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IN THE MATTER OF APPLICATION OF HEALTH NET INC. TO THE NEW JERSEY INDIVIDUAL HEALTH COVERAGE PROGRAM BOARD FOR AN EXEMPTION FROM ITS LOSS ASSESSMENT FOR THE 1999/2000 TWO-YEAR CALCULATION PERIOD

ADMINISTRATIVE ORDER NO. 01-03

Health Net, Inc. (formerly Foundation Health Systems, Inc., the parent of Physician Health Services) (hereinafter "Health Net"), a "member" carrier of the New Jersey Individual Health Coverage Program as defined at N.J.S.A. 17B:27A-2 and –10a, applied for an exemption from the assessment and reimbursement for losses for the 1999/2000 two-year loss calculation period as permitted by N.J.S.A. 17B:27A-12d.[1] The application, dated June 12, 2001, was made significantly later than the July 24, 2000 deadline set by the New Jersey Individual Health Coverage ("IHC") Program Board of Directors (the "IHC Board") for submission of such applications and after the conclusion of the entire calculation period. For the reasons set forth below, the IHC Board hereby vacates IHC Administrative Order No. 01-02, denies Health Net's application for an exemption for the 1999/2000 two-year calculation period for failure to file the application for an exemption in a timely manner, and denies Health Net's request for a stay of the 1999/2000 assessment.

1 Health Net includes PHS Health Plans of New Jersey and Qual Med Plans for Health of New Jersey. As of May 2, 2001, all New Jersey companies operate under the name Health Net.

Procedural History

On June 12, 2001, Health Net filed with the IHC Board a request for an exemption for the 1999/2000 two-year loss calculation period. The IHC Board consists of four public members, appointed by the Governor with the advice and consent of the New Jersey Senate; the Commissioner of Banking and Insurance or his or her designee; and four health insurance carriers elected by the IHC's carrier-members. N.J.S.A. 17B:27A-10b. The IHC Board's carrier members at all times relevant to this matter were Aetna U.S. Healthcare, the Guardian Life Insurance Company ("Guardian"), Horizon Healthcare Services, Inc. (d/b/a Horizon Blue Cross Blue Shield of New Jersey) ("Horizon"), and Oxford Insurance Company ("Oxford").

The IHC Board considered the filing at its July 31, 2001 meeting and voted to deny Health Net's request for an exemption. Because Guardian is engaged in a joint venture with Health Net, Guardian's representative recused himself from the discussion of and vote on Health Net's exemption request. The remaining IHC Board members present voted unanimously to deny Health Net's request for an exemption.

By letter dated August 10, 2001, counsel for Health Net filed an appeal with the Board, requesting a hearing with regard to the Board's decision to deny Health Net's exemption for 1999/2000. [2] On August 13, 2001, the IHC Board issued Administrative Order No. 01-02 evidencing the Board's decision to deny Health Net's application for an exemption. On August 15, 2001, counsel for Health Net filed an amendment and supplement to Health Net's August 10, 2001 appeal to reflect that it was also appealing the

[2] 2 The caption of the appeal incorrectly refers to the "1998/1999" calculation period.

Board's entry of Order No. 01-02, and stated that the amendment and supplement did not change the substance of Health Net's appeal.

On September 4, 2001, counsel for Health Net submitted documents captioned as a "Request by Health Net, Inc. for Reconsideration or a Stay of the IHC Program Board's decision of July 31, 2001." The Executive Director of the IHC Board notified Health Net, by letter dated September 11, 2001, that because the IHC's regulations do not provide for a reconsideration procedure, the IHC Board would treat the September 4, 2001 submission from Health Net as second amendment to its appeal of Order No. 01-02.

At the IHC Board's meeting on September 11, 2001, the Board representative from Aetna U.S. Healthcare reported that she had become aware that Aetna U.S. Healthcare had entered into an agreement with The Prudential Insurance Company of America, a carrier not affiliated with Aetna U.S. Healthcare, to assume that carrier's loss assessment liability for the 1999/2000 calculation period. At the IHC Board's meeting on October 11, 2001, Horizon's representative reported that she had become aware that Horizon had entered into an agreement with AtlantiCare Health Plans, a carrier unaffiliated with Horizon, to assume a portion of that carrier's assessment liability. Because of these contractual arrangements assuming responsibility for assessment liabilities of non-affiliated, non-exempt carriers, the decision on Health Net's request for an exemption would have a direct financial effect on both Horizon and Aetna U.S. Healthcare, and those carriers' Board representatives recused themselves from further participation in the IHC

Board's consideration of Health Net's request.[3] In addition, Guardian's representative continued to recuse himself for the reason previously noted.

