

**PREMIUM RATE REVIEW:  
POLICY CONSEQUENCES  
AND  
THE POTENTIAL FOR DISPUTE**

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Foley Hoag, LLP

# NOTICE OF DISAPPROVAL



COMMONWEALTH OF MASSACHUSETTS  
Office of Consumer Affairs and Business Regulation  
DIVISION OF INSURANCE  
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ECONOMIC DEVELOPMENT  
BARBARA ANTHONY  
UNDERSECRETARY OF CONSUMER AFFAIRS  
AND BUSINESS REGULATION  
JOSEPH G. MURPHY  
COMMISSIONER OF INSURANCE

April 1, 2010

VIA SERFF

XYZ Community Health Plan

Re: Notice of Disapproval - March 1, 2010 Small Group Rate Filing

Dear Mr. Gentile:

The Division of Insurance ("Division") received XYZ Community Health Plan's ("XYZ") M.G.L. c. 176J small group rate filing ("XYZ's Filing")<sup>1</sup> via SERFF on March 1, 2010 with proposed increases for small group products renewing on and after April 1, 2010. XYZ's Filing included documents required pursuant to 211 CMR 43.08 in support of its proposed rates for all small group products offered or renewed in the Massachusetts market.

The Division has completed its review of XYZ's Filing pursuant to M.G.L. c. 176G, M.G.L. c. 176J and 211 CMR 43.00. In accordance with the authority granted to the Commissioner of Insurance under M.G.L. c. 176G, § 16 and 211 CMR 43.08, the Division hereby DISAPPROVES Fallon's Filing and Fallon's proposed small group rates for all small group products offered or renewed in the Massachusetts market with proposed effective dates of, or after, April 1, 2010. Specifically, the Division finds that the proposed rates are unreasonable in relation to the benefits provided and excessive and, therefore, the proposed rates do not meet

<sup>1</sup> As used herein, the term the "Filing" shall include all documents, information and correspondence filed via SERFF, including, but not limited to, communications by and between XYZ and the Division's reviewing actuaries.

*In accordance with the authority granted to the Division of Insurance, the Division hereby **DISAPPROVES** the carrier's proposed rates with effective dates on or after **January 1, 2011.***

# Sample Rate Review Statute

*The subscriber contracts, rates and evidence of coverage shall be subject to the disapproval of the commissioner. No such contracts shall be approved if the benefits provided therein are unreasonable in relation to the rate charged, nor if the rates are excessive, inadequate or unfairly discriminatory.*

Mass. Gen. Laws c. 176G, §16

# Rate Review Standards

- Roughly one-half of states authorize rate disapproval; others require rate approval. Is there a meaningful difference?
- Rate review is distinct from rate setting:  
[Under rate review authority,] it is not for the Commissioner to set reasonable rates but rather to determine whether the proposed rates are reasonable.

*Blue Cross & Blue Shield of Mass., Inc. v. Comm'r of Ins.,*  
420 Mass. 707, 709 (1995)

# Rate Review Standards II

Although the standards have long been in use, there is little decisional law their meaning. The law that exists is not uniform.

Compare *Anthem Health Plans of Maine, Inc. v. Superintendent*

(“[T]he ‘adequacy’ requirement . . . relates to the ability of a rate to sustain projected losses and expenses . . . It does not entitle insurers to a mandated profit margin”) with

*Fallon Comm. Health Plan v. Division of Insurance,*

(A rate is not adequate, from an actuarial and regulatory perspective, if it does not cover the sum of the projected costs of covering claims, administrative costs, and some contribution to reserves/surplus”).

# Sample Regulation


- Each carrier shall submit base rates at least 90 days prior to their effective date(s).
- Each carrier shall submit specified documentation.
- The Commissioner shall notify the carrier of disapproval on the effective date of the proposed base rates.
- If the carrier's base rates are disapproved, the carrier must use the base rates as in effect 12 months prior to proposed effective date of the disapproved rates.

211 CMR 43.08

# Subjects of Regulation

- Is the carrier's financial condition relevant?
- Are provider contracting practices relevant?
- Are there limits on rate increases?

