State of Rhode Island and Providence Plantations
DEPARTMENT OF BUSINESS REGULATION
Division of Insurance
1511 Pontiac Avenue, Bldg. 69-2
Cranston, Rhode Island 02920

Public Notice of Proposed Rule-Making

Pursuant to the provisions of Chapter 5, Section 8 of the General Laws of Rhode Island, and in accordance with the Administrative Procedures Act Chapter 42-35 of the General Laws, the Department of Business Regulation hereby gives notice of its intent to amend Insurance Regulation 21 – Medical Malpractice Insurance.

The purpose of this amendment is to alter some of the requirements concerning the Stabilization Reserve Fund to allow for greater flexibility now that the funds are in the process of being paid back to policyholders and to allow licensed medical and dental professionals and licensed health care providers to obtain professional liability insurance from surplus lines carriers in addition to the current options of licensed carriers or self insurance.

The proposed amended regulation and concise summary of non-technical amendments are available for public inspection at www.dbr.ri.gov , in person at Department of Business Regulation, 1511 Pontiac Avenue, Cranston, Rhode Island 02920, or by email elizabeth.dwyer@dbr.ri.gov or by calling Elizabeth Kelleher Dwyer at (401) 462 9520.

In the development of the proposed amendments consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

All interested parties are invited to submit written or oral comments concerning the proposed regulations by **January 20, 2016** to Elizabeth Kelleher Dwyer, Department of Business Regulation, 1511 Pontiac Avenue, Bldg. 69-2, Cranston, RI 02920, (401) 462 9520 elizabeth.dwyer@dbr.ri.gov. A public hearing to consider the proposed amendment shall be held on **January 20, 2016** at 10:00 AM at 1511 Pontiac Avenue, Cranston, Rhode Island 02920, at which time and place all persons interested therein will be heard.

All are welcome at the Rhode Island Department of Business Regulation ("DBR"). If any reasonable accommodation is needed to ensure equal access, service or participation, please contact DBR at 401-462-9551, RI Relay at 7-1-1, or email dbr.dirofficeinq@dbr.ri.gov at least three (3) business days prior to the hearing.

Macky McCleary
Director, Department of Business Regulation

Date posted: December 10, 2015

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Concise Summary of Proposed Non-technical Amendments to Insurance Regulation Number 21 – Medical Malpractice Insurance

In accordance with the Administrative Procedures Act, Section 42-35-3(a)(1) of the General Laws of Rhode Island, following is a concise summary of proposed non-technical amendments:

1. Section 4(D) amends the procedures with regard to the Stabilization Reserve Fund to remove the Advisory Board and subject the investment of the funds to the Director discretion.

2. Section 5 is amended to allow insurance policies issued through surplus lines insurers to satisfy the requirements of R.I. Gen. Laws § 42-14-2.3.

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INSURANCE REGULATION 21

MEDICAL MALPRACTICE INSURANCE

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Section 1 ***Authority***

This Regulation is promulgated pursuant to R.I. Gen. Laws §§ 27-16-2.6, 42-14-2.3, 42-14.1-1 and 2 and 42-35-3.

Section 2 ***Applicability and Purpose***

The Director hereby finds that:

A. There has existed a lack of a competitive stable market for medical malpractice insurance in the State of Rhode Island for providers of health care. As a result, Emergency Regulation XXI (21) ("Emergency Regulation") was promulgated on

June 16, 1975, to provide a stable facility for medical malpractice insurance in Rhode Island. The Emergency Regulation expired at 12:00 midnight April 8, 1976.

Medical malpractice insurance has not been made reasonably available on a competitive stable basis for a significant majority of any class, type or group of providers of health care in the voluntary market which has resulted in a peril to the health care delivery system in Rhode Island and to the public health, safety and welfare of the people of the State of Rhode Island.

There is a need to provide a continuing stable facility for medical malpractice insurance subsequent to April 9, 1976.