Because both Aetna U.S. Healthcare and Horizon had participated in previous considerations of the issue, the properly constituted Board, with the remaining six members participating, voted unanimously at its October 11, 2001, meeting to vacate Order No. 01-02 and to consider the matter *de novo* – that is, to consider the matter as if for the first time. At the same meeting, after considering Health Net's request for an exemption for 1999/2000, the Board voted unanimously to deny the request. The Board also voted, by a vote of five to one, to deny Health Net's request for a stay of the issuance of the 1999/2000 assessment.

Background

In 1992, the New Jersey Legislature enacted the Individual Health Insurance Reform Act of 1992 (the "IHC Act"), P.L. 1992, c. 161 (N.J.S.A. 17B:27A-2 et seq.). The purpose of the IHC Act was to increase the availability of health coverage to individuals in the State. *See* Health Maintenance Org. of N.J. v. Whitman, 72 F.3d 1123, 1124-25 (3d Cir. 1995); In re Individual Health Coverage Program Final Admin. Orders Nos. 96-01 and 96-22, 302 N.J. Super. 360, 363-64 (App. Div. 1997). The IHC Board promulgated regulations to implement the IHC Act. See N.J.A.C. 11:20-1.1 et seq.

A key feature of the IHC Act is a loss assessment mechanism that is designed to encourage carrier participation in the individual market and to provide for the fair and equitable distribution of reimbursable losses among all carriers selling some form

3 The IHC assessment is a "zero sum" calculation: a change of one carrier's assessment obligation will have an impact on some or all of the other carriers because the amount of money to be collected is fixed. Whether the Board granted or did not grant an exemption to Health Net had no impact on the carriers that received a full or partial exemption. Granting an exemption to Health Net would have a negative impact on the 84 other carriers that did not apply for an exemption, eight of which were also in the individual market.

of health insurance in the State. N.J.S.A. 17B:27A-12. Under the IHC Act, the responsibility for the generally high-risk individual market has been spread to all IHC Program "members," that is, carriers that have "net earned premium" from any health benefits plans issued in the State including plans issued to individuals, small employers, and large employers, as well as Medicare or Medicaid.

Pursuant to the IHC Act, an IHC member that markets and sells individual health coverage in New Jersey is entitled to reimbursement for certain losses during each two-year calculation period. N.J.S.A. 17B:27A-12a(1)(b). IHC member carriers are assessed every two years in order to fund those reimbursements. N.J.S.A. 17B:27A-12a(2). A carrier can earn an exemption from its assessment liability for a given calculation period by participating in the individual health coverage market as set forth in N.J.S.A. 17B:27A-12d and complying with the regulations governing the exemption process.

Thus, to meet its obligation, each IHC member has three options. N.J.S.A. 17B:27A-4a. First, a carrier may choose not to offer coverage in the individual market, but it will be liable to pay its proportional share of a loss assessment to help fund loss reimbursements as set forth above. Second, a carrier may choose to offer individual health coverage in New Jersey and to be eligible to receive reimbursement for a portion of its losses in the individual market as set forth above, but it is also liable to pay a loss assessment. Third, a carrier may apply to the Board to seek an exemption from its loss assessment for the current calculation period.[4] For the 1999/2000 calculation period, not including Health Net, 83 carriers pursued option one above and paid an assessment. Eight

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4 A carrier that seeks an exemption also relinquishes the right to any reimbursement of losses for that calculation period. N.J.S.A. 17B:27A-12d, N.J.A.C. 11:20-9(b)(3).

carriers pursued option two by offering coverage and choosing not to seek an exemption, thereby becoming eligible for a loss reimbursement. Seven carriers pursued option three by seeking exemptions from their respective loss assessment obligations.

The matter before the Board relates to the exemption process. Each member is given the opportunity to apply for and earn an exemption from its loss assessment obligation, in full or in part, by entering New Jersey's individual health coverage market and *prospectively* agreeing to cover a minimum number of lives, referred to in the IHC Act as "non-group person life years."[5] The IHC Act specifically provides that a carrier "may apply to the board, *by a date established by the board*, for an exemption from the assessment and reimbursement for losses provided for in this section. A carrier that applies for an exemption *shall agree to cover* a minimum number of non-group persons life years on an open enrollment community rated basis…." N.J.S.A. 17B:27A-12d (emphasis added). This provision makes clear that the Legislature intended that a member seeking an exemption must take the following steps:

- affirmatively make an application to the Board;
- make its application within the timeframe established by the Board;
- agree *prospectively* to cover a minimum number of non-group person life years during the calculation period to which the exemption applies; and
- make its application *during* that calculation period, on a date established by the IHC Board.

