

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
OFFICE OF THE HEALTH INSURANCE COMMISSIONER
1511 PONTIAC AVENUE, BLDG. #69-1
CRANSTON, RHODE ISLAND 02920**

**FINAL ORDER (OHIC-2011-5)
Examination of Blue Cross & Blue Shield of Rhode Island**

THIS MATTER comes before the Health Insurance Commissioner (the “Commissioner”) as a result of an examination of Blue Cross & Blue Shield of Rhode Island (“Blue Cross”) pursuant to a warrant issued on February 9, 2009. The examination was conducted on behalf of the Commissioner by Joseph Torti III and John Aloysius Cogan Jr. (the “Examiners”) with assistance from Rector & Associates, Inc.

The Commissioner has considered and reviewed the Examiners’ report dated October 12, 2010 (the “Examination Report”), the recommendations of the Examiners, the Care New England Agreements, and Blue Cross’ response. The Commissioner issued his Final Order on November 16, 2010. The Commissioner hereby issues this amended Final Order after consideration of significant and material subsequent events, as set forth in Findings of Fact Nos. 12, 13, and 14. After full review and consideration of the aforementioned materials, and of the subsequent events set forth in Finding of Fact Nos. 12, 13, and 14, the Commissioner hereby finds:

Findings of Fact

1. An examination of Blue Cross was commenced by the Office of the Health Insurance Commissioner (“OHIC”) pursuant to a warrant issued on February 9, 2009.
2. The examination focused on certain provider agreements between Blue Cross and Care

New England hospitals dated December 22, 2008 (the “Agreements”). The purpose of the examination was to determine Blue Cross’ compliance with applicable statutes and regulations and to analyze the financial and market impact of the Agreements on Blue Cross.

3. As a result of the examination, the Examiners completed a report with the assistance of Rector & Associates, Inc. on October 12, 2010 and filed a verified Examination Report with recommendations with the Commissioner on October 22, 2010.

4. In the course of completing the Examination Report, the Examiners found, among other things, that:

a. Although Blue Cross considered not entering into the Agreements, Care New England’s strong market position appears to have made such an option virtually unworkable for Blue Cross. The Care New England hospitals have the bulk of the state’s maternity beds, provide high risk pregnancy and neonatal services not otherwise available in Rhode Island, employ many obstetricians and gynecologists in the Blue Cross network, and operate the state’s only general psychiatric hospital. These factors appear to have combined to give Care New England a significant level of bargaining power in its negotiations with Blue Cross. As a result, Blue Cross simply could not walk away from the Agreements;

b. By entering into the Agreements, Blue Cross created for itself an insurance obligation that is not authorized by the company’s enabling statutes;

c. The open-ended nature of a certain provision in the Agreements (the “Major Adverse Event provision”) places Blue Cross’ reserves at risk and could potentially jeopardize the company’s solvency; and

d. Under the same Major Adverse Event provision Blue Cross has potentially ceded ultimate control over the rates it pays to the Care New England hospitals to an unknown third party mediator.

5. The Commissioner acknowledges without concurrence that Care New England disagrees with Finding No. 4(b), (c), and (d), above; viz, Care New England asserts that the Major Adverse Event provision is modeled after a long standing provision in the Rhode Island prospective payment arrangement, that the provision itself reflects shared and limited risk and no jointly identified or court appointed mediator would obligate Blue Cross to a settlement which jeopardizes the Company’s solvency; that the provision reflected the compromise and agreement of Care New England and Blue Cross to an adjustment to the base rates that Care New England hospitals charge to Blue Cross in the Blue Cross Care New England Agreements for services rendered to Blue Cross subscribers, and it therefore falls directly within the Blue Cross enabling legislation allowing “the rates charged by contracting hospitals to any non-profit hospital service corporation (Blue Cross) for hospital services rendered by the hospital to the subscribers of the corporation to be established from time to time by agreement between the contracting hospitals and the corporation.” R.I. Gen. Laws § 27-19-7 (a).

