**STATE OF OREGON**
**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**
**INSURANCE DIVISION**

Before the Insurance Administrator
Department of Consumer and Business Services

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| In the Matter of Rulemaking to Adopt<br>OAR 836-200-0300, 836-200-0305, 836-200-0310<br>and 836-200-0315 Relating to Certified Retainer<br>Medical Practices Application, Renewal<br>and Disclosure Requirements | )<br>)<br>)<br>)<br>)<br>) | SUMMARY OF TESTIMONY<br>AND HEARING OFFICER'S<br>RECOMMENDATION |

## Recital of Rulemaking Procedures Followed

On September 15, 2011, the Director filed with the Secretary of State a Notice of Proposed Rulemaking Hearing (Notice), giving notice that the Director of the Department of Consumer and Business Services (DCBS) proposed to adopt rules, OAR 836-200-0300, 836-200-0305, 836-200-0310 and 836-200-0315. The Notice announced that a rulemaking hearing would be held on October 25, 2011, and that interested persons could submit comment through November 1, 2011. The notice was filed with a Statement, consisting of a Statement of Statutory Authority, Need for Action, Advisory Committee, Principal Documents Relied Upon and Fiscal and Economic Impact. A copy of the Notice was published in the Secretary of State's Oregon Bulletin of October 1, 2011. Copies of the Notice and Statement and the proposed rulemaking were delivered or mailed to all health insurers, to persons on the DCBS Insurance Division mailing list established under the Administrative Procedures Act, to medical provider organizations, to legislators who are required by law to be notified, and to the press and to other interested persons. Copies were also made available to interested persons through the Division's e-notify system and were posted on the Division's website.

The Division presented the draft proposed rules to an advisory committee that met on July 25 and September 8, 2011.

This rulemaking is necessary to implement the requirements of Senate Bill 86, which became effective June 23, 2011. Senate Bill 86 exempts from the Insurance Code a primary care doctor, physician assistant, nurse, naturopath, acupuncturist, chiropractor or other medical professional who is operating a retainer medical practice that is certified by the Department of Consumer and Business Services (DCBS). The rules establish the information that must be submitted when applying for initial certification and renewal. The rules also clarify the disclosure requirements and add an additional disclosure requirement to provide patients with the Insurance Division's consumer advocacy help line.

The requirements for certification are minimal when compared to the requirements to obtain a certificate of authority as an insurer. Under the final rules the retainer medical practice must comply with all the statutory standards for certification and submit an application to the department that includes:

- An attestation that the retainer medical practice complies with the statutory requirements and that the information provided in the application and all supplemental and additional information is true and complete, and the applicant will submit to the jurisdiction of the courts of the State of Oregon.

- Information to establish that the applicant is financially responsible and that the applicant has the necessary experience and expertise to operate a retainer medical practice.
- A statement of whether any license or registration of the applicant or any person with control of the applicant has ever been refused, revoked, or suspended in this or any other state and whether the applicant or any person with control of the applicant has been the subject of an enforcement action taken by a licensing or registration agency.
- A copy of the retainer medical agreement the applicant will use.
- The names and Oregon license numbers of all providers providing services through the medical retainer practice.
- The physical and mailing addresses, telephone numbers, facsimile numbers, email addresses, and website addresses for each location providing retainer medical services.
- The name and address for service of process for the retainer medical practice.
- The name, mailing address, telephone number, signature, and email address of the person completing the application on behalf of the applicant.
- All names, including assumed business names, under which the retainer medical practice will operate, market, or otherwise does business.

The advisory committee discussed at length the kind of material necessary to demonstrate that an applicant is financially responsible. The advisory committee had a number of concerns with the requirement as originally proposed. First, the committee was concerned that the requirement was so onerous as to discourage providers from operating a retainer medical practice. Second, there was a great deal of concern about the requirement for a retainer medical practice to submit information that would become a public record if it contained sensitive patient or financial information or proprietary information. Unlike financial information submitted by an insurer all or some of which arguably may be exempt from disclosure, there is no clear exemption for any materials submitted by a retainer medical practice. The committee was also concerned that a new provider would not be able to meet the minimum requirements – financial or business experience – to set up a retainer practice. The committee also felt that the methods allowed to demonstrate financial responsibility needed to include a way for these new practices to meet this certification requirement.