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5 The IHC Act, as amended in 1997, defines a "non-group person life year" as "coverage of a person for 12 months by an individual health benefits plan or conversion policy or contract subject to [the IHC Act], Medicare cost or risk contract or Medicaid contract." N.J.S.A. 17B:27A-2. For the purpose of determining a carrier's satisfaction of its assigned target, "non-group persons" include individually enrolled persons, conversion policies issued pursuant to the IHC Act, Medicare cost and risk lives, and Medicaid recipients. N.J.S.A. 17B:27A-12d(1).

Thus, each carrier must make the prospective determination to file for an exemption based on its projections at the time of whether its expected losses will be greater or less than its projected assessment, considering the possibility of reimbursement of a portion of its own losses. Obviously, a carrier that waits until the end of the calculation period (or even later) to file for an exemption may enjoy an unfair advantage by virtue of having the benefit of the full calculation period from which to evaluate its losses and to obtain information about other carriers' losses in the market – an advantage not enjoyed by carriers that comply with the applicable statutory and regulatory time frames.

The IHC Board has promulgated regulations that establish the means for earning conditional exemptions and for reporting and certifying the number of non-group persons, as well as the standards for granting final (full or *pro rata*) exemptions from loss assessments. N.J.A.C. 11:20-9.1 through -9.6. These rules, consistent with the plain language of N.J.S.A. 17B:27A-12d, assume that a carrier will be non-exempt unless the carrier affirmatively files a written request for an exemption within the timeframes established by the Board. N.J.A.C. 11:20-9.3(a) provides that on or about May 1 of the first year of every two-year calculation period, the IHC Board shall issue to each member a minimum enrollment share of non-group persons for that two-year calculation period, and the member must agree prospectively to cover that share in that two-year calculation period in order to obtain an exemption from the losses from that two-year calculation period. Pursuant to N.J.A.C. 11:20-9.2, carriers seeking to be exempted from the obligation to pay a loss assessment are required to submit a written request for such exemption to the Board on or before June 1 of the first year of each two-year calculation period. On or before March 1 after the close of each calculation period, carriers that have filed for an exemption are required to file a Certification of Non-group Persons for the

previous two-year period. N.J.A.C. 11:20-9.2. The information contained in this certification is used to evaluate a carrier's level of satisfying its non-group market enrollment target.

The timing for the Board's issuance of minimum enrollment shares, however, depends on each of the IHC Program's members fulfilling certain informational filing requirements in a timely and accurate fashion. Pursuant to N.J.S.A. 17B:27A-12a(1)(b) and N.J.A.C. 11:20-8, each IHC member carrier is required to submit, no later than March 1 subsequent to each calculation period, a Market Share and Net Paid Gain (Loss) Report (known as “Exhibit K”) for the previous two-year calculation period. As part of the Exhibit K, the Chief Financial Officer or other duly authorized officer of the member carrier must certify that the information about a carrier's net earned premium from all health benefits plans, non-group enrollment (if any), and net paid gain or loss from community rated individual health benefits plans (if any) in Exhibit K was accurate and complete, and that it conformed with requirements of N.J.A.C. 11:20-8.

The information provided in the Exhibit K filings and the exemption-related filings forms the basis for the Board’s calculation of the loss assessment for the previous calculation period, as well as the enrollment targets for carriers to meet in order to earn exemptions from their loss assessment for the current calculation period. It is important that the information be correct before the Board uses it in developing assessment information and enrollment targets. In the past the Board has been forced to delay the issuance of assessments and enrollment targets, or to revise and reissue them because of the need for member carriers (sometimes including Health Net) to revise their Exhibit Ks in order to correct errors they have made in providing the necessary data.