6. As a result of the examination, the Examiners recommended the following:

a. Blue Cross not make any payments under the Major Adverse Event provision;

b. Blue Cross should use its best efforts to renegotiate the Agreements in a manner consistent with the company's legal authority;

c. Blue Cross should not include in any renegotiated Agreements any component which operates in a manner similar to the Major Adverse Events provision and any provision in which Blue Cross cedes authority over the reimbursement rates it pays to a provider to a third party; and

d. The Commissioner should consider, in light of the insurance-like nature of the Major Adverse Event provision and "its potentially disastrous impact on Blue Cross' solvency and/or the rates charged to subscribers" issuing an administrative penalty against Blue Cross.

7. The Commissioner acknowledges without concurrence that Care New England disagrees with Finding No. 6(d), above; viz. Care New England asserts that the Major Adverse Event provision both shares and caps Blue Cross risk, that in the highly unlikely event of a catastrophic qualifying situation with an estimated impact on Care New England of \$10 million or more, an agreed upon mediator (or a court appointed one) would resolve the allocation, that it is unreasonable for Rector or the Commissioner to assume that a competent mediator would adjudicate the matter in a way that would threaten Blue Cross' solvency.

8. Following receipt of the verified Examination Report and recommendations by the Commissioner, the Examination Report and recommendations were transmitted to Blue Cross on October 22, 2010 and Blue Cross was advised of its obligation to prepare and submit to OHIC a written submission or rebuttal with respect to any and all matters contained in the Examination Report and the recommendations.

9. Blue Cross filed a response on November 9, 2010.¹ The response is appended to the Examination Report. The response includes, among other things, the following statements and explanations from Blue Cross:²

a. Blue Cross states that the “overall objective of . . . [the Agreements] was to adopt a payment methodology that would have potential increases in reimbursement to CNE linked to outside events.”

b. Blue Cross maintains that it did not intend the Major Adverse Event provision as an insurance arrangement.

c. Blue Cross concedes that it was “under tremendous public pressure, as well as pressure from . . . [its] group customers and members to reach agreement with CNE.” Blue Cross agrees with the Examiners that the contract negotiations “disproportionately benefited CNE through the fact that certain positive events don’t offset negative events.” And while Blue Cross “agrees with the Examiner’s comments in Recommendation 8 that theoretical scenarios would show cost shifting in the many millions of dollars,” Blue Cross also notes that it “faced the equally definite increase of many millions of dollars” due to increased charges if Blue Cross could not come to agreement with CNE and the CNE hospitals were no longer participating providers in the Blue Cross network.

¹ The response was dated November 8, 2010 but was received by email on November 9, 2010.

² Although Blue Cross filed a response, it did not completely meet the requirements of R.I. Gen Laws § 27-13.1-5(b), which states, in part, “The response shall include a written plan of how and when the comments and recommendations contained in the examination report will be corrected and/or implemented. For each comment and recommendation, the response must include an implementation date and a completion date for each corrective action.” Although Blue Cross’ response does address most of the recommendations it does not provide a written plan of “how and when the comments and recommendations contained in the examination report will be corrected and/or implemented” and it does not address recommendation 5(b). Recommendation 5(b) states: “Blue Cross should use its best efforts to renegotiate the Agreements in a manner consistent with the company’s legal authority.” Since Blue Cross is being ordered to comply with all of the recommendation (with one modification), and it is expected that Blue Cross will do so immediately, its failure to fully respond according to the terms of the statute is immaterial to this Order.

Consequently, Blue Cross determined that entering into the Agreements, even with the Major Adverse Event provision, was more favorable to Blue Cross' solvency and reserves.

d. With respect to the use of a mediator to determine liability under the Major Adverse Event provision, Blue Cross states that it did not intend to cede financial solvency of its organization to a third party, but instead believed that use of an independent and knowledgeable mediator would be an efficient and economical way to resolve a dispute. Accordingly, Blue Cross asks that Recommendation 9 be amended or clarified so as to allow the use of an alternative dispute resolution mechanism, such as mediation, to resolve disputes.

e. Blue Cross asserts that because it (1) acted in good faith when it negotiated the Agreements with Care New England, (2) has not paid any amounts under the Major Adverse Event provision, and (3) fully cooperated with the Examiners and complied with the examination process, it should not have to pay an administrative penalty as a result of this examination.

10. The Commissioner acknowledges without concurrence that Care New England disagrees with Finding No. 9(d), above; viz. Care New England asserts that it agrees with Blue Cross' comments in finding No. 9 (d) in that the proposed dispute resolution process is a reasonable and effective business approach.

