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October 7, 2005

By E-mail and U.S. Mail

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional & Financial Regulation
124 Northern Avenue
Gardiner, Maine 04345

**Re: In Re: Review of Aggregate Measurable Cost Savings Determined by Dirigo
Health for the First Assessment Year
Docket No. INS-05-700**

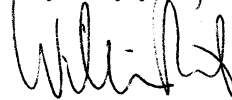
Dear Superintendent Iuppa:

Enclosed for filing in the above-referenced matter please find the original and one (1) copy of the following documents:

1. Filing Cover Sheet; and
2. Maine State Chamber of Commerce Memorandum of Law Regarding Hearing Procedure.

Thank you for your attention to this matter.

Very truly yours,



William H. Stiles

WHS/rdl
Enclosure

cc: Service List (*by e-mail and U.S. Mail*)
Kristine Ossenfort

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE)
MEASURABLE COST SAVINGS)
DETERMINED BY DIRIGO) FILING COVER SHEET
HEALTH FOR THE FIRST)
ASSESSMENT YEAR)

DOCKET NO. INS-05-700

To: Alessandro Iuppa, Superintendent of Insurance
Attn: Vanessa J. Leon

Dated Filed: October 7, 2005

Name of Party: Maine State Chamber of Commerce

Document Title: Memorandum of Law Regarding Hearing Procedure

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Respectfully submitted,



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STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:	REVIEW OF AGGREGATE)	
	MEASURABLE COST SAVINGS)	MAINE STATE CHAMBER OF
	DETERMINED BY DIRIGO)	COMMERCE MEMORANDUM
	HEALTH FOR THE FIRST)	OF LAW REGARDING
	ASSESSMENT YEAR)	HEARING PROCEDURE
)	
)	

Docket No. INS-05-700

NOW COMES Intervenor, the Maine State Chamber of Commerce (the “Chamber”), by and through its attorneys, and respectfully submits this Memorandum of Law Regarding the Hearing Procedure.

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INTRODUCTION

Pursuant to Section VII of the Superintendent's Procedural Order, the Chamber and other parties timely raised issues for the agenda of a "Wednesday meeting" to be held on October 5, 2005. See Exhibit A attached hereto, a true and correct copy of the issues raised by the Chamber. At the October 5, 2005 meeting, the parties and the Superintendent¹ discussed, among other things, who has the burden of proof, the standard of decision for the Superintendent, and what is meant by "the record" in Section B-2(2)(B) of P.L. 2005, ch. 400. The Superintendent invited the parties to submit a memorandum of law on this issue, no longer than 15 pages, and no later than Friday, October 7.

ARGUMENT

For all of the reasons set forth in the motions to dismiss filed by the Chamber and the Maine Automobile Dealers Association Insurance Trust and Bankers Health Trust, the Chamber maintains that the Board was required to provide interested parties with the opportunity for an adjudicatory hearing consistent with the express language of 24-A M.R.S.A. § 6913(1)(A). The Superintendent denied the motions to dismiss, and we must now wrestle with how to proceed.²

The Chamber expects the Board to argue that the Superintendent is required to apply an appellate standard of review, whereby the Superintendent must give substantial deference to the Board's determination of aggregate measurable cost savings. Without conceding the point, as a practical matter this might make sense if the Board had in fact provided interested parties with the opportunity for an adjudicatory hearing,³ and the Board's determination was therefore a product of that process. However, because the Board's determination was not the product of due

¹ Eric Cioppa, Deputy Superintendent, was present and representing Superintendent Alessandro Iuppa at the October 5, 2005 meeting. For ease of reference the Chamber will refer to the Superintendent.

² The Chamber of course reserves its rights on appeal.

³ Which would have included attendant discovery, sworn testimony, and cross examination, intended to produce a more balanced determination of aggregate measurable cost savings.

process, and because the Board itself was not unanimous in the first and most important year for determining methodologies and cost savings, the Superintendent should not give deference to the Board's determination. In fact, due process of law and the plain language of Section B-2(2)(B) of P.L. 2005, ch. 400 require the Superintendent to hold an adjudicatory hearing pursuant to the Maine Administrative Procedures Act ("APA"), Title 5, chapter 375, subchapter 4, and there is no place for an appellate standard of review in an agency adjudicatory hearing. Rather, the Superintendent must conduct a *de novo* hearing on whether the Board's determination of aggregate measurable cost savings is reasonable.