Therefore, in accordance with R.I. Gen. Laws § 42-14.1-2, there is hereby promulgated and adopted the following Regulation which shall be known as the Medical Malpractice Joint Underwriting Association of Rhode Island.

The purpose of this Regulation is to provide for medical malpractice insurance in Rhode Island including a residual market for those risks that are unable to procure coverage from competitive market insurers.

B. By this regulation the Department implements R.I. Gen. Laws §§ 42-14.1-2(a) requiring licensed healthcare facilities and medical or dental professionals to obtain and be covered by professional liability insurance for claims of bodily injury or death arising out of malpractice, professional error, or mistake.

C. By this regulation the Department implements the provisions of R.I. Gen. Laws §§ 42-14.1-2 allowing certain entities to self-insure. All persons and entities not granted permission to self-insure by this regulation must be covered by professional liability insurance issued by a licensed insurer or through a program established by a hospital affiliated with an accredited medical school in compliance with R.I. Gen. Laws § 27-16-2.6.

Section 3 <u>Definitions</u>

As used in this Regulation:

A. "Association" means the Joint Underwriting Association established pursuant to the provisions of this Regulation.

B. “Active Health Care Professional” means a health care professional who, as part of his/her professional practice, provides treatment directly or indirectly to patients in exchange for remuneration.

C. “Department” means the Rhode Island Department of Business Regulation, Insurance Division.

D. "Director" means the Director of the Department of Business Regulation of the State of Rhode Island or his or her designee.

E. "Health Care Facility " for purposes of sections 5, 6 and 7 of this regulation means any licensed health care facility as defined by R.I. Gen. Laws § 23-17-2.

F. "Incidental coverage" means any other type of liability insurance covering activities directly related to the continued and efficient delivery of health care that would normally be available and underwritten under a comprehensive general liability form of insurance, except liabilities that may arise out of the ownership or use of any motor vehicles and workers compensation insurance.

G. "Medical Malpractice Insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering or failing to render professional service by healthcare facilities and medical or dental professionals.

H. "Medical or Dental Professional" for purposes of R.I. Gen. Law § 42-14.1-2 and sections 5, 6 and 7 of this regulation means any physician or dentist licensed under the General Laws of Rhode Island.

I. "Net direct premiums" means gross direct premiums written on personal injury liability insurance (as defined in R.I. Gen. Laws § 27-9-2) including the liability component of multiple peril package policies as computed by the Director, less all premiums and dividends credited or returned to policyholders or the unused or unabsorbed portions of premium deposits.

J. "Provider of Health Care" for purposes of section 4 of this regulation means (a) any licensed physician, hospital or other licensed health care provider as defined in the General Laws of Rhode Island; and (b) any other group, type or category of individual or health related facility that the Director determines, with or without a hearing, to be necessary for the continued delivery of health care in Rhode Island.

K. “Teaching Hospital” means a hospital affiliated with an accredited medical school which has the right to implement and maintain an indemnity/self-insurance program as recognized by R.I. Gen. Laws § 27-16-2.6.

Section 4 ***<u>Medical Malpractice Joint Underwriting Association of Rhode Island</u>***

A. Creation

1. A Joint Underwriting Association (“Association”) is hereby created, consisting of all insurers authorized to write, within this state on a direct basis, personal injury liability insurance as defined in R.I. Gen. Laws §

27-9-2, including insurers covering such perils in multiple peril package policies. Every such insurer shall be a member of the Association and shall remain a member as a condition of its authority to continue to transact such kinds of insurance in this State.

2. The purpose of the Association shall be to continue to provide a market for medical malpractice insurance on a self-supporting basis.

3. The Association shall continue to underwrite medical malpractice insurance without interruption under the programs approved under the Emergency Regulation, including all policies and obligations assumed thereunder. The Association shall also be authorized to underwrite incidental coverages for any provider of health care but only if such provider of health care shall be insured by the Association for medical malpractice.

4. The Association need not be the exclusive agency through which medical malpractice insurance may be written in this state. Any insurer authorized to write medical malpractice insurance in this State shall be allowed to do so subject to the provisions of Rhode Island General Laws and regulations promulgated thereunder applicable to insurers writing casualty insurance policies in this state.

