

**ATTORNEY GENERAL OF THE STATE OF NEW YORK**

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In the Matter of

**AETNA LIFE INSURANCE COMPANY  
AND AETNA HEALTH INC.**

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**AGREEMENT CONCERNING PHYSICIAN PERFORMANCE  
MEASUREMENT, REPORTING AND TIERING PROGRAMS**

**PURSUANT TO EXECUTIVE LAW  
SECTION 63, SUBDIVISION 15**

1. Pursuant to the provisions of Article 22-A of the General Business Law and Executive Law §63(12), Andrew M. Cuomo, Attorney General of the State of New York (the “Attorney General”) caused an industry-wide inquiry to be made into certain business practices regarding physician performance measurement, reporting and tiering programs. The inquiry included Aetna Life Insurance Company and Aetna Health Inc. (“Aetna”).

2. The wide variation in the quality and cost-efficiency of care delivered by health care providers and professionals is well-documented. As a result, meaningful efforts to measure and publicly report the comparative quality of physician practice are needed to help consumers make informed choices of where and from whom to seek care. In addition, experience has shown that measuring and publicly reporting physicians’ performance based on quality and cost-efficiency supports provider efforts to improve their performance. The Attorney General believes that more and complete information provided to the consumer better educates all parties. However, because measuring physician performance is relatively new, complex and rapidly evolving, the need for transparency, accuracy and oversight in the process is great. In addition, when the sponsor is an insurer, the profit motive may affect its program of physician

measurement and/or reporting. This is a potential conflict of interest and therefore requires scrutiny, disclosure and oversight by appropriate authorities. When making important healthcare decisions, such as choosing a primary care physician or specialist, consumers are entitled to receive reliable and accurate information unclouded by potential conflicts of interest. The independence, integrity, and verifiable nature of the rating process are paramount. Aetna considers itself and seeks to be an industry leader in the area of health care transparency and consumer information.

### **THE ATTORNEY GENERAL'S INQUIRY**

3. The Office of the Attorney General (the "OAG") received information that Aetna was engaged in a physician performance measurement, reporting or tiering program. Specifically, Aetna has created a program to measure, report and/or tier physicians known as "Aetna Aexcel."<sup>1</sup> This network consists of specialists who meet standards of performance and efficiency, as determined by Aetna. According to Aetna's website, Aetna Aexcel is designed to "encourage members to select specialists who have demonstrated effectiveness in clinical performance and cost efficiency." Employers who have selected Aetna Aexcel may create financial incentives, such as reduced copayments or deductibles, to encourage their employees to use that network.<sup>2</sup> Because of this, consumers who select specialists outside Aetna Aexcel may pay more than consumers who select specialists within that network. As part of an industry-wide

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<sup>1</sup> This network consists of physicians practicing in any of twelve medical specialty areas, as follows: cardiology, cardiothoracic surgery, gastroenterology, general surgery, neurology, neurosurgery, obstetrics and gynecology, orthopedic surgery, ENT or otolaryngology, plastic surgery (where medically necessary), urology and vascular surgery. The Aetna Aexcel network of designated specialists is part of the Aetna Performance Network Option.

<sup>2</sup> On Aetna's website, on a page directed to consumers, Aetna states: "Your plan pays a higher benefit for Aexcel visits, which means you save money."

inquiry, the Attorney General examined whether programs such as Aetna Aexcel could potentially confuse or deceive consumers in violation of consumer protection laws.

4. Aetna has fully cooperated with this inquiry by providing documents and information to the OAG and by conferring with the OAG.

5. The Attorney General's investigation included a review of documents, meetings with representatives from Aetna, other insurers, consumer, labor and employer groups, medical societies and organizations, and experts in the field of measuring physician performance.

#### **FINDINGS OF THE ATTORNEY GENERAL'S INQUIRY**

6. The Attorney General finds that any initiatives to measure quality and cost-efficiency of physicians, such as Aetna Aexcel, have the potential to cause confusion if not conducted and communicated appropriately, and could result in a violation of law.

THEREFORE,

IT NOW APPEARS that Aetna and the OAG are willing to enter into this Agreement concerning Aetna's physician performance measurement, reporting or tiering program, without Aetna admitting the Attorney General's Findings, and that the Attorney General is willing to accept this Agreement pursuant to Executive Law §63(15) in lieu of commencing a statutory or other proceeding against Aetna pursuant to Executive Law §63(12).