I. The Plain Language of Section B-2(2)(B) of P.L. 2005, ch. 400 Requires the Superintendent to Hold an Adjudicatory Hearing Pursuant to the Maine Administrative Procedures Act

Section B-2(2)(B) of P.L. 2005, ch. 400 provides in relevant part:

Following a public hearing held in accordance with the Maine Administrative Procedure Act ... the Superintendent of Insurance shall issue an order approving, in whole or in part, or disapproving the [Board's] filing

The Maine APA, Title 5, Chapter 375, contains seven subchapters: I General Provisions; II Rulemaking; III Advisory Rulings; IV Adjudicatory Proceedings; V Licensing; VI Administrative Court; and VII Judicial Review-Final Agency Action. This matter is not a rulemaking, advisory ruling or licensing matter. The only subchapter applicable to this proceeding contains the provisions governing an adjudicatory proceeding. Notably this is consistent with the Superintendent's Notice of Pending Proceeding and Hearing, which was issued "pursuant to 5 M.R.S.A. § 9052." See Notice of Pending Proceeding and Hearing attached hereto as **Exhibit B**. Therefore, the Superintendent must hold an adjudicatory hearing consistent with Title 5, chapter 375, subchapter 4.

a. The Superintendent May Not Apply an Appellate Standard of Review in an Adjudicatory Proceeding on the Board's Filing

An adjudicatory proceeding is defined as “any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.” 5 M.R.S.A. § 8002. This definition describes a process whereby a party's rights and duties are determined after an adjudicatory hearing; not by an opposing party before the hearing, subject to a deferential appellate standard of review. In addition, Section B-2(2)(B) of P.L. 2005, ch. 400 does not say that the Superintendent shall approve the Board's determination unless it is proved unreasonable, which is what in effect the Board must be asserting. Put simply, there are no provisions in Title 5, chapter 375, subchapter 4 or Section B-2(2)(B) of P.L. 2005, ch. 400 which would support the position that the Superintendent may apply an appellate standard of review to an adjudicatory hearing or the Board's filing.

Furthermore, as a practical matter the Superintendent may not apply an appellate standard of review because there is no “record” for the Superintendent to review. Appellate review in the normal course contemplates an evidentiary record, with sworn witness testimony and at least some basic procedural framework. In the “procedure” before the Board, no deadlines were established for submitting evidence, no witnesses were sworn in presenting their methodologies, and no opportunity to cross examine was provided. Even assuming there was some opportunity to question the Board's methodology, given the late date on which the parties received Mercer's Final Report,⁴ the parties were deprived of any meaningful opportunity to test the methodologies and calculations contained in the Board's submission.

⁴ Important to note, even the Board did not have before it Mercer's Final Report when it made its determination of aggregate measurable cost savings.

Under these circumstances, the Superintendent should not apply an appellate standard of review to the Board's decision contained in its September 20, 2005 submission and should not give deference to their identified savings. The Board's submission may constitute "a public record" (see Section B-2(2)(A) of P.L. 2005, ch. 400), but it is not "the record."

b. The Parties Must be Given the Full Opportunity to be Heard in a De Novo Hearing

"The essential requirement of due process in the administrative context is that a party be given notice and an opportunity to be heard." Martin v. Unemployment Ins. Comm'n, 1998 ME 271, ¶ 15, 723 A.2d 412, 417 (emphasis added). As noted above, the interested parties were not given the opportunity to test the Board's experts and their calculations and, as a result, the Board's submission cannot be considered "the record."⁵ On the contrary, Title 5, chapter 375, subchapter 4, requires the making of a record during the adjudicatory hearing, and in this case due process requires the Chamber to have the right to present evidence and arguments on all issues, and to call and examine witnesses and to cross-examine any witness listed or subpoenaed or person present and testifying at the hearing. See 5 M.R.S.A. § 9056(2). This is consistent with the Superintendent's Notice of Pending Proceeding and Hearing at Section IV. **Exhibit B.**

In light of the foregoing, the Superintendent must conduct a *de novo* hearing,⁶ and the Board's September 20, 2005 submission is no more than a pre-filed exhibit for that hearing.

II. The Board Conceded it Bears the Burden of Proof

At the meeting on Wednesday October 5, 2005, counsel for the board stated: "We understand that we have to prove that the filing was reasonable." Therefore, the Board concedes it bears the burden of proof to demonstrate that its determination of aggregate measurable cost

⁵ While the Board held public meetings and some parties had input, what happened before the Board was more in the nature of a legislative hearing or negotiated settlement discussions. Also, it is important to understand that the parties participating in the public hearings were not provided copies of Mercer's draft reports until September 14 at the earliest, and copies of Mercer's Final Report until September 19 at the earliest.

⁶ To do otherwise would result in prejudice to interested parties due to the lack of a hearing before the Board.

savings was reasonable, and there should be no presumption of reasonableness or deference given to the Board.

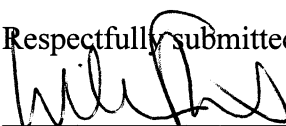
CONCLUSION

For the reasons set forth herein, the Superintendent may not give deference to the Board's determination in the form of an appellate standard of review. The Board's filing is akin to no more than a pre-filed exhibit, which the Board now has the burden to prove is reasonably correct. Intervenors of right must be given the opportunity to meaningfully test the Board's methodologies and calculations through presentation of evidence and cross examination of the Board's witnesses under oath.