5. The Association shall, pursuant to the provisions of this Regulation and the plan of operation with respect to medical malpractice insurance, have the power on behalf of its members:

   (a) to issue, or to cause to be issued, policies of insurance to applicants, including incidental coverages and subject to limits as specified in the plan of operation but not to exceed one (1) million dollars for each claimant under one (1) policy in any one (1) year and three (3) million dollars for all claimants under one (1) policy in any one (1) year;

   (b) to underwrite such insurance and to adjust and pay losses with respect thereto, or to appoint service companies to perform those functions;

   (c) to assume reinsurance from its members; and

   (d) to reinsure its risks in whole or in part.

B. Plan of Operation

1. The plan of operation of the Association submitted to the Director under the Emergency Regulation shall stand as approved for the Association and

shall serve as the accepted plan for the purpose of this Regulation subject to subsection G of this section of the Regulation relating to directors.

2. The plan of operation shall continue to provide for economic, fair and non-discriminatory administration and for the prompt and efficient availability of medical malpractice insurance and incidental coverages and shall contain other provisions including, but not limited to, preliminary assessment of all members for initial expenses necessary to commence operations, establishment of necessary facilities, management of the Association, assessment of members to defray losses and expenses, commission arrangements, reasonable and objective underwriting standards, acceptance and cession of reinsurance, appointment of servicing carriers or other servicing arrangements and procedures for determining amounts of insurance to be provided by the Association.

3. Amendments to the plan of operation may be made by the directors of the Association, subject to the approval of the Director, or shall be made at the direction of the Director.

C Policy Forms and Rates

1. All policies issued by the Association shall be on an annual basis unless sooner terminated in accordance with the provisions of this Regulation. All such policies shall be issued subject to the group retrospective rating plan and the stabilization reserve fund authorized by this Regulation. Policies may be written on a "claims made" or "occurrence" basis. No policy form shall be used by the Association unless it has been filed with and approved by the Director.

2. Cancellation of the Association's policies shall be governed by the General Laws of Rhode Island, except that the Association may also cancel any of its policies in the event of non-payment of any stabilization reserve fund charges by mailing or delivering to the insured at the address shown on the policy written notice stating when not less than ten (10) days thereafter cancellation shall be effective.

3. The rates, rating plans, rating rules, rating classifications and territories applicable to the insurance written by the Association and statistics relating thereto shall be subject to R.I. Gen. Laws § 27-9-1 *et seq.*, giving due consideration to the past and prospective loss and expense experience for such insurance written and to be written in this state, trends in the frequency and severity of losses, the investment income of the Association, and such other information as the Director may require. All rates shall be on an actuarially sound basis, giving due consideration to the group retrospective rating plan and the stabilization reserve fund, and shall be calculated to be self-supporting.

4. All policies issued by the Association shall be subject to a nonprofit group retrospective rating plan to be approved by the Director under which the final premium for all policyholders of the Association, as a group, will be equal to the administrative expenses, loss and loss adjustment expense and taxes, plus a reasonable allowance for contingencies and servicing. Policyholders shall be given full credit for all investment income, net of expenses and a reasonable management fee on policyholder supplied funds. The standard premium (before retrospective adjustment) for each policy issued by the Association shall be established for portions of the policy period coinciding with the Association's fiscal year on the basis of the Association's rates, rating plan, rating rules, rating classifications and territories then in effect. The maximum final premium for all policyholders of the Association, as a group shall be limited as provided in subsection (D) of this section of the Regulation.

5. The Director shall examine the business of the Association as set forth in subsection J of this section of the Regulation to make certain that the group retrospective rating plan is being operated in a manner consistent with this Regulation. If he or she finds that it is not being so operated, he or she shall issue an order to the Association, specifying in what respects its operation is deficient and stating what corrective action shall be taken.