As had happened in prior calculation periods, this is exactly what happened with the notice of 1999/2000 enrollment targets. The timing of the Board's issuance of the 1999/2000 non-group targets and the opportunity to request exemptions was delayed because several member carriers had failed to provide timely, accurate Exhibit K filings. On October 1, 1999, the IHC Board sent a Notice of 1999/2000 Minimum Enrollment Share and Preliminary Notice of 1997/1998 Loss Share (the "October 1st Notice") via certified mail to Robert Little[6] of Foundation Health Systems (Health Net's predecessor, which included affiliated carriers Physician Health Services ("PHS"), First Option Health Plan, and Qual Med Plans for Health), as well as to all other member carriers. The October 1st Notice advised Foundation Health Systems of the enrollment target it was required to meet in order to qualify for an exemption from its 1999/2000 loss assessment. The October 1st notice expressly stated,

> Exemptions from assessment are only available to carriers actively offering standard individual health benefits plans in New Jersey. If you wish to apply for a conditional exemption for the two-year calculation period 1999/2000, you must submit a request to the Board, in accordance with N.J.A.C. 11:20-9.2, no later than November 1, 1999. Please send the request for exemption to the attention of Ellen DeRosa, Deputy Executive Director. Late requests will be denied; there will be no exceptions.

The IHC Board received a delivery receipt from the United States Postal Service verifying that Health Net had received the October 1st Notice on October 11, 1999. The IHC Board has no record of receiving a request for an exemption from Health Net in response to the October 1st Notice, and its staff has no recollection of receiving such a request.

6 The IHC Board sends assessment materials directly to the person who provided the filing in the previous calculation period.

Subsequent to the issuance of the October 1st Notice, the Board received some new or revised Exhibit K filings. The revisions substantially affected the apportionment of market share, and therefore the assignment of 1999/2000 enrollment targets. As a result, the IHC Board sent a 1997/1998 Assessment Invoice and Revised Notice of 1999/2000 Minimum Enrollment Share on November 17, 1999 ("November 17th Notice") via certified mail to Robert Little of Foundation Health Systems, and to all other member carriers. The November 17th Notice advised carriers that

> [a]ll requests for a conditional exemption for the 1999/2000 two-year calculation period have been VOIDED since the decisions of carriers that requested the exemptions were based on data that subsequently changed. Carriers that wish to apply for a conditional exemption for the two-year calculation period 1999/2000 based on the REVISED minimum enrollment share information must submit a request to the Board, in accordance with N.J.A.C. 11:20-9.2, no later than December 17, 1999. Please send the Exemption requests to the attention of Ellen DeRosa, Deputy Executive Director at the address above. Late requests will be denied; there will be no exceptions.

The IHC Board received a delivery receipt verifying that Health Net received the November 17th Notice on November 22, 1999. The IHC Board has no record of receiving request for an exemption from Health Net in response to the November 17th Notice, and its staff has no recollection of receiving such a request.

Subsequently, due to revised filings from some carriers after the issuance of the November 17th Notice, the IHC Board sent a 1997/1998 Interim Reconciliation Invoice and Revised Notice of 1999/2000 Minimum Enrollment Share on June 23, 2000 ("June 23rd Notice") via certified mail to Robert Little of Foundation Health Systems, and to all other member carriers. The June 23rd Notice specifically provided that

> [s]et forth below is the REVISED Minimum Enrollment Share for 1999/2000. The IHC Board recognizes that some

> carriers have already requested a conditional exemption based on previously assigned Minimum Enrollment Shares. All exemption requests received as a result of the October 1, 1999 and November 17, 2000 notices of the Minimum Enrollment Share for 1999/2000 have been VOIDED. Any carrier that wishes to request a conditional exemption pursuant to N.J.A.C. 11:20-9.2(b) must make such request within 30 days of the date of this bulletin.

As with the previous two notices, the IHC Board received a delivery receipt from the United States Postal Service verifying that Health Net received the June 23rd Notice on June 29, 2000. The IHC Board has no record of receiving a request for an exemption from Health Net in response to the June 29th Notice, and its staff has no recollection of receiving such a request. Moreover, Health Net has not submitted any credible documentary proof that it ever filed a request for an exemption.

On March 7, 2001, Health Net filed its 1999/2000 Exhibit K, in which Health Net indicated that it was filing as an "Exempt carrier."[7] By letter dated June 6, 2001, Wardell Sanders, Executive Director of the IHC Board advised Health Net, that, among other things, the Board had no record of ever having received any Request for an Exemption for the 1999/2000 two-year assessment period, and asked that Health Net provide any documentation in support of having sent such a request. By letter dated June 12, 2001, Health Net requested an exemption for the 1999/2000 two-year assessment period. By letter dated June 13, 2001 from Tom Messer, Director of Actuarial Services of Health Net, to Wardell Sanders, and by letter dated June 26, 2001 from counsel for Health Net, Health Net has advised the IHC Board that it had not been able to find a copy of a written request for an exemption for the 1999/2000 two-year assessment period.

