APPROVED

MINUTES OF THE MEETING OF THE
NEW JERSEY SMALL EMPLOYER HEALTH BENEFITS PROGRAM BOARD
AT THE OFFICES OF THE
NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE
TRENTON, NEW JERSEY
May 21, 1997

Members present: Larry Glover, *Chair*; Gale Simon, *Vice Chair* (DOBI); Debbie Cieslik (BCBSNJ); James Donnellan (Prudential); Charlotte Furman (Anthem Health and Life); Eileen Gallagher (NYLCare); Linda Ilkowitz (Guardian); Jim Leonard; Amy Mansue (HIP of New Jersey); Bryan Markowitz; Leon Moskowitz, (DOHSS); Dutch Vanderhoof.

Others present: Kevin O'Leary, *Executive Director*; Wardell Sanders, *SEH Program Assistant Director*; Ellen DeRosa, *IHC Program Assistant Director*; Pearl Lechner, *Program Development Assistant*; DAG Josh Lichtblau (DOL).

I. Call to Order

The Executive Director called the meeting to order at approximately 9:40 a.m. and announced that notice of the meeting had been published in three newspapers and posted at the Department of Banking and Insurance ("DOBI") and the Office of the Secretary of State in accordance with the Open Public Meetings Act. A quorum was present.

II. Public Comments

No public comments were offered.

III. Minutes

** A. Mansue made a motion to approve the draft minutes of the April 16, 1997 Board meeting. L. Ilkowitz seconded the motion, and the motion was approved by voice vote, with D. Cieslik abstaining.*

** L. Moskowitz made a motion to approve the draft minutes of the April 16 , 1997 Board executive session meeting. J. Donnellan seconded the motion, and the motion was approved by voice vote, with D. Cieslik abstaining.*

** C. Furman made a motion to approve the draft minutes of the April 22, 1997 Board meeting. L. Moskowitz seconded the motion, and the motion was approved by voice vote, with D. Cieslik abstaining.*

** L. Moskowitz made a motion to approve the draft minutes of the May 1, 1997 joint Board meeting with the Individual Health Coverage Program Board. J. Donnellan seconded the motion, and the motion was approved by voice vote, with D. Cieslik abstaining.*

** C. Furman made a motion to approve the draft minutes of the May 1, 1997 joint executive session Board meeting with the Individual Health Coverage Program Board. E. Gallagher seconded the motion, and the motion was approved by voice vote, with D. Cieslik abstaining.*

IV. Report of the Policy Forms Committee

The Assistant Director reported that the Committee met on May 13, 1997 at the offices of Prudential. The first issue discussed was whether the Board should issue a bulletin regarding the requirements for a qualified high deductible plan for use with a Medical Savings Account ("MSA") in light of a recent interpretation by the IRS on how the family deductible limit worked. The Board had issued a prior bulletin, 97-SEH-09, which included a sample rider of decreasing value to create a high deductible plan. The Committee recommended that the Board issue a revised bulletin based on updated IRS information. The Board agreed that the bulletin could be issued upon approval of the Committee and the DOBI.

The Assistant Director reported that the second issue discussed was a draft bulletin on the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its impact on New Jersey's small employer health benefits market. He noted that the bulletin stressed the following points: (1) that each carrier is responsible for complying with federal law; (2) that New Jersey small employer plans may not be consistent with federal law, and that carriers should administratively comply with any applicable federal requirements; (3) that carriers should not use either the compliance and variability rider or the optional benefit rider mechanism to make HIPAA required changes; (4) that carriers may file amendments to their nonstandard plans with the DOBI, or may administratively comply with federal law; and (5) that the SEH Board would be making amendments to its policy forms as soon as possible following the enactment of New Jersey legislation. D. Cieslik noted that relying on administrative compliance would likely result in a confused marketplace. She suggested that the Board make amendments, to the extent possible, to its policy forms prior to any State legislative amendments to comply with HIPAA. A. Mansue argued against making regulatory amendments prior to State legislative changes and voiced a concern that without future federal guidance on HIPAA, the Board would be in the position of interpreting federal law for carriers. J. Donnellan indicated that HIPAA provided for a period good faith compliance. A. Mansue indicated that it was a confusing time in the market, and that the Board should issue one message to carriers on HIPAA, which should be after State legislative changes have been made. L. Moskowitz noted that the Board's conversation highlighted the need for the New Jersey Legislature to act quickly. B. Markowitz ask whether the Board

would have formal guidance for small employers. L. Ilkowitz noted that the Board did not regulate small employers and that the burden to inform employers about the federal changes would fall largely on the carriers. D. Cieslik asked what would happen if the Board discovered that carriers were not complying with federal law. The Executive Director noted that the Board would probably be unable to act until there were State laws in place. After some further discussion, the Board agreed to issue the bulletin as originally drafted.

The Assistant Director reported that the Committee discussed a draft report showing carrier responses to Exhibit BB, Part 1, the Certification of Forms Compliance. D. Cieslik asked that the column for "Pre-x" be clarified so that it was clear that the responses were to the question whether the preexisting condition statement was being used. The Assistant Director indicated that there would be no formal release of the report, but that it would be available upon request.

