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Lt. Governor



RALPH S. TYLER  
Commissioner

BETH SAMMIS  
Deputy Commissioner

525 St. Paul Place, Baltimore, Maryland 21202-2272  
1-800-492-6116 TTY: 1-800-735-2258  
www.mdinsurance.state.md.us

### **BULLETIN 08-19**

Date: September 5, 2008

To: Insurers with Certificates of Authority to Sell Health Insurance,  
Nonprofit Health Service Plans, Health Maintenance Organizations

Re: Capitation Payment, Insurance Business and Administrative Service  
Provider Contracts

This bulletin is intended to remind insurers with certificates of authority to sell health insurance, nonprofit health service plans, and health maintenance organizations (hereinafter "carriers") about the circumstances in which risk-sharing arrangements with health care providers constitute the business of insurance, as well as the requirements health maintenance organizations have when entering into a contract with administrative service providers.

#### *Capitation and Insurance Business*

Insurance is defined as "a contract to indemnify or to pay or provide a specified or determinable amount or benefit on the occurrence of a determinable contingency." (See §1-101 (s) of the Insurance Article) "Insurance business" includes all matters pertaining to an insurance contract and all matters arising from an insurance contract or a claim under it. (See §1-101 (t) of the Insurance Article)

When a carrier arranges for health care services and compensates health care providers through a capitation payment to provide specified services, the carrier has transferred risk to the health care provider, who assumes the risk that the capitation payment will be enough to cover the provision of health care services. Conduct that transfers risk in this manner falls within the definition of "insurance business". Health care providers conduct "insurance business" "by insuring the provision of health care benefits on the occurrence of certain determinable contingencies, for the payment of a premium in the form of a *capitation payment*." (See 75 Opinion Attorney General 319, page 327, emphasis added) However, because the carrier remains responsible for the fulfillment of the insurance contract or HMO contract, health care providers paid capitation are not required to obtain a certificate of authority.

If a carrier arranges for health care services on behalf of an employee benefit plan operated by a single employer (plan sponsor) on a “self-funded” or “self-insured” basis and compensates one or more health care providers on a capitated basis, the carrier has transferred risk from the plan sponsor to the health care provider. If the carrier has not established an insurance contract or HMO contract with the plan sponsor, the health care providers that are paid capitation are required to have a certificate of authority to engage in “insurance business”.

When a carrier enters into an agreement with a plan sponsor to establish an insurance contract or HMO contract for the provision of any health care services from health care providers who are paid capitation payments, the Maryland Insurance Administration maintains that the carrier must fully comply with all Maryland insurance laws. “Insurers and those acting as insurers are not released from state statutory obligations merely because those to whom they sell their products and services fall under the protection of ERISA. ERISA was intended to permit employers to craft creative methods of providing benefits to employees. But ERISA was not intended to exempt sellers of insurance from applicable state laws.” (See 75 Opinion Attorney General 319, page 327)

#### *Administrative Service Provider Contracts*

Administrative service provider contracts are contracts or capitation agreements between a health maintenance organization and a contracting provider that requires the contracting provider to accept and administer payment from a health maintenance organization for health care services to be provided by external providers. An external provider is a provider who is not a contracting provider or an employee, shareholder or partner of a contracting provider. (See §19-713.2 (a) of the Health-General Article)

For example, a capitation agreement with a laboratory provider may be an administrative service provider contract if the laboratory subcontracts with other providers for patient service centers or specialized laboratory services and the laboratory pays the subcontractors for the services provided to the health maintenance organization’s members.

It is the responsibility of the health maintenance organization to ensure it has entered into administrative service provider contracts with administrative service providers registered in accordance with Health-General Article, §19-713.3, Annotated Code of Maryland .

Additional guidance about administrative service providers was previously provided under Life and Health Bulletins 00-13, dated June 7, 2000 and 00-26, dated December 22, 2000, and are available on the Maryland Insurance Administration's website at [www.mdinsurance.state.md.us](http://www.mdinsurance.state.md.us).

Questions about this bulletin may be directed to the Life/Health Section at 410-468-2170.

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Beth Sammis  
Deputy Commissioner  
Maryland Insurance Administration