11. Upon receipt of Blue Cross' response, the Commissioner fully considered and reviewed the Examination Report and recommendations, together with the written response and relevant portions of the Agreements.

12. The Commissioner issued his Final Order Adopting the Examination Report on November 16, 2010. The Commissioner sent a copy of the November 16, 2010 Final Order to Care New England, pursuant to an agreement with Care New England to maintain the confidentiality of the Examination Report for a period of 30 days following the issuance of the Commissioner's Order. During said 30 day period Care New England filed suit in Rhode Island Superior Court against the Office of the Health Insurance Commissioner and Blue Cross, requesting among other remedies that the Superior Court vacate the Commissioner's Order. *See Care New England Health System, et al vs. Rhode Island Office of the Health Insurance Commissioner et al, Civ, Action No. PB/2010-6984.* After over four months, during which time OHIC contested the lawsuit, the parties reached an agreement ("Settlement") resulting in the dismissal of the lawsuit with prejudice.

13. The Commissioner's November 16, 2010 Order included the following terms:

First, Blue Cross may not make any payments under the Major Adverse Events provision.

Second, Blue Cross must use its best efforts to renegotiate the Major Adverse Events provision in a manner consistent with its legal authority. Any such renegotiation should not result in an agreement that includes any cost shifting component, any insurance obligations, or any provision in which Blue Cross cedes authority over the reimbursement rates it pays to a third party, consistent with paragraph 9, above.

14. The provisions of the Settlement included the elimination of the Major Adverse Events provision, and the elimination of any obligation by Blue Cross to make payments under the Major Adverse Events provision. Because of these changed circumstances relative to the

facts before the Commissioner when he issued his Order of November 16, 2010, there is no longer a need for the terms of the Order set forth in Para. 13, above, and such terms are therefore eliminated from this amended Order.

Conclusions of Law

15. The Commissioner has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 27-13.1-1, *et seq.*, 42-14.5-1, *et seq.* and 42-14-5.

16. Blue Cross is statutorily limited with respect to the lines of insurance it may write (i.e., lines of insurance for which it may accept risk). Those lines are (1) health insurance, (2) stop-loss and catastrophic insurance, and (3) the types of insurance that may be provided by nonprofit dental service corporations, nonprofit legal service corporations, and nonprofit optometric service corporations. R.I. Gen. Laws §§ 27-19-1(3), 27-19-5(a), 27-20-1(6), 27-20-1(4), 27-20-5, 27-19.2-3 (collectively health insurance); R.I. Gen. Laws § 27-19-5(d) (stop-loss and catastrophic insurance, but only for fully and partially self-insured health benefit plans sponsored by employers, associations, and third parties); R.I. Gen. Laws § 27-19-5(b) (dental, vision, and legal insurance).

17. Blue Cross is mandated by statute to protect its financial condition. R.I. Gen. Laws § 27-19.2-10(4).

18. The Commissioner is required to discharge the powers of OHIC to guard the solvency of Blue Cross. R.I. Gen. Laws § 42-14.5-2(1). Furthermore, whenever the Commissioner determines that any action by Blue Cross could adversely affect the company's solvency or financial condition or that any circumstance exists such that Blue Cross' solvency or financial

condition may be at risk, the Commissioner shall act to guard the solvency and financial condition of Blue Cross when exercising any power or duty of OHIC, including, but not limited to, issuing any order, decision or ruling or taking any other action authorized or required by statute or regulation. When taking such action, the Commissioner may consider Blue Cross' transactions with third parties, such as Care New England. OHIC Reg. 2, Section 5.

19. R.I. Gen. Laws § 27-13.1-5(c) states:

Within thirty (30) days of the end of the period allowed for the receipt of written responses or rebuttals, the . . . [Commissioner] shall fully consider and review the report, together with any written responses or rebuttals and any relevant portions of the examiner's workpapers and enter an order:

- (1) Adopting the examination report as filed or with modifications or corrections. If the examination report reveals that the company is operating in violation of any law, regulation, or prior order of the . . . [Commissioner], the . . . [Commissioner] may order the company to take any action the . . . [Commissioner] considers necessary and appropriate to cure the violation; or
- (2) Rejecting the examination report with directions to the examiners to reopen the examination for the purposes of obtaining additional data, documentation, or information, and refiling pursuant to this section; and
- (3) Calling for an investigatory hearing with no less than twenty (20) days notice to the company for the purposes of obtaining additional documentation, data, information, and testimony.