6. The Association shall certify to the Director the estimated amount of any deficit remaining after the stabilization reserve fund has been exhausted in payment of the maximum final premium for all policyholders of the Association. Within sixty (60) days after such certification the Director shall authorize the members of the Association to commence recoupment of their respective shares of the deficit by one of the following procedures: (a) applying a surcharge to be determined by the Association at a rate not to exceed one (1%) percent of the annual premiums on future policies affording those kinds of insurance which form the basis for their participation in the Association, under procedures established by the Association, or (b) deducting their share of the deficit from past or future taxes due the State of Rhode Island. The Association shall amend the amount of its certification of deficit to the Director as the values of its incurred losses become finalized and the members of the Association shall amend their recoupment procedure accordingly. This Section and any authorizations hereunder shall only apply to medical malpractice insurance and no other forms of insurance.

7. In the event that sufficient funds are not available for the sound financial operation of the Association, pending recoupment as provided in paragraph 6 of this Section of this Regulation, all members shall, on a temporary basis contribute to the financial requirements of the Association in the manner provided for in subsection F of this section of the

Regulation. Any such contribution shall be reimbursed to the members by recoupment as provided in paragraph 6 of this subsection.

D Stabilization Reserve Fund

1. There is hereby created a Stabilization Reserve Fund. The Fund shall be administered by the Director or his or her Deputy. ~~Without limiting the power of the said Director or his or her Deputy to administer the Fund, they shall seek the advice and assistance of an Advisory Board consisting of two (2) members, both of whom shall be appointed by the Director. The Advisory Board members shall serve no fixed term, but at the pleasure of the Director. One Advisory Board member shall be a representative of the Association, and the other a representative of its policyholders, provided, however, that the Director may from time to time substitute a member of the banking or financial industry for either representative.~~

~~2. The Advisory Board members shall serve without salary, but each Advisory Board member shall be reimbursed for actual and necessary expenses incurred in the performance of his or her official duties as an Advisory Board member of the Fund. The Advisory Board members shall not be subject to any personal liability or accountability with respect to the administration of the Fund.~~

~~3~~ 2. ~~All funds received by the Stabilization Reserve Fund shall be held in trust by a corporate trustee selected by the Director or his or her designee, after seeking the advice of and consulting with the Advisory Board. The corporate trustee may invest the monies held in trust, subject to the approval of the Director or his or her designee.~~ All investment income of the Stabilization Reserve Fund, less all expenses of administering the Fund, shall be credited annually to the Underwriting Fund. All funds received by the Stabilization Reserve Fund, together with all income therefrom, less all expenses of administering the Fund, are to be held in trust and used to replenish the Underwriting Fund if and when necessary in the sole discretion of the Director to enable the Underwriting Fund to pay its claims and expenses and to pay return premiums under the Group Retrospective Rating Plan. Policyholders shall be given full credit for all Stabilization Reserve Fund income, net of expenses, under the Group Retrospective Rating Plan. Funds will be transferred from the Stabilization Reserve Fund to the Underwriting Fund only for the following purposes:

(a) To reimburse the Underwriting Fund for any expenses paid by the Underwriting Fund which in the sole discretion of the Director are properly chargeable to the Stabilization Reserve Fund;

(b) To replenish the Underwriting Fund if and when necessary in the sole discretion of the Director to enable the Underwriting Fund to

pay its claims and expenses and return premiums under the Group Retrospective Rating Plan;

(c) If any monies remain in the Fund after all retrospective premium charges have been paid, such monies shall be returned to policyholders under procedures authorized by the Director.

E Procedures

1. Any provider of health care shall, on or after the effective date of the plan of operation, be entitled to apply to the Association for medical malpractice insurance and incidental coverage. Such application may be made on behalf of an applicant by a broker or agent authorized by the applicant.

2. If the Association determines that the applicant meets the underwriting standards of the Association as prescribed in the plan of operation and there is no unpaid, uncontested premium due from the applicant for prior insurance (as shown by the insured having failed to make written objection to premium charges within thirty (30) days after billing), then the Association, upon receipt of the premium or such portion thereof as is prescribed in the plan of operation, shall cause to be issued a policy or policies of insurance.

