

Proposed Massachusetts Regulations Governing Risk-Bearing Provider Organizations

On November 7, 2013, the Massachusetts Division of Insurance (“DOI”) published a [Notice of Hearing](#) and [proposed regulations](#) regarding the certification of Risk-Bearing Provider Organizations (“RBPOs”). These regulations are being issued under Chapter 176T of the Massachusetts General Laws. Chapter 176T, added by the 2012 health reform law, requires certain provider organizations that enter into contracts involving downside risk to obtain a risk certificate or risk certificate waiver from DOI.

Under the statute, an RBPO is any provider organization that manages the treatment of a group of patients and bears the downside risk according to the terms of an alternative payment contract—namely, a payor contract utilizing payment methods other than fee-for-service reimbursement. Downside risk refers to the risk that, under an alternative payment contract, the provider organization’s costs of treating a group of patients may exceed the budgeted payments. The statute requires DOI to promulgate regulations requiring RBPOs to obtain a certificate or waiver prior to entering into or renewing alternative payment contracts involving downside risk.

One year ago, DOI released Transitional Rules for Carriers and Provider Organizations Relative to the Certification of RBPOs ([Bulletin 2012-08](#)). The transitional guidance initially covered the period of November 4, 2012 through December 31, 2013. During that period, provider organizations were required to apply for and obtain a transitional period waiver in order to continue participating in alternative payment contracts with downside risk. The recently proposed regulations will supersede the transitional guidance and set forth the process for certifying, or waiving certification of, RBPOs.

Summary of the Proposed Regulations

Extension of the Transitional Period. The regulations extend the transitional period through June 30, 2014. Provider organizations that do not already hold a transitional period waiver but will be entering into or renewing risk contracts can apply for a transitional period waiver at any time during the transitional period. Following the transitional period (i.e., beginning July 1, 2014) all organizations will need to obtain either a risk certificate waiver or a risk certificate.

Risk Certificate Waivers. An RBPO may obtain a risk certificate waiver by demonstrating that its alternative payment contracts do not contain significant downside risk. The application must be certified by an officer and detail, among other items, the proportion of revenue subject to downside risk, the steps the RBPO will take to prepare for downside risk, and the reasons the RBPO believes the downside risk should be considered insignificant. The deadlines for obtaining a risk certificate waiver, to be effective July 1, 2014, will vary for different provider organizations, depending on whether the organization holds a transitional period waiver, and when the waiver was issued:

- A RBPO that has been granted a transitional period waiver prior to January 31, 2014 may apply for a risk certificate waiver by no later than February 1, 2014.
- A RBPO that has been granted a transitional period waiver on or after February 1, 2014 may apply for a risk certificate waiver at any time prior to June 30, 2014.
- A RBPO that has not previously been granted a transitional period waiver may apply for a risk certificate waiver at any time.

For future annual periods, the risk certificate waiver application must be submitted by December 1 of the year prior to the year in which the risk certificate waiver will be effective (for example, by December 1, 2014 for a waiver effective as of July 1, 2015).

Risk Certificates. Any RBPO that has not been granted a transitional period waiver (during the transitional period) or a risk certificate waiver must apply for and obtain a risk certificate. The application must be certified by at least two officers of the RBPO and must contain, among other items, a financial plan regarding management of risk, a utilization plan regarding monitoring of inpatient and outpatient utilization and an actuarial certification. As with the applications for risk certificate waivers, the deadlines depend on whether, and when, the provider organization received a Transitional Period Waiver:

- A RBPO that has been granted a transitional period waiver prior to February 28, 2014 may apply for a risk certificate by no later than March 1, 2014.
- A RBPO that has been granted a transitional period waiver on or after March 1, 2014 may apply for a risk certificate waiver at any time prior to June 30, 2014.
- A RBPO that has not previously been granted a transitional period waiver may apply for a risk certificate at any time.

Relevant Exceptions. There are a few notable exceptions clarified in the regulations. First, a provider organization that uses a contracting provider organization in entering into an alternative payment contract with downside risk will not be separately required to obtain a certificate or waiver so long as the contracting entity is subject to the regulations and obtains such a waiver or certificate. Additionally, an RBPO may contract with an insurance carrier for the carrier to administer an employer's self-funded employee benefit plan, without being licensed as an insurance carrier, provided that the terms of the alternative payment contract are substantially the same as the terms of the provider organization's alternative payment contract with the carrier for the carrier's insured business. Finally, the regulation includes the statutory exception for senior care organizations and integrated care organizations under the One Care program.

Public Hearing and Process for Finalizing

A public hearing regarding the proposed regulations will be held on December 12, 2013. Anyone wishing to provide oral comments at the hearing must file a Notice of Intent by December 10, 2013. Individuals who do not file a Notice of Intent will be heard after those who do file a Notice of Intent. Written comments will be accepted until the record of the hearing is closed.

For more information, please contact your usual Ropes & Gray advisor or the attorneys listed below:

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