The Assistant Director referred to a memorandum of understanding dated May 7, 1997 from Mark Stanton of the Office of Administrative Law ("OAL"). He indicated that the memorandum was the culmination of extensive discussions that staff had with the OAL regarding the publication of amendments to the Board's standard policy forms in the *New Jersey Register*. The Assistant Director reported that this process was very time consuming for both the staff and OAL staff and was of limited value, since most interested parties did not appear to be reviewing the *New Jersey Register's* version of the forms proposals or adoptions. The Assistant Director reported that memorandum identified a process whereby future proposals and adoptions would not include a publication in the *New Jersey Register* of all of the forms changes, but rather the Board would make available to all interested parties a copy of the proposal or adoption upon request. He noted that the understanding would be used for future changes, but would not be used for the adoption of the outstanding forms rule proposal.

The Assistant Director reported that the Committee discussed the comments that it had received to the Board's policy forms rule proposal. He indicated that comments were received from Blue Cross and Blue Shield of New Jersey, First Option Health Plan, and the New Jersey Protection and Advocacy, Inc. He noted that the comments received from the New Jersey Protection and Advocacy, Inc. were beyond the scope of the proposal since they referred to text published in the *New Jersey Register* that was provided for context only. He noted that he had spoken with the commenter as to how the that organization could provide input to the standard policy forms. The Assistant Director then discussed some of the significant comments and responses. Specifically, he noted that Blue Cross and Blue Shield had suggested that the Board propose changes consistent with HIPAA. The Board again agreed that HIPAA forms changes should wait until after the New Jersey Legislature had acted. The Assistant Director noted that the draft adoption incorrectly indicated that Blue Cross had asked that the forms be modified to define a small employer consistent with the definition of a small employer in HIPAA; Blue Cross's comments did not request that modification. Blue Cross requested that the application and certification be amended to ask if the employer is subject to TEFRA or

DEFRA. The Board agreed to put variable text to permit carriers to ask this question on the annual certification.

** A. Mansue made a motion to accept the recommendation of the Policy Forms Committee, as amended, to adopt the Board's rule proposal. B. Markowitz seconded the motion, and the motion was approved unanimously by voice vote.*

V. Report of the Assistant Director

The Assistant Director reported that the Board packets included the DOBI's list of approved riders of decreasing value and a revised Buyer's Guide insert of carriers with approval to sell high deductible plan riders.

The Assistant Director reported that the DOBI had received notices of market withdrawal from Aetna Health Plans of New Jersey and Employers Health Insurance.

VI. Report of the Executive Director

The Executive Director presented an expense report attached hereto as Exhibit 1.

** A. Mansue made a motion to accept the attached expense report. B. Markowitz seconded the motion, and the motion was approved unanimously by voice vote. [Met 2/3rds supermajority requirement.]*

The Executive Director asked for a resolution from the Board to change the signatories on the Board's bank accounts.

** J. Donnellan made a motion to have Wardell Sanders, Ellen DeRosa, Gale Simon, and Bryan Markowitz added as signatories to the Board's accounts. C. Furman seconded the motion, and the motion was approved unanimously by voice vote.*

The Executive Director reported that A-2261, a bill sponsored by Assemblyman Garrett, was heard in the Assembly Insurance Committee on May 5, 1997, and was reported out of Committee without a recommendation. The Executive Director reported that he testified against the bill as it contained a provision which would merge the IHC and SEH Boards and require the joint Boards to advise the Legislature on mandated benefits legislation. He reported that the Commissioner has now sent a substitute bill, which included HIPAA required changes to the IHC and SEH Acts as well as modifications to the IHC Act resulting from her hearings on the individual market, to Assemblyman Garrett, Assemblyman Bateman and to the Office of Legislative Services.

The Executive Director reminded the Board that the SEH Act requires the Board to do a study of the impact of full community rating in the small employer market which is due on or before June 30, 1997. He reported that he sent a survey to carriers in the market; carriers were asked to respond by May 23, 1997. He reported that he would put

together a draft report and forward it to the *ad hoc* committee as soon as possible. He noted that the timing of the report presented some difficulties, since carriers would begin to gear up for full community rating in September. Thus, any legislative changes made after that time would result in market disruption.

The Executive Director reported on a federal bill, H.R.1515, the "Expansion of Portability and Health Insurance Coverage Act of 1997," sponsored by Cong. Fawell along with New Jersey's Cong. Roukema and Cong. Saxton. The bill would extend ERISA protection to association plans. He noted that the major provisions of the bill were contained in a House version of the Kennedy/Kassebaum bill but was removed after some states lobbied against it. He noted that he had requested NAIC comments on the bill.

The Executive Director reported that he had written an executive director's manual and that he was working with the staff to prepare for his departure.

With respect to outreach, the Executive Director reported that he spoke at a New Jersey Business and Industry conference in Jamesburg on how to buy small employer health coverage. He noted that he was working with the DOBI on a draft press release announcing the publication of the 1997 premium comparison survey. He indicated that he was trying to develop a story to tell about changes in rates from the previous survey in order to obtain greater exposure for the story.