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7 The IHC Board did not design the Exhibit K as a vehicle for applying for an exemption, but rather to assist in the administration of the assessment mechanism. However, many carriers fail to complete this section or fail to complete this section correctly. Because of the unreliability of many of the responses to this section, it has little utility for the Board and is not used in the calculation of the assessment.

The June 13, 2001 letter from Tom Messer included a copy of a document purporting to be an electronic mail message sent on June 21, 2000, from Tom Messer to Liz Guerin of Health Net, which stated the following: "Liz, Spoke with Ellen [DeRosa, Deputy Executive Director of the IHC Board]. We are exempt. However, some new info has come to the IHC Board about other carriers. This info will change the targets. Therefore, Ellen expects carriers to have to file again. A notice should be coming soon, but soon was not defined. Now I can sleep soundly. Thanks Tom." Ms. DeRosa has advised the IHC Board that she has no recollection of that conversation.

Discussion

Although the Board has administered seven calculation periods, this issue is one of first impression for the IHC Board. As a threshold matter, Health Net's characterization of its failure to make a timely filing for an exemption as procedural noncompliance is inaccurate. To the contrary, the process of filing for an exemption, as set forth in the IHC Act and the IHC Board's regulations, is a substantive, and not merely procedural, requirement. An exemption application serves as a carrier's *prospective* declaration of its position in the market. The prospective nature of the exemption election is clear from both the IHC Act and the IHC's regulations, which both require a carrier seeking an exemption to agree, during the calculation period, that it "*shall*" enroll a minimum number of non-group-person life years. N.J.S.A. 17B:27A-12d(1); N.J.A.C. 11:20-9.2(b). The effect of the agreement is that the carrier makes a commitment in advance – in essence, committing itself to market and sell at a certain level in order to meet its enrollment target. Thus, the timing of the exemption application, set forth in IHC Act, clearly advances the Legislature's goal of enhancing and broadening the availability of individual health coverage in New Jersey by encouraging carriers to offer individual

coverage. If carriers were permitted to wait until after the calculation period closed, they could simply base their assessment decisions on their past performance, eliminating the incentive provided by the prospective commitment. Clearly, then, requiring a carrier to make an exemption decision early in the calculation period is not a mere procedural deadline, but a substantive requirement that is reasonably related to the Legislature's intent of enhancing availability. Allowing a carrier to apply for an exemption after the close of the calculation period would undermine the incentive mechanism that the Legislature created.

Furthermore, by requiring the issuance of a notice of non-group persons to all carriers at the same time, and by requiring all carriers to provide a response within a certain timeframe after the date of the notice, the IHC Act and the IHC Board's regulations place all members on an equal footing, with the same body of information from which to make a decision. No carrier has the benefit of additional time to evaluate its business or to attempt to evaluate the experience of other carriers in determining whether to file for an exemption. The legislative model of requiring a prospective application for an exemption, in essence, requires each carrier to make an educated projection by evaluating its anticipated experience against the anticipated experience of all carriers. For that reason the timing of the exemption process is important to prevent any one carrier from obtaining an unfair advantage.

Fairness to the market as a whole dictates that the IHC Board adhere to its regulations, in addition to the statutory dictate giving rise to those regulations. *See* In re CAFRA Permit No.87-0959-5 Issued to Gateway Assocs., 152 N.J. 287, 308 (1997). An agency that seeks to waive its own regulations without adopting a regulation that sets forth appropriate standards for such a waiver "opens itself to attack on the grounds that it did not

have the implicit power to waive a substantive regulation." Ibid. "Absent such a regulation, applicants, interested parties, and others may not know the rules of the game." Ibid. That would be the situation here. Fairness to the individual marketplace and to potential purchasers of individual coverage dictates that all carriers seeking an exemption do so on the same footing, according to the same schedule. Therefore, Health Net's 1999/2000 exemption request, made so far out of time as to frustrate legislative intent, should be denied.

Health Net argues that if its request for an exemption is denied, the size of its assessment would not be fair. That is not the case, however. As a non-exempt carrier, Health Net would be assessed in a manner that complies with the Board's regulations set forth at N.J.A.C. 11:20-2.17 and is consistent with every other non-exempt IHC member. Moreover, as a non-exempt carrier, Health Net's assessment would be approximately 2.7668% of its net earned premium, the exact same percentage of net earned premium as that of the other 91 non-exempt carriers. If Health Net's assessment is larger than that of any other non-exempt carrier, that will only be because it had more net earned premium during the 1999/2000 calculation period than any other non-exempt carrier member -- nearly a billion dollars -- and thus a larger assessment share. *See* N.J.S.A. 17B:27A-12a(2).