#### **CORE PRINCIPLES: ACCURACY AND TRANSPARENCY OF INFORMATION, OVERSIGHT OF THE PROCESS, AND FAIRNESS IN COMPARISON OF PHYSICIANS**

7. The core principles of this settlement are *accuracy* and *transparency* of information, and *oversight* of the process. Terms and conditions of accuracy and transparency are contained herein as well as an oversight mechanism of an independent monitor which will

examine, and report on, compliance with the terms herein.

## **Accuracy/Transparency**

### **Performance Measurement**

8. Two categories of measurement may be included in the rating: “quality of performance” and “cost-efficiency.” In information for consumers and public reporting, measures of cost-efficiency and measures of quality of performance shall be calculated separately and disclosed as such. To the extent the individual scores for quality of performance and cost efficiency are combined for a total ranking, the proportion of each measure shall be clearly disclosed. For example, a company could maintain separate cost efficiency scores and quality of performance ratings to disclose to the consumer. In the event the company decides to combine the cost efficiency and quality of performance scores for a total combined score, the individual component scores, and their proportion of the total combined score, shall be clearly disclosed.

9. In evaluating physician quality and cost-efficiency, Aetna should seek to achieve the goals of safe, timely, effective, efficient, equitable and patient-centered care, to the extent possible. Aetna should seek to include patient experience as a measure of patient-centeredness. Aetna shall use measures to determine quality of performance that are based on nationally-recognized evidence-based and/or consensus-based clinical recommendations or guidelines. Where available, Aetna shall use measures endorsed by the National Quality Forum (“NQF”) or other entities whose work in the area of physician quality performance is generally accepted in the healthcare industry. Where NQF-endorsed measures are unavailable, AETNA shall use measures endorsed by the AQA and accreditors. Where NQF, AQA, or accreditors’ measures

are unavailable, or data to calculate the measures are unavailable to Aetna, Aetna shall use measures based on other bona fide nationally-recognized guidelines. The basis and data used, and its relative weight or relevance to the overall rating, shall be fully disclosed.

10. In light of the need for greater consistency in physician quality performance and cost-efficiency evaluations, Aetna agrees to support the development and use of standardized quality and cost-efficiency measures.

11. At least 45 days prior to implementation of a material change to Aetna's program, Aetna shall inform physicians of its intent to use and process for using measures or other criteria to determine quality performance, cost-efficiency, or placement in a performance network.

12. In evaluating physician cost-efficiency performance, Aetna shall use appropriate and comprehensive episode of care software and shall ensure that any appropriate risk adjustment occurs as described below. In measuring physician cost-efficiency, Aetna shall compare physicians within the same specialty within the appropriate geographical market. The basis and data used, and its relative weight or relevance to the overall rating, shall be fully disclosed.

13. The oversight mechanism provided for in this Agreement shall examine compliance with the provisions and measurements described herein.

#### **Accuracy in Sample Size**

14. Aetna shall describe the statistical basis for the number of patients for each disease state or specialty and use accurate, reliable and valid measurements of a physician's quality performance.

15. Aetna shall describe the statistical basis for the number of patient episodes of care

and use accurate, reliable and valid measurements of a physician's cost-efficiency performance.

16. The oversight mechanism provided for in this Agreement shall examine compliance with this section.

#### **Measurements Adjustments**

17. In determining a physician's performance for quality and cost-efficiency, Aetna shall use appropriate risk adjustment to account for the characteristics of the physician's patient population, such as case mix, severity of the patient's condition, co-morbidities, outlier episodes and other factors.

18. The oversight mechanism provided for in this Agreement shall examine compliance with this section.

#### **Attribution**

19. In deciding physician attribution for quality measurement, Aetna shall determine which physician or physicians should be held reasonably accountable for a patient's care and shall fully disclose the methodology used for such attribution.

20. The oversight mechanism provided for in this Agreement shall examine compliance with this section.

#### **Transparency in Rankings**

21. In describing its physician performance program and how physicians are selected for Aetna Aexcel, Aetna shall clearly indicate the measurements for each criteria and its relative weight in overall evaluation. In ratings for consumers' use, measures of cost-efficiency should be used in conjunction with measures of quality of performance. Aetna shall not conduct rankings based solely on cost-efficiency, but shall consider quality dimensions. Specifically,

Aetna shall disclose to what extent the rankings and selection process are based on cost-efficiency and on quality. To the extent that Aetna presents a combined score or rating using cost-efficiency and quality, Aetna shall disclose the specific measures for each category and their relative weight in determining a combined score.

