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BULLETIN 2014-05

To: Commercial Health Insurers, Blue Cross and Blue Shield of Massachusetts, Inc. and Health Maintenance Organizations (collectively, "Carriers"); and Provider Organizations that have Entered into or Intend to Enter into Alternative Payment Contracts with Downside Risk

From: Joseph G. Murphy, Commissioner of Insurance

Date: August 15, 2014

Re: 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

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.* (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. The Division anticipates that the Regulation will be formally promulgated shortly by the Secretary of the Commonwealth. For reference, the provisions of the Regulation are set forth on the Division's website.

A. Background on the RBPO Regulation and Current Application Deadlines for 2014

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 will be extended up through **March 1, 2015**. In addition, during the Transition Period, any RPBO that previously received a Transition Period Waiver from the Division, as well as any 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 RBPO now applies for a Risk Certificate or Risk Certificate Waiver as set forth in the Regulation and this Bulletin.

Therefore, during the Transition Period, an RBPO that has previously been granted a Transition Period Waiver or an RBPO that has been managing the treatment of a group of patients according to the terms of an Alternative Payment Contract but has not applied for a Transition Period Waiver, and wants to continue doing so, must apply for an initial Risk Certificate Waiver if the RBPO does not have significant downside risk, but *must* do so by no later than **September 30, 2014**. Beginning in 2015, and thereafter, all applications for risk certificates waivers are due by August 15, unless otherwise specified. The application requirements are set forth in Chapter 176T and the Regulation. The initial Risk Certificate Waivers will be issued by the Division in a timely fashion, to allow sufficient time for RBPOs to prepare and submit the required information for the Risk Certificate if necessary, and will have a term of March 1, 2015, through March 1, 2016, and will be subject to annual renewal. Thereafter, the term of all risk certificate waivers will be from March 1 through March 1 of the following year.

Each RBPO that has significant downside risk and has *not* been granted a Risk Certificate Waiver shall be required to file an application for an annual Risk Certificate. During the Transition Period, an RBPO that has previously been granted a Transition Period Waiver or an RBPO that has been managing the treatment of a group of patients according to the terms of an Alternative Payment Contract but has not applied for a Transition Period Waiver, may apply for an initial Risk Certificate, but *must* do so by no later than **December 15, 2014**. The application requirements are set forth in Chapter 176T and the Regulation. The initial Risk Certificates will be issued by the Division in a timely fashion and will have a term of March 1, 2015, through March 1, 2016 and will be subject to annual renewal. Beginning in 2015 and thereafter, all applications for risk certificates will be due by November 15, unless otherwise specified. Thereafter, the term of all risk certificates will be from March 1 through March 1 of the following year.

B. Regulation Requirements

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 “Downside Risk” for those patients according to the terms of an Alternative Payment Contract obtain a “Risk Certificate” from the Division that

demonstrates that the RBPO 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 RBPO 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 RBPO.

In advance of seeking a Risk Certificate, a RBPO may seek a Risk Certificate Waiver, which is a waiver from the requirement to obtain a Risk Certificate; provided, however, that the RBPO 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 accordingly to the schedule specified above and as set forth in the Regulation 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" RBPO 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 RBPO, then the Commissioner can, after calling a hearing, suspend or cancel a RBPO's Risk Certificate.

The Division will be available to work with and assist individual RBPOs with respect to the Risk Certificate and Risk Certificate Waiver application processes, and the Division will endeavor to provide timely responses to requests for additional information and guidance from RBPOs and any requests for additional time within which RBPOs must otherwise respond to statutory and regulatory deadlines. The Division will also work with the Health Policy Commission ("HPC") to coordinate timelines and processes with the HPC's Registration of Provider Organizations ("RPO") Program, and further, will work with the HPC to coordinate efforts for involvement in HPC's upcoming and possible future training sessions.

C. Additional Guidance to RBPOs

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, or “per diems” to constitute Downside Risk under Chapter 176T.

Under the Regulation, the definition of “Health Care Payer” includes “Public Health Care Payer.” While the definition of Public Health Care Payer includes the Medicaid program established in Chapter 118E, and any Carrier or other entity that contracts with the office of Medicaid or the Commonwealth Health Insurance Connector Authority to pay for or arrange the purchase of health care services on behalf of individuals enrolled in certain health coverage programs, it does *not* include contracts with Medicare plans. An RBPO that bears Downside Risk *solely* as part of an Alternate Payment Contract for a Medicare plan is not subject to the Regulation. However, an RBPO that *is* subject to the Regulation because it manages the treatment of a group of patients and bears Downside Risk according to the terms of an Alternative Payment Contract with a Health Care Payer, must report on *all* contracts for which it bears Downside Risk, including risk arrangements with Medicare when applying for Risk Certificates or Risk Certificate Waivers under the Regulation.

Under the Regulation, the definition of “Health Care Services” would include any behavioral health services. In addition, the definition of “Provider or Health Care Provider” under the Regulation would include a provider of Health Care Services or any other person or organization that furnishes, bills or is paid for Health Care Services delivery in the normal course of business.

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 has already submitted or is concurrently submitting materials to the Health Policy Commission pursuant to Chapter 6D, Section 11 as a Registered Provider Organization, it should note the date of submission to the Health Policy Commission.
- 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 either entered into or has agreed to terms for Alternative Payment Contracts with Downside Risk.¹
- 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

¹ A Provider Organization that is actively negotiating terms for an Alternative Payment Contract that would make such Provider Organization subject to the Regulation needs to submit an application for either a Risk Certificate or a Risk Certificate Waiver only when the terms for such a contract have been specified and the only barrier to execution is receipt of a Risk Certificate or Risk Certificate Waiver from the Division.

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 RBPO 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.
- 211 CMR 155.06(2)(j): The Division will be working with the Health Policy Commission to provide guidance relative to internal appeals processes specified in Chapter 176O, § 24.

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 either entered into or has agreed to terms for entrance 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 expected 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.” An RBPO that has multiple Alternative Payment Contracts with any Downside Risk, or a single Alternative Payment Contract with substantial Downside Risk will likely under most circumstances be considered by the Commissioner to have significant Downside Risk, and will not be eligible for a Risk Certificate Waiver. The Division will not consider steps that an RBPO has taken to mitigate its risk (e.g., stop loss insurance) in its analysis of whether the RBPO’s Downside Risk is considered to be “significant.”

In 2014, in order to accommodate those RBPOs that currently have Transition Period Waivers and may need additional time to prepare their applications for initial Risk Certificate Waivers, the Division will be accepting such applications up through September 30, 2014. In addition, 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 that had NPSR from carriers and third party administrators 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 March 1, 2015 through March 1, 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. The granting of automatic risk certificate waivers to certain RBPOs as noted in this paragraph is a temporary provision and is limited to just the waivers issued for the term March 1, 2015 through March 1, 2016.

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), an 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, significant changes to the number or types of patients that are covered under existing Alternative Payment Contracts or substantial 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.