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**DIVISION OF INSURANCE**

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**BULLETIN 2014-XX**

**Guidelines on Submitting Filing Materials Relative to the  
Certification of Risk-Bearing Provider Organizations  
Under Chapter 176T of the General Laws and 211 CMR 155.00**

Date: June XX, 2014

The Division of Insurance (“Division”) issues the guidelines identified in this Bulletin to promote the most seamless transition to its regulation of Risk-Bearing Provider Organizations (“RBPO”). The Division is responsible to implement the requirements of Massachusetts General Laws Chapter (“Chapter”) 176T and the Division’s regulation 211 CMR 155.00 *et seq.* “Risk-Bearing Provider Organizations” (the “Regulation” or “211 CMR 155.00”) in a manner that will promote the development of Alternate Payment Contracts with Downside Risk while establishing appropriate safeguards for Massachusetts’ health care delivery system and the patients it serves.

**A. Background on RBPO Regulation**

The Massachusetts health care payment reform law, Chapter 224 of the Acts of 2012, became effective on November 4, 2012. Chapter 224, in part, created the new Chapter 176T, under which the Division must annually certify provider organizations that take on certain financial risk through alternative payment contracts with Carriers. The purpose of certification is to require provider organizations entering into these kinds of contracts to demonstrate on an annual basis that they do not assume excessive financial risk that could threaten their financial solvency.

On November 20, 2012, the Division issued Bulletin 2012-08, in which it noted that it considered the period from November 4, 2012 through December 31, 2013 to be a transition period (“Transition Period”) with respect to the issuance of Risk Certificates or Risk Certificate Waivers. During the Transition Period, the Division indicated that provider organizations and Carriers could enter into and continue to participate in Alternative Payment Contracts with Downside Risk if the provider organization applied for and received a Transition Period Waiver from the Division. On January 17, 2014, the Division issued Bulletin 2014-01, in which it extended the Transition Period up through June 30, 2014.

In this Bulletin, the Division now notes that the Transition Period described above has been extended in the Regulation up through January 15, 2015. In addition, during the Transition Period, any RPBO that previously received a Transition Period Waiver from the Division, as well as any

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RBPO that has entered into Alternative Payment Contracts with Downside Risk but did *not* apply for and receive a Transition Period Waiver, may continue to participate in Alternative Payment Contracts with Downside Risk in 2014 if the RBPOs apply for Risk Certificates or Risk Certificate Waivers as set forth in the Regulation.

## **B. Regulation 211 CMR 155.00, Risk-Bearing Provider Organizations**

The Regulation is intended to implement the provisions of Chapter 176T. In this regard, the Regulation is designed to increase the oversight of RBPOs and to require their “Risk Certification” by the Division.

Chapter 176T and the Regulation requires that any provider organization that both manages the treatment of a group of patients, *and* bears the “Downside Risk” that the cost of treating those patients according to the terms of an Alternative Payment Contract might exceed the contracted budgeted payment arrangement, obtain a “Risk Certificate” from the Division that demonstrates that the Risk-Bearing Provider Organization has satisfied the certification requirements of Chapter 176T, including demonstrating that the provider’s Alternative Payment Contracts are not expected to threaten its financial solvency.

Under Chapter 176T and the Regulation, in its application for a “Risk Certificate,” the Risk-Bearing Provider Organization must submit, along with an application fee, certain financial information and statements, including a list of all carriers and public health payers with which the provider organization has entered or intends to enter into Alternative Payment Contracts with Downside Risk, as well as an “actuarial certification” that shows that its Alternate Payment Contracts with Downside Risk are *not* expected to threaten the financial solvency of the Risk-Bearing Provider Organization.

As an alternative to seeking a Risk Certificate, under the Regulation, a Risk-Bearing Provider Organization may seek to obtain a Risk Certificate Waiver, which is a waiver from the requirement to obtain a Risk Certificate; provided, however, that the Risk-Bearing Provider Organization submits sufficient information to the Division to demonstrate that the provider organization’s Alternative Payment Contracts with carriers do *not* contain any significant Downside Risk.

Under Chapter 176T and the Regulation, it is within the discretion of the Commissioner of Insurance (“Commissioner”) as to whether to grant or deny a request for a Risk Certificate Waiver. There is no administrative appeal from the Commissioner’s denial of the Risk Certificate Waiver application. If an entity is denied a Risk Certificate Waiver by the Commissioner, the entity must then apply for a Risk Certificate if it wishes to enter into Alternative Payment Contracts with carriers that contain Downside Risk.