F Participation

All insurers which are members of the Association shall participate in its writings, expenses, servicing allowance, management fees and losses in the proportion that the net direct premiums of each such member (excluding that portion of premiums attributable to the operation of the Association) written during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the Association. Each insurer's participation in the Association shall be determined annually on the basis of such net direct premiums written during the preceding calendar year, as reported in the annual statements and other reports filed by the insurer with the Director.

G Directors

The Association shall be governed by a board of eleven (11) directors. Seven (7) directors shall represent member companies and be elected annually by cumulative voting by the members of the Association, with each member having one vote. The remaining four (4) directors shall be appointed annually by the Director of the Department of Business Regulation. All four (4) directors shall be representative of health care providers nominated by the Rhode Island Medical Society and the Hospital Association of Rhode Island. The Director of the Department, or his or her designee, serves on the Board in an *ex officio* capacity.

The annual meeting of the board of directors shall be the anniversary of the original enactment of this Regulation. Directors shall serve until their successors are duly elected or appointed as the case may be.

H Appeals and Judicial Reviews

1. Any applicant to the Association, or any person insured pursuant to this Regulation, or their representatives, or any affected insurer, may appeal to the Director within thirty (30) days after any ruling, action or decision by or on behalf of the Association, with respect to those items the plan of operation defines as appealable matters.

2. All orders of the Director made pursuant to this Regulation shall be subject to judicial review as provided in the R.I. Gen. Laws § 42-35-15.

I Annual Statements

The Association shall file in the office of the Director annually on or before the first day of March, a statement which shall contain information with respect to its transactions, condition, operations and affairs during the preceding year. Such statement shall contain such matters and information as are prescribed and shall be in such form as is approved by the Director. The Director may, at any time, require the Association to furnish additional information with respect to its transactions, conditions or any matter connected therewith considered to be material and of assistance in evaluating the scope, operation and experience of the Association.

J Examinations

It is the duty of the Director, at least every five (5) years, to make an examination of the financial condition and methods of doing business of the Association. The examination shall be performed, and the associated costs shall be borne by the Association, in accordance with R.I. Gen. Laws § 27-13.1-1 *et seq.*

K Privileged Communications

There shall be no liability on the part of, and no cause of action of any nature shall arise against the Association, the Director or his or her authorized representatives or any other person or organization, for any statements made in good faith by them during any proceedings or concerning any matters within the scope of this Regulation.

L Public Officers or Employees

No member of the board of directors of the Stabilization Reserve Fund who is otherwise a public officer or employee shall suffer a forfeiture of his or her office

or employment or any loss or diminution in the rights and privileges appertaining thereto, by reason of membership on the board of directors of the Stabilization Reserve Fund.

Section 5 ***Medical Malpractice Insurance Minimum Limits***

A All healthcare facilities and active medical or dental professionals shall carry medical malpractice insurance coverage with minimum limits of one million dollars ($1,000,000) for claims arising out of the same professional service and three million dollars ($3,000,000) in the aggregate. Medical or dental professionals may also satisfy this requirement by securing indemnification coverage under a program established in compliance with R.I. Gen. Laws § 27-16-2.6 or from a self-insured entity approved by the Department pursuant to section 7 of this regulation.

B To qualify under this section the insurance policy must be issued by an insurer licensed to write medical malpractice insurance in Rhode Island or by a surplus lines insurer or by a self-insurer authorized by the Department pursuant to Section 7 of this regulation or the coverage may be provided by an indemnification agreement under a program established in compliance with R.I. Gen. Laws § 27-16-2.6. ~~Policies issued by approved surplus lines insurers do not qualify to satisfy the minimum limit. This is not a prohibition on the sale of surplus lines policies which may be purchased in the voluntary market in addition to the minimum liability policy at the option of the insured.~~

C. Any licensed medical or dental professional may comply with this regulation by inclusion under a policy of insurance issued to such medical or dental professional's employer or affiliate. In addition, any licensed medical or dental professional employed by a physician's practice affiliated with a teaching hospital may comply with this regulation by inclusion under an indemnification agreement issued by such teaching hospital under a program established in compliance with R.I. Gen. Laws § 27-16-2.6.