On the other hand, Division staff were concerned that if the Division had to certify that a retainer medical practice was financially responsible, staff needed some evidence of that financial responsibility. Consumer advocates were understandably concerned that patients who prepaid for services would receive the services. An initial compromise allowed the applicant to choose the evidence to be submitted from a list of acceptable forms of assurance. So under the proposed rules, the applicant needed to provide a statement of whether the applicant has ever filed for bankruptcy during the 25-year period prior to the application or renewal and then the applicant would be allowed to select two of the following to submit:

- An audited annual financial statement. If the applicant is an entity that is newly formed for the purpose of transacting business as a retainer medical practice, year-to-date unaudited financial statement sufficient to prove the applicant is solvent and the applicant's business plan.
- A statement establishing that the applicant has the requisite business experience and expertise to operate a retainer medical practice.
- Proof that the applicant has established a segregated trust account, naming retainer medical practice patients as beneficiaries, with sufficient funds to reimburse the patients

of the retainer medical practice for retainer medical fees paid in advance in the event the applicant becomes insolvent or becomes unable to provide services for which such patients have paid.

- Proof that the applicant has an insurance contract that provides indemnification or reimbursement for the services promised under the retainer medical agreement in the event of default of the organization.
- An opinion, attestation or other signed document, feasibility study or statement from a qualified health actuary who is a member in good standing of the American Academy of Actuaries indicating that the periodic fee the retainer medical practice intends to charge is sufficient for the risk assumed by the retainer medical practice.
- Proof that the retainer medical agreement that will be used for the 12-month certification period obligates the retainer medical practice to reimburse retainer medical patients for retainer medical fees paid in advance if the retainer medical practice becomes insolvent or becomes unable to provide services promised under the retainer medical agreement.

These requirements have been further changed in the final rule to reflect public comments received and additional internal discussions with financial regulation staff.

The final rules require a retainer medical practice to renew the certification annually on February 1 and include a provision that assures that the practice would not have an initial certification period of less than one year, although the initial period may be more than one year.

The original draft of the rules proposed a separate reporting requirement to obtain information about the retainer medical practices. The reporting requirements were quite extensive and included the total number of retainer medical patients under agreement with the retainer medical practice, the average length of time a retainer medical patient remained under agreement with the retainer medical practice, the total number of retainer medical patients that voluntarily terminated the retainer medical agreement and the reasons for the terminations, the total number of patients with whom the retainer medical practice terminated an agreement, the reasons for the terminations, and the number of patients terminated for each stated reason, the total number of patients declined by the retainer medical practice, the reasons for the declinations, and the number of patients declined for each stated declination, the total amount of fees collected by the retainer medical practice, the methodology used to calculate the fee or fees described in the schedule of fees, the total number of retainer medical patient visits, the Current Procedural Terminology (CPT) code for the five most prevalent services provided to retainer medical patients, the average number of days between a request for an appointment by a retainer medical patient and the appointment, the number of complaints received by the retainer medical practice by retainer medical patients, the five most prevalent complaints including the number of each received and any other information required by the director.

At the first advisory committee meeting, the providers stated that they either did not track this information at all in the way described, or that it would be extremely expensive to track. Some members of the committee disputed the Division’s statutory authority to request the information. The Division revised the rules for the next meeting, deleting the reporting requirement as a separate requirement and simply asking for some of the information as part of the renewal application.

The proposed rules requested information as part of the renewal application. This information included the number of patients under agreement with the practice, the number of patients that voluntarily terminated their agreement, the number terminated by the practice and the number of patients declined by the retainer medical practice. If provided by the patients, the Division asked that the practice include the reasons for the patients' terminations. The Division staff believed that this information was the minimum needed to evaluate whether a practice continues to meet the requirements for certification related to patient load and scope of services provided. Although the members of the advisory committee were not enthusiastic about including these requirements on the renewal application, most seemed to understand the need for providing at least some of the information. However, some members continued to urge the Division to eliminate the requirement to voluntarily report information about why patients left the practice.

The proposed rules and the fiscal impact were reviewed by members of the external rulemaking advisory committee that included providers as well as insurers and consumers. The only suggestion from one member of the external advisory committee was to mention that if the reporting/renewal requirements required a change in the electronic health record system of the practice, there could be an additional initial impact of up to $5,000. Most members of the advisory committee did not think this would be necessary.