# Sample Scheduling Order



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JOSEPH G. MURPHY  
COMMISSIONER OF INSURANCE

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XYZ Health Maintenance Organization Inc., Petitioner,  
v.  
Division of Insurance, Respondent

Docket No. R2010-04

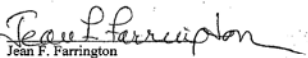
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**ORDER SCHEDULING CROSS-EXAMINATION  
AND EXHIBIT GUIDELINES**


Petitioner submitted pre-filed direct testimony of its witnesses in the above-captioned matter on May 19, 2010. Cross-examination of these witnesses shall commence on **June 7, 2010 at 10:00 a.m.** at the Division of Insurance, Hearing Room 1E, 1000 Washington Street, Boston, MA 02118 and shall continue, if necessary, on **June 9, 2010**.

Please refer to the attached *Evidentiary Hearing Exhibit Guidelines*.

Filed: May 20, 2010

  
Jean F. Farrington  
Presiding Officer

  
Stephen M. Sumner  
Presiding Officer

  
Susan L. Donegan  
Presiding Officer

**RECEIVED**  
MAY 20 2010  
4:05 P M  
HEARINGS & APPEALS  
MASS. DIVISION OF INSURANCE

December 1

Discovery Cut Off

December 8

Pre-Filed Testimony

December 13

Cross-Examination

December 15

Final Exhibit List

December 29

Post-Hearing  
Submissions



# Agency Review

- Intervention by and role of the Attorney General.
- Discovery and freedom of information requests.
- Witness selection (actuaries, contracting, sales, and experts), and the preparation of pre-filed testimony.
- Exhibits: rate submission; studies on trend, administrative load, profit and reserve levels; contracting and utilization practices; and substantiation of one-time deviations.

# Sample Complaint

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

CIVIL ACTION NO. 10-02345

ASSOCIATION OF HEALTH PLANS, XYZ COMMUNITY HEALTH PLAN, INC., and ABC ASSOCIATED HEALTH MAINTENANCE ORGANIZATION, INC.,  Plaintiffs,  v.  COMMISSIONER OF INSURANCE,  Defendant.
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**COMPLAINT**

**INTRODUCTION**

1. This is an action for declaratory judgment, by which the plaintiffs Association of Health Plans (“AHP”) and individual health plans (the “Plans,” and together with AHP, “Plaintiffs”) challenge two illegal and unconstitutional actions by the defendant, the Commissioner of Insurance (the “Commissioner”):

- a) the Commissioner impermissibly disapproved submitted rate increases for April 2010, based on a predetermined, arbitrary and inadequate rate cap; and
- b) the Commissioner impermissibly directed that plans whose rates were disapproved must use April 2009 rates, which are even more inadequate than the rates created by the arbitrary cap.

2. Absent relief from this Court, the individual Plaintiffs will suffer collective losses that threaten to amount to well over \$100,000,000.00, losses that will deplete their individual

*Before agency action:*

This is an action for declaratory judgment by which the plaintiffs challenge the illegal and unconstitutional actions by the Commissioner of Insurance. Absent immediate relief, the plaintiffs will suffer great and immediate irreparable harm.

# Sample Complaint II

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

ASSOCIATION OF HEALTH PLANS, XYZ COMMUNITY HEALTH PLAN, INC., and ABC ASSOCIATED HEALTH MAINTENANCE ORGANIZATION, INC., <p style="text-align: center;">Plaintiffs,</p> v. COMMISSIONER OF INSURANCE, <p style="text-align: center;">Defendant.</p>	CIVIL ACTION NO. 10-02345
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**INTRODUCTION**

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*After agency action:*

The plaintiffs are aggrieved by a final agency determination by the Commissioner of Insurance. More specifically, the plaintiffs maintain that the Commissioner’s determination is unconstitutional, exceeds the Commissioner’s authority, is unsupported by substantial evidence, and is arbitrary or capricious, an abuse of discretion, and is not in accordance with the law. The court should set aside or modify the Commissioner’s determination.

# Judicial Review

- By-passing agency proceedings and the doctrine of exhaustion.
- Appeal from final agency action.
  - Grounds for appeal and nature of record
  - Agency action that might be arbitrary, capricious or beyond the scope of legislative authority.
  - Agency action that might be unconstitutional.

# Conclusion

- Rates will be subject to enhanced review for the foreseeable future.
- Approval is likely to be based on a persuasive evidentiary and analytical justification of rates.
- When persuasive justification is lacking; or regulators set rather than review rates, disputes will arise.