In the alternative, should the Superintendent determine that the Board's determination is subject to an appellate standard, the Chamber respectfully requests an Order that Mercer's Final Report dated September 19, 2005 be stricken from the record, as it was not before the Board when it voted to approve and adopt Mercer's determination of aggregate measurable cost savings, and cannot be relied on to demonstrate that the Board's decision was reasonable when made.

Dated: October 7, 2005

Respectfully submitted,



William H. Stiles, Lead Attorney
Beth Dobson, Co-Counsel
Brett D. Witham, Co-Counsel

Counsel for the Maine State Chamber
of Commerce

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CERTIFICATE OF SERVICE

I, William H. Stiles, attorney for the Maine State Chamber of Commerce, hereby certify that on this 7th day of October 2005 I caused the foregoing document to be served upon all counsel of record via First-Class Mail and E-mail as follows:

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional & Financial Regulation
34 State House Station
Augusta, Maine 04333-0034
Vanessaj.Leon@maine.gov

Thomas C. Sturtevant, Jr.
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
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rpierce@preti.com

Dated: October 7, 2005

Respectfully submitted,



William H. Stiles, Lead Attorney

Verrill Dana_{LLP}
Attorneys at Law

Memorandum

By Email

To: Thomas C. Sturtevant, Jr., Assistant Attorney General

From: Beth Dobson, Esq.

Date: October 4, 2005

Re: DOCKET NO. INS-05-70

The following are items I would propose to include on the agenda for Wednesday's meeting.

1. Address status of Motion to Dismiss
2. Suggest supplementation of procedural order to address the following:
 - a. Allow for presentation of witnesses individually or in panels.
 - b. Establish witness designation deadline of Noon, October 14, 2005.
 - c. Establish deadline for subpoena requests of Noon, October 17, 2005 with subpoenas issued by Noon, October 18, 2005.
 - d. Establish deadline for pre-hearing briefs of 9:00 a.m., October 24, 2005.
 - e. Establish order of presentation and examination of witnesses at hearing.
 - f. Identify standard for decision (appellate with deference to decision of Dirigo Board/*de novo* with all parties able to introduce evidence of cost savings attributable to Dirigo).
 - g. Identify burden of proof, specifically, which party has the burden of proof and may parties offer alternatives to the Dirigo Board report which both tend to show the unreasonableness of the Dirigo Board findings and the reasonableness of an alternate approach and not be limited to challenging the Dirigo Board's findings.

- h. Are the letter and 15 attachments from Dr. McAfee to Superintendent Iuppa dated September 19, 2005 already part of the record on which Superintendent will base his decision or must those documents be offered and admitted into evidence and authenticated?
- i. What days will the hearing be held, October 24th and 27th only, or are other days that week also available?
- j. What are the parameters and procedures for collaboration in instances when one or more parties' views diverge with respect to: discovery (both outgoing and responding to incoming); pre-filed testimony and pre-hearing memoranda (if parties do not concur on all issues); cross-examination of witnesses (when not all parties agree on a point in contention)?
- k. Will public participation be permitted and if so what procedures and limits apply to public testimony?

cc: Service List (*by email*)
Kristine Ossenfort, Senior Governmental Affairs Specialist
William H. Stiles, Esq.
Brett D. Witham, Esq.

MAINE DEPARTMENT OF PROFESSIONAL & FINANCIAL REGULATION

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STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE)
 MEASURABLE COST SAVINGS)
 DETERMINED BY DIRIGO HEALTH) NOTICE OF PENDING
 FOR THE FIRST ASSESSMENT YEAR) PROCEEDING AND HEARING
)
 Docket No. INS-05-700)

Superintendent of Insurance Alessandro A. Iuppa issues this Notice of Pending Proceeding and Hearing in the above-captioned matter.

I. PENDING PROCEEDING & PUBLIC HEARING

Pursuant to 5 M.R.S.A. § 9052, 24-A M.R.S.A. § 230, and Bureau of Insurance Rule Chapter 350, the Superintendent hereby gives public notice of a pending adjudicatory proceeding on the required filing by the Board of Directors of the Dirigo Health Agency pursuant to Public Law 2005, chapter 400. The Dirigo Board is required to file with the Superintendent the Board's determination as to the aggregate measurable cost savings in this State as a result of the operation of Dirigo Health, including any reduction or avoidance of bad debt and charity care cost to health care providers resulting from the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004 (the "Dirigo Filing.") The Dirigo Board must include with its filing the supporting information for its determination. The Dirigo Filing is a public record and is required to be filed with the Superintendent no later than September 17, 2005.