## Testimony Received and Hearing Officer Recommendation

The hearing was held as scheduled. Jeannette Holman, Senior Policy Analyst, was the hearing officer. A number of persons attended the hearing and two people testified at the hearing. In addition, the Division received a number of written comments for this rulemaking.

Generally, all comments except those submitted by Mr. Stephen Petruzelli addressed similar areas of concern. First, the comments were concerned with the breadth of the rules, voicing concern that the rules were beyond the scope of oversight envisioned by the Legislature when it enacted Senate Bill 86. Several of the comments raised concern about requiring an attestation about criminal charges versus convictions and the lack of any time limitation for looking at these charges. There was almost unanimous opposition to inclusion of "voluntary reporting requirements" to obtain information upon renewal of a certification about why patients left a retainer medical practice. Another major area of concern was the materials required to demonstrate financial responsibility. Most suggested that these requirements would deter any provider from operating this kind of practice, a result contrary to the goal of the legislation. The concerns about financial responsibility included concerns about the cost to provide the necessary documentation, the availability of some of the options and the potential that the materials provided would be considered public records. A final area mentioned in several comments was related to the submissions required to demonstrate that the applicant has the necessary experience and expertise to operate a retainer medical practice.

In response to the comments, the proposed rules were revised to address most of the concerns raised. The notes following the specific comments as summarized below indicate how the final rules address the comments or why the department does not make any changes in response.

<u>At Public Hearing on 10/25/11:</u>

1. Gwen Dayton, General Counsel and Vice President, Health Policy, Oregon Medical Association testified at the hearing and provided written comments. Generally, her testimony at the public hearing summarized her written comments. Our response to her comments follows the summary of her written comments.

2. Paul Sonnenshein – urges that we consider the comments by John Marquis (see written comments below) specifically those distinctions between the types of retainer practices and which should be subject to the certification requirement and which are not (i.e., those that provide for access rather than promising services).

Written Comments:

1. John Marquis, Co-founder of American Academy of Private Physicians (national concierge physician organization):
    a. Generally discusses the two forms or models of concierge medicine – "fee for non-covered services" and the "fee for care" or "direct practice" model. Direct practice is the model most often confused with insurance; the "fee for non-covered services" does not embody any insurance elements. Would have clearly excluded these from SB 86.

    Agency Response: *Unfortunately, a provision excluding the "fee for non-covered services" is beyond the scope of the Insurance Division's authority for this rulemaking. However, we believe that the definition of retainer medical practice when combined with other provisions of Senate Bill 86, such as "primary care" would operate to exclude those instances where a fee is charged for special access to the provider rather than for primary care services.*

    b. Specific comments on the rules:
        i. Suggest that rules recognize the difference between the two models and provide lesser or no regulation of the "fee for non-covered services" type of practice.

        Agency Response: *See response above.*

        ii. Concern that the language of the rules requiring that the applicant is financially responsible and has the necessary business experience or expertise to operate practice will prevent a new primary care physician emerging from a residency program from starting a retainer practice. Mr. Marquis asks for clarification of the "two or more" of the items mentioned to show financial responsibility – what it means and who gets to choose and discusses the options for showing sufficient financial or business experience. If applicants get to choose the options to provide, no one will provide a trust account, an actuarial opinion or an insurance policy as they are expensive, not available at all or extremely complicated.

        Agency Response: *The requirements for demonstrating financial responsibility have been substantially rewritten in the final rule to address Mr. Marquis's request for clarification. The final rules simply require a statement regarding whether the applicant has filed for bankruptcy within the past 25 years, a business plan that discusses how the applicant will assure services promised under a retainer medical agreement will be provided and a copy of the agreement that includes provisions obligating the practice to provide the services promised.*

        iii. Clarify the renewal requirements – it is not clear what materials submitted as part of the original application must be resubmitted each year. If all of original materials are required, it may be a prohibitive task for the practices.