22. Aetna shall disclose how the perspectives of consumers, consumer advocates, employers, labor, and/or physicians were incorporated in the development of the physician reporting program.

### **Transparency - Disclosure to Consumers**

23. For existing programs, not later than 30 days from the effective date of this Agreement, Aetna shall disclose to consumers: (1) where its physician performance ratings are found; (2) that physician performance ratings are only a guide to choosing a physician, that consumers should confer with their existing physicians before making a decision, and that such ratings have a risk of error and should not be the sole basis for selecting a doctor; (3) information explaining the physician rating system, including the basis upon which physician performance is measured, and the basis for determining that a physician is not currently rated due to insufficient data or a pending appeal; (4) any limitations of the data Aetna uses to measure physician performance; (5) how physicians are selected for inclusion or exclusion in Aetna Aexcel; (6) details on the factors and criteria used in Aetna's rating systems, specifically its quality performance measures, cost-efficiency measures and other methodologies as prescribed herein; and (7) how the consumer may register a complaint about Aetna Aexcel with Aetna and the oversight monitor. Aetna agrees to directly and prominently display this information on its website(s) and other appropriate locations in accordance with the standards and template when

provided by the oversight monitor described below. To assure compliance with items one through seven of this paragraph, Aetna shall apply for and obtain review by the oversight monitor described below.

24. For programs Aetna will be implementing in the future, at the time the program is made public, Aetna shall document that it has already completed or has applied to complete a review by the oversight monitor described below. Aetna will conspicuously disclose to consumers on its website(s) and other appropriate locations and formats information that describes its processes with regard to the above seven items and such other processes and procedures as are set forth in this Agreement, in accordance with the standards and requirements set forth by the oversight monitor described below.

#### **Transparency - Disclosure to Physicians**

25. For existing programs, no later than 30 days from the effective date of this Agreement, Aetna shall apply for and obtain review by the oversight monitor described below, to enable reporting of the detailed data and methodologies to physicians in an independent and easily-accessible manner, including measures and other criteria, that Aetna used to determine physician quality and cost-efficiency ratings and inclusion or exclusion in Aetna Aexcel. In addition, Aetna shall explain to physicians that they have the right to correct errors and seek review of data, quality and cost-efficiency performance ratings and inclusion or exclusion from Aetna Aexcel. Aetna shall also inform physicians they may submit any additional information, including that contained in medical charts, for consideration. Aetna shall also provide a reasonable, prompt, and transparent appeals process.

26. For programs Aetna will be implementing in the future, at the time the program is

made public, Aetna shall document that it has already completed or has applied to complete review by the oversight monitor described below.

27. At least 45 days before making available to consumers any new or revised quality or cost-efficiency evaluations or any new or revised inclusions or exclusions from Aetna Aexcel, Aetna shall provide physicians with notice of the proposed change; an explanation of and access to the data used for a particular physician; methodology and measures used to assess physicians, including attribution; and an explanation of the physician's right to make corrections and appeal. If a physician makes a timely appeal, Aetna shall make no change in the physician's quality and cost-efficiency rankings or designation until the appeal is completed. The oversight monitor shall have oversight and review of the physician appeals process.

#### **Use of Data**

28. Data collection is a critical part of physician performance measurement. In order to produce the most reliable and meaningful information, Aetna shall use the most current claims or other data to measure physician performance, consistent with the time period needed to attain adequate sample sizes and to comply with the requirements of this Agreement. Aetna shall use its best efforts to ensure that the data it relies upon is accurate, including a consideration of whether some medical record verification is appropriate and necessary.

29. As part of its reporting to the oversight monitor described below, within 3 months of this Agreement, Aetna shall provide the oversight monitor a plan to use aggregated (pooled) data, validated as appropriate, as a supplement to test its own claims data, within 6 months of this Agreement. The OAG may in its sole discretion grant an extension of time in this regard.

## **Oversight**

30. To assure compliance with the terms of this Agreement, and to facilitate the collection and presentation to consumers and physicians of information about Aetna's processes and methodologies used in its physician performance reporting program, Aetna agrees to the appointment of an oversight monitor to be known as the Ratings Examiner ("Rx"). The Rx shall be a nationally-recognized standard-setting organization, nominated and paid for by Aetna, and approved by the OAG. Aetna shall promptly complete and maintain in good standing a review of its physician performance measurement and reporting process by the Rx. The review conducted by the Rx shall encompass all of the elements described in this Agreement. Aetna also agrees to obtain review by the Rx of such additional national standardized review processes as may be necessary to assure compliance with this Agreement, including fully disclosing Aetna's procedures for consumer and physician grievance or appellate rights. Aetna agrees to make the results of these review processes prominently accessible in all locations that describe the physician performance reporting program. The Rx shall report and make recommendations to the OAG every six months regarding the details of the methodologies used and the extent to which they reflect national standards and compliance with this Agreement.

