

ATTORNEY GENERAL OF THE STATE OF NEW YORK

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

1. Pursuant to the provisions of Article 22-A of the General Business Law, 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 make such efforts more meaningful for consumers, pairing that information with estimates of service cost, information on clinical training and other background data, and qualitative evaluations of consumers’ experiences, 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; and the public dissemination of physician performance could improve and enhance the lives of patients. 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 insurer's 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 some health plans were engaged in a physician performance measurement, reporting or tiering program. Separate from the inquiry, Empire Blue Cross Blue Shield ("Empire") has been in the process of planning to implement "Blue Precision", a program to measure, report and/or tier specifically targeted New York specialty physicians. This network would consist of specialists who meet standards of performance and cost-efficiency, as determined by Empire. As a means to establish a "best practices" standard of physician performance measurements, the Attorney General and Empire have cooperated in developing guidelines to ensure adequate and appropriate transparency and quality measurements.

4. The Attorney General's investigation included a review of documents, meetings with representatives from insurers other than Empire, consumer, labor and employer groups, medical societies and organizations, and experts in the field of measuring physician performance. After inception of the investigation, the OAG solicited Empire's input and position on this issue and the two parties worked jointly in developing this agreement.

FINDINGS OF THE ATTORNEY GENERAL'S INQUIRY

5. The Attorney General finds that any initiatives to measure quality and cost-efficiency of physicians 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 Empire and the OAG are willing to enter into this Agreement concerning the potential use of physician tiered network performance measurements by Empire.

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, Empire seeks to achieve the goals of safe, timely, effective, efficient, equitable and patient-centered care, to the extent possible. Empire seeks to include patient experience as a measure of patient-centeredness. Empire 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 and if applicable, Empire 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, Empire shall use measures endorsed by the Ambulatory Care Quality Alliance (“AQA”) or other qualified accreditors. Where NQF, AQA, or other accreditors’ measures are unavailable, or data to calculate the measures are unavailable to Empire, it shall use measures based on other nationally recognized guidelines or measures identified or endorsed by the respective national or statewide medical specialty society or association. 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, Empire 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 Empire’s Blue

Precision program, Empire shall inform affected 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, Empire 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, Empire shall compare physicians within the same or overlapping specialties 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. Empire 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. Empire 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 cost-efficiency, Empire 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, Empire 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 Rankings

20. In describing its physician performance program and how physicians are selected for the tiered network, Empire 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. As national standards for measuring quality performance are developed, Empire shall use such standards together with measures of cost efficiency in its measurements or rankings and it shall not conduct such rankings based solely on cost efficiency. Specifically, Empire shall disclose to what extent the rankings and selection process are based on cost-efficiency and on quality. To the extent that Empire presents a combined score or rating using cost-efficiency and quality, Empire shall disclose the specific measures for each category and their relative weight in determining a

combined score.

21. Empire 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

22. Prior to implementing its Blue Precision program, Empire 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 Empire uses to measure physician performance; (5) how physicians are selected for inclusion or exclusion in the Empire's tiered network; (6) details on the factors and criteria used in Empire'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 with Empire about the Blue Precision program and the oversight monitor. Empire 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.

23. Prior to the implementation of its Blue Precision program, Empire shall document that it has already completed or has applied to complete a review by the oversight monitor

described below. Empire 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 Physician

24. Empire shall notify physicians that they have the right, upon written request, to correct errors and seek review of data, quality and cost-efficiency performance ratings and inclusion or exclusion from the Empire tiered network. Empire shall also inform physicians they may submit any additional information in writing, including that contained in medical charts, for consideration. Empire shall also provide a reasonable, prompt, and transparent appeals process.

25. At least 45 days before making available to consumers any new or materially revised quality or cost-efficiency evaluations or any new or materially revised inclusions or exclusions from the Empire Blue Precision Network, Empire 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, in writing, make corrections and appeal. If a physician makes a timely appeal, Empire 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

26. Data collection is a critical part of physician performance measurement. In order

to produce the most reliable and meaningful information, to the extent practicable, Empire 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. Empire 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. At least three months prior to the use of Blue Precision (or other physician measurement tool substantially similar to Blue Precision) in New York, Empire shall submit to the oversight monitor prescribed in paragraph 27 below, a plan for the aggregation or pooling of data, validated as appropriate, as a supplement to test its own data. Within six months after Empire begins to use Blue Precision in New York, Empire shall use such aggregated data as a supplement to test its own data. Provided, however, if the aggregation of such data is not available, is not scientifically credible, or it is not feasible to use such aggregated data, the OAG shall extend the six month period until such time as credible aggregated data is available and the use is feasible.