Under Chapter 176T and 211 CMR 155.00, the Division must make an examination of the finances of each “risk-certified” Risk-Bearing Provider Organization every three years, with the focus of the examination being to ensure that the RBPO has the financial ability to meet its risk-bearing responsibilities under any alternative payment contracts. If the Commissioner determines

that the RBPO's existing or proposed Alternative Payment Contracts with Downside Risk are likely to threaten the financial solvency of the Risk-Bearing Provider Organization, then the Commissioner can, after calling a hearing, suspend or cancel a RBPO's Risk Certificate.

### **C. Additional Guidance to Risk-Bearing Provider Organizations**

Downside Risk is defined in 211 CMR 155.00 as the "risk taken on by a Provider Organization as part of an Alternate Payment Contract with a Health Care Payer, Employer or Individual in which the provider organization is responsible for either the full or partial costs of treating a group or patients that may exceed the contracted budgeted payment arrangements." The Division does not consider service-based payments, including but not limited to, diagnostic-related group payments, "per diems" or bundled payments to constitute Downside Risk under Chapter 176T.

Chapter 176T and 211 CMR 155.06(1) both require that an RBPO file an application for a Risk Certificate. In 211 CMR 155.06(2), the "application shall be certified by at least two officers of the RBPO, including a senior executive officer or partner, and either the treasurer or an assistant treasurer."

The Risk Certificate application is to include those items identified in 211 CMR 155.06(2). The following provides further guidance regarding some of the required materials.

- 211 CMR 155.06(2)(a): If an RBPO believes that the most recent materials submitted to the Health Policy Commission are already on file with the Division, it should note the date on which these materials were put on file with the Division.
- 211 CMR 155.06(2)(b): Unless otherwise requested by the Division, the list of Health Care Payers and Employers to be submitted to the Division should include the legal name and address of the entity, and may be limited to only those Health Care Payers and Employers with which the Provider Organization has entered into Alternative Payment Contracts with Downside Risk.
- 211 CMR 155.06(2)(c): Unless otherwise requested by the Division, the referenced arrangement to manage the treatment of a group of patients may be limited to only those arrangements where the Provider Organization has entered into Alternative Payment Contracts with Downside Risk.
- 211 CMR 155.06(2)(d): If an RBPO has audited financial statements, then those statements should be submitted to the Division; if an RBPO does *not* have audited financial statements, then other financial statements and/or documents should be submitted to the Division that show the applicant RBPO's assets, liabilities, reserves and sources of working capital and other sources of financial support and projections of the results of operations for the succeeding 3 years.
- 211 CMR 155.06(2)(e): An RPBO should identify the months during which it expects to receive income from Alternative Payment Methods and the months during which the

RBPO is liable for the associated medical claims. An RBPO should also state that it already has established and will maintain sufficient financial resources; in the alternative, the RBPO should specify the date on which it will establish and maintain sufficient financial resources for the Downside Risk in its Alternate Payment Contracts. In addition, an RBPO should identify the names of the insurance companies with whom the RBPO has coverage in effect at the time of the application, the periods during which the coverage is effective, and a summary description of the nature and scope of such coverage. The RBPO should also describe any other agreements which protect it from potential losses from Downside Risk.

- 211 CMR 155.06(2)(g): The Division is developing additional guidance to assist actuaries regarding the materials to review in order to complete their actuarial certification as required under the provisions of Chapter 176T and the Regulation.
- 211 CMR 155.06(2)(h): RBPOs should *not* submit the full text of Alternate Payment Contracts to the Division unless requested to do so. The application should include the exact contract language that is consistent with what is required under this section.
- 211 CMR 155.06(2)(i): RBPOs should describe, in as much detail as possible, the types of Health Care Services for which the RBPO is taking on Downside Risk, whether any of the costs of health care services are outside the control of the RBPO and the proportion of the Alternate Payment Contract's claim costs for which the RBPO is responsible.

#### **D. Guidance Regarding Applications for Risk Certificate Waivers**

Under Chapter 176T and 211 CMR 155.05(4), an RBPO may apply for a Risk Certificate Waiver if it wishes to demonstrate that its Alternative Payment Contracts do not contain "significant" Downside Risk. The application is to be certified by an officer of the RBPO and include those items identified in the Regulation.