31. For the purposes of this Agreement, a "national standard setting organization" shall be national in scope, independent, and an Internal Revenue Code § 501(c)(3) organization, and shall have existing standards and collection processes that would enable the transparency and accuracy terms of this Agreement to be satisfied.

## **SUMMIT MEETINGS**

32. Aetna agrees to participate in any summit meetings the Attorney General

convenes for the purpose of working on issues related to evaluating physician performance.

### **CONSISTENCY WITH STATE LAW**

33. As applicable, this Agreement shall be interpreted consistently with §4406-(d)(4) of the Public Health Law, § 4803 of the Insurance Law and any other New York State law or regulation.

### **SUPPORT FOR CONSUMER EDUCATION PROGRAMS**

34. Aetna shall pay a sum up to \$100,000 to a nonprofit 501(c)(3) organization, nominated by Aetna and approved by the OAG, to facilitate consumers' meaningful participation in medical decisions. These funds would be used by the recipient organization to improve consumer understanding of the purpose and impact of physician performance measurement, reporting and tiering programs. The multi-stakeholder process shall include individuals representing the perspectives of consumers, insurers, labor, physicians and employers. If such an organization or entity cannot reasonably be found, Aetna shall make the payment to the OAG. Aetna agrees to make this payment within 30 days from the effective date of this Agreement. The OAG shall have sole discretion to extend this deadline.

### **ATTORNEY GENERAL'S AUTHORITY**

35. Nothing in this Agreement shall in any way limit the Attorney General's ability to investigate or take other action with respect to any non-compliance at any time by Aetna with respect to this Agreement. The parties hereby agree that this is an evolving field and as new technology and information becomes available, the parties may wish to refine this Agreement by mutual agreement in a signed writing.

## **VALID GROUNDS AND WAIVER**

36. Aetna hereby voluntarily accepts the terms and conditions of this Agreement and waives any right to challenge it in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules or in any other action or proceeding.

## **CORRESPONDENCE AND PAYMENT**

37. All correspondence and payments Aetna submits to the Attorney General pursuant to this Agreement shall be sent to the attention of:

Henry S. Weintraub, Esq.  
Assistant Attorney General  
Health Care Bureau  
120 Broadway, 25<sup>th</sup> Floor  
New York, N.Y. 10271

Any checks issued to the OAG pursuant to this Agreement shall be made out to "State of New York Department of Law."

## **SUCCESSORS**

38. This Agreement, including, but not limited to, all obligations imposed on or undertaken by Aetna herein, will be binding upon and enforceable against any subsequent owner or operator (whether by merger, transfer of control, contractual arrangements, or other means) of all or any substantial portion of Aetna.

## **PRIVATE RIGHT UNAFFECTED**

39. Nothing herein shall be construed to deprive any consumer or other person or entity of any private right under the law.

## **MISCELLANEOUS PROVISION**

40. It is further understood and agreed that the acceptance of this Agreement by the

Attorney General shall not be deemed or construed as an approval by the Attorney General of any of the activities of Aetna, its successors, agents or assigns, and none of them shall make any representations to the contrary.

**EFFECT OF BREACH OF AGREEMENT**

41. Pursuant to the terms of Executive Law § 63(15), in the event that this Agreement is violated in a relevant and material respect, evidence of such violation shall be prima facie proof of a violation of General Business Law § 349 in any civil action or proceeding thereafter commenced by the Attorney General.

**EFFECTIVE DATE**

42. This Agreement shall be effective upon the date of the last signature to the Agreement, which may be executed in common parts.

IN WITNESS THEREOF, the undersigned subscribe their names:

Dated: November 13, 2007

**AETNA LIFE INSURANCE COMPANY  
AND AETNA HEALTH INC.**

By:   
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**Troyen A. Brennan, M.D.**  
**Chief Medical Officer**

**ATTORNEY GENERAL OF  
THE STATE OF NEW YORK**  
  
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**ANDREW M. CUOMO**