

Background Statement of Commissioner Roger A. Sevigny Announcing Proposed Rules for the New Hampshire Medical Malpractice Joint Underwriting Association Plan

This is an update from the New Hampshire Insurance Department regarding the New Hampshire Medical Malpractice Joint Underwriting Plan.

Examination. As has been previously announced, the Department recently commenced a formal examination of the Plan's status, operations and finances. Our goal for this examination is to ensure that the JUA Plan continues to perform its vital public purpose, which is to ensure the continued availability of medical malpractice insurance to New Hampshire healthcare providers so that New Hampshire citizens have adequate access to quality healthcare.

Examination Confidentiality and Timing. Insurance Department's examinations are conducted on a confidential basis in accordance with existing law. Examination findings are not made public until the conclusion of the exam. Our examination is still on-going. However, given the public purpose of the JUA Plan and the importance of this matter to the public, I am providing this update to you on the status of our review and our preliminary determinations.

Background on the Plan. The JUA Plan was originally established by the Insurance Department in 1975 when the commissioner determined that medical providers were being refused medical malpractice coverage or could only purchase this insurance at exorbitant cost. Since its founding in 1975, the JUA Plan has offered medical malpractice insurance to any medical provider at market rates, even to those medical providers who were refused coverage by the commercial market. Without the Plan, many high-risk providers (providers with previous claims filed against them or who work in high risk areas like OBGYN) could not continue to practice medicine in New Hampshire. We are very proud that the JUA Plan has served and continues to serve its important public purpose. This purpose is at the very heart of the creation of the Plan and it is my focus to ensure the Plan can continue in this important mission.

Open Questions and Need for Clarifications. The governing statute, RSA 404-C, provides me with the responsibility to see that the plan is properly structured, administered and operated and acts in the public interest. During the course of the *Tuttle* litigation, it became clear that the current rules that establish the governance of the Plan left many important issues unclear or unanswered. Our current examination has also uncovered several important operational issues that are not addressed by the current rules. These unanswered questions need to be resolved to prevent any further confusion to the public and to those who purchase Plan policies.

The Most Significant Concern—Federal Income Tax Status. In addition to these operational issues, the examination has focused on one issue that is of critical concern. The arguments of the *Tuttle* Plaintiffs and the decision of the lower court in *Tuttle* have challenged the Plan's status as a public entity and, therefore, have threatened the plan's exemption from taxation by the federal government.

Background Statement of Commissioner Roger A. Sevigny Announcing Proposed Rules for the New Hampshire Medical Malpractice Joint Underwriting Association Plan

Plan's Tax-Exempt Status Since 1976. Since the original authorization of the JUA Plan in 1975, the Plan has enjoyed exemption from federal income tax because the Plan is a state program under the control of the Insurance Department. Under longstanding federal tax law, entities that operate as "integral parts of a state government," for the benefit of public purposes and not for private interests, are not subject to federal income tax. So, for example, the Insurance Department is not subject to federal income tax. Similarly, other state agencies such as the Liquor Commission or the Housing Finance Authority are not subject to federal income tax. In a 1976 letter, the Internal Revenue Service confirmed the tax-exempt status of the JUA Plan because it "is an integral part of the state government."

Uncertainty and Question Concerning Tax Status. However, during the course of the *Tuttle* case, attorneys for the plaintiffs made arguments that questioned the status of the Plan as a program serving a public purpose, including a direct argument that the Plan was not a "state entity." Until that time, the Department had relied on the 1976 letter from the IRS confirming the Plan's tax-exempt status and all decisions of this Department were made based on this assumption. The Superior Court decision however, called into question this longstanding assumption. And while the Supreme Court expressly declined to adopt the Superior Court's position, the fact that the plaintiffs continue to assert that the plan is for the benefit of private individuals and not for the benefit of the public, requires us now to take very careful and deliberate steps to confirm again the tax-exempt status of the Plan.

Preliminary Quantification of the Potential Tax Liability. Why is this tax issue so important? Because if the Plan does not enjoy federal tax-exempt status as an integral part of our state government, then the IRS could assert that the Plan should have been filing tax returns with the federal Internal Revenue Service for the last 35 years. Based on our preliminary analysis, the IRS could claim a possible 35-year cumulative tax liability of the Plan, along with interest, in excess of \$100 million dollars. In addition to potentially losing the Plan's excess surplus to the IRS, if the Plan were to lose its tax-exempt status going forward, it is unlikely that the Plan will be able to offer coverage at competitive market rates. It is likely that the Plan would have to raise premiums, thus diminishing its capacity to fulfill its public purpose.

Need for Action. Under existing statutes, I as Commissioner, am responsible for the viability of this Plan, and I will not ignore this potential liability. I cannot emphasize strongly enough that losing the tax-exemption acknowledged by the IRS over 30 years ago would impair the ability of the Plan to continue to perform its public purpose. Accordingly, I have taken the following steps to confirm the tax-exempt status of the Plan:

- First, as part of our examination, we have retained expert tax counsel, Rath, Young and Pignatelli, to help us evaluate this issue and develop a plan to confirm the tax-exempt status of the Plan with the IRS.

Background Statement of Commissioner Roger A. Seigny Announcing Proposed Rules for the New Hampshire Medical Malpractice Joint Underwriting Association Plan

- Second, we have developed amendments to the administrative rules that govern the Plan's operations and programs to clarify and confirm the longstanding aspects of the Plan's operation and structure that support the Plan's tax-exempt status.

These steps are consistent with my duty as Commissioner to protect the public purpose of the JUA Plan, and they are fully consistent with current law, including the Supreme Court's recent final decision in the *Tuttle* case. None of these steps violate any policyholder right recognized by the New Hampshire Supreme Court.

Announcement of Administrative Rules. Today, we are filing our proposed rules with the Legislative Budget Assistant, which is the first step required by the standard, public administrative rules process. We are also posting the proposed rules on the Department's website. These rules address and clarify key questions that affect the operation of the plan. They make clear that the fundamental purpose of this Plan is to serve the public in maintaining an adequate healthcare delivery system by ensuring that health care providers have adequate access to medical malpractice coverage. The proposed rules clarify and confirm the longstanding aspects of the Plan's operation and structure as an integral part of the state so that we can move forward to confirm the 35 year history of the Plan's tax-exempt status.

No Distribution Shall Be Made to Any Party. The process for finalizing these rules, as well as the process for confirming the tax-exempt status of the Plan, will take time, perhaps many months. I want to make very clear today that until we have received satisfactory confirmation that the potential tax liability has been favorably resolved, I will not authorize or condone any distribution or transfer of funds from the JUA Plan. This determination is mandated by my responsibilities under current statutes, current rules and current policies, and it is entirely consistent with the Supreme Court's final order in the *Tuttle* case. Allowing a transfer of funds would be inconsistent with my principal duty to protect the soundness and viability of this very important public program.

Conclusion. In conclusion, I want to express my confidence in the continued soundness and operation of the JUA Plan, my appreciation for the assistance I am receiving from the JUA board, the Attorney General and others, and my commitment to doing everything in my power to protect the public purpose of this successful program that helps to ensure that New Hampshire citizens have adequate access to quality health care providers.