D. All medical malpractice insurance policies shall cover the legal liability of the insured for loss, damage, or expense incident to claims of bodily injury or death arising out of malpractice, professional error, or mistake.

E. Rates for all medical malpractice insurance shall not be excessive, inadequate or unfairly discriminatory and shall be actuarially justified.

Section 6 ***Requirements of Medical Malpractice Insurance Policies***

Insurers issuing medical malpractice insurance policies covering risks which are required to carry medical malpractice insurance by the provisions of R.I. Gen. Laws § 42-14.1-2 shall issue policies that comply with the following minimum requirements. This section does not apply to policies issued excess to a primary policy.

A. Policy limits shall be in a minimum of one million dollars ($1,000,000) for claims arising out of the same professional service and three million dollars ($3,000,000) in the aggregate.

B. Policies shall not include any deductible in excess of ten thousand ($10,000) per claim.

C. All medical malpractice insurance policies shall cover the legal liability of the insured for loss, damage, or expense incident to claims of bodily injury or death arising out of malpractice, professional error, or mistake.

D. Rates for all medical malpractice insurance shall not be excessive, inadequate or unfairly discriminatory and shall be actuarially justified.

Section 7 ***<u>Requirements for Medical Malpractice Self-Insurance</u>***

A. In order to qualify to self-insure an entity must either:

1. Qualify as a hospital affiliated with an accredited medical school that satisfies the requirements of R.I. Gen. Laws § 27-16-2.6; or

2. Obtain permission of the Department of Business to self-insure. The following requirements apply to entities seeking permission to self-insure:

a. The entity shall make a filing with the Department fully describing the self-insurance program.

b. The self-insurance program must be provided through a captive insurer or other approved self-insurance vehicle fully licensed and subject to the authority of the Department or other acceptable domiciliary jurisdiction.

c. The coverage provided by the self-insurance vehicle must meet the requirements of section 6 of this regulation

d. The entity must agree to file on an annual basis on or before June 1 of each year an audited certified financial statement and actuarial projections as to the soundness of its reserving as well as any other financial information requested by the Department.

e. The entity shall notify the Department of its intent to discontinue its self-insurance program ninety (90) days prior to its termination.

f. The entity shall provide whatever further information is requested by the Department.

B Nothing in this regulation shall prevent the self-insurance vehicles from obtaining reinsurance in whole or in part.

C. Employees and Affiliates

1. An entity that obtains permission pursuant to this section may include within that self-insurance program (i) health care facilities which are under common control with the entity, or (ii) medical or dental professionals which provide health care services within the scope of their employment by that entity or who have entered into an agreement with the entity to participate in a common indemnity program.

2. An entity that satisfies the requirements of R.I. Gen. Laws §§ 27-16-2.6 may indemnify employees and affiliates within that program.

D. Nothing in this regulation shall prevent the entity from partially insuring a portion of the risk.

(a) If a hospital chooses to partially insure and partially self-insure, that fact should be set forth in the annual filing to the Department specifying the portions insured and self-insured.

(b) All of the requirements listed in this section must be met for the self-insured portion of the risk.

Section 8 ***<u>Severability</u>***

If any Section, term, or provision of this Regulation should be adjudged invalid for any reason, that judgment should not effect, impair, or invalidate any remaining Section, term, or provision, which shall remain in full force and effect.

Section 9 ***<u>Effective Date</u>***

This Regulation shall be effective as indicated below.

EFFECTIVE DATE:	April 9, 1976
AMENDED:	December 1, 1976
	May 3, 1978
	September 17, 1982
	April 21, 1986
	February 16, 1988
	July 3, 1996
	July 25, 1996
	December 1, 1996
	December 26, 2001

August 14, 2007
November 24, 2013
February ___, 2016