Pursuant to 24-A M.R.S.A. § 229 and the requirements of 24-A M.R.S.A. § 230, 5 M.R.S.A. § 9052, and Insurance Rule Chapter 350, the Superintendent hereby gives notice that a public hearing will be held on the Dirigo Filing beginning at 9:00 a.m. on October 27, 2005, in the Central Conference Room of the Maine Department of Professional and Financial Regulation Building, 124 Northern Avenue, Gardiner, Maine. Members of the public are invited to attend the hearing.

II. SCOPE & STANDARD OF REVIEW

The purpose of the proceeding and hearing is for the Superintendent to review the Dirigo Filing and issue an order approving, in whole or in part, or disapproving the filing. The Superintendent is required to approve the Dirigo Filing upon a determination that the aggregate measurable cost savings filed by the Dirigo Board are reasonably supported by the evidence in the record. The Superintendent's decision must be issued no later than October 29, 2005.

III. INTERVENTION

The Dirigo Health Agency, through its Board of Directors, is a party to the proceeding. Other persons wishing to intervene as parties to the proceeding shall file their applications in writing with the Superintendent by 3:00 p.m. on the later of: (a) September 19, 2005, or (b) four (4) calendar days after the Dirigo Filing is delivered to the Superintendent. Only those persons willing to undertake the responsibilities placed upon parties to an adjudicatory proceeding under Bureau of Insurance Rule Chapter 350 should seek intervenor status.

Persons wishing to be placed on a list of interested persons to receive e-mail notice of the date the Dirigo Board has delivered its filing to the Superintendent shall make a written request to the attention of Vanessa J. Leon via e-mail address at Vanessa.J.Leon@maine.gov, or by U.S. Mail addressed to Vanessa J. Leon, Docket No. INS-05-700, Bureau of Insurance, Maine Department of Professional and Financial Regulation, #34 State House Station, Augusta, Maine 04333-0034. Additionally, persons may call my legal counsel in this matter, Assistant Attorney General Thomas Sturtevant, at any time to inquire about procedural developments at telephone 207-626-8413 or may contact him via e-mail address at Tom.Sturtevant@maine.gov.

Applications for intervention should be either hand delivered to the Superintendent at the offices of the Bureau of Insurance, 124 Northern Avenue, Gardiner, Maine, or mailed to the Superintendent at the following address:

Alessandro A. Iuppa, Superintendent
Attn.: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional and Financial Regulation
#34 State House Station
Augusta, Maine 04333-0034

An applicant for intervention shall simultaneously serve a copy of the intervention application on the Dirigo Board at the Dirigo Health Agency offices, 211 Water Street, Augusta, Maine, or mailed to the Dirigo Board at the following address:

Dirigo Health Agency
53 State House Station
Augusta, Maine 04333-0053

An applicant claiming intervention as of right pursuant to 5 M.R.S.A. § 9054(1) shall include in the application a statement either explaining how the applicant is or may be, or is a member of a class that is or may be, substantially and directly affected by the proceeding or identifying the applicant as an agency of federal, state, or local government. Applications for permissive intervention pursuant to 5 M.R.S.A. § 9054(2) shall contain a statement explaining and substantiating the applicant's interest in the proceeding. The Superintendent will not grant late applications without a showing of good cause.

If the Dirigo Health Agency or any other party opposes an application for intervention, it shall file a statement in opposition to the application with the Superintendent by 12:00 noon on the later of: (a) September 22, 2005, or (b) two (2) calendar days after the intervention application is filed with the Superintendent. The party opposing an application for intervention shall simultaneously serve a copy of the statement in opposition on all parties in the same manner as the service of an application for intervention.

IV. HEARING PROCEDURE

The Superintendent will conduct the proceeding in accordance with the provisions of the Maine

Administrative Procedure Act, 5 M.R.S.A. chapter 375, subchapter IV; 24-A M.R.S.A. §§ 229 to 236; and Bureau of Insurance Rule Chapter 350. All parties to the proceeding have the right to present evidence and witnesses at the hearing and have the right to be represented by counsel. Failure of any party to appear may result in disposition by default with respect to that party. The Superintendent, however, may set aside a default for good cause. A separate order will be issued by the Superintendent to establish certain procedural requirements and deadlines for the proceeding.

The Department of Professional and Financial Regulation does not discriminate on the basis of disability in the admission to, access to, or operation of its programs, services or activities. Individuals in need of auxiliary aid for effective communication in the hearing are invited to make their needs and preference known to Vanessa J. Leon at the Bureau of Insurance, telephone 207-624-8452, sufficiently in advance of the hearing so that appropriate arrangements can be made.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: June 29, 2005

By: _____
ALESSANDRO A. IUPPA
Superintendent of Insurance

Last Updated: **July 5, 2005**