Health Net argues that its intention for 1999/2000 may be gleaned from its former status as an exempt carrier, asserting that it had always filed for an exemption. However, the Board's records indicate beyond dispute that the exemption histories of the following Health Net-affiliated carriers are inconsistent, notwithstanding Health Net's contentions to the contrary: First Option Health Plan did not receive an exemption for 1993 or 1994; Qual Med Plans for Health did not receive an exemption for 1993, 1994,

1995, or 1996; PHS did not receive an exemption for 1996. In any event, however, statutory and regulatory provisions require carriers seeking an exemption to apply anew for each calculation period. In this respect, the assessment mechanism allows for changes in market dynamics that could cause a carrier to change its status. Furthermore, prior exemption history is not a reliable indicator of a carrier's future intentions. In fact, over the history of the IHC Program, carriers have changed their exemption status. For example, Horizon Blue Cross Blue Shield of New Jersey did not seek an exemption for the 1992, 1993, 1994, or 1995 calculation periods, but did seek an exemption for 1996, 1997/1998, and 1999/2000. Celtic Insurance Company, on the other hand, sought exemptions for 1995 and 1996, but did not seek an exemption for 1997/1998 or 1999/2000.

In addition, Health Net has argued that its failure to file for an exemption for the 1999/2000 calculation period was an administrative oversight on its part rather than a deliberate plan to seek an advantage in the market. This assertion is essentially a matter of corporate intent, difficult to evaluate in this or any other matter. If intent were relevant, it would be necessary to ascertain intent every time a carrier seeks to obtain an exemption without applying for it in a timely manner. Such a complex and subjective undertaking is clearly not contemplated by either the IHC Act or the IHC's regulations.

Request for a Stay

To succeed in its request for a stay, Health Net must demonstrate the following: (1) a preliminary showing of reasonable probability of ultimate success on the merits on appeal; (2) that the stay is necessary to prevent irreparable harm to Health Net; (3) that the relative hardships to the parties weigh in favor of granting a stay; and (4) that the public's best interests are served by the grant of a stay. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).

Health Net has not shown that the issuance of the 1999/2000 assessment would cause it irreparable harm. Issuance of the stay will obligate Health Net to pay its proportional share of the loss assessment. It is well established that monetary damages do not generally constitute irreparable harm. Crowe v. DeGioia, supra, 90 N.J. at 132-33; Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Furthermore, the IHC regulations include a mechanism that will protect Health Net from irreparable harm. Pursuant to N.J.A.C. 11:20-2.17(e)(2), an IHC member that disputes the amount of assessment for which it has been determined liable by the IHC Program Board shall be liable for and make payment of the full amount of the assessment invoice, including any interest penalty accruing thereon, until such time as the dispute has been resolved in favor of that member. The disputed monies are held in an interest-bearing account; if the matter is ultimately decided in favor of the challenging carrier, the monies are refunded to the carrier, with interest. As a result, Health Net has not demonstrated irreparable harm.

Furthermore, Health Net has not demonstrated that the IHC Board's issuance of the 1999/2000 assessment will cause greater harm to Health Net than will be caused to other entities if the assessment is stayed. A stay would prevent the Board from collecting any loss assessment funds, including undisputed assessment monies, from the IHC Program's remaining members. As a result, payment of reimbursements to carriers with reimbursable losses would be delayed until Health Net's appeal is settled, creating substantial harm for those carriers that are entitled to reimbursement. Therefore, a stay would cause greater harm to the IHC Program than the issuance of the assessment would cause to Health Net, especially in light of the fact that any disputed monies would not be

distributed to carriers, but rather would be paid into an escrow account. For the same reason, delaying the assessment would not further the public interest.

Finally, for the reasons set forth above, Health Net has not demonstrated that it is entitled to a stay of the assessment because it has not demonstrated a reasonable likelihood of success on the merits. Therefore, a stay of the 1999/2000 assessment is not warranted.