20. The Commissioner may, pursuant to R.I. Gen. Laws § 42-14-16 and in response to any action that is in violation of title 27 of the General Laws or any regulations promulgated thereunder, levy an administrative penalty against Blue Cross in an amount not less than one hundred dollars (\$100) nor more than fifty thousand dollars (\$50,000); order Blue Cross to cease such action; require Blue Cross to take such actions as are necessary to comply with title 27 or the regulations thereunder; or any combination of the above.

21. Based upon the Findings of Fact and Conclusions of Law enumerated above, the Examination Report, its findings and conclusions, and the recommendations of the Examiners, the Examination Report should be adopted, with a clarification to Recommendation 9, as more fully described below.

IT IS THEREFORE, BY THE COMMISSIONER, ORDERED THAT:

1. The Examination Report, its findings and conclusions, and the recommendations of the Examiners are hereby adopted and filed with OHIC and made an official record of OHIC, except with respect to Recommendation 9 and except with respect to those portions of the Report that constitute or contain trade secrets or other confidential business information (“Trade Secrets”).

2. Recommendation 9 is adopted and filed with OHIC and made an official record of OHIC with the following clarification: Blue Cross may rely on alternative dispute resolution processes and procedures to resolve disputes with providers, vendors, and any other party, unless otherwise prohibited by law, and may include provisions in its contracts that allow for the use of alternative dispute resolution processes and procedures to resolve contractual disputes. However, Blue Cross may not include within any contract it enters into any provision that allows a third party to make any decision that determines, directly or indirectly, the rates it pays to a provider in the absence of bona fide dispute between Blue Cross and the provider. Thus, Blue Cross may not include within any contract it enters into any terms that allow for a reopening of the contract, alteration of the terms of the contract, or amendment of the terms of the contract with respect to existing payment terms, by, through, or in connection with the decision of a third party.

3. An administrative penalty is justified in this case. If Blue Cross had entered into the Major Adverse Events provision (or an equivalent obligation) as a stand-alone agreement in exchange for a premium, a cease and desist order and an administrative penalty would certainly be issued. The penalty would likely be at or near the maximum amount of \$50,000. The fact that the Major Adverse Events provision is embedded in a reimbursement contract does not absolve Blue Cross of responsibility for agreeing to perform an insurance function not authorized by law. Nevertheless, it is noteworthy that Blue Cross appears to have acted in good faith and its actions in this matter can be attributed to significant market pressures. Such factors strongly militate for a significantly reduced penalty. Accordingly a penalty of \$5,000 will be assessed against Blue Cross.

4. The Commissioner retains jurisdiction over this matter to issue any and all further or supplemental Orders deemed appropriate or to take such further action necessary to dispose of this matter. Based upon the facts and circumstance known to the Commissioner upon issuance of this Order, the Commissioner attests and affirms that there will be no further reexamination of the hospital participation agreement which is the subject matter of the Examination Report for the duration of the term of the current agreement; notwithstanding the foregoing, the Commissioner retains without limitation his authority to:

a. examine the hospital participation agreement which is the subject matter of the Examination Report if new facts or changed circumstances warrant a reexamination;

b. conduct a general examination of provider participation agreements entered into by one or more health insurance carriers doing business in this state;

c. examine the financial condition of any health insurance carrier doing business in this state, including but not limited to financial examinations pursuant to R.I. Gen. Laws sections 27-19-9, 27.19.2-10, and 27-20-9, and chapters 27-14.1, 27-14.2, and 27-14.3; and

d. take any such actions as are necessary to address the findings and recommendations of any such examination or reexamination.



Christopher F. Koller
Health Insurance Commissioner

Dated: October 11, 2011

THIS ORDER CONSTITUTES A FINAL ADMINISTRATIVE DECISION OF THE OFFICE OF THE HEALTH INSURANCE COMMISSIONER. AS SUCH, THIS ORDER MAY BE APPEALED PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT, CHAPTER 35 OF TITLE 42 WITHIN THIRTY (30) DAYS OF THE DATE OF THIS ORDER. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.