Oversight

27. To assure compliance with the terms of this Agreement, and to facilitate the collection and presentation to consumers and physicians of information about Empire's processes and methodologies used in its Blue Precision program, Empire agrees to, prior to the use of Blue Precision in New York, 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 Empire, and approved by the OAG. Empire 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. Provided however, the OAG shall ensure that the Rx shall promptly and expeditiously complete its review of the performance measurement and reporting process. Empire 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 Empire's procedures for consumer and physician grievance or appellate rights. Empire 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. Three years after the appointment of the Rx by Empire, both the OAG and Empire shall meet and discuss whether the Rx continues to be necessary and whether the Rx process needs to be revised or discontinued. Such discussions shall be in good faith and shall be based on the performance by Empire and the Rx during such three year term. If there is a rational basis for discontinuing the Rx with respect to this agreement, and both parties agree to such discontinuance, then the provisions of this paragraph shall no longer apply to this agreement.

28. 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

29. Empire 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

30. 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.

APPLICABILITY

31. The provisions of this agreement shall apply exclusively to Blue Precision or any other substantially similar clinical physician performance measurement, reporting and physician network tiering program. The following programs, tools or initiatives shall be exempt from the requirements of this Agreement: 1) hospital or provider cost comparison or “shopping” tools which provide consumers with a range of estimated fees for services (e.g. the Anthem Care Comparison Tool). 2) Customer or patient survey or satisfaction tools in which consumers can rate and evaluate provider experiences. Provided, however, the use of any such customer survey or satisfaction tool shall include a conspicuous notice to members explaining the tool 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.

ATTORNEY GENERAL’S AUTHORITY

32. 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 Empire with respect to this Agreement. The parties hereby agree that this is an evolving field and as new technology and information become available, the parties may wish to refine this Agreement by

mutual agreement in a signed writing.

CORRESPONDENCE

33. All correspondence 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, 25th Floor
New York, N.Y. 10271

All correspondence to Empire pursuant to the Agreement shall be sent to the attention of:

Mark Wagar
President and General Manager
Empire Blue Cross and Blue Shield
1 Liberty Plaza
New York, N.Y. 10006

SUCCESSORS

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

PRIVATE RIGHT UNAFFECTED

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

MISCELLANEOUS PROVISIONS

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

37. The parties understand that the Attorney General intends to pursue legislative, regulatory, and/or other solutions to address the subject matter of this agreement in a manner that is generally applicable to the industry and/or other agreements specifically applicable to other health plans. In the event such effort results in the establishment of a law or regulation, or an agreement or settlement applicable to another health plan that is less restrictive in any way than any provision of this Agreement, then the parties agree that such less restrictive provision shall become applicable to Empire and immediately supersede the more restrictive provision of this Agreement.

EFFECT OF BREACH OF AGREEMENT

38. Both parties shall be bound by the terms and conditions of this agreement. Pursuant to New York Law, 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.

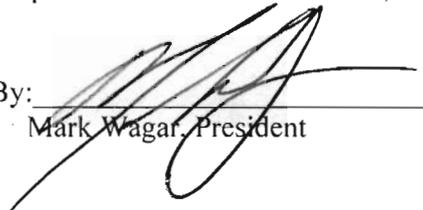
EFFECTIVE DATE

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:

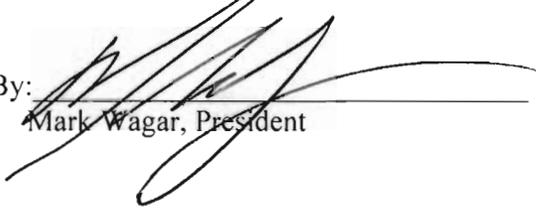
Dated: November , 2007

Empire HealthChoice Assurance, Inc.

By: 
Mark Wagar, President

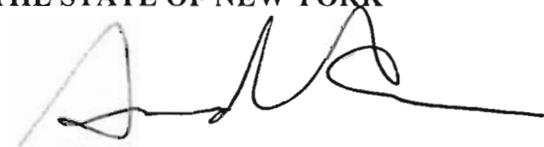
Dated: November , 2007

Empire HealthChoice HMO, Inc.

By: 
Mark Wagar, President

Dated: November , 2007

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



ANDREW M. CUOMO

WITNESS:



**AMERICAN MEDICAL
ASSOCIATION**



CONSUMERS UNION