*Agency Response: The renewal requirements have been rewritten to make it clear that only information that has changed since the original application need be submitted and the voluntary information reporting is eliminated.*

2. Gwen Dayton, General Counsel and Vice President, Health Policy, Oregon Medical Association:
   a. Generally, these rules pose unnecessary barriers to the establishment or continuation of a retainer practice. The rules are too punitive for type of practice that has not been the subject of patient complains, the rules lack clarity and are confusing, and in some instances there is overreaching by the agency that needs to be corrected. Ms. Dayton also notes a number of technical corrections needed.

   *Agency Response: The final rules are rewritten to simplify and clarify the requirements. The technical corrections noted by Ms. Dayton have been corrected where the pertinent sections remain.*

   b. Attestations: The requirement to attest that neither the applicant nor any person who controls the applicant or provides services for the applicant has been charged with a felony or misdemeanor involving dishonesty. At the least, a conviction should be required, and a time limitation so that issues in the distant past do not derail an application. The Division should also consider not making this an attestation but rather ask the applicant to disclose these instances and allow the Division the discretion to certify depending on the time, nature and severity of the conviction.

   *Agency Response: The language related to criminal charges has been removed from the rule. The biographical affidavit requires this but only for the director. The affidavit only requests information on convictions and does not result in an automatic denial. The applicant is allowed to elaborate as to the conviction which would afford an opportunity to disclose the nature of the conviction and when it occurred.*

   c. Financial Responsibility: Section dealing with financial responsibility (OAR 836-200-0305(1) (c) (B)) confusing and goes too far. Clarify that provider gets to choose two of the options and must submit those two. Also lists many options that are not feasible (insurance policy, audited financial statement is proprietary). This section assumes retainer practices are risky and they are not.

   *Agency Response: The requirements for demonstrating financial responsibility have been substantially rewritten in the final rule to address comments received. The approach in the proposed rules to allow the applicant to select from a number of options has been changed and now simply require a statement regarding bankruptcy within the past 25 years, a business plan that discusses how the applicant will assure services promised under a retainer medical agreement will be provided and a copy of the agreement that includes provisions obligating the practice to provide the services promised. The final rules provide more opportunity for each applicant to demonstrate financial responsibility through a business plan in a way that meets that applicant's particular needs.*

   d. Necessary Experience and Expertise: Requirement that applicant must provide the listed information to show the applicant has the necessary expertise and business experience to operate a retainer practice. The language "at a minimum" implies there is other information that must be provided but this is not clear and if a requirement for information is not included in the rule, OMA does not believe the Division can request the information. Also, this appears duplicative of one of the options under paragraph (B).

*Agency Response: The applicant is now able to demonstrate necessary experience and expertise in a number of ways, including experience in other jurisdictions, training or similar businesses. The rule specifies that the experience need not be specific to a retainer medical practice (e.g., experience operating a regular medical practice would count).*

e. Fees: The requirement that the provider submit a schedule of fees is unacceptable, as this information is proprietary. Even if this could be argued that the information is not subject to the public records law, providers will simply back away from retainer practices rather than supply this information.

*Agency Response: The requirement to submit fees or fees schedules is eliminated. The only requirement related to fees is a disclosure requirement that the retainer medical practice disclose to the patients what services are included for the fee charged.*

f. Renewal: The provision related to renewal is too broad and overreaching. It appears to give the director unlimited authority to ask for whatever information the director may want and require it in an unreasonable timeframe. The section needs clarification as to what exactly must be submitted on renewal and whether all of the information required for the original application must be submitted every year on renewal. OMA believes the reporting of patient termination, requested on renewal is outside the scope of the statute. The comments point out that a previous iteration of the rules simply requested this information as an annual reporting requirement, clearly outside the scope of the legislation; moving this to the renewal application does not cure that defect. Some practices may find it difficult to track the information required by this reporting/renewal requirement.

*Agency Response: The renewal requirements have been rewritten to make it clear that only information that has changed since the original application need be submitted and the voluntary information reporting is eliminated.*

3. Erika Bliss, MD, President and CEO, Qliance Medical Management Inc.: Supports the concept of a trust account, but suggests that an exemption is in order when the practice operation presents a minimal consumer risk. In Washington, a demonstration of financial responsibility is not required if the practice charges on a monthly fee basis and if at most one month's fee is collected in advance. Also points out that for a small practice, an insurance contract or an actuarial statement would be beyond the ability of a small practice to obtain. Dr. Bliss also points out that a practice just converting to a retainer practice model may not be able to demonstrate the adequate business experience. As an alternative, the Division should consider exempting a practice from the financial responsibility demonstration if the fee is collected in arrears.