Findings of Fact

The IHC Board finds the following facts:

1. Health Net Inc. (formerly Foundation Health Systems), and its affiliates Physicians Health Services of New Jersey and Qual Med Plans for Health of New Jersey, is both a "carrier" and an "member" as defined at N.J.S.A. 17B:27A-2 by virtue of having $926,883,560.86 in net earned premium from the sale of health benefits plans in 1999/2000.
2. On October 1, 1999, the IHC Board sent a Notice of 1999/2000 Minimum Enrollment Share and Preliminary Notice of 1997/1998 Loss Share ("October 1st Notice") via certified mail to Robert Little of Foundation Health Systems, and to all other member carriers, that advised,

> [e]xemptions from assessment are only available to carriers actively offering standard individual health benefits plans in New Jersey. If you wish to apply for a conditional exemption for the two-year calculation period 1999/2000, you must submit a request to the Board, in accordance with N.J.A.C. 11:20-9.2, no later than November 1, 1999. Please send the request for exemption to the attention of Ellen DeRosa, Deputy Executive Director. Late requests will be denied; there will be no exceptions.

3. Health Net received the October 1st Notice on October 11, 1999.

4. The IHC Board has no record of receiving a request for an exemption from Health Net in response to the October 1st Notice and no staff member has a recollection of receiving a copy of an exemption application from Health Net in response to the notice.

5. Due to revised filings of Exhibit K from some carriers after the issuance of the October 1st Notice, the IHC Board sent a 1997/1998 Assessment Invoice and Revised Notice of 1999/2000 Minimum Enrollment Share on November 17, 1999 ("November 17th Notice") via certified mail to Robert Little of Foundation Health Systems, and to all other member carriers.

6. The November 17th Notice clearly advised carriers that

> [a]ll requests for a conditional exemption for the 1999/2000 two-year calculation period have been VOIDED since the decisions of carriers that requested the exemptions were based on data that subsequently changed. Carriers that wish to apply for a conditional exemption for the two-year calculation period 1999/2000 based on the REVISED minimum enrollment share information must submit a request to the Board, in accordance with N.J.A.C. 11:20-9.2, no later than December 17, 1999. Please send the Exemption requests to the attention of Ellen DeRosa, Deputy Executive Director at the address above. Late requests will be denied; there will be no exceptions.

7. Health Net received the November 17th Notice on November 22, 1999.

8. The IHC Board has no record of receiving a request for an exemption from Health Net in response to the November 17th Notice and no staff member has a recollection of receiving a copy of an exemption application from Health Net in response to the notice.

9. Due to revised filings of Exhibit K from some carriers after the issuance of the November 17th Notice, the IHC Board sent a 1997/1998 Interim Reconciliation

Invoice Revised Notice of 1999/2000 Minimum Enrollment Share on June 23, 2000 ("June 23rd Notice") via certified mail to Robert Little of Foundation Health Systems, and to all other member carriers.

10. The June 23rd Notice specifically provided the following:

> Set forth below is the REVISED Minimum Enrollment Share for 1999/2000. The IHC Board recognizes that some carriers have already requested a conditional exemption based on previously assigned Minimum Enrollment Shares. All exemption requests received as a result of the October 1, 1999 and November 17, 2000 notices of the Minimum Enrollment Share for 1999/2000 have been VOIDED. Any carrier that wishes to request a conditional exemption pursuant to N.J.A.C. 11:20-9.2(b) must make such request within 30 days of the date of this bulletin.

11. Health Net received the June 23rd Notice on June 29, 2000.

12. The IHC Board has no record of receiving a request for an exemption from Health Net in response to the June 29th Notice and no staff member has a recollection of receiving a copy of an exemption application from Health Net in response to the notice.

13. Health Net filed a 1999/2000 Exhibit K dated March 7, 2001 in which it reported that it had $711,367,319.84 in net earned premium.

14. Because of errors in its March 7, 2001 Exhibit K filing with respect to the reporting of net earned premium, Health Net filed a revised 1999/2000 Exhibit K dated May 21, 2001 reporting net earned premium of $926,439,783.

15. Because of errors in its Exhibit K filing dated May 21, 2001 with respect to the reporting of non-group persons, Health Net filed a revised 1999/2000 Exhibit K on June 11, 2001.

16. Because of errors in its 1999/2000 Exhibit K filing dated June 11, 2001 with respect to the reporting of non-group persons, Health Net filed a revised 1999/2000 Exhibit K dated July 6, 2001.

17. In each of the 1999/2000 Exhibit Ks that it submitted, Health Net marked the line, "Exempt carrier, not eligible for reimbursement."

18. By letter dated June 6, 2001, Wardell Sanders advised Health Net, that, among other things, the Board had no record of ever having received any application for an exemption for the 1999/2000 two-year assessment period, and asked that Health Net provide any documentation in support of having sent such a request.

