

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of

EXCELLUS HEALTH PLAN, INC.

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

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.

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.

THE ATTORNEY GENERAL'S INQUIRY

3. The Office of the Attorney General (the "OAG") received information that insurers were engaged in physician performance measurement, reporting or tiering programs directed to consumers. Excellus Health Plan, Inc. ("Excellus") does not currently utilize such a program but may, at some point in the future, consider utilizing a physician tiered network program for consumers such as the program known as "Blue Precision" (a physician tiering program utilized by other Blue Cross Blue Shield Association plans unaffiliated with Excellus). This network would consist of physicians who met standards of performance and cost-efficiency, as determined by Excellus. As part of an industry-wide inquiry, the Attorney General examined whether programs such as "Blue Precision," as currently designed, could potentially confuse or deceive consumers in violation of consumer protection laws.

4. The Attorney General's investigation included a review of documents, meetings with representatives from 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

5. The Attorney General finds that any initiatives to measure quality and cost-efficiency of physicians, such as "Blue Precision" as currently designed, 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 Excellus and the OAG are willing to enter into this Agreement concerning Excellus' potential use of physician performance measurement, reporting or tiering programs (as defined herein) for use by consumers.

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

6. 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

7. 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.

8. In evaluating physician quality and cost-efficiency, Excellus will seek to achieve the goals of safe, timely, effective, efficient, equitable and patient-centered care, to the extent possible. Excellus will also seek to include patient experience as a measure of patient-centeredness. Excellus 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, Excellus 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, Excellus shall use measures endorsed by the Ambulatory Care Quality Alliance (“AQA”) and accreditors. Where NQF, AQA, or accreditors’ measures are unavailable, or data to calculate the measures are unavailable to Excellus, Excellus shall use measures based on other *bona fide* nationally-recognized guidelines, expert-based physician consensus quality standards, or leading objective clinical evidence and scholarship. The basis and data used, and its relative weight or relevance to the overall rating, shall be fully disclosed.

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

10. At least 45 days prior to implementation of a material change to Excellus’ Blue Precision program, or any other program covered by this Agreement (see ¶33, *infra*), Excellus 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.

11. In evaluating physician cost-efficiency performance, Excellus 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, Excellus 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.

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

Accuracy in Sample Size

13. Excellus 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.

14. Excellus 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.

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

Measurements Adjustments

16. In determining a physician's performance for quality and cost-efficiency, Excellus 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.

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

Attribution

18. In deciding physician attribution for quality measurement, Excellus 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.

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

Transparency in Ratings

20. In describing its physician performance program for consumers and how physicians are selected for the Blue Precision program or any other program covered by this Agreement, Excellus 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. Excellus shall not conduct ratings based solely on cost-efficiency, but shall consider quality dimensions. Specifically, Excellus shall disclose to what extent the ratings and selection process are based on cost-efficiency and on quality. To the extent that Excellus presents a combined score or rating using cost-efficiency and quality, Excellus shall disclose the specific measures for each category and their relative weight in determining a combined score.

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

Transparency - Disclosure to Consumers

22. Before launching Blue Precision or any other covered program, at the time the program is made public, Excellus 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 Excellus uses to measure physician performance; (5) how physicians are selected for inclusion or exclusion in any program subject to this Agreement; (6) details on the factors and criteria used in Excellus' 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 any program subject to this Agreement with Excellus and the oversight monitor. Excellus 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, Excellus shall apply for and obtain review by the oversight monitor described below.

23. Before launching Blue Precision or any other covered program, at the time the program is made public, Excellus shall document that it has already completed or has applied to complete a review by the oversight monitor described below. Excellus 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

24. At least 30 days prior to the adoption of Blue Precision or any other covered program subject to this Agreement, Excellus 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 Excellus used to determine physician quality and cost-efficiency ratings and inclusion or exclusion in the covered program. In addition, Excellus 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 the covered program. Excellus shall also inform physicians they may submit any additional information, including that contained in medical charts, for consideration. Excellus shall also provide a reasonable, prompt, and transparent appeals process.

25. For programs covered by this Agreement that Excellus will be implementing in the future, at the time the program is made public, Excellus shall document that it has already completed or has applied to complete review by the oversight monitor described below.

26. 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 the Blue Precision program or any other program covered by this Agreement, Excellus 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, Excellus 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

27. Data collection is a critical part of physician performance measurement. In order to produce the most reliable and meaningful information, Excellus shall use the most current complete 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. Excellus 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.

28. As part of its reporting to the oversight monitor described below, within three months prior to implementing Blue Precision or any other covered program, Excellus shall provide the oversight monitor a plan to use aggregated (pooled) data, validated as appropriate, as a supplement to test its own claims data, providing for such aggregation within six months after implementing Blue Precision or any other covered program. The OAG may in its sole discretion grant an extension of time in this regard.

Oversight

29. To assure compliance with the terms of this Agreement, and to facilitate the collection and presentation to consumers and physicians of information about Excellus' processes and methodologies used in its physician performance reporting program, Excellus

agrees that prior to its implementation of Blue Precision or any other covered program, an oversight monitor to be known as the Ratings Examiner (“Rx”) shall be appointed. The Rx shall be a nationally-recognized standard-setting organization, nominated and paid for by Excellus, and approved by the OAG. Excellus 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. Excellus 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 Excellus’ procedures for consumer and physician grievance or appellate rights. Excellus 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.

30. 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

31. Excellus 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

32. 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.

SCOPE OF AGREEMENT

33. The provisions of this Agreement shall apply to the Blue Precision program and any other similar program which tiers, ranks or rates physicians for consumers based on criteria of cost efficiency and/or quality (“covered program”). The Agreement shall not apply to the following programs, tools or initiatives: (1) hospital cost comparison or “shopping” tools which provide consumers with a range of estimated fees for services at particular facilities; (2) customer or patient survey or satisfaction tools in which consumers can rate and evaluate provider experiences. Provided, however, that the use of any such survey shall include a conspicuous notice to members explaining the survey and that such ratings or evaluations are only based on previous customer experiences, are subjective in nature, should not be the sole basis for selecting a physician, and are not clinical in nature, based on medical data, or a measure of clinical performance; (3) any program between Excellus and a physician whereby Excellus provides a financial reward, incentive or payment to a physician for attaining a certain quality standard, such as a “pay for performance” program; or (4) any program which is intended to designate in member publications those physicians who have attained a certain accomplishment or who participate in certain programs, including, but not limited to, certain specialty board participation or a designation of physicians who utilize electronic medical records.

ATTORNEY GENERAL’S AUTHORITY

34. 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 Excellus 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.

CORRESPONDENCE

35. All correspondence Excellus submits to the Attorney General pursuant to this Agreement shall be sent to the attention of:

Brant Campbell, Esq.
Assistant Attorney General
Health Care Bureau
120 Broadway, 25th Floor
New York, N.Y. 10271

SUCCESSORS

36. This Agreement, including, but not limited to, all obligations imposed on or undertaken by Excellus 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 Excellus.

PRIVATE RIGHT UNAFFECTED

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

MISCELLANEOUS PROVISION

38. 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 Excellus, its successors, agents or assigns, and none of them shall make any representations to the contrary.

EFFECTIVE DATE

39. 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: June , 2008

EXCELLUS HEALTH PLAN, INC.

By:_____

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

ANDREW M. CUOMO