*<u>Agency Response:</u> The requirements for demonstrating financial responsibility have been substantially rewritten in the final rule. The final rules simply require a statement regarding bankruptcy within the past 25 years, a business plan that discusses how the applicant will assure services promised under a retainer medical agreement will be provided and a copy of the agreement that includes provisions obligating the practice to provide the services promised. The business plan could include a trust account if appropriate, or other demonstration depending on the applicant's situation.*

4. Lester M. Baskin, MD, President and CEO of Baskin Clinic: Rules as proposed act to dissuade physicians from starting retainer practices such as the Baskin Clinic. Dr. Baskin is concerned with the criminal history requirement (excluding applicants who have been accused or charged with a felony or misdemeanor involving dishonesty) and implies that this should require at least a conviction. The elements required to demonstrate financial responsibility are onerous and exceed what is needed to provide adequate consumer protection. When the financial risk to the consumer is at most one month of fees ($50 to $150 in his practice), these requirements go too far. Also points out that for some new practitioners, it would be difficult to provide evidence of requisite business experience and expertise.

   *<u>Agency Response:</u> The language related to criminal charges has been removed from the rule. The biographical affidavit requires this but only for the director. The affidavit only requests information on convictions and does not result in an automatic denial. The applicant is allowed to elaborate as to the conviction which would afford an opportunity to disclose the nature of the conviction and when it occurred.*

   *The requirements for demonstrating financial responsibility have been substantially rewritten in the final rule to address comments received. The approach in the proposed rules to allow the applicant to select from a number of options has been changed and now simply require a statement regarding bankruptcy within the past 25 years, a business plan that discusses how the applicant will assure services promised under a retainer medical agreement will be provided and a copy of the agreement that includes provisions obligating the practice to provide the services promised. The final rules provide more opportunity for each applicant to demonstrate financial responsibility through a business plan in a way that meets that applicant's particular needs.*

5. Stephen J. Petruzelli, Health Policy Consultant: Submitted comments and a revised version of the proposed rules. Mr. Petruzelli proposed changes that would require much more stringent regulation by the department. The recommended changes would require that retainer medical practices calculate fees, audit and report performance in the same manner as other regulated insurance entities and to ensure that the covered benefits, exclusions, limitation, pricing and performance metrics are transparent and subject to audit and regulation. He also recommends that the practice's schedule of fees and all retainer medical agreement forms and marketing materials be submitted to the department, but that any change in the fee schedule, forms or materials should be submitted to the department prior to use.

   *<u>Agency Response:</u> The intent of Senate Bill 86 was to provide an expedited process to certify or register retainer medical practices, not to impose a heavy regulatory burden on the practices. The Legislative Assembly was interested in encouraging these types of practices as a way to deliver health care to persons not covered by traditional health insurance while*

*at the same time learning more about how many such practices exist and protecting patients from misunderstanding that these practices are "insurance" in the traditional sense. The suggestions received from Mr. Petruzelli would be to impose a much more onerous regulatory scheme on these practices and appears contrary to the Legislative intent. For this reason, the hearing officer does not recommend incorporating these changes into the rules at this time.*

The hearing officer recommends that the rulemaking be adopted with a number of changes to the proposed rules that are reflected by the response to comments above. These changes reflect comments received and internal discussions about what the Division really needs to evaluate whether a retainer medical practice should be certified, the scope and extent of the Division's authority and how best to address the concerns raised by the persons who submitted comments and the groups they represent.

These rules will take effect January 1, 2012.

The rulemaking was reviewed again for its economic effect on businesses, including small businesses, and there is no need for further change. The rulemaking is within the Director's rulemaking authority, and applicable rulemaking procedures were complied with.

Signed this 29rd day of November 2011.

Department of Consumer and Business Services

/s/

Jeannette Holman, Hearing Officer

This Summary and Recommendation are reviewed and adopted.

Signed this 29rd day of November 2011.

Department of Consumer and Business Services

/s/

Berri Leslie, Deputy Insurance Administrator