹³

III. The Department of Treasury Can Audit Opioid Settlement Fund Spending

The legislation creating the Michigan Opioid Healing and Recovery Fund names the Department of Treasury as “the administrator” of the fund “for audits of the fund.”¹⁴ Currently, the law enabling auditing is vague, but the Department of Treasury expressly has the power to pass rules which would create enforceable requirements on governments receiving opioid settlement money. In addition to these reporting requirements, the Treasury could also require these disclosures to be shared to provide a publicly accessible database. Creating such rules could be a powerful tool for collecting information and data about spending. The public could use this information to evaluate spending, make recommendations, and bring much needed transparency to settlement fund spending.

The Department of Treasury has the statutory authority to create rules defining what an “audit” means within the fund and it would be required to gather data, views, questions, and arguments in the process of developing an audit rule. The agency has previously promulgated several rules in other areas of law that granting audit authority to the agency.¹⁵ The agency has also previously provided an in-depth definition of what an audit entails in the

¹² If one or more of the following conditions exists the Committee may object: the agency lacks statutory authority for the rule; the agency is exceeding the scope of its rule-making authority; a public health, safety, or welfare emergency warrants disapproval of the rule; the rule conflicts with state law; circumstances have changed substantially since enactment of the law on which the rule is based; the rule is arbitrary or capricious; and the rule is unduly burdensome to the public or to a licensee licensed by the rule. MCL 24.245(a)(2).

¹³ MCL § 24.245(a)(3).

¹⁴ MCL § 12.253(5).

¹⁵ See Michigan Register: <https://ars.apps.lara.state.mi.us/AdminCode/AdminCode>.

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tax context.¹⁶ Therefore, the Department of Treasury has the ability and knowledge to pass a rule to audit settlement fund spending.

A rule promulgated by the Department of Treasury could focus on creating transparency in the use of the funds at both the state and local levels. At the county level, the Treasury could develop reporting tools in collaboration with the Michigan Association of Counties (MAC), using their voluntary annual report template as a starting point.¹⁷ The MAC could also be an instrumental partner in insuring that the audit process is comprehensive enough to meet the needs of the Treasury and the State of Michigan’s Opioid Advisory Committee (OAC) while not being overly burdensome for county leadership.¹⁸ The audit process could also provide transparency in county-level decision-making processes for spending, which would be vital for communities to be able to hold their elected leaders accountable.

The Department of Treasury should also have the authority to audit settlement fund spending by the Michigan Department of Health and Human Services (“MDHHS”) at the state-level. In developing an audit process for state-level opioid settlement fund spending, the Treasury could create an actual framework for understanding how state and local spending interact which would allow the MDHHS to spend settlement funds more strategically in coordination with county, city, and township harm reduction programs. With access to state-level spending data, the OAC would be better able to develop an “evidence-based assessment of the prior use of money appropriated from

¹⁶ See Audit Standards for Field Audits Rule by the Department of Treasury: https://ars.apps.lara.state.mi.us/AdminCode/DownloadAdminCodeFile?FileName=1405_2014-076TY_AdminCode.pdf&ReturnHTML=True.

¹⁷ Michigan County Opioid Settlement Funds Annual Report Templates, MICH. ASS’N OF COUNTIES, https://micounties.org/wp-content/uploads/Opioid-Settlements_County-Annual-Report-Template_2023.pdf.

¹⁸ *Id.*



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the Michigan opioid healing and recovery fund, including the extent to which such expenditures abated the opioid crisis in this state.”¹⁹

IV. Conclusion

A regulatory approach could effectively create transparency and accountability in Michigan Opioid Healing and Recovery Fund spending and give the OAC the information it needs to fulfill its statutory duties. The law creating the Fund explicitly grants the Department of Treasury audit authority, and a collaborative rulemaking process could greatly improve the efficiency and efficacy of settlement fund spending to the benefit of everyone in Michigan.

¹⁹ MCL § 4.1851(13)(c)(iii).