



### INSURANCE DIVISION BULLETIN INS 96-2

**TO:** All Interested Parties

**FROM:** Kerry Barnett, Insurance Commissioner

**SUBJECT:** Application of the Insurance Code to Health Benefit Arrangements That Include Provider Risk Sharing

**DATE:** April, 1996

The delivery and financing of health care services are undergoing rapid evolution. One of the prominent trends has been the expansion of risk sharing arrangements with participating health care providers. This bulletin is intended to advise interested parties about the circumstances in which such arrangements constitute the transaction of insurance and are subject to regulation under the Insurance Code.

**A. The Transaction of Insurance:** Oregon law defines insurance as, "A contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies," (ORS 731.102). The transaction of insurance is defined as, "Making or proposing to make an insurance contract," (ORS 731.146). All persons transacting insurance in Oregon shall comply with the Insurance Code (ORS 731.022) and must obtain a certificate of authority from the Insurance Division (ORS 731.354 and, for health care service contractors, ORS 731.026 and 750.055).

**B. When Provider Risk Sharing Constitutes the Transaction of Insurance:** An agreement between one or more health care providers and one or more purchasers of health care services constitutes the transaction of insurance if the following conditions exist:

The purchaser( s ) are individuals or entities that have not been issued a certificate of authority and are not specified in the Insurance Code as exempt; and

The provider(s) are compensated for the actual or potential delivery of health care services in a manner that involves risk sharing such as capitation, a fixed or "global" payment, or any similar arrangement.

#### Questions and Answers:

##### Q1

How does the federal Employee Retirement Income Security Act (ERISA) affect the treatment of a provider risk sharing arrangement under the Insurance Code?

##### A1

ERISA specifies that the regulation of insurance is a matter of state jurisdiction. If providers engage in a risk sharing arrangement as described in section B above, they are transacting insurance and such activity is subject to the Insurance Code. Although employee benefit plans that are operated on a "self-funded" or "self-insured" basis are exempt from state regulation

under ERISA, a provider risk sharing arrangement with a plan sponsor does not operate on a self-insured or self-funded basis. Rather, by its very nature, such an arrangement creates the transaction of insurance by establishing a transfer of risk from the plan sponsor to the providers.

**Q2**

Are providers who are compensated on a capitated basis by a health insurer or health care service contractor (HCSC) required to obtain a certificate of authority?

**A2**

Not if the capitation is internal to a policy of insurance that is delivered by an authorized insurer or HCSC. In such cases, the insurer or HCSC is the ultimate risk assuming entity and it remains responsible for the fulfillment of the insurance contract. Important Note: Providers would need a certificate of authority if the capitation arrangement were separate from a policy of insurance. For instance, if an insurer or HCSC were to "lease" their capitated managed care or HMO program to a "self-funded" plan sponsor without establishing a bona fide insurance contract, the capitated providers would need a certificate of authority .

**Q3**

Is an arrangement in which providers are compensated on a discounted fee-for-service basis considered to be a risk sharing arrangement?

**A3**

Not if the arrangement is truly fee-for-service (i.e., a fee is payable for each service that is rendered) and the discounts are explicit and limited. Similarly, a sliding scale of discounts may be established, but the scale must have explicit and reasonable limits, e.g., "Discounts of 5% to 20% will be applied, depending on total patient volume." An open-ended scale, or one with extreme limits, would constitute a risk sharing arrangement because it would transfer an open-ended or virtually open-ended portion of risk to the providers. Important Note: The use of a fee-for-service schedule within a capitated arrangement would still constitute the transaction of insurance. Insurance exists if the purchaser pays on a capitated basis, even if payments are allocated to individual providers within the contracting group on a fee-for-service basis.

**Q4**

Is an arrangement in which providers are compensated on a fee-for-service basis, subject to withholds, considered to be a risk sharing arrangement?

**A4**

Not if the arrangement is truly fee-for-service and the withholds are explicit, limited, and reasonable (see A3 above).

**Q5**

Is an arrangement in which providers are compensated on a per-case basis (e.g., a DRG basis or a packaged-service basis) considered to be a risk sharing arrangement?

**A5**

Not if the arrangement is truly fee-for-service (see A3 above). Risk sharing would exist if fixed or prepaid compensation is paid for an uncertain number of future cases.

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**Kerry Barnett**, Director and  
Insurance Commissioner