19. By letter dated June 12, 2001, Health Net requested an exemption for the 1999/2000 two-year assessment period. In the same letter dated June 12, 2001 to Wardell Sanders, IHC Program Executive Director, that accompanied its 1999/2000 Exhibit K dated June 11, 2001, Tom Messer, the Director of Actuarial Services for Health Net wrote, "you are right in that we did miss the refiling direction and consequently in this letter refile and ask that the Board again [sic] consider PHS an exempt carrier for the 1999/2000 period."

20. By letter dated June 13, 2001 from Tom Messer, Director of Actuarial Services of Health Net, to Wardell Sanders, and by letter dated June 26, 2001 from counsel for Health Net to Ward Sanders, Health Net has advised the IHC Board that it had not found a copy of a written request for an exemption for the 1999/2000 two-year assessment period.

21. Health Net claims that on or about June 21, 2000, Tom Messer had a conversation with Ellen DeRosa, Deputy Executive Director of the IHC Board, as set forth in the following transcript of an electronic-mail message: "Liz, Spoke with Ellen. We are

exempt. However, some new info has come to the IHC Board about other carriers. This info will change the targets. Therefore, Ellen expects carriers to have to file again. A notice should be coming soon, but soon was not defined. Now I can sleep soundly. Thanks Tom."

22. Ellen DeRosa has no recollection of the aforementioned conversation.
23. Health Net's June 12, 2001 written request for an exemption for the 1999/2000 calculation period was filed after the close of the two-year calculation period and nearly one year after such requests were required to be filed pursuant to the June 23rd Notice.
24. Health Net failed to file a timely request for an exemption from its 1999/2000 loss assessment.

Conclusions of Law

1. The requirement that requests for exemption from the loss assessment be made early in the applicable calculation period is in furtherance of the Legislature's intent in enacting the IHC Act of enhancing the availability of individual health coverage in New Jersey.
2. The statutory scheme allowing carriers to apply for an exemption is a substantive, statutory filing requirement, and the IHC Board does not have the authority to waive the filing requirement.
3. The regulatory scheme allowing carriers to apply for an exemption, set forth at N.J.A.C. 11:20-9.1 through -9.6, is a substantive filing requirement, and the IHC rules do not provide for a waiver of that requirement.
4. The form and content of the June 23rd Notice requiring resubmission of exemption applications was fair and equitable under the circumstances in giving notice of the requirement to refile.

5. The IHC Board, in denying Health Net an exemption, is not assessing Health Net a "penalty," but rather will assess Health Net in the same manner as any other non-exempt IHC member.

6. The alleged statements of Ellen DeRosa to Tom Messer on or about June 21, 2000 noted in paragraph 20 of the findings of fact, even if they were not disputed by the IHC Board, are not relevant for purposes of determining whether Health Net is entitled to an exemption for 1999/2000, since the alleged conversation took place two days before the Board issued a bulletin via certified mail announcing that all exemption requests had been voided and requiring that carriers seeking an exemption apply anew to the IHC Board.

7. Health Net's request for a stay of the 1999/2000 assessment should not be granted for the following reasons:

    a. Health Net has failed to demonstrate that a stay of the issuance of an assessment would result in irreparable harm;

    b. Health Net has failed to demonstrate a likelihood that any appeal of the IHC Board's decision to deny its request for an exemption from the 1999/2000 loss assessment would succeed on the merits; and

    c. If the Board were to grant Health Net's request for a stay of the 1999/2000 assessment, it would prevent the Board from collecting loss assessment funds from the other member carriers and thus would prevent the IHC Board from reimbursing carriers that have reimbursable losses, thereby causing a greater hardship to the IHC Program than the issuance of the assessment will cause to Health Net.

NOW THEREFORE, pursuant to the authority granted to the IHC Board by N.J.S.A. 17B:27A-2 et seq., N.J.A.C. 11:20-1 et seq., and all powers expressed or implied therein, and the decision of the IHC Board as expressed by this Administrative Order,

IT IS on this 28th day of November, 2001,

ORDERED that IHC Administrative Order No. 00-01 is hereby vacated; and

IT IS FURTHER ORDERED that Health Net's request for an exemption from losses for the 1999/2000 calculation period is denied; and

IT IS FURTHER ORDERED that Health Net's request for a stay of the issuance of the assessment is denied.

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Wardell Sanders, Executive Director
Individual Health Coverage Program Board