The following provides further guidance regarding some of the required materials.

- 211 CMR 155.05(4)(c): Unless otherwise requested by the Division, the list of Health Care Payers and Employers to be submitted to the Division should include the legal name and address of the entity, and may be limited to only those Health Care Payers and Employers with which the Provider Organization has entered into Alternative Payment Contracts with Downside Risk.
- 211 CMR 155.05 (4)(d): Unless otherwise requested by the Division, the referenced arrangement to manage the treatment of a group of patients may be limited to only those arrangements where the Provider Organization has entered into Alternative Payment Contracts with Downside Risk.

In addition to the materials required under 211 CMR 155.04, according to 211 CMR 155.05(5), each RBPO that applies for a Risk Certificate Waiver must submit sufficient information to the Division to demonstrate that its existing or proposed arrangements to manage the treatment of

a group of patients according to the terms of one or more Alternative Payment Contracts “do not contain significant Downside Risk.” Under this provision, the materials submitted to the Division by the waiver applicant should “project the proportion of organizational revenue that is subject to Downside Risk during the applicable period, the steps that the RBPO has taken to prepare for the Downside Risk, and the reasons that the RBPO believes that the contractual Downside Risk should not be considered significant.”

For *all* Risk Certificate Waiver applications, the application is to include the following information:

- the proportion of its net patient services revenue (“NPSR”) that is subject to Downside Risk, where NPSR is defined the total dollar amount of a Provider Organization’s charges for services rendered in a Fiscal Year, less any contractual adjustments;
- the steps that the RBPO had taken to prepare for Downside Risk; and
- the reasons, including quantitative justification, which the RBPO believes that the contractual Downside Risk should not be considered to be “significant.”

Where an RBPO has *only* a small proportion of its business made up health services provided under Alternate Payment Contracts, *and* only a small percentage of the payments that it receives under those Alternate Payment Contracts contain Downside Risk, it is likely under most circumstances that the RBPO’s Downside Risk will not be determined by the Commissioner to be “significant.”

In addition, during the remainder of 2014 only, and subject to the provisions of 211 CMR 155.05 and Chapter 176T, when reviewing an initial Risk Certificate Waiver application submitted under the Regulation by an RPBO with NPSR in the 2013 fiscal year of *less than* \$15,000,000, the Division intends to issue to such an RBPO, a Risk Certificate Waiver that will be effective January 15, 2015 through January 15, 2016. The burden for demonstrating that an RBPO has less than \$15,000,000 in NPSR in fiscal year 2013 is on the RBPO seeking the Risk Certificate Waiver.

#### **E. Guidance on Filing Report to the Division Concerning a “Material Change”**

Under Chapter 176T, as well as under both 211 CMR 155.05(7) and 211 CMR 155.06(5), a RBPO that has been issued either a Risk Certificate Waiver or a Risk Certificate, respectively, is required to report to the Division any “material change” to the information that was contained in the RBPO’s original or renewal application materials.

This “material change” would include, but is not limited to, the addition of new Alternative Payment Contracts, amendments to Downside Risk provisions in existing Alternative Payment Contracts, changes to the number or types of patients that are covered under existing Alternative Payment Contracts or changes to the organizational structure of any Provider. A report concerning any such “material change” must be submitted to the Division within 30 days of such change, and the report must be certified by an officer of the RBPO.

Under this requirement, the Division believes that a “material change” will *not* likely have taken place that would require the RBPO to make a report to the Division, where the change at issue does not impact the assessment of the degree of risk exposure relative to the provider’s financial position.

**F. Filing Materials with the Division**

In order to facilitate the review of materials submitted to the Division as part of applications for Risk Certificates or Risk Certificate Waivers, such applications and materials should be sent to the Division via electronic mail at DOI.RBPO@state.ma.us. Any required filing fees should be sent by mail, by courier or by hand to the Division, referencing “RBPO Application Filing Fee.”

Any questions regarding this Bulletin should be directed to: Robert A. Whitney, Deputy Commissioner and General Counsel, (617) 521-7308, robert.a.whitney@state.ma.us; or Kevin P. Beagan, Deputy Commissioner of the Health Care Access Bureau, (617) 521-7323, kevin.beagan@state.ma.us.