[J. Leonard arrived.]

The Board discussed the draft press release and provided the Executive Director with comments.

VII. Report of the Legal Committee

[A. Mansue left the meeting.]

The Executive Director reported that the Committee met via telephone conference on May 19, 1997. The Executive Director reported that the first issue discussed was whether an employee of a temporary agency, who is hired to perform services for other employers, could be considered an "eligible employee" of the temporary agency. He noted that, at the time of hire, it is difficult for these types of employers to judge whether the employees who are sent to other companies are working on a regular and permanent basis. The Executive Director reported that the Committee concluded that the temporary agency, like any other employer, must make a determination when it hires an employee as to whether it realistically expects that employee to work 25 hours a week or more on a regular and permanent basis and thus meet the definition of an "eligible employee." If in time, an employee's work schedule suggests that the employer has made an incorrect determination, the employer must correct its prior determination.

The second issue discussed was the draft bulletin on domestic employees. The Assistant Director noted that DAG Lichtblau provided staff with some non-substantive changes to the bulletin prior to the meeting. Also prior to the meeting, L. Ilkowitz asked that the bulletin make clear that there must be a *bona fide* employer/employee relationship, and that the household employees must meet all of the criteria of "eligible employees."

The third issued discussed was the draft bulletin on the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). D. Cieslik argued in favor of permitting carriers to modify the standard health benefit plans to conform with HIPAA. She noted her objection to the Bulletin's statement that carriers were not permitted to modify the standard plans.

The fourth issue discussed was whether an HMO may deny coverage to eligible employees or dependents if the employees or dependents seek coverage after the initial 30-day enrollment period. The Assistant Director reported that staff had received complaints from brokers that three different HMOs were denying coverage to eligible employees and dependents who seek coverage after the initial 30-day enrollment period. The three carriers were instructing these eligible employees and dependents that they must wait to obtain coverage during the annual "open enrollment period." The Committee noted that this practice of denying coverage was consistent with the practice of HMOs in other markets and other states. However, the Committee noted that the practice appeared to be in conflict with the HMO contract language. The Assistant Director reported that the Committee had originally recommended that staff send a letter to the HMOs involved identifying the contract language in the standard HMO contract on employee enrollment, and asking the carriers to support their policy of denying coverage. Upon further reflection, the Committee recommended that a bulletin go out to all carriers noting that this practice is not permitted, and requiring all carriers to contact individuals who had been denied coverage inappropriately and offer them coverage immediately. G. Simon asked that the bulletin be issued as soon as possible.

The fifth issued discussed was whether a carrier may decline to issue coverage to a small employer when the employer requests two different plans, one with a nonstandard optional benefit rider and one without the same nonstandard optional benefit rider. The Assistant Director reported that the Committee found that the issue was not a legal issue but rather was a policy issue for the Board. However, the Committee noted that the case did highlight the danger of adverse selection. The Board agreed that the issue presented a good example of adverse selection. After some discussion, the Board asked staff to provide it with a history of how the Board had developed its position on this issue. The Board also asked that a survey be sent to carriers in the market asking for their input.

The sixth issue discussed was whether a carrier may use both a two and four tier rating structure. The Assistant Director reported that a carrier had requested that it be permitted to rate its plans with both a two and four tier rating structure, giving the employer the option of selecting how it should be rated. The DOBI had advised the

carrier that this is not permitted to offer an employer both rating options pursuant to the SEH Board's regulations. The Committee concluded that pursuant to N.J.A.C. 11:21-7.14, a carrier may only use a four tier rating structure.

The seventh issue discussed was whether a carrier must continue to renew in force plans as they were issued, if the carrier decided to change one of the options set forth in the standard health benefits plans, and wanted to convert its in force business to the new option. The Assistant Director provided the example of a carrier that originally offered ABMT coverage in the plan rather than as a rider, and then decided to offer the coverage as a rider. He reported that the Committee noted that pursuant to many state laws and under HIPAA, a carrier would be able to replace an existing health plan with another health plan. However, the Committee referred to N.J.A.C. 11:21-7.12, which outlines the permissible grounds for nonrenewal of a plan. The Committee believed that a strict reading of the regulation would prohibit a carrier from canceling a plan with the original plan options. However, a carrier would not be prohibited in asking an employer to modify its plan.

** E. Gallagher made a motion to accept the recommendations of the Legal Committee. C. Furman seconded the motion, and the motion was approved unanimously by voice vote.*

VIII. Report on Board Finances

P. Lechner, the Board's new Program Development Assistant, reported that she was working on finalizing the fiscal year 1994 and 1995 audit report. Ms. Lechner reported that she had been examining DOBI files to determine what transactions the DOBI had made in those years.

IX. Executive Session

** C. Furman made a motion to move into executive session to receive advice from counsel. L. Moskowitz seconded the motion, and the motion was approved unanimously by voice vote.*

X. Close of Meeting

** G. Simon made a motion to end the meeting. D. Vanderhoof seconded the motion, and the motion was approved unanimously by voice vote.*